IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC14-1282

VICKI THOMAS, SIDNEY KARABEL and CHRISTOPHER TRAPANI,

Appellants,

v.

CLEAN ENERGY COASTAL CORRIDOR,

Appellee.

ANSWER BRIEF OF APPELLEE, CLEAN ENERGY COASTAL CORRIDOR

ON APPEAL FROM A FINAL JUDGMENT OF THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

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TABLE OF CONTENTS

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TABLE OF CONTENTS
(Continued)

Page

TABLE OF CITATIONS

Page

Cases

Weiss Serota Helfman Pastoriza Cole & Boniske, P.L.
2525 Ponce de Leon Boulevard, Suite 700, Coral Gables, Florida 33141 • T. (305) 854-0800 • F. (305) 854-2323

TABLE OF CITATIONS
(Continued)

Page

Statutes

TABLE OF CITATIONS
(Continued)

Page

Rules

REFERENCES USED IN BRIEF

References to appellants' appendix will appear as "A."

References to appellee's supplemental appendix will appear as "S.A."

References to the initial brief will appear as "I.B."

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INTRODUCTION

This appeal arises from a final judgment in a bond validation proceeding entered by the circuit court of the Second Judicial Circuit, in and for Leon County, Florida, approving the proposed bonds.

STATEMENT OF THE CASE AND FACTS

A. Statement of the case.

On December 12, 2013, appellee, Clean Energy Coastal Corridor ("Clean Energy"), commenced proceedings in the trial court by filing a complaint seeking to validate revenue bonds not to exceed at any one time $500 million, in the aggregate (hereafter, the "Bonds"), as well as the non-ad valorem assessments to secure the Bonds (hereafter, the "Assessments"). A. 1-2. Clean Energy effectuated the requisite notice and service, as mandated in Chapters 75 and 163, Florida Statutes. A. 2, 16. The validity of notice and service has not been challenged on appeal.

The complaint initially named as defendants (among others) all residents of Broward County, as well as non-residents owning property in Broward County. A. 1. To that end, service was effectuated on and acknowledged by the Office of the Broward County State Attorney. S.A. 1-2. On January 27, 2014, the trial court issued its notice and order to show cause directing all potentially interested parties to show cause why the Bonds and Assessments should not be validated, no later than the date of the anticipated final hearing on March 10, 2014. S.A. 3-6.

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On March 6, 2014, before any responses to the show cause order were filed, Clean Energy voluntarily dismissed all Broward County residents and property owners from the lawsuit.[1] A. 125-26. As Clean Energy explained both at the March 10, 2014, hearing and during the final hearing on May 12, 2014, Broward County was not a participant in the program to be funded by the Bonds. A. 191, 298-99.[2] Moreover, if Broward County were ever to elect to participate in the program, Clean Energy would be required to return to court to obtain a further validation of the Bonds as to Broward County and its residents. *Id.*

On March 10, 2014, the date initially scheduled for the final hearing, appellants, Sidney Karabel and Christopher M. Trapani (hereafter, the "Broward Residents"), filed a response to the trial court's order to show cause. A. 108-16. Appellant, Vicki Thomas ("Thomas"), did not file a response to the order to show cause by the deadline set forth in the order, nor did she appear at the March 10, 2014 hearing. At the hearing, the trial court heard testimony from a single witness (A. 192-201), but eventually continued the hearing until a later date to allow the

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1 Broward County was included initially because it was anticipated it would adopt a resolution to participate in the program through the Interlocal Agreement. A. 185-86. When that did not occur, Clean Energy dismissed Broward in consultation with the Broward State Attorney. A. 186. As counsel for the various State Attorneys indicated at the final hearing, Broward County accepted the voluntary dismissal, believing they did not have a "dog in the fight." A. 230.

2 To avoid unnecessary references to different documents, Clean Energy will refer to the pagination of the appendix when referencing hearing transcripts, rather than the pagination of the transcripts, themselves.

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parties to submit memoranda of law addressing, among other things, the standing of the Broward Residents to participate after the voluntary dismissal of all Broward County residents on March 6, 2014. A. 212-14.

On March 20, 2014, Clean Energy filed a motion and memorandum of law to strike the Broward Residents' response to the order to show cause on the basis that all Broward residents had been voluntarily dismissed by Clean Energy on March 6, 2014. A. 117-24. Clean Energy also filed a memorandum of law in opposition to the challenges asserted by the Broward Residents at the March 10, 2014 hearing.[3] A. 137-55.

Five days after Clean Energy moved to strike the Broward Residents' response, and 15 days after the deadline to respond to the order to show cause, Thomas, a Miami-Dade resident represented by the same counsel as the Broward Residents, filed a notice of appearance and adoption of the Broward Residents'

[3] Virtually all of the challenges asserted by the Broward Residents during the March 10, 2014 hearing and in their memorandum of law opposing validation (A. 157-70) have been abandoned on appeal. While the conclusion of the initial brief makes an *oblique* reference to impairment of contract and distorting the line between non-ad valorem assessments and private liens (I.B. at 14, 15), the brief itself contains *no argument* relating to these issues. *See, e.g., Banco Industrial De Venezuela C.A., Miami Agency v. De Saad*, 68 So. 3d 895, 897 n.4 (Fla. 2011) (holding that the failure to include substantive argument in a brief as to an issue constitutes an abandonment of the issue; mere mention of issue is insufficient).

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earlier filings.[4] S.A. 7-9. Clean Energy moved to strike Thomas' notice of appearance and adoption of prior filings as being untimely.[5] S.A. 10-28.

At the commencement of the May 12, 2014 hearing, which was a continuation of the hearing commenced on March 10, the trial court briefly addressed the status of Thomas, as a belated intervenor in the proceedings, as well as that of the Broward Residents. A. 230-34. However, the trial court deferred ruling on Thomas' status and that of the Broward Residents until the end of the hearing, after all three individuals (again, represented by the same counsel) made all the arguments they wanted to make.[6] A. 296-97. At that point in time, the trial court ruled that Thomas had standing, but that the Broward Residents did not, since all Broward residents had been voluntarily dismissed before the response to the order to show cause had been filed. A. 298. The trial court subsequently entered orders memorializing those ruling. A. 378-79.

