SOUTH FLORIDA WATER MANAGEMENT DISTRICT, a water management district organized and existing under the laws of the State of Florida,

Plaintiff,

v.

THE STATE OF FLORIDA, AND THE TAXPAYERS, PROPERTY OWNERS AND CITIZENS WITHIN THE JURISDICTION OF THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT, INCLUDING NONRESIDENTS OWNING PROPERTY OR SUBJECT TO TAXATION THEREIN AND OTHERS CLAIMING ANY RIGHTS, TITLE OR INTEREST IN THE CERTIFICATES OF PARTICIPATION HEREIN DESCRIBED, OR TO BE AFFECTED IN ANY WAY THEREBY,

Defendants.
_____/

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 2008-CA-031975XXXXMB

PLAINTIFF'S MEMORANDUM OF FACT AND LAW
IN SUPPORT OF COMPLAINT AND SUPPLEMENT TO COMPLAINT FOR VALIDATION

Plaintiff, the South Florida Water Management District (the "District"), respectfully submits this Memorandum of Law in support of its Complaint and Supplement to Complaint for Validation, which is set for hearing at 1:30 p.m. on February 6, 2009. In this memorandum, the District first briefly describes the background and procedural posture of this case (pages 2-8). Then, the District spells out the documentary and other record evidence that supports each allegation of the complaint, thus demonstrating why validation is appropriate (pages 8-25). Finally, the District discusses the relevant law the Court must apply (pages 25-41).

I. BACKGROUND

A. Factual History

The District is a regional governmental agency created pursuant to the Florida Water Resources Act of 1972, Chapter 373, Florida Statutes (the "Act"). *See* Ex. 1.c.[1] The District is responsible for water quality, flood control, water supply and environmental restoration in sixteen (16) counties: Broward, Charlotte, Collier, Glades, Hendry, Highlands, Lee, Martin, Miami-Dade, Monroe, Okeechobee, Orange, Osceola, Palm Beach, Polk and St. Lucie. The District manages and protects water resources on behalf of 7.5 million South Floridians, and is the lead agency in restoring the Everglades.

The District acts through its governing board (the "Governing Board"), which is comprised of individuals with "significant experience in . . . agriculture, the development industry, local government, government-owned or privately owned water utilities, law, civil engineering, environmental science, hydrology, accounting, or financial businesses." § 373.073(2), Fla. Stat. (2008) (Ex. 1.d.).

On June 30, 2008, the Governing Board adopted Resolution No. 2008-643 directing the staff to begin negotiating an agreement to acquire as much as 187,000 acres of agricultural land owned by the United States Sugar Corporation and affiliated entities ("U.S. Sugar"). This acquisition is the first step in a larger program known as the "River of Grass Everglades Acquisition Project." These tracts of land would be used to reestablish a part of the historic connection between Lake Okeechobee and the Everglades through a managed system of storage and treatment. At the same time, these tracts of land will safeguard the St. Lucie and

[1]Unless otherwise noted, references are to exhibit numbers used in Plaintiff's Request for Judicial Notice, served February 3, 2009.

Caloosahatchee rivers and estuaries. Acquiring this real estate offers the District the opportunity and flexibility to store and clean water on a scale never before contemplated to protect Florida's coastal estuaries and to better revive, restore and preserve the Everglades. The benefits of this land acquisition would include: (1) increases in water storage to reduce harmful freshwater discharges from Lake Okeechobee to Florida's coastal rivers and estuaries; (2) improvements in the delivery of cleaner water to the Everglades; (3) preventing and reducing the flow of phosphorus from entering the Everglades; (4) eliminating the need for "back-pumping" water into Lake Okeechobee; and (5) sustainability of agriculture and green energy production. *See* Ex. 11-d & Compl. Comp. Ex. A, Ex. A.

On October 9, 2008, the Governing Board adopted two resolutions to facilitate financing of the proposed acquisition: First, Resolution No. 2008-1026 established a lease purchase financing program and introduced the first project under the newly-established program, which is the acquisition of the land and improvements of U.S. Sugar. *See* Ex. 7.d. (Compl. Comp. Ex. C.) Second, Resolution No. 2008-1027 authorized the issuance of Certificates of Participation ("COPs") in sufficient amounts to acquire all of the land and assets of U.S. Sugar, and provide additional revenue for water resource development projects. *See* Ex. 7.e. (Compl. Ex. A.) Also on October 9, 2008, the South Florida Water Management District Leasing Corporation (the "Corporation") adopted Corporate Resolution No. 2008-01 authorizing the Corporation to enter into a master lease purchase agreement with the District. *See* Ex. 13.d. (Compl. Comp. Ex. B.)[2]

Based on further negotiations with U.S. Sugar, on November 13, 2008, the Governing Board adopted Supplemental Resolution No. 2008-1109, which authorized the District to

[2]The details of the proposed transaction are explained in more detail in Section II below.

purchase approximately 182,500 acres of land, without purchasing the related assets (operating sugar mill, refinery, citrus processing plant and railroads). *See* Ex. 9.d. (Supp. Compl. Ex. A-1.) The District would retain a right of first refusal to purchase the operating assets at a later time. The right of first refusal provides the District with more flexibility in negotiating other acquisitions of land related to the River of Grass Acquisition Project and helps maintain the value of the property being acquired by the District while the District determines which portion of the land being acquired will be retained for the River of Grass Acquisition Project.

After two full days of presentations, public participation, and discussion, on December 16, 2008, the Governing Board voted, by a vote of 4-3, to advance the River of Grass Acquisition Project by executing a land sales agreement and lease with U.S. Sugar. *See* Exs. 11.b. & 11.f. The Governing Board members were fully briefed on the project's pros and cons by District staff, including environmental and financial experts. The Governing Board meetings were public, and supporters and opponents of the project had an opportunity to be heard. *See* Ex. 11.a.

The District entered into the Agreement for Sale and Purchase with U.S. Sugar and others dated December 23, 2008. *See* Ex. **15.a.** The agreement, together with a related lease agreement authorized thereby (**Ex. 15.c.**), provides for the acquisition by the District of approximately 187,000 acres of land upon the satisfaction of a number of conditions precedent and the payment of the purchase price. Together the documents provide for the acquisition of the land and the subsequent lease to U.S. Sugar for a limited period of time during which lease

term U.S. Sugar has agreed to use and manage the land subject to a number of limitations and restrictions benefiting the District.[3]

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[3]Together, the Agreement for Sale (Ex. 15.a.) and the Lease (Ex. 15.c) collectively provide for the District to acquire the lands needed for vital restoration projects, to be completed later, while providing for proper upkeep of the lands until construction begins. The negotiated purchase price and rent are not independent concepts; rather, they are dependent upon each other and have an off-setting effect that is factored into the overall appraisal process. The net effect is the same as if, as originally envisioned in the June 2008 statement of principles, the District purchased only the future interest in the lands, which would have accomplished the same net result without the lease. The use of the up-front purchase and lease back structure affords the District greater contractual control over the lands during the interim period than would result from a pure future interest purchase. This structure is consistent with the primary public purpose of the District's action, which is to provide for surface water storage and treatment necessary for Everglades restoration.

The Agreement for Sale (Ex. 15.a.) contains many protections for the District's benefit and in furtherance of the overall objective, including: section 5(f) provides for removal of lands from the contract if title conditions or ownership obligations are not compatible with District's requirements; throughout the agreement, environmental representations and warranties, environmental closing conditions, environmental inspection rights, environmental remediation obligations and environmental indemnity and escrow provisions evidence the District's governmental objectives (see, for example, sections 6 (due diligence deliveries), 7(a)(closing conditions), 10(b)(escrow provision),12(a)(ix) (seller's environmental representation and warranties), 16 (property inspection rights), and 21 (environmental remediation obligations and indemnities)); various covenants restrict U.S. Sugar's use of the land and U.S. Sugar's ability to enter contracts or leases affecting the land during the pre-closing period (see, for example, sections 12(a)(xvii)(restrictions on further contracts or tenant leases) and 19(m) (regulation of U.S. Sugar's use and affirmative maintenance obligations pending closing)); and, finally, section 19(j) provides the District with flexibility to cause relocation of U.S. Sugar's retained railroad if the location interferes with any District project.

