IN THE SUPREME COURT OF FLORIDA
CASE NOS. SC09-1817 and SC09-1818 (consolidated)

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
Appellant,

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Appellee

NEW HOPE SUGAR COMPANY,
Appellant,

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Appellee

CONSOLIDATED ANSWER BRIEF OF SOUTH FLORIDA WATER MANAGEMENT DISTRICT

On Appeal from the Circuit Court for the Fifteenth Judicial Circuit
In and for Palm Beach County, Florida
Lower Tribunal Case No. 50-2008-CA-031975XXXXMB

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Citation Note:

Citations to the appellants' joint appendix are in the form "J.A. __"

Citations to the District's appendix are in the form "App. __"

Citations to final judgment being appealed are in the form "Final Judgment __"

STATEMENT OF THE CASE AND OF THE FACTS

The South Florida Water Management District (the "District") adopts, and will not unnecessarily repeat, the findings of fact in the final judgment. While the case has followed a winding path to arrive in this Court, the basic facts are simple.

The District is responsible for the welfare of millions of citizens living in sixteen counties in South Florida. Final Judgment 6 (J.A. 6.); (J.A. 980-81. While the facts of this case are simple, fulfilling the District's mission is not. The District builds and manages flood control and water quality through infrastructure such as reservoirs and water treatment facilities. The District needs land to build such facilities. (J.A. 310-11, 442-44, 448, 513, 528, 537, 955, 1013, 1436, 1769-70, 2011, 2234.) The District has narrow eminent domain powers, so it typically is limited to acquiring land from willing sellers. (J.A. 1415-19, 1775-76.) Once it acquires property, the District undertakes the process of designing site-specific facilities. Then, the District proceeds to build them. (J.A. 1415-16, 1500, 1707, 1775-76, 2245.) The entire process is time-consuming and, by necessity, flexible. (J.A. 995-96, 1420-21.) For the objective of Everglades restoration, which this case involves, the process might take thirty to forty years. (J.A. 1419, 1500-01, 2001-02, 2006-07.)

As environmental awareness has changed over time, so have political priorities. (J.A. 503-04, Garth W. Redfield, Ph.D, Summary of Benefits of USSC

Acquisition 11-16; J.A. 4686-91.) Today, Everglades restoration is a major part of the District's mission. Toward this end, it works closely with the Florida Department of Environmental Protection, the state agency responsible for protecting and restoring the environment. Final Judgment 15 (J.A. 15); (J.A. 1429-30.)

After many years of study involving multiple stakeholders, the general consensus is that restoration and protection of the Everglades requires addition of approximately one million acre-feet of water storage and associated treatment facilities in an area south of Lake Okeechobee known as the Everglades Agricultural Area (the "EAA"). (J.A. 296-298, 302, 416-21, 1405-08, 1413-14.) The EAA contains actively productive farmland. Major landholders include the United States Sugar Corporation ("U.S. Sugar") and its competitor, Florida Crystals, which controls the appellants, New Hope Sugar Company and Okeelanta Corporation (collectively "New Hope"). (J.A. 799, 1438, 1726, 1870, 2090.) For approximately the past decade, the District has been actively acquiring property in the region, in advance of final design of projects. (J.A. 298-99, 310-11, 525-27, 1415-18, 1421, 1497-99, 1622, 1744-48, 1767-69, 1775-76.) Following acquisition, and while final planning and design are underway, the District has been leasing land back to agricultural interests, including Florida Crystals and New Hope, who have continued to farm the land. (J.A. 770, 1768, 1926, 2012, 2162-

64.)

To advance the objective of Everglades restoration by adding approximately one-million acre feet of water storage and related treatment, the Governing Board of the District authorized staff in June 2008 to begin negotiating with U.S. Sugar to acquire its land within and near the EAA. (J.A. 207.) After months of intensive due diligence investigations by staff and outside consultants, the results of which were regularly reported at Governing Board meetings, in October 2008 the Governing Board resolved that acquiring property from U.S. Sugar would advance the District's objective of restoring the Everglades (Governing Bd. Res. 2008-1027 at 3 (Oct. 9, 2008) (hereinafter Res. 2008-1027)(J.A. 4669.) Further negotiations led to an agreement that the Governing Board approved by a 4-3 vote in December 2008. (Tr. Of S. Fla. Water Mgmt. Dist. Governing Board Meeting at 330-54 (Dec. 16, 2008)(J.A. 3835-59.) There was extensive and, at times, heated discussion among Governing Board members over what the ultimate long-term cost of the initiative might be, and whether the District was getting a good deal, but the majority agreed that it was important and valuable to acquire the land while it was available.

The agreement originally provided for acquisition of approximately 182,000 acres, which would have provided for more than one-million acre feet of water storage. As provided in the agreement, due to declining economic conditions, the

parties renegotiated and amended the agreement in May 2009, to provide for immediate acquisition of 73,000 acres and postponed acquisition of up to 107,000 acres. The Governing board approved the amended and restated agreement. (Final Judgment 16 (J.A. 16); Governing Bd. Res. 2009-500 A (May 13, 2008) (hereinafter Res. 2009-500A) (App. 5459-60 (initial purchase) 5521-28(option purchase).)

Consistent with past practice and the District's statutory authority, the agreement provides for the District to lease the land to U.S. Sugar for certain periods while the District proceeds with final design development. During this time, the environment will benefit from more stringent best management practices (or "BMPs") that the lease imposes on U.S. Sugar's practices. (Res. 2009-500A)(J.A. 5723-602); (J.A. 437.) The District has identified specific water resource construction projects to the parcels it will initially acquire. (J.A. 1405-08, 1722-34, 1741-57, 2233-34.) A stakeholder group known as the Water Resources Advisory Committee has begun generating conceptual designs for the projects, with construction expected to begin in approximately two years and then take another two to three years to complete. (J.A. 458, 1764-70.)

To finance the acquisition, the District has established a master lease-purchase program and proposes to issue certificates of participation (or "COPs"). Final Judgment 7-8 (J.A. 7-8.) The trial court expressly found that the proposed

financing was a "classic, annual appropriation, lease-purchase structure that has been consistently approved by the Florida Supreme Court." Final Judgment 30 (J.A. 30.) The District employed the same basic structure in 2006, which was validated by the circuit court (but not appealed). Final Judgment 19, 23 (J.A. 19, 23.) The details of the master lease-purchase program are set forth in paragraphs 11 through 30 of the trial court's findings of fact. Final Judgment 8-14 (J.A. 8-14.) The original complaint in this action sought to validate up to $2.2 billion of COPs to finance the entire master lease-purchase program, under which the first financing was to be the acquisition of the U.S. Sugar property.

The final judgment validated up to $650 million of COPs under the master lease-purchase program, finding that the District's initial acquisition of 73,000 acres is for the objective of water storage and treatment and serves a valuable public purpose. Final Judgment 20-21, 34 (J.A. 20-21, 34.) The trial court declined to validate any further amounts under the master lease-purchase program, such as might be used for acquisition of additional acreage from U.S. Sugar or for ultimate construction of infrastructure, finding that presently the District lacks sufficiently detailed and specific information about how the further acreage will be used. Final Judgment 21-22 (J.A. 21-22.)

The District cross-appealed from the final judgment to preserve the issue of additional financing under the master lease-purchase program. However, to

simplify this matter the District has decided not to pursue that issue in this case. The District will have the opportunity later to file a separation validation action, if necessary, for any additional financing under the program. Accordingly, the District hereby withdraws its cross-appeal.

SUMMARY OF ARGUMENT

This is a simple case, which the appellants attempt to confuse and confound to advance their private interests at the expense of the long-term welfare of millions of citizens of South Florida. While the basic financing structure under review is not unusual or unique, the transaction itself is politically controversial and is strongly opposed by two parties who have litigated for years over issues of Everglades restoration.

The appellants ignore the plain language of governing statutes and constitutional provisions and claim that the District's proposed transaction is an unlawful and arbitrary diversion of public funds to subsidize U.S. Sugar at the expense of previously planned restoration projects. The appellants' arguments are not only factually wrong and legally unsound, they are also collateral to the Court's inquiry in this proceeding under Chapter 75, Florida Statutes. The final judgment is supported by competent, substantial evidence and should be affirmed.

The trial court correctly found that the District has sufficient plans for the use of the initially acquired 73,000 acres, and that such use is for the objective of

conserving and protecting water resources. Final Judgment 20-21 (J.A. 20-21.) Therefore, the acquisition serves a public purpose. *See* § 373.139, Fla. Stat. (2008) ("The Legislature declares it to be necessary for the public health and welfare that water and water-related resources be conserved and protected. The acquisition of real property for this objective shall constitute a public purpose for which public funds may be expended.").

