IN THE FLORIDA SUPREME COURT
CASE NO. 10-794

Bond Validation Appeal From a Final Judgment
of the Circuit Court of the First Judicial Circuit,
Okaloosa County, Florida
(L.T. Case No. 2008-CA-6280-S)

MARGARET P. DONOVAN, JOHN S. DONOVAN, CAROLE A. RAND, KENNETH S. RAND, REBECCA R. SHERRY, DAVID H. SHERRY, and OCEANIA OWNERS' ASSOCIATION, INC., a Florida not for profit corporation,

Appellants,

v.

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

Appellee.

INITIAL BRIEF OF APPELLANTS

HOPPING GREEN & SAMS, P.A.,
D. Kent Safriet (FBN 174939)
Joseph A. Brown (FBN 25765)
Julie M. Murphy (FBN 41710)
119 South Monroe Street, Suite 300
Tallahassee, FL 32301
(850) 222-7500 – Telephone
(850) 521-2707 – Facsimile
ATTORNEYS FOR APPELLANTS

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INTRODUCTION

In this case, the County seeks to validate bonds for two beach restoration projects funded in part by a Municipal Service Benefit Unit. A primary issue is whether the County violated the state and federal constitutions by levying a special assessment on private property for a beach restoration project that will take portions of that property and allow the assessed funds to be used toward the payment of just or full compensation to the owners. This Court's decision in *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1118 n.15 (Fla. 2008), establishes that the beach restoration projects at issue will result in a taking of private property, including privately owned submerged water bottoms out to the pre-avulsive mean high water line (in Destin) and private exclusive use easements (on Okaloosa Island). In such circumstances, the state and federal constitutions require that just or full compensation be paid *to* the property owner (or property rights owner); they do not allow a government to levy a tax or assessment against the owner to help pay for the property it is taking *from* him. Therefore, the bonds in this case that allow for the funds to be used to pay any cost associated with the beach restoration projects are unconstitutional.

STATEMENT OF THE CASE AND FACTS

I. Nature of the Case

This case is an appeal from a final judgment of the First Judicial Circuit Court validating certain revenue bonds to be issued by Okaloosa County, Florida (the "County" or "Appellee") in an amount not exceeding $20,000,000, the security therefor, and all proceedings relating thereto.[1]

II. Factual Background

On October 21, 2008, the County's Board of County Commissioners adopted Resolution No. 2008-201 (the "Bond Resolution"), authorizing the issuance of revenue bonds to partially fund a proposed beach restoration project on part of Okaloosa Island ("Okaloosa Restoration") and in western Destin ("Destin Restoration") (collectively the "Project"). (Order, p. 2; App. A, ex. A.) The revenues pledged for repayment of the bonds include special assessments levied against properties within the boundaries of a Municipal Service Benefit Unit ("MSBU"), which the County created under Section 125.01(1)(q), Florida Statutes (2007), by adopting Ordinance No. 07-71 on December 4, 2007 (the "MSBU

[1] The circuit court's order is included in Volume 1 of the Appendix submitted by Appellants with this Initial Brief and references herein to the order are denoted by parentheses containing "Order" followed by the appropriate page or paragraph number (e.g., "(Order, p. __.)"). Other references to the Record on Appeal are made with citation to the Appendix and are denoted by parentheses containing "App." followed by the appropriate tab of the Appendix and an appropriate subdivision within that tab (e.g., "(App. __, p. __.)" or "(App. __, § __.)").

Ordinance").[2] (Order p. 2-3; App. B, § 2.) The assessments are to be collected annually for eight years from owners and leaseholders of assessed properties in the MSBU. (App. B, pp. 3-4; App. E, p. 3.)

The MSBU includes "two separate sub-assessment areas" roughly drawn to coincide with the two proposed beach restoration project areas. (Order pp. 3-4; App. B, § 2.) The east and west boundaries of the Okaloosa Island sub-assessment area generally span about three miles of beachfront adjacent to the proposed Okaloosa Restoration ("Okaloosa Sub-assessment Area"). The Destin sub-assessment area originally covered approximately 3.2 miles of beachfront in the proposed Destin Restoration, but was later reduced to about 1.7 miles ("Destin Sub-assessment Area").[3]

The MSBU Ordinance, at Sections 6 through 10, expressly requires that the County must adopt an "initial assessment resolution", prepare and give notice of a "preliminary assessment roll" (both by publication and by mail to owners of

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[2] The City of Destin consented to the establishment of the MSBU within the City limits. (Order, p. 3, n.1.)

[3] Specifically, on October 7, 2008, the County adopted Ordinance No. 08-36 to amend the MSBU Ordinance by redrawing the MSBU to remove about 1.5 miles of beachfront properties from the Destin Sub-assessment Area. (App. C, § 2.) On the same date, the County adopted Resolution No. 08-192 to drop those properties from the assessment roll. (App. D, § 6.) These properties were removed following this Court's ruling in *Stop the Beach Renourishment, Inc.* because the properties had not been designated as "critically eroded" for purposes of the Beach and Shore Preservation Act ("Act"), Chapter 161, Florida Statutes. (App. D, p. 3; *see* App. C, p. 1.)

affected properties), hold a public hearing, and only then adopt the final assessment roll. Section 6, requiring the "initial assessment resolution", spells out the mandatory procedure:

> The *initial proceeding* for the Assessment Areas and imposition of an Assessment *shall* be the Board's adoption of an *Initial Assessment Resolution*. The Initial Assessment Resolution *shall* (A) describe the real property to be located within the Assessment Area; (B) describe the Local Improvement or Related Service proposed for funding from proceeds of the Assessments; (C) estimate the Capital Cost, Service Cost, or Project Cost in the event Obligations are to be issued; (D) describe with particularity the proposed method of apportioning the Capital Cost, Service Cost, or Project Cost among the parcels of real property located within the proposed Assessment Area, such that the owner of any parcel of property can objectively determine the number of Assessment Units and the amount of the Assessment; (E) describe the provisions, if any, for acceleration and prepayment of the Assessment; (F) describe the provisions, if any, for reallocating the Assessment upon future subdivision; and (G) include specific legislative findings that recognize the fairness provided by the apportionment methodology. (Emphasis added).

The County never adopted an "initial assessment resolution" before giving notice to owners as required by Sections 6 *et seq*. of the MSBU Ordinance. Instead, the County gave notice of proposed assessments which the Board of County Commissioners had never approved. Then, on August 7, 2008, the County adopted Resolution No. 08-125 (the "Initial/Final Assessment Resolution"), which purported to be both the initial and final assessment resolutions for the imposition of the special assessments within the MSBU. (Order, p. 3; App. E, § 5.)

The County thus violated its own mandate in Section 6 of the MSBU Ordinance, under which an initial assessment resolution would first be adopted to specifically define the assessment area, the proposed project, the estimated cost, and the apportionment methodology, and to make specific legislative findings of fairness. As a consequence, the "preliminary" assessment rolls made available for public inspection before the August 7, 2008 Initial/Final Assessment Resolution were entirely without legal effect because they had never even been promulgated by the Board of County Commissioners as the MSBU Ordinance contemplated.

The Initial/Final Assessment Resolution provided that collection of the assessments would commence in November of 2008 "and continue in an equal amount for eight (8) years." (App. E, § 8.) The County began collection of the assessments in the fall of 2008, around the time of its adoption of the Bond Resolution. (*See* App. E, § 8.)

The Initial/Final Assessment Resolution, at Section 9, provided that "The adoption of this Final Assessment Resolution shall be the final adjudication of the issues presented herein . . . unless proper steps are initiated in a court of competent jurisdiction to secure relief within 20 days from the date of the Board action on this Final Assessment Resolution." Appellants and others timely filed suits in the

Circuit Court of Okaloosa County to challenge the Initial/Final Assessment Resolution, the MSBU, and the assessments on a number of grounds.[4]

The only support the County had for the apportionment methodology in the Initial/Final Assessment Resolution was the Okaloosa County Funding Feasibility Study for beach restoration on Okaloosa Island and City of Destin ("Funding Feasibility Study") dated October 1, 2007, which the resolution expressly approved and incorporated by reference. (App. E, § 5.) The Funding Feasibility Study was prepared by a coastal management consultant under contract with the unelected Okaloosa County Tourist Development Council ("TDC"). The contract between TDC and consultant Coastal Technology Corporation ("Coastal Tech") required only a preliminary review and very rough estimates ("conceptual" MSBU boundaries and "order of magnitude" assessments) to help the County explore whether an MSBU was a feasible funding mechanism for the proposed Project. (App. Z, pp. 3-4, 6.) As discussed below, although the County legislatively found that at least eight categories of benefits, including County-wide benefits, would flow from the Project (App. E, § 4(D)), its apportionment methodology considered only two: "recreation" and "storm damage reduction", (App. F, p. 9).