Similarly, the Lease (Ex. 15.c) contains many provisions protecting the District's and the public's interests and protecting the property for its intended future purposes, including: section 2 restricts ongoing uses by the lessee (U.S. Sugar) and requires affirmative environmental and management practices consistent with the District's objectives; section 4 termination rights are designed to ensure that the lessee properly maintains the land during the lease; section 10 assignment and subleasing restrictions are consistent with the District's desire to ensure the land is occupied and operated in an acceptable manner; section 13 broadly indemnifies the District for any liability during the lease term; section 16 requires detailed insurance coverages that the lessee is required to maintained during the term; section 18 environmental indemnification and remediation provisions specifically recognize the ultimate purpose of the land for Everglades restoration; section 31 reserves to the District the right to access, inspect and monitor the land and lessee's compliance with operating requirements;

B. Procedural History

On October 14, 2008, the District filed this action seeking validation of its authority to cause the issuance of COPs and certain matters associated therewith pursuant to chapter 75 of the Florida Statutes. Section 373.573 of the Florida Statues authorizes the District to seek validation in the Circuit Court of Palm Beach County for COPs issued pursuant to Section 373.584. *See* Ex. 1.n. This Court has previously validated a similar District financing program in Case No. 2005 CA 011646. *See* Ex. 2. The judgment was not appealed.

On October 21, 2008, the Court issued a Notice and Order to Show Cause why the relief requested by the District should not be granted, scheduling a hearing for December 12, 2008.

On November 14, 2008, the District filed an Agreed Motion to File a Supplemental Complaint and an Agreed Motion for Amended Notice and Order to Show Cause. The court granted the motions and entered an amended Notice and Order to Show Cause, which retained the hearing date of December 12, 2008.

On various dates, the State Attorneys for the 9th, 10th, 11th, 15th, 16th , 17th, and 19th circuits responded to the complaint, with none raising substantive objections. On December 12, 2008, the New Hope Sugar Company and Okeelanta Corporation (collectively, "New Hope") served an answer and a memorandum in opposition to the complaint. Also on December 12, 2008, Dexter Lehtinin served an answer.

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section 33(H) imposes additional restrictions on lessee's use to ensure protection of the land for District purposes; section 33(P) restricts the lessee's ability to bind the land to contracts; and, finally, section 36 includes condemnation provisions to ensure that lessee receives no portion of any condemnation awards relating to the land, and preserving all awards relating to the land for the District.

On December 11, 2008, the District filed a Motion for Continuance of Bond Validation Hearing. The parties appeared on December 12, 2008, when the Court considered the motion and subsequently entered a Second Amended Notice and Order to Show Cause, rescheduling the bond validation proceeding for February 6, 2009.

Following the December 12, 2008, hearing, several more interested parties have appeared. On January 9, 2009, U.S. Sugar served a notice of appearance and a Motion to Intervene as Party Defendant. On January 12, 2009, Dexter Lehtinen, already a defendant, served a notice of appearance and an answer on behalf of the Miccosukee Tribe of Indians of Florida (the "Tribe"). On January 23, 2009, various individuals and the Concerned Citizens of Glades, Inc. (collectively, the "Citizens") served a notice of appearance and an answer to the complaint. On February 3, 2009, the National Audubon Society and Florida Audubon Society served a notice of appearance and notice of intervention. Also on February 3, 2009, the Citizens served a memorandum of law in opposition to validation.[4] It is expected that these parties will appear at the hearing on February 6, 2009. In addition, pursuant to chapter 75 and the Second Amended Notice and Order to Show Cause, other interested parties may appear at the hearing.

During the past two months, the District and others have voluntarily participated in accelerated discovery proceedings, including: exchanges of expert interrogatories among the District, New Hope, and the Tribe; the District answering substantive interrogatories served by the Tribe; the District producing documents in response to requests to produce and public

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[4]Also on February 3, 2009, the law firm of Casey Ciklin served a limited notice of appearance "on behalf of the public" along with a motion to compel public attendance at the deposition of Tommy Strowd (which was conducted on January 26, 2009). Casey Ciklin also filed a notice of hearing on the motion for February 9, 2009. This issue is completely collateral to the bond validation proceeding and, therefore, the District will not address it here.

records requests; depositions of eight District staff by New Hope and the Tribe; and the District's deposition of four experts identified by New Hope and the Tribe.[5]

On February 3, 2009, the District served a Motion to Strike and Motion in Limine Regarding Issues and Evidence Beyond Scope of Hearing. The same day, the District served a Request for Judicial Notice. It will be necessary for the Court to address these two preliminary matters at the beginning of the hearing on February 6 (along with U.S. Sugar's pending Motion to Intervene).

II. SUPPORT FOR COMPLAINTS' ALLEGATIONS

In this section, the District recites each allegation in the complaint (and supplement) and then identifies the grounds supporting each allegation. In large measure, the various responsive pleadings filed to date have either admitted to the allegations or deferred to the documentary evidence, which speaks for itself. The following "cross-walk" will assist the Court in finding the documentary basis for the allegations in the complaint and in understanding the transaction's details.

1. Allegation: *This Court has jurisdiction over this matter pursuant to Sections 75.01 and 373.573, Florida Statutes.*

Proof: *See* **Ex. 1.n.** (section 373.573 of the Florida Statutes, authorizing the governing board of a water management district to have bonds validated pursuant to chapter 75); § 75.01, Fla. Stat. (circuit courts have jurisdiction to determine validation of bonds and certificates of indebtedness and all matters connected therewith).

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[5]The parties' voluntary cooperation in discovery moots the motions to shorten time for responding served by New Hope (January 2), the District (January 6), and the Tribe (January 12).

2. Allegation: *Plaintiff is a water management district, which is organized, exists and operates pursuant to the laws of the State of Florida, particularly the Florida Water Resources Act of 1972, Chapter 373, Florida Statutes, as amended (collectively, the "Act").*

Proof: *See* **Ex. 1.c.** (§ 373.069(1)(e), Fla. Stat., establishing District).

3. Allegation: *Headquartered in West Palm Beach, Palm Beach County, Florida, the District's territory encompasses all or a part of sixteen counties, i.e., Broward, Charlotte, Collier, Glades, Hendry, Highlands, Lee, Martin, Miami-Dade, Monroe, Okeechobee, Orange, Osceola, Palm Beach, Polk and St. Lucie.*

Proof: *See* **Ex. 1.c.** (§ 373.069(2)(e), Fla. Stat., defining District boundaries).

4. Allegation: *A nine-member Governing Board is authorized to set policy for and governs the District in accordance with Chapter 373, Florida Statutes.*

Proof: *See* Ex. **1.d.** (§ 373.073(1)(a), Fla. Stat., providing for nine-member Governing Board); **Ex. 1.e.** (§ 373.083, Fla. Stat., providing general powers and duties of Governing Board).

5. Allegation: *As permitted by the Act, specifically Section 373.584, Florida Statutes, at an open, public and duly noticed meeting on October 9, 2008, the Governing Board adopted a resolution ("Governing Board Resolution"), authorizing a certificate of participation lease-purchase financing program to finance and refinance certain capital projects, programs and works as approved by the District from time to time (the "Project"). The COPs are designated "Certificates of Participation, Series ____, Evidencing an Undivided Proportionate Interest of the Registered Owners thereof in Basic Lease Payments to be Made by the Governing Board of the South Florida Water Management District, as Lessee, Pursuant to a Master Lease Purchase Agreement with South Florida Water Management Leasing Corp., as Lessor." The principal amount of COPs that may be issued under the program is not limited by*

a specific par amount. At the meeting, the Governing Board Resolution and its exhibits were available for inspection and review by the public. A copy of the Governing Board Resolution No. 2008-1027 and the exhibits are attached hereto as Exhibit "A" and incorporated by reference herein.

Proof: *See* **Ex. 1.o.** (§ 373.584(1), Fla. Stat., authorizing District to issue revenue bonds for capital or other projects for purposes permitted by State Constitution, and § 373.584(4)(a), Fla. Stat., defining "Bonds" to include certificates of participation); **Ex. 7.a.** (notice of meeting published in the Florida Administrative Weekly dated Sept. 26, 2008); **Ex. 7.e.** (sections 1 and 3 of Governing Board Resolution, adopting recitals that state COPs' purpose and regarding par amount of COPs that may be issued in future).

6. Allegation: *The South Florida Water Management District Leasing Corp. ("Corporation"), a non-profit corporation was created on November 9, 2005, in accordance with the Act, and particularly Chapter 617, Florida Statutes. The Governing Board of the District and the Board of Directors of the Corporation, while comprised of the same members, are separate and distinct legal entities.*

Proof: *See* **Ex. 12..a.** (certificate of Status and Certified Articles of Incorporation, indicating Corporation was properly created as not-for-profit corporation and is currently active).

7. Allegation: *As permitted by the Act, at an open, public and duly noticed meeting on October 9, 2008, the Corporation adopted a resolution ("Corporate Resolution"), authorizing the Corporation to enter into a Master Lease Purchase Agreement in substantially the same form of Master Lease Purchase Agreement which is appended as an exhibit to the Governing Board and Corporate Resolutions. At the meeting, the Corporate Resolution and its exhibits were available for inspection and*

review by the public. A copy of the Corporate Resolution No. 2008-01 and exhibits are attached hereto as Exhibit "B" and incorporated by reference herein.

