IN THE SUPREME COURT OF FLORIDA
CASE NO. 94,135

STATE OF FLORIDA,

Appellant,

Lower Tribunal: Osceola Circuit Court

v.

OSCEOLA COUNTY, FLORIDA,
a political subdivision of the
State of Florida,

Appellee,

and

THE TAXPAYERS, PROPERTY
OWNERS AND CITIZENS OF OSCEOLA
COUNTY, FLORIDA, INCLUDING
NON-RESIDENTS OWNING PROPERTY
OR SUBJECT TO TAXATION THEREIN,
AND ALL OTHERS HAVING OR CLAIMING
ANY RIGHT, TITLE OR INTEREST IN
PROPERTY TO BE AFFECTED BY THE
ISSUANCE OF THE BONDS, HEREIN
DESCRIBED, OR TO BE AFFECTED THEREBY,

Appellees.
_____/

INITIAL BRIEF OF APPELLANT STATE OF FLORIDA

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I. Whether the decision below should be reversed because of defects in the County's Complaint for Validation as alleged in the State's Amended Answer, or, in the alternative, whether the decision below should be reversed and remanded because the court below failed to address, much less decide, the merits of those alleged defects.

A. Do the bonds violate Section 125.0104(3)(l)(2), Florida Statutes, of the Local Option Tourist Development Act (the "Act")?

B. To the extent the Act, as construed *sub silentio* or as applied below, authorizes the bonds, do the bonds nevertheless violate the public purpose doctrine here?

C. Does the Complaint comply with the disclosure requirements of Section 75.04(l), Florida Statutes, and, if so, is the County's undertaking in the Complaint that it will comply with SEC Rule 15c2-12 at a later point in time sufficient?

D. Is the Osceola Trace Community Development District an indispensable party and is the Complaint unripe?

STATEMENT OF THE CASE

a. **The Complaint and the Amended Answer.**

On August 14, 1998 Osceola County (the "County") filed its Complaint for Validation, with two exhibits. These two exhibits, which became the sole exhibits at trial, were:

1. The Tourist Development Tax Revenue Bond Resolution adopted July 27, 1998 (most of whose appendices were missing, but were "to follow") (the "Bond Resolution") (A11 - A331 & A445 - A766); and
2. Osceola County Ordinance #97-13 (the "Bond Ordinance"), also adopted by the Osceola County Commission, but over a year earlier, on June 30, 1997 (A1 -A338, A767 - A 774).

The County filed the Complaint because the County "has determined to issue not exceeding $35,000,000 of its Osceola County, Florida Tourist Development Tax Revenue Bonds, Series 1998...."[1] The County sought to validate these bonds (the "Bonds").

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[1] e.g., Complaint, p. 3, Para. 4 (A3); accord, id. p.1 (A1); accord, id. (caption) (A1).

The Court entered an *ex parte* Order to Show Cause on August 17, 1998 (A339-A342).

The Court entered an *ex parte* Amended Order to Show Cause on August 24, 1998 (A343 -A346).

The County served its notice of filing of affidavit regarding publication of the Amended Order to Show Cause on September 15, 1998 (A354 -A356).

The State of Florida (the "State") filed its initial Answer (A350 -A353) and the State Attorney's appearance (A348 -A349) on September 15, 1998. The State advised it was without knowledge regarding the material allegations and demanded strict proof of all matters at the hearing, especially proof of publication of notice (A350 - A353).

The State quoted the above language from the Complaint in its Amended Answer filed September 17, 1998 (A357-A364, at A358, Para. 20(i)). The State denied that all requirements of Florida and federal law pertaining to the issuance of the Bonds and the adoption of proceedings of the County, as issuer, had been strictly followed. In addition, pursuant to Section 75.05(1), Florida Statutes, the State alleged seven defects and insufficiencies in the Complaint (A358 -A362).

Chief among these defects, the State expressed serious doubt whether Section 125.0104(3)(1)(2), Florida Statutes, of the Florida Local Option Tourist Development Act (the "Act") in fact authorized the bonds, the Bond Ordinance, and the Bond Resolution and further alleged that subsection nowhere authorized the County to buy a convention center from somebody else (A359 -360)("Defect Three").

b. **The Show Cause Hearing.**

At the show cause hearing (A791-A847) held September 18, 1998, the Osceola Circuit Court heard testimony from two witnesses called by the County, namely, Gale Sittig, the newly hired Commission Auditor for the Osceola County Commission (A795 - A810) and Dr. Hank Fishkind, an expert witness (an economist) (A810 -A833), respectively. The County offered and the Court received two exhibits into evidence, viz., the Bond Resolution (A445 -A766) and the Bond Ordinance (A767 -A774), respectively. These exhibits and

these two witnesses are at the heart of the Statement of the Facts, infra.[2]

After the County rested (A833), and the State declined to present any evidence (id.), at the close of all the evidence, the Court heard closing arguments of counsel for the County (A833 -A834) and the State (A834-A842), plus a rebuttal argument by the County's bond counsel, who handed up the County's proposed final judgment to the Court at the end of rebuttal argument (A842-A845).

Then the Court recalled the economist, had the economist testify (A845-A846), whereupon, after several seconds, the Court stated, "I've read the findings adopted in the proposed judgment and I'm going to sign the judgment. Thank you, gentlemen." (A846). The Court then signed and entered the County's ten-page proposed final judgment, as handed to the Court moments before (A845, line 9).[3]

c. **The Final Judgment and the State's Objections Thereto.**

The Final Judgment tracked the allegations of the Complaint, made a single, fleeting reference (A852) to the State's initial Answer(A350-A353), and made no reference whatsoever to the State's

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[2]The County's bond counsel also identified his law firm colleague, George Nickerson (A794), along with Sittig and Fishkind, as a potential witness too, but the County did not call Nickerson at the hearing (A794).

[3]Except for the closing argument itself, the State was afforded no opportunity to comment on the proposed final judgment prior to its entry (A845-A846). Neither was the State afforded any opportunity to cross-examine the expert witness recalled *sua sponte* by the Court after the close of the evidence and all closing argument(Id.).

Amended Answer or to any of the defects in the Complaint alleged therein.

None of the Court's 24 detailed findings of fact and conclusions of law addressed, in terms, any of the issues raised by the State in its Amended Answer, any of the evidence adduced on cross-examination of the witnesses, or any of the State's arguments based on that Amended Answer and that evidence at the hearing. Consequently, all references in this brief to the trial court's rulings adverse to the State in the final judgment must be characterized as either *sub silentio* or *necessary* or *implicit* holdings.

Although the Court made detailed threshold findings in the Final Judgment regarding proper service on the State Attorney of both the Complaint and the Amended Show Cause Order (A852, preamble), no evidence was adduced at the hearing to support this finding. Neither is the State aware of summons or return of same on the State Attorney in this case.[4]

Likewise, although the Court also made crucial findings regarding proper notice and proof of publication re the show cause hearing (A852, Para. 3), no evidence was adduced, and no exhibit was tendered or introduced at the hearing to support this finding.[5]

Consequently, the State objected to the final judgment immediately upon its entry on the record -- to preserve the record (A846).

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[4] (Compare A347 (no Item 4) with A865, Item 4).

[5] (Cf. A354-A356, cited in text supra.)

d. **This Appeal.**

This direct appeal timely followed on October 12, 1998 (A848-A860).[6]

e. **The State's Appendix.**

The State's Appendix seeks to include all filings known to the State in the court below (A1-A869), plus the Act and a few other authorities (A870-A892). The State knows of no other way to show this Court what's not there.[7]

STATEMENT OF THE FACTS.

A. **The Statutory Scheme.**

i. **Chapter 75.**

Chapter 75, Florida Statutes (1997), sets forth the procedures to be used in a Florida municipal bond validation case. Chapter 75 also imposes duties on issuers like the County and imposes specific duties on the State Attorney, as counsel for automatic defendant, the State of Florida.

Section 75.05(1), Florida Statutes (1997), commands the State Attorney to bring to the attention of the Florida courts defects, insufficiencies, and untruths in would-be issuers' complaints in

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[6]The State's Directions to the Clerk in the court below designated the entire record with particularity, not just the "automatic record" (A861-A869).

[7]The Appendix accompanies this brief and is being served with it (A893). (As of this writing, no record citations exist, although the Clerk below anticipates preparing the record by December 1, 1998.)

bond validation cases. The Amended Answer was expressly filed pursuant to that section (A358).

Among other disclosure obligations on issuers, Section 75.04(1), Florida Statutes (1997), requires the complaint to set out, inter alia, "the amount of the bonds or certificates to be issued and the interest they are to bear;...."

ii. **Florida's Local Option Tourist Development Act.**

Section 125.0104, Florida Statutes (Supp. 1998) (A870-A876), known as the Local Option Tourist Development Act (the "Act") provides a mechanism for the adoption, at the local level, of a tax, sometimes informally, if imprecisely, referred to as a "tourist" tax.[8]

The Legislature has amended the Act many times since the late seventies, including last year and this year, including amendments in 1996 in Chapter 96-397, Section 44, at 2499-2500, Laws of Florida (A883 - A887), as codified in Section 125.0104(3)(1), Florida Statutes (1997) (A877-A822).

As a result of that 1996 amendment, Section 125.0104(3)(1)(2), Florida Statutes, has provided, at all times material to this case, that a qualifying county may impose up to an additional one-cent tax, by majority vote of the county commission (i.e., without referendum), in order to:

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[8]This Court held the Act to be constitutional seventeen years ago. See *Miami Dolphins v. Metropolitan Dade County*, 394 So.2d 981 (Fla. 1981). Tourists and others have been paying the tax in various Florida jurisdictions ever since.

