IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC06-1372
DCA Case No.: 2D05-2711

TINA BROWN, etc., et al.,

Petitioners,

v.

LEE COUNTY, FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE SECOND DISTRICT COURT OF APPEAL

PETITIONER=S BRIEF ON JURISDICTION and APPENDIX

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STATEMENT OF THE CASE AND FACTS

On November 27, 2001, Lee County adopted a school impact fee ordinance. The ordinance, which became effective December 1, 2001, requires that a school impact fee be paid before the County will issue a building permit for a residential dwelling, a move-on permit for a mobile home, or a development order for a mobile home park. The ordinance imposed fees of $2,232 for single family homes; $691 for multi-family residences; and $425 for mobile homes.[1] The ordinance does not contain a savings clause; it applies to all applicants for the affected permits, including those who had contracts in place before the ordinance went into effect.

The Petitioners (Plaintiffs below), a homeowner, a home builder, and an association of Lee County builders and contractors, brought a class action to challenge the ordinance, both facially and as applied, as an unconstitutional impairment of contract in violation of Article I, Section 10 of the Florida Constitution.[2] The Plaintiffs moved for partial summary judgment, asserting that as a matter of law, the impact fee ordinance on its face unconstitutionally impairs building contracts that were executed before the ordinance went into effect. The trial court rejected the County=s argument that disputes about the content, validity and impairment of certain of those contracts

[1]Recently, the fees were increased to $4,345 for single family homes, and $1,719 for multi-family units.

[2]The Plaintiffs also challenged the Ordinance as an invalid tax which failed to satisfy the dual rational nexus test. That claim was resolved in favor of the County.

precluded summary judgment, following established Florida case law and an advisory opinion from this Court. The trial court granted the Plaintiffs= motion, ruling that the ordinance was facially unconstitutional. In its order, the trial court relied on three established principles of Florida law to determine that: 1) facts regarding the specific contracts were not relevant to a determination that the ordinance was facially constitutional, citing Department of Revenue v. Florida Home Builders Assoc., 564 So. 2d 173 (Fla. 1st DCA 1990); 2) citizens cannot be charged with notice of impending legislation until its effective date, citing Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077 (Fla. 1978); and 3) contract rights are protected by the Florida Constitution, citing Green v. Quincy State Bank, 368 So. 2d 451 (Fla. 1st DCA 1979). On July 29, 2005, the trial court incorporated the order into a partial summary judgment in the Plaintiffs= favor, which the County appealed.

On June 9, 2006, the Second District Court of Appeal reversed the trial court=s ruling. In its written opinion, the Second District expressly disagreed with the First District=s decision in Florida Home Builders, upon which the trial court had primarily relied. The Florida Home Builders court had declared a law imposing a service tax on construction contracts to be facially unconstitutional, because, just like the impact fee ordinance, it applied to (and thus impaired) contracts entered into before its effective date. The Second District denied that the tax law or the impact fee ordinance could be facially unconstitutional, because each law could be validly applied to contracts executed

after its effective date. (App. 7). The Second District essentially held that an otherwise valid law that applies retroactively to impair pre-existing contracts can never be facially unconstitutional, if it also applies to at least one contract executed after its effective date. (App. 5).

The Second District blamed the result in Florida Home Builders on the First District=s Amisplaced@ reliance on this Court=s Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987), which declared a previous version of the same, retroactively-applied service-tax law to be facially unconstitutional:

> We think the First District=s reliance on the supreme court=s previous decision in In re Advisory Opinion was misplaced because the supreme court was not reviewing a trial court=s determination of constitutionality of the construction tax law but was issuing an advisory opinion regarding the constitutionality of the law. The supreme court was not called upon to determine the law=s facial sufficiency, or whether any set of circumstances exists under which the statute would be valid, but to opine as to whether it violated the contract clause on its face, or without resort to the particular facts of its application. Thus, the supreme court did not make a ruling striking the law as facially unconstitutional.

(App. 7) (emphasis in original).

The Second District remanded the case for disposition of the Plaintiffs= as-applied challenge to the impact fee ordinance, directing that each and every contract must be separately examined to determine if it has been impaired by the imposition of the fee. (App. 13-14). The class members= notice to invoke this Court=s discretionary jurisdiction was timely filed on July 7, 2006.