Proof: *See* **Ex. 13.a**. (notice of public meeting published in the Florida Administrative Weekly dated September 26, 2008); **Ex. 7.d**. (Corporate Resolution 2008-01, section 1 of which authorizes Corporation to enter into Master Lease Purchase Agreement).

8. Allegation: *Under a Master Lease Purchase Agreement, as referenced above, the Corporation is authorized to lease-purchase to the District certain improvements, equipment, fixtures and structures ("Facilities") on specific facility sites, which are or will be owned or leased by the District ("Facility Sites").*

Proof: *See* **Ex. 7.e**. (Governing Board Resolution No. 2008-1027, describing District's intent to establish master lease purchase program to finance and refinance certain capital projects, programs and works through issuance of COPs; see especially sections 2.1 and 2.10(f) of Master Lease Purchase Agreement (attached to resolution as Ex. B)); **Ex. 2.b**. (§ 373.019(26), Fla. Stat., defining works of District as "those projects and works, including, but not limited to, structures, impoundments, wells, streams, and other watercourses, together with the appurtenant facilities and accompanying lands, which have been officially adopted by the governing board of the district as works of the district"); **Ex. 1.o**. (§ 373.584(1), Fla. Stat., authorizing District to issue revenue bonds "to finance the undertaking of any capital or other project for the purposes permitted by the State Constitution, to pay the costs and expenses

incurred in carrying out the purposes of this chapter, or to refund revenue bonds of the district issued pursuant to this section");[6]

9. Allegation: *The Governing Board is authorized to lease or sublease each Facility Site to the Corporation through one or more ground leases (the "Ground Lease"), in substantially the same form as is appended to Exhibits "A" and "B."*

Proof: To establish the leasing relationship provided for in the Master Lease Purchase Agreement between the District, as the lessee, and the Corporation, as the lessor, it is necessary to first establish with the Corporation a leasehold interest in the land. This is accomplished through the Ground Lease, forms of which are attached to Governing Board Resolution No. 2008-1027 (**Ex. 7.e.**, Ex. D) and to Corporate Resolution No. 2008-01 (**Ex. 13.d.**, Ex. B). Once the Corporation has this interest in the land, it may then enter into the Master Lease Purchase

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[6]It is vitally important for the Court to understand the power section 373.584 of the Florida Statutes bestows upon the District. Subsection 373.584(4)(b) defines "project" to mean "a governmental undertaking approved by the governing body of a water management district and ***includes all property rights***, easements, and franchises relating thereto and ***deemed necessary or convenient*** for the construction, acquisition, or operation thereof, and embraces any capital expenditure ***which the governing body of a water management district shall deem to be made for a public purpose***" (emphases added). Subsection 373.584(4)(a) defines "bonds" to include COPs, and subsection 373.584(4)(c) defines "revenue bonds" to mean "bonds of a water management district to the payment of which the full faith and credit and power to levy ad valorem taxes are not pledged." The District's powers and authority relating to revenue bonds (including COPs) are set forth in subsection 373.584(2) (emphases added):

> ***The powers and authority of districts*** to issue revenue bonds, including, but not limited to, bonds to finance a stormwater management system as defined by s. 373.403, and to enter into contracts incidental thereto, and to do all things necessary and desirable in connection with the issuance of revenue bonds, ***shall be coextensive with the powers and authority of municipalities to issue bonds under state law. The provisions of this section constitute full and complete authority for the issuance of revenue bonds and shall be liberally construed to effectuate its purpose.***

Agreement with the District and lease back to the District both the land and the improvements to be constructed on the land. *See* Governing Board Resolution No. 2008-1027, § 1 (adopting recital authorizing District to lease or sublease each Facility Site to Corporation through one or more ground leases); § 6 (authorizing form of ground lease agreement) (**Ex. 7.e.**); Master Lease Purchase Agreement recitals (authorizing District to lease or sublease each Facility Site back from Corporation through one or more ground leases) (**Ex. 7.e.**, Ex. B).

10. Allegation: *Under the Master Lease Purchase Agreement, the District is authorized to and lawfully retains title to the Facility Sites or related Facility Site Leaseholds, and is authorized to lease-purchase the Facilities and Facility Sites in accord with schedules ("Schedules") attached to the Master Lease Purchase Agreement. Together, the Master Lease Purchase Agreement and each Schedule will comprise a lease ("Lease").*

Proof: Lease purchase financing is a method of financing pursuant to which the lessee (the District under the Master Lease Purchase Agreement) agrees to make lease payments to the lessor (the Corporation). The lease payment includes both principal and interest and at the time the final lease payment is made the lessee becomes the owner of the improvement. In order to raise the capital necessary to purchase or build a project the District and the Corporation will enter into a supplemental lease schedule which will identify a specific project and the lease payments associated with the project. The Corporation then assigns to a corporate trustee the Corporation's interests under both the Ground Lease and the Master Lease Purchase Agreement, as they relate to that individual project. The corporate trustee then authenticates and issues the COPs pursuant to the terms of the Master Trust Agreement. The COPs represent an investor's right to receive its proportionate share in each lease payment being made under

the Master Lease Purchase Agreement and the related lease schedule. *See* **Ex. 7.e.**, Ex. B, §§ 1.1, 2.10(f), 6.1 (Master Lease Purchase Agreement sections defining "Lease" to mean, collectively, Master Lease Purchase Agreement and each Schedule thereto (1.1); providing that District shall have fee simple title or valid leasehold interest to all Facility Sites (2.10(f)); and providing fee title to Facility Sites shall be in name of District (6.1)).

11. Allegation: *In accordance with the payment schedule set forth in the Lease, the District is authorized to make Basic Lease Payments ("Basic Lease Payments") to the Corporation for each Lease, from funds which the District appropriates each year. Such funds may include ad valorem revenues. The District cannot be compelled to appropriate funds with which to make the Basic Lease Payments.*

Proof: *See* **Ex. 7.e.**, Ex. B, § 3.1 (Master Lease Purchase Agreement providing for District to pay Basic Lease Payments stated in each Schedule and any Additional Lease Payments, providing lease payments may be made only from funds annually appropriated by District, and providing that District is not pledging its powers of taxation nor full faith and credit of District).

12. Allegation: *The District has not pledged its ad valorem taxing powers to pay any sum due under the Master Lease Purchase Agreement or any lease. Neither the Corporation, nor Trustee, or any holder of a COP can compel the District to levy any ad valorem tax to pay any sum due under the Master Lease Purchase Agreement or any Lease.*

Proof: *See* **Ex. 7.e.**, Ex. B, § 3.1 (Master Lease Purchase Agreement providing that District is not pledging its powers of taxation nor full faith and credit of District, and providing that neither Corporation, Trustee, nor any COP holder can compel levy of any ad valorem taxes by District).

13. Allegation: *Neither the full faith and credit of the District nor the State of Florida or any political subdivision or agency of the State is pledged to pay Basic Lease Payments or any other sum due under the Master Lease Purchase Agreement.*

Proof: *See* **Ex. 7.e.**, Ex. B, § 3.1 (Master Lease Purchase Agreement providing that full faith and credit of District, State of Florida or any political subdivision or agency thereof is not pledged).

14. Allegation: *Upon the direction and authorization of the Governing Board, the Corporation shall be duly authorized to fund the acquisition, construction and installation of Facilities by entering into a Master Trust Agreement with the Trustee ("Master Trust Agreement") in substantially the same form as is appended to Exhibits "A" and "B."*

Proof: *See* **Ex. 7.e.**, § 5 & Ex. C; **Ex. 13.d.**, § 3, Ex. C (Governing Board Resolution and Corporate Resolution approving form of Master Trust Agreement, pursuant to which trustee authenticates and issues COPs to raise capital to finance cost of project being financed through lease payments being made by District under Master Lease Purchase Agreement).

15. Allegation: *Under the Master Trust Agreement, the Corporation is authorized to (a) establish a trust and assign to the Trustee all of the Corporation's right, title and interest in and to the Master Lease Purchase Agreement and its Schedules, (b) direct the Trustee to execute and deliver series of COPs to the public, (c) deposit the proceeds of each series of COPs with the Trustee and (d) direct the Trustee to hold the proceeds from the sale of the COPs in trust to pay the costs of acquiring, constructing and installing the Facilities.*

Proof: *See* **Ex. 7.e.**, Ex. C, §§ 201, 202, 302, 305(c), art. IV; **Ex. 13.d.**, Ex. C, §§ 201, 202, 302, 305(c), art. IV (Master Trust Agreement declaring that Trustee holds Trust Estate for use and

benefit of COP holders; authorizing Corporation to assign and transfer to Trustee its rights under each Ground Lease and Lease; authorizing Corporation at request of District to direct Trustee to execute and deliver COPs to public; requiring proceeds of COPs to be deposited with Trustee; establishing accounts and providing for administration of funds and conditions for disbursements to pay for costs of acquiring, constructing and installing Facilities).

