

IN THE SUPREME COURT OF FLORIDA  
Case No.: SC06-1894

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DR. GREGORY L. STRAND,  
Appellant,

v.

ESCAMBIA COUNTY, FLORIDA, etc., et al.,  
Appellees.

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On Appeal from the Circuit Court of the First Judicial Circuit,  
in and for Escambia County, Florida  
Lower Tribunal No.: 2006-CA-881

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**AMICUS CURIAE BRIEF OF THE FLORIDA LEAGUE OF CITIES, INC.  
AND THE FLORIDA REDEVELOPMENT ASSOCIATION, INC.**

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## **IDENTITY AND INTEREST OF AMICI CURIAE**

The Florida League of Cities, Inc., and the Florida Redevelopment Association, Inc., collectively represent over 500 municipalities, units of local government providing municipal services, and community redevelopment agencies (“CRAs”) devoted to the public welfare of Florida’s citizens. Many have issued bonds and entered into other obligations under or in reliance upon the Community Redevelopment Act of 1969, as amended (codified as chapter 163, part III, Florida Statutes (2007)) (the “Redevelopment Act”). This case is fundamental to the ability of Florida’s local governments to access critical capital markets, finance a multitude of capital improvements and build, fund and equip basic facilities such as schools, city halls, courthouses, fire stations and other buildings serving vitally important government functions.

## **SUMMARY OF ARGUMENT**

In ruling on the validity of Escambia County’s (the “County”) proposed bonds, the Court does not act in a vacuum. Beyond the particular transaction, the Court must understand modern financing techniques and their use under the Redevelopment Act. Beyond these modern developments, the Court must understand the historical bright-line principle for determining which public financing transactions constitutionally require voter approval. The Court’s highest

duty is to uphold the constitution. The Court's greatest art is doing so in a manner that respects history, fosters stability, and accommodates practical realities.

On September 6, 2007, the Court invalidated the County's bonds and signaled retreat from *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), concluding that these precedents were not consistent with article VII, section 12 of the Florida Constitution.<sup>1</sup> We are passionate about preserving the Court's bright-line principle that for decades has guided the design and practice of public finance law in Florida and has ensured stability in the operation of local government finance and credit markets.

We describe the origin, development, and application of the bright-line principle, culminating in *Miami Beach's* proper application of it to a tax increment financing under the Redevelopment Act. There, the Court correctly concluded that the transaction did not trigger the referendum requirement because it did not directly or indirectly obligate the government to exercise its taxing powers. In the context of the Redevelopment Act, we also describe the facts behind tax increment financing and the fact that the increment is nothing more than a measure of increases in property values. Local governments may use any source of funds to make the deposit to the trust fund. The increment is not ad valorem taxes. In fact,

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<sup>1</sup>*Strand v. Escambia County*, 32 Fla. L. Weekly S550 (Sep. 6, 2007) (the "initial opinion").

tax increment financing provides greater safeguards than traditional revenue bond financing, because governments are not required to make transfers to the trust fund to the extent property values decrease or in the event they elect to reduce property tax rates. The Court's traditional *stare decisis* analysis leads to the conclusion that the long-standing bright-line principle applied in *Miami Beach* should not be abandoned now, and it need not be to decide this case. If the Court nonetheless is determined to change the law, it must do so in a manner that minimizes prejudicial consequences and protects vested rights.

### **ARGUMENT**

I. THE REFERENDUM REQUIREMENT DOES NOT APPLY TO REDEVELOPMENT ACT BONDS PLEDGING THE TAX INCREMENT BECAUSE THE BONDHOLDERS HAVE NO RIGHT TO COMPEL LEVY OF AN AD VALOREM TAX

A. **The Florida Constitution Has Never Required a Referendum to Issue Bonds When the Bondholders Lack the Power to Compel the Levy of a Tax**

Before 1930, the Florida Constitution did not impose any limitation on the power of local governments to incur debt. Following the growth of local government debt during the 1920s, much of which later defaulted, citizens amended the 1885 Constitution in 1930 by adding a new referendum requirement in article IX, section 6. The new requirement did not facially distinguish between general obligation and revenue bonds, but the Court soon drew that distinction in approving the issuance of revenue bonds without a referendum. *See State v. City*

of *Miami*, 152 So. 6 (Fla. 1933) (approving bonds to finance additions to municipal water supply system through revenue certificates payable from future net revenues of system).

