

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC06-1894

DR. GREGORY L. STRAND,

Appellant,

v.

L.T. Case No. 2006-CA-881

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

Appellee.

APPELLEE'S MOTION FOR REHEARING AND CLARIFICATION

By its undersigned attorneys¹ and pursuant to Florida Rule of Appellate Procedure 9.330(c), Appellee, Escambia County (the "County"), moves for rehearing and clarification of this Court's opinion in *Strand v. Escambia County*, No. SC06-1894, dated September 6, 2007 ("Opinion").²

¹ The County has received empirical market impact data and counsel from the Securities Industry and Financial Markets Association ("SIFMA"), which is comprised of more than 650 securities firms, banks, and asset managers. SIFMA's members account for approximately 90% of the nation's municipal bond underwriting and trading activity by volume, which represented an estimated \$5 trillion in municipal bonds in 2006.

² *Strand v. Escambia County*, No. SC06-1894, at 26 (Fla. Sept. 6, 2007). A copy of the Opinion is in the attached Appendix. "A-" denotes cites to the Appendix.

The County respectfully submits that rehearing and clarification is required because the Court overlooked or misapprehended the following points of law and fact, each addressed in greater detail below.

1. The Court placed into question the validity of certain public debt instruments, notwithstanding explicit statutory authority and more than thirty years of confirming case law. The Opinion unnecessarily caused upheaval in Florida's capital markets, significantly impairing existing, contractual rights and obligations of the participants in those markets and exposing innocent bondholders to the risk of loss and drastic federal tax penalties.

2. The Court misapprehended *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875 (Fla. 1980), and tax increment financing³ compliant with *Miami Beach*, and therefore erroneously held that it did not comport with *County of Volusia v. State*, 417 So. 2d 968 (Fla. 1982), and the constitutional aim to prohibit the compelled levying of ad valorem taxes.

3. The Court improperly rejected long-held judicial precedent, thus violating the doctrine of *stare decisis*.

³ "Tax increment financing is a method for financing a redevelopment project and is based on the premise that a portion of the increased ad valorem taxes generated as a result of the property improvement should be available to pay for the redevelopment." *State v. City of Daytona Beach*, 484 So. 2d 1214, 1215 (Fla. 1986).

4. The Court invalidated legislation not before the Court, without addressing the presumption of constitutionality, which acts of the Legislature must be afforded.

5. The Court overlooked that its Opinion imposed conditions upon issuers of TIFs and COPs, which cannot be effectuated under Florida law.

Memorandum of Law

When the Court held that all “bonds payable through tax increment financing [(‘TIFs’)] are subject to the referendum requirement of article VII, section 12” of Florida’s Constitution,⁴ it upset settled jurisprudence upon which local governments and bondholders have relied for decades. The Opinion unnecessarily calls into question the validity of all outstanding TIFs and certain other obligations payable from ad valorem taxes, such as certificates of participation (“COPs”).⁵ As a result of the Opinion, on September 7 and September 11, 2007, respectively, Standard & Poor’s placed all TIFs and COPs in

⁴ *Strand*, at 26; A- 26.

⁵ A certificate of participation is an instrument evidencing a *pro rata* share in a specific, pledged revenue stream, usually lease payments, which the issuer must make in accord with lease purchase agreements. *See, e.g.*, §§ 1001.42 (9)(b)(5) and 1013.15 (2)(a), Fla. Stat.

Florida on Credit Watch with a negative outlook.⁶ The resulting uncertainty has destabilized such securities in the capital markets.

The enormity of the Opinion's market impact cannot be overstated. More than thirteen billion dollars (\$13,000,000,000.00) in COPs and TIFs in Florida have been adversely affected.⁷ Thousands of holders of billions of dollars in unvalidated securities,⁸ many of whom are the same taxpayers the Court sought to

⁶ See Standard & Poor's, *Summary: Miami Beach Redevelopment Agency, Florida; Tax Increment*, 2 (Sept. 7, 2007), at A-29; Press Release, Standard & Poor's, *Florida School Dist. Certificates on Watch After Uncertainty of FL Supreme Court Decision*, 1 (Sept. 11, 2007), at A-31; Standard & Poor's, *Summary: Ratings on Various Florida School District Certificates Placed on Watch Neg; Appropriations* (Sept. 11, 2007), at A-33 to A-41. Moreover, Fitch Ratings placed \$164.2 million of TIFs on Rating Watch Negative on September 11, 2007 but did not take action on COPs. Fitch Ratings did note, however, that "even if existing COPs are deemed constitutional, future issuances may be jeopardized." Fitch Ratings, Press Release, *Fitch Places 164.2 million of Florida TIF bonds on Watch Negative; Comments on Florida COPs* (Sept. 11, 2007), at A-42 to A-43.

