IN THE SUPREME COURT OF THE STATE OF FLORIDA
Case No. SC10-794
L.T. Case No. 2008-CA-006280S

Bond Validation Appeal From a Final Judgment of the
First Judicial Circuit, Okaloosa County, Florida

MARGARET P. DONOVAN, JOHN S. DONOVAN, CAROLE A. RAND, KENNETH S. RAND, REBECCA R. SHERRY, DAVID H. SHERRY, and OCEANIA OWNERS' ASSOCIATION, INC., a Florida not for profit corporation,

Appellants,

v.

OKALOOSA COUNTY, FLORIDA, a political subdivision of the State of Florida,

Appellee.

ANSWER BRIEF OF APPELLEE OKALOOSA COUNTY, FLORIDA

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PRELIMINARY STATEMENT

Margaret P. Donovan, John S. Donovan, Carole A. Rand, Kenneth S. Rand, Rebecca R. Sherry, David H. Sherry, and Oceania Owners' Association, Inc., will be referred to collectively as "Appellants."

Okaloosa County, Florida, will be referred to as "the County" or "Okaloosa County" or "Appellee."

Reference to the transcript of the trial, attached as Appendix Volumes 3-5 to the Answer Brief, will be designated as "Tr." followed by the appropriate volume and page number.

Reference to Plaintiff's Exhibits will be designated "Plf. Ex." followed by the appropriate page number. The referenced exhibits can be found in Appendix Volumes 1-2 to the Answer Brief.

Reference to other materials within the Appendix to the Answer Brief will be designated as "AB App.," followed by the appropriate Tab Number.

Reference to materials within the Appendix to the Initial Brief will be designated as "IB App.," followed by the appropriate Tab Number. Citation to the Final Judgment contained within this Appendix is designated "IB App. Order."[1]

[1] Because this Final Judgment was included as an Appendix item attached to the Initial Brief, it is not included as an Appendix to the Answer Brief.

STATEMENT OF THE CASE AND FACTS

Appellee, Okaloosa County, acknowledges the Statement of the Case and the Facts filed by Appellants within the Initial Brief. However, as that Statement is unduly argumentative, Appellee submits its own Statement of the Case and Facts, as permitted by Florida Rule of Appellate Procedure 9.210(c).

The action below sought the validation of certain bonds pursuant to Chapter 75, Florida Statutes. Okaloosa County ("County"), a non-charter county and political subdivision of the State of Florida, sought validation of the Not Exceeding $20,000,000, Okaloosa County, Florida Beach Restoration Revenue Bonds, Series 2008 (the "Bonds") which were authorized pursuant to Okaloosa County Resolution No. 2008-201 (the "Bond Resolution"), as adopted on October 21, 2008 (Plf. Ex. 1). The County intends to issue the bonds for the purpose of using the proceeds to restore and renourish certain beach areas within Okaloosa County, Florida (the "Project").

As a result of the numerous storm events impacting Okaloosa County during the last few years, the need for efforts to restore and protect beach areas became a significant issue of public concern for the County. In furtherance of these needs, the County developed a plan for beach restoration. This plan consisted of shoreline, berm, and dune stabilization and restoration, along with the provision of infill sand in two areas to be separately permitted, in Okaloosa Island and a

western portion of the City of Destin. In an effort to finalize the approvals for the Project in a coordinated manner, the County attempted to pursue the resolution of both permitting and funding issues for the Project simultaneously. The County applied separately for Joint Coastal Permits from the Florida Department of Environmental Protection (DEP), for both the Western Destin and Okaloosa Island portions of the Project. While that was proceeding, the County began exploring potential funding sources for the Project. Ultimately, it was determined that the Project would be funded by a combination of three sources: state government grant money, tourist development taxes, and special assessments imposed upon benefited properties. Bonds would be issued and repaid from tourist development taxes and special assessments levied and collected for an eight-year period.

I. The MSBU Ordinance and Resolution.

On December 4, 2007, Okaloosa County enacted Ordinance No. 07-71, establishing the Okaloosa County Beach Restoration Project Municipal Service Benefit Unit (the "MSBU") for the purpose of funding that portion of the cost derived from special assessments. (Plf. Ex. 2). The MSBU boundaries included two sub-assessment areas: the Okaloosa Island Sub-Assessment Area, and the Destin Sub-Assessment Area ("Western Destin"). The County specifically found that those real property owners within the MSBU benefit most from the Beach Restoration Project. (Plf. Ex. 2 at 1).

