IN THE SUPREME COURT OF FLORIDA

WILLIAM MANN, et al.,	**)**	
Appellants,	**)**	
vs.	**)**	**Consolidated Cases**
	)	**APPEAL NOs. SC17-1806**
POINCIANA COMMUNITY	**)**	**SC17-1807**
DEVELOPMENT DIST., et al.,	**)**	**L.T. CASE NO. CA16-4023**
Appellees.	**)**	
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APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

AMENDED CONSOLIDATED ANSWER BRIEF OF APPELLEE[1] STATE OF FLORIDA

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[1] Amended only as to formatting.

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Constitutional Provisions

I. Preliminary Statement

Pursuant to counsel's duty under *Lakes of Emerald Hills v. Silverman*, 558 So. 2d 442, 443 (Fla. 4th DCA 1990), to assist an appellate tribunal by responding to briefs on appeal, the State Attorney for the Tenth Judicial Circuit, by and through his undersigned Assistant State Attorney, herein responds to the Appellants' initial briefs filed on October 12 and November 6, 2017, and intends to refer to the *Appendices* thereto as (MA) for the brief filed by Appellants Mann and Taylor, and (KA) for the brief filed by Appellant Kessler. *See Initial Brief, Mann et al. v. Poinciana Comm. Dev. Dist. et al.,* Case No. SC17-1806 (Fla. Nov. 6, 2017)(*Mann Brief*); *see also Initial Brief, Kessler v. Poinciana Comm. Dev. Dist. et al.,* Case No. SC17-1807 (Fla. Oct. 12, 2017)(*Kessler Brief*). In this consolidated Answer Brief, Appellee will refer to itself as "the State" to prevent confusion with co-Appellees, Poinciana Community Development District and Poinciana West Community Development District("the Districts").

II. Statement of the Case, Jurisdictional Statement, and Standard of Review

Appellants appeal a final order of Tenth Circuit Senior Judge, the Honorable Randall G. McDonald, rendered on August 31, 2017, denying the prayer of the Districts, units of local government incorporated pursuant to Chapter 190, Fla. Stat., to validate a bond issue, as to ancillary issues on which the lower court denied relief. This Court has original jurisdiction over bond validation appeals. *See* Fla. R. App. P. 9.030(b)(1)(A).

Appellants Mann and Taylor seek a determination of the Court that the lower court erred in granting relief only on the ground

of unlawful apportionment of the special assessments and contend that the lower court should have granted relief on all issues presented below. *See generally Mann Brief.* Specifically, they contend that the Districts improperly valued the property at issue, violating the public purpose requirement at law for bond validations; that the Districts had no actual public purpose but instead acted solely to enrich a private entity; that the action was arbitrary and capricious; and that the lower court improperly restricted discovery. *See generally id.* at 30-50.

Appellant Kessler seeks a determination of this Court that § 190.016(1)(c) Fla. Stat. (2017) requires all transactions entered into by local government to raise money to acquire property, involving the sale of bonds backed by non-*ad valorem* special assessments, to be for fair value as determined by a property appraiser, regardless of the plain language of the statute ostensibly restricting fair value analysis to situations where one is being paid directly with bonds issued in exchange for such property. *See generally Kessler Brief.* This claim dovetails with the first issue on valuation presented by Appellants Mann and Taylor, and therefore will be jointly addressed *infra*.

The Tenth Circuit State Attorney was joined below because § 75.05 Fla. Stat. (2017) requires service of a complaint for bond validation upon the state attorney in the circuit where the bonds are to be issued. The location in question is Polk County, within the Tenth Judicial Circuit. Section 75.05 requires the state attorney to "examine" a complaint for bond validation, and to defend against it if it appears on its face to be defective,

insufficient, untrue, or otherwise unauthorized. The Tenth Circuit State Attorney, as counsel for a separate party to this action, therefore has a responsibility under the law to brief the Court in this matter. *See Lakes of Emerald Hills, supra; see also* Phillip J. Padovano, *Florida Appellate Practice*, § 16:2, at 296 n.6 (West 2016). The undersigned is Director of Appellate and Civil Litigation in the Tenth Circuit State Attorney's Office, a duly qualified and appointed Assistant State Attorney in the Tenth Circuit, and therefore wields the Tenth Circuit State Attorney's power and discharges his duties as State's counsel in this appeal. *See* § 27.181 Fla. Stat. (2017).

This Honorable Court reviews the trial court's application of law to the facts herein *de novo*, while reviewing the trial court's determination of those facts to ensure that they are based upon substantial, competent evidence. *See City of Gainesville v. State*, 863 So. 2d 138, 143 (Fla. 2003). And the Court must presume that Judge McDonald's order was correct. *See Donovan v. Okaloosa County*, 82 So. 3d 801, 805 (Fla. 2012). As to discovery rulings, the Court reviews those for abuse of discretion. *See Nucci v. Target Corp.*, 162 So. 3d 146, 151 (Fla. 4th DCA 2015). Should the Court find that the law supports the lower court's decision, or that the issues below were concluded so as to render further consideration moot, it should **affirm**.