On May 27, 2014, the trial court entered final judgment validating the Bonds and Assessments. A. 312-40. Thomas and the Broward Residents timely appealed on June 26, 2014.

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4 In fact, Thomas has never articulated a position different than that espoused by the Broward Residents.

5 Clean Energy is not contesting Thomas' standing on appeal.

6 Nowhere in the hearing transcripts, nor even on appeal, is any differentiation made between the position advanced by Thomas below and that which was advanced (or might have been advanced) by the Broward Residents.

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B. Statement of the facts.

Clean Energy is a valid and legally existing public body corporate and politic within the State of Florida created pursuant to the Florida Interlocal Cooperation Act of 1969, Chapter 163, Part I, Florida Statutes, as amended, and pursuant to the provisions of an interlocal agreement filed in the public records of Miami-Dade County on September 20, 2013 at OR Book 28831, pages 1114-1128, and effective as of such date (the "Interlocal Agreement"), initially among the Town of Bay Harbor Islands, the Village of Biscayne Park, and the Town of Surfside, as members.[7] A. 3.

The Interlocal Agreement provides Clean Energy's authority to provide its services and conduct its affairs within each member's jurisdiction, as well as to facilitate the voluntary acquisition, delivery, installation, financing or any other manner of provision of (i) energy conservation and efficiency improvements, including energy saving water conservation improvements, (ii) renewable energy improvements, and (iii) wind resistance improvements, to property owners desiring such improvements, who are willing to enter into financing agreements with Clean Energy, as contemplated by section 163.08, Florida Statutes.[8] A. 4. Those

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[7] Given the narrow scope of the issues raised on appeal, much of this factual background is included solely to provide the Court with context, given the innovative funding program in question.

[8] In chapter 2008-227, Laws of Florida, the Legislature amended the energy goal of the state comprehensive plan to provide, in part, that the state shall reduce its energy requirements through enhanced conservation and efficiency measures in all end-use sectors and reduce atmospheric carbon dioxide by promoting an increased use of renewable energy resources. A. 7.

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property owners *voluntarily* agree to, among other things, the imposition and collection of non-ad valorem assessments, which shall run with the land on their respective properties to pay for the improvements. *Id.*

The Bonds are to be issued by Clean Energy pursuant to a Master Bond Resolution, which was attached to the complaint. A. 6, Exh. 3. The Bonds will be used by Clean Energy to provide financing related to the provision of qualifying improvements to participating property owners. The Bonds are to be secured by the proceeds derived from the Assessments, which are imposed by Clean Energy upon the voluntary agreement of the record owners of affected properties as authorized by section 163.08, Florida Statutes. A. 6. Consequently, unlike most assessments imposed by local governmental entities, an assessment imposed by Clean Energy pursuant to this program arises only upon the explicit and voluntary consent of the assessed property owner. A. 8-9. No remedy may be imposed on the property owner that he or she has not consented to by entering into a financing agreement with Clean Energy.

The financing agreement the property owner executes in order to participate in the program and obtain the property improvements provides, in relevant part for purposes of this appeal, as follows:

> Section 4. Collection of Assessment; Lien
>
> The Assessment, and the interest and charges thereon resulting from a delinquency in the payment of any installment of the Assessment, shall constitute a lien against the Property equal in dignity with county taxes and assessments, and when due shall be superior to all other liens, title and claims, including any mortgage, until paid. The Assessment shall be paid and collected on the same bill as real

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> property taxes using the uniform method of collection authorized by Chapter 197, Florida Statutes. The Property Owner agrees and acknowledges that if any Assessment installment is not paid when due, the Authority shall have the right to seek *all appropriate legal remedies* to enforce payment and collect the Assessment or amounts due hereunder, *including but not limited to foreclosure*, and seek recovery of all costs, fees and expenses (including reasonable attorneys' fees and costs and title search expenses) in connection with the enforcement and foreclosure actions. The Property Owner acknowledges that, if bonds are sold or if the Authority enters into another financing relationship to finance the Final Improvements or an Abandonment Payment, the Authority may obligate itself, through a covenant with the owners of the bonds or the lender under such other financing relationship, to exercise its foreclosure rights with respect to delinquent Assessment installments under specified circumstances.

A. 95-96 (emphasis added). Thomas and the Broward Residents argued below that the Bonds and Assessments should not be validated because Florida law does not presently allow for foreclosure of the Assessments. A. 252-54, 255, 271-72, 280.

In response, Clean Energy argued that the enumeration of foreclosure as a *potential* remedy did not mean that it was immediately exercisable by Clean Energy upon non-payment of the Assessments. Instead, Clean Energy pointed out:

> The primary [enforcement] mechanism is the statutory mechanism he's referring to, which is the sale of tax certificates, and eventually the sale of a tax deed. The only time the issue will arise on foreclosure is if we get to that end process and nobody buys the tax deed. Somebody's stuck with the property; it's the local government. They have – somebody has to have the ability at that point to foreclose, otherwise the homeowner gets a windfall.

A. 275. Nonetheless, the trial court noted (with the agreement of Clean Energy) that the Bond documents explicitly provide that collection of the Assessments shall

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be in accordance with the "uniform method of collection authorized by Chapter 197." A. 281. Thomas and the Broward Residents agreed that Clean Energy was restricted in its collection efforts to the method authorized by statute. *Id.*

As a result, the trial court reasoned that before foreclosure can be accomplished, it has to be, as the language of the financing agreement provides, deemed "an appropriate legal remedy." A. 284. The trial court continued:

> I think the final judgment would determine that – if you look at this language, that the collection has to be in accordance with Chapter 197, and that foreclosure can only be sought if it's an appropriate legal remedy. That's the way I would read it. I've written enough agreements; the lawyers don't want to leave anything out, including but not limited to going to the moon, if possible.
>
> * * *
>
> I understand your argument, but the way I read Section 4 [of the financing agreement] is the assessment and collection remedies are specifically limited by Chapter 197. And they're not saying that they're going to waive any remedy, but it has to be an appropriate legal remedy, which is clearly defined by Chapter 197.