On August 7, 2008, the County adopted Resolution, 08-125, which expressly constituted both the Initial and Final Assessment Resolution for the imposition of special assessments within the boundaries of the MSBU to fund a portion of the Project. (Plf. Ex. 3). Prior to that public hearing and pursuant to section 197.3632, Florida Statutes and Ordinance 07-71, notices of the hearing and assessment were published in local newspapers. Additionally, individual mailed notice was sent by U.S. Mail more than 20 days prior to hearing to each property owner within the MSBU boundaries that would be subject to the special assessment, which informed them of the proposed assessment amount on their property. In both the published and mailed notices, the public was notified of the date, time and place that the Board would consider the adoption of the Final Assessment Resolution and that the proposed assessment roll and methodological report were available for inspection at the Emerald Coast Convention and Visitors Bureau in Fort Walton Beach. (Plf. Exs. 3, 12).

Resolution 08-125 adopted and incorporated by reference the Okaloosa County Feasibility Study for Beach Restoration on Okaloosa Island and the City of Destin Final Report dated October 1, 2007 ("Funding Feasibility Study"). The Funding Feasibility Study sets forth in detail the apportionment methodology of the special assessment. (Plf. Ex. 6). The Resolution expressly found that the tax parcels on the assessment roll are specially benefited by the Beach Restoration, and

that the methodology for computing the annual assessments is a fair and reasonable method of apportioning the Capital Costs among the benefited property. (Plf. Ex. 3 at 6-8).

II. Elimination of Non-Critically Eroded Beach From the Project.

In September 2008, after the boundary areas for the MSBU were established by the County, this Court issued its opinion in Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008). In that decision, the Court made a distinction between critically eroded areas and non-critically eroded areas in the provision of beach restoration or renourishment projects. Though still believing that there were legitimate reasons for including areas that had not been designated as critically eroded, the Board of County Commissioners eliminated these areas from the MSBU to simplify the issues. Therefore, on October 7, 2008, the Board adopted Ordinance No. 08-36 to amend Ordinance No. 07-71 and eliminate non-critically eroded portions of the Project. (Plf. Ex. 4). These omitted areas were located solely with the Destin Sub-Assessment Area.[2] After this area was excluded, the Project included Okaloosa Island from reference marker R-1 to R-15, and Western Destin from R-17 to R-25.5. (Tr. Vol. II at 146-47; Plf. Ex. 4, 10).

[2] The City of Destin consented to the establishment of the MSBU within the City limits by City Ordinance 08-31-CN, as amended by Ordinance 08-39-CN.

Also on October 7, 2008, the Board adopted Resolution 08-192, the Amended Final Assessment Resolution, which amended the original assessment resolution by deleting the assessment for properties which had formerly been included with the boundaries of the MSBU and recalculating the amount of the assessments within the Destin Sub-Assessment Area based upon the reduction in the scope of the project and the exclusion of properties from the boundaries of the MSBU. (Plf. Ex. 5).

III. Bond Resolution and Validation Complaint.

The Bond Resolution at issue in this case was adopted by the County on October 21, 2008. (Plf. Ex. 1). The Pledged Revenues for repayment of the bonds are from two sources. First, the County has pledged the first cent of the Tourist Development Tax levied pursuant to Ordinance No. 89-23, as amended. In addition, the County has also pledged the special assessments levied within the boundaries of the MSBU. (Plf. Ex. 1 at 3-5). On November 13, 2008, a Validation Complaint was filed with the circuit court, and on December 5, 2008, this Court issued an Order to Show Cause why the Bonds should not be validated. (AB App. A-B).[3] A hearing was set for the bond validation for January 2, 2009.

[3] The Complaint and Order to Show Cause were served on the State Attorney pursuant to the requirements of Chapter 75, Florida Statutes. Additionally, the Order was published in conformity with the requirements of Chapter 75.

