IN THE FLORIDA SUPREME COURT
CASE NO. SC10-794

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.

REPLY 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Florida Cases

Florida Constitution

Florida Constitution

Florida Statutes

Ordinance

ARGUMENT

I. USING SPECIAL ASSESSMENTS TO PAY JUST COMPENSATION FOR PROPERTY TAKEN FOR PUBLIC USE CONTRAVENES CONSTITUTIONAL TAKINGS PRECEPTS.

Appellants argue that using the special assessments to pay what otherwise would be "just compensation" for property taken for a public purpose by the Project[1] is inappropriate because the just compensation burden is not borne by the public as a whole; rather, in such a case it is borne by a targeted subset of landowners. As the case law cited by Appellants illustrates, such a scheme is contrary to the precepts of the private property protections enshrined in the Florida and United States constitutions. Amend. V, U.S. Const.; Art. X, § 6, Fla. Const.; *see generally Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Joint Ventures, Inc. v. Dep't of Transp.*, 563 So. 2d 622, 624 (Fla. 1990); *Taylor v. Vill. of N. Palm Beach*, 659 So. 2d 1167, 1170 (Fla. 4th DCA 1995).

In addition to not citing case law to show that the County's scheme is **consistent** with takings law precepts, the County's response is deficient for three reasons: (1) the issue raised by Appellants is not premature; (2) it misconstrues Appellants' takings arguments under the *Stop the Beach* opinions; and (3) *Ocean Beach Hotel Co. v. Town of Atlantic Beach* (*Ocean Beach*), 2 So. 2d 879 (Fla. 1941), is inapposite.

---

[1] "Project" refers jointly to the two separate beach restorations proposed to be funded by the same bonds, which individual projects are referred to as "Destin Restoration" and "Okaloosa Restoration."

First, the County urges the Court to defer consideration of Appellants' argument because the Project has not yet caused a taking of private property. This argument misses the point—Appellants are arguing the special assessments cannot be used to pay "just compensation" for a taking of private property. The issue presented is not whether a taking has occurred, but instead how "just compensation" will be paid for a taking that is likely to occur. As this validation adjudges how the special assessments can be used in the future, this is the appropriate opportunity to ensure that the special assessments are prevented from being used to pay "just compensation" for the taking of private property for a public use.[2] Whatever prematurity exists is due to the County's unnecessary rush to validate bonds for a speculative and ever-changing MSBU and Project.

Second, the Project likely will cause a taking and the County misconstrues the Appellants' reliance on the *Stop the Beach* opinions. Appellants argue that a taking will occur because the Project's erosion control line ("ECL") will be established landward of the pre-hurricane Mean High Water Line ("MHWL"). As this Court stated, "when restoring storm-ravaged shoreline, the boundary under the Act should remain the [pre-hurricane] event boundary" and the footnote continues:

---

[2] The County incorrectly suggests that only Appellant Oceania Owners' Association, Inc. ("Oceania"), can make this argument. Ans. Br., n.9. Preventing the use of special assessments to pay for a taking—which is use for a public purpose—is a concern for all assessed landowners.

> if the ECL does not represent the pre-hurricane MHWL, the resulting boundary between sovereignty and private property might result in the State laying claim to a portion of land that, under the common law, would typically remain with the private owner.

Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1118 & n.15 (Fla. 2008), *aff'd Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S.Ct. 2592 (2010). The United States Supreme Court echoed this conclusion stating that "if the erosion control line were established landward of [the pre-hurricane MHWL], the State would have taken property." *Stop the Beach Renourishment, Inc.*, 130 S.Ct. at n.2. Contrary to the County's suggestion, Appellants are not arguing that the Project takes the rights of future accretion and contact with the water when the ECL and pre-avulsive MHWL are in the same location. Accordingly, the County's argument that no taking is likely or possible is inapposite.

Third, the County's reliance on *Ocean Beach*, 2 So. 2d 879, is inapposite as *Parrish v. Hillsboro County*, 123 So. 830 (Fla. 1929) controls. *Ocean Beach* affirmed the dismissal of assessed landowners' counterclaims to a foreclosure action instituted six years after validation of the bonds and special assessments. *Id.* It offers no insight into whether the use of special assessments to pay for a primarily public project rises to a taking. In contrast, *Parrish* focuses on this issue and concludes by stating "imposing the entire cost of a public improvement of highways upon abutting property without reference to benefits as between the

public and the abutting owners" is "clearly a violation of the Constitution in that it purports in effect to authorize private property to be taken for public use and for the benefit of others without just compensation and without due process of law, and is an arbitrary and oppressive exercise of governmental power . . . ." *Parrish*, 123 So. at 435; *See Hillsboro Island House Condominium Apartments, Inc. v. Town of Hillsboro* (*Hillsboro*), 263 So. 2d 209, 212 (Fla. 1972) (recognizing a beach restoration project is primarily and essentially for the public's benefit with only incidental benefit to shoreline owners).