III. Facts

Appellants sought below to prevent the validation of bonds to be financed by non-*ad valorem* special assessments on properties within a retirement community known as "Solivita,"

located wholly within the Districts, the proceeds from the sale of which would have been used to fund the acquisition of site-built recreational amenities from Avatar Properties, the developer that initially established the community. (KA Doc. #1 at 2-10, 17). The State accepts the statement of facts set out in Judge McDonald's order denying validation, and will rely on same in this Answer. *See id.* The State also accepts Appellants Mann and Taylor's recitation of the facts concerning discovery in this matter. *See Mann Brief* at 23.

Judge McDonald held that this Court has established a three-prong test for validation of bonds by a unit of local government. (KA Doc. #1 at 10). The inquiry below necessarily was limited to determining whether the Districts had the authority to issue the bonds, whether their purpose was legal, and whether the issue complied with the legal requirements. *See id.* (*citing Warner Cable Comm. v. City of Niceville*, 520 So. 2d 245, 246 (Fla. 1988) and *Donovan v. Okaloosa County*, 82 So. 3d 801 (Fla. 2012). The trial judge also observed this Court's precedent relating to special assessments, which must satisfy a two-component test; special benefit to the burdened property and that the assessments be fairly, reasonably apportioned among the burdened properties. (KA Doc. #1 at 11), *citing City of Winter Springs v. State*, 776 So. 2d 255, 257-61 (Fla. 2001).

Judge McDonald understood the Appellants' arguments below to encompass claims that the issuance lacked a public purpose, failed to comply with law, and improperly apportioned the special assessments. (KA Doc #1 at 12). These arguments centered upon two

things; first, that the developer exerted improper coercion or influence upon the Districts' Boards of Supervisors in procuring an agreement to purchase the recreational amenities on terms of the developer's choosing, which Judge McDonald referred to as the "control argument," and second, that the apportionment methodology underlying the proposed non-*ad valorem* special assessments on the residential properties in Solivita, upon which the Districts proposed to support the bonds which it would sell to finance the acquisition, was flawed. *See id.*

In resolving these claims, the trial judge held, as to the first component of the test, that the Districts had legal authority under Chapter 190, Fla. Stat., both to issue the bonds and levy special assessments to finance the bonds. (KA Doc. #1 at 15). None of the parties disputed this. *See id.* As to the second, the trial judge held that the Districts demonstrated the requisite public purpose, primarily based upon the deference legally required to be given to legislative determinations. *See id.* As a part of that, Judge McDonald held that the public purpose the Districts determined was not overwhelmed by the private monetary benefit to the developer resulting from the sale. (KA Doc #1 at 16). The judge also ruled that the developer did not exert improper influence upon the District Boards of Supervisors, as the law defines that term. *See id.*

As to the third component, Judge McDonald held that the Districts were in compliance with the legal requirements to issue bonds and levy special assessments. (KA Doc. #1 at 17). It is as a part of this finding that the trial judge held that §

190.016(1)(c) Fla. Stat. (2017) does not apply in a situation such as this, but would apply where property directly is being exchanged for bonds, as opposed to being exchanged for money derived from the sale of bonds. (KA Doc #1 at 17). Judge McDonald then examined the special assessments themselves, and refused to validate the bonds because the special assessments were improperly apportioned. (KA Doc. #1 at 19-24).

As to the apportionment problem, Judge McDonald first observed that Solivita residents pay fees to the developer to be members of something known as a "club plan," whereby Solivita homeowners gain access to the amenities at issue. (KA Doc. #1 at 2). Those fees are different depending where, within Solivita, that the property is located. *See id.* at 2-3. For calendar year 2016, there are five different "phases" in Solivita, each having a different club fee required to be paid. *See id.* at 3. The Districts' intent was to base the special assessments on the fees in the club plan. *See id.* at 5. Judge McDonald found this to be invalid because no proof was adduced as to how or why those fees were established; thus, the Districts failed to carry their burden to show that the assessments were not arbitrary. *See id.* at 19-24. These consolidated appeals followed shortly thereafter.

IV. Summary of the Argument

Appellants, who prevailed below and prevented the validation, now attack the remainder of the validation process. The State takes no position as to the correctness of Appellants' contentions. Rather, pursuant to its duty as Appellee to advise the Court, the State first observes that Appellants' claims may

be moot, as Judge McDonald denied validation and Appellants demonstrate no real harm that could flow from the lower court's denial of their contentions. If the Court determines the claims to be moot, the Court has discretion to end its inquiry without further judicial labor.

Should the Court hold that Appellants' claims are not moot, the Court must presume that Judge McDonald was correct. As to the portion of the validation process claim relating to § 190.016(1)(c) Fla. Stat., this presents an issue of statutory construction. This Court's precedent requires statutes to be read for their plain language, and *in pari materia* to other adjacent statutes. If the Court determines that the plain language of § 190.016(1)(c) restricts its application to situations where property literally is being exchanged for bonds, it should **affirm** on this ground. As to the remaining issues, the Court should apply its precedent to determine whether the parties' dispute over the valuation methods chosen prevents validation, or whether the Districts failed to show the requisite public purpose, or whether the Districts acted arbitrarily or capriciously in approving the purchase.