> Pay the debt service on bonds issued to finance the construction, reconstruction, or renovation of a convention center, and to pay the planning and design costs incurred prior to the issuance of such bonds.[9]

iii. **SEC Rule 15c2-12.**

In the last three years the federal government has taken steps to regulate municipal bond disclosure. See SEC Rule 15c2-12, 17 C.F.R. §240.15c-12 (A888 - A892).

In this case, the State alleged in its Amended Answer and argued at the hearing in the court below that the suggestion in the Complaint that the County will undertake to comply with SEC Rule 15c2-12 at a later point in time (Complaint, Ex. A, Sec. 8.04, at A77) is insufficient (A359).

iv. **Osceola County Ordinance #97-13 (June 30, 1997).**

The County Commission purported to authorize a fifth-cent of tax in the County Ordinance adopted last year (A332-A338 & A767-A774). It is on the authority of this Ordinance that the Bond Resolution was adopted a year later.[10]

v. **The County's Tourist Development Tax Revenue Bond Resolution (July 27, 1998).**

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[9]See A887, codified, A878, current version at A872. Later amendments to the next subsection of the Act also permit such additional tax to be used to "pay the operation and maintenance costs of a convention center for a period up to ten years." See §125.0104(3)(1)(3), Fla. Stat. (Supp. 1998).

[10]The State has at all times assumed *arguendo* in the court below that the Bonds' purposes are authorized by the Bond Resolution and the Ordinance, but have alleged the Bonds, the Bond Ordinance, and the Bond Resolution are not authorized under the Act (A359).

The Bond Resolution attached to the Complaint (A80-A330) and introduced into evidence at the hearing over State objections (A445-A766) speaks for itself and is addressed below.[11]

B. **The Three Projects: The Osceola County Convention Center Project, the World Expo Center Project, and the Osceola Trace Project.**

The Complaint and the Final Judgment refer to a defined term of art, the "Project," to refer to the Osceola County Convention Center Project (compare A2 with A780), which is the subject of the Bonds. Id. However, the exhibits to the Complaint introduced at the show cause hearing, and the witnesses' testimony regarding same, and the Complaint and Final Judgment, all also address another, much larger "project," namely the World Expo Center Project (compare A4 with A782), of which the defined Convention Center Project is a tiny sliver, described as a "component" of the larger project. Id. Parsing the two projects, which are, in turn, sometimes in the record treated by the witnesses as pieces of a third larger project, the "whole Osceola Trace Project" (e.g., A826), is essential to understanding the pleadings and the evidence, particularly the expert economic forecasting testimony;

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[11]The State wishes this Court clearly to understand that the version reproduced in the Appendix is a true copy of the version served with the Complaint and the State's copy of the trial exhibit used at the hearing. In the court below and this Court, the State continues to disclaim the Bond Resolution is a complete or true copy, but agrees this is what was certified to be a true copy over all State completeness objections (A797 - A798).

The missing and omitted appendices speak for themselves. See Appendix Index.

casual references to the "project" readily lead to ambiguity and confusion and ambiguity objections (A822).

The descriptions of these projects and the core agreements are the subject of the book-length Bond Resolution and exhibits and appendices thereto (A11 - A295) introduced at the hearing as County's Exhibit 1 (A445 - A730).

Sustaining the State's best evidence objections (A804) and the State's coaching objections (A806 - A807), but overruling the State's completeness objections (A797 - A798), the court below admitted and found the self-authenticated Bond Resolution to be the best evidence of the Operating Agreement, described infra, for the deal (Id. & A804). Here is a summary.[12]

i. **Overview of World Expo Center Project and Osceola County Convention Center.**

The initial phase of the Project will focus primarily on the 425-acre parcel located south of Osceola Parkway. The development components guaranteed in the initial phase include the following: The World Expo Center will include 2 million square feet of exhibition space plus 400,000 square feet of meeting rooms and

[12]The following summary of these inter-linked projects tracks, to the extent practicable and to the extent supported by the record, the diction and structure of a summary provided by the County to the State with the Complaint for this case. However, since that summary itself is apparently not part of the record (A826), and since the County's expert economist testified he had never seen it (A826, line 20), the State has endeavored to cite the corresponding allegations in the Complaint and exhibits and the testimony of the witnesses and the findings in the Final Judgment.

support space (e.g., A4, Para. 7, adopted in Final Judgment at A782, Para.11).

The Osceola County Convention Center itself has yet to be designed (e.g., A161 & A596, A162 & A597, A163 & A598). The County's expert witness has seen no designs (A833, line 1) and does not know what the Convention Center will cost (see A832, line 12).[13]

According to the Commission Auditor's testimony at the hearing regarding the Purchase and Sale Agreement for the Convention Center, "The purchase price cannot be determined until the design standards are set." (A803). And, in fact, based on the County's expert witness' own economic analysis, that economist admitted on cross-examination that (i) the County is not constructing the Convention Center (A830, line 22), but (ii) the County has instead made itself party to a purchase and sale agreement (A830, line 25). And moreover, the County's expert witness testified, based on his own reading of the documents and his own participation, that, in fact, all present plans contemplate that Hyatt or a Hyatt affiliate would have sole managerial control of the Convention Center (A830, lines 6-17).[14]

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[13]So, too, the State does not know what the convention center will cost, has seen no design standards and no designs and, consequently, the State has alleged the County does not know what the cost of the convention center will be, the amount of the bonds to be issued, and what the interest rate will be (A358, Para. 20(i)).

[14]The testimony of the Commission Auditor and the County's expert witness on these scores match the corresponding material fact allegations of the State's Amended Answer (compare A803 and A830 with A360 at Para. 20(iii); accord, id. A358 at Para. 20(i).

According to the County's expert witness' forecast testimony at the show cause hearing, the Convention Center project, the Expo Center Project, and the Osceola Trace Project are expected to provide new employment opportunities (A818, A820, & A826).

Specifically, the economist testified the convention center would create 200 jobs direct employment, for total job creation of 300 jobs, whereas the Expo Center Project, later clarified on cross-examination to mean the whole Osceola Trace Project, will result in about 15,000 jobs.[15]

The "project" will also include, according to the Final Judgment, "a 2,000 room Hyatt Hotel, an entertainment/retail commercial venue, parking facilities; and a public safety facility, which will be constructed and donated to the County" (see A4, Para. 7, adopted in A782, Para. 11). The court below further found, "Future phases of the complex may include additional hotel space, entertainment/retail offerings, a central energy plant, office space and time-share units." Id.

The evidentiary and record bases for these findings are unclear or unknown to the State inasmuch as the Development Order was also omitted from the Bond Resolution, the Complaint, and the trial exhibits (Compare, e.g., A162 with, e.g., A359, Para. 20(ii)

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[15] (Compare, e.g., A818, line 23 (over 200 jobs direct employment at Convention Center) with A820, l. 10-14 (approximately 200 direct jobs times 1.5 multiplier for total job creation of 300) with A826, l. 16-17 (15,000 jobs direct employment "for the larger project," referring to the entire Expo Center Project) with A826, line 5 (clarifying, on cross, 15,000 jobs from the whole Osceola Trace Project). The vast majority of which is a private project (A826, line 9), with private employers and private employees (A826, line 12).

with A597). Also omitted was the description of the Project Site (e.g., A168 with A603), not just the description of the Convention Site (cited supra), among numerous other missing and untendered exhibits to the Bond Resolution.

Neither did the witnesses' testimony afford any substitute record basis for these findings, except for the newly hired Commission Auditor's two-sentence testimony re same (A798 - A799), over State objections, after testifying she had no personal knowledge and no competence to state whether the Bond Resolution sought to be introduced was a true copy (A796-A797, line 7).[16]

ii. Bond Resolution.

The Bond Resolution authorizes the issuance of up to $35,000,000 of bonds, the proceeds from which will be used to purchase the Convention Center (A32).

Adoption of the Bond Resolution does not require the County to issue any bonds or to execute any appended agreements, each of which will be summarized below (A32). If issued, the proposed bonds will be payable from the fifth-cent tourist development tax imposed by the County Commission last year (A50 & A25).

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[16]On the contrary, after the Commission Auditor admitted on cross that the Bond Ordinance had passed a year before she even became an employee of the County (A800, line 11), the Court equated the Commission Auditor's "understanding" of the Bond Ordinance in this case to the Circuit Judge's "[own] understanding that President Clinton sort of dallied around with Monica Lewinsky." (A800, line 23 -25). The trial judge explained "[his own] understanding of that is as good as your understanding of this, isn't it?" (A801, lines 1 -3). "Somebody told you about it?" (A801, line 5).

Proceeds of the fifth-cent tourist development tax not required to pay debt service on the bonds will be available for other qualifying projects, including improvements to the County's spring training facilities and agricultural center (A58). The Bond Resolution contemplates that, following validation, a purchase contract for the bonds, including the specific principal amount and terms of the bonds and final versions of each document attached to the Bond Resolution, will be presented to the Board for approval (A71).

The following documents were appended to the Bond Resolution and included in the bond validation proceeding.

iii. Purchase and Sale Agreement

The Purchase and Sale Agreement (See A85 & A520; A80 - A159 & A514 - A594) will be entered into by the County and Osceola Development Project, L.P. (the "Development Partnership").[17]

Under the Purchase and Sale Agreement, the Convention Center and related parking and drainage facilities will be constructed by the Development Partnership and purchased by the County (A101 - A102, A536, A136 & A571).

