IN THE SUPREME COURT OF FLORIDA
CASE NO: SC09-1817/1818

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, and
NEW HOPE SUGAR COMPANY, and
OKEELANTA CORPORATION,

Appellants

-v-

THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Appellee

Consolidated Reply Brief of Appellants New Hope Sugar Company and Okeelanta Corporation

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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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ARGUMENT

I. INTRODUCTION

In its Statement of Facts, SFWMD[1] lays the fabric of misinformation upon which its arguments are based, and attempts to hide the true legal issues that are before this Court and which should be most troublesome to the Court.

SFWMD starts out by positing that a transaction that involves only the purchase of land, with not one penny allocated or available for construction of any improvements, and which will yield in rentals only $6 million of the estimated $45-50 million in debt service, is nothing more than a garden-variety COP transaction. Based on this, SFWMD argues that any inquiry into its fanciful ability to implement a project is beyond any judicial review and is "collateral."

The fact that the deal underwent three transformations and that SFWMD personnel testified to the need for the entire 182,000 acres during one three-day trial, with sketches of what was, in effect, a second Lake Okeechobee, was to be ignored when it reincarnated the deal as a 73,000 acre purchase -- 33,000 acres of which was citrus land so useless that it is let rent free -- together with a scattering of parcels with no connectivity other than a presumably appreciative seller.

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[1] This brief utilizes the same abbreviations set out in the Table of Abbreviations to New Hope's Initial Brief. Citations to the Initial and Answer Brief are denoted with the abbreviations IB and AB respectively, and, unless stated otherwise, refer to the Initial Brief of New Hope and the Answer Brief of SFWMD.

SFWMD then suggests that a valid public purpose is served by acquiring land and then taking 30 to 40 years to achieve its "objective." AB 1. In addition, SFWMD claims that "the general consensus is that restoration and protection of the Everglades requires addition of approximately one million acre feet of storage and associated treatment facilities . . ." AB 2. Yet, it proceeds in this case without any plan or ability to implement its claimed "general consensus", since the record is clear that SFWMD cannot afford to acquire the additional land for such a project, nor has the resources to improve even what it is purchasing.[2] Then, for extra measure, SFWMD has cancelled the EAA reservoir that would have provided 190,000 acre-feet of water, and lost $250 million already expended for that Project, all of which will make it possible for it to purchase parcels scattered all over the EAA for some vague purpose to be effected at some unspecified point in the future, with funding that the agency does not claim to have.

Finally, SFWMD slyly claims that "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."

[2] SFWMD's chief engineer estimates that the total cost of building one million acre feet of storage and associated treatment is between $14 and $17 billion, with an additional $300 million needed for annual operating costs. A.10 2092, 2102-03; A.23. SFWMD however only seeks $650 million for *some* of the land, claims the most it can afford is $1.1 billion, and does not even attempt to address how operating cost would be paid even if the project could be built. A.10 1602.

AB 2. However, what it fails to disclose is that neither of these companies leased back land which they had sold to SFWMD. Nor does it mention that when caught with a below market value rent the first time out of the box, SFWMD and its partner, USSC, were forced in the second deal to raise the rent for the land that USSC chose to pay (40,000 out of 73,000 acres) from $50 to $150 per acre.[3]

Chief Justice Quince and Justice Lewis in their dissenting opinion in *Strand v. Escambia County*, 992 So. 2d 150 (Fla. 2008), predicted that the principles of *Strand*, could "operate[] to circumvent voter participation in a decision that requires popular approval under the Florida constitution." *Strand* at 164 (Lewis J. and Quince, C.J., dissenting). As the Court is well aware, the reversal of this Court's original position in *Strand* on rehearing was based upon principles of *stare decisis*. Thus, it is for this Court to decide today whether it wishes to expand its *stare decisis*-based decision in *Strand* to include a long-term financing of a non-project, approved by a non-legislative executive agency that makes no attempt to show it can bring the land to public use and that then will turn around and lease the land to the seller for an indefinite period of time.

If *Strand* is to be stretched this far, then what conceivable teeth are left in the financing restrictions of the Florida constitution? If a non-legislative executive

[3] Of course, if you divide $6 million by the full 73,000 acres, you will see that the rent is really $82.19 per acre. The $150 acre price is accomplished by letting some of the land for free.

agency can issue long term paper without any ability of review by the people or the courts, what purpose is there to bond validation? It is one thing to accommodate routine infrastructure financings via COPs. It is quite something else to allow this transaction to make its way through that narrow constitutional gap.