[4] Appellants' suits asserting objections to the MSBU and assessments are Case Nos. 2008-CA-004669-S and 2008-CA-004670-S.

III. Course of the Proceedings

Rather than litigate Appellants' circuit court cases challenging the MSBU, the County initiated the bond validation proceeding in the court below on November 13, 2008. In its Complaint for Validation, the County prayed for an order validating and confirming the bonds, the security therefor and the proceedings related thereto. On December 5, 2008, the Circuit Court issued an order to show cause why the proposed bonds and the proceedings authorizing them should not be validated.

Appellants[5] intervened in the validation proceeding pursuant to Section 75.07, Florida Statutes (2008)[6]. They filed answers, affirmative defenses, and counterclaims for declaratory relief invalidating the bonds, the security therefor (the MSBU special assessments), and the proceedings relating thereto (the MSBU Ordinance and the Initial/Final Assessment Resolution).[7] Appellants maintained

[5] "Appellants" refers collectively to an association of owners and individuals who own or lease real property located within the boundaries of the MSBU, have intervened in this proceeding, and are subject to the special assessments imposed by the County as security for repayment of the bonds at issue. During the course of the litigation, Intervenors Carole A. Rand and Kenneth S. Rand (collectively "Rands") sold their interest in the real property subject to the special assessments; however, the Rands maintain standing in this proceeding because they have paid special assessments under the MSBU at issue.

[6] Unless indicated otherwise, all citations to Florida Statutes reference the 2008 version of the statutes.

[7] Because the County initiated this validation proceeding after requiring opponents to file suit within 20 days from the Initial/Final Assessment Resolution, Appellants

that the assessments were unlawful and should not be charged or collected, or, if collected, must be refunded. (App. CC, pp. 23-24, ¶ F.44.)

In response to Appellants' counterclaims, the County filed an answer which repeatedly admitted that any special benefit from the proposed Project to be partially funded by the bonds was still uncertain: "[B]ecause the specifics of the Project have not been approved [by the Florida Department of Environmental Protection], the County is without knowledge at this point in time of where the sand will be placed . . . ." (App. G, ¶¶ 23, 24, 69.) Based on this admission, Appellants argued that since the County did not even know the Project area, all of its assertions about special benefit to assessed properties were entirely speculative. (App. CC, p. 24, ¶ F.45.)

The Circuit Court heard preliminary argument on January 2, 2009, the date initially set for the hearing, and then reset the hearing for April 8, 2009, to allow the parties to conduct expedited discovery. (*See* Order, p. 2.) The hearing went forward as scheduled on April 8, 2009, but carried over to August 13 and 14, 2009. (Order, p. 2.) During three full days of trial, a number of witnesses testified and numerous documents were introduced into evidence.

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were forced to reallege in this proceeding the same objections and issues they had already asserted in their earlier filed suits challenging the MSBU and the assessments.

In the middle of the April-to-August 2009 trial recess, the County attempted to remedy its legal error in this case, but it succeeded only in making more egregious mistakes. In particular, on June 16, 2009, the County adopted two new resolutions. One of them, No. 09-105, is an amended and restated "initial assessment resolution" which entirely replaced the August 7, 2008 Initial/Final Assessment Resolution, and which adopted, for the first time, a "preliminary assessment roll" in compliance with the two-step process mandated by the MSBU Ordinance. (App. H, § 6.) The other new resolution, No. 09-104, made 43 "corrections" to the existing preliminary/final assessment roll promulgated the year before in the Initial/Final Assessment Resolution. (App. I, p. 3; App. J, p. 1.)

The new June 2009 "initial assessment resolution", No. 09-105, was an attempt to try to retroactively "eliminate" the County's legal mistake of the prior year when it combined the initial and final assessment resolutions in violation of the two-step process mandated by the MSBU Ordinance. (*See* App. K, p. 1.) But the County scheduled its consideration of the proposed new amended and restated "final" assessment resolution for a Board of County Commissioners meeting to be held on August 18, 2009, four days *after* the trial of the validation proceeding below was set to conclude. (*See* App. L, p. 7.) The County also scheduled for the same date—four days *after* the trial ended—its consideration of an amended MSBU ordinance that would yet again change the boundaries of the Destin Sub-

assessment Area (by adding a parcel). (*See* App. M, pp. 1-2.)

At trial, Appellants objected to the introduction of the new June 2009 resolutions and the unadopted resolution and ordinance proposed for consideration in August 2009 after the trial, to the extent the County might be offering them to impliedly expand the pleadings to include validation of those uncompleted proceedings. (Order, p. 10, ¶ 17; App. N, pp. 411-18.) The June and August 2009 measures were not part of the County's complaint for validation, and the County never amended to include them. The circuit court preserved Appellants' objections, and admitted the documents only for other purposes. (App. N, p. 418.)

The June 2009 resolutions and the proposed post-trial resolution and ordinance are, in effect, admissions by the County that it had erred in 2008 when it failed to approve a preliminary assessment roll and instead combined the initial and final assessment resolutions. In fact, as discussed below, the absence of a final assessment resolution is a failure by the County to satisfy a condition precedent to filing the validation proceeding, and such a failure deprived the circuit court of jurisdiction.[8]

During the course of the hearing, the circuit court declined to dismiss the County's validation complaint for lack of jurisdiction, or on any other basis urged by Appellants. (App. EE, pp. 13-30 (ruling on Motion for Summary Judgment),

[8] Moreover, the County's uncompleted proceedings showed conclusively that any validation of the security for the bonds was premature at the time of trial.

496-514, 519-21 (ruling on Motion for Involuntary Dismissal).)

IV. Disposition Below

Immediately upon the conclusion of the hearing on August 14, 2009, the circuit court gave oral reasons and ruled that it would grant validation. Although expressing disappointment at the unconventional way the County had handled the MSBU (App. O, p. 862), the court rested its decision entirely on its view of the burden of proof in a validation proceeding, (App. O, pp. 858-65; *see also* Order, p. 15). The circuit court later issued a written Final Judgment filed March 31, 2010. As discussed below, the court's reasons were flawed.

SUMMARY OF THE ARGUMENT

The County desires to implement beach restoration projects for the benefit of the public as a whole and seeks validation of bonds to be used to fund the projects. Despite the asserted public purpose of the beach restoration, however, the County desires that only owners of property within proximity to the restoration fund the shortfall from public sources for bond repayment. To this end, the County created a Municipal Service Benefit Unit, intending to force the landowners therein to pay special assessments for the alleged benefits of beach restoration that will provide a general public benefit—only incidentally providing any private benefit. Such an assessment in and of itself violates the landowners' private property rights protected by both the State and federal constitutions, but this assessment is

particularly repugnant, as the County can apply the collected assessments to compensate the assessed property owners for any taking of their property rights associated with the beach restoration.

The circuit court's failure to require that the County satisfy conditions precedent to bond validation also violated Appellants' due process rights. First, the County's ordinance that authorizes the County to adopt a resolution to impose assessments requires a two-step adoption process, whereby the public would be provided notice after adoption of an initial assessment resolution and prior to adoption of the final assessment resolution. The County's adoption of a joint initial/final assessment resolution in contravention of the County's own ordinance therefore not only violated Appellant's due process rights, but deprived the circuit court of jurisdiction to validate the resolution. Validation proceedings are creatures of statute and the requirements of any statute which authorizes indebtedness must be met for the court's jurisdiction to exist.

Second, this Court has held that a bond issue for a beach erosion project cannot be validated unless the local government first makes a reasonable showing that regulatory approval for the project will be obtained (and that work in advance of approval will not lead to irreparable harm should approval be denied) *and* the

court affirmatively judges the showing to be sufficient.[9] In the proceeding below, the County made no showing whatsoever that the project will be permitted, and, consequently, the circuit court did not adjudge (and it could not adjudge) the nonexistent showings by the County to be sufficient.