The Purchase and Sale Agreement permits the Development Partnership to assign its responsibility for construction and sale

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[17]The general partner of the Development Partnership is Osceola Trace Development Corporation, which is wholly owned by Robert L. Miller (A155).

The limited partner of the Development Partnership is Partners Acquisition Trust, which is wholly owned by Nomura Asset Capital Corporation (See also A829).

of the Convention Center to the Osceola Convention Center Joint Venture (the "Construction Venture") (A149 - A150 & A584 - A585).[18]

Since the design concept and design standards have not been developed, the purchase price cannot be finalized (A129).[19] In addition to the normal conditions for closing, there are a number of transaction-specific conditions to the County's obligation to purchase the Convention Center.[20]

iv. Operating Agreement.

The Convention Center will be operated for a period of twenty years under an Operating Agreement that will be entered into by the County and the all private Development Partnership (A332 & A757).

The Purchase and Sale Agreement (A91) requires the Development Partnership to assign its obligations under the Operating

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[18]The principals of the Construction Venture are the all private Development Partnership and Welbo Development Corporation, which will act as the managing venturer (A158 & A593).

[19]The Purchase and Sale Agreement requires the County to escrow a down-payment of $1,500,000, which the Construction Venture can draw and apply against its design cost (A101, A102, A536 & A537). This amount will be applied to the purchase price or repaid to the County if the transaction fails to close (A106).

[20](1) The Convention Center building must be complete and ready for occupancy, meeting the standards specified in the agreement, the specifics of which have yet to be determined (A123).
(2) The access, drainage and parking facilities to serve the Convention Center must be complete (A124).
(3) The World Expo Center must be complete and ready for occupancy (A124).
(4) The Development Partnership must have provided sufficient funds to the County for construction of the public safety facilities (A124 & A559).
(5) The hotel owner must have sufficient resources to complete construction (A124 - A125 & A560).
(6) The owners of commercial facilities must meet the same condition. (A124 & A559).

Agreement to Hyatt Development Corporation SMG, H-T Osceola, L.L.C. (both Hyatt affiliates), or another nationally recognized convention center operator. (A91).[21]

v. Public Improvement Partnership Agreement.

The Public Improvement Partnership Agreement (A179 & A608) is appended to the Bond Resolution and will be entered into by the County and the Osceola Trace Community Development District (the "District"), which will be formed by the all private Development Partnership (A612).[22]

The Public Improvement Partnership Agreement provides a potential funding source to pay for internal roads and drainage facilities to be constructed by the District (A607 - A686).[23] All

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[21]The County is not obligated to purchase the Convention Center until the assignment has been completed (A125). The Convention Center operator will be entitled to retain all income from operations and will be responsible for any operating deficit (A307 & A742).

In addition, the Convention Center operator will pay an annual fee to the County, the amount of which has yet to be negotiated. (A307 & A742). The specific operating terms and conditions cannot be finalized until the design concept and design standards have been developed.

[22]The issue whether the District existed at the time of hearing is treated below. See §vii(b), infra.

[23]The Public Improvement Partnership Agreement provides a method of measuring the revenue and expense attributable to the District during a "Benefit Determination Year." During the fiscal year following the Benefit Determination year the net benefit or "profit" attributable to the District is determined. On October 1 of the second fiscal year following the Benefit Determination Year, the County shares sixty-five percent of the profit with the District. However, if any portion of the District is annexed into a municipality, the payment will be reduced by an amount equal to the revenue derived by the County from public service taxes and fire-rescue assessments during the last fiscal year prior to such annexation (A200 - A201).

of the funds paid to the District must be used to pay debt service on obligations issued by the District to fund its roads and drainage facilities. Id.[24]

vi. Joint Marketing Agreement

The Joint Marketing Agreement (A263 - A295) is appended to the Bond Resolution and will be entered into by the County and World Expo Management Corporation ("Expo Management").

The Joint Management Agreement provides for joint marketing of the World Expo Center and Osceola County for a term of thirty years, from the proceeds of tourist development taxes generated by operation of the World Expo Center (excluding the fifth cent, which will be used to fund "construction" of the Convention Center) (A291; A267 - A269).[25]

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[24]The net proceeds of these obligations (excluding interest earnings during construction) is limited to $62,000,000 and the obligations must mature on or prior to January 1, 2029. If the profit shared with the District exceeds the debt service, the additional funds must be used to prepay principal of obligations. (A607 - A686).

If the profit shared with the District is less than debt service for any fiscal year, the District will impose special assessments to fund the difference. Property owners paying a special assessment will be entitled to reimbursement, without interest, if the profit shared with the District in a future fiscal year exceeds the District's debt service. No repayment can be made until the debt service is fully funded for any fiscal year. In addition, the Public Improvement Partnership Agreement terminates when obligations are retired, whether or not landowners have been repaid. (A246).

[25]The Joint Marketing Agreement requires the County to appropriate an amount equal to sixty-five percent of the tourist development taxes (excluding the fifth cent) generated by the World Expo Center during the Benefit Determination Year. Notwithstanding the specified percentage, each annual payment will be limited to the amount which can be prudently used to effectively advertise and promote the project and the County (A270; A281). Like the Public Improvement Partnership Agreement, the Benefit Determination year

vii. The Osceola Trace Project: The Osceola Trace Community Development District.

a. The District.

Consistent with foregoing, the Complaint alleged:

> That the Development Agreement contemplates that the Plaintiff [County] shall enter into a Public Improvement Partnership Agreement,

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is the second fiscal year prior to the required appropriation. Unlike the Public Improvement Partnership Agreement, which limits the revenue generation to the project site, the Joint Marketing Agreement recognizes tourist development taxes paid in connection with off-site lodging provided for persons attending a convention or trade show at the World Expo Center. A "hold-harmless"provision will be included to avoid any revenue loss which may be associated with displacement of existing visitors. The agreement specifies the documentation required to claim credit for tourist development taxes generated off-site. (A290).

Amounts appropriated pursuant to the Joint Marketing Agreement will be included as a line item in the Convention and Visitor's Bureau budget for the purpose of funding an annual marketing plan. The marketing plan will be developed by a six-member joint marketing committee, three of whom will be appointed by Expo Management and three of whom will be appointed by the County and will include the projected expenditures for advertising and promotion of the World Expo Center, featuring the County as a tourist, convention or meeting destination. Prior to each July 1, the marketing committee will transmit the marketing plan to the Executive Director of the Convention and Visitor's Bureau, who will include the plan's budget as a line item in the Bureau's proposed budget. The marketing plan budget is limited to the tourist development taxes (excluding the fifth cent) generated by the World Expo Center during the Benefit Determination Year. (A281 - A282).

To provide an additional incentive for Expo Management to book accommodations within Osceola County for its delegates, the Joint Marketing Agreement requires that Expo Management or its booking agent pay a "Local Reservation Incentive Fee" to the County equal to five percent of the gross revenue derived from booking accommodations outside of Osceola County. (A290). Revenue derived by the County from this fee will be appropriated to the Bureau. (A290).

The Joint Marketing Agreement recognizes the need to promote the World Expo Center prior to the date on which it begins to generate tourist development taxes. The agreement establishes a maximum annual budget for this purpose and the amount the County agrees to provide. Expo Management is required to pay the difference from its own funds. (A286 - A289).

> which will provide, among other things, a potential funding source to pay for internal roads and drainage facilities to be constructed by the Osceola Trace Community Development District.[26]

In response, the State alleged:

> The Complaint and its exhibits reveal that a community development district will be impacted by the project for which the bonds are sought to be issued. Closer inspection of the exhibits seems to suggest that the district itself might not yet exist, even though its real interests may be determined in relevant part by these proceedings. Those interests ought to be joined in this case, even if the district created or to be created is to be the catspaw of private developers under the exhibits to the Complaint.[27]

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[26]Complaint at A5, Para. 12, quoted in State's Amended Answer at A361, Para. 20 (vi).

[27]Id. ("Defect 6").

Even after the hearing, very little is disclosed about it in the record.[28]

b. The District's Creation.

The hearing below established radically inconsistent facts about the District's creation through the County's witnesses on cross-examination.[29]

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[28]The Commission Auditor testified , on cross, about the purpose of the District (A807, lines 17 - 23), its geographical boundaries (A807 - A808), its location as the place where the Expo Center, the Convention Center, the Hyatt Hotel, and the shops are to be built and the fact that it is in or will be in Osceola County and within the jurisdiction of the court below (A808).

Crucially, the Commission Auditor testified the District is, not will be, but is, the subject of an Interlocal Agreement between the County and the District (A808 - A809). Asked when this Interlocal Agreement was effective, the Commission Auditor testified non-responsively that "There are varieties of documents that are all various hybrids of the Inter-Governmental Agreement," (A809), but when again asked about the effective date of the Interlocal Agreement, she testified, "I don't know."(A809). And she testified on direct that the Bond Resolution contemplates the County will enter into, inter alia, the "Tri-County Agreement." (A805)

The County's expert witness referred to "the various inter-local agreements" under which revenues will be shared with and by the County in the project (A822). He testified on direct and again on cross that "the Convention Center is the linchpin for the Osceola Trace Project." (A821, lines 15 - 16 & A827, lines 13 - 18).