QUESTION PRESENTED

The Second District held that even if the impact fee ordinance impairs pre-existing contracts, it cannot be facially unconstitutional, because it validly applies to contracts executed after its effective date. Does this decision expressly and directly conflict with the First District=s decision in Florida Home Builders, where, in keeping with this Court=s Advisory Opinion, a services-tax law which affected, and therefore impaired, pre-existing contracts was declared facially unconstitutional?

SUMMARY OF THE ARGUMENT

The Second District=s decision cannot be reconciled with the First District=s decision in Department of Revenue v. Florida Home Builders Assoc., 564 So. 2d 173, 175 (Fla. 1st DCA 1990). The cases are without material factual distinctions, and the Second District=s semantic distinction between the terms Afacially unconstitutional@ and Aunconstitutional on its face@ is without substantive difference or support. Moreover, the Second District=s position that the First District should not have followed Advisory Opinion when faced with the same fundamental issue that the Opinion resolved is contrary to the rulings of this Court. Express and direct conflict exists, and this Court should exercise its discretionary jurisdiction.

ARGUMENT

The Decision of the Second District Court of Appeal Expressly and Directly Conflicts with the First District=s Decision in Department of Revenue v. Florida Home Builders Assoc., 564 So. 2d 173 (Fla. 1st DCA 1990) on Whether a Law That Impairs Pre-existing Contracts, but Can Be Validly Applied to Contracts Executed after its Effective Date, Is Facially Unconstitutional.

A. The Basis for Jurisdiction is Conflict.

This Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal on the same question of law. See Art. V, ' 3(b)(3), Fla. Const.

B. Express and Direct Conflict Exists.

The Second District held that even if Lee County=s school impact fee ordinance unconstitutionally impairs contracts executed before its effective date, it cannot be facially unconstitutional, because the ordinance can be validly applied to contracts executed after its effective date. That decision cannot be reconciled with the First District=s decision in Department of Revenue v. Florida Home Builders Assoc., 564 So. 2d 173 (Fla. 1st DCA 1990), appeal dismissed, 581 So. 2d 164 (Fla. 1991). The two decisions address the same question of law, and are not factually distinguishable. See Kyle v. Kyle, 139 So. 2d 885 (Fla. 1962).

Similar to the Plaintiffs= challenge to the impact fee ordinance, the challenge in Florida Home Builders was to a services-tax law that applied to construction contracts executed both before and after the effective date of the tax. See 564 So. 2d at 173. Like the Plaintiffs in this case, the Florida Home Builders plaintiffs moved for summary judgment, asserting that as a matter of law, the services-tax law was a facially unconstitutional impairment of the contracts that pre-dated it. Id. at 175. Just as the County did here, the Department of Revenue opposed the motion by arguing that there

were disputed factual issues with regard to the builders= individual contracts that precluded summary judgment. Id. The trial court disagreed and granted the motion. Id. The trial court relied primarily on this Court=s Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987), in which this Court found the previous version of the same law to be facially unconstitutional because it applied retroactively to pre-existing construction contracts. Id.

On appeal, the First District affirmed the trial court=s ruling, stating that Afacts regarding appellees= specific contracts, while perhaps relevant to a contention that the law was unconstitutional *as applied*, were unnecessary to a determination of facial constitutionality.@ Id. (emphasis in original). The court confined itself to the text of the statute and the undisputed fact that the tax applied to contracts executed before its effective date, and declared it to be facially unconstitutional. Id. Like the trial court, the First District based its decision on this Court=s Advisory Opinion. Id. at 175-76.

In Advisory Opinion, this Court reviewed the facial constitutionality of a previous version of the services tax at issue in Florida Home Builders. See 509 So. 2d 292. Among the interests opposing the new tax were representatives from the construction industry. Id. at 313. The tax applied to construction contracts executed both before and after its effective date of May 1, 1987, with a narrow exemption for those that were executed before the law=s effective date and fully performed before June 30, 1988. Id.

The construction industry argued that the exemption did not save the new law from being a facially unconstitutional impairment of the pre-existing contracts. Id. In opposition, the State argued, as did Lee County in our case, that the law was facially constitutional because it did not adversely affect all of the contracts to which it applied. Id. at 314. This Court rejected the State=s position, and explained:

> The legislature filed the instant statute on April 23, 1987, and the Governor signed it into law on the following day. Once enacted into law, contractors were placed on notice that they should take their upcoming tax burden into consideration when entering into construction contracts after May 1, 1987 [the statute=s effective date]. The act, however, does not limit its effect to this permissible burden. Instead, by retroactively placing a tax burden upon all construction contracts that are incomplete by June 30, 1988, and thereby adding an unknown, uncontemplated cost, it retroactively burdens contracts that were in existence before any party could have reasonably been on notice of the impending tax.
>
> Unquestionably, contract rights are ordinarily subject to the state=s powers of taxation. It is equally indisputable, however, that rights existing under a valid contract enjoy protection under the Florida Constitution. We cannot accept the state=s argument that the fact the instant tax may make certain contracts unprofitable does not constitute an impairment of contract. Any legislative action which diminishes the value of a contract is repugnant to and inhibited by the Constitution.

