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IN THE SUPREME COURT OF FLORIDA

Case Nos. SC19-1250, SC19-1343

ROBERT EMERSON, et al.,
Appellants/Cross-Appellees,

v.

HILLSBOROUGH COUNTY, FLORIDA, et al.,
Appellees/Cross-Appellants.

STACY WHITE, et al.,
Appellants/Cross-Appellees,

v.

HILLSBOROUGH COUNTY, FLORIDA, et al.,
Appellees/Cross-Appellants.

CROSS-REPLY BRIEF OF HILLSBOROUGH COUNTY, HILLSBOROUGH COUNTY METROPOLITAN PLANNING ORGANIZATION, AND CITY OF TAMPA

On Review of Final Orders of the
Circuit Court of the Thirteenth Judicial Circuit
L.T. Nos. 2019-CA-001382, 2019-CA-001382

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ARGUMENT

I. The Hillsborough County Commission's post-referendum decisions that deemed appropriate the uses and allocation provided for in Article 11 are not inconsistent with § 212.055(1). That section only requires that a county commission deem appropriate the uses and allocation of surtax proceeds. It is silent on how and when that decision must be made.

White's Cross-Answer Brief challenges the Commission's ability to independently deem appropriate the uses and allocation of surtax proceeds provided for in Article 11, a charter amendment overwhelmingly approved by a public referendum. The Commission's independent 6-1 decisions deeming those uses and allocation appropriate are not inconsistent with the plain language of § 212.055(1). Indeed, those policy decisions establish that the Commission did what that law required. It deemed appropriate the uses and allocation of the surtax proceeds.

A. The Commission's policy decisions deeming appropriate the uses and allocation in Article 11 should not be disturbed.

Although the Commission independently voted to deem appropriate the uses and allocation in Article 11 on multiple occasions, White argues Article 11 eliminated the Commission's purportedly exclusive responsibility to make "policy decisions" about the appropriate use of surtax revenue. (White Cross-Ans. Br. 15.)

This argument should be rejected. The Commission had the statutory right and duty not to accept the uses and allocation provided in Article 11 if it did not deem them appropriate. If the Commission did not believe the uses and allocation

in Article 11 were appropriate, it could have refused to act by not calling the measures up for vote; it could have declined to defend against White's lawsuit, consented to a judgment in White's favor, or joined White as a plaintiff. But the Commission chose not to do any of these things.[1] Or, as White notes, the Commission could have adopted the Bond Resolution without deeming the uses and allocation appropriate. (*Id.* ("[T]he bond resolution could have been issued without a finding 'deeming appropriate'…the entire thirty-year plan allocating funds to other 'Agencies.'").)

Instead, the Commission independently exercised its statutory duty to deem appropriate the uses and allocation contained in Article 11. In multiple, 6-1 votes, with White as the lone dissenting vote, the Commission expressly approved the uses and allocation approved by the citizens it represents.

Simply stated, in adopting both measures, the Commission made a policy decision to deem the uses and allocation in Article 11 appropriate. Thus, White's argument that Article 11 compelled the Commission to approve the uses and

[1] White asserts that the other Commissioners blindly followed the advice of counsel in voting to adopt the Bond Resolution. (White Cross-Ans. Br. 29.) There is no citation to the record for this assertion, because no such evidence was introduced before the trial court below. What White cites is his attorney's argument in support of a proffer of evidence; but the evidence was not admitted. White has not challenged that evidentiary ruling on appeal. In any event, an opinion of legal counsel that Article 11 is constitutional does not mean the Commissioners were required to vote to adopt the Bond Resolution, the Interlocal Agreement, or take any other action deeming the uses and allocation appropriate.

allocation should be rejected. The Commission's policy decision complies with § 212.055(1) and shows that Article 11 can co-exist with that statute.

B. White's argument is based on the mistaken notion that the Commission has improperly bound future commissions for 30 years.

White further claims that, by voting to adopt the Bond Resolution, the current Commission improperly bound future commissions to certain uses and allocations of the surtax proceeds for a 30-year period.

