IN THE SUPREME COURT OF FLORIDA

CASE NO: SC09-1818
Lower Case No. 50-2008-CA-031975XXXXMB

NEW HOPE SUGAR COMPANY, and
OKEELANTA CORPORATION,

Appellants

-vs-

THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT

Appellee

INITIAL BRIEF OF NEW HOPE SUGAR COMPANY and OKEELANTA CORPORATION

On Appeal from the Circuit Court for the Fifteenth Judicial Circuit
In and for Palm Beach County, Florida

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TABLE OF ABBREVIATIONS

"Acquisition" means the "River of Grass Acquisition Project," the term used by SFWMD to denote the acquisition of land from USSC. (A.52, 4669).

"Amended Agreement" means the Amended and Restated Agreement for Sale and Purchase between USSC and SFWMD. (A.2).

"COPs" means Certificates of Participation.

"EAA" means the Everglades Agricultural Area, the area between Lake Okeechobee and the Everglades where the majority of the USSC land and the landholdings of New Hope are located (See map at A.33).

"First Validation Hearing" means the bond validation hearing held on February 6 and March 16-18, 2009. (Transcript at A.5).

"Governing Board" means the Governing Board of SFWMD, the collegial body that is the head of that agency.

Order means the order on appeal, the Circuit Court's Final Judgment Validating Certificates of Participation Lease Purchase Financing, Not to Exceed $650 Million. (A.1).

"Report" means the Summary of Benefits of the USSC Land Acquisition Report attached as Exhibit A to the Resolution. (A.14 and A.52, 4674-4713)

"Resolution" means Governing Board Resolution No. 2008-1027. (A.52, 4667 et seq.)

"Second Validation Hearing" means the bond validation hearing held on July 13-16, 2009, after passage of the Second Supplemental Resolution.

"Second Supplemental Resolution" means SFWMD's Second Supplemental Resolution, No. 2009-500A. (A.54, 5229-32).

"Supplemental Resolution" means SFWMD's Supplemental Resolution, No. 2008-1027. (A.53, 5222-24).

"SFWMD" means Appellee, Plaintiff below, the South Florida Water Management District.

"USSC" means United States Sugar Corporation.

STATEMENT OF THE CASE AND OF THE FACTS

A. Procedural background.

SFWMD filed its Complaint for Validation (A.52) in October 2008, seeking court approval of $2,200,000,000 of COPs, and travelling under the Resolution attached to that Complaint.[1] The Complaint and Resolution alleged that the COPs were for the "River of Grass Acquisition Project" (the "Acquisition"), which at the time consisted of the purchase of all assets of USSC for the sum of $1,750,000,000. *Id*. The stated purpose for the Acquisition was set out in a Report (A.14; A.52, 4674-4713), attached to the Resolution and premised on amorphous claims of environmental "restoration" and "water storage and treatment," with no specifics as to when, where or how any project would be constructed and no claim that the requested COP funding would be used to *actually* build any public infrastructure for these supposed purposes.[2] (A.14, 2413-35)

Soon after, the deal was modified by the Supplemental Resolution (A.52) authorizing negotiations of a land-only purchase. The purchase, authorized in December 2008, embraced a new acquisition structure, the purchase of 182,000

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[1] Citations to the Appendix are the form A.[tab], [page range], denoting the tab and bates number range.

[2] The Governing Board has never approved any project for the land to be acquired (A.10, 2093-94) Thus, the best SFWMD could do to support the claimed purpose below was to state that the purchased land is "suitable" for various types of restoration projects, provides a restoration "opportunity," and that restoration somewhere in the EAA is the general intent. *(Id*., 1767, 1838-39)

acres of land, with a seven-year lease of the land back to USSC with a right of first refusal thereafter. Based on this, the lower court held the First Validation Hearing on February 6 and March 16-18, 2009.

Soon after that hearing concluded, and before the trial judge had an opportunity to rule, the Acquisition morphed again into a purchase of *some* USSC land with an option to buy more. The final deal is reflected in the Amended Agreement (A.2), incorporated by reference in SFWMD's Second Supplemental Resolution (A.53, 5218-19) There, SFWMD agreed to buy scattered, non-contiguous pieces of real estate, dispersed throughout the EAA, including 33,000 acres of citrus land that USSC insisted had to be included (*See* map at A.33). The purchase now constitutes 73,000 acres of land for $536 million, $50-68 million of which represents the cost of a non-transferable option to purchase another 107,000 acres at some undisclosed point in the future, were funding to materialize.[3] (A.2)

The total capital cost of utilizing the land, as outlined in SFWMD's own estimates, far exceeds even the most hopeful estimates of what SFWMD can

[3] The option allows SFWMD to purchase 107,000 acres in additional land for market value, subject to a minimum guaranteed price of $791 million. (A.25) SFWMD claimed that the most it can afford to issue in COPs is $1.1 billion, $536 to $650 million of which would go to the present acquisition. (A.10, 1602) This would leave a capacity of between $450 and $537 million, far below even the minimum price for the option. No plan or projection for exercising the option was ever presented below, and there was no dispute that SFWMD lacks the financial capacity to exercise it. There was no explanation as to why, with that being the case, the generous payment was agreed to.

finance. SFWMD's Chief Engineer projected the total cost of the infrastructure discussed in the Report at $14,638,787,416. (A.10, 2092) Unrebutted evidence showed that SFWMD has no means to finance this. (A.10, 1578-79; A.38, 2745-50) Not surprisingly then, no plan for implementing or financing any public use of the USSC land was ever presented to either the lower court or the Governing Board. (A.10, 1578-80, 1618-25; A.48, 4047-4048) Absent some showing of achievability, the stated use of the land is little more than a creative fiction.

Moreover, despite the fact that the Second Supplemental Resolution changed the terms of the purchase transaction, SFWMD did not change the stated public purpose, which SFWMD witnesses admitted continued to presume the purchase of the full 182,000 acres.[4] (A.10, 2022-23, 2031; A.46, 3902, 3904, 3912) Thus, the entire validation is premised on an acquisition that no longer comports with the Amended Agreement. As it stands today, the Report, the sole stated "public purpose", requires the purchase of more than twice as much land as SFWMD claims it can afford, and far more than it claims it can finance under its statutory

[4] SFWMD argued below that the Option allows it to travel on a stated public purpose that would require the full land purchase. However, its own executives admit that while SFWMD may have a legal right to purchase the remaining land at some unspecified price above $791 million, SFWMD has no practical ability or reasonable expectation of being able to finance such a purchase.

debt cap,[5] *plus* multiple billions of dollars more for infrastructure for which there is no plan of finance and no finding of feasibility by the Governing Board.

B. The current acquisition structure

Presumably to address declining SFWMD revenues, the current acquisition structure divided the purchase into phases, the 72,813 acres that SFWMD can presently afford for $536,486,180[6] and an option for the remaining 107,187 acres. Of these, 33,000 acres are citrus land which has traditionally suffered from a fungus which leaves the oranges a sort of market-resistant green color, and the remaining 40,000 of more-valuable sugar cane land. (A.25, 2565-66) The purchase land will be leased back to USSC for 20 years at a rate of $150 per acre per year for the sugar cane land and *the citrus land will be provided to USSC for free*. (*Id*. at 2566) While the public cost of the acquisition is over $45 million dollars per year, USSC only pays $6 million per year to lease all the land back. (A.25, 2565)

[5] The most the agency can borrow is $1.1 billion, far short of what is needed to acquire all the land. A.10, 1602; *Order* A.1, 21 (SFWMD cannot purchase the land without "collaborative finance"; *i.e.*, some other government body picking up the tab)

[6] As its Executive Director confirmed, SFWMD "backed into" the $536 million transaction "from an affordability standpoint". (A.10, 1475-76)

The lease is subject to "takedown"[7] of certain portions of the property, meaning that SFWMD can cease USSC's farming and use a portion of the property for public infrastructure. Of the 73,000 acres, the Amended Agreement allows SFWMD to takedown the citrus land (with one years notice) and up to 10,000 acres of the sugar cane land (with two years notice) in the first 10 years, and another 10,000 acres of sugar land in the second 10 years. *Id*. It can also access another 3,000 acres after seven years specifically for local economic development. The remaining 17-20,000 acres of sugar cane land cannot be accessed for at least 20 years, unless SFWMD can come up with *a minimum* of $791 million more to buy the Option lands within three years and or some unknown higher price in the following seven years. (A.25, A.10, 1610)

But, these limited "takedown" rights are predicated on SFWMD being able to finance, approve and construct projects. Project construction is the only basis to eject USSC during the term of the lease, which extends for 20 years. Thus, absent SFWMD having an actual ability to construct, USSC gets to continue farming the land sold until at least 2030.[8] (A.3, 120-123)

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[7] "Takedown" is the term SFWMD land managers use for terminating the farming lease for a parcel to use that land for construction of some project.