16. Allegation: *Through one or more assignment agreements ("Assignment Agreement"), the Corporation is authorized to assign the Corporation's right to receive Basic Lease Payments under each Lease and all of its other rights in each Ground Lease and Lease to a Trustee, in substantially the same form as is appended to Exhibits "A" and "C."*

Proof: For the Trustee to authenticate and issue the COPs secured by the lease payments to be made by the District, the Corporation must first assign to the Trustee the Corporation's interest under the related Ground Lease and Lease. *See* **Ex. 7.e.**, § 7 (Governing Board Resolution approving form of Assignment Agreement whereby Corporation shall assign to Trustee all of its right, title and interest in and to Ground Lease and Lease or Leases created by one or more Schedules, including its right to receive Basic Lease Payments under such Leases).

17. Allegation: *The COPs evidence undivided proportionate interests in the principal and interest of the Basic Lease Payments and are secured by and payable from only the Trust Estate, created under the Master Trust Agreement or any supplemental Trust Agreement. The Trust Estate is comprised of all the estate, right, title and interest of the Trustee in (a) the Basic Lease Payments, the Master Lease Purchase Agreement, the Leases and each Assignment Agreement, (b) all amounts, including investment earnings, deposited in the funds and accounts created pursuant to the Master Trust*

Agreement and any supplemental Trust Agreement in accord with the Master Lease Purchase Agreement; and (c) any and all monies, which the Trustee receives and is not required to remit to the Governing Board, pursuant to the Master Lease Purchase Agreement or the Master Trust Agreement.

Proof: *See* **Ex. 7.e.**, Ex. C, §§ 101, 201, (Master Trust Agreement defining "Series" or "Series of Certificates" to mean "each series of Certificates evidencing an undivided proportionate interest of the owners thereof in a particular Lease and the Basic Lease Payments thereunder, issued pursuant to this Trust Agreement or a Supplemental Trust Agreement"; defining "Trust Estate" to include "all estate, right, title and interest in and to the Basic Lease Payments, the Master Lease Purchase Agreement, the Leases and each Assignment Agreement; all amounts deposited in the funds and accounts created by the Master Trust Agreement; and all other monies received by the Trustee pursuant to the Master Trust Agreement"; and providing each Series of Certificates represents an undivided proportionate interest of the Certificate Holders in Basic Lease Payments under corresponding Lease).

18. Allegation: *Pursuant to the Master Trust Agreement and upon the direction and authorization of the Governing Board, each series of COPs shall be authorized by the Corporation, and executed and delivered by the Trustee to (a) finance or refinance the cost of acquiring Facility Sites and/or Facilities, (b) finance or refinance the cost of constructing, installing and equipping Facilities, (c) finance or refinance the cost of increasing, improving, modifying, expanding or replacing any Facilities, (d) pay or provide for the payment of the principal portion and interest portion of the Basic Lease Payments with respect to, all or a portion of the Facilities financed from the proceeds of any series of COPs theretofore executed and delivered, (e) fund a reserve account, (f) capitalize the interest portion of Basic Lease Payments during construction, and (g) pay the costs of issuance applicable thereto, including any*

premium for any credit enhancement on the COPs. The District may enter into one or more hedge or swap agreements in connection with the COPs.

Proof: *See* **Ex. 7.e.**, § 3 & Ex. C, § 302 (Governing Board Resolution and Master Trust Agreement describing purposes for which Corporation may authorize Trustee to execute and deliver COPs at request of District).

19. Allegation: *At the direction of the Corporation, the Trustee shall be authorized to issue the COPs as fully registered certificates, which will mature on a specified date or dates, not more than 30 years after the date of initial issuance, bear interest at a rate that does not exceed the maximum rate permitted under Florida law and have such other details as may be determined by subsequent resolution or resolutions of the Governing Board and the Corporation, and incorporated in the Master Trust Agreement.*

Proof: *See* **Ex. 7.e.**, Ex. C, § 303 (Master Trust Agreement describing COPs terms and providing that, each time series of COPs is to be issued, District will request Corporation to authorize Trustee to authenticate and issue such series based on financial terms set out in related Lease).

20. Allegation: *By resolution, and as required by law, the Governing Board is authorized and required to choose a qualified banking institution to serve as Trustee which is authorized to do business in Florida, accepts trusts under Florida law, and has the ability to accept and administer the trust created by the Master Trust Agreement, and such Trustee shall be obligated to certify to the proper expenditure of the proceeds of the COPs and be a fiduciary for the certificate holders.*

Proof: *See* **Ex. 7.e.**, Ex. C, §§ 202, 401, 402 (Master Trust Agreement requiring Trustee to establish all funds and accounts into which all proceeds from the sale of a series of COPs shall

be deposited; authorizing Trustee to disburse amounts in funds to pay costs of project only upon submission by District in proper form and containing required certifications related to amounts being requisitioned, including certification that each obligation, item of cost or expense mentioned therein has been properly incurred, is an item of Cost of the Facilities comprising the related Project, and has not been the basis of any previous withdrawal).[7]

21. Allegation: *A Trustee which meets the qualifications in paragraph 20 above, as a matter of law, will be acceptable to the Court.*

Proof: *See* § 75.04(2), Fla. Stat.

22. Allegation: *The District has fully complied with the law in its authorization of the certificates of participation lease-purchase financing structure and any interim financing, and has completed all conditions precedent to seeking validation of its indebtedness.*

Proof: Through the adoption of the Governing Board Resolution and the Corporate Resolution, the District and the Corporation, respectively, has each taken the necessary corporate steps to authorize the master lease purchase program and to authorize the execution of the documents and agreements that implement such financing program. No other action is

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[7]Section III of the Citizens' memorandum of law in opposition to validation (pages 23-27) concerns this paragraph of the complaint. Citizens do not deny that the District has properly pled the language required section 75.04(2) of the Florida Statutes, but they do claim that the allegation is false. It is important for this Court to know that the Corporation has approved the selection of Deutsche Bank National Trust Company, which is authorized to accept trusts under Florida law as provided in Corporate Resolution No. 2008-01 on October 9, 2008. *See* **Ex. 13.d.** Pursuant to Governing Board Resolution No. 2008-1027, the Governing Board approved the form of the Master Trust Agreement and the Trustee. The identical Master Trust Agreement language, and the selection of Deutsche Bank as trustee, was approved and validated by this Court in the 2006 case involving a similar COPs program. See Ex. 2, at ¶¶ 24-27 & V.

required at this time. This Court previously ruled that the process was sufficient when followed on a similar financing program, which was validated in 2006. *See* **Ex. 2.**

23. Allegation: *The initial term and all renewal terms of each Lease entered into pursuant to the Master Lease Purchase Agreement expires on September 30 of each fiscal year of the District, but may be automatically renewed annually, subject to the District making sufficient annual appropriations therefor. The Master Lease Purchase Agreement provides that the District's obligation to make lease payments shall not be a debt of the District or the State of Florida, and shall not be a pledge of the full faith and credit of the District or the State of Florida, and that neither the District nor the State of Florida shall be obligated to make any payments from ad valorem or other taxes, except the taxes which are included in the District's legally available funds budgeted and appropriated to make Basic Lease Payments each year.*

Proof: **Ex. 7.e.**, Ex. B, §§ 3.1, 3.5 (Master Lease Purchase Agreement providing that District is not pledging funds from any source of taxation nor full faith and credit of District; providing that lease payments may be made only from funds annually appropriated by District; and automatically renewing all Leases on September 30, unless Governing Board gives notice of intent not to appropriate funds).

24. Allegation: *Charged with regional flood control, water supply and water quality protection and ecosystem restoration management within its territorial boundaries, the District's responsibilities and lawful mandate include, but are not limited to, restoring and cleaning up the Everglades ecosystem.*

Proof: See **Ex. 1.a.** (§ 373.016(3), Fla. Stat., declaring it to be Legislature's policy: (a) to provide for the management of water and related land resources; (b) to promote the

conservation, replenishment, recapture, enhancement, development, and proper utilization of surface and ground water; (c) to develop dams, impoundments, reservoirs, and other works to provide water storage; (d) to promote availability of sufficient water for all existing and future reasonable-beneficial uses and natural systems; (e) to prevent damage from floods, soil erosion, and excessive drainage; (f) to minimize degradation of water resources caused by the discharge of stormwater; (g) to preserve natural resources, fish, and wildlife; (h) to protect the water quality of the state by controlling pollution; (i) to promote recreational development, protect public lands, and assist in maintaining the navigability of rivers and harbors; and (j) to otherwise promote the health, safety, and general welfare of the people of the State of Florida); *see also* § 373.4592(1), Fla. Stat. (expressing intent of Legislature to promote Everglades restoration and protection and Legislature's findings regarding the ecological endangerment currently faced in Everglades).

