IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR POLK COUNTY, FLORIDA
CASE NO: 53-2016-CA-004023

POINCIANA COMMUNITY DEVELOPMENT DISTRICT, a local unit of special-purpose government organized and existing under the laws of the State of Florida, and

POINCIANA WEST COMMUNITY DEVELOPMENT DISTRICT, a local unit of special-purpose government organized and existing under the laws of the State of Florida,

Plaintiffs,

v.

THE STATE OF FLORIDA, AND THE TAXPAYERS, PROPERTY OWNERS AND CITIZENS OF POINCIANA COMMUNITY DEVELOPMENT DISTRICT AND POINCIANA WEST COMMUNITY DEVELOPMENT DISTRICT, INCLUDING NON-RESIDENTS OWNING PROPERTY OR SUBJECT TO TAXATION THEREIN, AND OTHERS HAVING OR CLAIMING ANY RIGHTS, TITLE OR INTEREST IN PROPERTY TO BE AFFECTED BY THE ISSUANCE OF THE BONDS HEREIN DESCRIBED, OR TO BE AFFECTED IN ANY WAY THEREBY,

Defendants.

REPLY CLOSING ARGUMENT OF PLAINTIFFS POINCIANA AND POINCIANA WEST COMMUNITY DEVELOPMENT DISTRICTS

Plaintiffs Poinciana Community Development District and Poinciana West Community Development District, by and through undersigned counsel, hereby submit their reply closing argument in this case, and state as follows:

INTRODUCTION

The closing arguments of defendants William Mann and Brenda Taylor fail to sum up evidence actually presented or testimony actually heard at trial. What their closing does exemplify, however, is four classic fallacies: contextomy (taking words out of context); proof by verbosity (barraging the reader with so many "facts" one cannot reasonably respond to all); shotgun argumentation (raising every issue under the sun to con the reader into thinking something must be wrong); and argument by repetition (repeating falsities so many times that the listener begins to believe they are true).

The Districts' proposed amenity acquisition and the issuance of bonds and levy of assessments to repay the bonds is eminently reasonable under the circumstances. **Defendants know this.** But they apparently wanted the District Boards to negotiate a different deal. They apparently want different or additional terms for this deal. They disagree with their locally elected officials as to the terms of the subject transaction and with the Florida courts and Legislature regarding well-established bond and special assessment law. But they cannot point to anything *legally* wrong with the transaction. So they employ sophistry to try to convince this honorable Court to give them what they want.

This Court is not empowered to second-guess the legislative decision-making of the District Boards. This Court's role is not to evaluate the viability of the project, its financial feasibility, or other collateral matters. Its sole role is to assure itself that the actions of the

Boards comport with the modest legislative thresholds for validating bonds and special assessments, i.e., that the Boards did not act arbitrarily and capriciously.

It would be a fool's errand to try to address Defendants' 73 pages of "alternative facts," i.e., facts that were never proven at trial. So this reply will focus on four (4) main points: (1) the valid public purpose to the project; (2) the irrelevance of "fair value" under section 190.016(c)(1), Florida Statutes; (3) the validity of the District's valuation; and (4) the validity of the assessment allocation. The response will then controvert several other defense misdirections to ensure the Court remains on the right course in evaluating this transaction.

ANALYSIS

1. Valid Public Purpose.

Defendants' argument with respect to the public purpose is based on a false premise — the "purpose" for this transaction is to pay AV an illegal profit. From this false premise, defendants assert that AV "controlled" the Districts' consultants and counsel and "forced" the District Boards into an "unconscionable" agreement. The evidence *actually presented* at trial does not even remotely support Defendants' position.

First, the public purpose as found by the Boards is to construct new, and to acquire existing, recreational amenities for the benefit of the lands within the Districts. As proven at trial, the transaction will give the community (*inter alia*) control over the amenities, allow the community to control the upkeep of the amenities, provide funds for reserves and replacement, allow the community to control programming of activities, and provide an additional $11.2 million in infrastructure all while *saving* residents money as compared to what they pay under the Club Plan today. Yes, AV will have to be compensated for conveying the amenities to the Districts and giving up its right to collect Club Fees (which increase each year) in perpetuity. But paying AV money is not the "purpose" of this transaction any more than it is one's purpose

to help AV "profit" when one buys a home in Solivita. The public purpose is one expressly recognized by statute. *See* §190.012(2)(a), Fla. Stat. (specifically authorizing CDDs to acquire and construct recreational facilities). There is no doubt that the public purpose is valid.