The trial court correctly concluded that the appellants "failed to show that any private benefit to U.S. Sugar is more than incidental to any public purpose." Final Judgment 23 (J.A. 23). For this reason, the transaction complies with Article VII, section 10 of the Florida Constitution. This Court recently reviewed the proper framework for analysis of such issues in *Jackson-Shaw Co. v. Jacksonville Aviation Authority*, 8 So. 3d 1076 (Fla. 2008). The trial court properly applied that analysis and reached the correct conclusion.

The trial court also correctly concluded that the District plans to finance this acquisition by issuing "COP's pursuant to a "classic, annual appropriation, lease-purchase structure that has been consistently approved by the Florida Supreme Court." Final Judgment 30 (J.A. 30.) This Court expressly approved this financing structure in *State v. School Board of Sarasota County*, 561 So. 2d 549 (Fla. 1990), which has been relied upon for nearly twenty years. The District is expressly authorized to issue COPs by section 373.584, Florida Statutes. Because the COPs

do not create an obligation "maturing more than twelve months after issuance," no voter referendum is required by article VII, section 12 of the Florida Constitution.

The appellants raise four other minor arguments, which the trial court properly rejected. Therefore, the final judgment should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

The final judgment comes to this Court with a presumption of correctness. Findings of fact must be considered correct unless patently erroneous. The Court's inquiry is limited to three legal issues: whether the District has the authority to issue the COPs; whether the purpose of the obligation is legal; and whether the COPs issuance complies with the requirements of law. The appellants bear the burden of demonstrating that the record and evidence fail to support the trial court's conclusions. *See, e.g., Strand v. Escambia County*, 992 So. 2d 150, 156 (Fla. 2008); *Boschen v. City of Clearwater*, 777 So. 2d 958, 962 (Fla. 2001).

New Hope wrongly claims that it "is [the District's] burden in this case to show that an actual and paramount public purpose exists." (Appellant New Hope's Brief 21.) To the contrary, the District bears no burden on appeal.

The Court is "not in a position to reweigh the evidence, but must solely determine whether competent, substantial evidence supported the [challenged] decision." Boschen, 777 So. 2d at 968. the trial court was best positioned to assess the evidence and the credibility of witnesses. *See, e.g., Hernandez v. State*,

4 So. 3d 642, 668 (Fla. 2009). Deference to the trial court is particularly warranted here, since it presided over basically the same trial twice (in March and July) and heard from the same witnesses and entertained the same arguments of counsel. There were serious questions concerning the credibility of the appellants' expert witnesses (see e.g., Mar 18 at 874-79), and the trial court had a superior vantage point in seeing and hearing the competing witnesses as they presented conflicting scientific and economic testimony. *See Flood v. Union Planters Bank*, 878 So. 2d 407, 410 (Fla. 3d DCA 2004). This Court should defer to the weight and credibility the trial court afforded to the various witnesses.

II. THE TRIAL COURT'S FACTUAL FINDINGS ARE COMPLETE AND ADEQUATE ON THE RELEVANT ISSUES

The Tribe concedes at page 5 of its brief that the trial court's findings of fact are "correct with a few exceptions." The Tribe then goes on for 17 pages of argumentative narrative to "supplement[] and balance[]" the trial court's findings. Similarly, New Hope improperly weaves legal argument into its 14-page statement of the case and facts. The appellants misconceive the nature of these proceedings, and their attempts to expand this matter to include collateral issues should be rejected.[1]

More than 50 years ago this Court proclaimed: "It was never intended that

[1]This section of the argument responds to the Tribe's argument section III.B (pages 5-21) and to New Hope's argumentative statement of the case (pages 1-14) and argument sections III and IV (pages 21-29).

proceedings instituted under the authority of this chapter to validate governmental securities would be used for the purpose of deciding collateral issues or those issues not going directly to the power to issue the securities and the validity of the proceedings with relation thereto." *State v. City of Miami*, 103 So. 2d 185, 188 (Fla. 1958). Unlike the appellants, the trial court grasped the import of this Court's precedents and properly honored them in its analysis. While the trial court was overly generous in entertaining evidence and arguments about collateral issues, its final judgment properly recognized that the court was not called upon to second-guess the political, financial, or policy considerations underlying the issuance of the COPs. Final Judgment 18, 22-23 (J.A. 18, 22-23); s*ee, e.g., Boschen*, 777 So. 2d at 968; *Panama City Beach Cmty. Redev. Agency v. State*, 831 So. 2d 662, 667-69 (Fla. 2002); *State v. Div. of Bond Fin*., 530 So. 2d 289, 290 (Fla. 1988); *Town of Medley v. State*, 162 So. 2d 257, 257-259 (Fla. 1964).

The trial court, in its final judgment at least, thus avoided the error displayed in *Town of Medley*, where validation was initially denied, in part, on the basis that the proposed plan of financing was "unreasonable and not financially and economically feasible" and "would eventually result in depriving the town of its traditional and necessary operating expenses." On appeal, this Court reversed and observed: "We have consistently ruled that questions of business policy and judgment incident to the issuance of revenue issues are beyond the scope of

judicial interference and are the responsibility and prerogative of the governing body of the governmental unit in the absence of fraud or violation of legal duty." *Town of Medley*, 162 So. 2d at 258-59.

There has been no showing of fraud or violation of legal duty in this case, such as to justify departure from the Court's long-standing refusal to interfere with questions of business policy and judgment. Appellants offered plenty of overblown rhetoric and scandalous remarks at trial, but when called upon to produce supporting evidence, they admitted there was none. (*See* J.A. 23, 751-52, 1145-46, 1148, 2349-53.)

Through pretrial motions and repeated evidentiary objections, the District attempted to keep the validation hearing focused on the proper considerations. Nonetheless, the trial court demonstrated great latitude toward the appellants. Now, the appellants argue that the trial court erred in refusing to clutter the final judgment with their extraneous offerings. In truth, the trial court should have refused to admit their evidence at all, which would have prevented the appellants from going so far off track at every turn. *See, e.g.*, *Warner Cable Commc'ns, Inc. v. City of Niceville*, 520 So. 2d 245, 246 (Fla. 1988) (trial court properly struck arguments concerning the economic and fiscal feasibility of the project proposed to be financed by bonds);[2]

[2]A later case explains in more detail the nature of the evidence that this Court determined was properly rejected as "not cognizable" in a bond validation

The District did not attempt to prove financial feasibility, which is a collateral issue irrelevant in these proceedings. But beginning as early as June 30, 2008, the Governing Board heard and considered evidence regarding the nature of the initiative, the use of the land, and the benefits to be achieved. (J.A. 2007.) It is

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proceeding: "[T]he evidence proffered . . . . primarily concerns the subjects of political, financial, or economic feasibility, need, and necessity of the project and business policy and judgment, which were not shown to be due to fraud or violation of legal duty by the city and are matters beyond the scope of a bond validation proceeding." *Byrd v. City of Niceville*, 541 So. 2d 696, 697 (Fla. 1st DCA 1989). *See also, e.g., Noble v. Martin County Health Facilities Auth*., 682 So. 2d 1089, 1090-91 (Fla. 1996); , *Murphy v. City of Port St. Lucie*, 666 So. 2d 879, 880 (Fla. 1996) ("We find that whether the City failed to consider the reasonable price of the utility during the acquisition from the county is a collateral issue and beyond the scope of these validation proceedings."); *Partridge v. St. Lucie County*, 539 So. 2d 472, 473 (Fla. 1989) (whether drainage improvements were needed was political question that falls exclusively within power of the board); *Taylor v. Lee County*, 498 So. 2d 424, 425 (Fla. 1986) (rejecting as collateral challenger's argument that issuer could not satisfy obligations because it lacked authority to impose tolls); *DeSha v. City of Waldo*, 444 So. 2d 16, 18-19 (Fla. 1984) (trial court properly excluded proffered evidence concerning the necessity for and reasonableness of project; finding challengers, "as citizens who oppose the project on policy grounds, are merely seeking a second hearing in this Court of policy matters already decided by governing body); *Nat'l Airlines v. Dade County*, 76 So. 2d 277, 278 (Fla. 1954) (trial court properly denied proffer of evidence of contract that challenger argued was violated by bond issuance due to allegedly insufficient revenues to pay obligations); *State v. City of Daytona Beach*, 431 So. 2d 981, 983 (Fla. 1983) ("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"); *State v. Sunrise Lakes Phase II Special Recreation Dist.*, 383 So. 2d 631, 632 (Fla. 1980) ("The wisdom or desirability of this type of bond issue is not a matter for our consideration. Our review concerns only the legal validity of the bonds."); *Coldewey v. Bd. of Pub. Instruction of Gulf County*, 189 So. 2d 878, 881 (Fla. 1966)