⁷ See, e.g., A-28 to A-43; Bill Kaczor, *Fla.: Bond Ruling Rehearing Sought*, *Houston Chronicle*, Sept. 13, 2007, available at: <http://www.chron.com/disp/story.mpl/ap/fn/5132588.html>, at A-44.

⁸ TIFs and COPs are municipal securities, and they are very popular commodities. U.S. residents currently hold eight hundred seventy six billion dollars (\$876,000,000,000.00) in municipal securities. See Securities Industry and Financial Markets Association, *Holders of U.S. Securities* (2007), http://www.sifma.org/research/pdf/Holders_Municipal_Securities.pdf (using source data from the Federal Reserve System), at A-51. The popularity of these securities has increased annually over the last decade and by 78% since 1996. *Id.* No doubt, given the large percentage of senior citizens and retirees here, a significant number of these municipal bonds were purchased in Florida.

protect, will be harmed in the wake of the Opinion. Although the Court specifically exempted validated bonds from its holding, the vast majority of bonds have not undergone validation. Issuing local governments (and bond purchasers) have relied upon the precedential authority of the earlier validations of like securities, instead of undertaking expensive and lengthy judicial proceedings.

The Court's decision calls into question the validity "*ab initio*" of existing TIF and COP debt. The Internal Revenue Service has ruled that invalid state or local government securities *never* constituted a "state or local bond" for purposes of the Federal income tax exemption provided by section 103(c)(1) of the Internal Revenue Code of 1986, as amended. Accordingly, holders of such debt face not only the devastating loss of their initial investments, but also Federal income tax liability for prior tax years. *See* Rev. Rul. 87-116, 1987-2, C.B. 44; I.R.S. Tech. Adv. Mem. 2007-05-027 (Feb. 2, 2007).

Equally troubling is the Opinion's impact upon governmental operations. For example, school construction projects, nearly all of which are financed by COPs, will be brought to a halt or, at a minimum, substantially delayed by uncertainty about the validity of issued and planned COPs. Because school systems throughout the state must increase the number of classrooms to comply with the class size reductions required by article IX, section 1(a) of Florida's Constitution, the impact of the Opinion is particularly ill-timed. Similarly,

redevelopment projects addressing urban blight, substandard housing and neighborhood renewal pursuant to Florida's Community Redevelopment Act, ch. 163, part III, Fla. Stat. ("CRA"), will be halted or delayed by the uncertainty about the validity of unvalidated TIFs.

I. THE OPINION IMPAIRS CONTRACTS AND DISADVANTAGES INNOCENT BONDHOLDERS.

The Opinion calls into question the validity of billions of dollars of outstanding bonds, resulting in the impairment of contractual rights and obligations throughout the credit markets, including the rights of bondholders and the obligations of issuers. The Opinion contravenes the constitutional principle, long upheld by this Court, that changes in law cannot be applied so as to impair rights and obligations under existing contracts. Art. I, § 10, Fla. Const. *See also County Comm'rs v. King*, 1869 WL 1560, at *2 (Fla. 1869).

This Court expressly applied the "impairment of contract" principle in the context of outstanding bond obligations in *King*, 1869 WL 1560 at *2. In doing so, it rejected the County Commissioners' assertion that they need not satisfy the County's obligations under the bonds because subsequent legislation, reducing the County's territory, abrogated the obligations. As the basis for this holding, the Court concluded that the law in existence at the time a contract is made becomes part of the contract, stating:

The laws in force at the time of making a contract, and in pursuance of which the contract is made, enter into and form a part of the contract, as if they were incorporated into it, including those which affect its validity, construction, discharge, and enforcement; and when a county issues its bonds under a statute which provides the time and manner of discharging them, . . . the Legislature cannot, by repealing the act or changing it, limit the amount of taxes to be levied to a rate insufficient to raise the amount necessary to meet the obligation, unless other adequate means are provided. Such a law impairs the obligation of the contract.

