IN THE SUPREME COURT OF FLORIDA

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

NEW HOPE SUGAR COMPANY and
OKEELANTA CORPORATION, et. al.

Defendants/Appellants,

vs.

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT

Plaintiffs/Appellee.
_____/

EMERGENCY MOTION OF NEW HOPE AND OKEELANTA TO STAY PROCEEDINGS PENDING DISPOSITIVE PROCEEDING BEFORE DISTRICT COURT OF APPEAL, THIRD DISTRICT

Appellants, New Hope Sugar Company and Okeelanta Corporation (together "New Hope"), move for an order of this Court staying this appeal pending the resolution of a related case currently pending before the District Court of Appeal, Third District[1] the disposition of which logically should precede the determination of this case and which could moot any action taken by this Court in this direct appeal. The appeal before this Court involves the review of a final judgment of the

[1] *Miccosukee Tribe Of Indians Of Florida, v. South Florida Water Management District*, Case No. 3D09-1960 (notice of appeal filed July 15, 2009)

circuit court[2] validating $650 million in COPs to be issued by the South Florida Water Management District (SFWMD).[3] The related Third District case involves the propriety and validity of the SFWMD's denial of Appellants' requests for a formal administrative hearing to challenge the underlying transaction to be financed by COPs.[4]

Were the transaction overturned, the bond validation would necessarily fail. Since the Third District's grant of the relief sought by Appellants would, in effect, moot the bond validation, proceeding in this action ahead of the Third District case would be a waste of judicial resources, avoidable were this Court to stay this

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[2] Final Judgment Validating Certificates of Participation Lease-Purchase Financing, Not To Exceed $650 Million, (Fla. 15th Cir. filed August 26, 2009) (the "Order").

[3] COPs are certificates of participation, a financing device used by governmental entities to avoid voter approval of bonding instruments.

[4] SFWMD has filed in this Court and in the Third District motions to urge both courts to keep everyone's feet to the fire, as far as schedule is concerned. This, it is urged, is required by the timing of the deal below. What SFWMD sheepishly fails to reveal to either court is that these proceedings have dragged and languished below as SFWMD and its supposedly shy and "hard-to-get" seller have negotiated and re-negotiated their deal THREE times and changed the size of the deal from $1.75 billion to $1.34 billion, to a more "modest" $650 million as SFWMD valiantly tries to come up with a number which will not create a financial cataclysm. The bottom line is that having delayed and delayed the proceedings below at every turn, neither SFWMD nor USSC should now be heard to urge that the case be considered in reverse order to accommodate their ever-changing sense of urgency. Should there be a delay at all, it will make no difference as U.S. Sugar will continue farming the land whether the deal closes or not, the only difference being whether or not its bank account swells by more than one-half billion of taxpayer borrowed funds, while it farms the land as it has for the past 60 years.

appeal until such time as the Third District concludes its review. Alternatively, should the Third District certify its case to this Court as one of great public importance, and this Court were to accept that invitation, both appeals could be decided at one time.[5] However, it makes little sense to proceed in the face of a pending lower court case which could require further hearings and a new decision on whether to undertake the transaction for which COP financing is sought.

The need for orderly decision-making and full judicial review is particularly important in this case, which involves the largest use of COPs ever attempted in this state and does so in the context of a transaction evidencing the most bizarre usage of COPs ever concocted. Also unique from other validations is that the transaction at issue is designed to allow an executive-branch agency, *with no elected member accountability*, to bypass both the Administrative Procedure Act and the peoples' right to decide whether they want $650 million of their monies paid to a farming company, which will continue to farm the same land for at least two decades after the people have paid for that land. All of this stretches the

[5] Appellants have simultaneously filed before the Third District a Motion To Certify Case To Supreme Court of Florida As A Matter of Great Public Importance. Should the Third District grant this motion and certify the case to this Court, the Court would have the option to consider both appeals together as an alternative to a stay.