II. THE TRIAL COURT DID NOT DETERMINE THAT THE USSC LAND WILL ACTUALLY BE PUT TO A PUBLIC PURPOSE.

A large portion of SFWMD's and its supporters' briefs are devoted to the claim that the trial court made a finding that the acquisition served a public purpose, and that this should limit the scope of review on appeal. Appellees attempt to prop this up by stating that the "trial court heard and considered extensive evidence." AB 18. What they ignore is that while extensive evidence was presented, much by proffer, the trial judge made clear that he would not consider most of it based upon the legal handcuffs he thought to exist under this Court's precedents. *Order* 22. This case is unique as it is contingent on *future* actions and *future* financing that the trial court noted there is no reason to expect would ever come to fruition.[4] Yet, this key issue was not analyzed in that court's Order because the lower court thought it could not go there.

[4] The closest case is *State v. Suwanee County Development Authority*, 190 So. 122 (Fla. 1960), which involved issuance of certificates for the purpose of purchasing land and constructing buildings to be leased to a private entity, with the public purpose to be provided by future actions, separately financed, that would incorporate all of this into a "larger project" with a public purpose. *See id* at 191.

This case does not center on evidentiary dispute. The primary issue is whether the trial court could consider all the evidence. As to public purpose, the question is whether the lower court should have considered the fact that Appellees utterly failed to show a realistic basis for the claimed public purpose and instead proceeding on speculation as to what the SFWMD board might approve as a project in the future -- if it can find the $14 billion or so its staff estimates would be needed for a project on the scale being discussed (IB 27-29).

Extensive evidence was presented on the speculative nature of the claimed public purpose underlying the financing. *Id*. This led the trial court to determine that SFWMD's claims were "economically impossible" (*Order* 22), but to nonetheless approve the financing on the grounds that the court was precluded from considering this fact. As discussed in the Initial Brief (at 25-32), this legal determination took an overly restrictive view. The trial court should have looked beyond the stated "objective" of SFWMD and determined whether there was adequate factual support for its claimed public purpose, and the case should be remanded to allow the trial court to fully consider that question.

In any event, it is clear that the trial court did not find that a public purpose *actually* exists for the COP proceeds or that the USSC lands will *actually* be used

for restoration, reservoirs or other such use.[5] To the contrary, the Order expressly states that the Defendants made a "strong showing" that this stated purpose is "economically impossible," and that the total cost of the claimed water storage and treatment project on USSC land would be "upwards of $8 billion dollars or more; yet these figures were never communicated to the Governing Board." *Order* 22. Nothing in the Order implies that there is any finding of feasibility for the later, separately-financed project needed to bring the land to public use. The trial court felt obligated to ignore this finding as a matter of law, however, viewing it as "collateral to bond validation…" *Id.*

III. UNDER A PROPER ANALYSIS SFWMD COULD NOT HAVE BEEN FOUND TO HAVE SHOWN A PUBLIC PURPOSE.

a. A public purpose must be factually supported.

SFWMD's public purpose argument boils down to a theory, unsupported in any case law even closely analogous, that its staff's self-serving statements that the land is intended to someday be used for "restoration" is a *conclusive* showing of public purpose that cannot be tested by evidence. Never mind that it is undisputed that the COPs will not accomplish the stated purpose, that the Governing Board

[5] SFWMD admits that it "did not attempt to prove feasibility," arguing that the issue is "irrelevant to these proceedings." AB 12. Its witnesses admitted that there is no basis to support any claim that the public purpose set out in the resolution is feasible or that SFWMD has any reasonable expectation of ever making that stated purpose anything more than a convenient, pretextual vision. *See* IB 6-11, 24-32.

has never approved a project even conceptually for the 73,000 acre acquisition, or that there was no real dispute below that SFWMD has no reasonable expectation of financing the one-million acre foot reservoir repeatedly referenced by Appellees. All of these minor details are, in SFWMD's view, "collateral" issues of "economic feasibility" that no one may second guess.[6]

Bond validation hearings are not so toothless as SFWMD would like. As this Court explained in *Suwannee*,[7] a claimed public purpose may not simply be contingent on speculative future actions: "petitions for validations of bonds and revenue certificates should set forth in reasonable detail the purpose or purposes which will be accomplished with the proceeds."[8] 122 So.2d at 194. Here of

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[6] SFWMD staff did not even want their own Governing Board looking too hard at this. While SFWMD attempts to prop up the board's qualifications (AB 13), it ignores the fact that the staff dismissed Petitions for Formal Administrative Hearing intended to raise critical questions as part of the Governing Board's administrative process. In this way, staff was able to limit discussion to just the present land acquisition, with no one looking over the horizon to whether the land could be brought into public use. The same agency now argues in a related appeal that the bond validation, which did not look behind the resolutions, makes the failure to follow the APA unreviewable. *See* Answer Brief of SFWMD in *Miccosukee Tribe v. SFWMD*, Fla. 3d DCA Case No 09-1960.