Like a broken record, Defendants suggest once again that the "paramount" purpose is private, relying primarily on *Orange County Industrial Development Authority v. State*, 427 So.2d 174 (Fla. 1983). In that case, the Florida Supreme Court affirmed a circuit court's denial of validation of industrial development revenue bonds to be used to expand an existing television station. The Court found that the bonds could not be validated under chapter 159, Florida Statutes, because a television station was not an "industrial" or "manufacturing" facility within the meaning of the applicable statute. Had the project been within the scope of the statute, then it would only require a valid public purpose. The Court went on to evaluate whether the bonds were nevertheless valid under the "paramount public purpose" test, and it found they were not. Of course, neither issue is involved in this case, as the recreational amenity acquisition is expressly authorized by statute, and the paramount public purpose test does not apply here because the unrefuted evidence at trial showed that the Districts are not pledging their full faith and credit or using their ad valorem taxing power to support his transaction. Defendants' repeated effort to inject the paramount public purpose test into this case must be rejected.[1]

Second, there is no evidence that AV "controlled" any of the District's consultants or "forced" the Districts into any transaction. The defense's constant repetition of this bald fiction will not make it somehow true. The actual evidence proved the independence of the consultants,

[1] Defendants also cite to *Zedeck v. Indian Trace Cmty. Dev. Dist.*, 428 So. 2d 647 (Fla. 1983) in noting the applicable standard, an interesting choice as the *Zedeck* court found a CDD's issuance of bonds for water and sewer expansion that would primarily benefit Arvida, the master developer, to be valid. The Court found the public purpose to be valid because (as here) chapter 190 authorized such projects. *Id*. at 648.

including District counsel. The evidence showed that the Boards were acting reasonably in moving forward with this transaction. No evidence even remotely suggested the Boards acted out of fear. They saw an opportunity to gain control over the amenity assets and to gain additional amenities at no added cost to residents. Using sound business judgment, they engaged independent professionals to evaluate the proposal by AV and ultimately concluded the transaction was in the best interests of the Districts and their residents. Suggesting the Board members were overcome with fear is ludicrous and demeaning.

As a matter of law and fact, the amenity acquisition serves a valid public purpose under the standards germane to this validation.

2. <u>Section 190.016(1)(c), Florida Statutes, Does Not Apply</u>.

As proven at trial, the "fair value" clause of section 190.016(1)(c), Florida Statutes, has no bearing on this case. That fact is perhaps best illustrated in the closing argument of Dr. Kessler, who "rewrites" the statute to say what he contends it "should" state, namely:

> The price or prices for bonds sold [the proceeds from a sale] (c) [but] In the case of special assessment or revenue bonds ---the indebtedness to contractors or other persons may be paid with such bonds [with bond proceeds] or the fair value of any properties exchanged [bartered, or under contract] for the bonds [with bond proceeds.]

Defendant Kessler's Closing Argument and Summary Analysis, p. 16. But the statute does not say "proceeds from the sale" or use the term "bond proceeds." Rather, it says in relevant part:

> The price or prices for any bonds sold, exchanged, or delivered may be:
>
> (a) The money paid for the bonds;
>
> . . .
>
> (c) In the case of special assessment or revenue bonds, the amount of any indebtedness to contractors or other persons paid with such bonds, or the *fair value of any properties exchanged for the bonds, as determined by the board*.

§ 190.016(1)(c), Fla. Stat. The language could not be clearer. **The evidence proves that no properties in the amenity purchase are being exchanged for bonds.** Rather, bonds will be issued in exchange for cash. The cash will be held by a trustee. The trustee will, in turn, use the cash to pay for the amenity purchase. Defendants' repeated effort to conflate payment with cash and payment with bonds must be rejected. No court has construed this statute in this manner. The "fair value" provision in section 190.021(1)(c) does not apply.

3. The Districts Valued the Transaction Within Their Lawful Discretion.

Defendants' position that validation should be denied because the Districts did not obtain a certified property appraisal from a Florida certified real estate appraiser fails for at least three reasons. First, there is no legal requirement for a valuation consultant to be licensed in Florida to provide expert valuation testimony. Indeed, chapter 475 expressly exempts one from being certified to provide such testimony. *See* § 475.612(4), Fla. Stat. Rather, the starting point for ascertaining whether an expert is qualified to provide expert testimony is Florida Rule of Evidence 90.702, which merely mandates that the expert have special "knowledge, skill, experience, training, or education." Here, Mr. Harder has been providing expert valuation services for over 30 years, and he was admitted as an expert in valuation without objection. He has done many similar analyses in the past for utilities, which also have an income stream. Defendants cannot quarrel with his bona fides now.