tolerance of *Strand v. Escambia County*, 992 So. 2d 150 (Fla. 2008) ("*Strand*") far past its breaking point.[6]

INTRODUCTION AND PROCEDURAL HISTORY

On September 23, 2009, Appellant Miccosukee Tribe of Indians (the "Tribe") filed its notice of appeal of the Order in this action. A separate notice seeking this Court's review of the same Order was filed on September 25, 2009, by New Hope. The Order validates up to $650 million worth of COPS, to be issued by the SFWMD, which plans to use the COP proceeds to purchase certain lands of United States Sugar Corporation (USSC). Those lands would then be leased back to USSC for farming.[7]

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[6] *Strand* saw this Court switch from a unanimous reversal to a 4-2 affirmance on rehearing. In so doing, the Court was compelled to balance very sensitive constitutional and public policy needs in weighing constitutional rights of the electorate to approve financings. SFWMD now brazenly challenges this Court with the opportunity to mutate *Strand* far beyond anything that this Court could have contemplated, by allowing executive branch agencies to issue debt with no legislative authorization, based on fictional projects, with no demonstration that the supposed public purpose will ever come to fruition. Doing so would validate the darkest fears of the two dissenters in *Strand*, Chief Justice Quince and Justice Lewis who aptly predicted what has been wrought below whereby SFWMD's action "operates to circumvent voter participation in a decision that requires popular approval under the Florida constriction." *Strand*, 992 So. 2d 150, at 164 (Lewis, J., and Quince, C.J., dissenting)

[7] The $650 million also includes the purchase of a non-transferable option to purchase additional lands, where the record is clear that SFWMD does not have and will not have the ability to exercise the option.

The final decision to acquire the USSC lands with the COP proceeds and to lease those lands back to USSC was made by the SFWMD Governing Board on May 13, 2009. Appellants timely requested an administrative hearing pursuant to sections 120.569 and 120.57, Florida Statutes, and the denial of that request is the subject of the Third District appeal.

The Third District thus has before it the question of whether the procedures for making the agency decision underlying the validation request were proper. Reversal by the Third District would require remand to SFWMD to reopen its decision-making process, afford a proper hearing, and reconsider its action in light of the findings and recommendations of an Administrative Law Judge (ALJ).

To finance the purchase, bond validation was sought in the instant case. SFWMD's original validation Complaint was based on its planned $1.75 billion acquisition of all USSC business assets, equipment and land, with USSC supposedly set to close shop seven years thereafter. The deal then morphed into a $1.34 billion acquisition of just the land of USSC, subject to farming by USSC for an indefinite period. Validation under this structure was tried before the lower court on February 6 and March 16-18, 2009.

Before a judgment could be issued, however, the deal changed yet again, and on May 13, 2009, the Governing Board approved the present USSC acquisition -- a $536 million contract for 73,000 acres, with an option to buy yet more land at a

minimum price of $791 million. As in the preceding deal, USSC was to keep control of the land it "sold" unless and until it could be used for reservoirs and other large-scale infrastructure that the evidence showed SFWMD has no capacity to finance or build.

A key issue presented in the bond validation hearing below is what information was shown to the Governing Board and whether there were adequate agency findings. The Board was presented several "concepts" that would supposedly make use of either the USSC land, or other land that SFWMD staff asserted could be traded for that of USSC. However, the Governing Board was never told how much any of these concepts would cost, how any infrastructure would be financed, or how the operating costs of projects would be paid. The Governing Board was also never given any timelines for construction of infrastructure. Nor has any plan for public use of any of the USSC lands ever been approved by the Board. It was also undisputed below that all the concepts for use of the land presented to the Governing Board presume acquisition of all USSC land. Yet, several SFWMD executives, including its chief financial officer, admitted in the proceedings below that SFWMD could not afford to purchase the remaining land. This information was also never shared with the Governing Board.