A. 284-85. In response to a direct question by the trial court, Clean Energy's counsel acknowledged that it was asking only "for a collection method that's authorized by Chapter 197." A. 287-88.

After further colloquy with counsel, the trial court explained how it intended to rule on the issue:

> THE COURT: What if I put in the order that the only authorized method of assessment collection is what's authorized by [chapter] 197 "or otherwise authorized by Florida law"?

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MR. DECARLO:[9] That's fine.

THE COURT: Because I mean, one-nine –

MR. DECARLO: That's exactly –

THE COURT: The legislature is not a static institution, it can change.

* * *

THE COURT: … So what if we do that? If we say the method is limited to Chapter 197 as stated in Section 4, or as otherwise authorized by Florida law? Wouldn't that correct that problem?

MR. LAWSON: I think the only way to correct the problem is that it's only authorized as provided by that provision.

THE COURT: Well, what if the legislature comes in next year and says, "Well" –

MR. LAWSON: Well, you change it. Right.

THE COURT: Yeah. That's what I mean by "or as otherwise authorized by Florida law."

MR. LAWSON: Well, that's certainly – I understand what you're trying to do, Your Honor –

THE COURT: Right.

MR. LAWSON: – and –

THE COURT: But it's – I understand your argument now.

MR. LAWSON: Okay.

THE COURT: And –

MR. LAWSON: It puts anybody else in the – it puts the entire world at a disadvantage if there's not clarity on this, and the legislature was clear.

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9 Mr. DeCarlo was Clean Energy's counsel at the hearing, along with Mr. Burnstein.

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> THE COURT: I think that if in the order I – the language is put to the effect that it's limited to you know, "The method of collection is limited by Chapter 197, Florida Statutes, or as otherwise – or otherwise applicable law of Florida," then that should put the bondholders on notice when they see the order that Subparagraph (4) [of the financing agreement] is collection of the assessment lien has got to be by 197, or if there's some other Florida law like a statutory amendment or a court decision or otherwise.

A. 288-89.

Counsel for Thomas and the Broward Residents did not argue to the trial court that it was precluded from interpreting the financing agreement in this fashion or that it was engaged in re-writing the Bond documents – the argument they now advance on appeal. Instead, counsel indicated his "view" that Clean Energy "should go back and do it right and get their bond resolution right within the confines of the marketplace."[10] A. 290.

SUMMARY OF ARGUMENT

On the issue of the trial court's purported improper "amendment" of the complaint and Bond documents, Thomas and the Broward Residents failed to preserve the substantive argument they have raised on appeal. They failed to argue to the trial court that its interpretation of the financing agreement and the foreclosure remedy referenced therein constituted a denial of their due process rights, a position they now advance on appeal. On the contrary, when the trial

[10] Earlier in the proceedings, counsel for Thomas and the Broward Residents made it clear that they believed Clean Energy would inevitably be able to get the Bonds approved; they just wanted Clean Energy to do it correctly. A. 235.

Weiss Serota Helfman Pastoriza Cole & Boniske, P.L.
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court posited a solution to the foreclosure inquiry by offering to restrict Clean Energy's remedies to those authorized by Chapter 197, Florida Statutes, Thomas and the Broward Residents failed to object. In fact, they acquiesced.

Even if they had preserved their objections to the trial court's interpretation of the Bond documents and proposed solution of the foreclosure issue, their appeal would still lack merit, since the trial court did nothing more than interpret the Bond documents in a manner consistent not only with Florida law, but with the position Thomas and the Broward Residents were advancing. Florida courts have routinely interpreted bond documents as part of bond validation proceedings.

With respect to their claim that they were improperly denied standing, the Broward Residents are, first and foremost, precluded by the invited error doctrine from challenging that ruling on appeal. When the standing issue arose in the trial court, counsel for the Broward Residents sought affirmative relief from the trial court and asked that the final judgment's scope be limited so as to exclude Broward County and its residents. The trial court gave the Broward Residents what their counsel requested; they cannot be heard to complain about the result on appeal.

Even if they had not invited the trial court's action below as to the standing issue, the trial court was correct in concluding that the Broward Residents lacked standing. Clean Energy had voluntarily dismissed Broward County and all property owners therein from the lawsuit before the Broward Residents ever filed a response or notice of appearance. That voluntary dismissal deprived the trial court

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of *in personam* jurisdiction over the Broward Residents, and they lacked standing to assert any challenges with respect to a program in which Broward County had not even agreed to participate.

Finally, any purported error the trial court may have committed with respect to the Broward Residents' standing was harmless, since they were permitted to (i) participate in the show cause hearing; (ii) question the witness who testified; and (iii) present lengthy and detailed arguments as to the alleged invalidity of the Bonds and Assessments. The Broward Residents have failed to articulate any argument or position that they were precluded from presenting below by virtue of the trial court's ruling on their standing. Additionally, the Broward Residents' positions were co-extensive with that of Thomas, as to whom the trial court determined there was standing.

ARGUMENT

I. THOMAS AND THE BROWARD RESIDENTS FAILED TO PRESERVE THE SUBSTANTIVE ARGUMENT THEY RAISE ON APPEAL.

On appeal, Thomas and the Broward Residents have argued that the trial court "newly minted" documents as part of its ruling, because it interpreted the financing agreement as being limited to remedies authorized by Chapter 197, Florida Statutes.[11] I.B. at 9-10. They describe the trial court's action as "well-

[11] This Court has repeatedly held that the scope of a bond validation proceeding is limited to consideration of three issues: 1) whether the public body had authority to incur the obligation; 2) whether the purpose of the (continued . . .)

meaning," *id*. at 9, but fail to point out that *they never challenged the trial court's actions below*. The failure to raise this challenge below precludes appellate review here. Time and again this Court has held that a party must raise the precise argument or objection before the trial court in order to preserve the issue for appellate review. *See, e.g., Rosado v. DaimlerChrysler Financial Servs. Trust*, 112 So. 3d 1165, 1171 (Fla. 2013) (citing *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and *the specific legal argument or ground to be argued on appeal or review must be part of that presentation* if it is to be considered preserved.") (emphasis added)).