[7] SFMWD claims that Appellants "cling to" this decision, but they do so rightly as this is the one cited decision where a public expenditure is premised on speculative future actions – the same question presented in the instant case.

[8] Had the Court been of the view that all that is required is a public purpose or purposes which *might*, if later approved and funded, be accomplished, *Suwannee* would have had a far different result and the Authority's argument that a later, larger project would accomplish a public purpose would have prevailed.

course, the only purpose to be accomplished with the proceeds is the acquisition of land to be leased back to the seller on highly favorable terms. SFWMD attempts to get around this by claiming that some grand restoration project will be built somewhere in the vicinity of the land, not necessarily on this land itself,[9] and that this statement is all that is required to satisfy the requirement of a public purpose.

This Court has been clear, however, that for any expenditure to be legal it is the burden of the state agency to show a "reasonable expectation" that the public purpose will *actually* be accomplished:

> It is only when there is some clearly identified and concrete public purpose as the primary objective and a reasonable expectation that such purpose will be substantially and effectively accomplished, that the state or its subdivision may disburse, loan or pledge public funds or property to a non-governmental entity …[10]

Thus, it is not enough to state that the "objective"[11] is restoration, and that any inquiry into whether this will actually be accomplished is beyond inquiry.

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[9] A.32, 2635-38; A.10, 2089. Where any theoretical future project might be built is a matter left for *future* decision of the Governing Board. *Id*.

[10] *O'Neill v. Burns*, 198 So. 2d 1 (Fla. 1967); s*ee also, Panama City Beach Community Redevelopment Agency v. State of Florida*, 831 So. 2d 662 (Fla. 2002). The issue of whether the requirement of a reasonable expectation of accomplishing the public purpose goes directly to whether the use of the validation proceeds is a legal one. The trial court should have fully analyzed this issue in light of the evidence presented.

[11] SFWMD's Answer Brief is deliberate in its language and uses terms such as "objective" when discussing the purpose of the acquisition. SFWMD continuously hedges its words to avoid any claim that something will actually be done, sticking to the view that stated intentions of agency bureaucrats are all that is required.

SFWMD attempts to argue its way around this requirement -- easily met in nearly every validation -- by piecing together statements from various cases that economic feasibility is collateral. As discussed below, all that this means, in the context of the facts of those cases, is that the validation hearing should not second guess the wisdom of choosing one public purpose over another. That is a far cry from blind unquestioning adherence to a stated public purpose that

1. no one claims will be accomplished by the validation,
2. is contingent upon future actions and future financing that are, to put it kindly, speculative and
3. is proffered by an agency that admits it did not even attempt to show that it has a "reasonable expectation" that the public purpose "will be substantially and effectively accomplished."

See IB 25-32.

Finally, it is worth noting that requiring a factual basis for the claimed purpose is particularly appropriate in this case, as it involves a state agency that enjoys only delegated powers and must therefore act solely within the context of that delegation. *See Askew v. Cross-Key Waterways*, 372 So. 2d 913 (Fla. 1975). The delegation invoked by SFWMD is section 373.139. AB 14. That statute, which does not speak to bond or COP financing, generally allows the District to purchase land for certain uses set out in section 373.139(2). Whether SFWMD will *actually* put the land to the required uses is a key component of "determin[ing] if the purpose of the obligation is legal." *Strand*, 992 So. 2d at 154.

Yet, the lower court felt it could not make any factual determinations as to whether the land will actually be used for the required purposes, whether the purposes can be implemented, or even if there is any reasonable expectation of implementing the stated purpose. Without looking to whether SFWMD can put the land to the statutorily-required uses, the trial court could not properly determine whether the purported use of the proceeds was for a valid public purpose, much less one that met the confines of SFWMD's statutory powers.

b. The cases relied upon by SFWMD do not preclude a review of whether the agency has a basis for the claimed public purpose.

In its attempt to avoid any inquiry into the factual underpinnings of the claimed public purpose SFWMD cites several decisions of this Court: *Strand,* 992 So. 2d 150, *Boschen* v. *City of Clearwater*, 777 So. 2d 958, 966 (Fla. 2001), *State v. School Board of Sarasota County*, 561 So. 2d 549 (Fla. 1990) and *Town of Medley*, 162 So. 2d 257, 258-59 (Fla. 1964). None support the position taken by SFWMD, as none of these cases involve a situtation where a governmental agency bases its expenditure on claims that some future action -- which it has not attempted to show is at all likely or even reasonable -- will create the requistie public purpose. In sharp relief to the instant case, all four of these prior cases involved integrated projects, where the proceeds of the validation would direrectly create the public purpose – no further actions or contingencies necessary.