25. Allegation: *As permitted by the Act, specifically Section 373.139, Florida Statutes, at an open, public and duly noticed meeting on October 9, 2008, the Governing Board adopted a "Plan Resolution," amending the five-year plan to include the acquisition of U.S. Sugar's land and assets. At the meeting, the Plan Resolution and its exhibits were available for inspection and review by the public. A copy of the Plan Resolution No. 2008-1026 is attached hereto as Exhibit "C" and incorporated by reference herein.*

Proof: See **Exs. 7.a. & 7.d.** (notice of public meeting published in Florida Administrative Weekly on September 26, 2008, and Governing Board Resolution 2008-1026 amending the five-year plan).

26. Allegation: *To continue its mandate, the District is undertaking the continued restoration of natural resources, including the Everglades ecosystem, by undertaking projects pursuant to Section 373.016(3), 373.0831 and 373.086(1), Florida Statutes, which is known as the "River of Grass Everglades Acquisition Project" as part of the Project (the "Initial Project"). The cost of the financing of the Initial Project shall be financed with the initial series of COPs to be issued in an aggregate principal amount of not to exceed $2,200,000,000.*

Proof: *See* **Ex. 7.e.**, § 3 (Governing Board Resolution No. 2008-1027 authorizing issuance of COPs not to exceed $2,200,000,000); **Ex. 1.a.** (§ 373.016(3), Fla. Stat., declaring Legislature's policies in adopting Chapter 373); **Exs. 1.b & 1.f.** (§§ 373.0831 & 373.019(22), Fla. Stats., authorizing District to fund and implement water resource development projects, including collection and evaluation of surface water and groundwater data; structural and nonstructural programs to protect and manage water resources; development of regional water resource implementation programs; construction, operation, and maintenance of major public works facilities to provide for flood control, surface and underground water storage, and groundwater recharge augmentation; and related technical assistance to local governments and to government-owned and privately owned water utilities).

27. Allegation: *As permitted by the Act, specifically Section 373.584, Florida Statutes, at an open, public and duly noticed meeting on November 13, 2008, the Governing Board adopted a supplemental resolution to Governing Board Resolution No. 2008-1027 ("Supplemental Resolution") which reflects recent negotiations that have transpired between Plaintiff and United States Sugar Corporation since the filing of the Complaint relative to a purchase of land only and a right of first refusal with respect to certain operating assets. A copy of the Supplemental Resolution is attached to the*

Supplement to Complaint as Exhibit "A-1" and incorporated by reference herein. The acquisition of such lands (and potentially assets) of U.S. Sugar includes certain lands (and potentially assets) that likely are not needed for the public purpose of restoring, protecting and preserving the Everglades ecosystem as part of the Initial Project; and, the District is authorized, in such circumstance, to acquire same and diligently pursue their disposition and sale.

Proof: *See* Ex. **9.d.**, § 1 (Governing Board Resolution No. 2008-1109 (Supplemental Resolution) adopting recitals authorizing a purchase of land only with a right of first refusal for the purchase of certain operating assets of U.S. Sugar and regarding purchase of land and assets that may not be needed for public purpose of restoring, protecting and preserving Everglades); **Ex. 1.i.** (§ 373.139, Fla. Stat., authorizing District to acquire in fee title to real property, easements and other interests or rights therein); **Ex. 1.g.** (§ 373.089, Fla. Stat., authorizing District to sell lands, or interests or rights in lands, Governing Board determines to be surplus).

28. Allegation: [omitted][8]

29. Allegation: *The District is authorized to lease all or a portion of the Initial Project to one or more private entities.*

Proof: *See* **Ex. 1.h.** (§ 373.093, Fla. Stat., authorizing District to lease any lands or interest in land to which District has acquired title).

30. Allegation: *The Governing Board's finding in its Staff Report entitled "Summary of Benefits of USSC Acquisition," attached to the Governing Board Resolution and the Plan Resolution, evidences and summarizes the due and reasonable necessity for the acquisition of the land and assets to be*

[8]Under the agreement ultimately reached (Ex. 15.a.), the District is not going to acquire land located outside of the District's territory; therefore, this allegation is moot.

acquired from United States Sugar Corporation as a major component of the restoration of the Everglades ecosystem.

Proof: *See* **Ex. 7.e.**, at 3 and Ex. A (Governing Board Resolution No. 2008-1027, recitals and Exhibit A summarizing benefits).

31. Allegation: *The issuance of the COPs is consistent with the prior determinations of this Court on February 23, 2006, wherein this Court validated the authority of the District to issue its "South Florida Water Management District Certificates of Participation, Series 2006, evidencing an Undivided Proportionate Interest of the Registered Owners thereof in Basic Lease Payments to be Made by the Governing Board of the South Florida Water Management District, as Lessee, Pursuant to a Master Lease Purchase Agreement with South Florida Water Management Leasing Corp., Lessor" for the purpose of financing expansion of stormwater treatment areas, construction of water preservation areas and restoration of certain coastland wetlands.*

Proof: *See* **Ex. 2** (Final Judgment Validating Certificates of Participation Lease-Purchase Financing Not to Exceed $1.8 Billion, Case No. 2005 CA 011646).

32. Allegation: *The health and safety and public welfare of the citizens of Florida will be benefited by the District financing, constructing, equipping and installing the Initial Project. The financing of the Initial Project under the Act is and constitutes a valid public purpose.*

Proof: *See* Ex. **1.i.**(§ 373.139, Fla. Stat., declaring that District's acquisition of land for water and water-related resources to be conserved and protected shall be a public purpose for which public funds may be expended); Ex. **1.o.** (§ 373.584(4)(b), Fla. Stat., defining "project" for purposes of issuing COPs to mean ***"a governmental undertaking approved by the governing body of a water management district and includes all property rights,*** easements, and

franchises relating thereto and ***deemed necessary or convenient*** for the construction, ***acquisition,*** or operation thereof, and ***embraces any capital expenditure which the governing body of a water management district shall deem to be made for a public purpose***") (emphases added).

33. Allegation: *The COPs to be issued pursuant to the proposed lease-purchase program are of the character and the proceedings preliminary to their issuance are of the nature, which entitle Plaintiff to proceed within the provision of Chapter 75, Florida Statutes, to cause the COPs to be issued.*

Proof: See **Ex. 1.n.** (§ 373.573, Fla. Stat., authorizing Governing Board to have bonds validated pursuant to chapter 75); **Ex. 1.0.** (§ 373.584(4)(a), Fla. Stat., defining "Bonds" to include COPs).

III. LEGAL ANALYSIS

A. Standard of Review

Section 75.01 of the Florida Statutes provides that "[c]ircuit courts have jurisdiction to determine the validation of bonds and certificates of indebtedness and all matters connected therewith." The Court's narrow task in this proceeding is to determine whether (1) the District has legal authority to issue the COPs, (2) the purpose of the COPs is legal, and (3) the issuance of the COPs complies with the requirements of law. *See Strand v. Escambia County*, 992 So. 2d 150, 154 (Fla. 2008); *Boschen v. City of Clearwater*, 777 So. 2d 958, 962 (Fla. 2001); *Wohl v. State*, 480 So. 2d 639, 641 (Fla. 1985). "The function of a validation proceeding is merely to settle the basic validity of the securities and the power of the issuing agency to act in the premises." *State v. Manatee County Port Authority*, 171 So. 2d 169, 171 (Fla. 1965).

In this case, the various defendants have raised many issues far afield of the three germane inquiries the Court is authorized to make under chapter 75. Bond validation hearings

are not the proper forum for any matters that are not dispositive of the three well-recognized and authorized inquiries:

> It was never intended that proceedings instituted under the authority of this chapter [75] to validate governmental securities would be used for the purpose of deciding collateral issues or those issues not going directly to the power to issue the securities and the validity of the proceedings with relation thereto.

State v. City of Miami, 103 So. 2d 185, 188 (Fla. 1958). Therefore, collateral issues—issues that do not go to the entity's authority to issue bonds, the legality of the purpose for which the bonds are issued, and the legality of the process followed to issue bonds—are not within the province of this Court when conducting a bond validation proceeding.

Limiting bond validation proceedings to only the questions of law or fact that are relevant to the validity of the indebtedness at issue is necessary to preserve the statutory purpose of bond validation proceedings: putting to rest any questions regarding the validity of the bonds and making certain the marketability of the bonds in a timely fashion.

> [R]ecognition of the propriety of injecting collateral questions into bond validation proceedings would seriously handicap the speedy and efficient disposition of bond validation proceedings in this state and, as a result, would defeat the purpose of the statute and the rules of this Court and seriously impair the general welfare.

