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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-710

L.T. CASE NO. 13-CA-003396

ROBERT R. REYNOLDS,

Appellant,

v.

LEON COUNTY ENERGY IMPROVEMENT DISTRICT, ET AL.,

Appellee.

On Appeal from the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida

REPLY BRIEF of APPELLANT

J. STEPHEN MENTON
Florida Bar Number 331181
Rutledge Ecenia, P.A.
119 South Monroe Street
Suite 202
Tallahassee, FL 32301
smenton@rutledge-ecenia.com
Telephone: (850) 681-6788
Facsimile: (850) 681-6515

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ARGUMENT

The judgment on appeal should be reversed and remanded because it purports to validate bonds that, if issued, would be repaid from assessments that violate Florida law. Appellee correctly concedes, in its Answer Brief, that Florida law does not allow for the remedy of judicial foreclosure of a Property Assessed Clean Energy (PACE) assessment lien, and that the Financing Agreement[1] established and pled by Appellee is unlawful. Appellee only argues that the Financing Agreement's authorization of judicial foreclosure of PACE assessment liens is merely an enumeration of a remedy that might possibly be enacted by the Legislature in the future or that a court at a later date could ignore the judgment of validation and sever the offending provision of the Financing Agreement. Appellee neither understands nor respects the crisp statutory distinction in remedies between a non-ad valorem assessment and a contract lien that employs judicial foreclosure.

Appellee's Answer Brief is otherwise devoted to arguing that, despite established case law, the plain language of section 75.08, Florida Statutes, and his status as a defendant named in the Complaint as a property owner, taxpayer, and citizen of Leon County, Appellant Reynolds does not have standing to appeal a judgment entered against him. For the reasons discussed below, Appellant

[1] Appellee appears to have missed the fact that the Financing Agreement is evidence of the assessment and compliance with statutory notice requirements, not a security agreement. § 163.08(8), Fla. Stat.

Reynolds has standing to bring this appeal and the judgment below should be reversed and remanded for entry of a judgment that the bonds are not valid.

I. Appellant Reynolds is a Party to this Appeal and has Standing as Conferred by Section 75.08, Florida Statutes, and Applicable Case Law, Regardless of Whether He Appeared in the Proceeding Below.

Appellee argues Appellant lacks standing because (1) Appellant did not have standing to intervene in the proceeding below, (2) Appellant did not appear at the hearing below, and (3) this Court is not a trial court and thus cannot determine whether Appellant owns property in Leon County. Appellee's first argument fails because, if accepted, it would deprive this Court and the Circuit Court of jurisdiction to resolve the matter. Appellee's second argument likewise fails because it is contrary to well-established and well-reasoned Florida law. Appellee's final argument fails because it misapprehends the nature of standing.

A. Appellant Had Standing to Intervene in the Proceeding Below, and If He Did Not, the Complaint Did Not Present a Case Capable of Judicial Resolution Because It Presented No Adverse Interest.

Appellee asserts that a property owner must be adversely affected before having standing to appear at a bond validation hearing. This assertion is directly contrary to current Florida law. Appellant first cites *Rich v. State*, 663 So. 2d 1321 (Fla. 1995) for the proposition that "only those property owners . . . who will be 'adversely affected' if the bonds are issued have standing." (Ans. Br. at 12.) *Rich* addresses only the question of whether a person who is *not* at taxpayer, citizen, or

property owner within the jurisdiction may otherwise appeal as an "interested person." § 75.07, Fla. Stat. (2013). In fact, *Rich* expressly distinguishes *Meyers v. City of St. Cloud*, 78 So. 2d 402 (Fla. 1955), which came to a contrary result where the appellant was a property owner. Thus, *Rich* cannot control the outcome of the instant case, where Appellant is a property owner in the district seeking to validate bonds, and is not using the "interested person" catchall as in *Rich*.

Appellee also refers to cases decided in 1929 and 1937 wherein this Court held that a taxpayer or citizen must have a justiciable interest in a bond validation proceeding before participating. However, this Court in *Meyers* determined—without reference to any fact other than that the appellants were "taxpayers, property owners, and citizens"—that such a party may appeal a bond validation judgment having not appeared at the proceeding below. *Meyers*, 78 So. 2d at 402, 404. *Meyers* did not find it necessary to determine the appellants' interest; Appellee asks this Court to, for the first time, require a property owner to demonstrate an interest in a bond validation proceeding below before appearing at the appellate level. This position flouts the plain language of the statute and the Legislature's intent, described in *Meyers* as "liberalizing procedure, and extending the rights of interested persons, on appeal." *Id.* at 404.