[8] The only limited exception is that after 7 years the Amended Agreement allows SFWMD to transfer up to 3,000 acres to certain local governments, for local government purposes rather than restoration projects.

There has been no showing that any substantial portion of the USSC lands will be used for project construction at any point in the foreseeable future. (A.10, 2029) Thus, the contract provisions give USSC long-term control of the land it "sold" to SFWMD, effectively for the next two decades, as the record is clear that SFWMD has no projected capability of financing the improvements required to justify a takedown. Thus, USSC takes the money and stays, as a guest of the taxpayers of SFWMD.

C. The claimed public purpose

The COPs do not include any funding for infrastructure or improvements to the land; they are solely for land acquisition. There is also no dispute that the land purchase alone does not do anything for water or water-related resources absent the building, operation and maintenance of massive infrastructure. Both the Executive Director of SFWMD and its Chief Environmental Scientist testified that the stated purpose, as set out in the Report, requires the construction of infrastructure (A.10, 1437, 1589-90, 1921-32, 2067), infrastructure that will cost upwards of $14 billion in unattainable funding.

The Resolution attempts to justify the COP issuance based upon the following statement of public purpose:

> WHEREAS, undertaking the acquisition of the assets in US Sugar as part of the River of Grass Acquisition Project, which will constitute Facility Sites and/or Facilities, will serve a public purpose by increasing the water storage capability of SFWMD to reduce harmful

> freshwater discharges from Lake Okeechobee to Florida's coastal rivers and estuaries; improving the timing and quality of delivery of cleaner water to the Everglades ecosystem; preventing phosphorus from entering the Everglades ecosystem; eliminating the need for "back-pumping" water into Lake Okeechobee and improving the sustainability of agriculture and green energy production all as more particularly described in staff report entitled Summary of Benefits of the USSC Land Acquisition attached hereto as Exhibit A (the "Report"). (A.52, 4669)

Attached to the Resolution is the Report (A.14), authored by three SFWMD executives. The Resolution and Report are the sole statement of public purpose approved by the Governing Board,[9] which, amazingly, assumes the full 182,000-acre acquisition as originally negotiated in October 2008.[10] The never-updated Report, thus analyzes the impact of acquiring land and constructing projects commensurate with the 182,000-acre acquisition, even thought SFWMD was now only acquiring 73,000 acres, with the not-surprising result that many of the projects stretch over land not being "bought."

The Report further describes several benefits that SFWMD contends *could* accrue from the Acquisition Project, were necessary infrastructure built. However,

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[9] Appellants argued below that that the legality of the COPs must be judged according to that stated intent, as the Report defines the proffered purpose. As discussed below the undisputed evidence, and indeed the very admission to the SFWMD Executive Director (A.10, 1437), showed that the land purchase will not further these benefits without the construction of infrastructure, and SFWMD presented nothing to the trial court to suggest it had even reasonable expectation of being able to construct the necessary facilities to accomplish the stated public purpose.

[10] A.46, 3908, 3912 (agreeing that summary of Benefits does not analyze at 73,000 acre project); A.10, 2072/10-15 (same), 1816.

the authors of the Report stated that the Report presumes (i) a land acquisition of over 100,000 acres and (ii) the construction of vast infrastructure by SFWMD, including an above-ground reservoir or reservoirs approximately 100,000 acres in size and associated conveyance, pumping and treatment infrastructure.[11] SFWMD's Executive Director herself admitted, that the land purchase is not an integrated project and construction of infrastructure is needed to turn the land into a project. (A.10, 1435-36) As this testimony confirmed, the Acquisition is not a project; it is merely an undefined and fiscally-unrealistic future aspiration,[12].

Despite the major reduction of the deal, SFWMD based its stated public purpose on the larger 182,000-acre acquisition, and presumed that it could finance construction. These assumptions are contrary to the evidence presented below, which shows that SFWMD cannot afford even the $791 million minimum option price, much less the multiple billions needed for the necessary infrastructure. (A.10, 2203-04; A.47, 3945-46, 398-4010; A.49)

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[11] A.10, 1789, 2037, 2094-95.

[12] *Id*. SFWMD witnesses testified that massive infrastructure is presumed in the summary of benefits. (A.10, 720-21, 1922-24, 2132-35; A.46, 3902-03). Financial experts presented by Appellants also explained that there is no way for SFWMD to finance the needed infrastructure. (A.10, 2203-04; A.47, 3945-4010). The SFWMD did not even attempt to dispute this evidence, resting its case (successfully below) on the legal theory that the issue of whether the public purpose is real or fictional is a collateral matter outside the scope of bond validation. (Order, A.1, at 22).

D. Failure of Governing Board to approve a project, or evaluate the feasibility of any public purpose.

At the time of the October 2008 Resolution, no plans existed in even minimal form regarding the scope or financing of these required facilities. (A.5, 456-57; A.48 4021-23) Nor, despite Appellants repeated protestations on this issue, was any such plan brought to the Governing Board in the months that passed between October 2008 and the July 2009, conclusion of the validation proceedings. (A.10, 2093-94) Nor is there any reasonable expectation of being able to exercise the option and purchase the remaining land, as confirmed by the (i) the Governing Board's own determination to cancel the $1.34 billion purchase for financial reasons (A.10, 1475-76), (ii) the SFWMD's admission that it could not exercise the Option without reliance on to be identified "partners" (A.10, 1605; A.1, 21), and (iii) the unrebutted testimony of Appellants financial experts (*see* n. 16, *infra*).

Additionally, although the Board was shown numerous land-use concepts, these had little correlation to the USSC land.[13] Given that no decision has been made as to the use of even one acre of USSC land, it is impossible to tell how much of the land would be used -- even if a project were financeable. And, as to the various concepts presented, no cost information or other key details were ever shown to the Governing Board. (A.5, 839, 842-47; A.10, 1581, 1593) It was

[13] In total 11 concepts were shown to the Board. All but one used less than 50 percent USSC land, and the range of USSC land utilization ran as low as just seven percent. (A.32, 2635-38; A.10, 2089).

therefore impossible for the Board to make any determination of the feasibility of any concept. (A.5, 839, 842-47; A.10, 1581)

Going to the heart of the supposed public purpose, the Governing Board was never told the estimated cost (or range of possible costs) of the necessary infrastructure, nor ever presented even a rudimentary plan for financing that cost.[14] Estimates existed as of November 2008 showing a construction cost of $8.6 to $12.3 billion, but the staff hid these numbers from the Board. As both Appellants' municipal finance expert and the SFWMD budget director confirmed, it would be impossible to determine feasibility without this information. (A.5, 641-42, 775-80) Willful blindness, however, was the order of the day.

The most recent estimates created by SFWMD's chief engineer show that the early estimates were in fact overly optimistic, and SFWMD's "best estimate" of the infrastructure presumed in the Report showed a total project cost of $14 to $17 billion (depending on configuration). (A.10, 2102-03; A.23) This likewise was never shared with the Board. Nor did SFWMD present the court below with any plan for financing any of this infrastructure. And, none of the three Governing Board resolutions in this matter find, explicitly or implicitly, that a complete project (land, infrastructure, and operating cost) is in any way feasible. (*See*, A.52, 4667-73; A.53, 5222-24; A.54, 5229-32)

[14] A.48, 4021-23 (no financial analyses of any construction projects have been created); A.10, 1472 (Board never given financial analysis on the option).

SFWMD's financial managers thus failed to undertake *any* analysis of how to finance any infrastructure.[15] (A.10, 1656-57; A.48, 4047-48) However, detailed, and unrebutted, financial analyses presented by Appellants' experts demonstrated that SFWMD has no financial ability to implement the supposed public purpose.[16]

Thus, SFWMD failed to show any reasonable basis for claiming that the purchase would achieve the supposed public purpose.[17] All that the trial court was

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[15] No affordability or financial feasibility analysis for the full project cost has ever been produced by SFWMD, as all SFWMD personnel that testified in the case and Governing Board member Michael Collins unanimously confirmed. (A.5, 1581, 1593) No analysis showing that SFWMD can afford the full project was ever presented to the Governing Board. (A.10, 1472) The Governing Board was never given even the most minimal set of information needed to support such findings, even after this was made a prominent issue in the February and March validation hearings. (A.48, 4047-48)

[16] Dr. Bartley Hildreth, a nationally-recognized expert in municipal securities, presented detailed analyses showing that even a project half the cost of that contemplated in the Report would not be feasible, based on SFWMD's own revenue projections. (A.47) Mr. Antonio Argiz, a certified public accountant with extensive experience in financial and forensic accounting, similarly testified that based on SFWMD's latest audited financials there is no capacity for either exercise of the option or construction of billions in infrastructure. A.10, 2203-05. SFWMD presented nothing to rebut this evidence.