The Commission's determinations deeming the uses and allocation appropriate have not improperly bound future commissions at all. To the extent future commissions are bound by an action taken by the current Commission, it is the decision to issue bonds with the surtax revenues pledged for repayment that might bind future commissions. And, as White acknowledges, there is nothing unusual or improper about pledging a certain revenue stream as security for the life of the bonds and that doing so binds future commissions for the length of the bonds. (A12. 644-45, 684-85 (White Dep. 208:01-209:7, 248:16-249:5).)

Indeed, there is nothing uncommon about government bonds with a 30-year term. Section 212.055(1) expressly authorizes and contemplates the surtax revenue will be pledged as security for bonds to finance transportation improvements. § 212.055(1)(d)(3)-(4), Fla. Stat. There is no statutory time limit on the bonds' maturity dates. In sum, upon deeming appropriate the uses and allocation in Article

11, the Commission lawfully pledged the surtax revenue for repayment of the bonds.

C. Section 212.055(1) does not prescribe how or when the Commission must deem uses and distributions appropriate.

White similarly challenges the Commission's actions in deeming the uses and allocation appropriate on the basis those actions were taken after he filed his lawsuit. For the same reason, White claims the Court must ignore the Commission's ordinance deeming appropriate the uses and allocation because it was adopted after entry of the final judgments below. This position has no basis in the language of the statute and is contrary to the fundamental principle that courts may not second-guess such policy decisions.

i. The basis for a local government's decision to issue bonds is entitled to substantial deference and should not be disturbed unless clearly erroneous.

It is well-established that courts do not second-guess the policy considerations underlying a local governing body's determination to issue bonds. *Panama City Beach Cmty. Redevelopment Agency v. State*, 831 So. 2d 662, 667 (Fla. 2002); *Boschen v. City of Clearwater*, 777 So. 2d 958, 968 (Fla. 2001); *State v. Brevard Cnty.*, 539 So. 2d 461, 464 (Fla. 1989).[2] The legislative determinations

[2] *Accord State v. Sarasota Cnty.*, 372 So. 2d 1115 (Fla. 1979); *Rianhard v. Port of Palm Beach District*, 186 So. 2d 503, 505 (Fla. 1966); *Strand v. Escambia Cnty.*, 992 So. 2d 150 (Fla. 2008).

of the issuer's governing body in a bond resolution are presumed correct and must be upheld unless patently erroneous. *Boschen*, 777 So. 2d at 966. The Commission's determinations that the uses and allocation of the surtax revenue are appropriate are exactly the types of policy determinations into which the courts do not intrude. *See e.g.*, *State v. Sunrise Lakes Phase II Special Recreation Dist*., 383 So. 2d 631 (Fla. 1980); *Miccosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist.*, 48 So. 3d 811, 817–18 (Fla. 2010).

The legislative findings in the Bond Resolution are themselves competent substantial evidence to support the Commission's determinations. *Miccosukee Tribe*, 48 So. 3d at 821. Thus, it was unnecessary for the County to introduce evidence "to explain this action." (White Cross-Ans. Br. 30.) White's criticism of his fellow Commissioners and their policy decisions to deem the uses and allocation appropriate are not issues for this Court. They are merely the complaints of the losing side in a policy decision by an elected body.[3]

Finally, there is nothing improper about the County's decision to file a bond

[3] White also challenges the Commission's decision to deem appropriate the uses and allocation based on a transportation plan that was the "undisclosed core political strategy of AFT," a plan that White believes was not properly studied. In doing so, White ignores the MPO 2040 Plan, even though much of the spending allocations in Article 11 track that Plan, and other transportation studies performed in Hillsborough County. (Local Gov. Cross-Initial/Ans. Br. 28; A12. 233-435.) Even assuming the legislative determinations contained in the Bond Resolution are not dispositive, the record evidence shows that the Commission's legislative findings were not clearly erroneous.

validation proceeding. The very purpose of a bond validation is "to settle the basic validity of the securities and the power of the issuing agency to act in the premises." *State v. Manatee Cnty. Port Auth.*, 171 So. 2d 169, 171 (Fla. 1965). This includes the validity of the revenue stream pledged as security. Given the uncertainty created by White's challenges to Article 11, the County was within its rights under chapter 75, Florida Statues, in bringing a validation action.

ii. The Commission was entitled to take action to deem appropriate the uses and allocation at any time. Section 212.055(1) does not provide a manner or timing for such an approval.