As noted above, the parties engaged in a protracted colloquy with the trial court regarding the availability of foreclosure as a remedy for non-payment of the Assessments, and Clean Energy acknowledged that it was *not* seeking a final

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(. . . continued)

obligation is legal; and 3) whether the proceedings authorizing the obligation were proper. *See, e.g., Keys Citizens For Responsible Government, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 944 (Fla. 2001); *City of Winter Springs v. State*, 776 So. 2d 255, 256 (Fla. 2001); *Murphy v. Lee County*, 763 So. 2d 300, 302 (Fla. 2000). Thomas and the Broward Residents have not even attempted to identify how their arguments fall within one of these three concerns. The trial court's judgment comes before this Court clothed with a presumption of correctness. *Strand v. Escambia County*, 992 So. 2d 150, 154 (Fla. 2008). As such, the burden of proving reversible error rests with Thomas and the Broward Residents. *Donovan v. Okaloosa Cnty.*, 82 So. 3d 801, 805 (Fla. 2012).

Weiss Serota Helfman Pastoriza Cole & Boniske, P.L.
2525 Ponce de Leon Boulevard, Suite 700, Coral Gables, Florida 33141 • T. (305) 854-0800 • F. (305) 854-2323

judgment that allowed for that remedy, except as permitted by Chapter 197, as it currently exists or subsequently may be amended. A. 287-88. The trial court sought the input of the parties regarding its proposed resolution of the matter, by interpreting the financing agreement as limited to remedies permitted by Chapter 197, as amended, and indicating that the final judgment would so reflect. A. 289. As the trial court went through this process, *not once* did Thomas or the Broward Residents object and argue that the trial court was precluded from purportedly "amending" the complaint or Bond documents. *Not once* did Thomas or the Broward Residents intimate – much less argue – that the trial court's interpretation of the financing agreement would result in a denial of their due process rights, as they do now on appeal. I.B. at 7-11.

Instead, when the trial court indicated its interpretation of the documents and what it intended to do in terms of the final judgment, the response from Thomas and the Broward Residents (through counsel) was, "I understand what you're trying to do, Your Honor … it puts the entire world at a disadvantage if there's not clarity on this, and the legislature was clear." A. 289. The closest Thomas and the Broward Residents came to giving the trial court *any* indication that what it was doing and proposing to do with the final judgment was unlawful was when their counsel expressed his "view" that Clean Energy "should go back and do it right and get their bond resolution right within the confines of the marketplace."[12] A.

[12] Interestingly, on appeal, Thomas and the Broward Residents argue that *their* due process rights were violated below. I.B. at 9. The Court will long scour (continued . . .)

290. This ambiguous expression of counsel's "view" does not meet this Court's test for preservation of error: "the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." *Sunset Harbor*, 914 So. 2d at 928.

Since Thomas and the Broward Residents failed to preserve the issue, this Court should decline review of the issue in the first instance on appeal. The judgment below should be affirmed.

II. EVEN IF THOMAS AND THE BROWARD RESIDENTS *HAD* PRESERVED THE ISSUE FOR REVIEW, THEIR DUE PROCESS ARGUMENT IS MISTAKEN FOR A NUMBER OF REASONS.

A. The trial court did not amend the complaint or any of the Bond documents; it merely interpreted the documents before it.

Thomas and the Broward Residents mistakenly contend that the trial court improperly amended the complaint and Bond documents. I.B. at 7, 10. In actuality, the record reflects that the trial court did nothing more than interpret the existing Bond documents *in pari materia*, attempting to understand what was meant by the "seek all appropriate legal remedies" and "including, but not limited

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(. . . continued)

the record of the May 12, 2014 hearing for any indication that Thomas and the Broward Residents made mention of a denial of their due process rights. In fact, the term "due process" is not used once during the entire hearing, much less in response to the trial court's interpretation of the financing agreement and proposed limitation of remedies in the final judgment.

Weiss Serota Helfman Pastoriza Cole & Boniske, P.L.
2525 Ponce de Leon Boulevard, Suite 700, Coral Gables, Florida 33141 • T. (305) 854-0800 • F. (305) 854-2323

to, foreclosure" language in section 4 of the Financing Agreement. The trial court did not arbitrarily decide to re-write the financing agreement. As the trial court made clear, it reconciled the quoted foreclosure language with the broader requirement in the same set of Bond documents that enforcement of the Assessments was limited to the "uniform method of collection authorized by Chapter 197." A. 281. Florida's courts require that a trial court construe related documents together to ascertain their meaning. *See, e.g., OBS Co. v. Pace Constr. Corp.*, 558 So. 2d 404, 406 (Fla. 1990); *Leon F. Cohn, M.D., P.A. v. Visual Health and Surgical Center, Inc.*, 125 So. 3d 860, 863 (Fla. 4th DCA 2013); *Bengal Motor Co., Ltd. v. Cuello*, 121 So. 3d 57, 61 (Fla. 3d DCA 2013). Moreover, neither Thomas nor the Broward Residents disagreed that the Bond documents provided as much.

The trial court correctly reasoned that since the Bond documents restricted the collection remedies to those authorized by Chapter 197, any other remedy language in the documents had to be read and understood in that context. A. 284-85. To eliminate the potential for any ambiguity, either as to Thomas or the Broward Residents or any bondholders in the future, the trial court indicated it would include the remedy limitation in the final judgment. To reiterate, Clean Energy did not oppose this limitation and expressly indicated that it was not seeking any remedy that would fall outside the authorization of Chapter 197. A. 287-88.