In conclusion, the bonds—as presented—cannot be validated as they do not preclude the use of special assessments to pay for a taking caused by the Project.

II. THE COUNTY'S FAILURE TO COMPLY WITH ITS ORDINANCE DIVESTED THE CIRCUIT COURT OF JURISDICTION.

Appellants argue that the circuit court lacked jurisdiction to validate the bonds because the County failed to comply with the MSBU Ordinance's specific procedural requirements and therefore failed to satisfy the statutory prerequisites for validation.[3] Section 75.03, Florida Statutes, mandates adoption of an enabling ordinance or resolution "in accordance with law." Failure to comply with a governing ordinance or code provision invalidates the local government action.[4]

---

[3] Okaloosa County, Fla., Ordinance 07-71 (Dec. 4, 2007) ("MSBU Ordinance") (creating the Municipal Service Benefit Unit ("MSBU") at issue).

[4] *City of Hallandale v. Ravel Corp.*, 313 So. 2d 113, 115-16 (Fla. 4th DCA 1975); *Klein v. Metro. Dade County*, 217 So. 2d 155, 157 (Fla. 3d DCA 1968); *cf Fox v. Fratello*, 308 So. 2d 581, 582 (Fla. 2d DCA 1975).

It is disingenuous for the County to assert that all "requirements" of the MSBU Ordinance were met while the County acknowledges it did not abide by all of the Ordinance's procedures. Ans. Br., p. 21. The County inexplicably argues that it was excused from abiding by these procedures because "there was no need," and therefore, it was not necessary to either adopt an initial assessment resolution or, after public notice, separately adopt a final assessment resolution.[5] *Id.* The County should not be permitted to cherry-pick which procedural provisions it will follow when issuing bonds. As result, the circuit court was without jurisdiction to validate the bonds.

III. THE PROJECT CONTINUES TO CHANGE—IT IS PREMATURE TO VALIDATE BONDS FOR AN UNFINALIZED PROJECT.

The Project is in a state of flux, and thus, it is premature to consider issuance of bonds for the Project.[6] In *Hillsboro*, this Court stated that bonds can only be validated for a project dependent upon permit issuance where there is (1) a reasonable showing that the permit would be forthcoming, (2) the showing is judged to be sufficient by the circuit court, and (3) the adverse party has not presented strong and convincing proof to the contrary. *Hillsboro*, 263 So. 2d at 211-12. The Court then stated "Although we find that under the circumstances this

[5] If there truly was "no need" to comply with these procedures, the County should—and could—have amended the MSBU Ordinance.

[6] Again, the County misses the Appellants' argument, which is the Project is not sufficiently finalized to know what project will be permitted by Department of Environmental Protection, if any. The Appellants' challenges to the permits are pending at the Division of Administrative Hearings.

issue can be satisfactorily disposed of, **we caution that it is a vital and decisive issue** in [bond validation litigation]." *Id.* at 212 (emphasis added).[7] These three elements require invalidation of the bonds.

First, the specific Project and permits about which the County's witnesses testified will not be forthcoming.[8] On July 23, 2010—one day after serving its Answer Brief—the County amended the Destin Restoration Project's permit application by removing Oceania and its members' properties from the proposed Destin Restoration.[9] On September 7, 2010, the County adopted Ordinance 10-159 to exclude Oceania from the MSBU Ordinance and refund the 71 unit owners their two years worth of assessments with interest. *See* Okaloosa County, Fla., Ordinance 10-159 (Sept. 7, 2010). These changes are very significant as Oceania's exclusion creates a 574 foot gap in the middle of the 8,976 foot long project.[10]

The County's statement that "much work had been done" prior to validation is irrelevant to whether a permit will actually be issued and ignores the changing nature of the Project. Ans. Br., p. 24. Most recently, DEP has issued an

---

[7] The County's suggestion that the "concern of the Hillsboro Island" was the unavailability to challenge administrative actions as it pre-dated the Administrative Procedures Act is not suggested anywhere in the opinion. Ans. Br., p. 28.