White and Emerson argue the Commission's decision to deem appropriate the uses and allocation in Article 11 after it was approved by the voters is an after-the-fact effort to revive an invalid charter amendment. This argument fails as a matter of law. The Commission had the right to deem the uses and allocation appropriate after the referendum was passed by Hillsborough County voters.

Section 212.055(1) is silent on the manner and timing of a commission's action to deem uses and distributions appropriate. In absence of any provisions dictating when and how uses and allocations must be deemed appropriate, the Commission had the right to deem the uses and allocation in Article 11 appropriate while this lawsuit was pending. Fla. Att'y Gen. Op. 2004-27 (2004) (when a statutory grant of authority is "unaccompanied by definite directions as to how the power or authority is to be exercised, such a grant implies a right to employ the

means and methods necessary to comply with the statute"); *Lockridge v. City of Oldsmar*, 475 F. Supp.2d 1240 (M.D. Fla. 2007) (applying Florida law and holding that the repeal of the operative ordinance mooted the plaintiff's claim for injunctive relief). White offers no legal basis for his argument.

Emerson also asserts: (1) that the Commission could not ratify what it was not authorized to do in the first place; and (2) under § 212.055(1), the Commission could not have itself placed Article 11 on the ballot for voter approval, as that would be abdicating its statutory duty to deem appropriate uses and allocations. (Emerson Cross-Ans. Br. 15.) Emerson cites three cases for this proposition, none of which applies.

First, in *Broward County v. Plantation Imports, Inc.*, 419 So. 2d 1145 (Fla. 4th DCA 1982), a county commission enacted an ordinance establishing a consumer protection board to impose civil penalties for violations of the county's consumer protection code. After the ordinance was adopted and an Attorney General Opinion concluded the ordinance was not authorized by Florida law, the Legislature enacted a special law to authorize the county commission to create a consumer protection board and to impose civil penalties. *Id.* at 1147. In finding the ordinance invalid, the appellate court concluded that the special law could not validate an ordinance that was unauthorized when enacted. *Id.* at 1147-48. By contrast, here, the Legislature enacted § 212.055(1) before Article 11 was

approved by Hillsborough County voters, and the statute is silent as to when a county commission may "deem appropriate" the allocation of the surtax proceeds. The Commission's actions to deem appropriate the allocation was an independent act taken in accordance with § 212.055(1), not an act to validate an otherwise unauthorized legislative enactment.

The second case, *City of Coral Gables v. Giblin*, 127 So. 2d 914, 917 (Fla. 3d DCA 1961), held that a city had no power to authorize city police officers to make arrests outside of the city's geographic boundaries. There, it was clear that the city had no authority to confer upon it or its employees extra-territorial powers. Here, the Commission has the authority to deem the uses and allocation appropriate. There is nothing in the statute saying that the Commission cannot deem appropriate the uses and allocation the people desire, which is what the Commission has done.

Finally, the court in *P.C.B. Pship v. City of Largo*, 549 So. 2d 738, 741 (Fla. 2d DCA 1989), held that a city cannot contract away its police powers to a private entity. There, the city had entered into a contract with a private entity that restricted the city's ability to decide whether to build a road, install a traffic device, and permit the development of a parking lot. Giving away police powers by a contract entered into with a private party is a far cry from the Commission obtaining referendum approval from its constituents. Local governments routinely

seek voter referendum approval for actions the governing body has authority to take itself. Indeed, local governing bodies sometimes propose charter amendments to their citizens that restrict powers granted to the governing body by the Constitution and statute. The citizens' right to limit such powers is nothing akin to contracting away powers to a private entity.

The Commission has deemed appropriate the uses and allocation of the surtax proceeds consistent with its authority and the terms of § 212.055(1). White's and Emerson's arguments must be rejected.

II. Section 212.055(1) does not require that the Commission have unfettered discretion to choose the uses and allocation of surtax revenue.