apparent from the 4-3 vote in December 2008, and the related transcript of the two-day hearing, that the Governing Board was very concerned about the financial feasibility of the transaction. Tr. of S. Fla. Water Mgmt. Dist. Governing Bd. Meeting (Dec. 15, 2008) (J.A. 3295-505); Tr. of S. Fla. Water Mgmt. Dist. Governing Bd. Meeting (Dec. 16, 2008) (J.A. 3506-860 (esp. 3810-858).) From previous restoration projects, such as the EAA reservoir, the Governing Board members have extensive personal experience with construction costs of major restoration projects. (J.A. 330-31.) When the Governing Board met in May 2009 to consider and approve the final transaction (which is what the trial court validated), it had before it the culmination of all of its meetings since June 2008 ***and*** much of the evidence generated during the February and March validation hearing, including the testimony of opposing expert witnesses and opposing counsel's cross-examination of District employees concerning the ultimate cost of completing all of the planned construction. (J.A. 4110-302.) It was correct for the trial court not to second-guess the Governing Board's analysis and policy conclusions.

III. THE PURPOSE OF THE COPs IS LEGAL

The appellants attack the trial court's finding that the District demonstrated a valid public purpose for the COPs.[3] *See* Final Judgment at 19-23 (J.A. 19-23.) In

[3]This section of the argument responds to the Tribe's argument section III.C.2 (pages 22-28) and to New Hope's argument section V (pages 29-32).

the appellants' view, the acquisition of the U.S. Sugar land is an illegitimate "mere first step" that has no purpose in and of itself. The trial court correctly found otherwise.

The Governing Board determined that the proposed project serves a public purpose and a paramount public purpose. *See* Governing Bd. Res. 2008-1027 (Oct. 9, 2008) (hereinafter, Res. 2008-1027) (J.A. 4666-939); Governing Bd. Res. 2009-500A (May 13, 2009) (hereinafter, Res. 2009-500A) (App. 5454-6034.) The trial court found sufficient evidence to validate the initial purchase of 73,000 acres. *See* Final Judgment at 20-21 (J.A. 20-21.) This Court cannot find either determination patently erroneous. To the contrary, the Governing Board's action and the final judgment are wholly consistent with the Florida Legislature's express declaration on this exact issue: "The Legislature declares it to be necessary for the public health and welfare that water and water-related resources be conserved and protected. ***The acquisition of real property for this objective shall constitute a public purpose for which public funds may be expended***." § 373.139, Fla. Stat. (2008) (emphasis added); *see* § 373.019(26), Fla. Stat. (2008) (defining "works of the district" to include "accompanying lands"); *see also* § 373.016(3), Fla. Stat. (2008).

The trial court properly rejected the appellants' arguments that the proposed project does not serve a public purpose. The gist of the appellants' position is that

the District is "acquiring land only," does not have final plans for exactly what use to make of the property, and has not demonstrated the financial feasibility of the proposed program. The trial court correctly found that the District does have plans for the property, namely, storage and treatment of water. *See* Final Judgment 20 (J.A. 20.) As admitted by defendants' own expert witnesses, surface water storage and treatment is a valid public purpose. (J.A. 978-79, 2164.) The District cannot store surface water without land. (J.A. 310-11, 442-44, 448, 513, 528, 537, 955, 1013, 1436, 1769-70, 2011, 2234.) The District is expressly authorized to acquire land and to issue COPs to finance such acquisition. §§ 373.089, 373.139, 373.584(1), (4), Fla. Stat. (2008).

The appellants completely ignore the plain and dispositive statutory language, particularly section 373.139, Florida Statutes, which authorizes the District to acquire land for the objective of conserving and protecting water and water-related resources. The appellants would remove the term "objective" from the statute, and require that any acquisition of land somehow magically result in the immediate materialization of mature construction projects. The plain meaning of the word "objective" is "serving as a goal; being the object of a course of action." *American Heritage Dictionary of the English Language* 905 (1981). Similarly, the word "goal" means "the purpose toward which an endeavor is directed; an end; objective." *Id.* 564. The record is replete with competent

substantial evidence that the District's objective in acquiring the U.S. Sugar land is to further Everglades restoration and thereby conserve and protect water-related resources. Even while the appellants soar in their rhetoric—suggesting that this case threatens to "usher in a new era of government land speculation" (Tribe Br. 28) and that the District is taking a "foray into land speculation" (New Hope Br. 18)—they have not and cannot deny or disprove that the District's objective is wholly aligned with its express statutory authority. It is not as though the District has set out to develop shopping centers or condominiums.

The appellants likewise ignore the Chapter 373 broad definition of the term "project." Subsection 373.584(4)(b) defines "project" to mean "a governmental undertaking approved by the governing body of a water management district and ***includes all property rights***, easements, and franchises relating thereto and deemed necessary or convenient for the construction, ***acquisition***, or operation thereof, and embraces any capital expenditure which the governing body of a water management district shall deem to be made for a public purpose" (emphases added). This broad definition is the same as that applied to municipal borrowing by home-rule jurisdictions. *See* § 166.101(8), Fla. Stat. (2008). For financing purposes, the District's powers and authority are coextensive with those of home-rule jurisdictions. *See* § 373.584(2), Fla. Stat. This is the operative definition of the term "project," which the appellants simply fail to address. Instead, the

appellants' base their entire case on their own invented narrow definition, where "project" means only "concrete" fully-developed construction of a water treatment or storage facility.

The appellants cling to *State v. Suwannee County Development Authority*, 122 So. 2d 190 (Fla. 1960), for the general proposition that it is illegal to seek to finance a "first step" of a larger undertaking. That proposition may have been the specific holding of *Suwannee County* based on its specific facts—where the only plan or program envisioned at the time of the proceedings was the purchase of unidentified land and construction thereon of unspecified structures for lease to unknown private industries, which the issuing development authority hoped to attract into the county. The authority's only definite plan was to use the majority of the proceeds for the purchase of land and construction of buildings. There were no definite plans as to what land would be purchased, what buildings would be constructed, or to what firm or person they would be leased. The authority had not yet devised *any* broad program or project.

The logic of *Suwannee County* cannot be stretched to this case, where, by contrast, the District (along with many other interested stakeholders) has been working for years on the complicated issues involving Everglades restoration, knows what land it needs, knows to what statutorily-authorized and mandated purposes it will be put (that is, approximately one million acre-feet of water

storage and treatment (J.A. 296-98, 302, 1405-08.) and, based on decades of collaborative research and policy development with many private stakeholders and other federal, state and local government bodies, knows generally the projects necessary to accomplish those purposes (that is, construction of reservoirs and treatment facilities).

The appellants' cramped reading of the law is not only legally unsound, it is also naively unworkable in practice. There is no way that government bodies—particularly a government body like the District with comprehensive, long-term, responsibilities—can act in the manner demanded by the appellants. Two federal judges have recognized the complicated nature of Everglades restoration and the opportunity this land acquisition presents. The parties have consistently testified that restoring the Everglades is a complex undertaking that can take at least 30-40 more years to complete. (J.A. 1419, 1500-01, 2001-02, 2006-07.) The planning process takes a long time, and stakeholders, including the public, are vital to the planning process. (J.A. 2006-07.)

While the planning process continues, the District will receive a guarantee, by virtue of ownership and the option, that the land will not be developed by others. (J.A. 299, 1414-16, 1419-21, 1767-69.) Undoubtedly, there is a public benefit to leasing the land back to U.S. Sugar during the planning process, in addition to the lease revenue. The other alternatives of allowing the land to go

fallow or allowing it to be developed into subdivisions would be worse than allowing the farming to continue, as the appellants' own witnesses admitted. (J.A. 1767-69, 2012, 2162-64.)

The appellants' arguments ignore the District's statutory authority, the foregoing practical realities, and the evidence of how the District actually operates. The District typically acquires land that it, in its reasoned judgment, determines is necessary to advance its public purposes (as reflected throughout chapter 373). Multiple witnesses so testified, and the appellants offered no contrary testimony. (J.A. 298-99, 310-11, 525-27, 1415-18, 1421, 1497-99, 1622, 1744-48, 1767-69, 1775-76.) Substantial, competent evidence supports the trial court's conclusion that the District's proposed acquisition is for the objective of preserving and protecting water resources. The Governing Board was presented with detailed land condition information. (App. 5396-421.) The trial court had the benefit of not only that evidence, but also the sworn testimony of witnesses who tied specific parcels to specific water resource projects. (J.A. 1405-08, 1722-34, 1741-57, 2233-34.)