If anything, the clear purpose and meaningful analyses presented by in these cases only underscrore the glaring defects in the present one. In *Boschen* for example, the City knew what it was going to build a road and had conducted a supporting traffic study. It also had engineering information and estimates of cost, which was to be directly financed by the validation proceeds. *Boschen*, 777 So. 2d at 960-61. Obviously, this Court declined to second guess the political judgment of a legislative body to go forward with a defined project that it had a more than reasonable expectation of accomplishing *with the validation proceeds*. Similar situtations were presented in the other cases where the sponsoring local governments were building what was unquestionably public infrastructure, and had created reasonable cost estimates that comported with the financing.[12]

All of this contrasts with the instant case. Here the agency is looking to purchase land, and nothing more. But it claims no public purpose from the land alone. A.10, 1437, 1589-90, 1921-32, 2067. It instead proffers what its own engineers estimate would cost over $14 billion -- 25 times the valdiation amount -- to construct. IB 7-10. SFWMD does not claim that the public purpose exists without this infrasture; in fact, its CEO admits it does not. A.10, 1437 (Wehle).

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[12] *Strand* and *Boschen both* involved the building of roads, with the validation proceeds. *Strand*, 992 So. 2d at 152-53; *Boschen*, 777 So. 2d at 960. *School Board of Sarasota County* involved schools, and *Medley*, various water, transportation and other infrastructure, fully defined and likewise to be accomplished with the proceeds. None depended upon speculative future funding.

As its Answer Brief concedes (at 12), SFWMD has staked its entire case on the position that any inquiry into the public purpose is improper. But, none of the cases it cites support that claim with anything more than a passing statement made in the context of a wholly distinguishable fact structure.

Despite Appellees' attempt to distinguish it, *Suwannee* is clearly the most analogous case on bond issuance without a project. There an authority sought to issue non-recourse "revenue anticipation certificates" to buy land and build structures that would be leased for some time to private users. Opponents of the financing argued that a purchase and lease to a private company was not a sufficiently public purpose. In response, the Authority made the same argument as SFWMD does here -- that the lease is a means to an end and "leasing is only a first step in a much larger overall 'project' or development" that would eventually show a public purpose. *Suwannee*, 122 So. at 191.

This Court soundly rejected that argument. It did so for exactly the same reasons that SFWMD claims were beyond the scope of review – because *the evidence* showed that the claimed project was speculative and undefined:

> The testimony showed clearly that the only definite plan made by the Authority was to use all, or certainly the major portion, of the proceeds of the certificates for the purchase of land and construction of such buildings, although 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 testimony was to the effect that the Authority felt it could not make plans or devise

> a program until it knew whether the funds from the proposed certificates would be available. The evidence shows that the Authority had not yet devised any broad program or "project." *Id*. at 191-92.

SFWMD tries to distinguish *Suwannee* by arguing that it involved "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." AB 17. This offers no meaningful distinction. SFWMD knows what land it is purchasing, but does not know what, if anything, would be located there or whether the land must be "traded" for other unspecified land. A.32, 2635-38; A.10, 2089. It also does not know what structures would be built, or from where the money would come. IB 9-12. All it offered were musings of staff as to what the Governing Board *might* approve in the future. *Id*. The only real distinction it offers is the "unknown private industries" point, as in this case we know clearly who is gaining at the public's expense. This does nothing to undermine the key point of *Suwannee* -- that a clear, realistic public use exist.[13]

[13] Nor does the implication that there was a long stakeholder process change the analysis. SFWMD does not point to any public process that advocated the purchase of the USSC land alone as advancing restoration. As its own brief demonstrates, the planning process is geared toward the building of projects. AB 17-18 (advocating construction of reservoirs and storage.). Yet, there is no indication that any project can or will *actually* be built on this land.

c. Agency bureaucrat's statements regarding their "objectives," hopes, dreams or aspirations do not trump the requirements of Suwannee.

Lacking any reasonable expectation of actually using the land for a public purpose, SFWMD turns to exercises in sophistry to get out of making even the most minimal showing on this point. It claims that all that is required is an "objective" or "goal" to use the land for the public good, and therefore, so long as its staff claim as much, their statements of goals or aspirations become an irrefutable showing of public purpose.[14] AB 15-16. It was certainly not lost on SFWMD that allowing subjective statements of goals, aspirations, or objectives to control effectively puts the public purpose question above court inquiry.