Second, Defendants' only argument that valuation is even relevant is section 190.016(1)(c), which (as stated above) does not even apply to this case. But assuming *arguendo* that it did, Defendants misquote the statute, ignoring the fact that it says "fair value" as "determined by the board." It does not say anything about value as determined by a real estate appraiser following chapter 475, much less a Florida licensed real estate appraiser. Defendants

have not cited a single case that would support their construction of the statute, one that essentially would require this Court to legislate and revise chapter 190 to meet the defense's interpretation. The only standard that must be observed is that the Boards cannot act arbitrarily or capriciously. The evidence at trial proved the Boards used sound judgment and relied on a valid, well-reasoned analysis by their independent valuation consultant, Scott Harder of EFG. The fact that the Boards looked at the actual income stream to AV under the Club Plan as a basis for computing the purchase price for the amenities is reasonable.

Third, Defendants try to disparage Mr. Harder's work suggesting he used a "target price" or that he was "controlled" by Kevin Mulshine (of MBS Capital) or AV. The evidence actually adduced at trial showed he did his own analysis, and there was no target price. He had to use information provided by various consultants and persons, including representatives of AV, to derive a purchase price that was consistent with the precepts of the transaction.[2] For example, he obtained planned unit counts for future development from AV, the off-shoot of which will be to require AV to pay operation and maintenance fees on its undeveloped lands and to pay debt special assessments in connection with the amenity purchase (money AV does not currently pay under the Club Plan).[3] Defendants likewise criticize Mr. Harder's analysis of reserve and replacement needs but failed to provide any evidence at trial to contradict his analysis. At best, Defendants offer the classic battle of the experts to support their position. But the Court cannot

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[2] It is unsurprising, however, that Mr. Mulshine (a financial analyst) could derive a similar value for the amenity transaction on his own. He is certainly capable of analyzing the value of the income stream from the Club Plan. In the same way, it is not surprising that two independent property appraisers could come up with approximately the same value for a home.

[3] Mandating that assessments be included on AV's undeveloped property was perfectly sound. Those lands will benefit from the amenity transaction just like the developed properties. To not include and assess those lands as part of this transaction would be to allow them to benefit from the amenities for free, while all of the developed lots pay for those improvements. To not include and assess those lands would be arbitrary and capricious.

disturb the legislative findings of the Districts based on a mere battle of the experts. *City of Winter Springs v. State*, 776 So. 2d 255, 261 (Fla. 2001) (citing *Rosche v. City of Hollywood*, 55 So. 2d 909, 913 (Fla. 1952) ("[A] mere disagreement of experts as to the choice of methodology is legally inconsequential."); *Donovan v. Okaloosa Cty.*, 82 So. 3d 801, 812 (Fla. 2012).

The Districts acted well within their legislative discretion when relying on the independent and professionally sound analysis of Mr. Harder. Defendants' unproven "target price" theory and their misgivings with his analysis are legally insufficient to overcome the legislative discretion of the Boards. To the extent it is even relevant, valuation is not a basis to deny validation.

4. <u>Assessment Allocation</u>.

The law on assessment allocation is well-settled. As stated by the Florida Supreme Court:

> [T]he findings regarding apportionment are legislative in nature. Accordingly, even if other methods of apportionment also appear to be valid, the method used must be upheld unless it is determined to be arbitrary. *City of Winter Springs*, 776 So. 2d at 259 ("And though a court may recognize valid alternative methods of apportionment, so long as the legislative determination by the City is not arbitrary, a court should not substitute its judgment for that of the local legislative body.").

Donovan v. Okaloosa Cty., 82 So. 3d 801, 813 (Fla. 2012). Reading the defense's analysis on allocation, one would assume the opposite is true, that there is only one way to allocate assessments. But the law has never said that. There are any number of valid ways to allocate assessments. Here, the Districts allocated the base assessment equally per unit having concluded each benefits the same. There is nothing arbitrary about an equal allocation, and Defendants neither argued nor presented any evidence to suggest otherwise.