White argues that Article 11 cannot co-exist with § 212.055(1) because § 212.055(1) requires the Commission to have full discretion over how to use and allocate the surtax revenue. (White Cross-Ans. Br. 5-16.) Again, White reads words into the phrase "deems appropriate" that do not exist. First, contrary to White's contention, § 212.055(1) does not increase the Commission's authority; it simply allows it to choose among enumerated transportation options. Second, and relatedly, the statute does not state the Commission must have the unfettered authority to decide how to use the proceeds on an annual basis, or any other such details. It also contains no language prohibiting voters, who are expressly authorized to adopt the surtax by charter amendment, from providing guidelines for how the proceeds may be used within the statutorily authorized uses and

allocation.

White and Emerson continue to fixate on the fact that charter counties require a grant of statutory authority to levy non-ad valorem taxes. But this case is not a preemption case, as the Legislature has by general law authorized counties to levy the exact surtax at issue. The Legislature has dedicated the decisions regarding the uses and allocation of the tax proceeds to the local level and, in doing so, omitted any specific procedures or requirements for making those decisions. The only issue is whether the language "deems appropriate"—without more—prohibits a county's citizens from passing by popular vote uses and allocations that are later approved by the citizens' county commission. *See* § 125.86(8), Fla. Stat.; Art. I, §§ 1, 5, Fla. Const.

Under the circumstances here—where the Legislature has expressly authorized the people to adopt the tax by charter amendment, without limitation on what the charter amendment may provide, and has provided no directives for when and how the Commission must deem the uses appropriate—the language relied on by White and Emerson does not negate the constitutional and statutory authority vested in the people to direct their elected representatives. If the Legislature intended to prohibit the voters from voting on certain categories of transportation spending, it would have said so in the statute.

Next, White and Emerson largely ignore *State* v. *Sarasota County*, 549 So.

2d 659 (Fla. 1989), cited in the Local Governments' cross-initial brief. *Sarasota County* dealt with: (1) a statutory grant of authority to pledge gas tax revenues for the repayment of bonds, without any conditions requiring voter approval; and (2) a county charter provision that required voter approval in order to issue the bonds in a certain amount. *Id.* This Court rejected the argument that the charter provision, by which the voters restricted the county commission's power to pledge the gas tax, conflicted with the statute authorizing the pledge of the gas tax without voter approval.[4]

Under the statute at issue there, a county commission could pledge the tax revenue itself. But under the charter amendment, the voters limited that power by requiring voter approval. In concluding the charter amendment did not conflict with the statute, the Court explained: "The charter does not prevent the county from pledging gas tax revenues for bond issues but merely requires voter approval if the bond issue is sufficiently large. Likewise, the statute does not prohibit a county from imposing restrictions upon its own ability to pledge tax revenues." *Id.* at 660-61.

[4] Imposing a requirement that a commission obtain voter approval in order to exercise a power granted to the commission by the Constitution or statute is an extremely limiting restriction. There is probably no greater restriction that could be imposed on a commission's power to issue bonds, for example, than requiring voter consent, unless the voters prohibited the commission from issuing bonds altogether.

As in *Sarasota County*: (1) § 212.055(1) does not prohibit the County from placing restrictions on its own ability to determine the uses and allocation of the surtax revenue; and (2) Article 11 neither prevents nor compels the Commission to deem the uses and allocation desired by the voters appropriate. *See also Boschen*, 777 So. 2d at 965 ("To be sure, the City could elect to limit its authority further by including more stringent requirements in the charter.").

Finally, White and Emerson misconstrue the main holding in *Sarasota All For Fair Elections, Inc. v. Browning*, 28 So. 3d 880 (Fla. 2010). That case dealt with challenges to various charter provisions, one of which was upheld and one of which was found to conflict with state law. One charter provision provided a process for audits and manual recounts, which was held to conflict with the timing for certification of election results and processes for recounts; it was severed from the charter.