Id.

This Court consistently has upheld this bedrock constitutional principle. *See Humphreys v. State ex rel. Palm Beach County*, 145 So. 858, 861 (Fla. 1933) (citing *King* to hold that laws passed after bonds were issued, purporting to take away taxes needed to pay bonds when they were sold, were invalid as impairing obligation of contract); *Durham v. Pentucket Groves, Inc.*, 189 So. 428, 430 (Fla. 1939) (the purchaser of bonds “takes them burdened with the provisions of” existing statutes, which become “part of his bond contract”).

This principle applies with equal force to judicial decisions. *See* 11 WILLISTON ON CONTRACTS § 30:19 (4th ed.) (existing laws, including the common law of the state and its constitutional provisions, are incorporated into a contract). Indeed, the *King* Court expressly found that, even if it invalidated the statute under which the bonds were issued on constitutional grounds, obligations under existing bonds would not be impaired, for the Court’s decree would apply only

prospectively: “. . . it is too late to challenge the constitutionality of the law and the validity of the bonds in the hands of a *bona fide* holder, and . . . a judgment of the court now, declaring the law unconstitutional, would not affect the bonds heretofore issued, but would operate only upon the future.” 1869 WL 1560 at *1.

As discussed *supra* at 3-5, if the Opinion becomes final and TIFs issued without validation proceedings are deemed invalid, payment of billions of dollars in bonds will be unlawful, and tens of thousands of innocent bondholders will be damaged. Payment of more than \$13 billion of outstanding TIFs and COPs will be unlawful, and tens of thousands of innocent bondholders will be damaged. Because the Opinion impairs existing contractual rights with respect to outstanding bonds, in contravention of *King* and its progeny, it should be withdrawn or expressly given only prospective application.⁹

**II. BECAUSE THE COUNTY’S BONDS WILL NOT HAVE THE EFFECT
OF REQUIRING INCREASED TAXATION, A REFERENDUM IS NOT
REQUIRED.**

The only security or revenue source for the County’s TIFs is a sum equal to the increases, if any, in property values in the redevelopment area. The sums in

⁹ This Court previously has refused to apply its rulings in bond cases retroactively, recognizing the significant hardships that “would be imposed on cities, bondholders, and others.” *Martinez v. Scanlan*, 582 So. 2d 1167, 1175 (Fla. 1991) (“Where 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.”) (citing *Cipriano v. City of Houma*, 395 U.S. 701 (1969)).

the trust fund are the sole security for the County's TIFs. If these sums are not sufficient to meet the bond obligations, the bondholders have no right to compel the levy of ad valorem taxation.¹⁰

Prior to issuance of the Opinion, the Court consistently interpreted article VII, section 12 of the Florida Constitution, and its predecessor provision of the 1885 Constitution,¹¹ not to require referenda in such circumstances, carefully drawing and painstakingly protecting the distinction between the *discretionary* power of the government to levy (or not levy) taxes, and the power of bondholders to *compel* the government to levy taxes.¹² Whether the taxing power is pledged or use of ad valorem revenues is assured is precisely the standard this Court

¹⁰ Page 6 of the County's TIF Ordinance specifically provides that "the holders of such bonds, notes or other forms of indebtedness have no right to require the imposition of any tax or the establishment of any rate of taxation in order to obtain the amounts necessary to pay and retire such bonds, notes or other forms of indebtedness." On the other hand, bonds that are payable from ad valorem taxation in the constitutional sense would provide that the issuer is authorized and required to levy annually a special tax upon all taxable property within the county, over and above all other taxes authorized or limited by law sufficient to pay principal and interest as the same respectively become due and payable. § 125.013, Fla. Stat.

¹¹ Fla. Const. 1885, art. 9, § 6.

¹² The bondholders' power to compel can take two forms: (i) the right of enforcement through judicial action; and (ii) covenants that, in effect, require the issuer to raise taxes. § 125.01(3), Fla. Stat.; *Volusia County*, 417 So. 2d at 971-972.

established in *Volusia County* for requiring a referendum.¹³ The Opinion obliterates that distinction by equating a commitment to appropriate an amount, measured by a certain increase in ad valorem revenues, with a pledge to exercise ad valorem taxing powers in the future. The County respectfully submits that the Court erred in this regard.