The staff's selective presentation of information and outright hiding of key facts from the Governing Board was a primary issue Appellants attempted to present below. The trial judge, however, felt constrained to find all of this outside the scope of his review under this Court's bond validation precedents, a situation that the trial court may never have faced had the administrative hearing sought by Appellants been granted.

These hearing requests were, however, denied by orders issued by SFWMD staff attorneys,[8] who argued that SFWMD's approval of the USSC acquisition is not subject to the Administrative Procedure Act, chapter 120, Florida Statutes, and/or that Appellants lacked standing to request a hearing. Had the staff not quashed the request, the administrative hearing would have allowed a complete evidentiary record and the recommendation of a neutral ALJ to be presented to the Governing Board. *See* Fla. Stat. §§ 120.569 and 120.57. This would, however, have had the effect (unfortunate for USSC) of having the Governing Board make a decision informed by the facts, rather than staff's selective, rose-colored view of the "opportunity"[9] presented by the USSC acquisition.

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[8] This dismissal of the administrative hearing petitions is one more issue that the staff chose not to take to the Governing Board. The Petitions were instead dismissed by agency attorneys in the SFWMD office of general counsel.

[9] Throughout the presentations to the Board, and in the staff report supporting the validation request, the staff frequently talks about the "opportunity for restoration"

A full presentation of the facts would have eliminated several of the issues raised in the bond validation. For example, the staff's hiding of critical information from the Governing Board could have been addressed by allowing interested parties a formal hearing to present evidence that would then have been distilled into factual findings and a recommended order by an ALJ and presented to the Board.[10] In this way, the hearing process could have fulfilled the function intended by the Legislature: to "independently serve the public interest by providing a forum to expose, inform and challenge agency policy and discretion."

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provided by the USSC purchase. There is never any claim that SFWMD can fulfill this vision, and the testimony in the bond validation hearing shows that there is no reasonable basis to think that SFWMD can ever finance what the staff presents as a unique opportunity. The staff for example had estimated that the most debt SFWMD can issue under a statutory debt cap is $1.1 billion, and that even this would strain its budgets, yet the "opportunity" is estimated by SFWMD's chief engineer to cost upwards of $12 billion with an additional $300 million-plus needed ever year, in perpetuity, for operating costs. None of this information (undisputed before the trial court) was given to the Governing Board. And, the circuit judge disregarded these facts as collateral based on his view that absolute deference should be given to the Governing Board's decisions on "economic feasibility," even though in this case the Board actually made no finding on that subject. SFWMD was therefore able to proceed with a massive public expenditure based on nothing more than hopes and aspirations, with no one having a forum to challenge the underlying fallacy of its action.

[10] Key issues regarding the feasibility of the supposed public purpose, the ability to purchase the remaining land, suitability of the land for the supposed purpose, and impacts to other critical Everglades restoration projects could have been fully developed in a formal hearing, findings of fact on these issues made by an ALJ and the actual facts, not just those selected by staff, presented to the Governing Board for a decision on the purchase.

See State ex. rel. Willis v. Dept. of Gen. Service, 344 So. 2d 580, 590 (Fla. 1st DCA 1977). The denial of Appellants' administrative hearing requests removed any such opportunity, as Appellants were given only three minutes to address the Board in "public comment" and could do little more than present written information that SFWMD simply ignored.[11]

Both New Hope and the Tribe appealed the denial of their administrative hearing petitions. Both cases are now pending before the Third District, and initial briefs were filed on September 23 and 29th by the Tribe and New Hope, respectively. (A copy of New Hope's Initial Brief, without exhibits, is attached at App-1; the order on appeal in the Third District is attached (without its attachments) at App-2; New Hope's Petition for Formal Administrative Hearing is attached at App-3.)