Finally, Appellants Mann and Taylor's discovery challenge involves discovery they wished to take from a non-party to the validation process. The Court should apply its precedent relating to third-party discovery, and if it finds that the lower court's order was overbroad, further review for harmless error.

V. Argument

Ultimately, Judge McDonald denied validation of the bonds. Therefore, this Court's precedent may lead it in exercise of its discretion to find that the controversy below was so fully resolved as to leave this Court's determination of the issues presented meaningless. Appellants also attack the validation process itself. If the Court chooses to address the issue on the merits, application of the Court's precedent on construction of statutes and the legal procedure for validating bonds, combined with the presumption that the lower court ruled correctly, may compel decision affirming the decision below. Finally, Appellants Mann and Taylor attack the pre-hearing discovery process. If the Court finds that restriction of third-party discovery in this case was error, then it should further review for harmless error.

Issue I. The case may be moot.

Judge McDonald's order resolved most issues against the Appellants; however, it ultimately provided that the bonds in question would not be validated, as Appellants suggested they should not be. (KA Doc. #1 at 24). The Court therefore has discretion to determine whether it should or should not exercise jurisdiction on the ground that the controversy below is moot, validation having been denied and the Districts not having cross-appealed. *See Merkle v. Jacoby*, 912 So. 2d 593, 594 (Fla. 2d DCA 2005)(*holding that* mootness does not defeat appellate jurisdiction). In *Merkle*, 912 So. 2d at 594, the district court released an opinion before discovering that the parties had settled during pendency of the appeal. The district court

exercised its discretion not to vacate its opinion, observing that the opinion had been published and practical concerns thus predominated. *See id.* Nevertheless, the question now before the Court is whether the controversy has been so fully resolved that its decision would have no practical effect. *See Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992). This Court has held that "[g]enerally, a moot case will be dismissed." *Id.*

The Court has set forth three circumstances where it will exercise its discretion not to dismiss a moot case. First and second, the Court will hear a moot case where the question is likely to recur or the issue is one of great public importance. *See Godwin*, 593 So. 2d at 212, *quoting Holly v. Auld*, 450 So. 2d 217, 218 n.1 (Fla. 1984). Third, the Court will hear a moot case where collateral legal consequences affecting a party's rights "flow from the issue . . . ." *Id.*, *citing Keezel v. State*, 358 So. 2d 247 (Fla. 4th DCA 1978).

If the Court finds that the issues presented are of great public importance or likely to recur, then in accordance with *Holly*, 450 So. 2d at 218 n.1, it will wish to hear the appeal. An excellent recent example of this is *Public Defender v. State*, 115 So. 3d 261 (Fla. 2013). There, the Court confronted an issue of constitutional significance relating to a statute denying the state's public defenders the ability to withdraw from a case based on workload. *See id.* at 279. The Court accepted the case despite the case having been resolved below, as the issue was likely to recur and involved the duties of public officers. *See id.* at 281. Additionally, the Court may consider whether

collateral legal rights are violated by the order; this took place in *Keezel*, 358 So. 2d at 248, when a lower court failed to follow the proper procedure for contempt but the contemnor had served his sentence before the issue properly was appealed. Keezel, an attorney, faced collateral legal consequences to his licensure stemming from the contempt citation therefore, the district court exercised jurisdiction. *See id.*

Notably, none of the Appellants make the claim that collateral legal rights similar to those at issue in *Keezel* are impaired by the decision below; therefore, the State will not address this concern. However, this case also involves public officials, here representing community development districts involved in validating bonds to acquire property from a residential developer, a scenario frequently happening in our State. In *State v. Matthews*, 891 So. 2d 479, 484 (Fla. 2004), the Court accepted an issue involving awards of prison credit under the "likely to recur" standard, as it was capable of repetition yet evading review. If the Court determines that this case resembles *Public Defender* or *Matthews*, then it may exercise discretion to accept review.

Issue II. The Validation Process

On the merits, Appellants Mann and Taylor first contend that the lower court erred in holding that the Districts complied with legal requirements for issuing bonds, in that the bonds were improperly valued. *See Mann Brief* at 32. Appellant Kessler joins in this argument. *See generally Kessler Brief*. Second, Mann and Taylor contend that the districts lacked a valid public purpose,

taking position that the purpose of the issuance was to benefit Avatar Properties. *See Mann Brief* at 39. Finally, Mann and Taylor contend that because the amenities were improperly valued, the Districts acted arbitrarily and capriciously in approving the bond issue. *See id.* at 42-43. In response to these arguments, the State first will discuss this Court's precedent as to bond validation proceedings. It will explain the requirements at law, the procedure the Court has approved for dealing with disputes over valuation methods, and discuss the public purpose requirement for bond issues.