*City of Miami* recognized that “municipal obligations, which are not payable from taxes, but are provided to be payable solely from the revenues of an independent revenue producing asset or utility, do not constitute a debt of the municipality, within the prohibition of a constitutional or statutory debt limit.” *Id.* at 9. The Court further recognized that the water revenue certificates “do not directly, indirectly, or contingently obligate the city to levy or to collect any form of taxation whatever therefor.” *Id.* at 13.

From *City of Miami* in 1933 until today, there has been a clear, undisturbed line of precedent applying the principle that a bond or similar obligation is subject to the referendum requirement *only where* it directly or indirectly obligates the government to exercise its taxing powers.<sup>2</sup> This analysis requires a review of the substance of the transaction undertaken, and not the mere form that was followed. *Id.* at 11. Implicit in this analysis is the issue of whether the governmental agency

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<sup>2</sup>See, e.g., *State v. City of Sunrise*, 354 So. 2d 1206, 1209 (Fla. 1978); *Nohrr v. Brevard County Ed. Facilities Auth.*, 247 So. 2d 304, 309 (Fla. 1971); *State v. Tampa Sports Auth.*, 188 So. 2d 795, 797-98 (Fla. 1966); *State v. Monroe County*, 81 So. 2d 522, 523 (Fla. 1955); *State v. City of Miami*, 72 So. 2d 655, 656 (Fla. 1954); *State v. City of Jacksonville*, 53 So. 2d 306, 308 (Fla. 1951); *State v. City of Key West*, 14 So. 2d 707, 708 (Fla. 1943); *State v. Dade County*, 200 So. 848, 849 (Fla. 1941); *State v. City of Hollywood*, 179 So. 721, 723-24 (Fla. 1938); *Flint v. Duval County*, 170 So. 587, 597-98 (Fla. 1936).

holding the tax increments also actually possesses the power to levy an ad valorem tax. If the tax increment is transferred to an entity that does not have such power, the referendum requirement does not come into play.<sup>3</sup>

The Court further developed the principle in *Seaboard Air Line Railroad Co. v. Peters*, 43 So. 2d 448 (Fla. 1949). In *Seaboard*, a port authority proposed to issue bonds payable solely from a special fund, into which the authority would deposit the net operating revenues of the airport and the proceeds of ad valorem taxes it was authorized to levy for the purchase of land and for the expansion and development of the airport. The bonds did not grant any rights to the bondholders to compel ad valorem taxation, but rather created solely a lien on the funds in the special fund. As a result, there was no prohibited pledge of the taxing powers of the authority, and no violation of the referendum requirement. Subsequently, the Court again confirmed the constitutionality of *using* ad valorem taxes as long as the power to tax was itself not *pledged*, and reiterated that the referendum requirement encompassed only bonds or certificates of indebtedness that directly obligate the ad valorem taxing *power*. *Town of Medley v. State*, 162 So. 2d 257, 258 (Fla. 1964).<sup>4</sup>

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<sup>3</sup>The referendum requirement by its very terms applies only to governmental units that possess power to levy ad valorem taxes. CRAs have no taxing power.

<sup>4</sup>Observing that the Court had “consistently and repeatedly so held,” *Town of Medley* cites many authorities from the preceding decades. See 162 So. 2d at 258.

The 1968 constitutional revision amended the referendum requirement and relocated it to article VII, section 12. The revision broadened the class of instruments subject to referendum and rejected the *Tapers* doctrine,<sup>5</sup> but it did not disturb the line of authority stretching from *City of Miami* to *Town of Medley*. In fact, one of the principal drafters of the new constitution commented,

In 1930, article IX, section 6 of the 1885 Constitution was amended to provide that no local governmental unit could issue bonds without the approval of a freeholder election. It did provide that refunding bonds could be issued without a referendum.