Defendants' problems with the allocation have nothing to do with how benefits are allocated to the benefitting real property. Instead, they focus on financing differences between

areas within the development, which Mr. Plenzler explained at trial had to do with differences between developed and undeveloped lands (and the rates and terms of financing they could expect). They also complain about the impact of a voluntary contribution by AV. For example, Defendants spend much of their time arguing about the concept of the assessment equalization payment ("AEP"), misunderstanding (or worse, misrepresenting) the very concept in the context of this transaction. Contrary to Defendants' argument, the AEP is not — and never was — intended to "equalize" assessments between parcels. It is a financing mechanism to assure one of the precepts of this transaction (i.e., owners will not pay more in Club Assessments than they did for 2016 Club Fees) is met.[4] So AV is basically voluntarily buying down assessments for certain lots. The developer's willingness to do this does not change what would be fair and reasonable. It does not affect the amount of the pre-financing base assessment per unit.[5]

Finally, Defendants argue that all unit owners should benefit from the AEP. This argument is legally devoid of merit. As the entity making the voluntary contribution, AV gets to decide which lots will receive a credit against their assessments, just like AV could decide it wants to pay off all of the amenity assessment for one lot but not another. In fact, any owner (including Defendants) could pay off the amenity assessment of another, and it would not affect the benefit allocation whatsoever. What AV volunteers to do with its money is not an assessment allocation issue. To the extent certain lots are not receiving as much of a credit

[4] Defendants' contention that the AEP lowers assessments to match their 2016 Club Fees is a misrepresentation to this Court. The evidence actually presented at trial shows that the assessments will be *lower* than what owners paid in Club Fees in 2016.

[5] The assessment payment credit is essentially the same as a contribution of infrastructure which Eckert and Plenzler stated is done often by developers. There is no magic in the language and the concept is not uncommon.

against assessments from AV as other lots, the owners can take the issue up with AV. It does not affect how the *Districts* allocate assessments one iota. And the AEP does not render the allocation arbitrary and capricious.

5. Defense Miscellany and Misdirection.

A few final points must be made in connection with the Defendants' closings:

a. Independence of District Consultants and District Counsel. Perhaps the most blatant use of contextomy by Defendants is their effort to question the independence of the Districts' consultants and counsel. To be clear, the unrefuted testimony by the District Manager, District Engineer, District Counsel, the valuation consultant, and the assessment allocation consultant was that they used their own independent judgment. Given the nature of the transaction, they had to rely on information provided by third parties, including AV, MBS, and Evergreen Lifestyles, to do their analyses. But relying on relevant information from the people who have it does not affect one's independent judgment about what to do with the information. Furthermore, there was no evidence that the information actually provided was false, inaccurate, or misleading. To suggest counsel's and the consultants' "independence" was affected because they worked with AV to get important facts about the transaction is totally irresponsible (and, but for the litigation privilege, would amount to actionable libel).

The fact that AV is reimbursing the Districts for their consultants' fees is also irrelevant. As Mr. Moyer testified, in late 2015 (when the concept was first discussed with the Districts) the Districts had not budgeted for and would not bear the expense of the due diligence of this transaction. Mr. Moyer testified he would not recommend that the Boards expend their own funds for the due diligence. Thus, they entered into a funding agreement whereby the Districts would pay the consultants and then seek reimbursement from AV. Messrs. Eckert and Moyer both testified such funding agreements are routinely used by CDDs in Florida. There is nothing

out of the ordinary with such funding agreements. None of the Districts' witnesses even suggested their judgment was impacted because of the funding agreement, or for any other reason.[6]

b. Termination of Club Plan. At trial, Defendants made much of the fact that the Club Plan will be terminated if this transaction goes through. Defendants argued that the Districts should not consider the Club Fees in calculating the purchase price because the Districts did not plan to collect those fees post-acquisition. This argument is absurd. AV has the right to collect Club Fees today. If AV is going to sell the amenities to the Districts and, in so doing, give up its right to collect Club Fees into the future, it will naturally want to be compensated for what those assets are worth to it, which includes land and improvements *and* Club Fees. If one wants to buy a business for the purpose (in part) of eliminating it, one must be prepared to pay the value of the business.[7] The termination of the Club Plan is yet another red-herring.

c. AV "Scaring" Boards into Transaction. Another prominent theme throughout trial was the Board members were scared into submission by AV. Of course, there was no evidence that AV either "controlled," "scared," or "overcame the will" of any Board Member (much less all of them). To suggest such is an insult to the Board members, including Chairman Zimbardi and Chairman Case, who worked extensively and thoroughly in evaluating the amenity purchase transaction.

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[6] Defendants suggest MBS acted inappropriately because it disclosed to the Districts that it did not owe them any fiduciary duty in connection with its work on this transaction. Mr. Mulshine testified that the disclosure is legally required when MBS Capital is serving as an underwriter. That testimony was specifically read into the record during trial.

