IN THE SUPREME COURT OF FLORIDA
Case Nos. SC09-1817 and SC09-1818 (Consolidated)

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, and
NEW HOPE SUGAR COMPANY, et al.,
Appellants

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT
Appellee

CONSLIDATED ANSWER BRIEF OF INTERVENORS, FLORIDA AUDUBON SOCIETY, INC., AND NATIONAL AUDUBON SOCIETY D/B/A AUDUBON OF FLORIDA AND NATHANIEL P. REED

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

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STATEMENT OF THE CASE AND OF THE FACTS

Intervenors Florida Audubon Society, Inc., and the National Audubon Society (collectively "Audubon") and Nathaniel P. Reed adopt the findings of fact in the trial court's Final Judgment. Briefly, a Complaint was filed by the Appellee, South Florida Water Management District ("District") on October 14, 2008, to validate the proposed issuance of Certificates of Participation (the "COPs") to finance the purchase of approximately 182,500 acres of land owned by the United States Sugar Corporation (the "USSC") that will provide the foundation for a historic opportunity to restore the Everglades ecosystem. (A. 1, 1).[1] Coined the "River of Grass Acquisition," this project allows for Everglades restoration on a scale and in a location not previously thought possible. (A. 29, 12). New Hope Sugar Company and Okeelanta Corporation (collectively, "New Hope") and the Miccosukee Tribe of Indians of Florida (the "Tribe"), the Appellants before this Court, both filed papers in opposition. On February 3, 2009, Audubon served a Notice of Intervention as an environmental non-profit organization interested in the restoration of America's Everglades. (A. 29, 3). Shortly thereafter, Nathaniel P. Reed, a taxpayer and environmentalist within the District's boundaries, also intervened. *Id*.

The initial validation hearing was held on February 6, 2009, and continued

[1] Citations to the Appendix are in the form A. [tab], [page range], denoting the tab and page(s) of the cited document.

on March 16, 17 and 18, 2009. (A. 1, 3-4). On April 1, 2009, Governor Crist announced that the District and USSC were considering renegotiating the transaction. (A. 1, 16). As such, on April 7, 2009, the District Filed a Motion to Abate Proceedings and to Reopen Evidence to Consider Modification of Transaction with U.S. Sugar Corporation, which paralleled prior motions by New Hope and the Tribe. (A. 1, 4). The court entered an Order Granting Joint Motions to Abate Proceedings on April 16, 2009. *Id*.

On May 13, 2009, at an open, public, and duly noticed meeting, the District's Governing Board adopted an Amended and Supplemental resolution which approved the amended and restated terms of the agreement between the District and USSC. (A. 1, 16). The new agreement preserved the once in a lifetime opportunity, but structured it in a staged manner appropriate for these fiscally tough times. The revised transaction allows the District to initially acquire approximately 73,000 acres of the most needed lands for approximately $536 million, with an option to acquire the remaining 107,000 acres at a later time. (A. 1, 16). The transaction leases property back to the USSC such that the lands do not lay fallow while awaiting future restoration projects. (A. 27; A. 28). Notably, the lease agreement to USSC imposes stringent Best Management Practices on the property, reducing pollution without the construction of a single project. *Id*. The validation hearing continued on July 13, 14, 15 and 16, 2009, and August 6, 2009

in order to consider the revised purchase agreement. (A. 1, 5-6). On August 26, 2009, after hearing many days of testimony, and claims by the Tribe and New Hope that the purchase solely serves a private interest, the trial court issued its Final Judgment declaring the acquisition of lands for Everglades restoration was an important public purpose and validating the COPs in the amount of 650 million dollars, sufficient to purchase the initial 73,000 acres of key property from the USSC. (A. 1). On September 30, 2009, the Tribe and New Hope filed separate appeals with this Court.

SUMMARY OF THE ARGUMENT

As explained by this Court in *Strand v. Escambia County*, 922 So. 2d 150 (Fla. 2008), bond validation proceedings for COPs present three legal issues: (1) whether the entity issuing COPs has the authority to do so; (2) whether the purpose of the obligation is legal; and (3) whether the issuance of the COPs complies with the requirements of law. The Appellants characterization of the River of Grass Acquisition as not serving a public purpose is directly opposite the trial court's findings and demands that Intervenors address the second prong of the *Strand* analysis. For the sake of brevity in a proceeding characterized by voluminous documents, Intervenors adopt the arguments of the District for the remaining analysis under *Strand*.

This particular acquisition happens to represent a once in a lifetime opportunity to acquire critically located lands, an opportunity that "Governor Crist called … 'as monumental as our nation's first national park,' while U.S. Secretary [of the Interior] Dirk Kempthorne declared it 'an historic turning point for the largest watershed project in the world.'" (A. 29, 10-11). The lower court correctly held that the acquisition of 73,000 acres critical to Everglades restoration furthered a public purpose and that the proposed issuance of COPs complies with the requirements of *Strand*.

ARGUMENT

I. STANDARD OF REVIEW

The Final Judgment has the benefit of coming to this Court with a presumption of correctness. The lower court's 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 in this case must bear the burden of demonstrating that the record and evidence fail to support the trial court's Final Judgment. *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).