Except for the fact that the new constitution limits local bonding to capital projects, *the new constitution offers the same basic provision as did the 1885 Constitution after 1930*.

Art. VII, § 12, Fla. Const, Commentary by Talbot “Sandy” D’Alemberte, 26A Fla. Stat. Ann. § 101 (1995) (emphasis added); see *State v. Orange County*, 281 So. 2d 310, 312 (Fla. 1973) (1968 constitutional revision did not abrogate *Town of Medley*). Because the referendum requirement remains similar in this regard, pre-revision precedents remain good authority. See, e.g., *Fla. Dep’t of Revenue v. City of Gainesville*, 918 So. 2d 250, 256-62 (Fla. 2005).

Ten years after the constitutional revision, the Court recognized that there was no prohibition against a local government *using* ad valorem tax revenues

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<sup>5</sup>See *State v. County of Dade*, 234 So. 2d 651, 652-53 (Fla. 1970). The *Tapers* doctrine authorized the financing of “essential government requirements” without a freeholder vote. *Tapers v. Pichard*, 169 So. 39 (Fla. 1936).

where it was required to compute and set aside a prescribed amount, when available, for a discreet purpose (servicing the bond obligations). *Tucker v. Underdown*, 356 So. 2d 251, 254 (Fla. 1978).<sup>6</sup>

***B. Miami Beach Appropriately Articulated and Applied the Referendum Requirement in the Context of the Redevelopment Act and Should Not be Overruled***

*Miami Beach* recognized and respected the long-standing bright-line principle that the referendum requirement applies only when bondholders have the power to compel, directly or indirectly, the levy of an ad valorem tax.

What is critical to the constitutionality of the bonds is that, after the sale of the bonds, a bondholder would have no right, if the redevelopment trust fund were insufficient to meet the bond obligations and the available resources of the county or city were insufficient to allow for the promised contributions, to compel by judicial action the levy of ad valorem taxation. Under the statute authorizing this bond financing [*i.e.*, the Redevelopment Act] the governing bodies are not obliged nor can they be compelled to levy any ad valorem taxes in any year. The only obligation is to appropriate a sum equal to any tax increment generated in a particular year from the ordinary, general levy of ad valorem taxes otherwise made in the city and county that year.

*Miami Beach*, 392 So. 2d at 898-99.

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<sup>6</sup>Footnote 3 of the initial opinion dismisses *Tucker* because, in the Court's view, it involved the violation of bond covenants, rather than the pledge of ad valorem taxes and the referendum requirement. We respectfully but strongly disagree. *Tucker* specifically cites to article VII, section 12, at page 254, and to *Rianhard v. Port of Palm Beach District*, 186 So. 2d 503 (Fla. 1966), which applies the bright-line principle at page 506.

In so ruling, *Miami Beach* joined the vast majority of jurisdictions around the country that have upheld tax increment financing. *See Okla. City Urban Renewal Auth. v. Medical Tech. & Research Auth. of Okla.*, 4 P.3d 677, 687 n.42 (Okla. 2000) (collecting cases);<sup>7</sup> *see generally* Harry M. Hipler, *Tax Increment Financing in Florida: A Tool for Local Government Revitalization, Renewal, and Redevelopment*, 81 Fla. B.J. 66 (Aug. 2007).

Tax increment financing eases some of the tension running through the referendum requirement cases, that is, the need to draw the line between transactions that “incidentally affect” the ad valorem taxing power<sup>8</sup> and those that “indirectly pledge” them. Tax increment financing avoids this exercise simply because it is self-limiting – there can never be pressure on the general ad valorem taxing power because the bondholders bear the entire risk that insufficient funds will be available to satisfy the bonds. Page 6 of the initial opinion concisely describes the concept, but it is vitally important to understand exactly how it works. In particular, the “tax increment” is *a measure* of the amount of money

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<sup>7</sup>While upholding tax increment financing, the Supreme Court of Oklahoma subjects such transactions to that state’s broader constitutional referendum requirement. *See* 4 P.3d at 680 n.3