No case is cited for the proposition that nothing beyond stated intentions of agency staff is required.[15] All that SFWMD has been able to cobble together is

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[14] Section 373.139(1) declares that "acquisition of real property for th[e] objective" of conserving water and water related resources "shall constitute a public purpose…." SFWMD jumps on the word "objective" to claim that land does not actually have to be used for conservation of water resources, so long as agency bureaucrats keep that "goal" in mind. AB 15. The next section of the statute, however, lists uses of land that meet the requirement of section (1): "flood control, water storage, water management, conservation and protection of water resources, aquifer recharge, water resource and water supply development, and preservation of wetlands, streams, and lakes." None of this is provided by the purchase of farm land which will continue to be farmed by the seller, particularly where the agency did not attempt even a reasonable expectation of building public water projects.

[15] It is worth reiterating that while agency staffed mused on the stand regarding possible uses for the USSC land, no use for even one acre of that land has been approved by the Governing Board of SFWMD. As there has been no such agency

language from statutes indicating that the purchase of land is *part* of a project and that a water resource project is a public purpose. The point, which SFWMD misses, is that this validation does not accomplish such a project, as there is no reasonable expectation for its remaining components.[16]

d. There is nothing "naively unworkable" about the analysis that should have been undertaken.

SFWMD attempts to deflect attention from the fact it did nothing to support its claimed public purpose by arguing that any court analysis of whether a public purpose has a basis in reality is "naively unworkable" and supports this via strawman arguments, such as a claim that Appellants argument would require detailed construction specifications before land could be purchased. Thus, SFWMD argues that it should essentially be given a pass to avoid having the Court delve into such thorny issues.[17]

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decision, all that SFWMD really presented is speculation as to what *could* be done with the land – assuming that some funding source existed.

[16] Citing section 373.584, Florida Statutes, SFWMD claims that because land acquisition is a *part of* a project (or as the statute puts it a project "includes" acquisition of necessary property rights) this does not mean that land, without the other components is a project. The statute is in fact quite clear, that to have a water resource project – the stated public purpose -- the agency needs construction, operation and land acquisition. All of these are "include[d]" within a project, which is not to say that one without the other is a project.

[17] SFWMD made essentially the same argument before the Third District in claiming that its decisions relating to the USSC acquisition are also unreviewable under the Administrative Procedure Act. *See* Answer Brief of SFWMD in *Miccosukee Tribe v. SFWMD*, Fla. 3d DCA Case No 09-1960.

There is, however, nothing unworkable in having administrative agencies prove the bases for their claims. No one has argued that detailed engineering specifications are required or that every last project detail must be ironed out. There is no claim that SFWMD needs blueprints. But, this does not mean it can simply make up a vague purpose it has no reasonable expectation of building, label it an "objective" and avoid all further inquiry. There must be some reasonable factual support for a claimed public purpose. After all we are dealing with any agency that seeks to spend $650 million public dollars premised on a purpose that the evidence showed the agency has no ability to implement.[18]

This case is a far cry from a court needing to delve into minutiae of project planning. There is no minutiae in this case; there are not even broad strokes. What this Court has before it is an executive agency that has no reasonable basis for its claims arguing that the Court should overlook that because in some other case (where there is a project) a trial court may have to go too far into the weeds.

IV. THE LENGTHY INVOCATION OF EMINENT DOMAIN CASES BY SFWMD ONLY UNDERSCORES HOW FAR OUT ON THE LIMB IT HAS GONE.

Apparently unable to find bond validation cases that support its view that a public purpose is whatever the agency says it is, the District argues that it is

[18] Moreover, even were the money to materialize, there is not even any telling as to what the project would be or even how much of the USSC land it would use.

instructive to look at eminent domain cases. AB 20-23. None of the cases cited by SFWMD stand for the proposition that agencies can buy, much less condemn, land for the *actual* purpose of returning them to the same private to which they are presently put -- with no showing of any plan or ability to bring even a substantial portion of the land to public use.