As noted in *Boschen*, 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. Thus, the Court relies on the trial court's assessment of testimony, recognizing that the trial court judge was present to listen to and assess the credibility of each witness. *See Hernandez v. State*, 4 So. 3d 642, 668 (Fla. 2009).

II. THE TRIAL COURT CORRECTLY FOUND THAT THE RIVER OF GRASS ACQUISITION SERVES A PUBLIC PURPOSE.

A. The River of Grass Acquisition serves a public purpose.

The River of Grass Acquisition will provide water managers at the District with an unprecedented opportunity to store and treat water on a scale never before envisioned for the restoration of America's Everglades. (A. 29, 12). This opportunity will allow the District to better meet its statutory responsibility to restore the Everglades ecosystem, benefiting the public through a clean water supply and a healthy functioning ecosystem. *See* § 373.016(3), Fla. Stat. (2008). (A. 1, 20). Notably, the Legislature has specifically provided for the District to accomplish this mission through the acquisition of land. *See* § 373.139, Fla. Stat. (2008); § 373.019(26), Fla. Stat. (2008). This led the lower court to find that the River of Grass Acquisition offers "the District the opportunity and flexibility to store and clean water in order to protect Florida's coastal estuaries and to revive, restore and preserve the Everglades." (A. 1, 8). Audubon and Reed agree with this finding and believe that this purchase will allow for increases in the storage of water to reduce harmful discharges of freshwater into the coastal estuaries, improve the delivery of cleaner water into the Everglades, assist in the protection of Lake Okeechobee, and cumulatively, benefit all of South Florida.

In reaching its conclusion that the purchase of 73,000 acres will serve the public purpose of protecting and managing water resources for Everglades Restoration, the court described the careful review by the Governing Board. (A. 1, 6-18). For instance, the court noted that the Governing Board of the District is composed of individuals with "significant experience in … agriculture, the development industry, local government, government-owned or privately owned water utilities, law, civil engineering, environmental science, hydrology, accounting, or financial businesses," and that these Governing Board members had been "briefed on the project's pros and cons by District staff, including environmental and financial experts." (A. 1, 6-7)(citing § 373.073, Fla. Stat. (2008)). The court also noted that the Board voted on the acquisition after extensive "presentations, public participation and discussion." (A. 1, 15).

While the Tribe now argues that "[t]he District failed to demonstrate how it will restore the Everglades by simply purchasing 73,000 acres with $650 million in COP proceeds," the court below addressed this claim, finding that "[t]he importance of protecting and managing water resources in the Everglades was emphasized not only by the witnesses testifying on behalf of the District but also by experts called to testify by the Defendants." (Tribe's Initial Brief at 23; A. 1, 20). Furthermore, "[a]s admitted by defendants' own expert witnesses, surface water and storage is a valid public purpose." (A. 1, 21).

It is worth noting that the Fifteenth Circuit is not the only court to have recognized the tremendous opportunity for Everglades restoration that the River of Grass Acquisition represents. For instance, in one of the many cases regarding Everglades restoration, Federal Judge Moreno, of the United States District Court for the Southern District of Florida, recently found that "the Court cannot ignore the potential for monumental environmental improvement that the [River of Grass] land acquisition would offer," and then denied a motion that would have compelled the completion of an Everglades restoration project in order to allow the District to pursue this historic opportunity. (A. 29, 2).

B. The lower court correctly dismissed Appellants' characterization of the acquisition as a "bail out" of the U.S. Sugar Corporation.

Both Appellants' briefs are colored with arguments that this historic opportunity is nothing more than a bail out of USSC. This serious accusation was not overlooked by the trial court. Fifteenth Judicial Circuit Judge Hafele made sure to note in the Final Judgment that, "while the Court <u>has carefully considered these allegations</u> Defendants have failed to show any private benefit to U.S. Sugar is more than incidental to any public purpose." (A. 1, 23)(emphasis added). After failing to convince the lower court that evidence exists to show some illicit intent to benefit USSC, the Appellants now seek to convince this Court that *State v. Suwannee County Dev. Authority*, 122 So. 2d 190 (Fla. 1960), demands such a conclusion.

In *Suwannee County*, "[t]he State opposed the validation of the certificates by the trial court principally on the ground that the proceeds thereof are to be used for purchasing real estate and constructing building or buildings thereon, which buildings will be leased to a private business." *Id.* at 191. Notably, "the only plan or program envisioned by the Authority at the time of the proceedings in the trial court was the purchase of land and construction thereon … for … a private industry which the Authority hoped to bring into the county." *Id.* In contrast, in the case at hand "the District's witnesses outlined, parcel by parcel, the immediate and future benefits to be gained by the 73,000 acre acquisition." (A. 1, 20; A. 13; A. 18). Furthermore, while Appellants suggest that *Suwannee County* should be read to prevent the financing of a "first step" of a larger undertaking, such an interpretation is not applicable to the instant case.