[29]i. The Commission Auditor testified that at the time of the hearing the District did not exist, but it would exist on Monday of the week following the hearing (i.e., September 21, 1998) (A806, line 2 -11). The Court itself confirmed this was the Commission Auditor's answer. Id.

ii. Thereupon, after being told what to say, the Commission Auditor, reversed herself, and testified the District does exist (A806, lines 13 -20).

iii. Thereupon, the State asked her what is the effective date of the District and she testified "Monday," whereupon she was coached again and the State objected again (A806, line 25 & A807, line 1). Sustaining the State's objection (A807, line 2), the Court told bond counsel, "She is the witness. You're not supposed to be - You're not her director." (A807, lines 2 - 3).

iv. Whereupon, the Commission Auditor (i) testified the

c. The County's Expert Witness' Employment Relationships with the District and Its Developer.

The revelation that the County's expert witness had been hired by the District the day before the hearing (see id.), came on cross, only after the economist had testified at the outset of cross, "Actually, I'm not retained by anybody. I've worked with the County and they asked me to testify. So, I'm not being paid today."[30]

Only many questions later did the State learn that the economist (i.e. the County's volunteer expert witness without subpoena), in fact, is not only familiar with the District (A827), and not only involved with the District, but he is its financial advisor. (A827)

> Q. Alright. Are you involved in that District in any way?
> A. I'm its financial advisor.
> Q. And how long have you held that capacity?
> A. Since yesterday when the District hired me. The District was formed Monday the 14th. It had its organizational meeting yesterday, the 17th.

(A828).

District "exists," (b) then testified it exists as of "Monday," (c) then testified "that the legal documents are passed." (A807, lines 7 - 8). She then repeated these points (Id., lines 11 - 13).

v. However, the County's expert witness testified, on cross, "The District was formed Monday [September] the 14th. It had its organizational meeting yesterday, the 17th." (A828, line 1 - 3). In fact, the District hired him "yesterday." (Id.)

[30](A824, lines 9 - 12). When asked, "So, You're here as a volunteer," id., he testified, "The County asked me to come..." Pressed by the Court, the witness said he was not a County employee (A824). He said he had never been previously directly engaged by the County, but had "been indirectly engaged by the County for studies for the Tourism and Convention Bureau." (A825). He came to court because, "Mr. Stewart asked me to come..." but didn't prepare any reports for him" (A824). The County solicited his testimony two to three weeks before the hearing (A825).

And, in response to questions about his compensation from the District, the economist testified the District pays him $25,000 per year, plus "between fifty and seventy-five cents per bond, assuming that the District issues any bonds," later clarified and amended to "between seventy five cents and a dollar per bond, assuming that the District issues any bonds." (A828).[31]

Further cross-examination revealed the economist had been previously retained by the development partner in this deal (A828) "to assist them in economic analysis."[32]

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[31]The State understood and argued (A840) this to mean a dollar per each of the Bonds the County wants to sell (the transcript shows the State, the Court reporter, and the Court repeatedly had difficulty hearing and understanding the witnesses, including the State on this point (e.g., A828, line 12)), but the economist testified after closing that the State "inadvertently misled" the Court and that he has no financial interest in the County's Bonds. (A845). The State never did take the intended distinction (i.e., never got it), because it made no difference to the State, and would have made no difference to the State, whether the witness got paid by the County or the District: "I've alleged this District is an indispensable party. I further maintain that this witness is subject to impeachment for interest and bias." (A846). I.e., rightly or wrongly, the State maintained the economist still stands to gain enormously, only it will be much more than the State had assumed in closing argument. The State figured his hypothetical compensation at a dollar a bond at a $1,000 per bond on a base of $35,000,000 (A840), not the much larger base for the District's bonds, upon which the economist's "plus" compensation will be based.

[32]The development partner that retained him was Osceola Trace Community Development Project, L.P. (A829), whose principal limited and general partners are a subsidiary of Nomura and another conduit partnership (A829). Now that the economist is retained as the financial advisor to the District (i.e., as of the day before the hearing), he can't hold a position with the developer. (Id.) But he in fact hasn't resigned his position with the developer, he's simply completed his assignments and won't take on new ones, "because it would be a conflict of interest with my role as financial advisor to the District." (Id.) He understands Hyatt or a Hyatt affiliate will have sole managerial control over the Convention Center (A830).

SUMMARY OF THE ARGUMENT

In the State's view, the Bonds are not authorized by Section 125.0104(3)(l)(2) of the Act. The Legislature says a county can finance construction of a convention center with tourist tax dollars. Just as counties traditionally build schools and courthouses under other laws, the Act says qualifying counties can now build convention centers with tourist tax dollars. But this is not what the County intends to do here.

Instead, the County, according to such partial drafts as are available, plans to enter into sundry inchoate contracts loaded with conditions, the upshot of which provides that the County can use tax revenues to buy a convention center from private parties under a purchase and sale agreement, also styled a "development agreement" by the prospective parties thereto. Then more inchoate drafts of more agreements contemplate the County will contract with private parties to operate the convention center under private control - all as part of a mammoth series of private projects. The State says this scheme is contrary to the Act.

While the Bond Ordinance and the Bond Resolution, on their face, assumedly authorize the Bonds, that fact tells one nothing about the validity of the Bond Ordinance or the Bond Resolution. The State contends the Ordinance and the Resolution are invalid as well under the Act.

The State does not concede, even on an *arguendo* basis, that the decision below addressed the State's arguments, but the decision *de facto* necessarily construed or applied the Act to save the Bond Ordinance, the Bond Resolution, and the Bonds themselves from the explicit challenge thereto alleged in the State's Amended Answer. Had the court below agreed with the State's interpretation of the Act, that court would never have reached the public purpose question. If this Court agrees with the State's interpretation of the Act, this Court need never reach the public purpose question.

If this Court upholds the Bonds under the Act, the State asks this Court to hold that the Bonds -- and the Act, as and if so construed and applied to save the Bonds -- violate the public purpose doctrine. The State does <u>not</u> argue tourist tax bonds to <u>build</u> a county convention center violates that doctrine. The State simply maintains <u>these</u> Bonds do violate that doctrine, or, at the bare minimum, these Bonds do so on this record, or perhaps, most precisely of all, this Court cannot say on this record.

Independent of all arguments under the Act and the public purpose doctrine, the State questions the facial validity of the Complaint based on the omissions of the true amount of the bonds and interest rate on the bonds from the Complaint. The State claims that information is specifically required by Section 75.04(1), Florida Statutes. A few of this Court's cases seem to suggest that less is required of this statute than the bond statute itself says. The State asks this Court either to (i) clarify its interpretation of the statute's plain language, ideally to hold

that statute means what it says, or, (ii) in the alternative, clearly relieve the State Attorney of any duty under Section 75.05(1), Florida Statutes, to plead that material omissions under Section 75.04(1) are defects or insufficiencies in bond validation complaints within the meaning of Chapter 75, Florida Statutes. The State would welcome some bright line rules from this Court on this vexing question.

Finally, the State asks this Court to take a very hard look at the stunning testimony regarding the Osceola Trace Community Development District, its creation, its role, its employees, and its inter-local agreement(s) with the County, and decide either that (i) the District should have been joined as an indispensable party, as the State maintains, or, in the alternative, (ii) hold, as the State also pled and argued below, the Complaint is still unripe for decision.

ARGUMENT

I. THE DECISION BELOW SHOULD BE REVERSED BECAUSE OF DEFECTS IN THE COMPLAINT, OR, IN THE ALTERNATIVE, THE DECISION BELOW SHOULD BE REVERSED AND REMANDED SO THAT THE COURT BELOW MAY ADDRESS THE MERITS OF THOSE ALLEGED DEFECTS IN THE FIRST INSTANCE.

Introduction.

i. What This Appeal Is Not About.

The State has no interest whatsoever in the wisdom or unwisdom of the Bonds or the Convention Center Project, the World Expo Center Project, or the whole Osceola Trace Project, including the

Osceola Trace Community Development District. This should go without saying, but it needs saying here.[33]

The State Attorney makes these disclaimers here only because the local, state, and national press keep posing precisely those questions in connection with this appeal.[34]

ii. What This Appeal Is About.

The State's only interests in this case are first, the legality of the Bonds, which the State doubts and has denied, and second, the validation process by which that question of legality

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[33]*A fortiori*, the State, at least insofar as the State Attorney represents the State, has no interest whatsoever in any separate or satellite litigation or administrative appeals engaging other agencies of the State, represented by other State lawyers, against various players in the three projects parsed in this brief. This too should go without saying, but it too needs saying here.

A fortiori, the State Attorney has no interest at all in the wisdom or lack thereof of any other reported substantial inventories of municipal bonds seeking to come to market out of Osceola and Orange Counties in the next few months. How much scrutiny he gives those deals may depend on how this Court sees the scope of his duty in bond validation cases.