Even if this Court were to determine that a taxpayer, property owner, and citizen must demonstrate a justiciable interest in a bond validation proceeding in

order to appear, Appellant has such an interest here. Initially, Appellee's assertion that Appellant has failed to assert standing is irrelevant—a party who is a defendant in a case does not need to allege standing unless challenged. Raising the issue of standing for the first time in its Answer Brief, Appellee assumed its way through logical steps—that Appellant's standing arguments will be unsupported, that Appellant's standing will be based on evidentiary questions—before declaring Appellant must not have standing. This conclusion is incorrect.

Appellant's standing is a pure question of law, *Johnson v. State*, 78 So. 3d 1305, 1314 (Fla. 2012), and as such does not require an examination of evidence or application of law to that evidence. Thus, this Court may examine standing in the first instance, especially given the right of an appellant in a bond validation case to appeal without first appearing before the trial court. Appellee claims that, because its assessment program is voluntary, Appellant lacks standing to participate in this appeal, apparently based on the logic that Appellant can choose not to participate in the PACE program and thus can avoid a direct impact from the bond issuance. Appellee fails to comprehend that standing is based on a reasonable expectation of a direct *or indirect* impact based on the result of the litigation. *Id.* (citing *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 505 (Fla. 2006)). That impact is present in this case. First, the judgment issued here would be valid against Appellant and others who later acquire title through him. Regardless of whether

Appellant has the present intent to participate in the assessment program, neither he nor any subsequent owner of his real property may participate in the program except on the terms validated by the Circuit Court. Thus, a valuable property right has been determined in the judgment of validation—the right to participate in a PACE program that is free of legal flaws. Secondly, a decision that Appellant is disinterested in a bond validation because participation in an assessment program is voluntary would cause significant and broad-ranging legal consequences.[2] Appellee's argument fails for want of logic. If the voluntary nature of an assessment were to defeat the ability of a property owner to participate in a bond validation case, no property owners would be permitted to participate in this case, despite being named parties in the complaint. All PACE assessments are voluntary, and therefore the same argument would apply equally to all parties.

If Appellee's argument that Appellant and all other property owners, taxpayers, and citizens lack standing is correct, this Court—and the Circuit

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[2] PACE assessments, like many other non-ad valorem assessments—those for stormwater, for example—are not imposed until a property owner does some act. With a PACE assessment, that act is choosing to enter into a financing agreement to evidence consent to the assessment, but with other assessments, it might be choosing to install impervious improvements by applying for a building permit. While there is an element of choice, by conditioning the right to take a certain action on consent to an assessment, the choice is between foregoing a property right and the assessment. In denying standing to a property owner who can opt out of an assessment by declining to exercise a property right, this Court would create unfortunate precedent, effectively preventing owners of undeveloped property from challenging an assessment applicable only to developed property as they could opt not to improve the property.

Court—lack jurisdiction, and the judgment below should be vacated and the case dismissed. The only parties to a bond validation case are the Plaintiff issuer and the Defendant property owners, taxpayers, and citizens. The State of Florida is the named defendant on behalf of those persons. *See* § 75.05, Fla. Stat.[3] If no defendants have a justiciable interest, the State Attorney has no interest to represent. A court may not determine an issue when there is no adversarial interest or controversy. *May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952).

For the reasons discussed above, however, Appellant does have a property interest in the case that is not based on a factual determination but rather inheres in the legal relationship between property owners and those with the power to impose assessments on their property. Accordingly, Appellant is a proper party to this proceeding and would have been a proper party at the validation hearing.[4]

B. Appellant Is a Party to this Appeal.

Appellee's next argument appears to suggest that Appellant may not be a party solely because he did not appear at the hearing below. The rule in *Meyers*,

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[3] The State Attorney must be named in the complaint, but merely acts as the representative of the interests of the property owners, taxpayers, and citizens. The State itself has no justiciable interest in a bond validation proceeding.