The very issues that could have been presented via an administrative hearing and the very issues hidden from the Governing Board, were claimed by SFWMD

[11] Even though New Hope is the largest private landowner in the Everglades Agricultural Area, excluding USSC, and even though many of the concepts presented used more of New Hope's land than that SFWMD is purchasing from USSC, New Hope was denied the opportunity to address the Board in any meaningful fashion. New Hope was only allowed to come up as a general member of the public for a maximum of three minutes. In fact, its representatives were cut off by the Governing Board when they tried to speak for a longer period. This is a far cry from the extensive hearing rights, ability to call adverse witnesses, right to conduct cross-examination and other procedural safeguards required under the APA and the Uniform Rule of Administrative Procedure.

in the instant bond validation case to be beyond the scope of the trial court's review. SFWMD thus claimed, successfully below, that whether a project is feasible, and whether there is even a reasonable expectation of public use of the purchased land, are "collateral" and matters to which absolute deference was due to SFWMD.[12] Yet, there was also no right to develop information on these issues at the administrative level according to SFWMD staff. In effect, via administrative sleight of hand, SFWMD staff has successfully kept the fact that the emperor has no clothes -- that there is no basis to support the fictional public purpose underlying the USSC transaction -- from being addressed in any forum, either judicial or administrative.

The claims and arguments before the Third District could have the effect of negating any validation issued by this Court. As explained in New Hope's initial brief to the Third District (App-1), if that court finds that New Hope was entitled to a hearing the matter would be remanded to SFWMD.[13] Such a remand would mean that there is no final agency action approving the purchase until a hearing was held pursuant to section 120.57, Florida Statutes, and a new decision made by the

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[12] This deference was apparently due to findings the Governing Board never made, as the Board never approved any project for the USSC lands, was never given even minimal data on the cost and feasibility of any "concept," and certainly never found that any infrastructure on the USSC land was feasible.

[13] *See* Fla. Stat. § 120.68(7)(a) (requiring remand for a hearing when an agency dismisses a petition that raises disputed issues of material fact).

Governing Board. Given full information and the benefit of an ALJ's factual findings and recommendation, the Governing Board could decide not to proceed with the purchase for many of the same reasons presented to the circuit court below and deemed outside the scope of judicial bond validation.

ARGUMENT

In its Petition for a formal administrative hearing, New Hope alleges,[14] *inter alia*, that there are no plans to do anything with the USSC land; that the SFWMD has no capacity to finance the second phase land purchase and no plan for obtaining that money; that SFWMD has no financing plan or funding source for constructing public projects on the purchased land; that SFWMD has no viable use for any significant portion of that land other than continued farming by USSC; and the SFWMD must abandon ongoing restoration projects to finance the deal, and arbitrarily and capriciously failed to consider the detrimental impacts to Everglades restoration. New Hope also alleges that the agency action commits SFWMD to lease back the land purchased from USSC with public funds, and during that time spend hundreds of millions of public dollars to accomplish nothing more than a *de facto* subsidy of USSC's farming.

[14] Because that appeal involves the dismissal of a Petition without an opportunity for an evidentiary hearing, the allegations are taken as true and in the light most favorable to the Petitioner. *See University Psychiatric Center, Inc. v Dep't of HRS*, 597 So. 2d 400 (Fla. 1st DCA 1992)

The factual bases for these alleged deficiencies should have been addressed in a formal, evidentiary hearing, which would have allowed the same evidence presented to the trial court to be presented to an ALJ and ultimately placed squarely before the Governing Board in a recommended order. Seeking to squash any scrutiny, however, the SFWMD staff dismissed New Hope's challenge outright and denied the requested hearing without ever taking the hearing request to the Governing Board. The propriety of this denial and the refusal to afford a hearing to address disputed issues of material fact are the primary issues before the Third District.