IV. The Intervenors.

The Appellants intervened in the proceedings below. All hold an interest in beachfront property in the MSBU. Rebecca R. Sherry and David Sherry ("the Sherrys") have an interest in property on Okaloosa Island in the Surf Dweller Condominium, within the MSBU (pursuant to a long-term lease), and are assessed $135.26 per year for the Project. (Tr. Vol. II at 258; Plf. Ex. 12; IB App. Tab CC). Although Surf Dweller is adjacent to the beachfront, the Sherrys are not riparian owners[4], as the Surf Dweller property line does not touch the Mean High Water Line (MHWL). Similarly John and Margaret Donovan ("the Donovans") hold an interest in property on Okaloosa Island within the MSBU (pursuant to a long-term lease), in El Matador Condominium. Like the Sherrys, the Donovans are not riparian owners. The Donovans are assessed $124.96 annually per unit. (Tr. Vol. II at 259; Plf. Ex. 12; IB App. Tab CC). Kenneth and Carole Rand similarly owned non-riparian property on Okaloosa Island within the MSBU. The Rands were assessed $135.71 annually for their unit. (Plf. Ex. 12).

Oceania Owners' Association, Inc. is the condominium association for Oceania Condominium, which is located within the Destin portion of the MSBU. Unlike the owners in Okaloosa Island, owners within Oceania assert ownership

[4] The terms riparian and littoral property will be used interchangeably for purposes of this Brief, both referring to property owned to the MHWL on the Gulf of Mexico.

rights to the MHWL. Unit owners within Oceania are assessed $217.48 per unit for each year of the Project. (Tr. Vol. II at 259; Plf. Ex. 12; IB App. Tab CC).

Shortly after adopting the original assessment resolution, imposing assessments on property owners within the MSBU, and before any permits were issued by the State for construction of the Project, these property owners (along with several others) filed actions in the circuit court. These property owners challenged not only the validity of the MSBU, but also raised issues related to the permitting process for the Project, including sand quality and takings claims. Appellants also intervened in this cause, raising virtually the same issues raised in the separate circuit court proceedings. (IB App. CC).

V. Bond Validation Hearing.

The final hearing on the bond validation complaint was continued to and held on April 8, 2009, and concluded over two days, on August 13 and 14, 2009. Prior to the hearing, the County argued its Motion in Limine requesting that certain evidence regarding issues related to the permit, which had not yet been issued by DEP, should be barred as collateral to the bond validation proceeding. The trial court took the motion under advisement and did not rule and, therefore, the evidence related to the permitting issue was submitted to the Court. (Tr. Vol. I at 11, 31).

Accordingly, the parties proceeded with the final hearing.[5] The County presented the testimony of the Coastal Management Coordinator for Okaloosa County and the Tourist Development Center, Jim Trifilio, who was hired to oversee the completion of the Project. (Tr. Vol. I at 49-50). The County also presented the testimony of Michael Trudnak, a coastal engineer who contracted with the County regarding the design, permitting, and construction of the Project. (Tr. Vol. II at 141; and Vol. III at 451). Appellants did not present any expert testimony regarding the permitting aspects of the Project.

A large measure of the testimony below also focused on the validity of the special assessment methodology. Peter Ravella of Coastal Tech, the author of the Funding Feasibility Study testified on behalf of the County, as an expert coastal management consultant who had been involved in numerous restoration and renourishment projects. (Tr. Vol. II at 220-229). Mr. Ravella described the methodology developed in the Funding Feasibility Study at length, explaining that a special benefit would be had by those living in close proximity to the shoreline. (Tr. Vol. II at 246-47). This assessment was broken down into two benefit

[5] The County has provided the Court with the complete record of the trial court proceedings as part of its Appendix to the Answer Brief. Appellants failed to provide the full record of the proceedings below.

categories, recreational (40% of the assessment) and storm damage reduction (60% of the assessment).[6]

Because the trial did not finish as scheduled in April, it was continued until August. In the interim, the County adopted Resolution 09-104, on June 16, 2009, which corrected the assessments for 43 properties. (Plf. Exs. 21-22). These corrections were related either to misapplications of the methodology to specific properties or classification issues based upon the Property Appraiser's data, as opposed to changes in the methodology itself. (Tr. Vol. III at 420, 423). Corrections were always contemplated where mistakes were discovered in the application of the methodology to individual properties to ensure that all properties pay their fair share of the contribution towards the Project. (Tr. Vol. I at 74-75). Notice to owners of affected property was provided more than twenty days prior to the hearing date.

Also during the course of these proceedings, the County began the process to adopt assessments for 2009, the second year of the eight year Assessment Period. As part of this process, the County adopted Resolution 09-105, the Amended and Restated Initial Assessment Resolution, on June 16, 2009. (Plf. Exs. 23-24).

