IN THE SUPREME COURT OF FLORIDA

DR. GREGORY L. STRAND,

Appellant,

v.

CASE NO. SC06-1894
L.T. Case No. 2006-CA-881

ESCAMBIA COUNTY, FLORIDA,
a political subdivision of
the State of Florida,

Appellee.
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FLORIDA ASSOCIATION OF COUNTIES'
MOTION FOR REHEARING AND CLARIFICATION

The Florida Association of Counties ("FAC"), amicus curiae in the above-styled action, by and through its undersigned counsel, and pursuant to Fla. R. App. P. 9.330, moves for rehearing and clarification of the opinion issued by this Court on September 6, 2007.

Before the Court is an appeal from a final judgment validating certain tax-increment-financed bonds proposed to be issued by Escambia County. The purpose of the bonds was to finance a road widening project which would improve economic development and alleviate traffic congestion. Pursuant to the Ordinance and the Resolution adopted by Escambia County, funds derived from "Tax Increment Revenues," which are the moneys deposited in the Southwest Escambia Improvement Trust Fund,

would be the primary source of revenues pledged for the payment of the debt service on the proposed bond. (See Escambia County, Florida Resolution R2006-96, Art.III Sec. 302 (May 4, 2006); Ordinance 2006-38 Sec. 3 (1)(b)).

On September 6, 2007, this Court reversed the final judgment and expressly receded from its prior decisions in State v. Miami Beach Redevelopment Agency, 392 So. 2d 875 (Fla. 1980), and State v. School Board of Sarasota County, 561 So. 2d 549 (Fla. 1990). See Strand v. Escambia County, 32 Fla. L. Weekly S550 (Fla. Sept. 6, 2007). In so doing, the Court specifically held:

> [T]he phrase "payable from ad valorem taxation" in article VII, section 12 refers not only to a pledge of the taxing power itself but also to a pledge of ad valorem tax revenues. And, because tax increment financing pledges funds obtained from ad valorem tax revenues, bonds that rely upon such financing schemes are bonds "payable from ad valorem taxation". Consequently, approval of such bonds by referendum, as mandated by article VII, section 12, must be obtained.

Id. at S552. Further, in crystallizing its holding, this Court stated:

> In other words, a referendum is required whenever bonds financing capital improvements (1) are payable from ad valorem taxation; and (2) mature more than twelve months after issuance. Specific to the issue here, because the payment is from ad

> valorem taxation in either case, a referendum is required not only when localities pledge ad valorem taxing power, but when localities pledge ad valorem tax revenues.

Id. at S554.

FAC requests that this Court grant a rehearing on its decision. Specifically, FAC asks this Court to reconsider whether the County's proposed use of tax increment revenues to finance the road improvement project was subject to the referendum requirements of Article VII, Section 12 of the Florida Constitution. This Court has misinterpreted the jurisprudence and history of Article VII, Section 12, Florida Constitution, and has done so in a proceeding where the issue deemed pivotal by the Court was not specifically raised by the parties. This Court's holding with respect to the requirement that tax increment financing be subject to a referendum has already led to great instability in local governments which have issued this type of debt and in the financial markets in general.[1] Accordingly, this Court should, in recognizing the great public importance of this issue, grant rehearing.

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[1] As a result of this Court's decision, Standard and Poor's and Fitch's Ratings Services have placed on credit watch, with negative implications due to the uncertainty of this Court's decision, all ratings on unvalidated Florida tax incremental financings and on certificates of participation (COPS), which is

Part of this Court's holding is the statement that the decision would not impact previously issued bonds which had been validated. In the event that the Court does not grant rehearing on the merits, FAC requests this Court either reconsider or clarify the decision so that it will apply prospectively and only impact bonds issued after the date the opinion is final.

FAC also requests this Court to clarify its decision as it relates to State v. School Board of Sarasota County 561 So. 2d 549 (Fla. 1990). There are significant and pertinent distinctions between the financing approved in the School Board of Sarasota County case and the financing plans in the present matter and in the Miami Beach Redevelopment Agency case. The inclusion of the School Board of Sarasota County case in this Court's receding from the premise in the Miami Beach Redevelopment Agency case implies a similarity of financing plans that simply does not exist. FAC requests that this Court clarify its decision to indicate that the discussion of the School Board of Sarasota County case does not suggest that a referendum under Article VII, Section 12 of the Florida

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the financing structure approved in the School Board of Sarasota County case.

Constitution would also be required under that financing structure.