For many decades, Florida courts have held that the constitutional requirement of a referendum for “bonds payable from ad valorem taxation” applies only to bond issues that give bondholders the right to *compel* the levying of ad valorem taxes. *Miami Beach* expressly reaffirmed this distinction:

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.

392 So. 2d at 898 (emphasis added). The bonds in *Miami Beach*, like those of Escambia County, were payable from a trust fund that would receive revenues appropriated each year by the city or county equal to an amount “measured by the tax increment.” *Id.* The Court correctly recognized that under these

¹³ In *Volusia County*, the Court affirmed the invalidation of bonds because “the pledge of all legally available, unencumbered revenues of the county, other than ad valorem taxation, along with a covenant to do all things necessary to continue receiving the revenues, as security for the bonds, will have the *effect* of requiring increased ad valorem taxation so that a referendum is required.” 417 So. 2d at 969 (emphasis added) (cited in *Strand*, at 12-13; A- 12 to A-13).

circumstances the issuer's obligation "to make the annual contributions . . . does not mean, however, that these bonds are payable from ad valorem taxation, in the *constitutional sense of the term*." *Id.* (emphasis added). The cases preceding *Miami Beach* all demonstrate that the term "payable from ad valorem taxation" has never been applied in accordance with its "plain meaning" as suggested in the Opinion. Instead, the constitutional text prohibiting bonds payable from ad valorem taxation has always been applied in the "*constitutional sense*" of the term, referring to the right of bondholders to compel the levy of ad valorem taxes either through judicial action or covenants that, in effect, require the issuer to raise taxes.

Miami Beach's progeny have faithfully followed this critical constitutional distinction. *See State v. Inland Prot. Fin. Corp.*, 699 So. 2d 1352, 1357 (Fla. 1997) (bonds held constitutional without referendum because "no bondholder could initiate judicial action to levy taxes in satisfaction of the debt represented by the bonds"); *Penn v. Florida Def. Fin. and Accounting Serv. Ctr. Auth.*, 623 So. 2d 459, 461 (Fla. 1993) (bonds held constitutional without referendum because "bonds are to be issued solely in the name of the Authority, which itself has no taxing powers"); *Jacksonville Shipyards, Inc. v. Jacksonville Elec. Auth.*, 419 So. 2d 1092, 1094 (Fla. 1982) (bonds held constitutional without referendum because the bonds at issue "are not to be deemed an indebtedness of the city which would

require it to levy ad valorem taxes”). The Court also has followed *Miami Beach* in cases involving leases¹⁴ and COPs used to finance the construction of public schools. *Barnett v. Department of Mgmt. Serv.*, 931 So. 2d 121, 126 (Fla. 1st DCA 2006).

Volusia County and its progeny support this distinction. In *Volusia County*, the Court held that a “pledge of all available revenues, together with a promise to maintain the programs entitling the county to receive the various revenues, will have a substantial impact on the future exercise of ad valorem taxing power.” 417 So. 2d at 972. In other words, a promise to the bondholder to fund programs that will have the effect of increasing taxes is the same as a promise to levy taxes. *Volusia County* recognized this same principle in concluding that a lawful ordinance could not have the practical effect of **compelling** the municipality to levy taxes. Therefore, *Volusia County* is consistent with *Miami Beach* and merely expands its doctrine also to prohibit the **indirect** compulsion to levy taxes. *Id.* (“[t]hat which may not be done directly may not be done indirectly.”).

Accordingly, the Court should rehear this matter, withdraw its Opinion and reissue an Opinion, which affirms the judgment of the circuit court that a

¹⁴ See, e.g., *School Board of Sarasota County v. State*, 561 So. 2d 552 (Fla. 1990) (“*Sarasota County*”) (discussing *State v. Brevard County*, 539 So. 2d 461 (Fla. 1989)).

referendum is not required for a TIF financing, and thus is in harmony with *Volusia County* and the myriad cases cited above.

III. THE OPINION VIOLATES THE DOCTRINE OF STARE DECISIS BY ABROGATING EXISTING PRECEDENT, AND THEREBY UNNECESSARILY CAUSES DEVASTATING HARM TO BONDHOLDERS AND OTHERS WHO RELIED ON THE COURT'S PRIOR RULINGS.