[8] For permitting purposes the County and DEP are treating the Destin Restoration and Okaloosa Restoration as two separate projects, but the County is inexplicably treating both projects as one for funding purposes.

[9] Dep't of Envtl. Prot.'s and Bd. of Tr. Notice of Filing Request for Modification and Revised, Draft Joint Coastal Permit, *Sherry v. Okaloosa County*, DOAH Case No. 10-0515 (consolidated) (filed July 26, 2010).

[10] *Id.*

emergency beach fill permit for the western end of Holiday Isle, which encompasses the only area of the Destin Restoration that truly needs sand and making that portion of Destin Restoration duplicative warranting further modification of the Project.[11] In addition, DEP has amended its agency action and is now requiring an ECL for the Destin Restoration[12] in part prompting nine additional landowners to file challenges to the Permit revisions and attempt to join the Project's permit challenge.[13] The County's own Coastal Management Coordinator stated he "could not testify as to what the State would ultimately approve," *id.*, which underscores that the "Project" is speculative. Accordingly, under *Hillsboro* the bond validation is premature.

Second, nothing in circuit court's order demonstrates that the judge considered whether the County reasonably showed that the permit for the "Project" (which has changed since entry of the order) would be forthcoming. *See generally* Final Judgment, pp. 11-22. *Hillsboro's* second element has not been satisfied.

Third, Appellants presented strong and convincing proof to the judge that

---

[11] The emergency permit is available at: http://bcs.dep.state.fl.us/env-prmt/okaloosa/issued/0158078_Holiday_Isle_Emergency_Beach_ Fill/001-JC/Final%20Order/Cover%20Letter.pdf (last visited Sept. 3, 2010).

[12] Dep't of Envtl. Prot.'s and Bd. of Tr. Notice of Revisions to the Proposed Joint Coastal Construction Permit, *Sherry v. Okaloosa County*, DOAH Case No. 10-0515 (consolidated) (filed Aug. 18, 2010).

[13] *See* Petition to Intervene, *Sherry v. Okaloosa County*, DOAH Case No. 10-0515 (consolidated) (filed Sept. 8, 2010). The County may similarly drop the new petitioners' properties—rendering the Destin Restoration Project more akin to a dotted line.

the Project would continue to change and that it was speculative to say that DEP would issue a permit for the Project iteration that was presented at trial. Since then, the Destin Restoration Project has been substantially modified twice. The Final Judgment and parties' briefs recognize Appellants' submission of evidence demonstrating the uncertainty of the permit issuance. *Id.* at pp. 10, 20; In. Br., p. 24; Ans. Br., p. 24. Further, the testimony at hearing no longer describes the scope of the Project because of the above-described changes.

Lastly, the County's argument that a statutory deadline necessitated seeking bond validation before obtaining the Project's permits is misleading. Ans. Br., p. 29. The two-year time limitation cited by the County begins upon *the County recording* the ECL. § 161.211, Fla. Stat. The County itself controls when this two-year period begins and to date, no ECL for the Destin Project has been adopted much less recorded and therefore the timeframe has yet to begin. The "deadline" is not and will not constrain the County's actions, and its argument is meritless.

As a result of the significant changes to the Project (e.g., modification of the MSBU to eliminate Oceania, the emergency beach fill permit for a limited portion of the Project, etc.) it is clear that the MSBU methodology used for the original MSBU is now out-dated and the County must start anew with a methodology that properly allocates any benefits from the revised Project. Accordingly, it is premature to validate bonds for this ever-changing Project given the Court's ruling

in *Hillsboro* and recognition that the likelihood of receiving a permit is a "vital and decisive issue in [a bond validation]." *Id.* at 212.

IV. THE COUNTY ERRS IN ARGUING THE FUNDING IS ALLOWED BECAUSE THE PROJECT CANNOT BE PRIMARILY A PUBLIC BENEFIT AND AT THE SAME TIME BE PRIMARILY A PRIVATE BENEFIT.