Rehearing on Applicability of the Referendum Requirement of Article VII, Section 12 of the Florida Constitution to Tax Increment Financing

FAC respectfully requests that this Court grant a rehearing and supplemental briefing of its decision denying validation of bonds in this case. The original briefs did not contest the validity of the Miami Beach Redevelopment Agency case, nor did they even raise the School Board of Sarasota County case. In fact, the record reflects that the objection to the proposed bonds was that tax increment financing could only be used in a redevelopment area pursuant to the statutory requirements of Chapter 163, Florida Statutes. As this Court's decision has significant statewide impact upon both past and future financings, FAC believes that the Court would benefit from supplemental briefing and argument on the specific issue of whether the referendum requirements of Article VII, Section 12 are implicated by Escambia County's tax increment financing plan.

Having the benefit of a full briefing and argument on the threshold issues is especially important in the context of a bond validation because of the far reaching impacts of a decision. Section 75.09, Florida Statutes, states, as follows:

> If the judgment validates such bonds, . . . *and the judgment is affirmed, such judgment* is forever conclusive as to all matters adjudicated against plaintiff and all parties affected thereby, including all property owners, taxpayers and citizens of the plaintiff, and all others having or claiming any right, title or interest in property to be affected by the issuance of said bonds, . . . [which] shall never be *called in question in any court by any* person or party.

Id. Bond validation proceedings, like no other civil action, *carry with them the cloak of stability that is relied upon by* both the financial markets and governmental entities to provide the necessary guidance and direction in financing infrastructure needs. The importance of a full briefing is only heightened in proceedings such as this where the Court is seeking to overturn *decades of established precedent.*

In this case, the Court traced the historic development of the constitutional restrictions on local borrowing and noted that, in 1930, the 1885 Florida Constitution was amended to require a referendum for local bonds be added to Article IX, Section 6. See Strand v. Escambia County, 32 Fla. L. Weekly at S553-554. As this Court indicated, the purpose of the 1930 amendment was to impose a restriction on local borrowing and to impose a restraint on "the spendthrift tendencies of political subdivisions to load the future with obligations to pay for

things the present desires, but cannot justly pay for as they go." See Leon County v. State, 165 So. 666, 669 (Fla. 1936).

However, this Court has carefully maintained in its past precedent a consistent interpretation of Article VII, Section 12, and its 1885 constitutional predecessor provision, that the distinction sought to be addressed within Article VII, Section 12 was between (1) the authority of the government to levy taxes in its discretion and (2) the power of bondholders to compel the government to levy those taxes against local property owners. See Seaboard Air Line R. Co. v. Peters, 43 So. 2d 448 (Fla. 1949).

The adverse consequences sought to be addressed by the 1930 amendment to the 1885 Constitution was not the sufficiency of the revenues to pay the bonds but, rather, the granting to bondholders the power to compel the levy of property taxes to pay the debt service on the bonds. See Seaboard Air Line R. Co., 43 So. 2d at 455; and Miami Beach Redevelopment Agency, 392 So. 2d at 894-895. The distinction is not mere semantics. The 1930 amendment and subsequent interpretations of its provisions have always sought to allocate the risk of economic downturn, not to Florida's local property owners, but to the bondholders. This distinction was the premise of the Miami Beach Redevelopment Agency case, as the various statutes under which

the bonds in that case were issued had been carefully crafted to avoid the ability of bondholders to compel the levy of ad valorem taxing power.

The Supreme Court noted in Miami Beach Redevelopment Agency that upon adoption of Article VII, Section 12, the language was modified to include the qualifying language "payable from ad valorem taxation." However, the inclusion of this phrase was to specifically incorporate the well-established judicial interpretation that it was the pledge of taxing power that implicated the referendum requirement and not the use. This Court's decision in the instant case has receded not only from the Miami Beach Redevelopment Agency case, but also from decades of prior precedent upon which it is based that has rigidly maintained this distinction.

Under the provisions of the Escambia County ordinance and in tax increment structure generally, that well-established distinction is maintained as the amount of ad valorem taxes or tax increment transferred to a trust fund is limited and calculated in the enabling legislation, whether ordinance or statute. Such amount is limited to the tax increment increase that occurs as a result of an increase in taxable value within a prescribed area. No bondholder or outside party has any right

to compel the creation of the increment or direct the trust fund accumulation resulting from the transfer.