[34]Chris Cobbs, "State Could Hold Up Expo Center Bond," Osceola Sentinel at 1, Sept. 23, 1998; Editorial "Added Scrutiny Is On the Money," Osceola Sentinel at __, Sept. 27, 1998; Jim Molis, "Florida Officials Could Block Osceola County's Convention Center Plans," Bond Buyer at __, Sept. 30, 1998; Chris Cobbs, "Parkway Deal May Be on Hold," Osceola Sentinel at 1, Oct. 7, 1998; Ferdie De Vega, "State Faults Plans for World Expo," Osceola News-Gazette, Oct. 8, 1998; Mark Pino, "At the Center of All, Who's Friend, Foe?," Osceola Sentinel, Oct. 9, 1998; Jim Molis, "Florida Seeks to Block Osceola County Bonds," Bond Buyer at __, Oct. 15, 1998; Ferdie De Vega, "State Decides to Appeal Ruling on Center Bonds," Osceola News-Gazette at 1, Oct. 15, 1998; Ferdie De Vega, "State, Expo Close to Settling Differences," Osceola News-Gazette at 1, Oct. 16, 1998; Tim Barker, "Challenge Could Delay Expo Center," Orlando Sentinel at B-1, Oct. 16, 1998.

is decided, as to which process the State entertains serious doubts.[35]

iii. The Big Picture: Why the State Appeals in This Case.

For this State Attorney, at least, the State's decision to challenge a bond validation in a Florida circuit court in the first place is empirically unusual. The State's decision to appeal a bond validation to this Court is even more unusual. Indeed, institutional memory is hard pressed to recall the last time the State appealed to this Court a bond validation from the Osceola Circuit Court.[36]

The State appeals the decision below not merely because the State disagrees with the result below, and not merely because the State disagrees with the decision's legal reasoning.[37]

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[35]However, much as the State would covet an outright reversal by this Court for long-term policy reasons, the State candidly questions whether this case is even now ripe for a meaningful decision on the merits in this Court for the very same reasons advanced by the State in its pleadings and closing argument below suggesting the Complaint and, consequently, the validation question are both "grossly unripe for decision" (A834 - A842, esp. A842). Moreover, while the State patently believes the decision below is mistaken, the State also confesses that is not the sole inducement to appeal.

[36]The State Attorney apparently last asked this Court to review and reverse a bond validation from the Ninth Judicial Circuit at the beginning of the decade. He did not ask lightly then. See *State v. City of Orlando*, 576 So.2d 1315 (Fla. 1991) (reversing bond validation on appeal from the Orange Circuit Court). He does not ask lightly now.

[37]The State Attorney handles tens of thousands of criminal cases a year and a number of bond validation cases. Given scarce resources, he very rarely can afford, as a practical matter, to seek a second judicial opinion from this Court or another appellate court.

What makes this case different -- and so striking -- is the degree to which the State's pleadings and doctrinal arguments, and the substantial evidence adduced at the hearing to support them, were simply not addressed at all in the decision below. So much so that literally the State's Amended Answer was not even mentioned in the final judgment.

This phenomenon of validation as a seemingly foregone conclusion in Florida trial courts -- and what it says about municipal bond litigation in this State these days -- deeply concerns the State. The instantaneously entered final judgment here, with ten pages of fact findings, signed at the conclusion of the show cause hearing, stands in marked contrast with the deliberative judicial process of crafting a final judgment in a bond validation case only after that decision is drafted to reflect the evidence and arguments actually adduced at the hearing, and the trial court's actual findings and rulings on the parties' competing arguments and pleadings, and then only after the State has had a meaningful opportunity to comment thereon.[38]

Indeed, we seem to have reached the point in this State where municipal officials compete in print to boast how fast they can sail a bond validation case through the Florida courts.[39]

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[38] E.g., *Sunshine State Governmental Financing Commission v. State*, Civil Action No. 98-1985 (Fla. 2d Cir. Ct.) (Leon Circuit Court) (Judge Davey) (*ore tenus* validation) (final judgment pending), summarized in Jim Molis, "Florida Financing Commission Seeks to Stretch Debt Cap with New Issuance," The Bond Buyer at _ (Oct. 16, 1998).

[39] E.g., Acton & Campbell, "Public Funding of Sports Stadiums and Other Recreational Facilities: Can the Deal Be 'Too Sweet'?,"

Meanwhile, in the face of what the law reviews see as a century-long abdication by states and state courts to police the municipal bond industry, the Securities and Exchange Commission has begun in the last three years to federalize the municipal finance disclosure process (A888 - A892).[40]

But the Florida Legislature still commands the State Attorney to do his duty. Section 75.04(1), Fla. Stat. And so long as Florida Statutes says the State Attorney "shall" tell the trial courts of defects, insufficiencies, and untruths in bond validation complaints, he shall do so.

But the State could truly use some guidance from this Court, and believes the lower courts could too, and thus urges this Court to see this appeal as clear evidence of the need for this Court to tell the lower courts to police the bond validation process better. Civil infraction hearings have been known to receive closer judicial scrutiny than bond validations. The lack of time for meaningful preparation by the State in the circuit courts, and the hyper-expedited briefing process in bond validation cases in this

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27 Stetson L. Rev. 877 (1998) (an example of just such a boast, not a critique thereof) (anecdotal account of *Poe v. Hillsborough County*, 695 So.2d 672 (Fla. 1997)).

[40]E. M. Eady, Jr., "A Municipal Official's Safety Manual for Municipal Securities Disclosure," 28 Urb. Law. 943 (Fall 1996); A. J. Gellis, "Municipal Securities Market: Same Problems -- No Solutions," 21 Del. J. Corp. L. 427 (1996); N. S. Lang & L. M. Gardner, "The SEC's Attempt to Impose a Regulatory Regime on Municipal Securities Issuers," 24 Sec. Reg. L. J. 229 (Fall 1996); C. Scheel [student author], "Amended SEC Rule 15c2-12: An Attempt to Improve Disclosure Practice in the Municipal Securities Market," 45 DePaul L. Rev. 1117 (Sum. 1996); Q. F. Seamson & D. S. Schaffer, Jr., "Emerging Disclosure Issues for Municipal Securities," 24 Sec. Reg. L. J. 392 (Wint. 1997)

Court, all conspire to guarantee the State can be left in the dark long enough to prevent the State penetrating the deal, much less shining any sunshine on it.[41]

That is why the Florida municipal bond industry, which is so used to the State not interposing serious objections either in pleadings or at trial, apparently exhibits such consternation and indignation when the State actually attempts to read the pounds of paper on a crash basis and asks for the other pounds of paper that matter and are missing. That same attitude of dismissiveness (the inevitability of validation as a foregone conclusion) is also why experienced and competent bond counsel in this and other Florida cases feel they need only make a one minute initial closing argument in a contested $35 million civil case (A833 - A834; cf. A842 - A845 (rebuttal)).[42]

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[41]To demonstrate, the State would draw the Court's particular attention to the following concerns. The record below, which should be seen as illustrative and not unique, denotes the often surreal nature of the State Attorney's legal obligation in a bond validation case.

On the one hand, as a practical matter, in a matter of days invariably, if the State Attorney is served with process at all (compare A347 re "no Item 4" with A865, Item 4), he must learn of an *ex parte* show cause hearing, read pounds of paper the other side started on over a year before, respond on the merits while vainly seeking to acquire additional meaningful information from bond counsel, and then be pilloried or prejudiced, or both, for not following the niceties of routine discovery in ordinary civil cases -- notwithstanding the State Attorney's right of access.

Then imagine this process being repeated throughout the year, and the Court can plainly see the vetting process is next to impossible for the State, even for those State Attorney's Offices which are prepared to divert prosecutorial (often white collar crime) resources to that end.

[42]Equally invariably, the one minute closing is, in turn, nominally sought to be justified by reliance on the issuer's

It is against this background, from the State's vantage point, that the State makes the following arguments on the merits of this particular deal. And already the County has moved this Court to expedite the State's appeal.[43]

A. THE BONDS, THE BOND ORDINANCE, AND THE BOND RESOLUTION VIOLATE SECTION 125.0104(3)(1)(2), FLORIDA STATUTES, OF THE FLORIDA LOCAL OPTION TOURIST DEVELOPMENT ACT (THE "ACT").

Many times recently this Court has reaffirmed:

> The scope of our inquiry in bond validation proceedings is limited to: "1) determining if the public body has authority to issue the bonds; 2) determining if the purpose of the obligation is legal; and 3) ensuring that the bond issuance complies with the requirements of law" *Lozier v. Collier County*, 682 So.2d 551, 552 (Fla. 1996).

State v. Florida Hurricane Catastrophe Fund Finance Corp., 699 So.2d 685 (Fla. 1997); accord, e.g., *State v. Inland Protection Financing Corporation*, 699 So. 2d 1352 , 1355 (Fla.. 1997); *Kessler v. City of Winter Park*, 696 So.2d 761 (Fla. 1997); *Poe v. Hillsborough County*, 695 So.2d 672 (Fla. 1997); *Noble v. Martin County Health Facilities Authority*, 682 So.2d 1089 (Fla. 1996).

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boilerplate memorandum of law (A365 - A384) and by reference to this Court's cases re the limited scope and standard of review in bond validation cases (A385 - A444). This case was no exception (A833, line 10), even if that memo here and this Court's past cases articulating the standard of review, with which the State agrees, tell the Circuit Court virtually nothing about the merits of the defects, especially the statutory claims, alleged in the State's pleadings in this case (see id.).

Consequently, it is now possible in this State for a prospective issuer to do a closing argument in a bond validation case without ever specifically articulating out loud on the record precisely what the ostensible paramount public purpose actually is asserted to be; frequent incantation and repetition of the mere rubric was enough here (semble, A833 - A834 & A842 - A845).

[43]See "Appellee's Motion to Expedite Appeal," served October 26, 1998 in this case in this Court.