Additionally, it is fundamentally inconsistent for the circuit court to find that the private property burdened by the special assessments will derive a "direct, special benefit" from the restoration—a condition of the assessment's validity—where the circuit court validated the bonds because the beach restoration serves a paramount public (as a whole) purpose. This Court has previously held that beach restoration, for which the benefit to shore owners is incidental to the public's interest in preservation of the shore line, is appropriately funded through issuance of general obligation bonds—*not* bonds funded by special assessments.

Moreover, the circuit court erred by completely deferring to the County's biased and arbitrary "legislative findings" in the MSBU Ordinance and the Initial/Final Assessment Resolution. A trial court's factual findings in a bond validation proceeding are required to be supported by "substantial competent evidence", and while legislative findings are afforded deference, the mere fact that the enactment containing the legislative findings is introduced during the bond validation hearing does not constitute *per se* the substantial competent evidence

[9] Moreover, an adverse party must not present strong and convincing proof to the contrary.

necessary to support the court's findings. In comparison, the record below (and on appeal) demonstrates that the assessments do not provide the required direct, special benefit to the burdened property and that the apportionment methodology is palpably arbitrary. The circuit court's order dedicates 19 paragraphs recognizing Appellants' presentation of evidence in support of the same, but ultimately validates the bonds based on an incorrect application of the burden of proof in a validation proceeding.

Finally, it was error for the circuit court to validate the special assessments as security for the bonds because the new land created by the beach restoration will belong to the State and exist outside of the boundaries of the MSBU. The statute authorizing creation of a MSBU expressly requires that services derived from special assessments be provided within the boundaries of the MSBU.

The circuit court should not have validated the subject bonds and the assessments therefor, and this Court should reverse the circuit court's order.

BASIS OF JURISDICTION

This Court has mandatory jurisdiction to hear this direct appeal pursuant to Florida Constitution Article V, Section 3(b)(2); Section 75.08, Florida Statutes; and Florida Rule of Appellate Procedure 9.030(a)(1)(B)(i).

STANDARD OF REVIEW

The scope of a bond validation proceeding is to "(1) determine if a public body has the authority to issue the subject bonds; (2) determine if the purpose of the obligation is legal; and (3) ensure that the authorization of the obligation complies with the requirements of law." *Strand v. Escambia County*, 992 So. 2d 150, 154 (Fla. 2008) (quoting *City of Gainesville v. State*, 863 So. 2d 138, 143 (Fla. 2003) (quoting *State v. City of Port Orange*, 650 So. 2d 1, 2 (Fla. 1994))).

A valid special assessment must meet the following two-pronged legal test: (1) the property burdened by the assessment must derive a "direct, special benefit" from the service provided by the assessment; and (2) the assessment for the services must be properly apportioned. *Collier County v. State*, 733 So. 2d 1012, 1017 (Fla. 1999).

This Court reviews the trial court's conclusions of law *de novo* and findings of fact for substantial competent evidence. *Strand*, 992 So. 2d at 154 (citations omitted).

ARGUMENT

I. A Governmental Entity Cannot Use a MSBU Assessment to Force a Private Property Owner to Help Fund the Just or Full Compensation the Government Owes the Owner for the Taking of the Property.

One of the principal purposes of the Fifth Amendment's protections for property is "to bar Government from forcing some people alone to bear public

burdens which, in all fairness and justice, should be borne by the public as a whole." *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (citing *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960)); *Taylor v. Vill. of N. Palm Beach*, 659 So. 2d 1167, 1170 (Fla. 4th DCA 1995); *see also Joint Ventures, Inc. v. Dep't of Transp.*, 563 So. 2d 622, 624 (Fla. 1990) (recognizing that under Florida and U.S. constitutions compensation is due when a regulation "unfairly impos[es] the burden of providing for the public welfare upon the affected owner"). Hence, the very foundation of the takings concept is that the public as a whole will bear the burden of projects for a public use or purpose by paying just or full compensation to the affected landowner.[10]

The Florida Supreme Court has recognized that beach restoration projects in some circumstances take private property. *See Stop the Beach Renourishment, Inc.*, 998 So. 2d at 1118 n.15. Further, the United States Supreme Court recently heard oral argument in an appeal of this decision regarding the circumstances in which Florida's beach restoration projects may take private property without payment of compensation. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, USSC Case No. 08-1151 (argued Dec. 2, 2009).[11] Unquestionably,

[10] The federal Constitution and Florida Constitution prohibit the taking of private property for a public use without just and full compensation, respectively. Amend. V, U.S. Const.; Art X, § 6, Fla. Const.

[11] As of the filing of this brief, no decision has been rendered.

then, there are circumstances in which the Project at issue could cause a taking of private property for which full compensation is due.

The potential use of the MSBU funds collected from the targeted property owners (for "any" Project cost) for the purpose of taking the same owners' properties for the Project, violates a fundamental precept of the Florida and federal constitutional takings provisions, as argued to the trial court. *See generally* App. DD, pp. 56-57; Amend. V, U.S. Const.; Art. X, § 6, Fla. Const. Thus, for the potential bonds to pass constitutional muster they must contain an explicit restriction preventing any MSBU funds from being used to compensate any landowner for a taking.

For the public to actually bear the public burden imposed by a taking, the payment of just or full compensation must be from general funds the government collected from the *public as a whole*—not from a targeted group of landowners that are the victims of the government's taking. *See* 31 U.S.C. § 1304 (2006) (the federal government pays compensation for takings from a general appropriation fund); *see generally* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345, n.104 (2000) ("Ordinarily, compensation for litigated takings by the federal government is paid out of the Judgment Fund, a permanent appropriation established by 31 U.S.C. § 1304 (1994).").

Similarly, this Court has held: "If a highway improvement is primarily for the benefit of the public and only secondarily or incidentally beneficial to abutting property, the imposition of the entire expense of the improvement upon the owners of the abutting property would be a violation of organic property rights." *Parrish v. Hillsborough County*, 123 So. 830, 831-32 (Fla. 1929). In *Parrish,* the Court declared a statute unconstitutional that assessed the entire cost of road improvements to abutting owners irrespective of whether the landowner or public benefited from the improvements. *Id.* The Court reasoned that the owners' payment of assessments in such a scenario in and of itself was a taking in violation of the Florida and federal constitutions. *Id.* As articulated in *Parrish,* a limited number of landowners cannot exclusively pay for a benefit that will primarily benefit the public—otherwise, the assessment in and of itself violates the landowners' private property rights and is a taking.

The present case is even more egregious because the MSBU funds could be applied to pay part of the expense of the Project's takings, thereby forcing the assessed property owners to pay themselves for their property taken by the Project. The use of MSBU funds to pay compensation to the same private property owners against whom the funds were assessed is repugnant to both the Florida and federal constitutional requirements that the public as a whole bear the burden of a benefit accruing to the public. *See Parrish*, 123 So. at 831-32. Moreover, it violates the

fundamental precept of the takings clause—which requires the public as a whole to bear the burden of providing for public benefits—by shifting payment of compensation from the general public to a targeted group of citizens. *Dolan*, 512 U.S. at 384; *Joint Ventures, Inc.*, 563 So. 2d at 624.

Because the MSBU assessment would violate the constitutional rights of many assessed MSBU property owners, it should not be validated. Additionally, the assessments already made constitute a taking of property, see *Parrish*, 123 So. at 831-32, to which the assessed owners are entitled to a refund plus interest and attorney's fees.

II. The Trial Court Lacked Jurisdiction to Validate the Bonds in this Case and Violated Appellants Due Process Rights by not Requiring the County to Comply with the Procedural and Substantive Requirements of its MSBU Ordinance.

Circuit courts have jurisdiction to determine the validation of bonds and certificates of debt "and all matters connected therewith" upon the filing of a complaint by an appropriate entity. §§ 75.01-.02, Fla. Stat. The judgment in such a case can validate "any taxes, *assessments* or revenues affected." § 75.09, Fla. Stat. (emphasis added).

A condition precedent, however, to the validation of bonds and assessments, is the existence of valid enabling legislation (e.g., a valid ordinance or resolution adopting the assessments). § 75.03, Fla. Stat. ("As a condition precedent to filing of a complaint for the validation of bonds or certificates of debt [the entity]

desiring to issue them shall . . . adopt an ordinance, resolution or other proceeding providing for the issuance of such bonds or certificates in accordance with law.").