[4] Appellee's Answer Brief also appears to argue that this court should decline to decide a factual question regarding Appellant's standing, but instead should resolve the factual issue by defaulting to the position that Appellant lacks standing. Appellant has demonstrated that it has standing as a matter of law based on the foregoing. Appellant owns property in Leon County. Leon County Property Appraiser, http://www.leonpa.org/print.cfm?ACCOUNT=212380%20%20I0050.

based on the "plain language" of section 75.08, Florida Statutes, that sections 75.07 and 75.08, Florida Statutes, "clearly provide alternate methods of reaching [the Florida Supreme Court]," is clear. *Meyers*, 78 So. 2d at 404. *Meyers* confirms that a person who complies with the procedural rules for timely filing of appeals and with section 75.08, Florida Statutes, has standing on appeal in the supreme court. As Appellee suggests, *Meyers* did not discuss a factual dispute as to the issue of standing. In this appeal, too, there is no factual issue of standing—Appellee does not suggest that Appellant does not actually own property in Leon County or is not a taxpayer or citizen thereof, and standing is a purely legal question that can be resolved without an evidentiary hearing. Thus, a fact-based standing analysis is as inapplicable to this case as it was to *Meyers*. Despite Appellee's plea to the contrary, *Rich* is of limited value in this context; in *Rich* it was undisputed that the appellants were *not* property owners, taxpayers, or citizens. *Rich*, 663 So. 2d at 1323.

Appellee's invitation to recede from nearly sixty years of established precedent and overrule *Meyers* should be rejected. *Meyers* controls the outcome of the standing issue in this case, which presents an identical factual pattern: a person dissatisfied with the judgment of the Circuit Court, who had not participated in that tribunal, timely appealed the judgment pursuant to section 75.08, Florida Statutes. Just like in *Meyers*, in this case there is no dispute as to the identity of Appellant as

a taxpayer, citizen, and property owner within the jurisdiction to be affected by the bonds. For standing analysis purposes, the cases are indistinguishable. Appellee's attack on *Meyers* relies on several concepts outside of the bond validation context, and on general rules that have exceptions across varying areas of law. Nearly sixty years of precedent has established that application of the specialized standing rule in *Meyers* applicable to bond validation cases has not undermined any "fundamental principal of our justice system." (Ans. Br. at 20.)

The *Meyers* court's reliance, in small part, on *State v. Sarasota County*, 159 So. 797 (Fla. 1935), was neither misplaced nor significant in the resolution of *Meyers*. The reference in *Meyers* to *Sarasota County* simply introduces the logic and language of sections 75.07 and 75.08; *Meyers*, *as stated in the opinion*, was resolved based on the plain language of section 75.08, Florida Statutes. *Meyers*, 78 So. 2d at 404. As the court in *Meyers* correctly determined, an argument that section 75.08, governing appeals, is somehow nullified or preempted by the rules for appearing below contained in sections 75.05 and 75.07 should be rejected.

Appellee correctly identifies the purpose of chapter 75 as providing an expeditious method of resolving questions of bond validity. The procedures in place for implementing this purpose, including the extraordinary relaxation of normal procedural mechanisms for pursuing litigation, such as allowing for constructive rather than personal service of process, reflect the judgment of the

Legislature of the minimum necessary to protect the due process rights of property owners, taxpayers, and citizens affected by bond validation actions. Appellee now seeks to further curtail the limited procedural protections afforded defendants by suggesting that this Court rewrite section 75.08 to allow appeals only from those who became parties pursuant to section 75.07—something the statute does not contemplate.[5] This Court should decline to recede from *Meyers* and should determine that Appellant is a proper party to this appeal.

II. The Unlawful Remedies Provided in the Financing Agreement Specifically Validated by the Circuit Court Render the Bonds Invalid, and a Judgment Purporting to Validate Invalid Bonds Must Be Reversed.

By including the remedy of foreclosure in the documents attached to the Complaint for Validation, Appellee rendered the bonds dependent on those documents invalid. As Appellee candidly concedes, the documents included—specifically the Financing Agreement—have no power to authorize remedies denied by statute. Incredibly, Appellee argues that its Financing Agreement does not authorize foreclosure in the event of a failure to timely pay the assessment.[6]

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[5] Appellee is correct that, in most litigation circumstances, an appeal may not be taken by a person who did not participate in the proceeding below. However, this Court's precedent, the demands of due process, and the plain language of the Florida Statutes all expressly require an exception to such general rule in the bond validation context—one that has been widely recognized for nearly sixty years.