Id. at 188. Thus, "[c]ollateral attacks not germane to the main inquiry . . . are properly dismissed from consideration, leaving the determination of same to a proper forum in an appropriate direct proceeding wherein all interested and affected parties may be heard." *State v. Sarasota County*, 118 Fla. 629, 644, 159 So. 797, 803 (1935).

The District has filed a Motion to Strike and Motion in Limine Regarding Issues and Evidence Beyond Scope of Hearing. The District will not repeat its arguments here, but asks the Court to rule on the motion at the commencement of the hearing on February 9, 2009, to prevent

defendants from improperly hijacking the proceeding and confusing matters with their host of collateral issues.

The findings and decisions of the District's Governing Board are presumed valid and should be considered correct unless patently erroneous. *See Strand*, at 156; *see also Lee County v. S. Fla. Water Mgmt. Dist.*, 805 So. 2d 893, 896 (Fla. 2d DCA 2001) (in temporary injunction action against District, a state authority whose action was at least facially within its discretion, trial court properly required heightened showing by challengers that District's planned conduct would constitute a patent violation of law or palpable abuse of authority commensurate with illegality). The Court is not called upon to reweigh the evidence or to second-guess the political, financial, or policy considerations underlying the issuance of the COPs. *See, e.g., Boschen*, at 968; *Panama City Beach Cmty. Redev. Agency v. State*, 831 So. 2d 662, 667-69 (Fla. 2002) (legislative determinations are entitled to a presumption of correctness); *State v. Div. of Bond Fin.*, 530 So. 2d 289, 290 (Fla. 1988); *Town of Medley v. State*, 162 So. 2d 257-59 (Fla. 1964).

Town of Medley is instructive. There, the trial court denied the validation of the bonds, in part, on the basis that the proposed plan of financing was "unreasonable and not financially and economically feasible" under the facts and circumstances of the case and "would eventually result in depriving the Town of its traditional and necessary operating expenses." The Supreme Court reversed and held: "[w]e have consistently ruled that questions of business policy and judgment incident to the issuance of revenue issues are beyond the scope of judicial interference and are the responsibility and prerogative of the governing body of the governmental unit in the absence of fraud or violation of legal duty." *Town of Medley*, 162 So. 2d at 258-59.

B. The District's Authority to Issue the COPs

Manifestly, the District is authorized to issue COPs. See § 373.584, Fla. Stat. (Ex. 1.n.). The statute defines revenue bonds to include COPs, and provides:

> ***The powers and authority of districts*** to issue revenue bonds ... and to do all things necessary and desirable in connection with the issuance of revenue bonds, ***shall be coextensive with the powers and authority of municipalities to issue bonds under state law. The provisions of this section constitute full and complete authority for the issuance of revenue bonds and shall be liberally construed to effectuate its purpose.***

§ 373.584(2), Fla. Stat. As a result, the District possesses the same broad powers to issue COPs that municipalities possess under chapter 166 of the Florida Statutes. This Court has previously recognized and validated the District's authority to issue COPs. *See* Ex. 2.

Both New Hope and the Tribe have identified expert witnesses, whose testimony they hope to introduce at the validation hearing. The District objects to these witnesses, because their testimony and opinions concern only collateral issues. However, it is worth noting that the District has deposed these four expert witnesses, and none has opined that the District lacks authority to issue COPs.

Citizens, however, have suggested as much in their memorandum of law in opposition, served February 3, 2009. In particular, Citizens' arguments I and II suggest that the District's power to issue the COPs is limited or restricted, and that the District has not overcome the restrictions. These arguments are not well-founded.

1. *Voter Approval Is Not Required by Article VII, Section 12*

Citizens contends that article VII, section 12, of the state constitution requires the District to obtain referendum approval before issuing the COPs, because the lease payments will be "payable from ad valorem taxation." This argument is misguided on two fronts: the

obligation to make lease payments is an annual obligation and does not extend more than twelve months and the lease payments are not "payable from ad valorem taxation."

Citizens' argument ignores the plain language of the constitution, of the Florida Statutes, and of the governing resolution and agreements. *See* Master Lease Purchase Agreement § 3.1 (Ex. 7.e., Ex. B). It also ignores the Supreme Court's decision in *Strand*, which expressly rejected the reasoning advanced by Citizens. In September 2007, the Supreme Court issued an opinion in *Strand* concluding that "payable from ad valorem taxation" meant potentially payable from ad valorem tax revenues and reversing *State v. School Board of Sarasota County*, 561 So. 2d 549 (Fla. 1990). On motion for rehearing, but before oral argument on rehearing, the Supreme Court quickly issued a revised opinion restoring the holding of *Sarasota County*. Following oral argument on rehearing, in September 2008, the Supreme Court issued its final opinion in *Strand*, reaffirming its long-held distinction between (1) pledges of the ad valorem *taxing power* and (2) use of ad valorem tax revenues. *See Strand*, 992 So. 2d at 157-59; *see generally* Robert C. Reid and Jason M. Breth, *Miami Beach: Receded, Revised, and Reaffirmed*, Fla. B.J., Feb. 2009, at 18 (describing history and meaning of *Strand* decision). *Strand* is wholly consistent with the relevant statutory language here (section 373.584), which provides that "the ad valorem ***taxing powers*** of the district may not be pledged . . . without compliance with the requirements of the State Constitution," rather than speaking in terms of use of tax revenues.

Citizens' argument ignores *Strand*, but does address and attempt to distinguish this case from *Sarasota County*, the seminal case authorizing COPs in Florida. Citizens' attempt is fruitless, as the District is squarely within the holding of *Sarasota County* and has maintained budgetary flexibility as discussed in that decision. If the District cannot afford the lease

payment, the District is free to non-appropriate for the lease payment. As in *Sarasota County*, here the trustee only has the remedies of a lessor, which, if exercised, would permit the trustee to possess the land only for the balance of the ground lease term. Fee title to the public lands at all times remains in the name of the District. Many school districts in Florida have relied on *Sarasota County* to undertake billions of dollars of financing of needed school sites and buildings. For example, the School Board of Miami-Dade County currently has in excess of $2.4 billion in leased purchased schools representing 27% of the school board's student stations. They would also need to walk away from the leased facilities for the balance of the term of their ground lease in the event they choose not to appropriate their annual lease payment. The mission of the School Board of Miami-Dade County is no less important then the restoration of the Everglades. The facilities financed by the school board are just as indispensible to the school district as the land is to the District. *Sarasota County* held that, so long as there is no direct pledge of the ad valorem taxing power, no referendum is required under article VII, section 12.

2. ***Legislative Approval Is Not Required by Article VII, Subsection 11(f)***

The second limitation Citizens contends applies to the District is the requirement of legislative approval under article VII, subsection 11(f) of the state constitution. This section applies to "state bonds" and, per subsection 11(d), applies to revenue bonds issued by "the state or its agencies." According to Citizens, the District is a "state agency" for purposes of this constitutional section and, therefore, subsection 11(f) applies. Subsection 11(f) provides: "Each project . . . to be financed with revenue bonds issued under this section shall first be approved by the Legislature by an act relating to appropriations or by general law."

Citizens fails to point out a number of cases and opinions that are directly on point. Florida law is clear that, while the District is a "state agency" for some purposes, it is not for purposes of article VII of the Florida Constitution.

At the outset, it is worth noting that Citizens' argument, which relies on section 11 of the constitution (state bonds), contradicts its first argument, which relies on section 12 (local bonds). Citizens cites no authority supporting its position that subsection 11(f) applies to or otherwise restricts the District, and that is because there is none. From the position that the District is an "agency" for some purposes (such as the Administrative Procedures Act or Sovereign Immunity under the federal constitution), Citizens cannot legitimately leap to the conclusion that the District is a "state agency" for purposes of subsection 11(f) or other tax and financing purposes.

First, and decisively, article VII, subsection 1(a), prohibits the state (and its agencies) from levying ad valorem taxes upon real estate or tangible personal property. Yet, article VII, subsection 9(b), authorizes levy of ad valorem taxes "for water management purposes" and for "all other special districts." Since the District can (and does) levy ad valorem taxes, it cannot be deemed a "state agency" for purposes of article VII.