The County's discussion of the *Jackson-Shaw Co. v. Jacksonville Aviation Authority*, 8 So. 3d 1076 (Fla. 2008), case misses Appellants' argument. Most simply, the Project cannot be "primarily for the benefit of the public" and at the same time be "primarily and essentially for the benefit of the abutting property." This Court in *Hillsboro* has expressly recognized a beach restoration project is primarily and essentially for the public's benefit with only incidental benefit to shoreline owners. *Id.* at 212. Thus, this Court rejected an argument that beach restoration project should have been funded by special assessments rather than general obligation bonds. *Id.; see also Parrish*, 123 So. at 831-32 (improvements have to be either "primarily and essentially for the benefit of the abutting property" or "primarily for the benefit of the public").[14]

In addition to state funding, the County has pledged two funding sources for this project: the first cent of the Tourist Development Tax, which funds 64 percent of the Destin Restoration and 76 percent of the Okaloosa Restoration, and special

[14] The only expert economist at trial testified that the cost of the Project outweighed the benefit and would not bring any direct special benefit to any properties except those few at the western end of Holiday Isle that truly need sand and are a part of the emergency permit. App. V, pp. 791-800.

assessments levied within the MSBU, which fund 36 percent of the Destin Restoration and 24 percent of the Okaloosa Restoration. The proportion of the funding from each source shows this Project to provide primarily a public benefit which should be funded by general obligation bonds. *See generally Hillsboro*, 263, So. 2d at 212.[15]

Utilizing a segregated approach to analyze funding for the bonds, the County necessarily asserts: that (1) the Project provides primarily a public benefit substantial enough to justify pledging the Tourist Development Tax,[16] and utilizing a separate analysis, (2) the same Project provides primarily and essentially a direct special benefit—separate and apart from that enjoyed by the public—to assessed landowners sufficient to warrant imposition of special assessments.[17] This segregated approach ignores the fact that a single bond validation is at issue for a Project for which the public benefit costs (which should be funded by taxes) and the direct special benefits, if any, have not been segregated. Instead of undertaking such an economic analysis, the County levied special assessments to make up the

---

[15] When adding in the proportion of the special assessments dedicated to public recreation (40% of the assessment) the proportion of funding for a public purpose increases to 78% for the Destin Restoration and 85% for the Okaloosa Restoration.

[16] Tourist Development Taxes can only be used for beach renourishment and restoration "to which there is public access . . . ." § 125.0104(5)(a)(4), Fla. Stat. Further, "neither the State nor a political subdivision 'may expend public funds for or participate at all in a project that is not of some **substantial benefit to the public**.'" *Jackson-Shaw Co.*, 8 So. 3d at 1095 (citation omitted) (emphasis added).

[17] *See Collier County v. State*, 733 So. 2d 1012, 1017 (Fla. 1999) (special assessments must provide a direct special benefit).

shortfall between taxes and total cost. In. Br., p. 41; App. F, p. 5.

In effect, the County tries to argue it both ways: that the Project primarily provides a public benefit that satisfies a substantial public purpose, as required for using taxes, and that the Project primarily and essentially provides a direct special benefit to the assessed private properties, as required for special assessments. The County's conflicted funding scheme is inherently contradictory because the Project cannot provide a "primarily public" benefit and a "primarily private" benefit at the exact same time. Accordingly, the bonds as presented must be invalidated.

V. THE COUNTY'S RECORD EVIDENCE FAILS TO SATISFY THE TWO-PRONG SPECIAL ASSESSMENTS TEST.

The evidence demonstrated that the special assessments did not provide a direct special benefit and were arbitrarily allocated, and consequently are unlawful. As this Court explained, special assessments must (1) provide a direct special benefit and (2) be reasonably apportioned. *Collier County,* 733 So. 2d at 1017. The County makes two unavailing arguments to attempt to comply with this test.

First, the County argues deference to the legislative findings is sufficient to demonstrate the special assessments satisfy the two-prongs; however, arbitrary legislative findings are not entitled to deference. *See Panama City Beach Cmty. Redevelopment Agency v. State*, 831 So. 2d 662, 667 (Fla. 2002). As explained below and in Appellants' Initial Brief, the legislative findings cited by the County are arbitrary, and the circuit court's absolute deference to them improper.

Second, the County argues that the record evidence shows the special assessments provide a direct special benefit and are reasonably apportioned. As explained in Appellants' Initial Brief, it is apparent that the special assessments do not provide a direct special benefit to the assessed landowners. Dr. Fishkind, the only expert economist at the trial, testified that the cost outweighed the benefit and the Project would bring no direct special benefit to any properties except those at the western end of Holiday Isle that truly need sand.[18] App. V, pp. 791-800. In fact, Dr. Fishkind testified the Project would cause a decrease in property values. *Id.* As to the second prong, the County fails to demonstrate reasonable apportionment; instead, the record demonstrates arbitrary storm damage reduction ("SDR") and recreational ("REC") apportionment methodologies, which Appellants' Initial Brief explains in detail. A few examples are provided to respond to the County's Answer Brief.