<sup>8</sup>The Court has consistently held that an incidental impact on ad valorem taxes does not trigger the referendum requirement. *See, e.g., Murphy v. City of Port St. Lucie*, 666 So. 2d 879, 881 (Fla. 1995); *Rowe v. Pinellas Sports Auth.*, 461 So. 2d 72, 78 (Fla. 1984); *City of Palatka v. State*, 440 So. 2d 1271, 1273 (Fla. 1983).

that the local government puts into the trust fund to which bondholders may look for payment (if and only if deposits are made). The measure derives from increases in taxable value within a designated area, but the money itself can come from any source, and often does. In other words, the funds are measured by the ad valorem tax revenues attributable to increased taxable values, but they are not required to be *appropriated* from ad valorem taxes. In fact, taxing authorities have no obligation to levy any ad valorem taxes and may, in their sole discretion reduce ad valorem taxation in any given year.

Following *Miami Beach*, the Court has continued to apply the bright-line principle and sanction the use of ad valorem tax revenues to pay debt service without a referendum. See *Panama City Beach Comm. Redev. Agency v. State*, 831 So. 2d 662 (Fla. 2002); *State v. City of Daytona Beach*, 484 So. 2d 1214 (Fla. 1986); *Holloway v. Lakeland Downtown Dev. Auth.*, 417 So. 2d 963 (Fla. 1982); see also *State v. Inland Protection Fin. Corp.*, 699 So. 2d 1352, 1357 (Fla. 1997) (bonds did not violate article VII, section 11, because no bondholder could initiate judicial action to levy taxes in satisfaction of the debt represented by the bonds); *State v. Fla. Dev. Fin. Corp.*, 650 So. 2d 14, 18 (Fla. 1995) (state bonds did not violate article VII, section 10, because “bondholders clearly cannot compel a levy of taxes to pay the bond obligations”).

The bright-line principle accounts for the Court's decisions invalidating bonds for failure to comply with the referendum requirement. For example, where a local government pledges all legally available non-ad valorem sources of revenue, while also covenanting to maintain programs entitling it to receive the various revenues, there is a substantial impact on the taxing power. *See Volusia County v. State*, 417 So. 2d 968 (Fla. 1982). Similarly, where a contractual non-substitution clause for expensive and mission-critical equipment deprives a government of budgetary flexibility and would inevitably force it to spend ad valorem tax dollars under the contract, the referendum requirement applies. *See Frankenmuth Mut. Ins. Co. v. Magaha*, 769 So. 2d 1012, 1025-26 (Fla. 2000). Further, if the bond covenants of a special hospital district legally obligate the district to levy ad valorem taxes to provide the funds necessary to operate the hospital, the referendum requirement applies because the district indirectly obligated itself to exercise its tax powers. *See State v. Halifax Hosp. Dist.*, 159 So. 2d 231, 232 (Fla. 1963).

The bright-line principle developed in 1933 and consistently applied through today practically protects taxpayers' interests while also providing local governments access to necessary capital.<sup>9</sup> When analyzing the substance of a

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<sup>9</sup>The initial opinion's puzzling treatment of failed efforts to amend the constitution deserves comment, because it does not demonstrate citizens' rejection of the bright-line principle. The "failed amendments" discussion at pages 21-23

transaction proposed by a government with the power to tax, the critical constitutional question is, does the transaction directly or indirectly obligate the government to impose taxes in order to support its debt obligations? Stated more precisely, can a holder of that debt compel the government to exercise its taxing powers?

**C. The Presumption in Favor of *Stare Decisis* Is Strong and Should Be Respected Here to Preserve Entire Systems of State and Local Government Operations Built upon the Court’s Bright-Line Principle**

The initial opinion omitted the Court’s traditional *stare decisis* analysis. *See N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 637-38 (Fla. 2003). This careful analysis leads to the conclusion that the Court should not abandon the long-standing bright-line principle. First, the factual premises underlying the bright-line principle have not “changed so drastically as to leave the