[7] If, for example, a buyer wanted to purchase a thriving gas station/convenience store across the street from its business and turn the property into a park so as to alleviate traffic problems stemming from the gas station, the buyer would not be able to buy the gas station property as if it were actually a park. It would pay the value of the gas station (including goodwill) as a gas station for the privilege of being able to turn the property into a park.

d. **Kessler Testimony on "Unconscionable" Transaction.** Defendants' effort to rely on Dr. Kessler's bald conclusion that the transaction is "unconscionable" is misplaced. Dr. Kessler was admitted as an expert in economics, not a legal expert. His conclusory statement that a contract is "unconscionable" is beyond any reasonable scope of *economic* testimony. At most, it amounts to his lay opinion regarding this transaction, which is irrelevant. And over the course of three court days, the Districts offered extensive evidence showing the reasonableness of the transaction. Saying Dr. Kessler's "expert testimony" on the topic of "unconscionability" – an opinion for which he has no basis to opine – was uncontroverted is, once again, irresponsible.

e. **Chapter 475 is Irrelevant.** As noted above, sections 475.611, .612, and .628, Florida Statutes, having nothing to do with bond validations. Defendants have not cited a single case or statute suggesting otherwise.

f. **Competitive Bidding Law.** The Court is well-aware of the five (5) issues governing this proceeding, and competitive bidding is not one of them. Rather, it is a collateral issue to this case.

g. **AV Completing Improvements.** Defendants suggest that AV may close on the transaction and never build the $11.2 million in new or reconstructed amenities. This is yet another fallacy (straw-man argument). It has always been planned for the *Districts* to undertake that work with the proceeds of the bond issuance being held by the Trustee. The Districts absolutely control and will assure that those improvements are built.

h. **The Club Plan and Litigation Over Same is Irrelevant.** Knowing they have ongoing litigation against AV related to the validity of the Club Plan, Defendants asserted throughout the case that the Club Plan legality was not an issue in this litigation. The Districts

agree. Whether the Club Plan is legal or illegal is a collateral matter. Defendants' effort to inject that issue in this case should be rejected.[8]

i. Irrelevant Other Developments and Transactions. The Internal Revenue Service's dealings with The Villages in connection with an unrelated transaction has no bearing on this case. Suffice it to say, federal income tax law is not at issue in a bond validation, nor is another CDD's dealings with the IRS relevant to whether *state* requirements for bonds and special assessments have been met. Similarly, Defendants brazenly *ignored* this Court's evidentiary ruling on the admissibility of two valuations done for two other, unrelated amenity transactions involving CDDs in Florida and filed those ostensibly in response to the Districts' Pre-Hearing Memorandum of Law. This Court should uphold its prior ruling and strike those valuations from the record.

j. Amount of Club Fees Set by AV. Finally, Defendants argue the Club Fees are "arbitrary" because they were "set by AV." Prices for goods and services are routinely set by the seller. The issue becomes whether buyers believe the value they will receive from the goods and services merit the cost. At Solivita, over 4,000 homeowners demonstrated – by buying a home in Solivita – that they believe it is a sound economic investment to buy the home and pay the amount of Club Fees and Club Expenses that they are required to pay. That is evidence that the value, as adjudged by the consuming public, meets or exceeds the cost to the buyers. Otherwise,

[8] Defendants grossly mischaracterize the ruling in the other case as well by suggesting the Court has concluded, as a matter of law, that AV Homes is a homeowner's association, that the Club Plan is illegal, and that the Club Membership Fees are illegal. Instead, all the Court did was deny a motion to dismiss, which is not uncommon, even in cases with zero merit. Plaintiffs have apparently pled sufficient facts to get past a pleading motion; but the Plaintiffs have not *proven* AV is a homeowner's association and subject to chapter 720, that the Club Plan is illegal, or that the Club Membership Fees are illegal. Such has not been established by any court of law.

how AV calculated what the consuming public would be willing to pay in Club Fees based on the amenity package available in Solivita is irrelevant and collateral.

CONCLUSION

The Districts' evidence at trial demonstrated that all elements required for validation were met. The evidence was and is factually unrefuted. Defendants knew throughout the case that the Districts readily met their burden, so they instead opposed validation with a shotgun, ad hominem character attack on the District Boards and their independent consultants and counsel. The Districts' evidence and witnesses soundly refuted these attacks at trial. This Court should not allow factual and legal arguments founded on fiction and fallacy to prevail. This honorable Court should validate accordingly.

Respectfully submitted this 14th day of August, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via transmission of a Notice of Electronic Filing through the Court's E-filing Portal to the following on this 14th day of August, 2017:

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