A. Legal Requirements for Issuing Bonds

In *Donovan*, 82 So. 3d at 805, the Court limited its review to three things: (1) whether the public authority has authority to issue the bonds; (2) whether the purpose is legal; (3) and whether the issuance complies with the requirements of the law. Appellants' first claim, relating to the methods used to determine value of the subject properties, necessarily falls under the third *Donovan* component and attacks the legal requirements for bond issuance. Appellants assert two issues; first, that fair value was not obtained in accordance with statute; second, that an improper valuation method was applied. *See Mann Brief* at 32-33; *see generally Kessler Brief*. Here, the State first will review the lower court's decision on this issue and then detail the relevant legal standard.

1. "Fair Value"

Judge McDonald held that the plain language of § 190.016(1)(c) Fla. Stat. (2017) revealed that it simply did not

apply to the valuation in this case, as the Districts are not exchanging bonds for property; rather, they are selling bonds and funding the transaction with the proceeds. (KA Doc #1 at 17-18). This is a legal conclusion, where the lower court ruled that the statute only applies in situations "where property is exchanged for literal bonds . . . ." *Id.* The Court therefore considers it *de novo. See Heart of Adoptions, Inc. V. J.A.,* 963 So. 2d 189, 194 (Fla. 2007)(*superseded by statute on other grounds, see Children's Home Soc'y. v. V.D.,* 188 So. 3d 920, 922 (Fla 1st DCA 2016)). Appellant Kessler attacks this conclusion by asserting that the trial judge misapprehended the plain meaning of the statute. *See Kessler Brief* at 5, 7. Kessler claims that

> legislative intent was to require a "fair market value" appraisal for any forms of indebtedness to be discharged and so avoid any arbitrary or capricious or unorthodox or frivolous valuations methods.

Id. at 7 [sic]. Mann and Taylor simply claim in conclusory fashion that the statutory provision requires fair value analysis, without considering the Court's decisions as to statutory interpretation. *See Mann Brief* at 33.

"A court's purpose in construing a statute is to give effect to legislative intent, which is the polestar that guides the court in statutory construction." *Larimore v. State*, 2 So. 3d 101, 106 (Fla. 2008). The Court determines legislative intent primarily from a statute's text. *See Borden v. East-European Ins. Co.,* 921 So. 2d 587, 585 (Fla. 2006). Additionally, the Court gives full effect to all provisions of a statute, and strives to avoid rendering any part of it meaningless. *See Velez v. Miami-Dade Cty. Police Dept.,* 934 So. 2d 1162, 1164-65 (Fla. 2006).

Finally, "where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned." *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976).

In *Heart of Adoptions*, 963 So. 2d at 191-4, the Court confronted a similar question of statutory interpretation; the issue there being whether an unmarried biological father's parental rights could be terminated, where he fails to file a claim of paternity with the state putative father registry. *See id.* The facts involved an adoption where the adopting agency never informed the father that he had to register his claim of paternity. *See id.* at 192. The father's position was that he was entitled to statutory notice by the adoption agency of the requirement to register. *See id.* at 194. The Court read the statutes *in pari materia*, determining that legislative intent required that the adoption agency notice the father of the adoption plan, <u>including</u> the requirement to register. *See id.* at 200-1. The Court reasoned that

> [r]elated statutory provisions must be read together to achieve a consistent whole, and . . . [w]here possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.

963 So. 2d at 199 (*quoting Woodham v. Blue Cross & Blue Shield, Inc.*, 829 So. 2d 891, 898 (Fla. 2002)).

In relevant part, the portion of § 190.016(1) relating to special assessment and revenue bonds provides that

> (1) Special assessment and revenue bonds may be delivered by the district as payment of the purchase price of any project or part thereof, or a combination

> of projects or parts thereof, or as the purchase price or exchange for any property, real, personal, or mixed, including franchises or services rendered by any contractor, engineer, or other person, all at one time or in blocks from time to time, in such manner and upon such terms as the board in its discretion shall determine. The price or prices for any bonds sold, exchanged, or delivered may be:
>
> (a) The money paid for the bonds;
>
> (b) The principal amount, plus accrued interest to the date of redemption or exchange, or outstanding obligations exchanged for refunding bonds; and
>
> (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.

Here, reading the entirety of § 190.016(1), the Legislature provided that bonds **themselves** may be "delivered . . . as payment of the purchase price" for property. Subsection (c) refers to "contractors or other persons **paid with such bonds**." (emphasis added). However, § 190.016(1) makes reference to "the price or prices for any bonds **sold**, exchanged, or delivered . . . ." *Heart of Adoptions* requires all statutory provisions to be read *in pari materia*. Further, in *Thayer* the Court observed the general rule that if a statute sets forth that on which it operates, the things it does not mention are excluded from its ambit.

Should the Court hold that this plain language compels the conclusion that the Legislature was speaking of actual bonds being exchanged for property, then logically it would follow that that the lower court decided correctly, and the Court would find for the Districts. This would be reinforced by the fact that § 190.016(1)(c) plainly leaves out the language "sold, exchanged,

or delivered" from § 190.016(1). However, if the Court, reading the provisions *in pari materia,* determines that including the "sold, exchanged, or delivered" language in § 190.016(1) mandates consideration of whether the **proceeds** of the bonds also fall under the statutory provision, it could rule for Appellants.