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cites no authority for its novel approach to constitutional interpretation. The Court rejected this same reasoning in *Miami Beach*. See the CRA’s answer brief in *Miami Beach* at page 30. The failed 1976 amendment did not contain the safeguards built into the Redevelopment Act, and it authorized a specific pledge of tax revenues; thus, its failure actually supports the bright-line principle. The failed 1978 revision was part of a package of amendments that included casino gambling and cabinet restructuring, all of which failed in large part, according to observers and constitutional scholars, due to Governor Askew's vehement opposition. *See* Steven J. Uhlfelder & Billy Buzzett, *Constitutional Revision Commission: A Retrospective and Prospective Sketch*, 71 Fla. B.J. 22, 24 (Apr. 1997). These failed efforts predated *Miami Beach* and the Court gave them their proper due at the time – very little if any. If the Court elects to employ this novel approach to constitutional interpretation, it must at least consider the circumstances that led to the proposed amendment’s defeat.

decision's central holding utterly without legal justification.” *Id.* at 637. To the contrary, as explained above, the development of tax increment financing has strengthened the central holding, by shifting the risk of insufficient funding to the bondholders and away from property tax payers. Second, the bright-line principle has not “proved unworkable due to reliance on an impractical legal ‘fiction.’” *Id.* To the contrary, as outlined above, the Court has consistently applied the principle to require a referendum where taxpayer interests were truly implicated, while at the same time providing practical access to critically needed capital.

Third, and of most importance, abandoning the bright-line principle now will cause both “serious injustice to those who have relied on it and . . . serious disruption in the stability of the law.” *Id.* Stability is particularly vital in the area of public finance, where investor confidence depends in large measure on the perception that settled law will remain settled. Instability equals risk. The initial opinion’s proposed new principle – which would subject not only the pledge of the ad valorem taxing power to the referendum requirement, but also the pledge of dollars measured by the ad valorem tax increment – would create an unworkable requirement. The court system in Florida cannot possibly validate every bond issue. Without a bright-line test, local governments would be hard-pressed to obtain necessary legal opinions as to their bonds’ validity if they potentially access ad valorem revenue, a position this Court soundly rejected in *Town of Medley*.

Senselessly complicated new accounting procedures might be necessary. The mix of ad valorem and non-ad valorem revenue sources is unique to each individual bond issue. Must local governments now segregate accounts, to ensure that ad valorem tax revenues are never commingled with non-ad valorem sources?

Beyond this instability and damage to market confidence, abandoning the bright-line principle would cause serious injustice to those who have relied on it. The entire legislative edifice for financing local government projects has been developed over the years in reliance on the Court's precedents. Rejecting the precedents now would bring critical capital flow to a halt. Community redevelopment would suffer severely, and critical new infrastructure would be hopelessly delayed.

With Florida poised for further growth, local governments and CRAs have devoted years of effort to long-term planning. Many have expended significant sums in advancing those plans and improving our state. Others have agreed to spend money later, as consideration for contracts with developers that have undertaken renewal projects. Some governments have entered into long-term contracts for large projects, but have only issued a portion of the necessary bonds in order to reduce interest costs. In addition, CRAs commonly enter into interlocal or joint participation agreements committing to use funds from their redevelopment trust funds to support bond issues for community redevelopment

purposes. The anticipated bonds will provide the funds necessary to satisfy the contractual rights to payment of those involved in the redevelopment process, for example, capital contribution for community redevelopment, costs of feasibility studies, design and conceptual plans, engineering, purchase of property, geotechnical testing and remediation. Further, many projects are now mid-stream, following years of planning and financing, and require further financing or amendments of redevelopment plans that were forged in reliance on the bright-line principle. The Court's *stare decisis* analysis must understand and account for these reliance interests and avoid injustice to them.

## II. THE COURT CAN DECIDE THIS CASE ON THE FACTS AND IT IS NOT NECESSARY TO RECEDE FROM *MIAMI BEACH*

For the reasons set forth in Part I, the Court should find the County's financing scheme valid because no bondholder can compel the levy of ad valorem taxes to pay the bond obligations. However, it is possible for the Court to find constitutional infirmity without reversing over seventy years of *consistent* and *settled* judicial precedent, thereby blurring the bright-line principle. To determine whether the County has attempted to do indirectly what it is not authorized to do directly, the Court must focus on the differences between what the County created and the structures required under the Redevelopment Act. While the Redevelopment Act is not the only mechanism to effectuate redevelopment, it does embody sufficient protections to allow for tax increment financing in harmony

with the referendum requirement. A tax increment financing plan that conforms to the Redevelopment Act does not trigger the referendum requirement because the bondholders' lien attaches only after the revenues are deposited into the community redevelopment trust fund. *See Miami Beach*, 392 So. 2d at 894.