The other charter provision in *Browning* is analogous to this case and was upheld. The opponents of the other *Browning* charter provision argued it conflicted with a statutory provision authorizing the county commission to choose among enumerated voting systems. That charter provision, which was adopted through the citizens' initiative process, restricted the county commission by eliminating some options enumerated by statute. Thus, the relevant holding in *Browning* demonstrates that even where a statute grants a governing body discretion to

choose among enumerated options, the voters have a right to place restrictions on their representatives' discretion to so choose. Just as in *Browning*, here, the statute authorized the Commission to choose among certain enumerated uses. The voters merely restricted the use of their tax proceeds to certain of those uses, which the Commission later approved by separate, independent votes.

Under these cases and § 125.86(8), the voters had the right to restrict their representatives in selecting among the uses enumerated in § 212.055(1).[5] The voters narrowed the universe of uses and allocations allowed by the Legislature; but they did not authorize any use of the tax proceeds beyond what is allowed by the statute. (A10. 738.) White's and Emerson's arguments that a limitation on statutorily authorized uses creates a direct conflict with § 212.055(1) must be rejected; the statutorily authorized uses are expressly left to a county to choose among at the local level.

[5] The charters of local governments across Florida limit powers granted by the Constitution or statute to local governing bodies, such as the power to convey government owned real property and issue debt. *See Boschen* (analyzing if the charter's limitation on the city council's constitutional and statutory authority to issue bonds was satisfied). Emerson's reference to the voters' right to restrict powers granted to the governing board as a radical proposition merely reflects his lack of understanding of how local government works in Florida and a total disregard of the power that is inherent in the people under our Constitution and governmental system. As *Sarasota County*, *Browning*, *Boschen*, and § 125.86(8) reflect, the voters can by charter amendment place parameters on constitutionally and statutorily granted powers to their elected bodies.

III. The duties and authority provided to the IOC do not directly conflict with § 212.055(1).

White and Emerson argue that Article 11 conflicts with § 212.055(1) because it gives powers to the IOC that make it much more than an advisory board. Their challenge to the IOC continues to be grounded on their interpretation of the authority of the IOC to approve project plans that goes beyond a determination that the plans are consistent with Article 11. White also attacks the IOC's role in the process to reallocate funds under Article 11. Finally, White contests the IOC's power to suspend surtax payments to an agency if they are non-compliant with § 212.055(1) or Article 11.

White's and Emerson's interpretation of the IOC's authority to override the Commission's approved project plan relies on reading Section 11.10 in a vacuum. However, when read in the context of the entire Article 11, as the rules of statutory construction require, the IOC has the authority only to approve project plans based on a finding that they comply with Article 11 and Florida law.[6] (*See* Local Gov. Cross-Initial/Ans. Br. 42-43.)

This interpretation is consistent with the IOC's core power to ensure that the County, municipalities, HART, and the MPO spend the surtax proceeds in a manner compliant with Article 11 and § 212.055(1). The IOC's powers and duties

[6] If this Court disagrees with this interpretation, it should find that the lower court correctly severed the words "Approve Project Plans and approve and" from section 11.10(2) and uphold the remainder of Article 11.

challenged by White and Emerson are premised on this core function. Rather than directly conflict with § 212.055(1), they ensure that the parameters of § 212.055(1) are followed diligently. (*See* Local Gov. Cross-Initial/Ans. Br. 41-43.)

Considering all relevant constitutional and statutory provisions and correctly applying the narrow test for determining if there is an unconstitutional conflict, there is only one possible conclusion: there is no unconstitutional conflict between Article 11 and § 212.055(1).

CONCLUSION

For the foregoing reasons, this Court should reverse the final judgments of the trial court, and remand for entry of final judgments validating the bonds and upholding Article 11. Alternatively, the Court should affirm the trial court's judgments and uphold the modified Article 11 under the severability doctrine.

Respectfully submitted on December 12, 2019.

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CERTIFICATE OF SERVICE

I certify that, on December 12, 2019, the foregoing was filed electronically with the Florida Courts E-Filing Portal and a copy served on the counsel listed on the service list below by email.

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Pursuant to Florida Rule of Appellate Procedure 9.210, I certify that this brief complies with the type size and style requirements and has been prepared in Times New Roman, 14 Point Font.

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