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Effect of Strand vs. Escambia County on CRAs

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This document addresses the effect and impact of the recent Florida Supreme Court decision in *Strand vs. Escambia County* (case no. SC06-1894) on community redevelopment agencies in Florida and the use of increment revenue financing.

Summary

Escambia County ("Escambia") established an improvement district by ordinance for capital projects on Perdido Key, in the unincorporated area of the county. To fund the cost of the projects, Escambia created a trust fund and authorized the use of Tax Increment Financing ("TIF"). The district, the trust fund and the increment revenue program were not established pursuant to Part III, Chapter 163, Florida Statutes (the "CRA Act"), but pursuant to Escambia's home rule powers. Escambia also adopted a resolution authorizing the issuance of bonds for the district, for the purpose of financing a four-lane road-widening project in the district, to improve economic development and alleviate traffic congestion. Escambia is to appropriate by February 1st of each year an amount equal to the incremental increase in tax revenues and deposit such appropriated funds in the trust fund. The money in the trust fund is pledged to the repayment of the bonds. If the increment revenues deposited in the trust fund are insufficient for payment of debt service on the bonds, then Escambia will budget and appropriate from legally available non-ad valorem sources an amount to make up the difference. The bonds are not a debt or a pledge of the full faith and credit of the issuer of the bonds, and a bondholder shall not have the right to compel the exercise of the ad valorem taxing power of the issuer, i.e., Escambia.

Escambia filed an action in circuit court to validate the bonds. The state filed an answer and Strand intervened as a resident and taxpayer of Escambia. The circuit court entered a final judgment validating the bonds and found Escambia could issue the bonds without first obtaining approval of the electors in a referendum. Strand appealed to the Florida Supreme Court. The issues on appeal were whether (i) Escambia had the authority to establish the TIF program under

its home rule powers rather than the CRA Act, (ii) the TIF program was an indirect pledge of ad valorem taxes, and (iii) Escambia had to have the bonds approved at a referendum.

The Florida Supreme Court in its decision released on September 6, 2007 reversed the trial court's final judgment. The opinion states that the Court holds that the phrase "payable from ad valorem taxation" as used in Article VII, Section 12 of the Florida Constitution, refers not only to the pledge of the taxing authority but also to the pledge of ad valorem tax revenues. The Court further found that because tax increment financing pledges funds derived from ad valorem tax revenues, bonds that rely on TIF are bonds payable from ad valorem taxation. The Court said that "in order to pledge tax increments for the repayment of ... bonds, approval of the electorate by referendum must be obtained." The Court further said it was not holding that tax increment financing is unconstitutional, just that bonds payable through TIF are subject to the referendum requirement of the Constitution. The Court's decision is said in the opinion not to affect bonds that were validated prior to the opinion becoming final. The Court reversed the trial court and in doing so stated that it was receding from its decision in State vs. Miami Beach Redevelopment Agency (which upheld the constitutionality of TIF and found no referendum was required) and its decision in State vs. School Board of Sarasota County (which had upheld the use of "certificates of participation" in the financing of school facilities).

Effect

The Court's decision will require any CRA or any other local government receiving and increment revenues from a CRA pledging increment revenues to the payment of any debt maturing more than twelve months after the issuance of such debt to have such pledge approved at a referendum. Any debt validated pursuant to Chapter 75, Florida Statutes, prior to the Court's decision becoming final are "grandfathered" and not required to be approved at a referendum.

Issues

1. Is any form of financial obligation (e.g., notes, lines of credit, interlocal agreements, and contractual obligations) of more than 12 months subject to the Court's decision or only "bonds, certificates of indebtedness or any form of tax anticipation certificates" (see Art. VII, Section 12, Florida Constitution)?
2. If any bonds or other financial obligations pledging increment revenues were not validated are they protected by the contracts clauses of the US and Florida constitutions?
3. If bonds or other financial obligations maturing more than 12 months were not validated are they now subject to challenge for having not been approved at a referendum?
4. If bonds or other financial obligations mature more than 12 months after issuance and must be approved by a referendum, who votes in the referendum?
5. Must a separate referendum be held for each taxing authority or can they be combined into one?
6. If only one referendum is held, must the approval of the pledge be by each taxing authority's electors?
7. What does "recede" from the Miami Beach decision mean? Was the Court referring only to the referendum issue decided in Miami Beach?

8. Is there a legislative fix or must the Constitution be amended?

Impact

- On Friday, September 7, 2007, all bonds and other obligations in Florida secured by increment revenues were put on Credit Watch by Standard & Poor's and their rating reduced to negative. This has the effect of closing the capital markets to TIF secured debt.
- CRAs will be unable to finance capital projects on a long term basis (more than 12 months) through bonds, notes or other forms of obligations (including lines of credit).
- CRAs will be unable to enter into contracts with other local governments or with private parties (i.e., property owners, developers) to financially assist redevelopment projects if the obligation of the CRA to pay TIF lasts for more than 12 months.
- Special assessments will be used to pay for redevelopment projects which will make redevelopment projects more difficult and more costly (especially to the affected property owners).
- CRA outstanding debt pledging TIF that matures more than 12 months from issuance and was not validated prior to the Strand decision becoming final, may be in jeopardy of being challenged or being called early by banks or bondholders.
- CRAs will have to pay for referenda to approve long-term debt which diverts those funds from paying for redevelopment.
- At a time of instability, if not recession, in the real estate market in Florida, CRAs will be unable to provide financial assistance to encourage capital projects in redevelopment areas.

There are likely more impacts that will be discovered in the near future if the Strand decision remains in effect as issued by the Court on September 6th.

FRA Response

FRA is joining in a motion by the Florida League of Cities to the Florida Supreme Court to file an amicus brief in support of Escambia County's motion for a rehearing and/or clarification. FRA has previously filed an amicus brief in the case of City of Parker et. al. v. State of Florida, et. al., (SC07-1400) now pending before the Supreme Court. Bay County, Florida, filed a cross-appeal challenging the constitutionality of tax increment financing and FRA has filed a motion for leave to file an amicus brief in opposition to Bay County's cross appeal. If the Court approves FRA's motion to file an amicus brief in support of Parker in the cross appeal by Bay County in that case, we will include in the brief the effect of the Strand decision on TIF and seek answers to the issues raised above.

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