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Contrary to the argument raised on appeal, Florida courts routinely and properly interpret documents associated with bond validation proceedings without committing reversible error. Thus, in *State v. Florida State Turnpike Auth.*, 80 So. 2d 337 (Fla. 1955), this Court considered whether the trial court's allowance of a supplemental petition after publication rendered the bond validation improper. Specifically, in that case, the petitioner filed an amended or "supplemental" petition changing the amount of the bonds to be issued and, more materially, changing the projected route of the turnpike extension.[13] *Id.* at 340. The trial court did not issue a further order to show cause. *Id.*

As Thomas and the Broward Residents argue here, the challengers in *Florida State Turnpike* "argued that the changes of the southern part of the route and the southern terminus were so material that the court could not proceed to a valid decree without a newly instituted proceeding, or a new notice to show cause issued and published after the amendment." *Id.* at 341. The Court rejected the argument, stating:

> Although the power to issue bonds for the construction of the 'partpike' may not be divorced from the proceeding to validate the instruments, … we do decide, in elaborating on the order, that the cause proceed to hearing on the merits, that if the Authority was empowered to construct the 'partpike' along the route described in the first resolution and if it was empowered to build the 'partpike' along the route described in the second resolution, the disparity between the

[13] Here, of course, Clean Energy did not seek to file an amended or supplemental complaint or to alter the nature of the program or Assessments.

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> two did not, because of the failure to require a new notice, divest the court of the power to proceed.

Id.

Just as the Bond documents here contemplated that collection of the Assessments was restricted to remedies authorized by Chapter 197, the documents in *Florida State Turnpike* contemplated a potential realignment of the roadway to be constructed. *Id.* Here, Clean Energy did not seek to materially alter either the Bonds or the Assessments from what was originally submitted to the trial court and the public. Instead, the trial court merely "interpreted" the documents to require that Clean Energy abide by Chapter 197, as the documents indicated.[14]

The holding in *Florida State Turnpike* was reaffirmed in *Test v. State*, 87 So. 2d 587 (Fla. 1956), under facts even more analogous to those presented in this appeal. In *Test*, the trial court issued a supplemental decree after the initial bond validation had been affirmed by this Court. *Id.* at 588. The supplemental decree, in relevant part, "added a provision consistent with our opinion to the effect that no property could be purchased with the proceeds of the sale of the bonds unless such property was intended for use for off-street parking facilities." *Id.* In other words,

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[14] Conceivably, if the trial court had adopted an interpretation that *expanded* Clean Energy's rights or remedies beyond those contemplated by Chapter 197, the issue before the Court might arguably be postured differently. However, since the trial court's interpretation of the documents *restricted* Clean Energy's remedies in a manner consistent with Thomas and the Broward Residents' interpretation of the law (and consistent with Clean Energy's affirmation in open court as to what it was seeking), there has been no material deviation from the Bond documents or published notice.

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the supplemental decree interpreted or clarified the original decree to specify how the bond proceeds could be used. Analogously here, the trial court interpreted the Bond documents to make clear that Clean Energy's remedies, such as they were, had to be authorized or permitted by Chapter 197.

This Court reached a comparable conclusion in *Gate City Garage, Inc. v. City of Jacksonville*, 66 So. 2d 653 (Fla. 1953), where it considered a challenge to a bond validation based on the local government's purported authorization of activity not permitted by law. Like Thomas and the Broward Residents, the challengers in that case argued that the city had improperly reserved a power to itself not allowed by law:

> The appellants next urge that because the Ordinance … provides that nothing in the Ordinance shall be so construed as to prevent the exercise by the city of its right to lease any part or all of the parking system to private operators; the undertaking is not for a public or municipal purpose and is in effect *the reservation of a power* to acquire the lands by eminent domain for a public purpose, which may later be used for a private purpose.

Id. at 659 (emphasis added). The Court rejected the argument:

> In this case *there is no legislative authority to sell the land in question or to lease the entire property to some private individual or corporation for private gain*. The city can only sell such property pursuant to legal or constitutional authority granted and no such authority has been granted.

Id. (emphasis added).

Similar to the "seek all appropriate legal remedies" and "including, but not limited to" language in Clean Energy's financing agreement, the "nothing in the

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Ordinance shall be so construed" language in the *Gate City Garage* ordinance was interpreted as a potential limitation on the municipality's authority:

> The provision complained of in the Ordinance is a part of the bonds and is nothing more than an obligation of the bond and a limitation upon the power of the city (*should any such power ever be granted to it by the Legislature*), that the city will not sell or lease the property except as provided for in the Ordinance. This provision of the Ordinance does not violate any provision of the Constitution of the State of Florida.

Id. at 559-60 (emphasis added).

More recently, in *County of Palm Beach v. State*, 342 So. 2d 56 (Fla. 1977), this Court reversed a trial court's denial of validation of a bond issue. The trial court had "interpreted" the term "maintenance" in the bond documents (as it related to the county's beaches and parks) as an improper use of the proposed bond proceeds and denied validation. *Id.* at 57. After noting that the bond proceeds could not be used "for the purpose of non-capital expenditures, such as payment of daily maintenance expenses," *id.* at 58, the Court concluded that it was appropriate to interpret "maintenance" as potentially reaching "capital maintenance," which was permissible. *Id.* More importantly, the Court was persuaded by the county's representations before the Court:

> Before us, the Commission has avowed its intention to use the bond proceeds only for constitutionally proper capital projects, and after the election it adopted a resolution validating the election which omitted the word 'maintenance'. *We accept the averments of the Commission, cognizant of the fact that if any attempt is made to use bond proceeds in an improper manner an action for injunctive relief would lie*.

Id. (emphasis added).

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Like Palm Beach County did, Clean Energy has avowed in open court that its remedies for collection of the Assessments are restricted to those remedies authorized or permitted by Chapter 197. The trial court's interpretation of the documents and inclusion of that limitation in the final judgment is entirely consistent with this Court's holding in *County of Palm Beach* and cannot serve as the basis for overturning the final judgment below.[15]

B. The cases relied upon by Thomas and the Broward Residents are inapposite.

Thomas and the Broward Residents rely principally on *Ingram v. City of Palmetto*, 112 So. 861 (Fla. 1927), in support of their argument that the trial court improperly "amended" the complaint and Bond documents. I.B. at 10. The reliance on *Ingram*, however, is misplaced. In fact, Thomas and the Broward Residents have materially misinterpreted and misstated the holding in *Ingram*.