Validation proceedings are a creature of statute and the requirements of the statute must be met for jurisdiction to exist. *City of Oldsmar v. State*, 790 So. 2d 1042, 1047 (Fla. 2001) ("Proceedings to validate bonds are purely statutory. The power of the courts with reference thereto must be found within the statute itself." (quoting *State v. City of Miami*, 103 So. 2d 185, 188 (Fla.1958))). In the *City of Oldsmar*, this Court described the purpose of validation proceedings under Chapter 75, Florida Statutes:

> The purpose of the statutory validation proceedings is to provide a forum and a course of legal procedure to which any county, municipality, taxing district, or other political district or subdivision may resort for the purpose of determining whether or not any *proposed obligation in the form of a bonded debt, or in the form of a certificate of indebtedness, may be validly issued* by it in the form proposed in its ordinance, resolution, or other action taken under the law as the initiatory step for issuance of an obligation of that character. . . .

790 So. 2d at 1048 (quoting *State v. City of Miami,* 152 So. 6, 8 (1933)) (emphasis in original).

In this case, the County never adopted proper assessment resolutions as required by the MSBU Ordinance, thereby failing to meet the condition precedent that would create jurisdiction in the circuit court. The County's MSBU Ordinance enabling and creating the assessment expressly requires a two-step adoption

process: first an "initial assessment resolution" must be adopted and, after providing public notice, a second separately adopted "final assessment resolution." (App. B, §§ 6, 10.)

Despite a blatant violation of this two-step adoption process, wherein the County adopted a single resolution on August 7, 2008, that "constitute[d] both the Initial and Final Assessment Resolution" (App. E, § 5), the circuit court erred as a matter of law by holding:

> As all of the requirements of the initial assessment resolution had been complied with prior to the public hearing held on August 7, 2008, a separate hearing was not necessary for the consideration of the initial resolution and both the initial and final assessment resolutions could be adopted jointly. The Intervenors' arguments to the contrary are without merit. (Order, p. 14.)

This error is fatal, as the County's admitted failure to comply with the two-step adoption deprived the circuit court of jurisdiction. In fact, the County was so concerned with this jurisdictional defect and due process failure that it unsuccessfully attempted to correct its error by adopting two revised assessment resolutions to comply with the two-step requirement *after* the trial of the case.[12]

[12] On June 16, 2009, in the middle of the April-to-August 2009 trial recess, the County adopted a brand new amended and restated "initial assessment resolution" (No. 09-105), which entirely replaced the August 7, 2008 Initial/Final Assessment Resolution. (*See* App. H.) The County then set a hearing to adopt a "Final Assessment Resolution" on August 18, 2009, four days *after* the trial of the validation proceeding was concluded. (*See* App. L.) The County also scheduled for the same date, four days *after* the trial ended, its consideration of an amended

At the time the trial concluded, the County had not adopted a proper final assessment resolution in compliance with the two-step adoption requirement of the MSBU Ordinance, nor was it (or could have even been) a proper part of the Complaint seeking to be validated by the County. While the circuit court properly did not rely upon the County's belated attempt to fix its failure to comply with the two-part requirement of the MSBU Ordinance,[13] it did err as a matter of law when it failed to require strict compliance with the two-step adoption requirement of the MSBU ordinance. As a result, the circuit court lacked jurisdiction to validate the August 7, 2008 "Initial/Final Assessment Resolution" or alternatively, violated Appellants' due process rights by not requiring the County to strictly comply with two-step adoption requirement.

III. The Assessments and Bond Issue are Invalid as they are Premature Because they are Based on Speculation that the Project will Receive the Required Environmental Permits.

The circuit court should not have validated the bonds in this case because it is pure speculation whether the Project's necessary environmental permits will be issued to the County. In fact, the western Destin Restoration permit is being challenged based in part on the fact the Project may result in a taking based on this

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MSBU ordinance that would yet again change the boundaries of the Destin Sub-Assessment Area (by adding a parcel). (*See* App. M.)

[13] Such reliance would have amounted to an improper advisory opinion. *See Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720-21 (Fla. 1994).

Court's opinion in *Stop the Beach Renourishment, Inc.*[14] Neither the County nor the Florida Department of Environmental Protection ("FDEP") have taken any action to address this constitutional takings issue, and they continue to proceed ignoring this constitutional issue. Moreover, the County does not have permission from the Appellants to even apply for a permit for regulatory approval for construction on the Appellants' undisputed private property (much less to enter the property to perform construction), which permit is required by the Project.[15]

This Court has recognized that a local government seeking bonds prematurely, specifically in the context of a beach restoration project, is a "vital and decisive issue in litigation of this nature." *Hillsboro Island House Condo. Apartments, Inc. v. Town of Hillsboro*, 263 So. 2d 209, 212 (Fla. 1972). In *Hillsboro Island*, this Court held that bond approval can be validated only after (1) reasonable showings have been made that regulations and permit requirements will be met and that there will be no irreparable environmental harm if the permits are denied, (2) these showings have been judged sufficient by the Court involved, and (3) if an adverse party has not presented strong and convincing proof to the contrary. *Id.* at 211.

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[14] Appellants' challenges to the western Destin Restoration permit are Florida Division of Administrative Hearings Case Nos. 10-515 and 10-516.

[15] Appellants' challenge to the Okaloosa Island permit is Florida Division of Administrative Hearings Case No. 10-2468. *See also supra* n.14.

The County made no showing whatsoever in the validation proceeding that the regulations for the environmental permits would be met. The County's own municipal finance expert testified that both the permitting and the contracting for the proposed Project must be finalized before any financing is possible. (App. T, pp. 208-17.) At the time of trial, no one knew when either of those would be finalized. Moreover, the County's coastal engineer testified that the sand source for the Project (an offshore borrow site) should be reevaluated after the restoration project permitted for the Eglin Air Force Base removes sand from the same site for its project on Okaloosa Island, which restoration has already been permitted and will likely proceed first. (App. S, pp. 192-95.)

Rather than making the necessary showing, the County continually dodged all issues relating to the Project's environmental permits repeatedly arguing that many of the issues Appellants raised below should be litigated in an administrative challenge to the permits (which they are) and not this bond validation proceeding. (App. FF, pp. 35-40, 506-507.) Accordingly, the circuit court did not adjudge (and it could not have adjudged) the nonexistent showings by the County to be sufficient. Such a failure is inconsistent with the requirements of *Hillsboro Island*.

Lastly, Appellants presented strong and convincing proof that the environmental permits will not be granted. That evidence related to the uncertainty in permitting, Project design, Project area, contracting, cost, sand quality, timing,

and ultimate location of the yet-to-be-set erosion control line (the new line between public and private property in west Destin). (*See* Order, pp. 10, 20.) Accordingly, this Court should reverse the circuit court's validation of the bonds because the validation was premature.

IV. The Specific Bonds in this Case Based on the Special Assessments Violate Either the Requirements for a Special Assessment Because they do not Provide a "Direct Special Benefit" to the Private Property or Violate the "Public Purpose" Test Because they are not for a Predominately Public Purpose.

The use of a Municipal Service Benefit Unit to conduct beach restoration creates an irreconcilable conflict under Florida law that prevents the validation of the bonds in this case. Florida law requires a special assessment to meet the following two-pronged test: (1) the property burdened by the assessment must derive a "special benefit" from the service provided by the assessment; and (2) the assessment for the services must be properly apportioned. *Collier County*, 733 So. 2d at 1017 (citing *Lake County v. Water Oak Mgmt. Corp.*, 695 So. 2d 667, 688 (Fla.1997), and *City of Boca Raton v. State*, 595 So. 2d 25, 30 (Fla. 1992)). The first prong requires that the services funded by the special assessment provide a "direct, special benefit" to the real property burdened. *Water Oak Mgmt.*, 695 So. 2d at 670.

Conversely, with respect to issuance of bonds, Florida law requires there be a "paramount public purpose" before a bond can be validated. This test was

succinctly stated by this Court in *Orange County Industries Development Authority*, 427 So. 2d 174, 179 (Fla. 1983) (emphasis added) (citations omitted), as follows:

> Running throughout this Court's decisions on paramount public purpose is a consistent theme. *It is that there is required a paramount public purpose with only an incidental private benefit.* If there is only an incidental benefit to a private party, then the bonds will be validated since the private benefits "are not so substantial as to tarnish the public character" of the project. If, however, the benefits to a private party are themselves the paramount purpose of a project, then the bonds will not be validated even if the public gains something therefrom.