[17] While SFWMD makes vague allusions to funding from the state Legislature or federal government, there is no claim that it has even sought such funding as of the date of the Bond Validation Hearing. Tellingly, the Governing Board was never presented with a scenario or projection whereby the infrastructure is even partially funded by the state Legislature or federal government. Nor would such funding, even under the rosiest SFWMD scenario, provide a significant portion of the total costs. Even if all hopes and assumptions on intergovernmental funding come true, SFWMD still projects that it must fund *over $12 billion* in capital cost (out of $14 billion total) from its own resources. *See* A.32 and A.39 (breaking constructions costs into internal and cost-shared programs); A.10, 290-92 (explaining analysis).

left with were SFWMD's statements of good intentions, based on its hopeful aspiration to one day, somehow bring about the purpose set out in the Report.

E. Pledging of other public land

SFWMD, in the Second Supplemental Resolution, has reserved for itself the right to include under the Master Lease any and all "other land it currently owns." (A.54, ¶12, 5228-32). These include various critical infrastructure projects of SFWMD, a list of which are at A.17. (A.10, 2226; A.17). It is unknown what property SFWMD actually would include under the Master Lease and therefore pledge as security for the COPs, because SFWMD has purposely structured its decisions to occur after validation. What is known is that SFWMD has given itself the right to encumber *any* land it currently owns, which would include significant public infrastructure that its Executive Director characterized as "essential to the public" (A.10, 2226), and therefore not subject to forfeiture without imperiling critical structures.

F. The Final Judgment below

The trial court heard extensive evidence on the hypothetical nature of the supposed public purpose. The vast majority of the evidence summarized above was ignored, however. While the trial court clearly had great trepidations about the bootstrapped nature of SFWMD's $650 million dollar expenditure, it felt that this Court's precedents handcuffed its ability to consider "feasibility":

> [T]he Court recognizes that economic feasibility of the project is outside of its scope of review. The Court acknowledges the strong arguments made by the Defendants that the project is simply economically impossible. They point to evidence showing that water management district staff had estimated the cost of the total project (including construction of infrastructure) to be upwards of $8 billion dollars or more; yet these figures were never communicated to the Governing Board. (Trial Tr. vol. VI, 686-89, July 15, 2009). While the Court questions the wisdom of seeking $ 2.2 billion in COPs during these economic times, it is bound by precedent which instructs that economic feasibility is collateral to bond validation proceedings. *Warner Cable Commc'ns* v. *City of Niceville*, 520 So. 2d 245, 246 (Fla. 1988) (trial court properly rejected as collateral arguments questioning necessity for project and economic and fiscal feasibility); *see also Boschen* v. *City of Clearwater*, 777 So. 2d 958, 966 (Fla. 2001) ("[T]he wisdom or desirability of a bond issue is not a matter for [courts'] consideration"). As such, the Court cannot and does not base its decision on whether SFWMD will have the financing to actually complete a project of this magnitude.

Order A.1, at 22.

As a result the trial court did not look behind the stated intentions of agency bureaucrats, effectively accepting as fact that "[t]he pleadings filed by the District and the testimony offered by the SFWMD's witnesses evidence plans to utilize the revenue bonds for water storage and treatment." *Id*. at 20. The Order does so without further addressing the fundamental defects in SFWMD's stated intentions: that the approved COPs only provide for the acquisition of land, not for "water storage and treatment"; that SFWMD showed no ability to finance "water storage and treatment" infrastructure; and that the "plans" referenced were just vague statements of what bureaucrats might be done, not any project approved by the

Governing Board.

The Court also ignored a key argument made by Appellants: that the right of non-appropriation set out in the finance documents is illusory, as a practical matter, for reasons unique to the instant case. The documents proffered by SFWMD contained standard boilerplate language designed to evade the requirement of a referendum. This was summarized as follows by the trial court:

> If in any year, the District determines not to appropriate funds to make the annual rental payments, the Lease Term of all Leases made under the Master Lease Purchase Agreement will terminate no later than the end of the District's fiscal year for which the District appropriated funds to make lease payments. Upon such termination, the District must immediately surrender and deliver possession of the property to the Trustee as assignee of the Leasing Corporation. The District surrenders possession only for the remaining period of the Ground Lease but does not surrender ultimate ownership of the property. At the end of the Ground Lease, the District regains possession of the property. During such period of the ground lease, the District may freely substitute other property for the property then controlled by the Leasing Corporation pursuant to the Ground Lease.

Id. at 30-31.

Appellants, however, claimed that whatever rights are afforded under the various leases are meaningless because the facilities pledged as security, which "the District must immediately surrender … to the Trustee" (*id*.) have no substitute and cannot simply be abandoned by SFWMD for budgetary expedience. The trial court ignored this argument and chose to merely rely on the language of the agreement and not on the practical impediments to SFWMD surrendering

facilities.[18] *Id*. at 29-31.

SUMMARY OF THE ARGUMENT

The Order below validates a $650 million debt issuance based upon the finding that SFWMD "has demonstrated a valid public purpose with respect to the initial purchase of 73,000 acres of land". *Order*, A.1, at 19-20. The immediate problems with that holding are that (i) the agency head, the Governing Board, never approved any project for land, (ii) the Governing Board never made any determination that any project constituting a public purpose was feasible, (iii) there was no evidence below showing any realistic expectation for public use of the land given the decision of SFWMD not to analyze financial feasibility; and (iv) the Report setting out the supposed "public purpose" presumed the acquisition of 107,000 acres more than was being acquired, even though SFWMD admits it cannot afford that land, much less the necessary infrastructure. Further, the trial court erred in validating the bonds based on wholly inadequate information, as SFWMD structured key decisions necessary to determine if a public purpose exists to occur after validation and after the transaction closes.

[18] Evidence on this point, for which there are no findings, include the admission of The Chief Financial Officer of the SFWMD that it would never exercise a non appropriation clause and the admission of the Executive Director that public lands that may be pledged include a number of essential public facilities for which control could not be ceded. (A.10, 1678-79, 2226)

The Order below fundamentally erred by not looking behind the statements of agency staff. Agency bureaucrats claimed general suitability of the land for uses never approved by the Governing Board. These were equated below into "plans" sufficient to support validation. Evidence that their claims presumed infrastructure costing 10-20 times the present financing, for which no plan of finance nor showing of affordability was presented, was ignored as collateral. Any insight into the fact the "public purpose" is merely a multi-colored map with no basis in reality was dismissed as "collateral" on notions of deference to "legislative findings" of an executive agency that did not even look at these issues.

Likewise, issues relating to whether a voter referendum should be held were reviewed based solely on self-serving language in leases from SFWMD to its alter ego corporation, without the consideration of the practical ability to walk away from the debt that this Court's cases require. While the agreements contain boilerplate "non-appropriation" language, the unique facilities and circumstances of this case, including the continued occupancy of the land by USSC and the ability to pledge "essential" public water and flood control infrastructure as security make any such right illusory. Moreover, SFWMD's financial statements will carry the supposedly "walk-away" obligation as a long-term liability.

The key issues were thus not considered in the Order despite extensive evidence showing that there is no realistic expectation for the stated public

purpose, that there is no project to be implemented with the financing, that necessary Legislative approval was not sought, and that the entire transaction is structured so as to make the right to walk away from the COPs (the sole basis to avoid voter approval) meaningless. For all of these reasons the Order should be reversed and the validation denied.

ARGUMENT

I. INTRODUCTION

Without both the entire USSC purchase and the monies to build the infrastructure, SFWMD cannot achieve the stated public purpose. This case thus presents the novel situation of a financing -- that the agency states is barely affordable -- travelling under a "public purpose" that is contingent upon *future* financing 10-20 times larger than what is sought today.[19] And, unlike the vast majority of validation cases, all this is sought by a non-elected executive agency that has not even sought Legislative approval of its foray into land speculation.