For more than a quarter century, participants in Florida's credit markets have relied upon this Court's prior rulings that article VII, section 12 does not require a referendum when the bonds do not pledge the ad valorem tax power. *Miami Beach*, 392 So. 2d at 898. *See also Sarasota County*, 561 So. 2d at 552 (extending holding of *Miami Beach*). As detailed above, those markets will suffer enormous disruption, and many of their participants will be exposed to significant liabilities, as a result of the Court's reversal of the principles affecting investor protection.

Stare decisis is "a judge-made rule created to assist courts in rendering decisions by making the work of judges easier, fostering stability in the law, and promoting public respect for the law as an objective, impersonal set of principles." *Perez v. State*, 620 So. 2d 1256, 1267 (Fla. 1993). "*Stare decisis* provides stability to the law and to the society governed by that law." *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995). Indeed, the Court has required that, before reversing established precedent, it answer the question: can such reversal be accomplished

“without serious injustice to those who have relied on it and without serious disruption in the stability of the law?” *North Florida Women’s Health & Counseling Servs, Inc. v. State*, 866 So. 2d 612, 637 (Fla. 2003).

The answer to that question in the instant case is unequivocally “No.” The credit markets serving TIF and COP financings have been structured around the principles established in *Miami Beach* and *Sarasota County*, so that investors recognize, and are compensated in their interest rates for, the lack of recourse to ad valorem taxes or other general governmental revenues. Tens of billions of dollars in such financings have been based on those principles, with more than \$13 billion of such financing still outstanding. The far-reaching reliance on these principles and the devastating impact of obliterating them militate strongly in favor of preserving the clearly established, well-functioning, predictable and vibrant, existing marketplace.

Moreover, *stare decisis* dictates that a court avoid basing its decision upon a reversal of precedent with far-reaching implications when a more narrow basis, affecting only the case at bar, is available. *See, e.g., Rutkin v. U.S.*, 343 U.S. 130, 138 (1952) (declining to overrule a distinguishable precedent, but limiting that precedent to its facts); *Collinson v. Miller*, 903 So. 2d 221, 227 (Fla. 2d DCA 2005) (“we must narrow our focus to the dispositive issue presented in this case and decide that issue in a manner consistent with precedent and the appropriate

legal principles”). The Court should grant rehearing so that it can consider fully the unforeseen consequences of the Opinion and decide the case without reaching constitutional questions. *See, e.g., Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (the Court “will not anticipate a question of constitutional law in advance of the necessity of deciding it”); *Florida Bar v. Rayman*, 238 So. 2d 594, 596 (1970) (a “well established rule” requires disposing of a case without adjudicating constitutional questions, whenever possible).

A narrow focus is particularly required where, as here, none of the parties in the case asked the Court to overturn its precedent. *See U.S. v. Int’l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996) (Court has “rarely [overruled governing decisions] on grounds not advanced by the parties”); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 319-20 (1971) (Court should avoid overturning precedent without affording an opportunity for briefing and argument by interested parties). In its brief, the Appellant argued that *Miami Beach* was “inapposite” to the case at bar because, unlike those of Escambia County, the bonds in *Miami Beach* were issued pursuant to the Community Redevelopment Act. Appellant’s Brief at 8. Nowhere did the Appellant argue for the reversal of *Miami Beach*, or any other precedent.

When a governmental entity issues bonds in its own name, the credit markets assume that the government might use its taxing power to support the

bonds. On the other hand, if the government issues bonds through another entity that has no taxing power, the markets do not necessarily make that assumption. Accordingly, this Court could have concluded that the unique nature of tax-increment financing, which bases the amounts to be deposited in the trust fund as security for the bonds on *ad valorem tax increments*, unacceptably implies to the market that the *ad valorem taxing power* of the issuer is “pledged” to the payment of the bonds in the *constitutional sense*. Thus, the Court could have achieved the same outcome here with a narrow ruling that the proposed financing mechanism was invalid because the County did not intend to issue the bonds through a separate entity or authority, which lacked taxing power. By limiting its ruling to the specific facts of this case, the Court would have avoided the serious – and unnecessary – collateral implications of its decision to overturn *Miami Beach* and *Sarasota County*.