Beyond the District's clear statutory authority to acquire land only, for later use in water resource projects, general constitutional principles belie the appellants' position. In this regard, it is legitimate and instructive to consult eminent domain cases, because the "standard for determining the question of

'public purpose' is the same under Article VII, Section 10 [of the Florida Constitution, which governs bonds] and Article X, Section 6 [which governs takings]." *State v. Miami Beach Redev. Agency*, 392 So. 2d 875, 885 (Fla. 1980).

One such case is *Wright v. Dade County*, 216 So. 2d 494 (Fla. 3d DCA 1968), where challengers argued that the county's planned condemnation of land did not serve a public purpose. The county planned to develop a hospital complex, and to acquire additional land adjacent to the planned complex, for construction of clinical, research and teaching facilities of the University of Miami Medical School. The challengers contended the plan was illegal, because the county had not yet prepared plans for construction or even determined the exact use to which the challengers' land would be put. The court rightfully rejected their argument:

> ***[I]t is not necessary that the officials proceed to make immediate use of the property thus acquired, or that they have "plans and specifications prepared and all other preparations necessary for immediate construction before it (the county) can determine the necessity for taking private property for public purpose."*** *Carlor Co. v. City of Miami, Fla.1953, 62 So. 2d 897.*
>
> It is clear that the basis of this taking was the county's conclusion that there was a need of additional land for anticipated growth and expansion of the hospital complex. As stated in the *Carlor* case, "***It is the duty of public officials to look to the future and plan for the future.*** In erecting public buildings and public improvements, it is likewise the duty of public officials to build and plan not only for the present but for the foreseeable future." Further in that case the Supreme Court held that failure of county officials to so plan for future expansion of a public facility would represent a dereliction in the performance of their duties, and said: "***The hands of public officials should not be tied to the immediate necessities of the***

> ***present but they should be permitted, within reasonable limitations, to contemplate and plan for the future***."
>
> The necessity of the taking and the amount of land reasonably needed for the anticipated expansion of the medical facilities were matters for determination which rested within the discretion of the county officials. *City of Miami Beach v. Hogan*, Fla.1953, 63 So. 2d 493. In the absence of a showing of fraud or bad faith, the legislative findings of those officials in that respect should not be upset without "strong and convincing evidence of the most conclusive character." *Rott v. City of Miami Beach*, Fla.1957, 94 So. 2d 168, 173.

Wright, 216 So. 2d at 496 (emphases added).

The principles articulated by this Court in *Carlor Co. v. City of Miami*, 62 So. 2d 897 (Fla. 1953), and discussed and applied in *Wright*, amply support the District's actions in this case and reveal the absurdity of the appellants' view. A government taking of private property can serve a "public purpose" even where the government body does not have money on hand, has not prepared plans and specifications, and is otherwise not prepared to proceed with construction on the land. *See Cent. & So. Fla. Flood Control Dist. v. Wye River Farms, Inc.*, 297 So. 2d 323, 326-27 (Fla. 4th DCA 1974);[4] *see also, e.g., Dade County v. Paxson*, 270 So. 2d 455 (Fla. 3d DCA 1972) (county was not required to provide details of internal placement of improvements within property before acquiring property); *Road Dep't v. Southland, Inc.*, 117 So. 2d 512 (Fla. 1st DCA 1960) (not gross abuse of discretion for department to determine public necessity for acquisition of

[4]The Central and South Florida Flood Control District is the District's predecessor.

land before funds had been allocated, before department had completed detailed engineering plans, construction drawings and specifications, and before department could determine when construction would commence).

These "public purpose" principles applied in Florida are consistent with other jurisdictions. For example, in *Sellors v. Town of Concord*, 107 N.E.2d 784 (Mass. 1952), the challenger argued that a taking was invalid because the planned use of the property was not allowed under applicable laws. The challenger argued that the town could not "take the land merely in the hope or expectation that at some indefinite time in the future it might be authorized to use it for the purposes for which it was acquired." *Id.* at 261. The court rejected this argument in *Sellors*, just as this Court should reject appellants' identical argument in this case:

> Obviously in the carrying out of the projects contemplated by the town ***many steps must be taken, and they cannot all be taken at once***. The town would hardly be in the position to ask the board of appeals for permission to use the land for municipal purposes before it had acquired the land. It would have to appropriate funds for the construction of the proposed buildings. And, conceivably, it might have to borrow money for this purpose. Very likely the services of an architect would be required and authority to employ him would be necessary. Perhaps building permits would also be required. ***It is possible, therefore, that the proposed buildings might never be built*** because of the failure of the town to obtain or grant authority with respect to one or more of these matters. ***But it would be unreasonable to hold that the town could not exercise the power of eminent domain until all steps necessary to the carrying out of the projects had been taken***.

Id. at 262-63 (emphases added); *see Seward County Bd. of Comm'rs v. City of*

Seward, 242 N.W.2d 849, 852 (Neb. 1976) (quoting and applying this portion of *Sellors*).

What was true in *Sellors*—"many steps must be taken, and they cannot all be taken at once"—is all the more true here, where the overall program is much more complex, expensive, and time-consuming.

Moreover, there is a practical logic to the sequence of the many necessary steps, which the appellants would entirely reverse. The District must own land to accomplish its purposes. The Court cannot reasonably conclude that the District must design and engineer all of its capital projects to be built on a piece of land before it is authorized to acquire the land. Such a rule would be unworkable, not least because final designs are site-specific. (J.A. 1770-71.) In addition, the market for land is much more uncertain, short-lived and unique than the planning and design process. The structure of the U.S. Sugar transaction allows the District to act now to acquire interests in the property while also giving it time to complete the necessary engineering of the water resource structures to build on the land, which may take upwards of five years. (J.A. 1758-70.) This sequence and timing is authorized by the District's governing statutes. Section 373.056(4), Florida Statutes, expressly authorizes the District to dispose of surplus lands. This authorization necessarily implies that the District previously acquired lands that it ultimately did not require for a final construction project or other need.

IV. THE TRANSACTION COMPLIES WITH ARTICLE VII, SECTION 10

The appellants argue that the transaction violates article VII, section 10 of the Florida Constitution, which provides that the District shall not "give, lend or use its taxing power or credit to aid any corporation, association, partnership, or person," with certain exceptions.[5] Having "carefully considered" such arguments, the trial court properly rejected them: "Defendants have failed to show that any private benefit to U.S. Sugar is more than incidental to any public purpose." Final Judgment at 23 (J.A. 23.)

By invoking Article VII, Section 10, the appellants attempt to heighten the Court's scrutiny of the transaction. The trial court's analysis was consistent with this Court's recent decision in *Jackson-Shaw Co. v. Jacksonville Aviation Authority*, 8 So. 3d 1076 (Fla. 2008), and its earlier decision in *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304 (Fla.1971).[6]

As this Court has explained, the term credit "implies the imposition of some new financial liability . . . which in effect results in the creation of a [public] debt for the benefit of private enterprises." *Jackson-Shaw*, 8 So. 3d at 1095. If the District has not assumed the obligation to pay a debt of a third party with public

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[5]This section of the argument responds to the Tribe's argument section III.C.3 (pages 28-30) and to New Hope's argument section VI (pages 32-35).

[6]New Hope ignores the difference when it asserts, "This Court has long held that ***any*** public financing must serve a paramount public purpose." (New Hope Initial Br. 33 (emphasis added).)

funds, and no District property is placed in jeopardy by default of the third party, then the District has not lent its credit.

Here, as in *Jackson-Shaw*, the District is not lending its credit to U.S. Sugar. The District's participation in the lease with U.S. Sugar is limited to that of lessor. The District has no responsibility for financing, promoting, or developing U.S. Sugar's use of the land. The District bears no direct or indirect obligation to pay any debt of U.S. Sugar, and the District's fee simple interest in the land is not obligated, encumbered or in any way placed in jeopardy by any potential default of U.S. Sugar.

Even if the transaction could be deemed a favorable deal for U.S. Sugar at the District's expense, that does not obligate or in any way encumber the District's credit to the advantage of U.S. Sugar. *See Jackson-Shaw*, 8 So. 3d at 1094-97. Here, U.S. Sugar will immediately surrender its fee simple interest in the land to the District, and, after maintaining the land for several years under terms of a lease with heightened protections for the District and the public good, the company ultimately will lose possession and the District will have at its disposal an unprecedented amount of land well-situated for surface water storage and treatment purposes. The longer term public good substantially outweighs any short term private advantage, which is merely incidental.