2. Valuation method

Appellants Mann and Taylor contend that the lower court improperly found that their alternative valuation methodology did not compel relief. *See Mann Brief* at 37. They argue that only a licensed property appraiser may be used to value property, and that the Districts' use of an income-based valuation methodology was not supported by the evidence. *See id.* at 37-38. The lower court held that the dispute between Mann and Taylor and the Districts on this point "allowed for reasonable people's differing opinions thereon," and constituted a dispute between the parties' experts as to the proper method to undertake. (KA Doc. #1 at 18).

With respect to apportionment of special assessments, this Court has held that "a mere disagreement of experts as to the choice of methodology is legally inconsequential." *City of Winter Springs*, 776 So. 2d at 261. The Court relied upon its opinion in *Rosche v. City of Hollywood*, 55 So. 2d 909, 913 (Fla. 1952), for the proposition that where evidence as to a benefit received to a property conflicts and depends on the judgment of witnesses, legislative findings will not be disturbed. This case law is directly analogous to the issue at hand, as the Court is

confronted with what is, in essence, a dispute between experts retained by the parties.

Judge McDonald observed that three bidding consultants, including Environmental Financial Group (EFG), the eventual nominee for the valuation of the amenities, endorsed an income-based approach to valuation. (KA Doc. #1 at 6, *citing* a trial exhibit of the Districts and the trial transcript). It is undisputed that Scott Harder, who conducted the valuation for EFG, was not a certified property appraiser, and that the report he submitted was not entitled a certified appraisal report. The Districts themselves instructed EFG to use the income approach. (KA Doc. #1 at 7). Judge McDonald construed the results of a "Valuation Report" completed by EFG and submitted as Joint Exhibit 50 at the trial below, relating that the report found that the approach was funded by a "fixed and dedicated revenue stream" with value "unique to Solivita" and was based on club fees. *Id.* Joint Exhibit 50 may be found in Mann and Taylor's Appendix at 8504, with a supplemental valuation report at 8506.

Compare with Sarasota Citizens for Resp. Gov't v. City of Sarasota, 48 So. 3d 755, 763 (Fla. 2010), where this Court held that a trial court relied upon substantial, competent evidence from the record based on the evidence submitted at a validation hearing. There, county officials rendered testimony that set out their roles in negotiations with a Major League Baseball team, and the Court held that the trial court properly relied on that to hold that no negotiations were conducted without the deputy county administrator's presence. *See id.*

Mann and Taylor contend that no one may provide any form of valuation services on any real property without being a certified property appraiser. *See Mann Brief* at 38, *citing* §§ 475.611(1)(e); (1)(a)(1); 475.612(1). They conclude that as Scott Harder of EFG was not a licensed appraiser, the Districts failed to comply with the requirements of the law in relying on EFG's valuation. *See Mann Brief* at 38. Section 475.611(1)(e) does include any report relating to a "conclusion of value" in the definition of an "appraisal report." However, at the validation hearing Gary Moyer, manager of the Districts, testified that it is routine for community development districts to hire uncertified validation consultants such as Harder for income-based valuation of properties such as the Solivita amenities. (MA 11779-80). In *Termaforoosh v. Wash,* 952 So. 2d 1247, 1249 (Fla. 5th DCA 2007), the district court answered the question of whether <u>all</u> appraisals must be <u>certified</u> appraisals in the negative. In view of Mr. Moyer's testimony at the validation hearing, that case bears discussion.

Termaforoosh involved a commercial real estate valuation. *See id.* The case was on summary judgment, and the material issue of fact extant was whether an "appraisal" had been obtained as required by the sale contract. *See id.* The seller pointed to the statutory definition of "appraisal," and claimed that an "appraisal" necessarily must be done by a licensed appraiser as the statute provides. *See Termaforoosh*, 952 So. 2d at 1250. The district court brushed that aside, observing that the sale contract did not specify a "certified" appraisal. *See id.* The

issue of whether an uncertified valuation was an "appraisal" sufficient under the sale contract was therefore an issue of fact suitable for the factfinder to determine. *See id.*

Termaforoosh is instructive because that case specifically involved an uncertified appraisal and the district court distinguished between a certified appraisal and an uncertified appraisal, declining to hold that the term "appraisal" in a sale contract meant that the statute had to be complied with strictly. If the Court determines that a valuation may be done under the statute as long as the person doing the valuation does not hold it out as an "appraisal" or himself as an "appraiser," then Mann and Taylor's objection on this ground would have no merit, as there is no suggestion that Scott Harder of EFG did either one. In that case, the Court may turn to the EFG valuation and consider whether that, in conjunction with the testimony detailed in Judge McDonald's order, provides substantial, competent evidence to support his ruling.