SFWMD serves up to this Court the opportunity of extending the already burdened holding of *Strand* [20] to include a long-term financing of a non-project, secured by a cash flow that meets only 13 percent of the annual debt service, approved by a non-elected, non legislative executive agency, hampered by a paucity of supporting evidence, to purchase only land, with a clear inability to ever build infrastructure that could qualify as a project, while at the same time leasing

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[19] SFWMD's two primary financial managers, CFO Mr. Dumars and Budget Director Mr. Bergstrom both testified that they conducted no analysis on how any project would be financed, because they were not asked to do so. (A.10, 1657-61, A.48, 4021) Its lawyers then argued that the Court had to ignore the unrebutted analysis on these points by Appellants' experts because such issues are "collateral." Under this approach, so long as an agency does not make the mistake of actually studying its actions and their consequences it apparently has a free pass in bond validation.

[20] *Strand v. Escambia County*, 992 So. 2d 150 (Fla. 2008).

the purchase land back to the seller for an effective financing rate of two percent for what could be decades. In so doing, SFWMD conjures up the worst fears of Chief Justice Quince who joined with Justice Lewis in his dissenting opinion in *Strand*, and predicted that reliance on *Strand* "operates to circumvent voter participation in a decision that requires popular approval under the Florida constitution." *Strand*, 992 So. 2d at 164 (Lewis, J and Quince, CJ dissenting)

II. STANDARD OF REVIEW

This Court's review of the trial court's conclusions of law is *de novo*. *See Panama City Beach Community Redevelopment Agency v. State of Florida*, 831 So. 2d 662 (Fla. 2002). As explained in *Boschen v. City of Clearwater*, 777 So. 2d 958 (Fla. 2001), this Court performs a

> comprehensive inquiry . . .[in which the Court*] thoroughly examined[s]all of the legal conclusions rendered by the trial court*. For example, this Court both 'determine[d] whether the evidence presented at the validation hearing supported the trial court's validation of the bonds,' and *examined whether sufficient evidence existed in the record to 'demonstrate that the overall project promotes public health and safety*.' (emphasis added).

See also Panama City Beach Community Redevelopment Agency, 831 So. 2d 662, 665 (Fla. 2002) *citing Boschen*, 777 So. 2d 958, 966, 968 (Fla. 2001).

Further, while this Court has stated that "questions concerning the financial and economic feasibility of a proposed plan are to be resolved at the executive or administrative level and are beyond the scope of judicial review in a validation proceeding," this can only apply where such findings exist and are supported by

adequate evidence and analysis. Thus even legislative findings are not dispositive and "where the legislative determinations and conclusions [of public purpose] are clearly erroneous", a court "should refuse to validate the bond." *Id.*

In this case there are no legislative findings: this validation is sought by an executive agency and the Legislature never approved the financing much less made "legislative findings" on the public purpose. Nor are there any "executive or administrative" findings on the reasonableness of the public purpose. Despite this Court's admonition that "financial and economic feasibility" of a proposed plan are to be "resolved at the executive or administrative level," the Governing Board did not review, and made no findings on "economic feasibility of a proposed plan." And, when Appellants asked for a formal administrative hearing to develop a record on these points at the "executive or administrative level" SFWMD staff attorneys dismissed that request without ever taking it to the Governing Board.[21]

Never ones to be bothered by consistency, SFWMD will now, no doubt, ask (as it did below) that absolute, unassailable deference be granted to a determination on questions that its Governing Board never considered. Nothing in *Boschen* or any other decision of this Court mandates such an absurd result.

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[21] The denial of Appellants' Petitions for Formal Administrative Hearing is presently on appeal before the District Court of Appeal, Third District. As has been presented in other filings to this Court, if relief is granted in that case, it could moot the instant case.

III. THE LOWER COURT ERRED IN VALIDATING BONDS BASED ON THE INADEQUATE INFORMATION PRESENTED.

A bond validation petition must "set forth in reasonable detail the purpose or purposes which will be accomplished with the proceeds." *State v. Suwanee County Dev. Authority*, 122 So. 2d 190, 194 (Fla. 1960). It is SFWMD's burden in this case to show that an actual and paramount public purpose exists at this point in time, not merely to speculate on what *might* be done with the USSC lands if the stars align in their favor. *Id.; see also, Orlando,* 576 So. 2d at 1317.

The only approved use of the COPs is acquisition 73,000 acres of land. The amount validated would not provide for acquiring the remaining land,[22] much less any project infrastructure. The trial court found that "[t]he pleadings filed by SFWMD and the testimony offered by SFWMD's witnesses evidence plans to utilize the revenue bonds for water storage and treatment." *Order* at 20. By "plans" however the court means ***statements of intent*** by agency bureaucrats, not projects approved by the Governing Board, nor anything supported by any analysis of feasibility, financial or otherwise.[23]

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[22] Nor could they as the minimum cost of the option is $791 million, which added to the present $650 million validation for the initial 73,000 acres far exceeds the $1.1 billion that SFWMD claims it can issue under its statutory debt cap.

[23] SFWMD staff walked through a series of parcels and argued that certain water projects could be located there, claiming this satisfied the requirement of a public purpose. The Governing Board, however, has never approved any particular use for any parcel. Thus, what SFWMD travelled under were the views *of SFWMD*

Allowing SFWMD to proceed on vague allusions of "opportunity for restoration", the lower court erred in validating even a portion of the bonds.[24] While the description of what SFWMD intends to do with the land does not have to be exact to the last detail, it must, however, "be sufficiently detailed to enable a member of the public and the state to determine whether the issuing agency can lawfully expend public monies therefor." *State v. Suwannee County Development*, 122 So. 2d 190, 193 (Fla. 1960). A "proposed validation must provide enough details by which its legality can be measured" and for the Court to determine "whether the expenditures will meet a paramount public purpose." *State v. City of Orlando*, 576 So. 2d 1315, 1317-18 (Fla. 1991); *Suwannee County*, 122 So. 2d at 194. SFWMD fell far short of this requirement and did not even attempt to show a "reasonable expectation" that the purpose described in the Report "will be substantially and effectively accomplished." *See O'Neill v. Burns*, 198 So. 2d 1, 4 (Fla. 1967). And, while in cases involving legislative findings some deference is afforded, even then the Court must still examine whether there was support for the

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staff as to what the Governing Board *might* do in some future action, again without even showing that were the Governing Board to authorize such uses it would have any means to make the bureaucratic dreams a reality.

[24] The trial court validation included $50-68 million for an "option" that the evidence showed SFWMD has no ability to exercise. (A.48, 4055-56) It is unclear to New Hope how a trial court can determine that the SFWMD failed to provide enough information so that it could validate the bonds to purchase the remaining 107,000 acres, and yet validate the $50-68 million required for the option to purchase that same 107,000 acres.

view that the purpose exists. *See Panama City Comm. Redevelopment Agency v. State*, 831 So. 2d 662 (Fla. 2002) (court must "examine the record to determine whether the City had a reasonable basis" for its findings). There is no basis to use this financing device for SFWMD's equivalent of a "hope chest."

What is before this Court is the issuance of debt that will only accomplish the acquisition of land by SFWMD to be leased back to the seller for the same purpose to which it is presently put. The law is clear that the acquisition of land merely to be leased back to the seller does not meet the constitutional public purpose requirement. [25] Nor is it sufficient to simply speculate as to purposes that *might* be accomplished in the future.

IV. THE ECONOMIC FEASIBILITY DETERMINATION WAS CLEARLY ERRONEOUS

Although this Court has stated in certain cases that economic feasibility should be determined by the issuing governments, in none of those cases was the Court presented with a situation where (i) there is no legislative approval for a project and (ii) economic feasibility was never determined even by an administrative agency. Nor does any such case involve a purpose that is contingent on a future financing many times larger than the present validation.

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[25] *See Brandes v City of Deerfield Beach*, 186 So. 2d 6 (Fla. 1966); *Suwannee*, 122 So. 2d 190. 191-92 (Fla. 1960); *State ex reI. Ervin v. Cotney*, 10 So. 2d 346 (Fla. 1958).

SFWMD willfully refused to conduct any analysis of feasibility, apparently for fear of the answer, while the undisputed evidence showed (with no disagreement from the trial court) that there is no ability to finance the supposed public purpose. See Order at 22. The trial court erroneously applied this Court's previous rulings so as to require it to turn a blind eye to a public purpose it knew to be little more than a useful fiction (see Order at 22), and based on this, gave absolute, irrebuttable deference to "legislative findings" on issues neither the Legislature or the executive agency seeking validation ever reviewed.[26] This fundamental error permeates the Order, which gave SFWMD a free pass on the key issue of showing of a reasonable expectation of achieving the stated public purpose. *O'Neill*, 198 So. 2d at 4 (requiring showing of a "reasonable expectation" that the purpose "will be substantially and effectively accomplished."); *See Panama City*, 831 So. 2d at 667 (same).