Section 373.093, Florida Statutes, empowers the Governing Board to lease

any lands or interests in land to which the District has acquired title, or to which it may acquire title, as long as the lease is consistent with the purposes for which the lands or any interests in land were acquired. A leaseback to a seller is consistent with the needs of the District in maintaining the land and asserting land management controls consistent with ownership during the period of time the District develops the detailed specifications and Projects to be built on the lands. In fact, the evidence shows that the District has in the past leased back to sellers other lands that the District plans to restore in the future, and appellants' own experts conceded that this a reasonable and prudent practice. (J.A. 2012, 2162-64.)

In sum, the trial court correctly found that the District is not pledging or lending its credit to U.S. Sugar. Accordingly, the trial court did not undertake to determine whether the transaction served a "paramount" public purpose. But, even under the heightened standard, the transaction would pass muster and this Court should find a paramount public purpose. This case is categorically different from the typical case involving issuance of debt to finance some activity of a private entity on public land. *See, e.g.*, *State v. Osceola County*, 752 So. 2d 530, 535-39 (Fla. 1999) (finding paramount public purpose and validating bonds to finance convention center); *Poe v. Hillsborough County*, 695 So. 2d 675 (Fla. 1997) (finding paramount public purpose and validating bonds to finance sports stadium). Here, the public purpose is to manage and treat surface waters for the ultimate

purpose of protecting, preserving and restoring a singularly significant eco-system on the planet, the Everglades, along with Florida's inland lakes and coastal estuaries. Weighed against such a great public good, the value of even a no-payment lease would be incidental.

V. THE TRANSACTION DID NOT REQUIRE A VOTER REFERENDUM

The appellants contend that article VII, section 12 of the Florida Constitution requires the District to obtain referendum approval before issuing the COPs.[7] The trial court properly rejected this argument. *See* Final Judgment at 29-32 (J.A. 29-32.)

Article VII, section 12 governs local bonds, as opposed to state bonds,[8] and provides (emphasis added):

> Counties, school districts, municipalities, special districts and local governmental bodies with taxing powers may issue bonds, certificates of indebtedness or any form of tax anticipation certificates, ***payable from ad valorem taxation and maturing more than twelve months after issuance*** only:
>
> > (a) to finance or refinance capital projects authorized by law and only when approved by vote of the electors who

[7]This section of the argument responds to the Tribe's argument section III.C.4 (pages 30-39) and to New Hope's argument section VII (pages 35-45).

[8]New Hope's argument on this point is inconsistent with its argument in section VIII of its brief, where New Hope contends that the District is a state agency (in which case it would be governed by Article VII, Section 11). The District's position is that it is governed by–and has complied with–article VII, section 12.

> are owners of freeholds therein not wholly exempt from taxation; or
>
> (b) to refund outstanding bonds and interest and redemption premium thereon at a lower net average interest cost rate.

Subsection 12(a) requires a referendum only when both of the emphasized conditions are met, that is, when an obligation is payable from ad valorem taxation and maturing more than twelve months after issuance. In this case, neither condition is satisfied, so the trial court properly concluded that a referendum was not required.

A. Background of COPs and Lease-Purchase Financing

The Court recently addressed article VII, section 12 issues in a trilogy of decisions: *Strand*, 992 So. 2d at 150; *Bay County v. Town of Cedar Grove*, 992 So. 2d 164 (Fla. 2008), and *City of Parker v. State*, 992 So. 2d 171 (Fla. 2008). While these cases are obviously instructive, it is important to note that they are not directly on point. Unlike *Strand*, this case does not involve tax-increment financing. Unlike *Town of Cedar Grove* and *City of Parker*, this case does not involve the Community Redevelopment Act (as did *Miami Beach*, 392 So. 2d at 875). The directly controlling authorities are *School Board of Sarasota County*, 561 So. 2d 549 (Fla. 1990), and *State v. Brevard County*, 39 So. 2d 461 (Fla. 1989), which addressed COPs and lease-purchase financing. Although the initial *Strand* decision on September 6, 2007, receded from *School Board of Sarasota County*, this Court quickly and unanimously restored that authority in its revised

opinion on September 28, 2007. The unanimous revised opinion on September 28, 2007, recognized (in note 8 on page 24) that COPs were different and would not require a referendum, even if the Court receded from *Miami Beach*, because they do not "matur[e] more than twelve months after issuance." Ultimately, in September 2008 the Court issued its final revised opinion in *Strand* and re-affirmed *Miami Beach*, so it was not necessary to point out that a reversal would have no effect on *School Board of Sarasota County*.

The September 28, 2007, unanimous revised opinion in *Strand* properly reflects that lease-purchase financing and COPs have unique and important features that must be understood for proper constitutional analysis.[9] Unlike a "true lease," where the lessor remains the true owner, with a lease-purchase arrangement the lessee acquires the leased asset over time. Either type of lease structure can be "full-payout" or "annual." Under a full-payout lease, there is a fixed lease term during which an investor receives (through rent payments) the initial investment in the leased asset plus the agreed rate of return on that investment. The lessee does not have an option to terminate the lease before its originally established termination date, and any attempt to do so results in default and damages. By

[9]The following few pages of background explanation of lease-purchase financing and COPs draw from the Brief of Amicus Curiae in *State v. School Board of Sarasota County*, Case No. 74,979 (Dec. 18, 1999), filed on behalf of the Florida School Boards Association, Inc. The explanation is very useful for a complete understanding of the basis of this Court's ruling in that case.

contrast, and as its name applies, an annual lease is subject to termination on an annual basis at the option of the lessee. The trial court correctly found as a matter of fact that this case involves an annual lease purchase structure, under which the District will decide annually whether to appropriate funds to make rent payments in the next fiscal year. The District is free not to appropriate such funds, and cannot be compelled to do so. Final Judgment at 11 (J.A. 11); Master Lease Purchase Agreement §§ 3.1, 3.5 (J.A. 4793-97.)

The trial court also correctly described the role of the Leasing Corporation, which acts as the nominal lessor. Nominal lessors are common in lease-purchase government financing, particularly where, as here, there is a master lease structure that ultimately will involve multiple sellers, developers, and/or contractors. *See, e.g., School Board of Sarasota County*, 561 So. 2d at 550-51 (describing role of not-for-profit entities acting as nominal lessors).

Lease financing obligations differ from the various bond financing obligations typically addressed in decisions under Chapter 75, Florida Statutes. The basic form of "constitutional debt" is a general obligation bond, that is, a pledge of the government's full faith and credit and taxing power. A full-payout lease might be secured by full faith and credit, in which case it would require the same legal formalities as any other general obligation bond, including a referendum. However, this case does not involve a full-payout lease and is not

secured by a pledge of full faith and credit. Rather, this case involves an annual lease that expressly disclaims such security, as the trial court correctly found. Final Judgment at 11 (J.A. 11); Master Lease Purchase Agreement § 3.1 (J.A. 4793-95.)

The second typical type of bond is a revenue bond, which is secured by a pledge of non-ad valorem revenues.[10] While the District's authorizing statute includes COPs under its definition of bonds in Subsection 373.584(4)(a), Florida Statutes, it is significant to realize that an annual lease is not typically secured by a pledge. Typically, and in this case, nothing is "pledged" because at the end of every fiscal year the lessee is free to non-appropriate for rental payments and instead to use the very same monies to acquire or lease substitute facilities or for any other lawful purpose. Thus, it is incorrect to speak of the District "pledging" anything with respect to the COPs, or to use other misnomers loosely, which do not apply to annual lease-purchase financing.

The annual lease in this case also lacks a "covenant to budget and

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[10]While ad valorem revenues might also be used to pay a revenue bond, the issuer does not pledge to do so; that is, the issuer does not pledge its taxing power, and no bondholder can compel the issuer to levy ad valorem taxes to satisfy bond obligations. This bright-line distinction was made in *State v. City of Miami*, 152 So. 6, 13 (Fla. 1933), and continually developed and applied in the line of cases including *Seaboard Air Line Railroad Co. v. Peters*, 43 So. 2d 448 (Fla. 1949), *Town of Medley*, 162 So. 2d at 258, *Tucker v. Underdown*, 356 So. 2d 251, 254 (Fla. 1978), *Miami Beach*, 392 So. 2d at 898-99, and culminating in *Strand*, 992 So. 2d at 157-59.

appropriate," through which a government may promise to budget and appropriate monies to make debt service payments from unspecified non-ad valorem revenues. *Cf. State v. City of Daytona Beach*, 431 So. 2d 981, 983 (Fl. 1983). Here, the District does not covenant to appropriate, and it has absolute discretion to determine whether or not to do so. *See* Master Lease Purchase Agreement § 3.5 (J.A. 4796-97.) In this way, the lease never goes beyond one year unless and until the District affirmatively determines that it will for another twelve-month period. Any "obligation" of the District is always created at the beginning of a fiscal year and never continues beyond the end of that fiscal year, thus preserving the integrity of the lease purchase transaction under article VII, section 12.