This Court, presumably recognizing the mutually exclusive nature of these two tests, has held that the proper method to fund beach restoration is through the issuance of general obligation bonds and not by special assessments (such as the MSBU in this case). *Hillsboro Island*, 263 So. 2d at 212. In *Hillsboro Island*, citizens challenged the validation of a general obligation bond to fund a beach restoration project. *Id.* at 211. These citizens argued that the beach restoration project should be funded by "special assessment, not by a general obligation bond, because only the property owners along the [restored] shore will be benefited." *Id.* at 212. This Court disagreed holding that "the benefit to the shore owners is *incidental* to the preservation of the shore line as the eastern boundary of the Town." *Id.* (emphasis added). Consistent with this holding is the Legislature's declaration that beach restoration projects are in the *public interest*—not in the

interest of private property owners. § 161.088, Fla. Stat.

The *Hillsboro Island* holding, as well as common sense, precludes a finding that a single beach restoration project can at the same exact time provide a "direct, special benefit" to the real property assessed and have a paramount public purpose such that there is only an "incidental private benefit." The allocation of the alleged "benefits" in this case are illustrative. The County's MSBU methodology uses two conflicting benefits to value the "direct, special benefit" received by property owners. The first is a "storm damage reduction" benefit that values the benefit a private property receives from storm protection and is given 60% weight. Conversely, the other benefit is a "recreation" benefit. This recreation benefit, however, is not a private benefit because the new beach created is owned by the State and open to the public; thus providing a public benefit.

Accordingly, the bonds in this case that are funded by special assessments—as opposed to a general obligation bond—cannot be validated. To the extent, the County wishes to fund beach restoration it may do so through issuance of general obligation bonds but not a MSBU. *See Hillsboro Island*, 263 So. 2d. at 212.

V. Even Assuming that the Special Assessment Could be Used to Fund a Beach Restoration Project, the County's Special Assessment Fails to Meet the Two-Prong Test for Special Assessments.

Notwithstanding that a MSBU cannot be used to fund a beach restoration project as a matter of law as noted above, the MSBU in this case does not meet the

special assessment test, even assuming it was applicable because the assessments do not properly confer a "direct special benefit" on Appellants' property nor are they properly apportioned. *See Collier County*, 733 So. 2d at 1017 (describing benefit and apportionment prongs). The special assessment methodology used in this case (as well as the results) is arbitrary, and the circuit court erred in relying upon the language of the ordinance without any evidence to demonstrate compliance with the two-prong test for special assessments.

A. The Circuit Court Erred by Completely Deferring to the County's Findings in the MSBU Ordinance in Determining Whether the Two-Prong Test for Special Assessments was met.

The circuit court in this case fashioned what amounts to a rule of *per se* validity essentially completely deferring to the biased and arbitrary "legislative findings" in the MSBU Ordinance and Initial/Final Assessment Resolution. Although legislative findings are entitled to deference, such deference does not negate the requirement that such determinations be supported by competent substantial evidence in the record. *See Panama City Beach Cmty. Redevelopment Agency v. State*, 831 So. 2d 662, 667 (Fla. 2002); *Strand*, 992 So. 2d at 154 (reviewing a trial court's factual findings in a bond validation proceeding for support by "substantial competent evidence"); *City of Gainesville*, 863 So. 2d at 143; *cf. City of Winter Springs v. State*, 776 So. 2d 255, 258-61 (Fla. 2001) (detailing the specific evidence introduced during the bond validation hearing,

consisting of reports and expert testimony, supporting legislative determinations). Substantial competent evidence is that which is sufficiently relevant and material that "a reasonable mind would accept [it] as adequate to support [the] conclusion reached." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). The mere fact that the enactment containing the legislative findings is introduced during the bond validation hearing does not constitute *per se* the competent substantial evidence necessary to support such findings. *Cf. Panama City Beach Comty. Redevelopment Agency*, 831 So. 2d at 669 (noting that "the City Council cannot simply label an area 'blighted' and make it so").

The circuit court erred in this case because the County did not provide competent substantial evidence to support the bond validation and the special assessments. To the contrary as demonstrated below, the competent substantial evidence demonstrates the assessments do not confer a special benefit and are allocated arbitrarily.

B. Prong 1 - The Bond is not Valid Because the Assessments do not Provide a "Direct Special Benefit".

The individual Appellants are owners (leaseholders) of upper floor units, and of undivided interests in the common elements, of assessed real properties located adjacent to a public beach on Okaloosa Island at Surf Dweller Condominium, El Matador Condominium, and Gulf Dunes Condominium. (App. CC, ¶¶ 1-2; App. Q, pp. 615, 624-25.) At its southern boundary, each of those properties is subject to

recorded Protective Covenants and Restrictions, granted by an agency of Okaloosa County, which, since 1955, have designated 150 feet of beach seaward of the property line as "private beach" (meaning reserved for the exclusive use of the adjacent leaseholders/owners), and the more seaward 150 feet of that same beach as entirely open to the public. (App. R, pt. F.) FDEP has determined that upland structures along two designated stretches of beach within the Okaloosa Sub-assessment Area, including the stretch where Gulf Dunes Condominium is located, is designated "critically eroded"—not because the structures are exposed to a storm or erosion threat—but only because of the alleged need for restoration of *adjacent* stretches of beach on Okaloosa Island.[16] (App. U, pp. 1-2.)

The members of the associational Appellant, Oceania Owners' Association, Inc., own units at Oceania Condominium on Gulf Shore Drive, which is in the Destin Sub-assessment Area. (App. CC, ¶ 3.) Their beachfront is deeded to the mean high water line of the Gulf of Mexico, and therefore is privately owned. FDEP has determined that upland structures along 2800 feet of the beachfront in the Destin Sub-assessment Area designated as "critically eroded", including the

[16] FDEP acknowledged the absence of threat to upland development and infrastructure along the beach in the Okaloosa Sub-assessment Area between R-8.5 and R-12 and between R-13 and R-15, including the Gulf Dunes Condominium property, and in the Destin Sub-assessment Area between FDEP reference monuments R-20.3 and R-23.2, including the Oceania owners' property. Those non-threatened areas are included only for "design integrity" of the proposed beach restoration projects or for "continuity of management" of the coastal system, that is, for the benefit of other properties. (App. U, pp. 1-2.)

Oceania beachfront, are not exposed to a storm or erosion threat—but, again, are so designated only because of the alleged need for restoration of *adjacent* stretches of beach in the Destin Restoration.[17] (App. U, pp. 1-2; App. GG, pp. 81-87; App. S, p. 183; App. P, p. 543.)

Thus, these properties are admittedly included in the Project not for their own benefit, but for the benefit of adjacent properties. As a result, under Florida law, the special assessments are invalid because a special assessment must provide a "direct special benefit" to the real property burdened. *City of Boca Raton*, 595 So. 2d at 29 ("special assessments must confer a specific benefit upon the land burdened by the assessment"); *Collier County*, 733 So. 2d at 1017. In discussing this prong in detail, this Court has stated:

> We explained in *Water Oak Management* that the first prong requires that the services funded by the special assessment provide a "direct, special benefit" to the real property burdened. 695 So.2d at 670. A majority of this Court concluded that the fire services funded by the assessment in *Water Oak Management* met this requirement by providing for lower insurance premiums and enhancing the value of property. *Id.* at 669. In rejecting the criticism that our decision in *Water Oak Management* would open the flood-gates for municipalities and counties to impose improper taxes labeled as special assessments, we made clear that
>
> > *services such as general law enforcement activities, the provision of courts, and indigent health care are,* like fire

[17] Despite receiving confirmation from FDEP in January of 2009 that some of the Project areas do not need storm or erosion protection, the County still failed to reevaluate the purported MSBU methodology or formula or the apportionment of the special assessments. (App. X, pp. 339-344.)

> protection services, *functions required for an organized society.* However, unlike fire protection services, those services provide no direct, special benefit to real property. *Thus, such services cannot be the subject of a special assessment.*

Collier County, 733 So. 2d at 1017 (quoting *Water Oak Mgmt.*, 695 So. 2d at 669-70) (emphasis in original).

While the benefit provided by the assessment does not have to be unique, there must be a "logical relationship" between the services provided and the benefit to real property. *Water Oak Mgmt.*, 695 So. 2d at 669. In *City of Fort Myers v. State*, 117 So. 97 (Fla. 1928), the City attempted to assess only properties which abutted the streets for all services regardless of whether they had received storm sewer, catch basin, or manhole improvements. This Court found the assessment scheme invalid because the properties abutting the paved roads were bearing the cost of storm sewer service which was provided to other remote properties. *Id.* at 105. Akin to that case, the County presently seeks to have abutting beachfront property owners pay for construction of new (in Destin) or expanded (on Okaloosa Island) public beach that will be owned by the State and available to the County's citizens and visitors.