That situation is a far cry from cases such as *Wright v. Dade County*, 216 So. 2d 494 (Fla. 3d DCA 1968) or *Carlor Co. v. City of Miami*, 62 So. 2d 897 (Fla. 1953) where a local government acquires additional land adjacent to a present facility for future expansion.[19] In such a case there is a clear present public use and a plan for incorporating the adjacent land into that use. In both *Wright* and *Carlor* that was further supported by a *legislative* finding of necessity. And in neither case was there any question raised as to the ability to make public use of the land or a claim that public use is a mere pretext with no reasonable expectation of coming to fruition.[20] These cases cannot be read to mean executive agencies, operating with no specific legislative authorization, can incur debt to acquire any land they want with nothing but speculation as to what uses might be made in the future premised

[19] In both cases the nature of the facility (an airport and hospital) meant that the adjacent land was the only land suitable for expansion. In the present case, by way of contrast, SFWMD is acquiring a shotgun scattering of parcels throughout the EAA with no showing that any present facility will be expanded.

[20] Nor is there any bearing to cases saying that detailed "engineering drawings" or every last detail of a project. AB 22. As previously noted, this is simply an attempt to mischaracterize the argument.

on future agency action, future plans, possible “trades”, with no “attempt to prove financial feasibility…”. AB 12.

If anything, eminent domain case law undercuts the claim that it supports the acquisition of land based on the mere incantation of a public purpose with no reasonable expectation of accomplishing it. In condemnation it is clear that public purpose is an issue of fact to be decided by evidence, not something resolved by the mere incantation of a goal by agency staff. *Canal Authority v. Miller*, 243 So. 2d 131 (Fla. 1970); *Wilton v. St. Johns County*, 98 Fla. 26, 123 So. 527 (Fla. 1929). The agency must *prove* that the acquisition is reasonably necessary to serve the particular public use for which the property is being acquired. *See e.g. Department of Transp. v. Fortune Federal Sav. and Loan Ass'n*, 532 So. 2d 1267 (Fla. 1988); *City of Lakeland v. Bunch*, 293 So. 2d 66 (Fla. 1974). Thus, while a reviewing court may give deference to the condemning authority's exercise of discretion; the discretion is not unbridled as SFWMD agues in the instant case. *Canal Auth.y v. Litzel*, 243 So. 2d 135 (Fla. 1970).

Moreover, it is well-settled that "eminent domain cannot be employed to take private property for a predominantly private use...." *Baycol, Inc. v. Downtown Development Auth.*, 315 So.2d 451, 455 (Fla. 1975). Thus, an agency could not condemn land merely to be leased with no plans for public use. This point has been recently clarified in the United States Supreme Court decision in *Kelo v. City of*

New London, 545 U.S. 469 (2005). There, the Supreme Court held that a public agency "cannot take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 478. The reviewing court is therefore required to *carefully consider* the agency's plan, reviewing objectively the claimed purposes – the exact opposite of what SFWMD argues here. *Id.*

Thus, while New Hope does not agree that there is any need to turn to eminent domain case law, doing so only strengthens Appellants' position. There is nothing in the cases cited by SFWMD to indicate that an agency could institute condemnation merely to possibly, if it decides to do so in the future, and if funding materializes, use the property for some public purpose to be determined..

V. SFWMD DID NOT PROVIDE THE TRIAL COURT THE INFORMATION NEEDED TO FULLY EVALUATE THE VALIDATION REQUEST.

As noted in the Initial Brief (at 21-23, 26), a proposed validation must provide adequate information by which its legality can be measured. Contrary to this straightforward requirement, SFWMD deferred key decisions until *after* the validation essentially putting important issues – including questions that go the heart of whether a referendum should be required – outside the court's purview. For example, SFWMD based its acquisition on uses that its Governing Board *might* approve in the future. Whether such uses will be approved is in SFWMD's

view none of the trial or apparently this Court's concern as that will happen, if at all, years after the validation. (A. I 0,2092-94)

SFWMD has also left open the question of what lands will be placed under the Master Lease and would therefore revert to the control of a trustee in the event of non-appropriation. IB 43-45 SFWMD has thus reserved for itself the ability to encumber land that its own Chief Executive admits could never be ceded, even temporarily, to a trustee. *Id*. SFWMD's response to what should be a critical question of whether it can actually exercise its claimed non-appropriation right is simply to mock the argument, stating Appellants are too concerned about "evil" trustees. AB 42. This misses the point -- or more accurately tries to distract from it. The point is that if SFMWD cannot cede control of an asset, its placement under the master lease would defeat the supposed ability to walk away. This is not a question that can be cast aside with nothing more than misplaced levity.[21]

Along these same lines, SFWMD now adds one more bit of missing information. New Hope pointed out that the USSC lease is not a "permitted

[21] Nor does SFWMD's argument that allowing it to pledge critical infrastructure grants "more flexibility" speak to the issue. No doubt allowing the agency to give borrowers better security than a claim to a small income stream from USSC will make COPs more marketable. Pledging critical flood control infrastructure under the master lease would obviously make any investor feel safe, specifically because they could be sure that the "non-appropriation" clause would never be invoked. The fact the District has more flexibility (*i.e.*, more ways to encumber key public infrastructure) is a cause for higher concern, not lesser scrutiny.

encumbrance" under the financing documents. IB 38-39. This technical legal point is of critical importance because for non-appropriation (the legal fiction allowing avoidance of a referendum) to work SFWMD has to be able to walk away from the financing without further liability. SFWMD cannot do so because this requires delivery of the land to the trustee free of all encumbrances except "permitted encumbrances." *Id*. The land, however, is encumbered for the next 20 years by the farming lease to USSC, defeating the claim of non-appropriation.