In *Ingram*, the trial court allowed the validation petition to be amended. *Id.* at 862. However, this Court did not take issue with the allowance of the amendment, but rather with the fact that the intervening challenger was not afforded an opportunity to address the amended petition:

> If the amendments made the petition sufficient in law, *the intervener was given no opportunity to take issue on the facts alleged*. The only adversary pleading was the intervener's demurrer to the original petition; there being no pleading interposed to the petition as amended, apparently because no opportunity was afforded.

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[15] Thomas and the Broward Residents have failed to disclose the existence of any of the above-cited cases to the Court.

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Id. (emphasis added). This due process concern formed the basis of the Court's ruling. That concern, however, is not present in this case.

First of all, Clean Energy neither amended nor sought to amend its complaint. As previously noted, the only thing that took place was that the trial court interpreted the Bond documents in a manner entirely consistent with the view of the law espoused by Thomas and the Broward Residents. Second, Thomas and the Broward Residents were given ample opportunity to address the trial court's interpretation and proposed limitations in the final judgment. At no time did they argue that they were being denied due process by virtue of the trial court's interpretation. Neither did they request leave to amend their objections to the Bonds and Assessments in light of the trial court's interpretation of the financing agreement. This is hardly surprising, of course, since the trial court was interpreting the documents in a manner consistent with the challengers' position: that Clean Energy could not invoke an enforcement remedy unless it was authorized by Chapter 197.[16]

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[16] Underlying Thomas and the Broward Residents' due process argument is the premise that some theoretical citizen failed to participate in the proceedings and lodge objections to the Bonds and Assessments because some alleged post-filing "change" to the Bond documents was not previously disclosed to him or her. When one examines this premise in the context of the facts of this case, one is left to wonder what theoretical citizen would complain that he or she was precluded from participating in the hearing by the non-disclosure that Clean Energy's remedies would be *more* restrictive than supposedly contemplated by the financing agreement.

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The remaining cases cited by Thomas and the Broward Residents stand for propositions that are either wholly unremarkable or have no direct application to the issues on appeal. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) ("An elementary and fundamental requirement of due process in any proceeding … is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Key Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 948-49 (Fla. 2001) (finding that constructive notice by publication in bond validation proceedings is sufficient; actual notice to each affected property owner is not required); *Rianhard v. Port of Palm Beach Dist.*, 186 So. 2d 503, 505 (Fla. 1966) (discussing generally the expedited nature of bond validation proceedings).[17]

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[17] Inexplicably, Thomas and the Broward Residents cite *Rianhard* for the proposition that discovery is severely curtailed in bond validation proceedings. I.B. at 8. *Rianhard*, however, does not mention discovery at all. Their citation to *Brown v. Reynolds*, 872 So. 2d 290 (Fla. 2d DCA 2004), is even more inexplicable given that bond validation proceedings are unlike "any other civil action." In *Brown*, the court merely observed in the context of a *replevin* action that a show cause hearing is not the final hearing on the merits. *Id.* at 296 ("Whatever the result of the hearing on the order to show cause, the case proceeds as any other civil action would, and the trial court must still make a final adjudication of the claims of the parties."). *Brown* is inapposite because this Court has specifically recognized that the show cause hearing in a bond validation proceeding need not continue to a final evidentiary hearing. *See, e.g.*, *Rianhard*, 186 So. 2d at 504-05 (noting the abbreviated nature of the bond validation hearing and the court's discretion whether to conduct a further hearing).

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III. THE TRIAL COURT'S DECISION TO STRIKE THE BROWARD RESIDENTS' RESPONSE FOR LACK OF STANDING SHOULD BE AFFIRMED.

A. The Broward Residents waived any objection they had to the trial court's ruling on their standing by affirmatively requesting that the trial court limit the scope of the final judgment.

During the trial court's discussion of its reasoning as to why the Broward Residents did not have standing, counsel for the Broward Residents *requested* that the trial court limit the scope of the final judgment to exclude Broward County:

> THE COURT: The Dade County Defendant has got standing, denied as to that. Dade County Defendant can appeal if she wants to. I think the Broward County Defendants do not have standing because the Petitioner has dismissed all aspects of the complaint that would relate to any citizen of Broward County. *Because I'm not approving this for use in Broward County*.
>
> MR. LAWSON: *All right. Now, with that clear then, are you not approving this for use in other communities in the state*? Is this a state-wide validation, or is this just for these three cities in Dade County, what is it for?
>
> MR. BURNSTEIN: No, it's not state-wide.
>
> THE COURT: It's it's – * * * It's just for the cities who are in the interlocal agreement, aren't they?
>
> MR. BURNSTEIN: Or ones that join –
>
> THE COURT: Or ones that later join.
>
> MR. BURNSTEIN: And not –
>
> MR. DECARLO: And if that happens to be outside of Dade County, we'll have to come back for another validation.
>
> THE COURT: Okay.
>
> MR. DECARLO: Simple as that.

MR. BURNSTEIN: Not Broward County.

MR. LAWSON: *Can we – if we can order that clearly, so that it doesn't because I will tell you the other orders, once validated, they can move around the state*.

THE COURT: *Well, why don't we just make it clear in your order that it's limited to the municipalities that are involved in – are they all municipalities or is there county – the municipalities that are involved in this interlocal agreement, "or any other municipalities that are in Dade County."*

MR. BURNSTEIN: Yes, sir. Right.

THE COURT: *We'll limit it to that*.

MR. LAWSON: *Okay*.