**IV. THE COURT INADVERTENTLY FAILED TO DEFER TO THE
LEGISLATURE AND SPECIFICALLY EXAMINE STATUTES PRIOR TO
SUBJECTING THE ACTS TO CONSTITUTIONAL REVERSAL.**

Although retroactive application of the Opinion would invalidate bonds funded by tax increment revenues and issued pursuant to the CRA, the Court did not specifically review or consider the CRA, nor did it afford the CRA the presumption of constitutionality that is due all acts of the Legislature. Similarly

affected are COPs issued pursuant to the Legislature's enactment of financing mechanisms for the public schools of Florida. *See* § 1013.15, Fla. Stat.

In this case, the Court considered the constitutionality of a bond ordinance that was authorized pursuant to the County's home rule power, arising from article VIII, Florida Constitution and Florida Statutes, chapter 125. *See* Appellee's Brief at 25-26. The Court found that the County lacked authority to issue the proposed bonds without a referendum, and in so doing receded from the premise in *Miami Beach* (which was a CRA financing) and *Sarasota County* (which was a COP financing) that there is a distinction between a pledge to pay debt service with moneys that may come from ad valorem tax *revenue* (which does not require referendum approval), and a pledge of ad valorem taxing *power* (which does require a referendum). Because the Court's analysis should have focused on the financing mechanism at bar, and not the statutory constructs of the CRA, the CRA was not afforded the deferential examination required to secure the balance of power between the judicial and legislative branches.

Although the Court notes that it is not "holding that tax increment financing is unconstitutional"¹⁵ it finds that bonds payable through tax increment financing must be approved by referendum. This conclusion has the effect of deeming sections 163.387 and 163.385, Florida Statutes (which provide that CRA debt is

¹⁵ *Strand* at 26; A-26.

not secured by a pledge of the taxing power or a debt subject to any constitutional limitation) facially unconstitutional, despite the absence of a specific review of the Legislature's carefully crafted language, or its intent or authority to effectuate its intent. Similarly, by receding from *Sarasota County*, the Opinion casts a shadow of unconstitutionality on the Legislature's enactment of lease-purchase financing under the Funding for Educational Facilities Act, § 1013.15, Fla. Stat. ("FEFA"), a statute that was not mentioned, much less examined, in this appeal.

Because the Legislature's enactments for the financing of urban renewal and public schools have not received specific consideration, the Court's obligation "to look for a reason to uphold the act[s] of the legislature and adopt a reasonable view that will do so" has not been fulfilled. *Tyson v. Lanier*, 156 So. 2d 833, 838 (Fla. 1963). *See also Department of Legal Affairs v. Rogers*, 329 So. 2d 257, 263 (Fla. 1976). Moreover, a reviewing court is "obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible." *Florida Dep't of Revenue v. Howard*, 916 So. 2d 640, 642 (Fla. 2005). *See also Florida Dep't of Bus. & Prof'l Regulation v. Gulfstream Park Racing Assoc.*, No. SC05-2130, at 7 (Fla. Sept. 6, 2007) (the Court's acknowledgement and affirmation of this principle on the same day as the Opinion). Thus, before the court unravels a statute, it must examine the act through the lens of presumed constitutionality.

If the Opinion stands as written, it will, in effect, nullify provisions of the CRA and FEFA without specific examination, and thus without due consideration of the presumption of constitutionality that all acts of the Legislature must be afforded. Accordingly, the County respectfully asks the Court to clarify that its holding is limited to the factual situation before the Court: (i) bonds issued by a County, rather than an authority without taxing power; (ii) pursuant to the County's home rule power; (iii) which are payable from tax increment revenues; (iv) to finance the widening of a road.

V. THE COURT LEGISLATED AN OUTCOME THAT IS NOT PRACTICABLE UNDER THE STATE'S LAW OR CONSTITUTION.

In addition to the need for deferential review of the CRA and FEFA, rehearing is necessary because the application of the Opinion to these statutes renders them impracticable. Neither of the statutes provides a framework by which public referendum can be introduced. Nor are the financing mechanisms anticipated by the Legislature conducive to the introduction of referenda. Accordingly, the County respectfully seeks rehearing to address the Court's obligation to seek a construction of the CRA and FEFA, which will give effect to the Legislature's intent.