In *Donnelly v. Marion County*, 851 So. 2d 256 (Fla. 5th DCA 2003), *rev. denied*, 860 So. 2d 978 (Fla. 2003), the Court held that general law enforcement services, even if "enhanced" services, did not provide direct, special benefit to

properties assessed in a municipal service tax unit, and thus, such services did not satisfy Section 125.01(1)(q), Florida Statutes, since there is no logical relationship between services provided and benefit to the real property assessed. Similarly, in this case, generalized recreation services to the public on public property are not direct, special benefit to private property—especially not to beachfront property that is privately owned or exclusively reserved for the recreation needs of its owners and their guests.

With the exception of a handful of condominium complexes at the western tip of Holiday Isle in Destin that require additional sand to protect their properties from storms,[18] no other properties within the Project will derive a benefit from the additional sand because the design of the Project provides no more protection than what these other properties currently enjoy.[19] In essence the Project was devised to

[18] The problem with these properties is that the structures were built dangerously seaward of the coastal construction control line ("CCCL"). (*See*, *e.g.*, App. P, pp. 544-47.)

[19] The County is not issuing special assessment bonds for a project with direct special benefits to the assessed beachfront properties—these properties (like those of the Appellants) already have storm protection that exceeds the 50 year return storm design of the Project, or which (like those of Oceania and Gulf Dunes) are on beachfront being included in the proposed Project only for the benefit of *other* properties. (*See* App. U, pp. 1-2; App. P, p. 543.) Oceania's building and Gulf Dunes' buildings, as well as others, are completely landward of the CCCL, and therefore already protected from a 100-year return storm event. (*See, e.g.*, App. P, pp. 544-47; App. S, 169-71, 186-87.)

benefit a handful of properties on the tip of Holiday Isle that need permanent protection from storms.[20]

Not only does the Project fail to provide a special benefit to assessed properties, but it in fact is a detriment. Dr. Henry Fishkind, an expert economist, testified without challenge that the proposed Project would deliver no direct special benefit to most of the assessed properties in Destin outside of a limited area of true need. (App. V, pp. 791-800.) Indeed, he concluded on the basis of his study that property values of beachfront property in Destin would decline with construction of a public beach seaward of what is now privately owned beach. (App. V, pp. 794-95.)

Dr. Fishkind also addressed the County's "economic analysis" of the proposed Okaloosa Restoration, prepared by the County's coastal engineers, Taylor Engineering, and belatedly submitted to FDEP in the middle of the April-to-August trial recess below. That report, dated June 25, 2009, finally revealed the County's own calculation of Project costs and benefits of the proposed Okaloosa Restoration (it did not address the Destin Restoration). (App. W, § 4.) Using the

[20] In fact, since the trial, FDEP, on April 6, 2010, issued an emergency permit for restoration of this small segment of beach. *See* Joint Coastal Permit for Holiday Isle Emergency Beach Fill Project, File No. 0158078-001-JC, which is a public record of the State of Florida of which this Court may take judicial notice. The Permit is available at http://bcs.dep.state.fl.us/env-prmt/okaloosa/issued/0158078_Holiday_Isle_Emergency_Beach_Fill/001-JC/Final%20Order/TS%20Ida%20(2009)%20Emergency%20JCP%20(4-6-2010).pdf (last visited May 21, 2010).

County's *own* figures, and converting them to present value as required by standard economic methodology (and approved by U.S. Army Corps of Engineers), Dr. Fishkind found that the costs of the proposed Project substantially exceeded even the County's projected benefits. (App. V, pp. 791, 796-800.) That uncontested evidence shows conclusively that there is only detriment to the assessed properties, and not a direct special benefit.[21]

C. Prong 2 - The Assessments are not Properly Apportioned Because the Methodology is Arbitrary.

In Section 4(D) of the Initial/Final Assessment Resolution, the County legislatively found that the Project would provide a special benefit to assessed properties within the MSBU in eight distinct ways:

(1) improving and securing road access;
(2) protecting the natural environment associated with the beach;
(3) providing enhanced storm protection;
(4) protecting and enhancing the market value and marketability of properties within the MSBU;
(5) enhancing the use and enjoyment of such property through the provision of the aesthetic and recreational beach amenities;

[21] Even if the County had designed reasonable assessments based on special benefit, the MSBU in this case would fail anyway. The County did not account for the relatively short anticipated life of the beach restoration (which even the County admits is not perpetual). And it did not account for the detriment that the proposed Project will impose on private property values and the detriment it will impose on property rights. Appellants' witnesses also opposed the planned use of inferior quality sand for the Project (darker, coarser, and with much higher shell shard content than the native beach sand of the Florida Panhandle), which would injure use and enjoyment. Finally, to the extent that the Project will be used to take private property by placement of the erosion control line under the Beach and Shore Preservation Act, the County failed to consider that offset as well.

(6) a greatly expanded beach area for their use and enjoyment;
(7) serving as a primary motivator for people to live in the MSBU; or
(8) serving as a primary motivator to visit properties in the MSBU.

The arbitrary nature of the apportionment methodology begins with the Initial/Final Assessment Resolution in which the County inconsistently elected to apportion only two of these eight "benefits" of the Project. (App. E, § 4(E).) Subsection 4(E) of the Initial/Final Assessment Resolution provides:

> Since the benefits received by properties from the Beach Restoration vary depending on the type of benefit and proximity to the Beach Restoration, with all properties receiving a [1] recreational benefit and with beachfront properties receiving [2] a storm protection benefit it is fair and reasonable for the County to establish separate Areas and apportion a share of the Capital Cost among the Areas.

The County's Funding Feasibility Study only addressed these two benefits, e.g., "recreation" and "storm damage reduction" benefit. The apportionment of these two benefits began based upon perhaps the most telling example of arbitrariness—"preconditions" dictated by the TDC. The TDC's consultant hired to prepare the study, Coastal Tech, was directed to "flatten out" the average assessments between the Okaloosa Sub-Assessment Area and Destin Sub-assessment Area. (App. X, 344-350.) Additionally, TDC mandated that all the beaches within these two sub-assessment areas be treated as "critically eroded" (when all were not), and that all the beaches be treated as though they suffered

threat to upland structures (which was also incorrect).[22] The County's decision to "flatten out" the assessments is directly contrary to its own legislative finding that "benefits received by properties from the Beach Restoration vary depending on the type of benefit and proximity to the Beach Restoration." (*See* App. E, § 4(E).)

Florida law requires that the assessment for each property not be in excess of the proportional benefits as compared to other assessments on other properties. *City of Boca Raton*, 595 So. 2d at 31; *see also Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So. 2d 180, 186 (Fla. 1996) (holding assessment not arbitrary as bearing "reasonable relationship to the benefits received by the individual . . . properties"); *Lainhart v. Catts*, 75 So. 47, 53 (Fla. 1917) (assessment "must be uniform in the sense that it must be imposed upon the property . . . so that . . . the charge on every parcel will bear a just proportion to that imposed on every other"). Because the foundation and premise for the entire methodology ignored proportional benefits between assessed properties and instead apportioned assessment based on a flawed predetermination to "flatten out" the assessments, all

[22] *Compare* the TDC's "Project Need" memorandum (App. BB), *with* FDEP's letter regarding critically eroded beaches (App. U). When the County removed 1.5 miles from the proposed beach restoration project and from the MSBU in October of 2008, and again when it received confirmation from FDEP in January of 2009 that some of the project areas do not need storm or erosion protection, the County failed to reevaluate, recalculate, or revise the Funding Feasibility Study, or the purported MSBU methodology or formula. The original approach, even had it otherwise been valid (which it was not), is clearly now outmoded and inapplicable.

other findings and conclusions flowing there from are rendered flawed, predetermined, and palpably arbitrary.

The history and further evolution of the assessment methodology demonstrates one arbitrary decision after another. This section details the creation of the Funding Feasibility Study and then explains the arbitrariness in its formulas for the "storm damage reduction" (or "SDR") benefit and the "recreation" (or "REC") benefit.

1. The Funding Feasibility Study

The County's special assessment methodology in the MSBU rested entirely on the Funding Feasibility Study performed by the engineering firm Coastal Tech under contract for the unelected TDC—which was delegated the duty to develop the project.[23] The Funding Feasibility Study was performed by a Coastal Tech employee and self-professed "beach management consultant" and former environmental lawyer named Peter Ravella, whose only actual experience was as a municipal finance consultant. (App. X, pp. 279-80.)