It is asserted that the Project will provide protection against a 50-year storm; however, the SDR methodology does not differentiate between properties with structures landward of the 100-year storm line, like Oceania's, that would probably be unaffected by a 50-year storm and those seaward of the line that would be potentially damaged by the same storm. The SDR methodology further compounds this undifferentiated approach by apportioning SDR assessments

[18] This area will receive sand pursuant to the Holiday Isle emergency permit. *See supra* notes 11 and 14.

equally for ground floor units that would be exposed to storm surge and upper floor units that would be largely unaffected by storm surge.[19] In total, the SDR methodology considered lot size, number of units, and beachfront footage; it did not consider the proximity of structures to the water or the beach, specific location of assessed units, and the existence or location of any ground floor common elements or amenities, which are the factors that would be relevant in predicting harm from storm surge. The methodology is arbitrary and the reliance upon legislative findings' professed good intentions is insufficient.

The REC methodology is equally arbitrary because hotels are treated as a single unit whereas each condominium is individually assessed for each unit. The County attempts to justify this disparity by comparing the **total amount assessed** between a hotel and condominium, and erroneously concludes that because it believes the total amounts are reasonable, the REC assessment must also be reasonable. Ans. Br., n.16. This illogical justification is an admission that the assessments are not based on the provided "benefit", and instead, based on ownership. For example, a 100 unit condominium building would be assessed 100 REC assessments, whereas a building with 100 apartments would only be assessed one REC assessment.

---

[19] The County now argues this apportionment is justified by the harm to the ground floor common elements and amenities; however, that rationale, if true, would have been included in the methodology, not a legal after-the-fact argument.

The apportionment methodologies must be fair and reasonable and not arbitrary. Appellants do not assert or suggest the methodology must attain perfection; however, they do expect the methodology to treat similarly situated structures and units equally based on factors relevant to the benefits actually received—e.g., distance to the water and whether the beach needs sand—as Florida law requires. The apportionment methodology utilized by the County is arbitrary, and, therefore, the special assessments are unlawful.

VI. SPECIAL ASSESSMENTS CANNOT FUND SERVICES OUTSIDE THE MSBU DESPITE THE COUNTY'S ATTEMPT TO REWRITE THE SECTION 125.01(1)(q) REQUIREMENT.

Section 125.01(1)(q), Florida Statutes, provides that "essential facilities and municipal services" funded by special assessments must be provided "within [the MSBU] only." The County impermissibly asks this Court to rewrite this statutory requirement by focusing on a different MSBU test: "[t]he test is whether the property within the boundaries of the MSBU derives a special benefit . . . and not whether a portion of the project is on adjacent property outside of the unit." Ans. Br., p. 49. *See generally Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999) (court cannot rewrite statute); *St. Petersburg Bank & Tr. Co. v. Hamm*, 414 So. 2d 1071, 1073 (Fla. 1982) (same). While properties within the MSBU boundary must derive a direct special benefit, the County cannot use one requirement to rewrite the second, which clearly states that the "essential services

and municipal services" must be provided **within** the MSBU boundary. § 125.01(1)(q), Fla. Stat.

The County's inappropriately rewritten requirement is yet another manifestation of its misguided reasoning that special assessments can be imposed on a targeted subset of property owners to subsidize a general public facility such as a library. Rewriting the Section 125.01(1)(q) requirement—as the County suggests—would remove any spatial limitation on how far outside the MSBU boundary the facilities could be built or the services provided. In effect, as long as the owners in the MSBU could make some use of the services or facilities, the creation of a MSBU would be appropriate, even if the assessed owners receive a "special benefit" no different in kind or degree from that received by anyone else in the county. The MSBU assessments are impermissible under Florida law.

CONCLUSION

Appellants respectfully urge that the circuit court erred in validating the subject bonds, the security therefore, and all proceedings relating thereto, and accordingly, that this Court should reverse the Circuit Court's Final Judgment.

/S/ D. Kent Safriet
D. KENT SAFRIET (FBN 174939)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Reply Brief have been served by United States Mail to each of the following on this 10th day of September, 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

/S/ D. Kent Safriet
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).

/S/ D. Kent Safriet
D. KENT SAFRIET