If the Court finds that the EFG valuation report and supporting testimony from Scott Harder of EFG and the District officials who testified provide substantial, competent evidence for the lower court's determination that the bond validation complied with law, then it should afford deference to the Districts' determination of that method and affirm Judge McDonald's well-reasoned opinion. *See, e.g. Rosche*, 55 So. 2d at 913. A dispute between Mann and Taylor's expert Michael McElveen and Harder should not inure against the Districts in that event. *See Sarasota Citizens*, 48 So. 3d at 763. If the Court finds that

the valuation report and testimony of District officials do not provide substantial, competent evidence to support the lower court's decision, or that the statutes Mann and Taylor reference require all business valuations to be conducted by certified real estate appraisers, it may reverse on this point.

B. The Public Purpose Requirement

Under this heading, Appellants attack Judge McDonald's order as to the second *Donovan* component, that being whether the purpose of the bonds is legal. *See Mann Brief* at 39; *see also* 82 So. 3d at 805. Principally, Mann and Taylor take position that enriching Avatar Properties is the overwhelmingly major purpose of the validation. *See Mann Brief* at 39-42. In this section, the State will recount Judge McDonald's findings as to the public purpose requirement, and detail the law relating to that portion of the bond validation inquiry.

Mann and Taylor support their claim of purpose to Avatar by attacking Avatar's profit motive in the transaction. *See Mann Brief* at 40. They also claim that the bond issuance will charge Solivita residents in multiple different ways for access to the amenities. *See id.* Judge McDonald focused on the Districts' purposes for the bond issue. (KA Doc. #1 at 15).

Judge McDonald found that § 190.012 Fla. Stat. (2017) allows the Districts to "financ[e], establish[], and maintain[] public parks and facilities for recreational . . . purposes." (KA Doc. #1 at 15). Section 190.012(2)(a) Fla. Stat. (2017) provides in relevant part that the Districts, following delegation from Polk County under Chapter 190,

> have the power to plan, establish, acquire, construct or reconstruct, enlarge or extend, equip, operate, and maintain additional systems and facilities for:
>
> (a) Parks and facilities for indoor and outdoor recreational, cultural, and educational uses.

At the validation hearing, Charlie Case, Chair of the Poinciana West Community Development District Board of Supervisors, testified that the Districts' intent was to gain

> the ownership and control of the facilities, the additional amenities to the point of $11.2 million. We thought there'd be increased property values and it would have better services to the residents.

(KA Doc. #1 at 15). Resolutions of the Districts' boards specifically provided that the public purpose of obtaining the amenities was "for recreational, cultural, and educational purposes." (KA Doc. #1 at 15). Gary Moyer testified that the Districts' purpose in obtaining the amenities was to

> enhance the utilization and enjoyment of recreational facilities for the residents within Solivita.

(MA 11773). Judge McDonald presumed the Districts' legislative purpose to be correct. (KA Doc. #1 at 15).

At the validation hearing in *Donovan*, 82 So. 3d at 808, the opposing parties clashed over the terms of permits relating to beach renourishment. This Court observed that "[i]t was never intended that proceedings instituted under [chapter 75] to validate governmental securities would be used for the purpose of deciding collateral issues or other issues not going directly to the power to issue the securities and the validity of the proceedings with relation thereto." *Donovan*, 82 So. 3d at 808, *quoting State v. City of Miami*, 103 So. 2d 185, 188 (Fla.

1988)(alteration in *Donovan*). It ruled that such issues were collateral to bond validation. *See id.* Should the Court find that the issues raised relating to the club membership plan, *see Mann Brief* at 40-41, are collateral to the purpose of a bond validation, then the Court should affirm.[2]

More to the point, Mann and Taylor raise a question that the Court properly should address under Art. VII, § 10 of our Constitution: Whether local government is lending its taxing power in aid of a private entity. *See Donovan*, 82 So. 3d at 809. If the Districts are doing so, then the bond issue must serve a *paramount* public purpose. *See id.* If not, then the Districts only had to show a public purpose. *See id.* And in such cases, even if the prime beneficiary of a project is a private party, that does not matter as long as a sufficient public interest inures. *See id., quoting State v. Housing Fin. Auth. Of Polk Cty.,* 376 So. 2d 1158, 1160 (Fla. 1979). But where a *paramount private* purpose underlies the bond issue, bonds will not be validated even if there is an incidental public benefit. *See id., citing Orange Cty. Ind. Dev. Auth. v. State*, 427 So. 2d 174, 179 (Fla. 1983).

Here, Mann and Taylor do not suggest that the Districts are using their taxing power in aid of Avatar. *See generally Mann Brief*. Judge McDonald's order sets forth that the Districts did not pledge credit or exercise their taxing power in this process. (KA Doc. #1 at 16). Therefore, this claim under our Constitution will turn on whether the Districts' support of Avatar's profit

[2] Mann and Taylor attack the club plan as unlawful. *See Mann Brief* at 39-40. Judge McDonald held that the plan was a contract between Solivita homeowners and Avatar, and therefore collateral to a bond issue. (KA Doc. #1 at 19).

motive constitutes a paramount private purpose under these facts, and one that overwhelms any public purpose for the bond issue.