All of Coastal Tech's work on behalf of the County regarding the MSBU was performed in conjunction with its limited contractual undertaking with the

[23] The County and the City of Destin have an Interlocal Agreement jointly designating the TDC to handle all beach and dune restoration and nourishment projects. The TDC is made up largely of representatives from local tourist and real estate industries. Its entire purpose is to promote county-wide tourism. (*See generally* App. Y.)

TDC. The contract's written "scope of work" dated February 6, 2007, stated that the TDC would provide Coastal Tech with "the storm damage reduction benefits (if any) expected for *each* parcel within the Planning Areas, *and* . . . [t]he *total* storm damage reduction and recreational benefits expected to accrue from the project(s) under consideration in each Planning Area." (App. Z, p. 3 (emphasis added); *see also* App. X, 283-86.) Not surprisingly and consistent with the arbitrary formulation of the Study, the TDC never quantified those alleged benefits, nor did Coastal Tech or anyone else. (*See* App. X, pp. 395-98; App. S, pp. 173-82, 489-91.)

Also in the contract, the TDC pre-determined the "recreation benefit" formula by conveniently promising to provide Coastal Tech with the very same information required in the methodology that Coastal Tech supposedly developed later: "the length of beach front (if any), the square footage of the lot, and the number of units on each multi-family parcel." (App. Z, pp. 3-4, 6.) In the end, Coastal Tech was required to recommend only a "conceptual" MSBU and "order of magnitude" assessments (meaning a very rough cut varying by a factor as high as ten); not a final MSBU assessment methodology. (App. Z, pp. 3-4.) Consistent with the preliminary scope of work, the contract required that "[e]conomic analysis of project benefits necessary to support an MSBU—should such an option be selected—would be performed in collaboration with a professional economist

experienced in such issues." (App. Z, p. 6.) Neither Coastal Tech nor the TDC ever hired a professional economist. (App. X, pp. 304-07.)

The Funding Feasibility Study was, by its own terms, never meant to be anything more than the name suggests—a *preliminary* study of the feasibility of funding the Project, with "conceptual" and "order of magnitude" results that would later be refined and completed if development of the MSBU went forward. The County, however, never went past the preliminary stage and arbitrarily decided to consider the Funding Feasibility Study to be a final and formal MSBU assessment methodology.

Unlike other MSBU projects, the groundwork in this case never included an actual MSBU design plan collecting empirical data, surveys, polls, and computer modeling.[24] Rather in this case, the TDC, because of its contract, was in control from the beginning arbitrarily dictating the benefit formula, the methodology, and the outcome, unrestrained by any empirical data from engineers, economists, or anyone else qualified to design a MSBU and special assessments.

The arbitrariness and shortcomings in the Funding Feasibility Study, and the errors in using it as a substitute for an actual MSBU design study, are many and

[24] The County did not even reexamine the apportionments when it changed the size of the Project and redrew the MSBU in October of 2008. *See generally supra* n.3, n.22 and accompanying text. Because of fixed costs embedded in the proposed Project, the reduction in the size of the project area would produce a less than proportional savings in project cost. Nevertheless, the County did not recalculate the allocation of benefits.

manifest. The Funding Feasibility Study contains no overall analysis of what portion of the total project cost the property owners in the benefit unit, or in either sub-assessment area, should bear in relation to their share of total project benefits. (*See* App. F.) Instead, the Funding Feasibility Study starts with the unsupported premise that property owners in the Destin Sub-assessment Area should bear 36 percent of the cost of beach restoration there, and that property owners in the Okaloosa Sub-assessment Area should pay 24 percent of the cost of beach restoration there. (App. F, p. 5.) The only basis for those plugged assumptions is that the stated percentages would produce the dollar amounts projected as the shortfall in funding from the other sources. (*See* App. F, pp. 4-5.) When the shortfall changed later, the TDC changed the plugged numbers accordingly, thus confirming they were never really tied to any empirical reasoning at all. The Funding Feasibility Study then uses two formulas to allocate benefits and thereby apportion costs, to the properties assessed in each sub-assessment area.

2. The Storm Damage Reduction Benefit

The "storm damage reduction" (or "SDR") benefit, to which the Study arbitrarily accords a 60 percent weighting, actually has nothing to do with storm damage or protection from storm damage. (App. X, pp. 290-93, 395-98.) The SDR methodology does not even consider the relative exposure of properties to storm surge damage, the extreme need of those few structures at the western tip of

Holiday Isle that were deliberately built far seaward of the coastal construction control line ("CCCL"), or the very low risk to structures (like Oceania's) built landward of the CCCL, which the State says are already protected from 100-year storms. (*See* App. P, pp. 544-47; App. X, pp. 361-63; App. S, pp. 169-71.) The proposed Project, with a design parameter of a smaller 50-year storm, will do nothing to enhance the existing protection for Appellant Oceania's building, or for any of the other buildings in the "non-threatened" areas identified by FDEP (including the Gulf Dunes Condominium of Appellants Rand on Okaloosa Island). (App. X, pp. 357-63; App. S, pp. 169-89.)

Mr. Ravella himself, the author of the Funding Feasibility Study, admitted at trial that his "storm damage reduction" benefit in fact had nothing to do with exposure to storms or storm damage. (*See* App. X, pp. 356-57.) The County's coastal engineering consultant, Mr. Trudnak, admitted that storm damage reduction should apply only to storm surge, not wind, and then only to ground floor units.[25] (App. S, pp. 486-88; *see also* Order, p. 6, ¶ 2.) The result of the County's upside-down and arbitrary SDR apportionment methodology is that sand-starved properties pay far less SDR assessments than others, while receiving inordinate amounts of sand and disproportionately higher benefit because of their severe erosion.

[25] None of the individual Appellants own ground floor units and the building of the associational Appellant does not have ground floor units.

Moreover, the SDR arbitrarily treats several beachfront properties as non-beachfront (resulting in lower assessments) and classifies actual non-beachfront properties as beachfront (resulting in higher assessments), even when they are a quarter of a mile from the water and already well insulated from storm surge. (Order, p. 6, ¶ 3; App. Q, pp. 696-98, 700-01; App. P, pp. 546-47, 551-54, 595-96.) For example, buildings in Destin Pointe (near the western tip of Holiday Isle) only 240 feet from the water and deliberately built seaward of the CCCL are not treated as beachfront for the SDR benefit, while buildings in Sandpiper Cove (in Destin) over 2,000 feet from the water, and buildings in El Matador (on Okaloosa Island) over 1,000 feet from the water, are categorized as beachfront. (App. Q, pp. 663-64; App. P, pp. 564-66, 589-91, 604-05.) Owners at El Matador and Sandpiper Cove are charged as beachfront no matter how far their units are from the Gulf. In Destin Pointe, owners are not treated as beachfront unless they are in a small southernmost area of 13 homes directly on the Gulf. (App. Q, p. 676.)

Destin Pointe, Jetty East, and a few other properties on the west end of Holiday Isle that are among the few properties actually in immediate need for the Project are the beneficiaries of this arbitrary SDR methodology. These few properties receive virtually all of the Project benefits, but they pay very small shares of the MSBU assessments. (App. Q, pp. 652, 673-75.) In Destin Pointe, the arbitrary methodology has million dollar houses built in harm's way, seaward of

the CCCL, paying no SDR, and others in the same situation paying some SDR but far less than vacant lots down the beach that have no structure to protect. (Order, p. 6, ¶ 4; App. Q, pp. 678-79, 693-94, 702-03; App. P, pp. 556-57, 593.) Not coincidentally, several of the TDC members responsible for this formula own property which received favorable treatment in the MSBU formula. (App. P, 566; App. Q, pp. 712-13.) Additionally, Coastal Tech was representing both the TDC and Destin Pointe landowners at the time it began working on the Funding Feasibility Study creating an obvious conflict of interest. (App. X, pp. 372-77.) Thus, it should be no surprise that the Destin Pointe area was one of the biggest beneficiaries of the arbitrary methodology.

These fundamental differences in the apportionment methodology have no explanation beyond the TDC's gerrymandering of the MSBU to favor certain property owners. The skewed MSBU allocations were a means of flagrantly and arbitrarily favoring the properties most in need of restoration at the western end of Holiday Isle.