A. A court cannot grant deference to non-existent findings

Throughout the proceedings below, SFWMD repeatedly claimed that questions of feasibility, not just of the Acquisition, but of the larger project that SFWMD claims is its intent, were outside the lower court's review prerogative.

[26] None of the Resolutions produced by SFWMD contain any finding regarding feasibility of a project, nor is there any Governing Board approval of a project. All the lower court had before it were statements by agency staff as to what could be done with the land if money were no object – not what anyone claimed the Governing Board had decided would be done or could be done.

SFWMD cited cases stating in dicta that a court should grant deference to local government "legislative findings" and should not interfere in questions of "business and policy judgment." *See, e.g., Town of Medley*, 162 So. 2d at 258-59; *Boschen*, 777 So. 2d at 268. What these cases essentially hold is that a court should not review *de novo* policy determinations and value judgments made by a *legislative* body.[27] Putting aside for the moment the fact that SFWMD is an executive branch agency, a key defect in its argument is that no complete project was ever reviewed or approved by the Governing Board.

The Governing Board was given some information on feasibility of the first phase acquisition; *i.e.*, paying USSC for the 73,000 acres. However, there is no dispute that this purchase does not, standing alone, further the stated purpose of water storage and treatment. (A.10, 1436-37). For that to occur and for a project to exist, infrastructure must be built, as both the SFWMD Executive Director and Chief Environmental Scientist testified. (Id; A.10, 1613; A.46, 3903) Moreover, the specific public purpose proffered to the lower court and adopted in the Resolution, requires additional land purchases, that SFWMD ***recognizes it cannot afford.*** (A.48, 4055-56)

[27] In *Boschen* for example the Court reviewed the extensive record and findings of the local government and stated that it would not overturn its findings of public necessity and feasibility so long as they are supported by "competent substantial evidence." 777 So. 2d at 968. The deliberative analysis and complete record of the issuing agency in *Boschen* (summarized at 966-67) stands in stark contrast paucity of review conducted by SFWMD.

The Governing Board was never presented, nor has it ever approved, a plan for the infrastructure. In November and December 2008, the Board was shown two concepts, but there is no resolution in the record stating that either or these will be built. Nor was the cost of either alternative, or even a component, ever presented to the Board. As with the Option, no plan for financing the construction costs exists, and nothing was presented to the trial court that rose above the level of speculation and conjecture.

In total, 11 concepts were shown to the Governing Board ranging in cost from $4 billion to $30 billion. But, none of these are "the project" according to SFWMD witnesses. (A.10, 2092-94) SFWMD instead claimed that the Acquisition would be folded into a yet-to-be determined plan, which will only be developed over the course of the next several years, and taken to the Governing Board for approval at some point long after the ink has dried on this Court's decision, without, of course, the need for any intrusive judicial review.

All that was presented below was speculation by staff, who are not the decision makers, as to what the Governing Board ***might approve in the future***. This situation is clearly distinguishable from cases involving an actual project that would flow directly from the financing and which no one disputed would provide a public benefit. Essentially, SFWMD asks this Court a blank check based on the promise that it will develop a public project and somehow find a way to pay for it.

B. The Governing Board was given no information by which it could determine the feasibility of any project

As noted, the Governing Board was never told the estimated cost (or range of possible costs) of the necessary infrastructure, nor ever presented even a rudimentary plan for financing that cost. *See* n. 16, *infra*. It would be impossible to determine feasibility without this information. (A.10, 641-42, 739-40)

The Governing Board also was not given any estimates for construction costs at all ahead of any of its votes on the ever-morphing and shrinking USSC deal, despite the fact that staff had an internal estimate of $8.6 to $12.3 billion as of at least November 2008. According to what the SFWMD Director of Everglades Restoration described as the staff's best estimates of total project cost – recent analyses by its Chief Engineer – the land acquisition cost pales in comparison to the total project cost of $14 to $17 billion. (A.39); n. 28, *supra*.

Thus, the Governing Board had no information by which it could approve a project or determine its feasibility. Nor do any of the three Governing Board resolutions presented to the Court pass upon the feasibility of constructing or operating any project. As the trial testimony of SFWMD witnesses showed, the Governing Board never made a determination that either the acquisition of "option" lands or the infrastructure presumed in the Report is feasible. (A.10, 1670-72; A.48, 4017, 4021-23) And, the Governing Board will not even decide

what the unfunded project will look like or even where it would be located for years to come.

All of these are key defects in the validation filing that were overlooked below under the trial court's restrictive view of bond validation which it felt compelled to follow. The lynchpin to the bond validation below is the holding that "it is bound by precedent which instructs that economic feasibility is collateral to bond validation proceedings." *Order at 22.* The trial court recognized that SFWMD cannot fund either the full acquisition cost or the cost of infrastructure construction under either its current revenues or any revenue projection presented to the Court.[28] But, despite the clear evidence that what SFWMD intends to do is "economically impossible" (Order at 22), the lower court refused to consider such evidence. Given the lack of a Governing Board finding on this issue, along with the lack of information provided to the Governing Board, this was clear error.

This case is completely different from the cases cited below for the proposition that "feasibility" is off limits. The Court is presented with a claimed public purpose that no one disputes will not be provided by the proceeds of the validation and instead requires billions in *additional* financing that the agency has not plan for obtaining. The size of this necessary future expenditure was hidden

[28] As noted, while SFWMD had construction estimates showing that the total cost would be over $14 billion (A.10, 2092), it has never created any plan or analysis to show where this funding would come from. (A.48, 4055-56)

from the Governing Board. Yet based on motions of deference, the agency asks the Court to presume that projects will magically spring to existence once USSC gets its money.

The central question for this Court is whether any statement of a public purpose, not matter how unrealistic, is sufficient to bind the judiciary under a general rule that to look behind such a statement would question "economic feasibility." Given that the Governing Board was never even given the information by which to review feasibility, and that without question this validation will not achieve the stated purpose, SFWMD's argument stretches this Court's bond validation precedents to the point of absurdity.

V. THE DETERMINATION THAT THE COPS SERVE A PUBLIC PURPOSE IS CLEARLY ERRONEOUS

The trial court found that the "District has demonstrated a valid public purpose warranting partial, but not full, validation of COPs because . . . the District has demonstrated a valid public purpose with respect to the initial purchase of 73,000 acres of land . . . ." *Order at 19-20.* There are two key defects in this finding. First, the purchase of land, without necessary infrastructure, does not achieve the public purpose. Second, the purpose under which SFWMD travels, as stated in the Resolution, cannot be implemented without exercise of the Option.

The central problem on both counts is that SFWMD has no plan or projection showing that it can pay for the infrastructure, the secondary land

purchase, or even the upkeep of the supposed project. Undisputed testimony presented by Appellants showed that the purpose claimed in the Report is wholly unrealistic, to which SFWMD responds not with facts, data or analysis, but with a legal theory whereby nobody save agency bureaucrats is allowed to examine feasibility. The issue of whether the public purpose is real or fictional is a key constitutional issue that should have been reviewed below.

The validation is fatally defective in that the supposed purpose is not intended to be funded by the validation itself. The Resolution (along with the supplements thereto) authorizes a "Land Acquisition Project" but does not claim a purpose from that acquisition. The public purpose is, instead, premised on a different, although nebulous, project, one that has many times the cost and for which no approval or funding is provided.

The "public purpose" outlined in the Resolution and the Report defines the proffered purpose. Axiomatically, if the so-called "River of Grass Acquisition Project" will not accomplish that purpose, the debt issuance for that "Project" cannot be validated. The three authors of the Report all confirmed that the "project" referred to in that document is not the same as the "River of Grass Acquisition Project" for which the debt is being issued.

SFWMD's Chief Everglades Scientist, explained that the word "project" as used in the Report means the acquisition *plus* the infrastructure that would go

along with it.[29] Likewise SFWMD's Executive Director admitted that she could not think "of a water restoration project in the whole world that buying the land by itself is just the project . . . . All benefits in Everglades restoration come from constructing the facilities." (A.10, 2366-67) Other SFWMD witnesses similarly explained that the Report analyzes, not the Acquisition, but construction of reservoirs and large scale constructed wetlands.