A. 298-99 (emphasis added).

The Broward Residents' counsel *invited* the trial court to address their lack of standing by including in the final judgment a provision that made it clear that its scope did not extend to Broward County. When the trial court agreed, the Broward Residents acquiesced in the trial court's solution. A party may not invite a court to take particular action in correcting an issue and then complain on appeal that doing so was error or failed to correct the problem. *See Gupton v. Village Key & Saw Shop, Inc.*, 656 So. 2d 475, 478 (Fla. 1995) (noting rule that party who invites error cannot successfully complain on appeal about such error); *Phillips v. Acacia Mut. Life Ins. Co.*, 168 So. 34, 35 (Fla. 1936) ("The rule is general ... that any defenses in behalf of either party are waived by stipulation and consent for a final decree."); *Sierra v. Public Health Trust of Dade County*, 661 So. 2d 1296, 1298 (Fla. 3d

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DCA 1995) ("A [party] may not ask for a particular ruling and then complain about that same ruling on appeal.").

B. Even if they had not waived their concerns, the Broward Residents lost standing to participate once Broward County and its residents were dismissed as defendants in the case.

The Broward Residents do not dispute (i) that Clean Energy dismissed all Broward property owners before the Broward Residents filed their response; (ii) that Clean Energy, as the plaintiff, generally had the right to dismiss any defendant previously named;[18] (iii) that Broward County is not a participant in the program; or (iv) that an additional validation proceeding would be required if and when Broward County elected to participate in the program. Instead, they argue that notwithstanding their dismissal from the suit as named defendants and the non-participation of Broward County, they individually had a right to participate in the proceedings. I.B. at 11-14. They do not, however, cite a single precedent that supports this position.[19]

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[18] *See generally* Fla. R. Civ. P. 1.420(a) (allowing for voluntary dismissal by plaintiff without order of court) and *Freeman v. Mintz*, 523 So. 2d 606, 610 (Fla. 3d DCA 1988) (allowing for voluntary dismissal of individual parties).

[19] While the Broward Residents do not cite this Court's decision in *Meyers v. City of St. Cloud*, 78 So. 2d 402 (Fla. 1955) (en banc), it is unavailing to them. In *Meyers*, this Court concluded that "citizens and taxpayers of the petitioning political unit bringing the proceedings" may participate in an appeal even if they did not appear in the trial court proceedings. *Id.* at 403. However, such standing derived from the individuals' status as residents of the petitioning entity. *Id.* at 402. Here, Broward County is not a member of the petitioning entity, and therefore, the Broward Residents are not "citizens and taxpayers" thereof.

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The first error in the Broward Residents' reasoning is that they claim to have a life, liberty or property interest in the proceeding. I.B. at 12. They do not explain, however, how they can have such an interest when the jurisdiction in which they purport to reside and own property will not be able to participate in the funded program under the current bond validation.[20] They do not, individually, have the right to participate in the program unless and until Broward County joins as a member of Clean Energy by becoming a party to the Interlocal Agreement. As Clean Energy clearly stated in the trial court, if and when Broward County joins in the Interlocal Agreement, Clean Energy would be obligated to return to court and obtain a new validation. A. 298-99. At *that* point in time, the Broward Residents could interpose their objections as *potentially* affected property owners who could elect to participate in the program. For this reason, the Broward Residents' reliance on cases that stand for the general proposition that property interests may not be deprived without due process is unavailing.

Moreover, the Broward Residents' accusation that the trial court "ignored" section 75.07, Florida Statutes, (I.B. at 12) is entirely unwarranted. This Court has expressly rejected the Broward Residents' contention that they are "interested" persons under that statute. In *Rich v. State*, 663 So. 2d 1321 (1995), a community

[20] Thus, section 75.07, Florida Statutes, provides that an individual may be a "party" to a bond validation proceeding if he or she (i) will be "adversely affected" if the bonds are issued; and (ii) objects to validation "at or before" the time set for the show cause hearing. § 75.07, Fla. Stat.

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development district filed a complaint seeking validation of bond issues.[21] *Id.* at 1323. The Court noted that the appellant-interveners were *not* citizens or taxpayers of the district. *Id.* at 1324.

The Court in *Rich* held that the appellant-interveners were not "persons interested" under section 75.07 because they would not be adversely affected by the issuance of the bonds and would "be in the same position after the issuance of the bonds as before the issuance of the bonds." *Id.* at 1324. This Court's affirmance of the trial court's denial of intervention and its final judgment validating the bonds was based on the fact that the appellant-interveners were not citizens or taxpayers of the district. *Id. See also Belmont v. Town of Gulfport*, 122 So. 10, 10 (Fla. 1929) (concluding that appellant's status as a citizen of the town seeking validation was not enough to give him standing to intervene; "a citizen possessing no justiciable interest in the litigation" lacks standing).

Another fundamental flaw in the Broward Residents' argument is their wholesale assumption that Clean Energy was seeking relief against Broward County because the complaint was not "amended." I.B. at 13. They assert – without citation to supporting case law – that a "plaintiff may not voluntarily dismiss a party while simultaneously seeking relief against them." *Id.* The argument puts the proverbial cart before the horse.

"Once a voluntary dismissal has been entered, the trial court is divested of *in*

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[21] Once again, the Broward Residents have failed to disclose the existence of this precedent to the Court, even though it was argued before the trial court.

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personam jurisdiction. If the voluntary dismissal is entered as to only one of several defendants, the court loses jurisdiction over the particular defendant." *Freeman*, 523 So. 2d at 610 (citing *Fed. Ins. Co. v. Fatolitis*, 478 So. 2d 106 (Fla. 2d DCA 1985)). As a result, once Clean Energy dismissed Broward County and all property owners therein, it could no longer obtain any kind of relief against those individuals, regardless of what the original complaint, prior to dismissal, might have said. The Broward Residents' argument classically elevates form over substance. As a result, the trial court's determination that the Broward Residents lacked standing was entirely correct and should be affirmed.