The COPs structure is simply a way of funding the lease through multiple investors, which is an attractive feature for large government projects. This is accomplished by assigning the lease to a trustee (here, Deutsche Bank), which then shares its rights with others (who "participate" in the lease). An actual COP is merely a piece of paper (or other token) which evidences an investor's ownership of a share or a participation in the lease. The COP is not a separate security or obligation. Where, as here, the lease is an annual lease subject to non-appropriation, no obligation goes beyond the current fiscal year; in the event of non-appropriation, a COP owner has no rights against the lessee beyond the termination of the lease and simply sharing pro rata in the proceeds of the

liquidation or (as in this case) the re-letting of the leased asset.

B. *School Board Of Sarasota County* Was Correctly Decided And Should Not Be Disturbed

Given these unique features of lease purchase financing and COPs, and how they differ from constitutional "debt," this Court was on solid ground when it approved this approach, first in *State v. Brevard County* (for equipment) and then in *School Board of Sarasota County* (for facilities). The transaction structure developed over a long period of time, and throughout the country, in response to unique demands on governments and within similar constraints on constitutional "debt." *See* Reuven Mark Bisk, *State and Municipal Lease-Purchase Agreements: A Reassessment*, 7 Harv. J.L. & Pub. Pol'y 521, 522-23 (1984), *cited in School Bd. of Sarasota County*, 561 So. 2d at 551 n.4; *see generally* George M. Mardikes et al., *Government Leasing: A Fifty State Survey of Legislation and Case Law*, 18 Urb. Law. 1 (1986) (survey by Association of Governmental Leasing and Finance). In approving this annual lease-purchase structure twenty years ago, this Court placed Florida among an overwhelming majority of jurisdictions that have done so —without a requirement for referendum approval and consistent with limits on constitutional "debt." *See In re Anzai*, 936 P.2d 637, 640-41 & n.6 (Haw. 1997) (collecting cases and citing *State v. Brevard County* to include Florida among 22-state majority position compared to 2-state minority position). Today, throughout the United States the COPs "structure is widely used by governments for lease-

backed financing property and equipment." The Bond Market Association, *The Fundamentals of Municipal Bonds* 57 (5th ed. 2001).

C. This Transcaction Is Squarely Within *School Board Of Sarasota County*

The trial court correctly found that the proposed transaction follows a classic, annual lease-purchase COPs structure that has been consistently approved by this Court. Final Judgment 30 (J.A. 30.) This structure allows the District to maintain full budgetary control in a fashion identical to that approved in *School Board of Sarasota County* and *Brevard County*. *Id.* 31 (J.A. 31.) Because there is no "obligation maturing twelve months after issuance," no referendum is required under article VII, section 12.

In addition, the trial court properly concluded that article VII, section 12 is not triggered because COPs are not payable from ad valorem taxation. The trial court rejected the reasoning advanced by the appellants and reaffirmed the long-held distinction between (1) pledges of the ad valorem *taxing power* and (2) use of ad valorem tax revenues. *See Strand*, 992 So. 2d at 157-59; *see also* note 12 above. *Strand* is wholly consistent with the relevant statutory language here, which provides that "the ad valorem ***taxing powers*** of the district may not be pledged . . . without compliance with the requirements of the State Constitution," rather than speaking in terms of use of tax revenues. § 373.584, Fla. Stat. (2008). The trial court correctly analyzed the substance of the proposed transaction

proposed by posing and answering the critical constitutional question: does the transaction directly or indirectly obligate the District to impose taxes in order to support the annual lease purchase obligations? Stated more precisely, can a holder of that obligation compel the District to exercise its taxing powers? Because the answer to this question is "no," a referendum is note required under article VII, section 12.

D. The Appellants Fail To Distinguish This Transaction From The Court's Clear Precedents

In their selfish zeal to advance their private interests, the appellants would ignore the logic and experience of public finance law and practice in Florida and throughout the country. Unable or unwilling to see beyond this particular case, they press a multitude of unfounded arguments and theories, many of which this Court has already considered and rejected.

1. <u>The District Maintains Budgetary Flexibility</u>

The Tribe leads (at pages 30-34 of its brief) with *County of Volusia* v. *State*, 417 So. 2d 968 (Fla. 1982), suggesting that a referendum is required merely because the District will use ad valorem tax revenues for part of the debt service. The Court expressly rejected this reasoning *School Board of Sarasota County*. *See* 561 So. 2d at 552-53. The fatal flaw in *County of Volusia*, absent here, is that the issuer covenanted "to do all things necessary to continue receiving the various revenues pledged." *County of Volusia*, 417 So. 2d at 969. The Court has regularly

recognized that it was this additional feature, and not the mere use of ad valorem tax revenues, which prevented validation without a referendum. *See, e.g.*, *Strand*, 992 So. 2d at 161; *Murphy v. City of Port St. Lucie*, 666 So. 2d 879 (Fla. 1995). That feature is not present here, where the District reserves the right to terminate the lease on an annual basis and maintains full budgetary flexibility. *See Brevard County*, 539 So. 2d 461 at 463. The District is free to abandon other projects and initiatives if additional funds are necessary in the future.

2. <u>The Lease-Back Is a Permitted Encumbrance</u>

New Hope argues (at pages 38-39 of its brief) that the U.S. Sugar lease constitutes an encumbrance that prevents exercise of the non-appropriation clause. New Hope selectively quotes the master lease definition of "Permitted Encumbrances," but ignores the fact that subparagraph (vii) allows any other lien or encumbrance that is listed on the Schedule related to the issuance of a Series of COPs that is approved by a Credit Facility Issuer. Master Lease Purchase Agreement § 1.1 (J.A. 4784-85.) The District will not prepare a schedule until it issues a series of COPs. The District could buy land that has a conservation easement, in which case it would add to the master lease list of Permitted Encumbrances by identifying the conservation easement on the related lease schedule. Similarly, when the District issues the COPs to finance the U.S. Sugar lands, it will identify the lease-back on that lease schedule.

New Hope's argument also ignores the fact that the subordination and non-disturbance agreement envisioned under Section 38 of the lease-back will ensure that U.S. Sugar's lease rights are subordinate to the superior rights of the finance parties under superior leases under the COPs financing structure. While U.S. Sugar expects to receive some contractual nondisturbance protection directly from the superior finance party as part of the agreement to be negotiated before closing, U.S. Sugar's lease would be subordinate to the finance party's interest, and in no event could U.S. Sugar rights extend beyond the term of the ground lease to the finance entity. In every COPs deal, while the governmental owner of the fee might lose possession solely for the term of the ground lease to the finance party in the event of non-appropriation, the investors would take possession of subject to Permitted Encumbrances.

3. The Right to Non-Appropriate Is Real and Not "Illusory"

Next, the appellants argue that the District's express ability to non-appropriate in any given fiscal year is "illusory" and that the District will be "morally compelled" to appropriate funds. They speculate that, because the ultimate water storage and treatment facilities will be central to the District's mission and tied into a system governed by federal law, it will be too difficult for the District to non-appropriate as a practical matter. The argument rests, in part, on the assumption that the works of the District will be under the authority of federal

laws rather than District authority. But the trial court heard testimony to the contrary. Tommy Strowd, a District witness, explained that the River of Grass initiative is not a CERP project or a Central and Southern Florida Project. (J.A. 1108.) The trial court expressly found Mr. Strowd to be "a credible witness" and "extremely well intentioned and a good public servant." (J.A. 2366.) Aside from appropriate federal regulatory permits, such as an Army Corp of Engineers permits, the District's implementation does not depend upon any federal authority, as Mr. Strowd testified. (J.A. 1108, 1114-15.) If federal agencies do get involved in the future, the District's dealings will be determined by what the law requires. That is true for every major financed infrastructure project, and cannot be the principled basis for concluding that the non-appropriation clause is illusory. Such a ruling would undermine financing for airports, prisons, schools, roads, parks, and government buildings around the country, which are no less difficult to abandon as a practical matter.