Among the issues to be addressed after validation, SFMWD claims that it will add the USSC lease to the definition of permitted encumbrance. AB 36-37. There is, of course, no reason this could not have been done prior to the validation. It has not, however, and this is one more in the laundry list of actions that SFWMD claims might occur *after* validation to extinguish the present defects in its request.

VI. A REFERENDUM SHOULD BE REQUIRED.

As explained in the Initial Brief (at 35-43), this case falls outside the narrow confines for avoiding a referendum set out in *State v. School Board of Sarasota County*, 561 So. 2d 549 (Fla. 1990). In that case, school districts sought to finance up to $135 million in new school construction via COPs. The COPs were to be repaid from a lease of the school buildings themselves. In the event of non-appropriation, the trustee would take possession of the schools and relet them for the benefit of the investors. *Id*. at 550-51.

There was no issue, as is presented here, of the loss of the new schools affecting the operation of the existing ones. Nor was there any problem with the schools being encumbered by a lease to a third party that would create liability in the event of non-appropriation. And, to be sure, the school districts did not purport to offer as additional security their existing public property, as SFWMD reserves the right to do in this case for greater "flexibility."

SFWMD falls outside the scope of *Sarasota County* for three reasons:

1. The USSC farming lease encumbers non-appropriation as it precludes delivery of clear possession to the trustee. *See* IB 38-40.
2. SFWMD has reserved the right to pledge not just the land being purchased, but any existing public infrastructure it owns as additional security for inclusion under the Master Lease. *See* IB 43-45.
3. If the Court assumes SFWMD's public purpose to be more than a fiction, it must also consider that the nature of those facilities would preclude no-appropriation. *See* IB 40-43.

As to the first two issues, SFWMD does not dispute that the USSC lease is an encumbrance or that other facilities might be included in the master lease, and therefore pledged to be ceded to the "evil" trustee in the event of non-appropriation. Its response is to say that it will address the issues later, after validation. No reason is given for why SFWMD could not already have determined the respective rights of the trustee and USSC. Nor is there any reason why it could not have determined the land to be included under the Master Lease.

As to the later issue, SFWMD disclaims any problem with divesting part of its water control infrastructure to a trustee, arguing that trustees are good honorable people. AB 42. The point of course is that loss of control of existing public assets, to a trustee -- *whose fiduciary obligation as a "good" trustee is to secure payment for the COPs, not serve the public interest* -- creates substantial liability in the event of non-appropriation.

While SFWMD may be cavalier with the public trust, this Court should not be. The very basis of *Sarasota County* is that the agency can walk away from the obligation with no further liability. *See Sarasota County*, 561 So. 2d at 552-53. That is hardly the case if the agency places itself in the position of losing existing critical infrastructure needed for flood control, water supply and regulatory compliance in order to decide not to "renew" its obligation to the master lease.

Appellees and the Florida School Boards' Association (FSBA), attempt to avoid this problem, and distinguish this Court's decision in *Frankenmuth Mutual Insurance Company v. Magaha*, 769 So. 2d 1012 (Fla. 2000), by arguing that there is no *contractual* preclusion of non-appropriation. However, there was no such problem in *Frankenmuth* either. The issue was that the government agency had structured its affairs in such a way as to prevent it from exercising its non-appropriation right, as a practical matter. *Id*. at 1025-26.

SFWMD's and FSBA's primary argument is that *Frankenmuth* addressed the issue of a "non-substitution clause" in the financing documents, and they attempt to limit the case to those facts. However, that clause in *Frankenmuth* did not, as a legal matter, prevent non-appropriation. The agency had a clear legal right to walk away just as SFWMD claims here.[22]

The problem was the consequences. The non-substitution clause created a practical, operational consequence, in that case inability to finance substitute computers, sufficient to compel the agency to continue appropriation. *Id*. The same issues exist here, but were not analyzed below. The interconnected nature of water structures, the vast difference between the value of land and the value of infrastructure, and the potential to pledge facilities that SFWMD's own CEO states could never be ceded to a trustee create, if anything, far greater consequences to non-appropriation and place this case squarely outside the clean break from the lease upon which *Sarasota County* is predicated. The trial court should have analyzed whether the above matters would preclude non-appropriation, or create liability, or (as in *Frankenmuth*) create operational difficulties sufficient to compel the agency to continue appropriations.