Id. at 314 (internal citations omitted). The Court concluded that the part of the tax law affecting pre-existing construction contracts was facially unconstitutional. Id.

There is no material difference between the service tax laws in Advisory Opinion

and Florida Home Builders, and the impact fee ordinance in this case. All three applied to pre-existing contracts as well as those executed after the laws went into effect, and imposed Aan unknown, uncontemplated cost . . . [on] contracts that were in existence before any party could have reasonably been on notice of the impending tax.@ Advisory Opinion, 509 So. 2d at 314. Therefore, there is no factual distinction between Florida Home Builders and our case that would allow the two to be harmonized.

The conflict here arises from the opinion of the Second District that the First District=s reliance on Advisory Opinion was misplaced. That opinion is grounded in the Second District=s perception that this Court did not, in fact, determine that the section of the services tax law affecting pre-existing construction contracts was facially unconstitutional. Despite this Court=s conclusion in Advisory Opinion that Ait is our opinion that section 31(4) of the statute is facially unconstitutional[,]@ the Second District stated:

> The supreme court was not reviewing a trial court=s determination of constitutionality of the construction tax law but was issuing an advisory opinion regarding the constitutionality of the law. The supreme court was not called upon to determine the law=s facial sufficiency, or whether any set of circumstances exists under which the statute would be valid, but to opine as to whether it violated the contract clause on its face, or without resort to the particular facts of its application. Thus, the supreme court did not make a ruling striking the law as facially unconstitutional.

(App. 7). If there is a distinction here, it is one without a difference. It is true that an advisory opinion is not a Aruling@ and Adoes not carry with it the mandate of the Court,@ but when an advisory opinion has answered the fundamental issue in a case, a district

court following the advisory opinion will be affirmed. See Barley v. South Florida Water Management District, 823 So. 2d 73, 82 (Fla. 2002); Advisory Opinion, 509 So. 2d 315. Advisory Opinion answered the fundamental issue in Florida Home Builders of whether the services tax law was a facially unconstitutional impairment of pre-existing construction contracts. The First District=s reliance on it was entirely proper, and the Second District=s assertion that it was not creates an express and direct conflict falling squarely within this Court=s discretionary jurisdiction.

C. The Underlying Issue Warrants the Supreme Court=s Review.

As school impact fee ordinances continue to proliferate in this State, the issue of whether such ordinances constitutionally apply to pre-existing contracts is affecting more and more of Florida=s citizens. Given our Constitution=s clear prohibition against the impairment of contracts, and this Court=s well-established championing of contract rights against government encroachment, the conflict between the Second District=s decision and the First District=s decision in Florida Home Builders fosters uncertainty in business relationships and in the law which only this Court can resolve.

CONCLUSION

The Second District=s decision expressly and directly conflicts with the First District=s decision in Department of Revenue v. Florida Home Builders Assoc., 564 So. 2d 173 (Fla. 1st DCA 1990). This Court should exercise its discretionary jurisdiction to resolve the conflict and provide certainty to the citizens of Florida upon whom school

impact fees are imposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on Jurisdiction has been furnished by regular U.S. Mail to DAVID OWEN, ESQ. and JOHN S. TURNER, ESQ., Lee County Attorney's Office, Post Office Box 398, Fort Myers, FL, 33902; GREGORY T. STEWART, ESQ., 1500 Mahan Drive, Suite #200, Tallahassee, FL, 32308; KEITH B. MARTIN, ESQ., Lee County School Board, 2055 Central Avenue, Fort Myers, FL, 33901; and MARK A. BOYLE, ESQ. and MICHAEL G. FINK, ESQ., 2030 McGregor Boulevard, Fort Myers, FL, 33901; this _____ day of July, 2006.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of Florida Rules of Appellate Procedure 9.100(1) and 9.21(a)(2).

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