The single most important distinction between what the Redevelopment Act requires and what the County created is the absence of a separate legal entity that both (i) controls the tax increment funds (derived from multiple governmental units with ad valorem tax powers) and (ii) lacks ad valorem taxing power. The Redevelopment Act procedure uses this separation of the source of the tax increment payments and the ownership of the redevelopment trust fund to make it explicitly clear that the power to compel the levy of ad valorem taxes is not given to the bondholder: the holder of the trust fund monies has no taxing power. The County did not preserve this separation; rather, it merged into a single entity the separate concepts that were approved in *Miami Beach*.<sup>10</sup> It would be logical for the Court to determine that the County failed to emulate the critical procedures and safeguards recognized in *Miami Beach*, which support the reality under the general law process that no lien can ever attach to any monies other than those measured

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<sup>10</sup>The County has argued that its structure removes from the bondholders the ability to compel the levy of taxes; however, the structure does not segregate the 'taxing authority' from the 'legislative body' that creates the structure, nor does the County's structure create a 'separate legal entity' with separate fiduciary responsibilities to hold and expend the revenues resulting from any tax increment. A significant safeguard that existed in *Miami Beach* is missing.

by the tax increment upon deposit into a trust fund owned by a separate legal entity.

Fundamental to a legitimate community redevelopment initiative under the Redevelopment Act are the statutorily proscribed safeguards.<sup>11</sup> Under the Redevelopment Act and *Miami Beach*, ad valorem taxes are not required to be levied and ad valorem tax revenues are not required to be deposited into the community redevelopment trust fund. A taxing authority is never required to levy any rate or millage. A taxing authority required by law to appropriate funds to the trust fund may deposit any legally available funds. *See Kelson v. City of Pensacola*, 483 So. 2d 77, 79 (Fla. 1st DCA 1986). Therefore, the initial opinion incorrectly states that use of the increment revenues to support a bond issue cannot occur without a referendum. If the taxing authorities elect to appropriate non-ad valorem revenues to the community redevelopment trust fund, as they are allowed to do, the increment revenues will consist of no funds that have as their source ad valorem taxes. The trust fund is never owned by any of the entities that levy ad

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<sup>11</sup>The Redevelopment Act process is dictated by the legislature to resolve an ill; the taxing authorities are required to contribute tax increment to a trust fund held by a separate legal entity without taxing power and subject to a separate fiduciary duty; a separate legal entity is in fact established to receive and expend the contributions for purposes articulated by the legislature; and once the contributions to the trust fund are made such funds are under the ownership and control of the separate legal entity. A community redevelopment trust fund created under section 163.387, Florida Statutes, may be established only after extraordinary public notice and hearings, adoption of a detailed redevelopment plan, and then used only in a manner consistent with the Redevelopment Act.

valorem taxes and that deposit money into it. The trust fund revenues are always owned by the CRA, a separate legal entity with no taxing powers. Pledging monies in the trust fund does not involve ad valorem tax funds, for referendum requirement purposes, because their owner has no taxing power.

Here, however, the County chose to act simultaneously as the legislature, taxing authority, and holder of the trust fund. The Court may wish to reconsider its observation that the “County’s tax increment financing scheme is certainly consistent with the premise and ultimate holdings of *Miami Beach*” and not abandon these concepts unnecessarily or without fully appreciating the consequences of doing so. Because of the merger of interests and because of the fact that a separate legal entity without taxing power has not been created to issue the bonds or to hold and expend the trust funds, the Court can invalidate the County’s approach on much narrower grounds than those articulated in the initial opinion.<sup>12</sup> The Court may reject the County’s transaction, but in doing so it should not unduly prejudice the many transactions contemplated or completed in reliance on and in accordance with the safeguards set forth in *Miami Beach*. This result can

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<sup>12</sup>The Court will soon have the opportunity to address the broader issues in other pending cases. See *City of Parker v. State*, Case No. SC07-1400; *Bay County v. Town of Cedar Grove*, Case Nos. SC07-1574, SC07-1572. The facts of those cases will allow the Court to consider more fully how the bright-line principle applies and the ramifications of its reversal in the context of the Redevelopment Act and the added safeguards it provides.

be reached without receding from *Miami Beach* or calling into question *Penn v. Florida Defense Finance & Accounting Service Center Authority*, 623 So. 2d 459 (Fla. 1993).