The appellants' "can't practically walk away" argument is old hat. They attempt to paint this case as materially different from the Court's binding precedent on annual lease purchase COPs financing, but their arguments should sound familiar to the Court. For example, in *School Board of Sarasota County*, the appellant similarly argued:

> [T]he Board's "discretion" not to renew the lease yearly is illusory, because alternative school buildings are extremely unlikely to be available and the use of the real property on which to build alternate

> schools has been lost. School buildings also have particular characteristics requiring large amounts of land and very particular design features such as cafeteria and gymnasium facilities. Moreover, if the School Board decided not to renew the annual lease in the instant case, it is extremely unlikely another lessee for the real property and buildings could be found. It is doubtful any lessee would be willing to go to the expense to convert a school building to another use and have the right of possession terminate at the end of the ground lease knowing their improvements would thereafter belong to the Board. Thus, if the School Board did not renew the annual lease, the bondholders would re-take the schools and public lands, and would be unable to generate sufficient income to service the debt and the Board would lose the use of public lands without any compensation.
>
> The Board and the Corporation intends [*sic*] to build approximately ten (10) new schools with the revenue form these bonds. Under the terms of the Ground Lease and Lease Purchase Agreements the Board cannot default on one school without defaulting on the entire issue. In other words, if at some future date the Board determines one particular school is no longer needed, they cannot close down that school and default on the Lease-Purchase agreement without losing their possessory interest in all the other schools built and leased under these agreements. Consequently, the School Board is compelled and morally obligated to renew the Lease Agreement every year.

Amended Br. of Appellant 10-11, *State v. School Bd. of Sarasota County*, Case No. 74,979 Nov. 30, 1989). This Court was not persuaded, and concluded that "the annual renewal option preserves the boards' full budgetary flexibility." *School Board of Sarasota County*, 561 So. 2d at 553.

The foregoing quote also belies appellants' repeated assertions that "schools are different" because a COPs issuer can elect to "walk away from one school"—"like the new Christmas tree lights; one goes out, the rest work." (J.A. 1161.) That's just not true, since issuers routinely employ master lease programs, and the

question of master lease financing was hotly contested in *School Board of Sarasota County*.[11] Before deciding that case, this Court had already approved the master lease concept in *State v. Florida Development Commission*, 142 So. 2d 69 (Fla. 1962). This Court was also aware of many other major master lease programs, including the State Capital Outlay Program, which was financed on all-or-nothing basis through annual master leases, included approximately $157 million in obligations covering 45 buildings in 10 cities (including the State Capitol and the Senate and House Office buildings). *See* Brief of Amicus Curiae 38, *State v. School Board of Sarasota County*, Case No. 74,979 (Dec. 18, 1989). The appellants cannot possibly ask this Court to believe that it would be any more "practically impossible" for the District to non-appropriate for the River of Grass initiative than it would be for the State of Florida to non-appropriate for the State Capital Outlay Program.

More recently, our neighboring state of Georgia likewise considered and rejected a "can't practically walk away" argument. *See Bauerband v. Jackson County*, 598 S.E.2d 444 (Ga. 2004). In *Bauerband*, the county employed a lease-

[11]Another repeated mischaracterization is that this case is different because it involves "land only" and school districts never use COPs to acquire land for future construction. (*See* J.A. 723, 1202, 1661-62, 1688, 2265.) In fact, the record in *School Board of Sarasota County* reveals that the programs at issue there also authorized purchase of additional lands for later construction, but that facet of the program was not challenged on appeal (and thus not addressed in the published opinion). *See* Answer Br. of Appellee 2 n.1, *State v. Florida School Bds. Ass'n, Inc.*, Case No. 75,154 (Jan 11, 1990).

purchase COPs structure to finance and construct a new courthouse. Like the appellants here, the challenger in *Bauerband* advanced a litany of arguments, including that, notwithstanding the express language of the documents, "the 'reality' of the circumstances surrounding the lease purchase agreement mandates that future county commissions will necessarily be bound to reauthorize the lease, to avoid the consequences of terminating the arrangement." *Id.* at 447. The Supreme Court of Georgia rejected this argument:

> Many policy choices made by…governmental bodies are difficult, but that does not render them unconstitutional . . . . [I]f this lease agreement is terminated, other office and courtroom space would have to be quickly found. However, hard choices regarding a decision to terminate a contract . . . and the attendant difficult circumstances they may present, do not render meaningless the power of termination . . . . That power is present in this agreement, and future County commissions are not bound to renew the agreement.

Id.

The same is true here, where the Governing Board is completely within its rights not to appropriate funds for lease payments. *See* Master Lease Purchase Agreement, § 3.5 (J.A. 4796-97.) Naturally, that would be a hard choice with consequences that the Governing Board would prefer to avoid, but the alternative is real and thus constitutional. (J.A. 1646-48.)

4. <u>The Ability to Include Other Lands under the Master Lease Increases the District's Flexibility and Opportunity to Lower Costs</u>

In a similar vein, the appellants attempt to twist the District's ability to

include "other lands" under the master lease program into a constraint on the District's ability to non-appropriate (Tribe's brief at 39-40, New Hope's brief at 43-45). As a matter of fact, the trial court found that this feature of the transaction ***increased the District's flexibility*** under the COPs program. *See* Final Judgment at 17 (J.A. 17.) The "other lands" provision was included in Resolution 2009-500A to allow the District to issue a portion of its obligations as tax-exempt under the Internal Revenue Code, thus saving the District potentially millions of dollars in interest costs. Res. 3009-550A at 2 (App. 5456.); Treas. Reg. § 1.141-4(g) (Example 9). Furthermore, the District's ability to substitute lands is of no more practical significance than the master lease programs regularly approved in other cases, where the master lease covers multiple schools and sites throughout a school district. At trial, the appellants strained credulity by arguing that a random list of District assets might be "pledged as collateral" or placed in the hands of evil "foreign" trustees who could threaten to flood south Florida. (J.A. 1974-78.) The trial court properly rejected this argument, not least because it is wrong to suggest that anything is "pledged as collateral" in a COPs financing. (JA. 1551-53, 2236-38, 2259.) Beyond that defect, the argument is a red herring because, as the trial court recognized, the District has more flexibility. That is, the District may place ***less*** critical assets under the master lease, which might have higher revenue streams of value to investors but would be easier for the District to abandon for the

term of the lease (for example, productive agricultural land or property suitable for other alternative commercial uses).

5. The Transaction Does Not Include a Non-Substitution Clause

Finally, the appellants would stretch beyond recognition the one case in which this Court denied the validity of a lease purchase obligation. *See Frankenmuth Mut. Ins. Co. v. Magaha,* 769 So. 2d 1012 (Fla. 2000). The issue arose in a unique procedural context, which justified more active judicial interference than is warranted in a Chapter 75 proceeding—the government raised the article VII, section 12 argument ***defensively*** against a suit to enforce lease payment rights, after the government employee who entered into the lease was indicted for doing so illegally.[12] *See Frankenmuth,* 769 So. 2d at 1016-17. The case was tried in federal court and then, on appeal, certified to this Court. On the article VII, section 12 issue, the Court quoted the federal judge's reasoning extensively and then simply approved it with little additional analysis or comment. *See id.* at 1024-26. The uniqueness of the case is apparent from the fact that, in the ten years since it has been decided, no court in Florida or any other state extended its holding beyond its specific context, where there was a separate "non-substitution" clause in the lease-purchase agreement.

In *Frankenmuth,* the non-substitution clause contractually limited the

[12]As discussed above at page 11, the Court's deferential standard of review in Chapter 75 proceedings assumes no fraud or violation of legal duty.

governmental entity from walking away from the lease obligation. *See id.* at 1024. In other words, the government had contractually agreed ***not*** to substitute other equipment for the equipment being leased, the practical effect of which, according to the sworn testimony of the county comptroller, was that "we would be shut down. We wouldn't be able to operate." *Id.* at 1025. The exact opposite is true here, where the sworn testimony is that the District is free to choose not to appropriate. (J.A. 1108-09, 1646.) The District maintains budgetary flexibility because it owns other land upon which it can build other stormwater treatment areas and similar environmental restoration projects. By choosing to undertake the River of Grass initiative, the District may obviate the need for some other currently planned projects; however, if the District changes its mind in the future, it has the option and ability to pursue other projects. (J.A. 367-68, 1414-15, 1647, 1655-60, 1767-69.) Those alternatives might be more expensive and less efficient than the River of Grass initiative, but they are real alternatives and the District maintains the budgetary flexibility to pursue them.