None of this is authorized or funded by COPs. All the money sought goes to USSC. SFWMD proceeded below is based on *assumed* infrastructure and a proffered public purpose that has no basis in reality. The Report presumes (but does not analyze the feasibility of) the building of infrastructure costing far more than the land acquisition at issue, yet (i) the bond-validation at issue provides no source of construction funding and (ii) SFWMD has identified no other source for obtaining that funding.[30]

This Court is presented with validation of COPs for 73,000 acres of land – and nothing more. There is no analysis or Governing Board decision as to what might be built there, how it might be built, whether the Option will be exercised and how 73,000 acres will fulfill the Summary of Benefits promise. At the very

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[29] A.46, 3871, 3878-79.

[30] The chief author of the Report, when asked how many years it would take for the full constructions of a project responded with little more than conjecture: "It depends on the future economic condition and other people that are will to help to potentially finance it." (A.10, 1798)

least, some plan or projection showing a reasonable expectation that of being able to build the required infrastructure was required. *See State v. Suwannee County Development Auth.*, 122 So. 2d 190, 194 (Fla. 1960). (Validation request must "set forth in reasonable detail" a public purpose that will flow from the proceeds).

A merely remote possibility of achieving the stated public purpose cannot justify providing public funds to a private entity, particularly where, as here, there is not even a reasonable plan to get from point A to point B. *O'Neill*, 198 So. 2d at 4 (public purpose showing requires "some clearly identified and concrete public purpose as the primary objective and a reasonable expectation that such purpose will be substantially and effectively accomplished."); *Orlando*, 576 So. 2d at 1317-18 (proposed validation must "provide enough details by which its legality can be measured."). Nor does the acquisition of property merely to be leased back to the seller on preferential terms meet any public purpose requirement, regardless of whether or not there is a pledge of *ad valorem* revenues. S*ee Brandes v. City of Deerfield Beach*, 186 So. 2d 6 (Fla. 1966) (denying validation of non-ad valorem revenue bonds); *Suwannee*, 122 So. 2d at 191-92 (denying revenue bonds).

VI. THE PROPOSED ACQUISITION AND FINANCING VIOLATES ARTICLE VII SECTION 10

Article VII, section 10 of the Constitution of Florida prohibits any state agency from "lend[ing] or us[ing] its taxing power or credit to aid any corporation, association, partnership or person." The purpose of this restriction is to "keep the

State out of private business; to insulate State funds against loans to individual corporations or associations and to withhold the State's (or municipal) credit from entanglement in private enterprise." *See Brandes* at 12.

As noted, Appellants presented extensive evidence showing that:

- USSC is to receive full market value for its land and then retain the use of that land for 20 years or more.
- SFWMD has no ability to construct projects on the land and therefore under the lease has no ability to eject USSC.
- USSC is to pay only one-seventh of the public debt cost to farm *all* of the land it "sold". While SFWMD estimates the public will pay over $46 million for the privilege of being USSC's landlord, USSC will, in turn only pay $6 million per year in debt service. This creates significant financial benefit to USSC and operates as a *de facto* public subsidy of its sugar and citrus farming.

See, supra pp. 4-11.

This Court has long held that any public financing must serve a paramount public purpose. The law is clear that the acquisition of land merely to be leased back to the seller does not meet the constitutional public purpose requirement:

- Issuance of revenue bonds for the purpose of buying land and leasing to a private enterprise, "is not for a public purpose or municipal purpose, and furthermore that the City, by the proposed services to be rendered by it, is lending its credit in contravention to the provisions of Sections 5 and 10, Article IX of the Constitution." *See Brandes*, 186 So. 2d at 12 (Fla. 1966) ();
- "it becomes quite clear that insofar as the issue of certificates involved here is concerned it is intended that they be used not for a public purpose, but for a private one, *i.e.* the purchase of land and erection of improvements for lease to a private enterprise." *State v. Suwannee County Dev. Auth.*, 122 So. 2d 190. 191-92 (Fla. 1960)

- "It must, however, be taken as settled law under the *Adams* decision and the previous decision of this court in *State v. Town of North Miami*, 59 So. 2d 779, that a public body cannot use its power and its funds to acquire property, either by purchase or by the exercise of the power of eminent domain, for the sole purpose of making such property available to private enterprises for private use." *State ex reI. Ervin v. Cotney*, 10 So. 2d 346 (Fla. 1958)).

There is no dispute that USSC derives substantial private benefit from this transaction. The court below, disregarded this however, and focuses solely on the claims of "Restoration opportunity" by agency staff.[31] Thus, the determination that the court must blind itself to all issues relating to "feasibility" permeates even this issue and caused the lower court to avoid the fact the paramount purpose of the transaction is to transfer a huge amount of public funds, financed by public debt, into the coffers of USSC.

Fundamentally, the lower court was called upon to look at both the public and private benefits and determine which is primary. "The mere incidental advantage to the public resulting from a public aid in the promotion of private enterprise is not a public or municipal purpose; and the incidental benefits or advantages gained by private enterprise from expenditures made for a public

[31] SFWMD also argued below that the non-appropriation clause means there is no "pledge" of public credit to trigger article VII, section 10. However, as discussed below, in its zeal to accomplish this deal, SFWMD took several steps that make the non-appropriation right illusory. And, in any event, even where there is no ongoing pledge of tax revenue, there is still a requirement that public transaction serve a primarily public purpose. *See Suwannee*, 122 So. 2d at 191-92 (invalidating "revenue anticipation certificates" to be funded by non-tax revenues).

purpose do not vitiate or diminish the public purpose." *Brandes, 186 So. 2d at 12*. By refusing to look at whether any public use would *actually* flow from the financing and Acquisition, the trial court fundamentally misapplied this test.

VII. SFWMD SHOULD HAVE BEEN REQUIRED TO HOLD A REFERENDUM.

Article VII, section 12 of the Constitution of Florida requires that any public financing be approved via referendum when the instruments at issue are "payable from ad valorem taxation and maturing more than twelve months after issuance." There was no dispute below that the COPs will be repaid from SFWMD *ad valorem* tax revenue and that, absent using that revenue source, SFWMD cannot service the debt. This point was, in fact, confirmed by both the Chief Financial Officer of SFWMD and its Budget Director. (A.10, 1662, 1692-93; A.48, 4017). There is likewise no question that the form COP certificate (A.52, 4894-4902) provided by SFWMD specifies a "maturity date," and that SFWMD intends to issue the COPs for a maturity greater than one year from issuance.

The trial court found nonetheless that SFWMD was not required to undertake a referendum based on the view that it had "not pledged its ad valorem taxing powers to pay any sum due under the Master Lease Purchase Agreement or any lease . . . [nor can] any holder of a COP[] compel the District to levy any ad valorem tax to pay any sum due under the Master Lease Purchase Agreement."

Order at 11. This decision was based solely on the language of the agreements, which disclaim any long term obligation.

That, however, is not where the analysis should have ended. As this Court did in *County of Volusia v. State*, 417 So. 2d 968 (Fla. 1982) and in *Frankenmuth Mutual Insurance Company v. Magaha*, 769 So. 2d 1012 (Fla. 2000), the trial court should have looked beyond the language of the agreement and analyzed the effects of the agreements as applied. Had it looked beyond the self-serving claims of SFWMD, the trial court would have found that although the Master Lease in Section 3.5 (A.52, 4796) contains a "non-appropriation" clause whereby SFMWD that is not obligated to continue payments, SFWMD has structured the transaction so that, as a practical matter it could never invoke that out clause.

A proper analysis would have shown that: (i) the lease to USSC is an encumbrance that precludes non-appropriation; (ii) SFWMD would have no substitute for the facilities it has reserved the right to pledge, which include existing water infrastructure "essential to the public" (A.10, 2226/20-25) and (iii) SFWMD has taken two inconsistent positions with regard to the Acquisition, claiming that it is supported by a public purpose of large scale water projects, but ignoring that if such projects existed they would be an integral part of its water supply and flood control infrastructure and could not be casually abandoned.

This situation is clearly distinguishable from this Court's original precedent accepting certificates of participation as not requiring a referendum. In *State v. School Board of Sarasota County*, 561 So. 2d 549 (Fla. 1990), this Court approved COPs to fund construction of schools, secured by those very school buildings. Those facilities were not to be rented and used by any private entity, nor encumbered by any such lease. Each school moreover, has no special value and its functions can be replaced by any other school or by buildings leased from private parties. That is hardly the case here where water supply and flood control infrastructure is to be pledged.