[22] For that reason the Court referred to issue as "moral compulsion." As the analysis of Justice Lewis in *Frankenmuth* explains, what this means is that even though there is a legal right of non-appropriation it could not be exercised without significant consequences to the agency sufficient to compel payment. *Id*.

VII. SFWMD CANNOT SHED ITS STATE AGENCY STATUS WHENEVER IT FINDS IT INCONVENIENT.

In its Initial Brief, New Hope points out that legislative approval is required for state agencies to issue debt, including "revenue bonds" which include COPs. IB 46-50. SFMWD's response is to claim that it is a state agency for some purposes, but not others. It confuses a general delegation of power to issue debt with a delegation of the full legislative powers constitutionally afforded to charter counties. AB 49-50. Nothing in the case cited by SFWMD, this Court's decision in *St. Johns River Water Management District v. Deseret Ranch of Florida, Inc*., 421 So. 2d 1067 (Fla. 1982), supports that view. While *Deseret Ranch* allows water management districts to levy taxes, it did not categorically exempt them from all requirements applicable to state agencies. Nor does any statute or case cited support the view that a water management district is a legislative body.

Districts are executive agencies, with only the powers delegated by the Legislature.[23] They do not act independently and are subject to extensive oversight and control by the Governor. The extent of that control was analyzed in *Grimshaw v. SFWMD*, 195 So. 2d 1358 (S.D. Fla. 2002), which found that the Governor controls nearly all aspects of SFWMD decision-making and expenditures. *Id*. at

[23] Their closest analogy to legislative power is the authority to make rules subject to the Administrative Procedure Act; however, even there they cannot make policy and their power is limited to implementing the specific provisions of law. *See* Fla. Stat. §§ 120.52(8) and 120.54.

1364-68 (analyzing executive branch control). Yet, SFWMD would now claim that it should be treated as an independent local government. Given the fact that the Governing Board and managers of SFWMD are under the Governor's control, this would essentially grant Legislative powers to the Executive Branch and tear down the fundamental concept of separation of powers.[24]

While it may find its status inconvenient, SFWMD is a state agency. The definition of "agency" in section 20.03(11) and the detailed analysis of SFWMD's operations and finances in *Grimshaw* confirm this inescapable fact. *Id*. The Constitution is likewise clear that specific approval by "general law or act relating to appropriations" is needed for this financing. SFMWD has never sought such approval, obviously aware of the political implications of doing so. It now improperly asks this Court to simply grant it (and by extension the Governor) legislative status and allow them to escape the restrictions of separation of powers.

VIII. THE SCHOOL DISTRICT'S FEARS ARE UNFOUNDED, AS NOTHING IN THIS CASE REQUIRES THE COURT TO OVERTURN *SARASOTA COUNTY SCHOOL BOARD*.

FSBA devotes its brief to supporting the Court's decision in *Sarasota County*, arguing its importance to school construction. But, the appeal does not require the Court to revisit *Sarasota County* or retreat from its approval of COPs as

[24] In this case, the entire transaction was undertaken at the direction of the Governor. A.2 271, 318; A.3 489,517.

a financing mechanism for schools. There is a vast chasm of difference between SFWMD's novel attempt to expand COPs and the accepted practice in Sa*rasota County*. The issue here is that SFWMD has presented a financing that simply cannot be squeezed into the reasoning of *Sarasota County*.

This is not a case where the financing directly accomplishes a public purpose, such as building schools. The purpose in this case is contingent and there is nothing to indicate any expectation that it will ever be built. All SFWMD travels on are its claims of lofty "goals" and "objectives" rather than actual public infrastructure. Likewise neither *Sarasota County* nor *Strand*, involve a situation where there were practical impediments and significant public consequences to non-appropriation. The evidence below was undisputed that water infrastructure projects are critical public infrastructure that SFWMD cannot simply abandon.

And of course the issues, previously discussed, regarding the encumbrance of the 20 year farming lease to USSC and the inclusion of presently unencumbered public infrastructure under the master lease create a character of instrument far different from that in *Sarasota County*, where all that was potentially lost were the schools built with the proceeds.

CONCLUSION

For the foregoing reasons and as further explained in the Initial Brief, the Final Judgment should be reversed and the validation denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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