In assessing appellants' arguments that the District will be "morally" or "practically" compelled to appropriate money each year, the Court may also consider the Legislature's recently expressed view of the matter. Chapter 2009-243, Laws of Florida, helps ensure budgetary flexibility by limiting the amount of debt that water management districts may issue. This new provision in the Act is

similar to statutory limitations on school boards' use of COPs financing. *See* § 1011.71(2)(e), Fla. Stat. (2008). The Legislature has thus determined the limits of both water management districts and school districts in the use of COPs financing. It is not the Court's role to second-guess this legislative policy decision.

VI. THE PROPOSED FINANCING STRUCTURE IS LEGAL

The Tribe challenges the District's authority to create the Leasing Corporation and its role in the financing.[13] The trial court addressed this argument and correctly rejected it. *See* Final Judgment at 32 (J.A. 32.)

The trial court made detailed findings of fact concerning the Leasing Corporation and how it functions under the master lease program. *See id.* at 8-14 (J.A. 8-14.) The trial court also recognized that government entities may create nonprofit corporations for the sole purpose of facilitating a COPs transaction. *See Leon County Educ. Facilities Auth. v. Hartsfield*, 698 So. 2d 526, 527 (Fla. 1997); *see also Barnett v. Dept. of Mgmt. Servs.*, 931 So. 2d 121 (Fla. 1st DCA 2006). Because the District possesses the broadest possible power with respect to financings (equivalent to home-rule power), *see* § 373.584(2), Fla. Stat. (2008), it follows that the District possesses authority to establish the Leasing Corporation. Therefore, the Tribe's argument is without merit.

[13]This section of the argument responds to the Tribe's argument section III.C.5 (pages 40-45), which is unique to the Tribe and not advanced by New Hope.

VII. THE OPTION TO BUY ADDITIONAL LAND DOES NOT UNDERMINE THE VALIDITY OF THE TRANSACTION

The Tribe contends that the trial court erroneously validated $50-68 million in financing for a "land option."[14] The Tribe did not raise this argument below, but it is based on a faulty understanding of the transaction and should be rejected.

The purchase price for all the land (180,000 acres) was originally valued at approximately $1.34 billion. The purchase price under the amended and restated agreement is still approximately $1.34 billion, but has been divided up into two separate purchases: (1) $536 million for 73,000 acres; and (2) for the additional 107,000 acres, an exclusive option for the first three years at a fixed price of $7,400 per acre, and a nonexclusive option for an additional seven years at the greater of appraised value or $7,400 per acre. *See* Final Judgment at 16 (J.A. 16); Res. 2009-500A (J.A. 5459-60 (initial purchase), 5521-28 (option purchase).)

The Tribe misconceives the structure of the transaction and argues that the District is paying an additional $50-$68 million for the option. That is not true. The $536 million purchase price is for the 73,000 acres. There is no additional cost for the option, and there is no money at risk if the option is not exercised.

The Tribe's argument rests on an isolated PowerPoint slide from a presentation to the Governing Board. *See* Tribe's Ex. 216 (J.A. 2394). However,

[14]This section of the argument responds to the Tribe's argument section III.C.6 (pages 45-48), which is unique to the Tribe and not advanced by New Hope.

the $68 million figure on that slide is clearly labeled "benefit of option," and must be read in the context of the entire presentation, including two slides earlier in the presentation, entitled "Option Lands," which clearly indicates "no option cost." *See* Tribe's Ex. 216 (J.A. 2392). The $68 million figure is not a cost to the District, it is merely a value that the District's appraiser assigned to present the overall value of the amended and restated agreement. There is no "cost" or purchase price for the option and no part of COPs proceeds will be devoted to paying for it.

VIII. THE DISTRICT MAY LEGALLY CONVEY PURCHASED LANDS TO MUNICIPALITIES

The Tribe argues that the transaction is illegal because the District will acquire more land than it needs and dispose of some of it via transfer to local governments by land swap or sale.[15] The Tribe cannot be correct in its position that the District must always make use of all the land it acquires and can never acquire more than it actually uses. Section 373.056(4), Florida Statutes, authorizes the District to convey land to a governmental entity, and Section 373.089, Florida Statutes, authorizes the District to dispose of surplus lands. The unrebutted evidence at trial was that the District historically has acquired land from willing sellers when available, and then surplused particular portions later if there were not

[15]This section of the argument responds to the Tribe's argument section III.C.7 (pages 48-50), which is unique to the Tribe and not advanced by New Hope.

needed (with the sales proceeds devoted to restoration). (J.A. 1480-81, 1744-47.)

Moreover, it is well recognized in the takings context, where the "public purpose" analysis is the same, that a government may acquire more land than it actually intends to use, if doing so benefits the overall transaction in some way. *See Dep't of Transp. v. Fortune Fed. Sav. & Loan Ass'n*, 532 So. 2d 1267, 1269-70 (Fla. 1988) (state may take more property than necessary for contemplated project to avoid payment of statutorily mandated business damages). This same principle is reflected in Section 373.056(4), Florida Statues, which authorizes the District to dispose of surplus lands (which, again, implies that the District previously acquired more land than ultimately required).

The parties' experts agreed that economic justice, or the impact on local communities, is a valid consideration in environmental restoration. (J.A. 1754-57, 2010.) In addition, the District has testified that it will seek to integrate District projects of stormwater treatment or spray fields with community projects. (J.A. 1754-57.) Early in the due diligence process, the Governing Board contemplated the use of integrated water resources within the local communities. Presentation to Governing Bd. (Sept. 10, 2008)(App. 5373-78); Presentation to Governing Bd. (May 13, 2009)(App. 5438-42.) Such use is not limited by the lease back. (Pl.'s Ex. 20.g.).

It is also important to reiterate the District possesses the broadest possible

power when it comes to financial matters. *See* § 373.584(2), Fla. Stat. (2008). In this context, the District's powers are coextensive with municipalities, which are expressly authorized to expend funds (including issuing bonds) for economic development activities, which the Legislature has deemed a public purpose. *See* § 166.021(9), Fla. Stat. (2008). Thus, even if this portion of the transaction were not tied to and supportive of the overall environmental program, the Tribe is wrong to argue that it would be an invalid public purpose beyond the District's authority.

IX. THE TRANSACTION DOES NOT REQUIRE LEGISLATIVE APPROVAL UNDER ARTICLE VII, 11(f)

New Hope argues that Article VII, Section 11(f) of the Florida Constitution required the District to obtain the Florida Legislature's approval of the transaction.[16] The trial court addressed this argument at length and properly rejected it. *See* Final Judgment at 24-26 (J.A. 24-26.)

The trial court's legal analysis was multi-faceted, but one point is dispositive. Article VII, subsection 1(a) prohibits the state (and its agencies) from levying ad valorem taxes. Yet, article VII, subsection 9(b) authorizes levy of ad valorem taxes "for water management purposes" and for "all other special districts." Since the District can (and does) levy ad valorem taxes, it cannot be deemed a "state agency" for purposes of article VII. It necessarily follows that New Hope's argument fails, since it rests on the assumption that the District is a

[16]This section of the argument responds to New Hope's argument section VIII (pages 45-50), which is unique to New Hope and not advanced by the Tribe.

"state agency" for purposes of article VII. *See St. Johns River Water Mgmt. Dist. v. Deseret Ranches of Fla., Inc.*, 421 So. 2d 1067, 1079-71 (Fla. 1982) (district was "special district" under Article VII and was thereby authorized to levy ad valorem taxes (which "state agency cannot do)); *see also Martinez v. S. Fla. Water Mgmt. Dist.*, 705 So. 2d 611 (Fla. 4th DCA 1997) (District not a state agency for purposes of Section 112.0455, Florida Statutes).

CONCLUSION

For the foregoing reasons, the District requests that the Court affirm the Final Judgment validating the COPs annual lease purchasing financing program in an amount not to exceed $650 million.

Respectfully submitted this 2nd day of November 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail and US Mail to **Joseph P. Klock, Jr., Esq.**, 283 Catalonia Avenue, 2nd Floor, Coral Gables, FL 33134; **Dexter W. Lehtinen, Esq.**, 7700 N. Kendall Drive, Suite 303, Miami, FL 33156; **Maureen Hackett, Esq.**, (for all of the served State Attorneys), State Attorney for 15th Judicial Circuit, 401 N. Dixie Highway, West Palm Beach, FL 33401; and **E. Thom Rumberger, Esq.**, P.O. Box 10507, Tallahassee, FL 32303, this 2nd day of November 2009.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition complies with the font requirements of Rule 9.100(*l*) of the Florida Rules of Appellate Procedure.

Frederick J. Springer