III. IN ADDITION TO THE *MIAMI BEACH* SAFEGUARDS, CERTIFICATES OF PARTICIPATION ARE UNIQUELY TREATED UNDER ARTICLE VII, SECTION 12

General and special purpose local governments throughout Florida, and not just school districts, have issued billions of dollars in certificates of participation (“COPs”) since the Court decided *State v. Brevard County*, 539 So. 2d 461 (Fla. 1989), and *State v. School Board of Sarasota County*, 561 So. 2d 549 (Fla. 1990). We rely primarily on amicus Florida School Boards Association to brief this issue fully, but submit that for the reasons set forth in Section I above, the Court should not recede from *School Board of Sarasota County*. In addition, the Court should specifically recognize that COPs are merely interests in obligations of less than one year and therefore do not violate the referendum requirement, which is specifically limited to obligations “maturing more than 12 months after issuance.”

IV. THE COURT MUST TAKE SPECIAL EFFORT TO ENSURE THAT ANY DEPARTURE FROM SETTLED CASE LAW DOES NOT IMPAIR BONDS, INTERLOCAL AGREEMENTS OR OTHER CONTRACTS

If the Court remains determined to chart a new course in the law of municipal financing, it must avoid impairing existing contracts in violation of

article 1, section 10 of the Florida Constitution.<sup>13</sup> To be sure, the Court did state that its initial decision does not affect bonds that were validated prior to the opinion becoming final. However, the vast majority of tax increment financing bonds have not been validated, because the clear authority of *Miami Beach* and other cases made it unnecessary to incur the expense and delay to do so. Thus, these bond issues fall directly within the undisputed principle that the overruling decision should unambiguously be given a prospective operation only. *Fla. Forest & Park Serv. v. Strickland*, 18 So. 2d 251, 253 (Fla. 1944). Therefore, the Court should remove the cloud on these issues, which would otherwise be the subject of later litigation.

More than issued but unvalidated bonds are at risk. Many of the bonds and other obligations discussed at pages 13-14 have been neither validated nor issued. Others have been validated and are pending, but have not been issued. The final decision in this case should not impair the contracts relating to redevelopment projects in process and should not limit governments' ability to incur such debt where they have in good faith entered into contracts or expended sums, even if the relevant bonds and obligations are not yet validated or issued. If the Court ultimately decides to depart from the bright-line principle relied upon by so many

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<sup>13</sup>We adopt, without repeating, the points and authorities reviewed in the Attorney General's amicus brief at pages 8-11, the Florida Association of Counties' Motion for Rehearing and Clarification at pages 10-14, and the County's Amended Motion for Rehearing and Clarification at pages 6-8.

for so long, it should clarify its opinion to provide unambiguously that the new rules do not apply to bonds (including COPs), interlocal agreements or other obligations issued or validated before the date the opinion becomes final. In addition, the Court should provide local governments, where they have entered into contracts or have incurred expenses in reliance upon this Court's settled precedent, a specific period within which to incur such debt obligations.

### **CONCLUSION**

We appreciate the opportunity to share our perspective, which we ask the Court to consider carefully when it revisits the initial opinion. The Court should withdraw the initial opinion and not abandon its bright-line principle for determining when a bond issue triggers the referendum requirement, or otherwise jeopardize local governments' ability to access necessary capital.

Respectfully submitted this \_\_\_\_\_ day of September, 2007.

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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 and by email to those on the attached service list this \_\_\_\_ day of September 2007.

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ATTORNEY

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the font size and style in the foregoing brief is 14 Times New Roman and that the brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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