The statutory constructs of the CRA and FEFA do not contemplate approval of the electorate, and thus are silent with respect to, *inter alia*, the appropriate

constituency from which to seek approval by referendum. For example, if a city creates a community redevelopment district, to be funded by incremental tax, the funds will be drawn from city and county taxes collected from property owners in the district, which by definition is a subpart of the city. The Opinion requires a referendum without indicating who comprises the electorate – people within the redevelopment district, people within the city, or people within the county? If the appropriate electorate are those within the redevelopment district, which would be consistent with the CRA’s provisions, the statute is further hindered because there is no provision in law by which to initiate the referendum required by the Opinion. Florida law does not permit a city or county to call for a referendum that excludes portions of its electorate. Moreover, the governing body of a community redevelopment district is not empowered to call a referendum. *See* § 100.201, Fla. Stat. *See generally* ch. 163, Fla. Stat. Thus, by imposing the requirement of a referendum, the Opinion renders impracticable the provision of the CRA by which the Legislature intended to permit tax increment financing.

The Legislature has expressed a clear intent to provide for the funding of urban redevelopment and public school construction. The broad sweep of the retroactive application of the Opinion does not accommodate this intent. Before thwarting the Legislature’s intent, at a minimum the Court should interpret the CRA and FEFA in accordance with the legislative intent. In the alternative, the

Court should clarify how governmental entities can implement the requirement to seek approval by referendum.

CONCLUSION

In conclusion, we respectfully request that the Court rehear and clarify the Opinion as a matter of great public importance. More than the roiling of the credit markets, the interests of bond houses, and the damage to citizens holding the investments so drastically affected by the impact of this Opinion is at stake. The Opinion also compromises the ability to provide classrooms for school children and affordable dwellings in the urban core. In addition, if the Opinion stands as written, the confidence that investors in the marketplace have placed in Florida municipal borrowing for many years will be lost, and additional costs of borrowing will be imposed on the government and taxpayers for many years to come.

The Opinion not only recedes from *Miami Beach* and *Sarasota County*, but also silently overrules the long-standing bedrock principle recognized in the 1869 *King* case, that contracts valid when made, cannot be abrogated retrospectively by the legislature or the courts. Rehearing and clarification are essential, lest it take years to correct the inequities that would follow.

Respectfully submitted,

Richard I. Lott, Fla. Bar No. 200824
LOTT & ASSOCIATES, P.L.
362 Gulf Breeze Parkway, Suite 288
Gulf Breeze, Florida 32561

Patricia Lott, Fla. Bar No. 243744
MILLER, CANFIELD, PADDOCK &
STONE, P.L.C.
25 West Cedar Street, Suite 500
Pensacola, Florida 32502

EDWARDS ANGELL
PALMER & DODGE LLP
One North Clematis Street, Suite 400
West Palm Beach, Florida 33401
Telephone: (561) 833-7700
Facsimile: (561) 655-8719
E-mail: ejames@eapdlaw.com

Attorneys for Appellee

By: _____
Elaine Johnson James, Fla. Bar No. 0791709
Richard J. Miller, Fla. Bar No. 0759678
Mark-David Adams, Fla. Bar No. 0509744
Christine Senne, Fla. Bar No. 0029541

OF COUNSEL:

Leslie M. Norwood
New York Bar No. 2986552
Managing Director and Associate General Counsel
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
360 Madison Avenue
New York, NY 10017
Telephone: 646.637.9230
Facsimile: 646.637.9122
lnorwood@sifma.org

Kevin M. Carroll
Washington, D.C. Bar No. 455371
Managing Director and Associate General Counsel
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1399 New York Avenue, NW
Washington, DC 20005
Telephone: 202.434.8452
kcarroll@sifma.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery this 17th day of September, 2007 to the persons listed below.

Elaine Johnson James

David A. Theiraque, Esq.
S. Brent Spain, Esq.
Timothy E. Dennis, Esq.
THERIAQUE, VORBECK & SPAIN
1114 East Park Avenue
Tallahassee, Florida 32301

Kerry Anne Schultz, Esq.
BORDELON & SCHULTZ LAW FIRM, P.A.
2721 Gulf Breeze Parkway
Gulf Breeze, Florida 32563

John Molchan, Esq.
Assistant State Attorney
Post Office Box 12726
Pensacola, Florida 32591

CERTIFICATION

The undersigned does hereby certify that she used 14 point Times New Roman type in this Motion for Rehearing and/or Clarification, and it complies with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

By: _____
Elaine Johnson James