C. Notwithstanding their lack of standing, the Broward Residents *were* permitted to participate in the final hearing.

The trial court did not rule on Clean Energy's motion to strike until *after* the conclusion of all substantive arguments during the final hearing on May 12, 2014. A. 298. Before that point in time, though, the Broward Residents, through the same counsel who represented Thomas, made each and every argument they wanted to make and the trial court considered those arguments. Even now on appeal, the Broward Residents fail to articulate what argument they *would* have made, but were precluded from making by virtue of the trial court's after-the-fact determination that they lacked standing. They ignore, for example, that Thomas adopted the Broward Residents' arguments without exception (or more accurately, they simply claim Thomas' adoption does not matter, I.B. at 14).

In response to the glaring reality that they actually participated in the trial court proceedings, the Broward Residents adopt the hyper-technical position that, because *after the hearing was concluded* they were found to lack standing, the final judgment should be reversed simply so that the hearing can be conducted anew and they may present, presumably, the exact same arguments that were previously presented. Their contention that the judgment should be reversed so that the Broward State Attorney may fully participate in the proceedings (I.B. at 14) borders on the frivolous. The Broward State Attorney explicitly stated on the record that Broward County had no interest in the proceedings and concurred in the dismissal. A. 230.

The Broward Residents' arguments flow from the mistaken belief that the current situation is not subject to harmless error analysis. I.B. at 14. They cite *Lovett v. Lovett*, 112 So. 768 (Fla. 1927), in support of that argument, a decision that nowhere mentions, much less applies, the harmless error doctrine. The section of the *Lovett* decision cited by the Broward Residents merely provides that an appellate court may reverse a judgment for want of an indispensable party and the issue may be raised for the first time on appeal.[22] *Id.* at 783. The decision does not

[22] Given the present circumstances, Clean Energy need not belabor whether this continues to be the law in Florida, or whether the absence of merely a "necessary" party constitutes fundamental error. To be sure, for the reasons previously articulated, the Broward Residents have failed to demonstrate that they were either "indispensable" or even "necessary" parties. Moreover, in *Broward County v. State*, 515 So. 2d 1273 (Fla. 1987), this Court made clear that the only "absolutely necessary" parties to a bond validation proceeding are the petitioning entity and the State. *Id.* at 1274.

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address, however, a situation where, as here, the parties in question *were* permitted to participate in the trial court proceedings, where the trial court considered their arguments, and where they fail to articulate how they have been harmed by the post-proceeding determination that they lacked standing. Notwithstanding the Broward Residents' assertion to the contrary, Florida courts *have* applied the harmless error doctrine in situations involving the denial of intervention in a proceeding. *See, e.g., Fasig v. Fla. Society of Pathologists*, 769 So. 2d 1151, 1155 (Fla. 5th DCA 2000); *Kane v. Harris & Co. Advert.*, 161 So. 2d 670, 671 (Fla. 3d DCA 1964).

In a case on point, the First District Court of Appeal in *Gregory v. Indian River County*, 610 So. 2d 547 (Fla. 1st DCA 1992), concluded that the denial of intervention was harmless where the proposed interveners' lack of standing did not effectively preclude their presentation of their position:

> While it was error to deny standing, an error involving standing to intervene in an administrative proceeding may be harmless where the party is provided a full opportunity to participate and present evidence, and the hearing officer rules on all issues which the intervenor may properly contest. [citation omitted]. Such is the case in the instant proceeding. *Appellants were allowed to participate and present evidence*.[23] In addition, the hearing officer made specific

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23 When the show cause hearing commenced on March 10, 2014, only the Broward Residents were before the trial court; Thomas had not yet appeared. The Broward Residents were permitted to cross-examine Clean Energy's witness, Joseph Spector. A. 200. Their counsel was then permitted to fully present their arguments. A. 201-11. Even more extensive opportunities for participation were afforded during the May 12, 2014 hearing.

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> findings of fact and conclusions of law concerning the extent of wetlands on appellants' property. *The appellants were also allowed to file exceptions to the recommended order*. Under these circumstances, *the erroneous ruling concerning standing was harmless*.

Id. at 554-55 (emphasis added; citing *First Hosp. Corp. of Fla. v. Dep't of Health and Rehab. Servs.*, 589 So. 2d 310 (Fla. 1st DCA 1991)). *See also Strand v. Escambia County*, 992 So. 2d 150, 155 (Fla. 2008) (finding that denial of continuance was not prejudicial to intervener in bond validation proceeding because intervener "was permitted to make an oral argument at the hearing and to then file a legal memorandum outlining his legal arguments following the hearing. This opportunity to file a legal memorandum ensured that [intervener's] arguments could be fully presented to the circuit court before the entry of the final judgment on August 18, 2006.").

The position the Broward Residents have taken on appeal can only be interpreted as intending to frustrate the legislative purpose of expediting bond validation proceedings. Without offering to the Court the slightest indication of what arguments they were precluded from presenting in opposition to the validation as a result of the trial court's belated standing ruling, the Broward Residents have insisted that the final judgment be reversed and the proceedings conducted again to satisfy, at best, an academic inquiry into their status as interveners. Such a waste of judicial and party resources should not be countenanced. The judgment of the trial court, respectfully, should be affirmed in its entirety.

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CONCLUSION

As the record reflects, Thomas and the Broward Residents failed to preserve the primary substantive argument they now raise on appeal, while the Broward Residents waived their objections to the trial court's ruling as to lack of standing by inviting the trial court to limit the scope of the final judgment to exclude Broward County. Even if they had preserved and not waived them, their arguments would fail. The trial court committed no error in interpreting the Bond documents so as to limit Clean Energy's remedies to those authorized by Chapter 197, Florida Statutes, and its determination that the Broward Residents lacked standing was correct in light of Clean Energy's dismissal of Broward County property owners from the lawsuit.

Accordingly, Clean Energy respectfully requests that the Court affirm the final judgment in its entirety.

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CERTIFICATE OF SERVICE

I certify that a copy of this answer brief on the merits was served via E-portal and by e-mail on September 17, 2014, on J. Stephen Menton, Esq. (smenton@rutledge-ecenia.com), Rutledge Ecenia, P.A. (Counsel for Appellants), 119 South Monroe Street, Suite 202, Tallahassee, FL 32301; Georgia Cappleman,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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