This Court in the instant case has attributed significance to the defeat of two proposed constitutional amendments that would have authorized the pledge of tax increment revenues without voter approval. See Strand v. Escambia County, 32 Fla. L. Weekly at S554. The first amendment was proposed by the Legislature in 1976 and was defeated by the voters on November 2, 1976. (CS for HJR 3982, Second Regular Session 1976) The second amendment was proposed by the Constitutional Revision Commission and was defeated on November 7, 1978. Fla. Const. Rev. Comm'n, Revision No. 7 (1978) (proposed art. VII, section 17, Fl. Const.). Though each of the proposed revisions included amendments authorizing the use of tax increment revenues for the repayment of debt without the necessity of voter approval, that fact provides no basis for the Court to conclude that the amendments' failures supports a receding from decades of established case law. For example, each proposed revision contained numerous other proposed amendments, including the authorization for the exercise of eminent domain for redevelopment purposes and the sale of that property to private parties. To suggest that the voters' rejection of the 1976 and 1978 revisions was the result of the specific inclusion of the

provision relating to use of tax increment revenues for payment of revenue bonds is speculative and should not be the basis for receding from Miami Beach Redevelopment Agency and School Board of Sarasota County.

Prospective Relief

There are billions of dollars of outstanding bonds and lease obligations issued or approved by school districts, counties, cities and other districts around the State of Florida which have used either a lease purchase financing structure similar to that which was approved by the Supreme Court in School Board of Sarasota County or a tax increment structure as previously approved in Miami Beach Redevelopment Agency. This Court, in an effort to address the application of the instant decision stated,

> Also, our decision in this case does not affect bonds validated prior to this opinion becoming final. (citations omitted). As this Court has stated, "after validation, the courts will protect even the purchasers of unconstitutional bonds." (citations omitted).

Strand v. Escambia County (32 Fla. L. Weekly at S555). By so limiting the application of its decision in this manner, this Court has opened the door to a floodgate of potential litigation attempting to attack the validity of obligations that have already been issued to finance essential public purpose capital

improvements, such as schools, highways, prisons and other essential public facilities, many of which have been outstanding for more than 20 years and which were issued in reliance on this Court's past decisions. The vast majority of bonds and other obligations which are issued or otherwise approved by local governments, school boards and districts are not validated. Once the law is deemed to be so settled and established by this Court, governmental entities and bondholders rely on that established precedent in planning, implementing and financing debt structures. The law established by the Miami Beach Redevelopment Agency and School Board of Sarasota County cases had never been questioned before the issuance of the Strand decision.

In Florida, there is a well-recognized exception to the general rule requiring the retroactive application of a judicial decision:

> [W]here a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation.

Fla. Forest & Park Serv. v. Strickland, 18 So. 2d 251, 253 (Fla. 1944).

The Supreme Court has applied this exception in the local government context, for example, in Barragan v. City of Miami, 545 So. 2d 252 (Fla. 1989), the Florida Supreme Court held that a city ordinance authorizing the City of Miami to reduce disability pension benefits for its retired employees in an amount equal to the workers' compensation benefits was invalid based on the repeal of section 440.09(4), Florida Statutes, by the Florida Legislature. Subsequently, in City of Miami v. Bell, 634 So. 2d 163 (Fla. 1994), a lawsuit was filed seeking retroactive application of the Barragan decision to reductions which had been made by the City prior to the Barragan decision. This Court, in addressing the issue, concluded that Barragan "has no effect on the amount of disability payments owed by the City to pensioners except those payments accruing after the effective date of that decision." The Court stated:

> The City's budgeting for salary and benefits as well as its allocation of tax resources was made in reliance on the ordinance and existing case law. Holding the City liable for past offsets would require a reallocation of municipal services and subject today's taxpayers to yesterday's fiscal obligations.

Id. at 166. The Court continued:

> When contractual rights are adversely affected in such a manner, we are reluctant to *apply a decision retroactively*. . . . Present and future benefits required by Barragan can be adjusted without serious

> financial consequence for City taxpayers; but to require back benefits for prior years would be fiscally unjust to the taxpayers of the City of Miami.

Id. (emphasis added). Accordingly, this Court ordered that reimbursement of claims for those offsets should be prospectively applied, only, after the effective date of Barrigan decision. Id.

Similarly, in the context of municipal financing, the United States Supreme Court has addressed the appropriateness of prospective application of a decision where the validity of electoral procedures were declared unconstitutional. In Cipriano v. City of Houma, 395 U.S. 701 (1969), the Supreme Court of the United States invalidated a Louisiana law which provided that only "property taxpayers" could vote in an election to approve the issuance of revenue bonds. The Court considered whether the decision should be applied retroactively. In addressing the issue, the Court discussed the "[s]ignificant hardships" that "would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect," stating:

> [w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.