[6] Appellee's Financing Agreement expressly authorizes the use of judicial foreclosure in four separate provisions of the contract. First, the Financing Agreement expressly provides that the District may collect an assessment that has not been timely paid using "all appropriate legal remedies . . . including but not

While Appellant claims it intends to pursue only legal remedies, or that it is simply preserving its right to pursue judicial foreclosure in the event the law might change, the fact remains the Circuit Court approved a Financing Agreement where the Property Owner and Appellee agree that Appellee may enforce its assessment lien using judicial foreclosure. Appellee fails to understand that the Financing Agreement unambiguously and unlawfully grants the power to foreclose.

Appellee also argues the severability clause contained in section 19 of the Financing Agreement would render the remainder of the Financing Agreement valid. While this statement is correct, Appellee fails to apprise this Court of the implications of accepting this argument as a reason to affirm the decision below.[7]

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limited to foreclosure . . . ." (Init. Br. App. 51.) Foreclosure being a legal remedy for failure to timely pay an amount due on secured debt, the Financing Agreement purports to unlawfully authorize the use of judicial foreclosure in the event of non-payment. In the same paragraph, the Financing Agreement further specifies that the property owner acknowledges that Appellee may obligate itself to bondholders to exercise its foreclosure remedies. (Init. Br. App. 52.) In the Financing Agreement, Appellee specifically reserves the right to assign any or all of its rights under the contract; the agreement enumerates some of those and includes "the right to pursue judicial foreclosure of the Assessment lien." (Init. Br. App. 54.) The same paragraph enumerates rights that the Property Owner has no power to disturb and includes "the right to pursue judicial foreclosure of the Assessment lien." (*Id.*)

[7] A judgment of validation is *res judicata* as to any complaints as to the invalidity of the bonds or any other issue decided by the Circuit Court against any party with an interest in the proceedings. § 75.09, Fla. Stat. Thus, if the judgment validating the bonds and approving the Financing Agreement is affirmed, no party may challenge the rights reserved in the Financing Agreement. The final judgment on appeal insulates the Financing Agreement and future bondholders relying on the same from any challenge as to its validity, despite its violation of Florida law.

Even if the preclusive effect of the judgment were not enough, the Financing Agreement itself contains a covenant on behalf of the Property Owner *waiving the right* "to file any lawsuit or other proceeding to challenge the Assessment or any aspect of the proceedings of [Appellee] undertaken in connection with the Program." (Init. Br. App. 52.) Further, the Financing Agreement provides that the Property Owner "waive[s] any and all rights and benefits conferred upon the Property Owner by the provisions of Florida law," including the right to avoid judicial foreclosure in the event of a default. (Init. Br. App. 53.)

Appellee argues it could simply delete the offending provisions after this Court renders its opinion in this case. This assertion is misleading: the likelihood that Appellee would choose to remove a remedy approved by this Court from its agreement is low, as is the likelihood that the credit market would decline additional security. Further, by making significant changes to documents that have been subjected to validation, Appellee would be creating documents lacking approval by any court and thus without the preclusive protection that a judgment of validation provides. Not only would it be illogical for Appellee to change the Financing Agreement as it suggests in its brief, there is no legal authority for this Court to rule based upon such a "trust me" argument from this local government. [8]

[8] The severability clause is inoperative in a validation proceeding. This Court, in the past, has remanded cases to the trial court to sever invalid provisions with directions to validate the bonds once the offending clauses were severed. *See*

The practice of allowing for a change in the Complaint—or the attachments thereto—in a bond validation case after publication of the Order to Show Cause, which is the only notice of the litigation to which citizens, taxpayers, and property owners are entitled, runs afoul of already-curtailed due process requirements that Appellee notice interested parties of the content of the proceeding. Accordingly, judicial modification of the Complaint and its exhibits is a dangerous practice violative of due process rights guaranteed to Appellant and, especially, those other taxpayers, citizens, and property owners not appearing before this Court.

By raising the specter of judicial foreclosure, Appellee has tampered with the structure carefully created by the Legislature to comply with the requirements of the Florida Constitution. The Legislature, both in chapter 163 and in chapter 197, drew a bright line between non-ad valorem assessments included on the tax roll to be enforced only by the tax certificate sale and tax deed process outlined in section 197.3632, Florida Statutes, on the one hand, and any other lesser lien, title, or mortgage not on parity with taxes and other assessments on the other hand. This bright line was designed to serve several purposes.