That's the standard and those are the conditions the State argued to the court below (A838, lines 15 - 25 & A839, lines 1-8). None of these conditions is satisfied here. The State pled:

> The State is in serious doubt whether either the Bonds, or the County Ordinance (Ex. B to the Complaint) and County [Bond] Resolution thereunder (Ex. A to the Complaint) ostensibly authorizing the Bonds, are in fact authorized under the cited provision of the Florida Local Option Tourist Development Act, Section 125.0104, Florida Statutes (the "Act").
>
> Specifically, although the County cites Section 125.0104(3)(l), Florida Statutes, perusal of relevant subsection (2), namely Section 125.0104(3)(l)(2), Florida Statutes, nowhere authorizes the County to buy a convention center from somebody else. That statute strictly authorizes an extra cent tax, if certain conditions are met, to "[p]ay the debt service on bonds issued to finance the construction, reconstruction, or renovation of a convention center, and to pay the planning and design costs incurred prior to the issuance of such bonds." Yet the exhibits to the Complaint show that the County is fronting the money from the Bonds to <u>buy</u> a convention center <u>to be built by others</u> (under the rubric of a public-private partnership, etc.) Indeed, review of the Complaint further reveals that once the convention center is built and the County in turn buys it, the County will instanter turn around and contract to private parties to operate the convention center. These private parties will exercise sole managerial control of this public facility to be bought with public money (but not actually constructed by the County, etc.) If the <u>Act</u> itself authorizes this, the Complaint fails to so allege, but in any case if the Act were construed or applied to authorize these Bonds, substantial questions would be raised about the Act itself, as so construed and applied. Clearly, the Legislature did not intend for the County to impose a fifth cent of tourist development tax so that those taxes could be applied to redeem

> bonds issued for such sustained private purposes.

Amended Answer at Para. 20 (iii) (A359 - A360)(brackets added).

The undisputed testimony on cross at trial by the County's own expert witness, the economist, directly confirmed and supported all three of the State's major premises in the foregoing argument.[44]

The County admitted on rebuttal closing, "It is true the design standards are not done." (A843). This admission hardly captured the scope of both witnesses' respective admissions. The essence of their testimony on this score was that the economist expert witness has seen no designs, period (A833, line 1), and does not know what the Convention Center will cost (A832, line 1). The Commission Auditor went even further, admitting on cross, that cost is unknowable until there are design standards: "The purchase price cannot be determined until the design standards are set." (A803, quoted in Statement of Facts, supra.

That is precisely the point. And that is exactly what the State had argued in its only closing argument:

> And, in fact, Your Honor, that's because the undisputed testimony that you've heard this morning, consistent with the State's allegations to you, is that nobody has a clue what this is going to cost. This is precisely the kind of information that the State would need to have in order to be remotely competent to otherwise advise you regarding the legality, and the public purpose, and the sufficiency of the authorizations. We don't have that information. We don't have any cost information. We don't have any design

[44]See A830, line 22 & A830, line 25 & A830, lines 6 - 17, summarized with particularity in Statement of Facts, supra.

> standards. And plaintiff's expert testified that he hasn't reviewed any and is not aware of any. So, I would suggest to you, Judge, that, in general, if one were a bond holder or a taxpayer, or merely, the fourteen million folks in the [S]tate of Florida, that this is a document replete with the absence of precisely the kind of information we would want to see in the first instance.

(A835) (brackets added).

Moreover, the State explicitly argued violations of the Act, not just the public purpose doctrine, and not just the procedural defects arguments under the main bond statute, Chapter 75, Florida Statutes (A837 - 839):

> The undisputed testimony of your [the] opponent's expert is that they are not constructing this facility. You have just heard argument, unsupported by any testimony, unsupported by any exhibits attached to the complaint, or any allegations of the complaint, that this mechanism is remotely authorized by the Legislature and the Statute. The State Attorney has been very precise in its pleadings to you in the amended answer. We don't dispute that the vocabulary, the diction of the resolution, the sixty-five pages, says it's okay for the County to do this. We don't even dispute *arguendo* that that resolution is predicated nominally, on the resolution from a year ago. We make a direct frontal assault on the validity of those ordinances and that resolution and its tactics under the statutory vocabulary, under the statutory language. What they're doing here is that they are, in fact, buying a pig in a poke. They are buying a convention center to be built. They want you to validate thirty five million bucks in bonds, or not to exceed thirty five million, real number unknown, and we are doing it blind.[45]

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[45](A837, lines 18 -25 & A838, lines 1 - 15.) As a matter of

The statutory construction issue to be decided is whether "acquisition" of a convention center under a "development agreement," set up as a *de jure* and *de facto* "purchase and sale agreement" (A80 - A159) is "financ[ing] the construction ... of a convention center" under the Act.

This Court, at the appropriate juncture, has to decide whether to read the legislative language strictly, as the State urges, or liberally, as the decision below implicitly or necessarily did when it held conjunctively that the County is authorized by the Act to "issue revenue bonds for the purpose of using the proceeds thereof (a) to pay all or part of the cost of acquisition AND construction of a publicly owned convention center (the "Project"), as more particularly described in Exhibit A to the Bond Resolution (as defined herein)...."[46]

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scholarship, especially on that kind of record, the State was and is entitled to an answer. The decision below gave none. The sole response offered by the County to counter the State's claim of defect on this score was an *ipse dixit* rebuttal argument (A843), which ignored the County's own witnesses' own testimony on this very score.

[46](A780, Para 6) (emphasis and all capitals added). This Court's resolution of the statutory interpretation question will drive the outcome of the corollary question, whether the court below was correct in holding the Ordinance valid under the Act, which Ordinance the court found was enacted "for the purposes of, among other things, financing the cost of acquisition...all in accordance with the Act...." (A781, Para. 9). However informally, there can be no question the decision below, implicitly or explicitly, construed and applied the Act to save and uphold the

But despite the straightforward nature of the issue and the State's argument, and the lower court's *de facto* interpretation and application of the Act, rejecting the State's argument, there is no corresponding language in the Act to support that construction or interpretation of the Act, which refers solely to "construction" and not "acquisition."[47]

The court below ruled with actual, record, and constructive knowledge of the State's objections and specific closing argument that the proposed final judgment far exceeded the scope of the issues legitimately before the court for decision:

> In pursuing this same theme, Your Honor, this resolution that you have before you is like a sixty-four page document and attached to it are literally dozens of dozens of exhibits, virtually all of which state that they are deliberately omitted or will follow. I cannot advise the Court and discharge the State Attorney's statutory duty about exhibits that don't exist, according to the sworn certificate, self-authenticating certificate of the Clerk of the Court [sic] [County Commission]. But to the extent that I can

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Bond Ordinance, and, by plain implication, the Bond Resolution, the Bonds, the Development Agreement, and the Operating Agreement, as demonstrated below.

[47] See §125.0104(3)(l)(2), Fla. Stat., quoted in text supra and in the Amended Answer at A360. The decision below also again necessarily construed and applied the Act to permit and authorize "acquisition," not just "construction," when that decision literally "validated and confirmed," not only the Bonds, the Bond Ordinance, and the Bond Resolution, but also, without limitation (A786), "the Development Agreement and the Operating Agreement, and the performance by Plaintiff [the County] of its obligations thereunder...." in its penultimate judgment and decree (A786).

The court below did so only after holding, "The Bond Resolution, the Development Agreement and the Operating Agreement are valid and enforceable in accordance with their respective terms." (A781, Para. 8).

> read what I see, I find that you have no indenture in this agreement. Now, it is certainly true that there is fine print in the Florida Statute that says, Well, if you're a county, you don't absolutely have to have an indenture. But no one in the world of securities can counsel you without seeing an offering circular, or seeing an official statement, or anything one would expect any municipal issuer to have, because we want to know what kind of disclosures they are making to potential investors, potential bond holders. We need to know now, not later. And we are extremely early in the development game of this project. And I'm going to develop that further with you in a minute. Because they're not just asking you to bless the bonds. They're asking you for a heck of a lot more when you read the fine print in the prayer of the complaint and you read the fine print in the Proposed Final Judgment they have given the State.

(A836- A837)(emphasis added).

As prologue for its final ripeness argument in the court below (see Argument I (D), infra), after arguing the District should be made an indispensable party (see id.), the State cautioned and concluded:

> Because when you get to the bottom line of this answer, this amended answer, Judge, you will see that they are literally asking you not just to validate the bonds, they are asking you to ratify the Development Agreement. And they're asking you to ratify the Operating Agreement. And this overreaches mightily. I am not making this up, Judge. If you examine and peruse the prayer for relief in this complaint, it literally asks you not only the bonds, but quote, "Including, without limitation," the ordinance, the bond resolution, the Development Agreement[,] and the Operating Agreement." So, we would suggest to Your Honor that you deny this validation outright for each of the grounds argued by the State. But even if you were not

> overwhelmingly persuaded by the State today, we would suggest that this complaint is grossly unripe for decision because this validation question is grossly unripe because they haven't provided any of the materials that we need to be able to do our job to protect the interests of Florida. Thank you.

(A842).

Despite the foregoing, the court below rendered these advisory opinions on these draft forms of inchoate unexecuted contracts, which are subject to change, as part of a series of exhaustive findings about the Development Agreement and the Operating Agreement.[48]

Again and again, the diction of the decision below leads the reader to assume or believe the court is ruling on contracts in being when referring to the Development Agreement, the defined euphemism for the Purchase and Sale Agreement, and when referring to the Operating Agreement. This impressionistic, affirmative pregnant about those agreements is only reinforced when the diction of the decision elsewhere makes that distinction by choosing to

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[48](A780, Para. 7). Thus the Court found, formally, that the Project defined in the final judgment (the "Convention Center" in context):

> shall be (a) owned by the County, (b) constructed in accordance with the terms and provisions of a certain Convention Center Purchase and Sale Agreement between Osceola County, Florida, and Osceola Development Project L.P. (the "Development Agreement") and (c) operated in accordance with the terms of the Osceola County Convention Center Operating Agreement by and between Osceola County and Osceola Development Project L.P. (the "Operating Agreement").