In *Orange County*, 427 So. 2d at 176, Orange County sought validation of a bond issue to buy land and build facilities for two privately-owned television stations. The public benefit to this would be increased employment; the private benefit would be to increase local news services and accept increased requests for profitable commercial production opportunities. *See id.* The bond issue was not to be financed from tax revenues. *See id.* at 179. However, the direct and actual use of the project was for private enterprise. *See id.* This Court therefore refused to order the bonds to be validated. *See id.*

In *Donovan*, 82 So.3d at 811, this Court distinguished *Orange County*. The beach renourishment project aided private property owners, but it also was and is the public policy of our state to protect the environment. *See id.* The Court found that beach erosion constituted a "serious menace" to "the economy and general welfare" of Florida citizens. *Id.* It held that the private landowners' benefit did not outweigh the public character of the project. *See id.*

The Court must determine whether the paramount purpose of the bond issue is to benefit Avatar, as Mann and Taylor allege. If the Court finds that Avatar's private benefit overwhelms public benefit to the District's residents, then *Orange County* applies and the Court should reverse on this point. But the Court also is by its own precedent required to afford deference to legislative declarations of public purpose. In affording that

deference, it should keep in mind that the boards of both Districts explicitly have determined that it is in the interest of their residents to obtain these properties for the public benefit thereof. If the Court finds the public benefit of District control of Solivita amenities to be sufficiently strong, then it should affirm Judge McDonald's well-reasoned opinion.

C. Arbitrary or Capricious

Appellants Mann and Taylor last argue under this heading that the lower court erred in finding the Districts' approval of the transaction neither arbitrary nor capricious. *See Mann Brief* at 42. In this argument, Mann and Taylor contend that the Districts were driven by a developer whose profit motive overrode "proper consideration" of the "facts, circumstances, rules, and procedures . . . ." *Id.* at 43. Mann and Taylor primarily base their claim on the Districts' negotiations with Avatar, Avatar's resistance to negotiation, and the use of the club plan as the benchmark for the special assessments. *See id.* at 44. In this section, after reviewing Judge McDonald's conclusions relating to this argument, the State will review Florida law relating to the "arbitrary and capricious" standard.

Judge McDonald observed that the overall transaction involved "negotiated give-and-take and intimate cooperation between individuals and entities involved in a complex real estate and bonds issuance process. . . ." (KA Doc. #1 at 16). As a part of the process, Avatar "may have engaged in tactics of persuasion on its behalf to maximize profits." *Id.* Judge McDonald found that Charlie Case and Poinciana Community Development

District Chairman Robert Zimbardi testified on this point, denying that Avatar overpowered the Districts' will or conspired with the Districts, or that Avatar representatives exerted improper influence on the District boards. *See id.*, *citing* trial testimony of Case and Zimbardi. The Districts used EFG because they considered it independent. *See id.* at 7. The Districts wanted to purchase the amenities from Avatar, construct new amenities, and finance the acquisitions via bonds. *See id.* at 4. And the Districts expended great effort to ensure that Solivita homeowners would not pay more than the assessments already being imposed pursuant to the club membership plan. *See id.* at 5.

At the validation hearing, Gary Moyer testified in detail as to the reason for seeking valuation using the income-based method. (MA 11776; 11789-92). Avatar wholly owns the amenities. (MA 11776). The decision to sell the amenities-and to whom to sell the amenities-under the club plan solely rests with Avatar. (MA 11776-78). Mr. Moyer, an experienced district manager, believed it "silly" to assume that a large number of recreational amenities, which were income-producing properties for Avatar, would be sold to the residents for the depreciated value of the real estate alone. (MA 11790-91). The Districts also were buying the right to receive the club fees, though that would end in favor of special assessments. (MA 11789-90). With the transaction, the Districts would lock in club fees at current levels for thirty years through the special assessments, and thus over time the residents would pay less in club fees. (MA 11791-92). The Districts' boards of supervisors discussed the issues

among themselves at public meetings, and they were composed, with the exception of one member prior to March 2016, entirely of Solivita homeowners. (MA 11773; 11781-82).

The terms "arbitrary" and "capricious" are defined in Florida law.

> A capricious action is one which is taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic, or despotic.

Agrico Chem. Co. v. State, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). Judge McDonald held that the use of the income-based methodology for valuation was neither arbitrary nor capricious. (KA Doc. #1 at 18). And in review of a bond validation action, appellate courts do not substitute their judgment for that of a legislative body if the legislative body's judgment on an issue of public concern is not arbitrary. *See South Trail Fire Control Dist. v. State*, 273 So. 2d 380, 383 (Fla. 1973).