Id. at 706. The United States Supreme Court ruled that the decision would not apply retroactively where the authorization to issue the securities was legally complete on the date of the decision. See also Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932).

In the present case, local governments have issued or authorized debt in reliance upon the established precedent of this Court, which has never been remotely questioned by any other decision. These entities have incurred or authorized vast amounts of debt to provide essential public facilities and entered into contractual relationships not only to provide the infrastructure but to repay the debt. As such, the application of this decision to bonds or to other obligations, such as certificates of participation, which have already been issued and were not validated, creates such a gross inequity and burden that the decision should only be applied prospectively.

State v. School Board of Sarasota County

In State v. School Board of Sarasota County, 561 So. 2d 549 (Fla. 1990), three separate final judgments validating obligations were consolidated before the Court. A review of the financing program in School Board of Sarasota County clearly distinguishes it from both the financing in the Strand case and

in the Miami Beach Redevelopment Agency case.[2] The financing structure in Sarasota County violated neither the first nor the second prong of Article VII, Section 12 of the Florida Constitution. Therefore, the decision of this Court, whether intentionally or inadvertently, has caused doubts and concerns as to the continuing viability of the financing mechanism approved in School Board of Sarasota County, particularly when its inclusion in analyzing Miami Beach Redevelopment Agency and this case is neither required nor appropriate.

The certificates of participation or lease purchase obligations approved in School Board of Sarasota County are fundamentally dissimilar to the tax increment bonds issued by ordinance in the instant case. The obligations approved in School Board of Sarasota County contained neither a pledge of the ad valorem taxing power nor a pledge of ad valorem revenues in violation of the first prong of the constitutional test embodied in Article VII, section 12, Florida Constitution. Under the Sarasota County structure, the school board, on an annual basis, determines whether to renew the lease and whether

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[2] This Court in its Strand Opinion cites language that it attributes to the School Board of Sarasota County decision. However, the particular language was, in fact, a quotation from the Miami Beach Redevelopment Agency case that had been included in the Sarasota County case. See 32 Fla. L. Weekly at S552.

to appropriate revenues for that purpose as part of its budget process. Even if the school board elects to make the annual appropriation, there is no requirement that ad valorem tax revenues be used to fund the appropriation.

The certificates of participation or lease purchase obligations approved in School Board of Sarasota County are likewise dissimilar to the tax increment financing scheme before the Court in the instant case in that any obligation of the school board under the underlying lease agreements was subject to annual appropriation during the ordinary budget cycle of the school district and thus no obligation was created "maturing more than twelve months after issuance" in violation of the second prong of the referendum requirement embodied in Article VII, section 12, Florida Constitution. State v. Brevard County, 539 So. 2d 461 (Fla. 1989).

Certificates of participation are not only utilized by school boards throughout the state to provide financing for educational facilities but they are also used by counties to provide a wide range of capital projects including courthouses, jails and even affordable housing. This Court's inclusion of the School Board of Sarasota County case within its reanalysis of the Miami Beach Redevelopment Agency case misapprehends the significant differences between the financing plans and has

wrongfully cast doubt as to whether certificates of participation violate the referendum requirements of Article VII, Section 12 of the Florida Constitution. FAC prays this Court will rehear or clarify its decision to reflect that the decision in Strand does not, in any way, stand for the proposition that the financing structure previously approved in the School Board of Sarasota County case is subject to the referendum requirement of Article VII, Section 12 of the Florida Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to DAVID A. THERIAQUE, ESQUIRE, S. BRENT SPAIN, ESQUIRE, TIMOTHY E. DENNIS, ESQUIRE, Theriaque Vorbeck & Spain, 433 North Magnolia Drive, Tallahassee, Florida 32308; KERRY A. SCHULTZ, ESQUIRE, Bordelon & Schultz Law Firm, P.L., 2721 Gulf Breeze Parkway, Gulf Breeze, Florida 32563; RICHARD LOTT, ESQUIRE and PATRICIA D. LOTT, ESQUIRE, Miller, Canfield, Paddock and Stone, P.L.C., 25 W. Cedar Street, Suite 500, Pensacola, Florida 32502; and JOHN MOLCHAN, ESQUIRE, Assistant State Attorney, Post Office Box 12726, Pensacola, Florida 32591, this 17 day of September, 2007.

GREGORY T. STEWART

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this motion complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

GREGORY T. STEWART