This conclusion, drawn from the plain language of the constitution, is consistent with a controlling decision not discussed by Citizens. The Supreme Court of Florida has expressly held that a water management district was not levying a state ad valorem tax in violation of Article VII, sections 1(a) and 9. *St. Johns River Water Mgmt. Dist. v. Deseret Ranches of Fla., Inc.*, 421 So. 2d 1067, 1070-71 (Fla. 1982). The District Court of Appeal and trial court decisions go into greater detail regarding this issue. The trial court specifically found that the water

management district was a special district under article VII, section 9(a) of the Florida Constitution, and "was thereby authorized to levy ad valorem taxes." *Deseret Ranches of Fla., Inc. v. St. Johns River Water Mgmt. Dist.*, 406 So. 2d 1132, 1139 (Fla. 5th DCA 1981) (reversed in part, but not as to issue of ability to levy an ad valorem tax). The District Court held, and the Supreme Court affirmed, that a water management district is not the alter ego of the Department of Environmental Regulation (now known as the Department of Environmental Protection, or "DEP"). *Id.* The water management districts are granted a wide number of powers and duties which are independent of DEP, and many of the functions of the water management districts are local in nature. *Id.* The District Court found that the "fact water resource conservation, control, planning and development are state functions does not make them exclusively so." *Id.* at 1140. Just because a water management district is furnishing a state function, policy or purpose does not mean it cannot levy an ad valorem tax where the local function, policy or purpose is important to the local district area. *Id.*

The foregoing analysis for purposes of article VII of the constitution is consistent with the great weight of authority under Florida law distinguishing between state agencies and water management districts. Generally, state agencies are component parts of the state with jurisdictions that extend to every part of the state, whereas districts are portions or subdivisions of the state for a special and limited governmental purpose. *See* Op. Att'y Gen. Fla. 96-89 (1996) (citing Fla. Att'y Gen. Fla. 84-21 (1984)). Unless legislatively declared to be or designated as an agency of the state, a district is not an agency of the state. *Id.* For instance, in opinion 90-66, the attorney general cited to the distinction between a state agency and a district noted above, and concluded that water management districts were not state agencies for purposes of section

253.025(8)(e), Florida Statutes, relating to acquisition of state lands. Similarly, in opinion 86-55, the attorney general concluded that a basin board is a part of a water management district and is not a part of the executive branch of state government, but rather is a sub-district of a special district. The attorney general cites section 20.261, Florida Statutes (1986), showing that in creating the Department of Environmental Regulation and in establishing its structure, the Legislature did not include water management districts as part of the department. Also, in opinion 96-89, the attorney general held that a water control district is not a state agency for purposes of section 112.0455, Florida Statutes, the Drug-Free Workplace Act. A number of these attorney general opinions were approved in *Martinez v. South Florida Water Management District*, 705 So. 2d 611 (Fla. 4th DCA 1997), when the District Court held the District is not a state agency for purposes of section 112.0455.

The entirety of Citizens' argument rests on the premise that the District is a "state agency" for purposes of article VII, subsection 11(f). Because the District clearly is not, the argument fails.

C. **The Purpose of the COPs is Legal**

The Governing Board determined that the proposed project serves a public purpose. See Resolution No. 2008-1027, at 3 (Ex. 7.e.). The Governing Board's determination is presumed valid and must be considered correct unless patently erroneous. *See, e.g., Boschen*, 777 So. 2d at 966 (collecting cases). The Governing Board's determination is wholly consistent with the Florida Legislature's express declaration on this exact issue: "The Legislature declares it to be necessary for the public health and welfare that water and water-related resources be conserved and protected. The acquisition of real property for this objective shall constitute a public

purpose for which public funds may be expended." § 373.139, Fla. Stat. (Ex. 1.i.); *see also* § 373.016(3), Fla. Stat. (Ex. 1.a.); *Div. of Bond Fin.*, 495 So. 2d at 184 (same "patently erroneous" standard applied to state legislative declarations of public purpose). It is difficult to imagine how it could be otherwise.

Nonetheless, Citizens, New Hope, and the Tribe all deny the District's allegation in paragraph 32 of the complaint: "The health and safety and public welfare of the citizens of Florida will be benefitted by the District financing, constructing, equipping and installing the Initial Project. The financing of the Initial Project under the Act is and constitutes a valid public purpose."

The gist of the defendants' position appears to be that the District is "acquiring land only," does not have final plans for exactly what use to make of the property, and has not demonstrated the financial feasibility of the proposed program. *See* New Hope's Memo. Opp. to Validation of Bonds 12-15 (Dec. 11, 2008). However, it is well established that courts may validate bonds without parties submitting detailed or final project plans. *See Strand*, 992 So. 2d at 156 (sufficient to submit supporting resolution generally describing proposed improvements) (citing *State v. Manatee County Port Auth.*, 171 So. 2d 169 (Fla. 1965)); *State v. Osceola County*, 752 So. 2d 530, 540 n.13 (Fla. 1999) (rejecting as collateral challenger's arguments that proposed development and operating agreement were incomplete). Without question, and as admitted by defendants' own experts during deposition, surface water storage and treatment is a valid public purpose. § 373.016(3), Fla. Stat. (Ex. 1.a.). Without question, one cannot store surface water without land. § 373.019(26), Fla. Stat. (Ex. 1.b.) (defining "works of the district" to include

"accompanying lands"). Without question, the District is authorized to acquire land, and to issue COPs to finance such acquisition. §§ 373.089, 373.584(1), (4), Fla. Stat. (Exs. 1.g., 1.o.).

The Court's inquiry should end here. Unquestionably, there might be disagreement, even passionate and well-founded disagreement, over the technical, environmental, scientific, economic or other aspects of the proposed program – as there was among the members of the Governing Board itself, which ultimately approved the U.S. Sugar sales agreement and lease by a 4-3 vote. *See* Ex. 11.f. However, within the indisputably public purpose context of providing for surface water storage and treatment, it is for the Governing Board to exercise it judgment to decide business/policy questions about particular programs and projects. "[T]he wisdom or desirability of a bond issue is not a matter for [courts'] consideration." *Boschen*, 777 So. 2d at 966. This is particularly true where, as here, the challengers' attempt to rely on expert testimony that they never submitted to the decision-making body. *Id.* at 967. It is not appropriate for the Court to "interfere with the [Governing Board's] exercise of discretion by second-guessing its judgment." *Id.; see also Warner Cable Communications v. City of Niceville*, 520 So. 2d 245, 246 (Fla. 1988) (trial court properly rejected as collateral arguments questioning necessity for project and economic and fiscal feasibility); *DeSha v. City of Waldo*, 444 So. 2d 16, 19 (Fla. 1984) (rejecting attempt by challengers, who oppose project on policy grounds, to get second hearing in court on project necessity or reasonableness, after proper public hearings and discussion by decision-making body).

The Court should see right through and reject New Hope's attempt to liken this case to *State v. Suwannee County Development Authority*, 122 So. 2d 190 (Fla. 1960). There, the only plan or program envisioned at the time of the proceedings was the purchase of unidentified land and

construction thereon of unspecified structures for lease to unknown private industries, which the issuing development authority hoped to attract into the county. The authority's only definite plan was to use the majority of the proceeds for the purchase of land and construction of buildings. There were no definite plans as to what land would be purchased, what buildings would be constructed, or to what firm or person they would be leased. The authority had not yet devised any broad program or project. Here, by contrast, the District (along with many other interested stakeholders) has been working for years on the complicated issues involving Everglades and other environmental regulation, there is basic understanding and consensus on the surface water management issues involved, and the District has a unique opportunity to acquire fee simple interest in extensive property on which it will be free to construct projects clearly implementing the District's statutory purpose, without worrying about attracting private industry (in fact, while eliminating a major private company that, in the eyes of some, has been detrimental to the environment).

In its attempt to attack the technical or financial wisdom of the project, New Hope does cite to article VII, section 10, of the Florida Constitution, which provides that the District shall not "give, lend or use its taxing power or credit to aid any corporation, association, partnership, or person," with certain exceptions. New Hope contends that the project amounts to a "thinly-veiled bailout of U.S. Sugar," because U.S. Sugar's lease payments will allegedly be at below-market rates. By invoking article VII, section 10, New Hope attempts to heighten the Court's scrutiny of the transaction. The differing levels of scrutiny were explained by the Supreme Court of Florida in a recent case:

> As used in article VII, section 10 of the Florida Constitution, the term credit "implies the imposition of some new financial liability upon the State or a political

subdivision which in effect results in the creation of a State or political subdivision debt for the benefit of private enterprises." *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So.2d 304, 309 (Fla.1971). This Court has also defined the lending of credit as follows:

> [T]he assumption by the public body of some degree of direct or indirect ***obligation to pay a debt of the third party. Where there is no direct or indirect undertaking by the public body to pay the obligation from public funds, and no public property is placed in jeopardy by a default of the third party, there is no lending of public credit.***

State v. Hous. Fin. Auth. of Polk County, 376 So.2d 1158, 1160 (Fla.1979) (citing *Nohrr*, 247 So.2d 304). This Court has also explained that "[i]n order to have a gift, loan or use of public credit, the public must be either directly or contingently liable to pay something to somebody." *Nohrr*, 247 So.2d at 309.