(A780, Para. 7).

refer to other agreements, which the court below says are "contemplate[d]" by the Development Agreement (A783).[49]

Thus the decision below determines:

> That the Development Agreement contemplates that the Plaintiff shall enter into a Public Improvement Partnership Agreement which will provide, among other things, a potential funding source to pay for internal roads and drainage facilities to be constructed by the Osceola Trace Community Development District.
>
> Further, the Development Agreement contemplates that the Plaintiff shall enter into a Joint Marketing Agreement for the promotion of the World Expo Center and Osceola County, to be funded from the first four cents of the tourist development taxes generated by the Project.[50]

The court below was apparently persuaded by the County's core counter-argument on rebuttal to the State's arguments under the Act and Chapter 75, Florida Statutes (the latter addressed in Arg., I(B), infra). Namely, the County made an explicit argument that the State, or at least the Assistant State Attorney at the hearing, simply lacks even an elementary understanding of the basics of the municipal bond validation process in Florida:

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[49]Literally, the decision below talks about what "the Development Agreement contemplates...," implying it exists already, without ever saying that this is merely what the Bond Resolution contemplates what the draft form of the unexecuted Development Agreement contemplates about some other draft form of unexecuted contract.

[50](A783, Para. 16 & 17), quoted in part (Para. 16) in State's closing argument at A841. Accord, A361.

> Judge, let me kind of try to see if I can hit the points that were addressed by Counsel. Initially, I think that there is a misunderstanding of the nature of validation and where we are with the process. You have a validation, the purpose of which is to validate the revenue source pledge and the project. You never have the sale of the bonds prior to the validation. There would be no purpose in the validation.

(A842 - A843). And later:

> Now, the reason that these agreements are not executed and the reason why they are attached as exhibits to the complaint is because, and as I indicated in my letter to Mr. Mangas yesterday, until you know that you have a revenue source to do the improvement you can't be entering into these agreements as to what you're going to do. It's purely a question, what the Court should look at, is this, in fact, a project that provides a paramount public benefit? And does, in fact, the revenue source that is going to be used to pledge it, is that authorized by the County? Clearly, they both are. And there is no contrary evidence that there is anything but a paramount public benefit from this project. We would say that all the provisions of law have, in fact been complied with and these bonds should be validated, Your Honor. And we have prepared a final judgment for your consideration, which I had previously provided to Mr. Mangas.[51]

However, the County's argument was simply a strawman:

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[51](A844 - A845), citing letter to State (A775 - A777). See generally A816. In other words, one may fairly conclude from the parties' foregoing respective closing arguments below that the parties agree the State is without a clue about these Bonds; the parties merely disagree on the reasons therefor. And, for the record, the State concedes in this Court it still does not have a clue about the Bonds, as will be further argued below. See Arg. I (B); Arg. I (C); Arg. I (D), infra.

i. Nowhere in the 900-page record did the State suggest the Bonds could or should be sold prior to validation.

ii. Nowhere does the County's explanation for the lack of executed versions, explain the absence of even draft forms of exhibits and appendices of proposed contracts and documents.

iii. Nowhere, moreover, does the County explain why it cannot enter into agreements, contingent on and subject to the court below -- or this Court -- validating the bonds (or any other conditions under the sun).

iv. Even if one could construct an excuse for point iii above, how would that explain away point ii above?

v. How does the "public purpose" doctrine, standing alone, and that strand of bond validation jurisprudence answer the State's (or any) threshold statutory interpretation question in this or any other case?[52]

vi. Likewise, how does the fact *vel non*, or any evidence *vel non* adduced at the hearing, of so-call "public benefit"

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[52]Certainly, it might be relevant, for the State alleges, and makes a policy argument about the Act, suggesting that the Legislature did not intend in the Act to authorize the County's proposed use for what are patently, principally private purposes (A360). And similarly the State suggests the 1996 amendment to the Act, which specifically provides that tourist tax revenue bond proceeds can be used "to pay the planning and design costs [for a convention center] incurred prior to the issuance of such bonds," Ch. 96-397, Sec. 44, at 2499-2500, Laws of Fla. (A883 - A887, at A887) (brackets added), codified at A878, current version at A872, also denotes or connotes that the Legislature too, like the State, anticipates and expects such essential information (design dictates cost) will be acquired by would-be issuers, logically, before, not after, bonds are validated and sold.

address, much less answer, the State's statutory interpretation question in this or any other case?[53]

vii. What do any of the County's arguments about the bond validation process have to do with the interpretation of a tax statute, i.e., the Act, when the County is a mere beneficiary of the proceeds of the Act (and wants the Osceola Circuit Court's permission to use those proceeds to buy a convention center)?[54]

viii. Why would not this Court expect the Act to be strictly construed in favor of the taxpayers, rather than presumptively the County, particularly in circumstances where it is the County, not the State, trying to push the envelope of the plain language of the Act?

ix. In any case, without meaningful and adequate information, how can the State Attorney do his job to verify the

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[53]The State does not object to the court below answering these additional important questions, which clearly must be answered under the State's pleadings if the State fails in its statutory argument. All the State says to this Court about the decision below is that it is insufficient analytically to make findings about public purpose and public benefit as a substitute for statutory analysis in the first instance. In effect, the County asked the lower court to decide the penultimate question (validation) first, without the Court ever even mentioning the Amended Answer and the allegations of defects pled therein. That is precisely what the final judgment did. Does Chapter 75 countenance that?

[54]What the Florida courts and what the State Attorney must be concerned about is whether more revenues can be exacted under that Act from the taxpayers over the next forty years to pay off the Bonds for that purpose (i.e., largely by the tourists who primarily pay the existing "tourist tax" and who will pay the fifth-cent adopted in the Ordinance).

accuracy of the complaint and due authorization, and thus fulfill Chapter 75's mandate that he tell the Circuit Court of any defects, insufficiencies, or inaccuracies in the Complaint?

As far as the State is concerned, it is up to the Circuit Court and, failing that, this Court, to make sure that adequate information is furnished the State Attorney to perform that function adequately, protecting the public. But in this case, even if the State had complete information, the statutory question under the Act would remain.[55]

B. EVEN IF THE BONDS WERE VALID UNDER THE ACT, THE BONDS WOULD VIOLATE THE PUBLIC PURPOSE DOCTRINE ON THIS RECORD.

The decision below concluded:

> The construction and operation of the Project [defined as the Convention Center] serves a valid and paramount public purpose, in that (i) the Project will directly promote the economy of the Plaintiff and the State, thereby improving the competitive position of both entities; (ii) the Project will further the development of tourism related business activities and other area industries, thereby

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[55]And so too would all the lurking questions, which would arise, if this Court were to agree with the result below that the Act really does allow what the County wants to do, and what the decision below clearly permits the County to do. These questions might not only arise under various provisions of the Florida Constitution, but also under the United States Constitution, especially in a tourist tax context. The State so pled (A360, Para. 20 (iii)). The State alleged there, "If the Act itself authorizes this [viz., County buying a convention center to be built by others and, then turning around and contracting with private parties to operate the convention center, with sole managerial control of this public facility in private hands], substantial questions would be raised about the Act itself, as so construed and applied.." (A360, Para. 20 (iii)).

> providing a more balanced and stable area of economy and increased opportunities for gainful employment; (iii) the Project will provide a forum for education, recreational and entertainment activities for the citizens of Osceola County and the State; and (iv) the project will meet an existing need for such facility in Osceola County and the State, thereby promoting the attractiveness of both Osceola County and the State to outside business.

(A786)(brackets added).

The State believes the decision below is mistaken. The State believes there is a good deal of evidence of want of public purpose on this record. And the State believes there might be a good deal more if the State had all the missing appendices to the Bond Resolution. But the existing record will and must suffice for now.[56]

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[56]First, the State would invite this Court to perform its own "random walk" spot audit of the quoted public purpose findings in the final judgment, prepared in advance of the hearing by the County, and prior to, and without the benefit of, the actual testimony at the hearing at the time of its drafting (see, e.g., A845, lines 8-10 & A837, lines 1-3). Then compare those findings with the Osceola County Commission's own year-old legislative findings of public purpose in the Bond Ordinance attached to the Complaint and introduced at the hearing (A332 - A338 & A767 - A774). I.e., the prose written by the County Commission over a year before the State Attorney appeared in this case and before the State's objection to the Bonds were pled.

The Bond Ordinance,[57] from the outset, on its face, noted the Act "authorizes the imposition of a one percent tourist tax to pay the debt service on bonds issued to finance the renovation of a professional sports franchise facility and to pay the debt service on bonds issued to finance the construction of a convention center;" (A332 & A767) and then purported to adopt and "levy the additional one percent tourist development tax authorized in Section 125.0104(3)(l), Florida Statues (1996 Supp.) for the initial purpose of financing the renovation of Osceola County Stadium and the additional purpose of financing construction of a convention center, which may be acquired through a public-private partnership, as hereinafter described." (A332 & A767)(emphasis added).[58]

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[57]Although too long to set out in the text here, the Bond Ordinance is a quick read and deserves to be set out in full. And what a difference a year makes, between the time the County wrote its findings in the Ordinance and the time the County wrote its proposed final judgment, which the court below entered.