First, unlike *Suwannee County*, the purpose of purchasing USSC lands is not to benefit USSC but instead to secure a premium footprint for Everglades restoration. (A. 2, 113; A. 3, 124-125; A. 4, 258; A. 5, 262; A. 9, 351; A. 11, 799; A. 12, 827; A. 14, 69, 70, 74-75; A. 15, 91; A. 16, 155; A. 17, 277; A. 20, 422-423; A. 21, 429-430; A. 24, 665-666; A. 26, 888). While the property will be leased back to USSC for varying lengths of time as the District plans the construction and phasing of projects, even the Appellants' experts agree that such a lease arrangement is better than letting the land go fallow while waiting to break ground.

(A. 1, 23; A. 20, 422; A. 25, 818). Under the Appellants' interpretation of *Suwannee County*, the acquisition of lands for Everglades restoration would almost always be viewed as a private use, as the property owner would receive funds for the purchase of the property and the District would prefer to have the property under lease until construction is eminent. (A. 2, 113; A. 16, 155; A.20, 422-423; A. 21, 429-430). This reading is a far cry from the narrow holding of *Suwannee County*, and thus the lower court was correct to find that "any private benefit inuring to U.S. Sugar Corporation is incidental." (A. 1, 21). Thus, the acquisition of land may just be the most important part of Everglades restoration and the public purposes such restoration achieves.

C. Purchasing critically located property is a necessary part of Everglades restoration.

What Appellants skillfully gloss over is the fact that purchasing critically located land has always been, and will continue to be, a required part of Everglades restoration. (A. 2, 113; A. 16, 155; A.20, 422-423; A. 21, 429-430). Appellants argue that there is no value to the purchase of property, but instead it is only the brick and mortar construction placed upon acquired property which may fulfill the public purpose of Everglades restoration. This argument belies not only common sense, but also the Florida Statutes. As mentioned above, Chapter 373 of the Florida Statutes, governing the District, states that the benefits of Everglades restoration serve a public purpose, directs the District to acquire lands for this

purpose, and even carefully includes "accompanying lands" within the definition of "works of the district." *See* §§ 373.016(3), 373.019(26), and 373.139, Fla. Stat. (2008).

In addition to this statutory framework, the importance of land is an obvious, unavoidable, and practical part of Everglades restoration. As phrased by the District's Executive Director, "[b]uying the land is part of the project because you can't build the facility unless you own the land." (A. 15, 91). The case at hand, and Everglades restoration as a whole, is not an instance where the "project" consists of a tidy and discrete building providing services wherever it is placed. Here the project consists of reservoirs and stormwater treatment areas ("STAs"), neither of which are brick and mortar packages that may be placed on top of just any parcel of land. Instead, these projects are created in and from the land, and the placement of which is critical to the project's success. For instance, as phrased by District staff during the bond validation hearing, "[t]he need to have a million-acre feet of storage and the need to treat that water is paramount to restoring the Everglades, whether it's a part of the Comprehensive Everglades Restoration Program or whether it's part [of] a District initiative, <u>having acres in the E[verglades] A[gricultural] A[rea] is critical</u>." (A. 14, 69)(emphasis added).

D. The acquisition itself, of U.S. Sugar Corporation lands, benefits Everglades Restoration.

Finally, the Appellants contend, "the purchase of land, without necessary infrastructure, does not achieve the public purpose."[2] New Hope's Brief at 29. While this claim is addressed by the above arguments, it is worth directly addressing this mischaracterization. The ownership of critically located lands ensures that even in the face of rampant development the property will always be available in a condition that allows for its use in Everglades restoration. (A. 2, 112-113; A. 3, 124-125; A. 15, 91). This point was emphasized by Mr. Ken Ammon, the District's Deputy Executive Director responsible for Everglades restoration, who stated, "there's always an opportunity for that land to be converted into something that's not compatible with Everglades restoration that you just can't undo. So locking up that land as early as you can, for any of our restoration projects, even conceptual projects are extremely important." (A. 3, 124-125). In addition, with ownership comes the right to condition the lease to USSC with stringent Best Management Practices to ensure, even without the construction of reservoirs or STAs, that the EAA will become a cleaner place. (A. 27; A. 28). Lastly, as lands are drawn out of the lease to USSC the resulting decrease in farmed lands will logically reduce pollution in the area. As phrased by

[2] The Tribe has made similar arguments and as such this section addresses both Appellants. *See* Tribe's Brief at 24, 30.

Federal Judge Moreno, "[l]ogically speaking, the most successful long-term solution to Everglades pollution may be to buy out the polluters, and currently that option appears viable. Perhaps only action of that magnitude will give the Everglades a chance at returning to the ideal of environmental sustainability." (A. 29, 3).

CONCLUSION

To say this acquisition does not serve a public purpose is to say that restoring the Everglades ecosystem does not serve a public purpose. Intervenors Audubon and Nathaniel P. Reed urge this Court to find that Appellants have not met their burden of demonstrating that the conclusions of the trial court are not supported by the record and evidence. Therefore, their appeals should be denied.

CERTIFICATE OF SERVICE

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