If the State or a political subdivision has not given, lent, or used its credit, a project must merely serve a public purpose. *See State v. Osceola County*, 752 So.2d 530, 536 (Fla.1999). This Court has explained that under the public purpose test "it is immaterial that the primary beneficiary of a project be a private party, if the public interest, even though indirect, is present and sufficiently strong." Hous. Fin. Auth. of Polk County, 376 So.2d at 1160 (citing State v. Putnam County Dev. Auth., 249 So.2d 6 (Fla.1971)). . . .

On the other hand, if the State or a political subdivision has given, lent, or used its credit, a project "must serve a paramount public purpose and any benefits to a private party must be incidental." *Osceola County*, 752 So.2d at 536. We have explained that under the paramount public purpose test, if the benefits to a private party are the paramount purpose, then the project will not pass constitutional muster. *See Orange County Indus. Dev. Auth. v. State*, 427 So.2d 174, 179 (Fla.1983).

Jackson-Shaw Co. v. Jacksonville Aviation Auth., 33 Fla. L. Wkly. S972 (Fla. Dec. 18, 2008) (2008 WL 5245640) (emphasis added).[9]

Jackson-Shaw was tried in federal district court. *See* 510 F. Supp. 2d 691 (M.D. Fla. 2007). While the case did not involve issuance of bonds, its discussion of the pledge of credit issue is illuminating. In this case, the District has not pledged its *taxing power*. Has it pledged its credit?

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[9]The challenger in Jackson-Shaw has filed a motion for rehearing, which is pending, so the December 18, 2008, opinion is not yet final.

As set forth above, under *Nohrr* the term credit "implies the imposition of some new financial liability . . . which in effect results in the creation of a [public] debt for the benefit of private enterprises." If the District has not assumed the obligation to pay a debt of a third party with public funds, and no District property is placed in jeopardy by default of the third party, then the District has not lent its credit. *See Jackson-Shaw*, 510 F. Supp. 2d at 732. Here, as in *Jackson-Shaw*, the District is not lending its credit to U.S. Sugar. The District's participation in the lease with U.S. Sugar is limited to that of lessor. The District has no responsibility for financing, promoting, or developing U.S. Sugar's use of the land. The District bears no direct or indirect obligation to pay any debt of U.S. Sugar, and the District's fee simple interest in the land is not obligated, encumbered or in any way placed in jeopardy by any potential default of U.S. Sugar. *Id.* at 733.

As in *Jackson-Shaw*, here New Hope incorrectly equates alleged "public financial assistance" (or a "bailout") to U.S. Sugar to an unconstitutional lending of credit. Even if it is assumed that U.S. Sugar's lease payments are below market-rate, and even if that could be deemed a favorable deal for U.S. Sugar at the District's expense, that does not obligate or in any way encumber the District's credit to the advantage of U.S. Sugar. *Id.* The Supreme Court of Florida directly addressed this argument in the same manner as the federal trial court and reached the same conclusion. *See Jackson-Shaw*, 33 Fla. L. Wkly. at S980.

Indeed, it is difficult to understand what advantage U.S. Sugar enjoys under the transaction. It is immediately surrendering its fee simple interest in the land to the District, and, after maintaining the land for several years under terms of a lease with heightened protections for the District and the public good, the company ultimately will cease to exist and the District will have at its disposal an unprecedented amount of land well-situated for surface water

storage and treatment purposes. The longer term public good substantially outweighs any short term private advantage, which is merely incidental.

In sum, the District submits that it is not pledging or lending its credit to U.S. Sugar, and, therefore, the Court need not find a "paramount" public purpose. But, even under the heightened standard, the transaction passes muster. This case is categorically different from the typical case involving issuance of debt to finance some activity of a private entity on public land. *See, e.g., Osceola County,* 752 So. 2d at 535-39 (finding paramount public purpose and validating bonds to finance convention center); *Poe v. Hillsborough* County, 695 So. 2d 675 (Fla. 1997) (finding paramount public purpose and validating bonds to finance sports stadium). Here, the public purpose is to manage and treat surface waters for the ultimate purpose of protecting, preserving, and restoring a singularly significant eco-system on the plant, the Everglades, along with Florida's inland lakes and coastal estuaries. Weighed against such a great public good, the value of even a no-payment lease would be incidental.

D. The Issuance of the COPs Complies with the Requirements of Law

New Hope's and the Tribe's experts did not opine at their depositions that the District has failed to comply with the requirements of the law governing issuance of COPs. The District has followed the same procedures it followed in issuing COPs in 2006, where were validated by this Court. *See* Ex. 2.. Nonetheless, Citizens has raised two arguments that conceivably go to this issue, which the District will address.

1. The Trust Indenture Is Sufficient

Citizens contends that the District has not established a trust indenture under which a trustee will certify the proper expenditure of the COPs proceeds, as required by section 75.04(2) of the Florida Statutes. In response, the District first notes that chapter 75 establishes

procedures for validation of bonds in circuit court, not substantive requirements for the issuance of bonds. Citizens concedes that paragraph 20 of the District's complaint strictly complies with the procedural pleading requirement. Substantively, however, Citizens claims that the allegation if false and that the Master Trust Agreement does not require the Trustee to certify to anything or to act as a fiduciary. In fact, through sections 202 and 305 of the Master Trust Agreement, the Trustee is bound to act as fiduciary and to hold and distribute the trust proceeds for the use and benefit of the Certificate Holders. Sections 402 and 404 closely control how the Trustee may use the proceeds. Section 505 holds the Trustee to account. *See* Ex. 7.e., Ex. C at 15, 19-20, 25-28, 36. There is no substantive Florida law requirement that a trust agreement provide for any kind of *written certification* process by a trustee. It is enough that the trustee assume contractual and fiduciary constraints on its expenditure of the funds, to act accordingly, and to keep accurate records thereof and be able to account for its expenditures when called upon to do so in accordance with the requirements of the Master Trust Agreement.

Citizens' argument does not square with *Dorman v. Highlands County Hospital District*, 417 So. 2d 253 (Fla. 1982). In *Dorman*, the challengers contended that the complaint failed to comply with section 75.04 because it failed to allege the present creation of a trust indenture. The complaint stated that all payments on the bond issue will be pursuant to a Trust Indenture substantially in the form attached to the bond resolution, to be made between the issuer and one of the banks or trust companies to be designated by the issuer by the adoption of a subsequent resolution. *Id.* at 254. The Court held the complaint, which included the bond resolution and trust indenture, complied with section 75.04(2) because the resolution listed three banks that will be designated as the trustee in a subsequently adopted resolution, and the trust indenture contained numerous blanks which would be filled in at the time of execution.

Here, the District already has determined to use Deutsche Bank as the Trustee, a selection the Court previously validated in connection with the 2006 COPs. *See* Ex. 2.

2. **Section 373.45924 Does Not Apply**

Citizens contends that the District has not strictly complied with the "truth-in-borrowing" requirements of section 373.45924 of the Florida Statutes. The District concedes that it has not, because that section does not apply to the proposed issuance prior to validation.

By its plain terms, the requirements of section 373.45924 apply only to financing of projects under section 373.4592, the "Everglades Forever Act." Presently, the District has not availed itself of any of the powers under that section, as Citizens itself concedes at the top of page 23 of its memorandum (but see page 27 n.2, where Citizens again contradicts itself). In the event the District does avail itself of such powers, it will comply with the provisions prior to the issuance of the bonds. The clear reading of the statute shows that the District cannot issue the type of statement required by section 373.45924 because many of the required details are not yet known, and could not be known until later in the process. The interest rate and the term of the COPs cannot be known until shortly before the sale of the COPs. Therefore, absence of these details now cannot be grounds for refusing to validate the bonds. *See GRW Corp. v. Dep't of Corrections*, 642 So. 2d 718, 720-21 (Fla. 1994) (rejecting argument that documents that must be completed before final issuance of COPs had to be completed before court could validate COPs).

The only documents completed to date and before the Court now for validation are those embodied in the formal resolutions (Exs. 7.d., 7.e., and 13.d.) and the sales agreement and related lease (Exs. 15.a., 15.c., and 15.c.). The Court must consider the underlying master lease program and related agreements, because they constitute the financing agreement that secures

the COPs. *See Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 946-47 (Fla. 2001). Any other documents or issues are collateral to this proceeding.

IV. CONCLUSION

For the foregoing reasons, the District respectfully requests that the Court reject all challenges to the complaint and issue a final judgment validating and confirming the COPs in the aggregate amount of not exceeding $2,200,000,000, the proceedings authorizing the issuance thereof, including the authority of the District and the Corporation to act, enter into and execute the transactions described herein, the sources of security pledged to the payment thereof, the obligations of the District, the use of the proceeds thereof for the purposes described herein, and the legality of all proceedings in connection therewith.

Respectfully submitted this 5th day of February, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this memorandum has been served by electronic mail and overnight delivery upon the persons identified on the attached service list this 5th day of February, 2009.

Frederick J. Springer

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