In *South Trail*, a fire control district sought to issue bonds for fire protection. *See* 273 So. 2d at 381. This was to be financed through taxes, via a statute passed by the 1970 Florida Legislature that declared fire protection and ambulance service to be benefits to all property within a fire control district. *See id.*, *quoting* Ch. 70-933 Laws of Fla. Property owners attacked the statute at a bond validation hearing and the lower court determined the statute unconstitutional. *See id.* at 382. On review in this Court, the question was whether the Legislature's determination of benefits in the challenged statute was arbitrary. *See South Trail*, 273 So. 2d at 383. The Court was chary of substituting its judgment for the Legislature's:

> A matter of this kind depends largely upon opinion and judgment as to what will, or will not, prove a benefit to the district and the Court substitute its opinion and judgment for that of the Legislature in the absence of a clear and full showing of arbitrary action or just plain abuse.

Id. The Court observed that evidence below supported the Legislative determinations, because commercial fires demand more manpower and equipment. *See id.*

If the Court concludes that Judge McDonald's reliance on the testimony of Case and Zimbardi, and the evidence surrounding the Districts' use of EFG's valuation report and the reasons for the purchase, constitute competent, substantial evidence that the Districts exercised thought and reason, informed by logic and fact, then the Court should affirm. If the Court finds that the evidence relied upon was not substantial and competent, then it may reverse on this point.

Issue III. The Discovery Process

Appellants Mann and Taylor raise a final issue for the Court's consideration, relating to the discovery process prior to the validation hearing. *See Mann Brief* at 46. Specifically, Mann and Taylor wished to depose Avatar executives Iorio and Shullaw. *See id.* at 47. Mann and Taylor wished to discover documents and things relating, among others, to the amenities sale and the influence Avatar may have had over that. *See id.* at 48-49.

In civil cases, discovery must be relevant to the subject matter and reasonably calculated to lead to admissible evidence. *See Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995). And as non-parties, Iorio and Shullaw are permitted to object on the basis of undue burden or attempts to reveal confidential

information. *See Dade Cty. Med. Ass'n. v. Hlis*, 372 So. 2d 117, 121 (Fla. 3d DCA 1979). Here, the circuit court's review necessarily was limited. *See Donovan*, 82 So. 3d at 805. The inquiry necessarily focuses on the public body issuing the bonds, not private concerns ancillary to a bond issue. *See generally id.* at 809-11. Also, Florida law requires that judgments not be set aside on a showing of error, if that error be harmless. *See* § 59.041 Fla. Stat. (2017). The test for harmless error requires the beneficiary of the error to show that the error did not contribute to the verdict. *See Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1253 (Fla. 2014).

Non-parties Iorio and Shullaw objected in writing to Mann and Taylor's subpoenas and 53 requests for production of documents. (MA 294-301). They variously raised objections to some documents being irrelevant to the limited purpose of a bond validation proceeding, and to some as overbroad, vague, or burdensome. *See id.* The lower court's written order sustaining Avatar's objection to third party discovery merely sustained the objection without further comment. (MA 620). Later, Mann and Taylor's attempt to obtain Iorio and Shullaw's testimony at the bond validation hearing itself was quashed, again without elucidation. (MA 5548).

Should the Court hold that the discovery Mann and Taylor sought was not relevant to the narrow subject of a bond validation proceeding or reasonably calculated to lead to admissible evidence, as opposed to a fishing expedition, then it should find that the trial court did not abuse its discretion in

denying the discovery sought; however, if Judge McDonald abused his discretion in restricting relevant discovery, then the Court may find him in error. As Judge McDonald ultimately did **not** validate the bonds, the Court may conclude that that any error it discerns in the discovery process did not affect the ultimate outcome. Therefore, the Court should first determine whether the discovery sought was relevant and reasonably calculated to lead to evidence relevant and admissible in a limited bond validation proceeding, and whether it unduly burdened the non-parties. If the Court holds that the discovery should have been allowed, then it should evaluate further, for the presence of harmless error.

VI. Conclusion

The Court will discern that this case, unusually for a bond validation case, has been the subject of much emotion and attendant litigation. The Record of these proceedings spans over 12,000 pages now, and the distinguished trial judge had much to weigh and consider. In the end, Judge McDonald denied validation, which is what Appellants sought. They now approach the Court to reverse the portions of the ruling on which they did not prevail, and the Court must consider its mootness and harmless error doctrines in addition to the merits of the claims raised. The scope of validation proceedings necessarily is narrow, but if the lower court improperly restricted discovery or erred in its findings relating to the developer's influence over the proceedings or the Districts' public purpose, this Court may discern that an injustice has taken place. If the Court does, then its course is clear. If not, then it should affirm.

VII. Certificate of Service and Font Compliance

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been served via the Florida Courts E-Filing Portal upon Counsel for Appellants Mann and Taylor, Kristin Norse, Esq. and Carter Andersen, Esq.; upon the co-Appellant *pro se*, Martin Kessler, Ph.D.; and upon Counsel for co-Appellees Doug Smith, Esq., Michael Eckert, Esq., and Lindsay Whelan, Esq., on this 9th day of November, 2017. **I FURTHER CERTIFY** that this brief is typed in 12-point Courier New font, in compliance with the font requirements of Fla. R. App. P. 9.100 (*l*) and 9.210(a)(2).

Respectfully submitted,

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