In the instant case, the circuit court was presented with similar issues regarding the SFWMD's economic ability, or lack thereof, to accomplish the stated "public purpose," but the trial judge, citing this Court's decisions in *Warner Cable v. City of Niceville*, 520 So. 2d 245, 246 (Fla. 1988) and *Boschen v. City of Clearwater*, 777 So. 2d 958 (Fla. 2001), reluctantly felt unable to consider the ability of the SFWMD to finalize the projects it claimed to constitute the "public purpose" of the Acquisition. As a result, the court stated "[w]hile the Court questions the wisdom of seeking $ 2.2 billion in COPs during these economic times, it is bound by precedent which instructs the economic feasibility is collateral

to bond validation proceedings." *Order* at 22.[15]

The two sets of appeals thus overlap substantially. They also present the unique situation where the lower appellate court is faced with preliminary issues directed to the procedures used, while the Supreme Court has before it issues related solely to the financing structure by which the action would be financed, *if affirmed by the lower court*. The lower court appeal could easily negate any action taken in the Supreme Court, as if a hearing was improperly denied there is no valid approval of the acquisition and will not be one until the procedural defect is cured (and then only if the Governing Board decides to approve the transaction following the hearing and in light of the ALJ's recommended order).

To address the fact that a decision in the Third District case could render a bond validation question moot, New Hope requests that this Court stay the instant appeal pending dispositive action by the Third District. In the alternative, New Hope has filed a motion with the Third District to certify the appeal before that court as a question of great public importance for immediate review by the

[15] The "economic feasibility" referred to in the Order is not the ability to complete a project with the approved financing, as in *Boshen*. There is no dispute that the present COPs will not create a project; they will only buy land and not one penny for project infrastructure is included nor, standing alone, does that purchase serve the supposed public purpose. The feasibility issue relates to whether the agency can secure billions of dollars in *additional* financing, upon which any public use is contingent.

Supreme Court. In this way two appeals can either be decided concurrently by this Court, or the Third District appeal can be decided first, so that procedural matters can be judicially reviewed and any required administrative process followed, prior to review of the merits of any validation by this Court.[16]

Such an approach will promote judicial efficiency by allowing review of whether a proper process was followed to precede or occur concurrently with substantive review of the financing mechanism. It would also avoid the possibility of this Court approving a validation for a matter that traveled on an improper administrative approval. *See Allstate Insurance Company v. Titusville Total Health Care* , 848 So. 2d 1166, 1167 (Fla. 5th DCA 2003) ("Courts have often held that it is appropriate for one court to stay an action in order to avoid a waste of judicial resources if a similar issue is pending in another action and will be dispositive." (citations omitted)); *Independent Fire Insurance Co. v. Arvidson*, 564 So. 2d 1254 (Fla. 4th DCA 1990) (claimant's action on insurance policy for personal injury in Broward County should be stayed until insurance company's

[16] The Third District case revolves around procedural matters and would not reach the merits of any decision. The court would either remand the case for a hearing, or decide that no hearing was required and affirm SFWMD's dismissal. In the first scenario, staying the present action would allow the Supreme Court to review validation with the benefit of the complete administrative record provided by a proceeding conducted under APA procedures. In the second, the Court could decide any appeal of the Third District's decision concurrently with the appeal of the validation Order.

action for rescission of contract in Palm Beach County has been concluded). Clearly, if the Acquisition was improperly approved or failed to meet statutory due process requirements of the APA, the financing of an improper Acquisition would be moot.

CONCLUSION

New Hope believes that in the interest of judicial economy that this Court should either stay the proceedings before it or, should the Third District certify a question of great public importance, review both matters concurrently. This approach would allow a logical determination of the issues presented in both appeals, such that the questions of whether a hearing should have been granted and whether the Governing Board should reconsider its decision in light of such a hearing are decided prior to, or in conjunction with, a determination on the propriety of the financing. Absent granting such relief, this Court may be in the position of approving bonds for a deal that is later held to be improper by the Third District.

Finally, without question, this Court should consider a stay to avoid necessity of reaching a constitutional issue and the need to again revisit *Strand*, when the orderly disposition of the dispute could well avoid such a result.

Respectfully submitted,

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By:_____
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CERTIFICATE OF SERVICE

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