Andrews v. City of Winter Haven, 3 So. 2d 805 (Fla. 1941); *State v. Citrus Cnty.*, 157 So. 4 (Fla. 1934). Such cases involved only the use of refunding bonds in a way that expanded beyond the authorization granted by the voters. In other words, this Court has severed illegal terms in bond validation cases only where doing so serves only to limit a refunding issue to the terms and amounts established by a vote of the electors in the case of general obligation bonds. Substantive issues surrounding the bond validation procedures for an original issuance are not analogous and changing them raises due process concerns.

First, the Legislature intentionally clarified that non-ad valorem assessments available to be imposed for qualifying improvements in a PACE program serve a compelling state interest and, like other assessments, are superior in interest to contract liens. The Legislature removed the ability to contract around this distinction as part of a statutory construct that is designed to ensure that imposition of an assessment in accordance with section 163.08 does not unconstitutionally impair mortgages. § 163.08(4), Fla. Stat.[9] The Legislature carefully designed the statute to match existing case law approving the priority of assessment liens.

Additionally, the Legislature made findings and constructed the statute to ensure that any perceived impairment of mortgage contracts was not intolerable in accordance with *Pomponio v. Claridge of Pompano, Inc.*, 378 So. 2d 744, 779-80 (Fla. 1979). *See also Gailey*, 123 So. at 693; *Lybass v. Town of Ft. Myers*, 47 So.

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[9] Section 197.122, Florida Statutes, provides that all taxes shall be superior to all other liens on any property against which the taxes have been assessed. The lien associated with property taxes is therefore superior to liens arising by virtue of mortgages or other non-governmental encumbrances. *Gailey v. Robertson*, 123 So. 692 (Fla. 1929). Special assessments are not considered taxes under the Florida Constitution. *City of Boca Raton v. State*, 595 So. 2d 25 (Fla. 1992). However, a special assessment may nonetheless be vested with lien status coequal with that of property taxes. *See, e.g.*, § 170.09, Fla. Stat. Legislation of this kind is expressly does not impair the obligation of a contract, and it is immaterial whether the enactment authorizing the special assessment existed before or was subsequent to the date of the mortgage lien. *Gailey*, 123 So. at 693. All private interests in real property are subject to the power of the local government responsible therefore to levy taxes and assessments. *Id.* Section 163.08(8) expressly provides that non-ad valorem assessments levied thereunder constitute a lien of equal dignity to county taxes and assessments from the date of recordation of the financing agreement.

346, 349-50 (Fla. 1908). In *Pomponio*, this Court held that an impairment of contract by a local government was lawful if not intolerable, measured by consideration of whether (1) the law was enacted to deal with broad or generalized economic or social problem, (2) the law operates in an area already subject to state regulation at the time the contract was entered, and (3) the law works a temporary, rather than a severe, permanent, and immediate change in the contractual relationship between the parties.[10] The Legislature made specific findings of fact regarding these three factors when it enacted section 163.08, and further included multiple procedural safeguards to protect the right of mortgagees.[11]

CONCLUSION

Appellee's approach—as outlined in the Financing Agreement and approved in the final judgment—fundamentally alters the procedural safeguards established by the Legislature ensuring that contracts are not unlawfully impaired. This Court has been assailed with trivial, meritless arguments regarding severability and standing that serve to distract from the merits of the issue, treating instead the bond validation process as if the court system was established simply to rubber-stamp local bond issuances rather than thoroughly examine each case on its merits. This case presents a simple question of whether a local government can distort the crisp

[10] (*See also* Init. Br. App. 176-80 (detailing such statutory safeguards).)

[11] This Court should decline to blur the distinctions carefully made by the Legislature to salve the oversights of Appellee in its zeal to unlawfully over-secure its debt.

line between non-ad valorem assessments and private liens that the Legislature has drawn. This Court should reinforce this distinction, conclude the bonds are invalid, and reverse and remand this case to the trial court to deny validation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via e-mail to JoLinda Herring at jherring@bmolaw.com, Susan H. Churuti at schuruti@bmolaw.com, Elizabeth Nieberger at eneiberger@bmolaw.com, Herbert Thiele at thieleh@leoncountyfl.gov, and Georgia Cappleman at capplemang@leoncountyfl.gov this 8th day of July, 2014.

J. Stephen Menton

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief is computer-generated in 14-point Times New Roman font in compliance with Florida Rule of Appellate Procedure 9.210(a).

J. Stephen Menton