Not only is the SDR formula arbitrary, but it also results in contradictory outcomes that are an affront. For example, the acreage of a property counts against the owners by increasing the SDR. (*See* App. X, p. 371.) Consequently, larger properties having structures more distant from the water, and therefore having little or no need for sand and receiving little to no benefit from the Project, are penalized

by reason of their additional acreage rather than rewarded for their lesser need. (*See* App. Q, pp. 663-64; App. P, pp. 564-66, 589-91, 604-05.) Thus, by including raw acreage in the way it does, this SDR formula takes a feature showing less need and less benefit and incongruously converts it into a basis for a higher SDR.

At the same time, the SDR formula completely ignores other property differences that show where need is minimal or nonexistent—crucial factors like elevation, storm protection features already in place (seawall, berms, dunes), lack of structures, storm-resistant construction, pilings, FDEP's express recognition of areas without threats to upland structures, areas with structures either recklessly seaward of or safely landward of the CCCL, and so on. The result is an arbitrary and irrational assessment scheme based on an arbitrary and irrational formula that merely pretends to provide a just and proportional allocation of storm damage reduction benefits between assessed properties, but which actually bears no relationship to proportional benefits received.

3. The Recreation Benefit

The Funding Feasibility Study arbitrarily allocates the remaining 40 percent to "recreation" (or "REC") benefit. It then makes no distinction for the fact that the beaches in Destin are privately owned, and that a portion of the beaches on Okaloosa Island are public but subject to an exclusive private easement. (Order, p. 9, ¶ 12; App. Q, pp. 625-27, 702.) The Study entirely ignores the fact that the

beaches in west Destin and on Okaloosa Island are already more than adequate for the recreation needs of all beachfront owners and leaseholders, except for a handful of complexes at the western end of Holiday Isle in Destin next to East Pass. (*See generally* App. F.)

Indeed, the County's "pro rata" methodology of allocating REC benefit is antithetical to a true benefit-based allocation. The TDC selected it because it meant that the County could charge each "parcel" in the MSBU roughly the same amount for REC, producing a gigantic discount for commercial interests, including hotels and the Gulfarium, whose owners happened to occupy seats on the TDC or wield influence there. (*See* App. Q, pp. 631, 677, 698-99, 712-13; App. P, pp. 566.)

For the REC assessment, the Funding Feasibility Study says each owner of a single beachfront condominium unit pays one share, whereas each beachfront hotel (some with hundreds of rooms), each motel, each apartment complex, each commercial business property, and each beachfront property designated as "multi-family" is favored by paying only one share, no matter the number of rooms, apartments, dwelling units, or customers. The Funding Feasibility Study thus arbitrarily favors business interests, including beach hotels and beach businesses represented on the TDC, who are the primary beneficiaries of enhanced tourism the beach restoration project is supposed to promote. Yet, in the County's MSBU

assessments, the financial contribution of those same primary beneficiaries is greatly reduced by the artificial "one-share-per-owner" concept the TDC applied.

One glaring example of arbitrariness in the REC assessment, and the flagrant favoritism to hotels, can be seen in a simple comparison presented at trial. The 335-room beach front Ramada Hotel on Okaloosa Island pays the exact same REC assessment as a single condominium unit. Hence, the owners of a 335-unit condominium complex would pay 335 times as much as the Ramada. The Donovans' condominium complex, El Matador, is 316 units and its owners pay 316 REC assessments; 316 times the amount of REC assessments the Ramada pays. (Order, p. 9, ¶ 11; App. P, pp. 564-66; App. Q, pp. 677, 698-99.) The County cannot realistically assert that assessing a single condominium unit the same amount as a 335-room beach front hotel property constitutes a just and proportional allocation of the recreational benefit between those properties.

The County's attempted justification for the formula and outcome is that the Ramada has only one owner. (*See* App. X, pp. 247-67.) This justification, however, is an admission that "recreation" benefit to the assessed properties is not really the basis for the REC assessment at all. Rather it is based on a personal benefit to specific property owners; a basis that is irrelevant and inapposite to apportionment of special assessments by the very nature. *Compare Water Oak Mgmt.*, 695 So. 2d at 669 (holding special assessment for fire protection services

valid as specially benefitting real property assessed), *with City of North Lauderdale v. SMM Properties, Inc.*, 825 So. 2d 343 (Fla. 2002) (holding assessment for emergency medical services invalid as only benefitting people and not providing any special benefit to property). This arbitrary apportionment is specifically created by a deliberate choice made by the TDC to design the methodology specifically to favor hotels. (*See* App. X, pp. 247-67.)

The arbitrary results from the arbitrary methodology are no surprise. When one begins with a flawed and arbitrary formula, the results will be flawed and arbitrary. Thus, when the TDC gave its consultant "pre-conditions" to the methodology, including requiring assessments be "flattened out" between the Destin Sub-assessment Area and the Okaloosa Sub-Assessment Area (*see* App. AA, p. 2), and that all beaches be treated as critically eroded when all were not (*see supra* n.19), the formula never had a chance to be anything but arbitrary.

VI. The Special Assessments are Invalid Because they Fund Improvements Outside the MSBU.

As this Court knows from *Stop the Beach Renourishment, Inc.*, a beach restoration project creates a new dry sand beach from what was submerged lands by placing sand on both existing upland property and out into the Gulf. *See generally Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102. The State claims title to the new dry lands seaward of the erosion control line ("ECL"), the new property line to be set by the State, which is typically located at the current mean

high water line. *Id.* (App. S, p. 160; App. P, pp. 575-76.) In both the Destin Restoration and Okaloosa Restoration, new state-owned land will be created by the Project.[26]

These new lands created by the Project are "not within" the MSBU, nor could they be, since that property belongs to the State. Consequently, the statute on which the County relies for its authority to impose the MSBU, Section 125.01(1)(q), Florida Statutes, cannot apply here. The statute allows creation of an MSBU "within which" may be provided "essential facilities and municipal services from funds derived from . . . special assessments . . . within such unit only." The MSBU in this case will provide no "municipal service" or "essential facility" within the MSBU at all because the Project will create or expand State-owned public beach outside the boundaries of the MSBU. The State—not the County or private property owner—will gain any alleged benefits.

This Court's opinion in *Hillsboro Island* is again instructive. There this Court held that the creation of new sovereign lands outside the Town's boundary with funds from a *general obligation bond* was permissible and rejected the argument that a special assessment was appropriate. *Hillsboro Island,* 263 So. 2d at

[26] Ownership to these new lands by the state as well the constitutionality of the ECL are open questions to be decided by this Court and the United States Supreme Court. *See Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102; *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, USSC Case No. 08-1151 (argued Dec. 2, 2009).

212. Unlike the requirements for a general obligation bond, a MSBU special assessment is statutorily required to provide services (here, alleged recreation and storm reduction benefits) "within" the MSBU itself. Because the assessments will provide benefits outside the MSBU, the assessments and bonds cannot be validated. Rather, the County, if it desires to fund the restoration projects should do so through a general obligation bond.

CONCLUSION

Appellants respectfully urge that the circuit court erred in validating the subject bonds, the security therefor, and all proceedings relating thereto; and accordingly, that this Court should reverse the circuit court's Final Judgment entered on March 31, 2010.

RESPECTFULLY SUBMITTED this 2nd day of June, 2010.

D. Kent Safriet (FBN 174939)
Joseph A. Brown (FBN 25765)
Julie M. Murphy (FBN 41710)
HOPPING GREEN & SAMS, P.A.
119 South Monroe Street, Suite 300
Tallahassee, FL 32301
(850) 222-7500 – Telephone
(850) 521-2707 – Facsimile
Attorneys For Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Initial Brief and of the accompanying Appendix have been served by United States Mail to each of the following on this 2nd day of June, 2010:

GREGORY T. STEWART
HARRY CHILES
CARLY J. SCHRADER
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
ATTORNEYS FOR OKALOOSA COUNTY, FLORIDA

JOHN R. DOWD
901 Eglin Parkway
P.O. Box 404
Shalimar, Florida 32579
ATTORNEY FOR OKALOOSA COUNTY, FLORIDA

STEVEN K. HALL
Hall & Runnels
4399 Commons Drive East, Suite 300
Destin, Florida 32541
ATTORNEY FOR OKALOOSA COUNTY, FLORIDA

WILLIAM B. BISHOP
Assistant State Attorney
I-B 9th Avenue
Shalimar, Florida 32579
ATTORNEY FOR STATE OF FLORIDA

_____
D. KENT SAFRIET

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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D. KENT SAFRIET