[58]Both the "Legislative Findings," denominated as such, and the actual tax levy language of the Bond Ordinance (i.e., both Sections 1 and 2) also repeatedly stated the same "primary purpose" and the same "additional purpose." See id.; accord, A333 & A770; A335 & A772. The Convention Center Project is at all times material the "additional purpose." Moreover, the Ordinance, "[i]n accordance with Section 125.0104(3)(l), Florida Statutes (1996 Supp.)," further provided with respect to the primary purpose (Osceola County Stadium) and the additional purpose (the Convention Center), "provided however, that the revenue from the Tax [i.e., the new fifth cent] shall first be expended for the purpose of financing improvements to Osceola County Stadium prior to any use of the revenues for financing a convention center." Bond Ordinance, Sec. 2 (B) at A335 & A772 (emphasis added). See A837 (State's argument that County has to apply new tax proceeds to stadium first, then the convention center).

But when the State made that contention in reliance on the County's representations and findings in, and expressed terms of, the Ordinance (id.), which remains the best evidence of that Ordinance, the County again dismissed the State's contention out of hand, again begging the aversion of the plain language of the Ordinance.[59] The Bond Ordinance, adopted June 30, 1997 (A336), was, according to its terms[60] (id., Sec. 7), effective on July 3, 1997 (A337). The Commission Auditor testified on direct, over State objections, regarding the Bond Ordinance, adopted a year before her employment with the County (A800 - A801). She testified, "It permitted the fifth cent to be used for reconstruction of the stadium and for construction of the Convention Center." (A802).

But on cross by the State, the Commission Auditor, the County's only fact witness, testified that she did not know how the tax is to be applied to the stadium and did not know whether the tax is to be applied to the Convention Center.[61]

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[59]The County told the court, "The issue concerning the construction and the stadium and which comes first, Counsel, I would address that in 1997 the Legislature amended that Statute and eliminated that need for doing that. That is not - that's not - the language that is being referred to by Counsel is no longer in existence." (Id.). But, the County imposed that requirement in its Ordinance. So why can't the State -- and this Court -- insist upon it? Moreover, the Legislature amended the Act in 1996 to permit bonds issued not only to finance a convention center (the then existing language), but also to pay for planning and design costs incurred prior to the issuance of tourist tax bonds (the amendment) (Ch. 96-397, Sec. 44, at 2499-2500, at 2500, top Laws of Fla. (A887), effective Oct. 1, 1996 (See §49).

[60]("This ordinance shall take effect immediately upon filing with the Florida Department of State.")

[61](A809 - A810).

The Ordinance itself predicated its Legislative Findings on what the Ordinance calls a "Feasibility Report."[62]

But the Feasibility Report is not attached as an exhibit to the Bond Ordinance, at least the one attached to the Complaint and introduced in evidence (id.), and the State does not know what that Report says or the qualifications or financial interests of anybody who wrote it.[63] All the record shows, other than the Report's absence therefrom, is that the County's expert witness, on cross, disclaimed participation in, or reliance upon, the Report for his testimony (A825).[64] Neither was any proof adduced that the County has in fact imposed four cents sales tax previously, the essential precondition for the imposition of a fifth cent of tax.[65]

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[62](A333 & A770). The Report dated June 3, 1996, by the Osceola County Tourist Development Council by Real Estate Research Consultants, Inc., is entitled "Osceola County Convention Center Feasibility Update, Final Report to the Tourist Development Council." (Id.). The Ordinance "acknowledged and accepted" the findings in the Feasibility Report and cited the latter thrice for enumerated findings. (A334 & A771).

[63]The State was entitled by law to this information and relied on the County's representations it would have this document at the hearing (Compare A776, first para., with, e.g., A815, lines 1-13, with A816, lines 7-15).

[64]The economist stated "It was a fine report," (A825) but that he had done his "own independent analysis." (A826).

[65]Neither was that documentation produced to the State, despite the County's written assurance prior to the hearing (A815, A816, A775). Neither did the County's third witness, bond counsel's name partner, ever take the stand to explain the documentation (A4, lines 8-9).

So the record shows to date no court has determined whether the Ordinance does require what the State claims it does. No court has examined the admissions against interest in that Ordinance, whose findings, despite themselves, tend to underscore the fact the Convention Center is to be but a tiny cog in a much larger -- and

When this Court assesses whether the Bonds have a public purpose, the State asks the Court to bear in mind the larger teaching of cases like *City of Orlando*, supra.[66] That same kind of legal realism ought to drive this Court to find these bonds lack a public purpose.[67]

C. THE COMPLAINT DOES NOT COMPLY WITH THE DISCLOSURE REQUIREMENTS OF SECTION 75.04(1), FLORIDA STATUTES, SPECIFICALLY, AND CHAPTER 75, FLORIDA STATUTES,

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private -- enterprise.

[66]In that case, this Court, agreeing with the State Attorney, reversed a bond validation, concluding there was no public purpose. The Court's methodology is to assess whether the primary purpose of the bonds is in fact a public purpose. That same methodology can yield different results for different issuers based on different policy judgments and the will of the Legislature in articulating what is a proper purpose. In *City of Orlando* this Court held the city's bonds invalid because the city's primary purpose was "reinvestment" (e.g., lending, arbitrage, etc.), 576 So.2d at 1317, column 2, even though the Court recognized in the next paragraph of the same decision, that under an interlocal agreement a consortium of municipalities and counties could do just that without violating the public purpose doctrine, because, in effect, the Legislature said they could.

City of Orlando, supra, 576 So.2d at 1318. E.g., *Sunshine State Governmental Financing Commission*, supra ($500,000,000 bonds, no claim by State Attorney of want of public purpose, but instead alleging procedural defects and materially misleading statements in complaint exhibits).

[67]If the Legislature disagrees, the Legislature can always seek to amend the Act to authorize counties to do what the County is trying to do here.

GENERALLY, AND THE COUNTY'S UNDERTAKING IN THE COMPLAINT TO COMPLY WITH SEC RULE 15C2-12 LATER IS INSUFFICIENT TO CURE SUCH OMISSIONS.

The State is in doubt whether the Complaint complies with Chapter 75's disclosure requirements for the amount of the Bonds[68] and the interest rate they are to bear[69], in particular, and with Chapter 75's more general requirements. Here' s why.

The State just wants and seeks a bright line rule.

But Chapter 75 also says the State Attorney shall disclose defects, insufficiencies, and inaccuracies in the Complaint. Where does this Court want the State to draw the line in the State Attorney's level of scrutiny? And is the State Attorney relieved of that obligation if the documents are incomplete on their face?

The fact that the County promises to its underwriters or the SEC to disclose all later under federal law tells one nothing about how much the County must disclose to the State and the Circuit Court in its Complaint. In short, if the State believes it is

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[68]Two of this Court's early cases suggested the amount of the bonds could be set by reference to matters outside the ordinance. *State v. City of Clearwater*, 169 So. 602 (1936); *State v. City of Miami*, 116 Fla. 517, 125 Fla. 73, 157 So. 13 (1934). This Court should tell the parties and the lower courts how far those cases go or decide to distinguish them (readily) from the facts here.

[69]This Court has specifically authorized "interest rates not to exceed the maximum rate permitted by law." E.g., *Dorman v. Highlands County Hospital District*, 417 So.2d 253 (Fla. 1982). See also *Holloway v. Lakeland Downtown Development Authority*, 417 So. 2d 963 (Fla. 1982); *State v. Leon County*, 410 So.2d 1346 (Fla. 1982). Those cases state the specific interest rate was not required to be alleged or proved, so long as the above quoted kind of recitals are in the bond resolution. How little must the County do in its pleadings, which contains similar language, to relieve the State of any obligation to plead this issue?

under a duty under Chapter 75 to allege material misstatements where it finds them in bond validation complaints (e.g., *Sunshine State*, supra), does the State have the same duty under the same statute to allege material omissions in bond validation complaints, as the State alleged and argued here? The State is less concerned with this Court's doctrinal answer than it is in having an answer, hence this appeal and hence this Brandeis Brief.

D. THE OSCEOLA TRACE COMMUNITY DEVELOPMENT DISTRICT SHOULD HAVE BEEN JOINED AS AN INDISPENSABLE PARTY AND THE COMPLAINT REMAINS UNRIPE.

The State believes the District is an indispensable party. The question for this Court is very simply this: where there is evidence of interlocking Interlocal Agreements between a county issuer and a community development district, should the latter be deemed an indispensable party, especially when it is the whale and the county's project is the minnow, and the district is likely to have far greater impact on the citizenry than the front-ended county project itself will have?[70]

The State pled that the Complaint is unripe; the State can hardly now tell this Court the Complaint is ripe. But the State would suggest that the record shows the State has been vindicated in every one of its predictions in the Amended Answer (the evidence to support those allegations turned out to be far more substantial than just the documentary evidence). And sadly, despite all the

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[70]And, if so, does the State Attorney have a duty to plead this?

legal fictions, the record shows none of the State's arguments was genuinely addressed below. Either this Court should sort out the record or order the Circuit Court to do so and report back its findings to this Court.

CONCLUSION

For the foregoing reasons, the decision below should be reversed, or, in the alternative, should be reversed and remanded.

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CERTIFICATE OF SERVICE

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