The determination of whether a referendum is required goes beyond the representations of the issuing entity and looks at the actual nature and real world effect of the financing. *See, e.g., County of Volusia v. State*, 417 So. 2d 968, 972 (Fla. 1982). Water and flood control facilities are interrelated and cannot simply be abandoned without detrimental effects upon other facilities. (A.10, 2022). Moreover, the value of the infrastructure greatly exceeds the cost of land, and thus any improved facility cannot be ceded to a trustee just to avoid a land lease without losing far more than what is gained. Given all of this, SFWMD is locked into paying the COPs, and a referendum should be required.[32]

[32] SFWMD's Chief Financial Officer testified that if it signs COPs it would have to continue making payments for the full term. (A.10, 1667-69)

A. The USSC Lease constitutes an encumbrance that prevents exercise of the non-appropriation clause.

The lynchpin to the decision below is the supposed ability to exercise the "non-appropriation" clause in the master lease. However, the Order fails to consider that SFWMD structured the transaction so that this right cannot be exercised. That is because the Master Lease requires SFWMD to return to the land to the trustee free of the encumbrance of the USSC farming lease, while that later lease locks USSC onto a significant portion of the land for 20 years. Any attempt to walk away would lead to substantial liability to SFWMD negating the claim that there is no need for a referendum due to the fact the agency retains "full budgetary flexibility." See *Frankenmuth*, 769 So. 2d at 1025-26 ("full budgetary flexibility" is required to avoid referendum); *Sarasota County*, 561 So. 2d at 552-53 (same).

The Order premises the finding that no referendum is required on the view that

> since the leaseback agreement is a permitted encumbrance, the District retains full budgetary flexibility and its hands are not tied. No obligation, legal or otherwise would prohibit the District from exercising its non-appropriation right under the Master Lease Purchase Agreement.

(Order, A.1., 30-31.) That is simply incorrect.

The Master Lease provides that

> [e]xcept as permitted under this Master Lease, during the Lease Term, each of the Corporation and the Governing Board shall not, directly or indirectly, create or incur, assume or suffer to exist any security interest, pledge, lien charge, encumbrance or claim on any of the

> Facilities or Facility Sites or leasehold interests therein, other than the respective rights of the Trustee, the Corporation and the Governing Board as provided herein.

(Master Lease §§ 6.2 and 6.1, A.52, 4808-10). The lease allows "Permitted Encumbrances", a defined term in the Master Lease, which include individual leases by and between SFWMD and its alter-ego Corporation, *but not the USSC Lease* (A.52, 4784) Thus, the farming lease to USSC is ***not*** a Permitted Encumbrance, notwithstanding the Court's affirmation otherwise. (*Id.*)

Were SFWMD to terminate payment under the Master Lease it could not deliver to the trustee the security required under that agreement, *i.e*, the property free of "any security interest, pledge, lien charge, encumbrance or claim." Indeed, USSC would be occupying the property and SFWMD would have no ability to eject it except for "takedown" (*i.e.*, the construction of projects).[33] (See generally, USSC Lease, §§3 and 4, A.3, 123-25). Given this SFWMD cannot rightly claim that it can simply walk away with no further liability to its taxpayers, the fundamental basis for this Court's prior approval of COPs without a referendum.

[33] Section 3 of the USSC Lease sets an initial term of seven years with the lease to automatically renew for two periods totaling 13 additional years if the option is not exercised. (A.3, 123-24).

B. Were the fictional project under which SFWMD travels to actually exist any right of non-appropriation would not be exercisable and would therefore be illusory.

SFWMD and the trial court travel under a Report that presumes the construction of vast infrastructure, sufficient to convey, store and treat large volumes of water from Lake Okeechobee through the storage and treatment areas and into the Everglades. (A.10, 1788-89). While such a project is merely conceptual and – given no plan or financing for it – will at best exist only on paper at some unspecified point in the future, it is nonetheless the stated public purpose under which SFWMD travels. As such, it is incumbent on the Court to review whether such a project, if it existed, would encumber ad valorem revenues therefore requiring a referendum under Fla. Const. art. VII § 12.

As noted, in this case there is no dispute that the primary funding source for the COP debt service is *ad valorem* revenues, and that the COPs cannot be funded without directly using that revenue. The trial court's holding against a requirement of referendum is the claim that SFWMD has not "pledged" its *ad valorem* revenues, because SFWMD can in any given year exercise a "non-appropriation clause" in the financing documents. (A.10, 1153-54; A.5, 221-22)

This was clear error, as the Court should have considered whether the consequences make such a right illusory. In *Frankenmuth*, for example, this Court looked at a proposed equipment lease for a computer system with a non-

appropriation clause similar to that at issue here. 769 So. 2d at 1015 (describing non-appropriation clause). The lease documents purported to let the agency walk away in any given year and disclaimed any pledge of *ad valorem* revenue, but, in the event these rights were used, the agency would lose use of the computer system and was precluded from obtaining a replacement system from another vendor. *Id*. This Court held that although a legal right to walk away existed, that right was illusory as a practical matter and therefore ineffective to avoid a "pledge." *Id. at 1017* (the inability to obtain substitute equipment "rendered illusory both the non-appropriation clause and the express disclaimer regarding ad valorem taxation…"). The agency could not simply decide to operate without computers and therefore the practicalities "transformed the [lease] agreement into a long-term certificate of indebtedness pledging ad valorem taxes." *Id*. at 1024.

A similar situation exists here, if one assumes the infrastructure necessary for a public purpose is actually built on the acquired land.[34] The project in question would necessarily tie into the water conveyance and flood controls system operated by SFWMD and could not just be handed over to a bond trustee. (A.5, 947-49, 956-58; A.10, 1980-81).

[34] While the non-appropriation problem discussed in this section might not exist absent the building of infrastructure, SFWMD cannot have it both ways asking the Court to presume the infrastructure necessary for a public purpose, but ignore the impact such project would have on SFWMD's ability to simply walk away.

Moreover, the infrastructure would have a value far in excess of these COPs according to SFWMD's own estimates. The infrastructure presumed in the Report would have a cost of over $14 billion or approximately 10 times the value of ***all*** the USSC land. As the SFWMD Executive Director admitted with respect to other similar projects, critical flood control and water supply infrastructure is "essential to the public" and SFWMD could not given up its control under any circumstances. (A.10, 2226) SFWMD also requested the court to assume that the cost will be partially funded by the federal government, which if true would create federal obligations that SFWMD continue its operation (A.10, 1980-81, 2106-08; A.5, 947-48).

The critical infrastructure presumed in the stated public purpose could not simply be turned over to a trustee at a whim. From an engineering standpoint, it would be impossible to simply separate out the type of infrastructure that is presumed in the Report. (A.10, 2116-18; A.5 947-48) And, as the infrastructure would be part of the Central and Southern Florida Project, SFWMD could not cede control absent federal approval.[35]

[35] The Central and Southern Florida Project is the federal project for flood control in South Florida. SFWMD has indicated that it would seek to include facilities under this project, so that partial federal funding could be obtained for projects. Were this to occur, the facilities could not be ceded to private control without violating federal law, agreements and consent decrees. This was extensively discussed in the testimony of Col. Terry Rice, the former Commanding Officer of the Jacksonville branch of the U.S. Army Corps of Engineers. (A.10, 1980-2108;

Thus, there would be no practical ability to walk away from the infrastructure. SFWMD could not simply cease to operate part of its flood control infrastructure to avoid COP payments. Nor could it give up control of $14 billion in infrastructure to save a few tens of million dollars a year in payments. As a practical matter, SFWMD would be locked in if the infrastructure exists regardless of what its lawyers may have written in the lease agreements. As in *Frankenmuth*, the practical impossibility of operating without the critical infrastructure under the lease would "inevitably require the [agency] to appropriate ad valorem dollars to make the lease payment" and accordingly implicates the referendum requirement applicable to long-term debt Article VII section 12.[36]

C. The pledging of key SFWMD projects makes any non-appropriation clause illusory.

For the same reasons discussed above, the pledging of key SFWMD properties would render any non-appropriation right illusory. SFWMD claimed below to be able to avoid a referendum by ceding control of the property pledged as collateral for the COPs. However, it did not address how this could occur if the property it would lose control of to a trustee includes critical public infrastructure.

A.5, 947-58) None of these issues are analyzed in the Order, which looked no further than the non-appropriation language in the Master Lease.

[36] The SFWMD implicitly recognizes this point as it treats the prior 2006 COPs, used to fund water treatment infrastructure, as long-term debt. (A.10, 2180-85, 2207-08). The only funding source adequate to service this debt and the present COPs is ad valorem revenue. (A.10, 1692).

SFWMD's Executive Director confirmed that many of the Properties that potentially could be pledged under broad language of the Second Supplemental Resolution could never be turned over to private control.[37] (A.10, 2226). The decision on what property would be pledged to support the COPs has not been made and is planned by SFWMD to be issued after validation. The trial court and this Court thus had and have no way to know what specific properties would be pledged and what the impact of the pledged property would be on SFWMD's claimed ability to walk away from the COPs in any given year by simply ceding control of the property. All that is known is that SFWMD has reserved for itself the ability to encumber, as security for its supposedly non-recourse debt, a vast amount of critical public infrastructure that its own Executive Director admits could never be ceded to a bondholder trustee. (A.10, 2226-2229).

This creates a fatal defect in the claim that SFWMD can exercise the non-appropriation clause. SFWMD could not lose control of these properties, and any non-appropriation, whenever exercised, would in effect surrender control of all properties under the Master Lease. As SFWMD has sought a right to encumber anything and everything it owns, has left the actual determination of properties to

[37] As noted, the Second Supplemental Resolution allows SFWMD to include under the Master Lease any "land it currently owns." What land would be pledged is unknowable as this would be determined by SFWMD *after* the validation is issued. However, a list of potential targets exists (at A. 17) which contains a number of items of critical public infrastructure over which SFWMD could not lose control.

be encumbered to post-validation decision-making, and has admitted that many of the potential targets of such encumbrance are properties that would preclude non-appropriation, its request implicates the referendum requirement of article VII, section 12. See *Frankenmuth, supra*.

VIII. THE ACQUISITION LACKS NECESSARY LEGISLATIVE APPROVAL

A. SFWMD lacks legislative authority for the Acquisition

As noted there is no Legislative approval for this financing. Nor, is there any Legislative declaration that the "River of Grass Acquisition Project" serves a public purpose. SFWMD argued below to be proceeding under section 373.139, Florida Statutes, which declares that "acquisition of real property" so that "that water and water-related resources be conserved and protected" is a purpose for which "public funds may be expended." Fla. Stat. § 373.139(1). That statute then specifies the types of projects that meet this requirement "flood control, water storage, water management, conservation and protection of water resources, aquifer recharge, water resource and water supply development, and preservation of wetlands, streams, and lakes."[38] Fla. Stat. 373.139(2).

While SFWMD claims it is proceeding to protect water and water related resources, the record showed that the Acquisition will, if anything have the opposite effect. SFWMD's Executive Director agreed that water resource benefits

[38] Purchasing land for continued farming by the seller is nowhere to be found.

claimed cannot exist without the construction of infrastructure on the land. (A.10, 1135-36) Yet, SFWMD presented no plan for any of these uses. Nor did it claim that the Governing Board had approved any project for any portion of the land that would meet the statutory requirements. And, there was not even an attempt to demonstrate any ability, or even reasonable expectation, of SFWMD being able to finance a project for water or water related resources on the land. Buying land for speculative purposes an agency has no ability to implement does not further the requirement that water resources be protected, particularly when other water resource projects have been sacrificed as a result.[39]

B. SFWMD lacks Legislative authority for the financing

The Constitution of Florida requires the state and its agencies to get "each project, building, or facility to be financed or refinanced with revenue bonds" approved by the Legislature before the financing occurs. The approval must be done by general law or by an act relating to appropriations. Fla. Const. art. VII, § 11(f). SFWMD does not assert either that it has obtained this Legislative

[39] Since announcing the purchase of the USSC lands, SFWMD has terminated or deferred other restoration projects, including the Everglades Agricultural Area Reservoir and related restoration projects. (A.10, 1660-61; A.5, 619; A.18, 2532). The EAA Reservoir was a 17,000 acres deep-storage reservoir, the construction of which the circuit court deemed to be essential to the health, safety, and welfare of the citizens of Florida when SFWMD sought validation of previous COPs in 2006.

approval or that it has asked or intends to ask that the Legislature approve the Acquisition Project.

Instead, SFWMD asserts that it is not an "agency of the state" for purposes of subsection 11(f). The trial court agreed and found that although SFWMD is a creature of statute and subject to the Florida Administrative Procedure Act, it is nonetheless *not* a state agency for some purposes. This view that SFWMD can selectively choose when and when not to be a state agency erroneously allowed it to skip the step of Legislative authorization and allowed to subsume Legislative powers and act contrary to general law.

The Legislature has defined "agency" as follows:

> "Agency," as the context requires, means an official, officer, commission, authority, . . . division, bureau, board, . . . or another unit or entity of government.

Fla. Stat. § 20.03(11). SFWMD is, indeed, a state agency and cannot escape the clear constitutional implications. SFWMD, further, is a body that has no inherent constitutional powers, and only powers granted by the statute creating it.[40] *See e.g. Campus Communications v. Dept. of Revenue, State of Florida,* 473 So. 2d 1290,

[40] Furthermore, the recently amended Florida Administrative Procedure Act states that "Statutory language . . . generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute." Fla. Stat. § 120.52 (8)(f); *see also* Fla. Stat. § 120.536 (1). Thus, there is no basis to claim that an executive agency has general legislative authority.

1292 n.1 (Fla. 1985); *State ex rel. Greenberg v. Florida State Board of Dentistry*, 297 So. 2d 628 (Fla. 1st DCA 1974), *cert dismissed*, 297 So. 2d 628 (Fla. 1974.

In the context of taxation and finance, SFWMD itself says that it is an "agency of the state." The financing documents attached to the resolution of SFWMD's Governing Board that authorized the COPs recite that SFWMD is "**an agency of the State of Florida**." (A.52, 4779). The recitation is contained in the forms of the Master Trust Indenture, the Master Lease, and the Ground Lease, all of which will underlie the COPs, if and when issued. (A.52, 4779, 4841, 4909). In the prospectus published by SFWMD in connection with the COPs issued by it in 2006, SFWMD described itself as "an agency of the State of Florida." It is difficult to imagine a context in which SFWMD would not be a state agency. The statutory scheme underlying SFWMD's existence and organization treats all water management districts in the same manner as state agencies.[41]

The trial court below held that although the Legislature defines it as a state agency and that it is an agency of the state for most purposes, this Court's decision

[41] For example, the members of the governing boards of the five districts are all appointed by the Governor and confirmed by the Senate. § 373.073(1), Fla. Stat. Like other state agencies, the appointment of the executive director of each water management district is subject to approval by the Governor and confirmation by the Senate. § 373.079(4)(a), Fla. Stat. The budget for each water management district is submitted each year to the Executive Office of the Governor for approval or disapproval, in whole or in part. Fla. Stat. § 373.536(5). Finally, as is the case with all state agencies, each water management district is a "state agency" subject to periodic "sunset review" by the Legislature under the Florida Governmental Accountability Act. Fla. Stat. § 11.905(1)(f).

St. Johns River Water Management District v. Deseret Ranch of Florida, Inc., 421 So. 2d 1067 (Fla. 1982), provides a basis for SFWMD to escape free of its state agency status in this case and operate without legislative authority. However, *Deseret Ranch* did not decide whether a water management district is or is not a state agency for purposes of subsection 11(f). The issue was entirely unrelated to any part of section 11 of article VII.

Instead, the case decided that the prohibition in subsection 1(a) of article VII against state ad valorem taxes did not prevent the Legislature from authorizing water management districts to levy property taxes so long as the taxes are used for local purposes. This is based on an analysis of the use of the tax proceeds, not whether the issuer is an agency of the state. The Court held that because the ad valorem taxes were used for purposes specifically authorized in Article VII, section 9 they were allowed.

This does not mean that water management districts are free of the requirements of due legislative authority, much less elevated to legislative status. To convolute it into a general exemption from all provisions applicable to the state has no basis in either the language of the constitution of *Deseret Ranch.*[42] It is especially troubling in this case given that the Acquisition was driven by the

[42] The detailed analysis of the Southern District of Florida of whether a water management district is an "arm of the state" also confirms that SFWMD is a state agency. *Grimshaw v. South Florida Water Management District*, 195 F. Supp. 2d 1358 (S.D. Fla. 2002).

Governor's office and that staff of the Florida Department of Environmental Protection were active participants. To allow water management districts to act free of Legislative authority would tear down the fundamental separation of powers allowing the Governor to accomplish indirectly, through his appointees, that which he could not do directly.

Because SFWMD's proposed Acquisition Project has not received the Legislative approval required by subsection 11(f) of article VII, the COPs should not have been validated unless and until the Legislature approves the financing.

CONCLUSION

For the foregoing reasons the Final Judgment of the trial court should be reversed and the validation denied.

Respectfully submitted,

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I hereby certify that the text of this brief complies with the Font requirements of Florida Rules of Appellate Procedure, Rule 9.210(a)

DATED: October 15, 2009

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