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[6] Mr. Ravella also relied on an economic study which concluded that following hurricanes, areas which were subject to beach restoration saw an average 30 percent increase in property values. (Tr. Vol. II at 256-57; Plf. Ex. 18).

Resolution 09-105 provides for adjustments to the assessment rolls for 2009, and thereafter. As a result of corrections, the 60/40 split between the storm damage reduction and recreational portions of the assessment was balanced among the properties. Upon recalculation, the assessment for certain properties, including several of the Appellants' properties, was slightly reduced. (Tr. Vol. III at 423-25). A public hearing on the adoption of the final assessment resolution was scheduled for a date after the trial was concluded.

At the conclusion of the August portion of the trial, and after hearing evidence from both the County and the Intervenors, the trial court ruled in favor of the County, and validated the bonds. Thereafter, on March 26, 2010, the trial court entered its written order, ultimately determining the Appellants showed no cause for why the bonds should not be validated. (IB App. Order at 22). This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court applied the correct standards of law, and competent substantial evidence supports the Final Judgment validating the Bonds. As the Final Judgment concluded, the special assessments used in part to fund the bond issue are lawfully imposed. The major issue at trial, and Appellants' fifth argument on appeal, is with regard to whether the Project would confer a special benefit, and that the special assessments were fairly apportioned. The County

presented much testimony regarding these issues. The trial court properly applied a deferential standard to the County's legislative determinations of special benefit and apportionment, and ruled in favor of the County, based on the showing made at trial on these issues, and the finding that these legislative determinations were not arbitrary. Although Appellants presented criticisms of the apportionment through both lay and expert testimony, the determination is whether the methodology of the County is reasonable, and the standard is not perfection. Because the approach of the County is fair and reasonable, and not arbitrary, the special assessments imposed meet the requirements of the law.

The remaining legal arguments raised by Appellants on appeal are all without merit, as follows. First, contrary to Appellants' suggestion, there is no potential for a broad taking of property owners' riparian rights in this case, as that issue was settled by this Court, and affirmed by the US Supreme Court. Therefore, Appellants arguments founded on this assumption are irrelevant and unsupported. Second, the adoption of the special assessment rate resolution by the County, as concluded by the trial court, was procedurally correct, as the resolution complied with the dictates of the County's ordinance 07-71, establishing the MSBU. Third, the bond validation proceedings were in no way premature. As established by the testimony below, the County has applied for, and expects a permit for the Project, and Appellants presented no expert testimony to the contrary. Appellants have

availed themselves of the proper remedy by admittedly bringing a separate administrative challenge regarding the permit issues; the permit issues are not properly resolved through these proceedings. Fourth, the Project both serves a public purpose and confers a special benefit on assessed property, by restoring critically eroded shoreline. Last, the benefits of the Project will be conferred on property within the MSBU, and there is no requirement that all of the sand be placed completely within the boundaries of the unit. Accordingly, the Final Judgment of the trial court should be affirmed.

STANDARD OF REVIEW

The scope of judicial inquiry in bond validation proceedings is limited to determining (1) whether the public body has the authority to issue bonds, (2) whether the purpose of the obligation is legal, and (3) whether the bond issuance complies with the requirements of law. See Poe v. Hillsborough County, 695 So. 2d 672, 675 (Fla. 1997) (citing Rowe v. St. Johns County, 668 So. 2d 196 (Fla. 1996)); Taylor v. Lee County, 498 So. 2d 424, 425 (Fla. 1986). Within the purview of the scope of validation is also the determination of the validity of the underlying securing revenue. City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992); State v. City of Port Orange, 650 So. 2d 1 (Fla. 1994); State v. Sarasota County, 693 So. 2d 546 (Fla. 1997).

Appellee agrees that this Court reviews the "trial court's findings of fact for substantial competent evidence and its conclusions of law de novo." Strand v. Escambia County, 992 So. 2d 150, 154 (Fla. 2008). "The final judgment of validation comes to this Court clothed with a presumption of correctness." Id.

ARGUMENT

I. THE SPECIAL ASSESSMENT DOES NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF THE PROPERTY OWNERS WITHIN THE MSBU.

Appellants characterize their initial point in the context of a prohibition of the use of special assessments for the funding of the "taking of property." (Initial Brief at 15). However, the argument largely ignores this funding issue, but rather is premised on the purported existence of a taking of property under the provision of the Beach and Shore Preservation Act (Part I of Chapter 161, Florida Statutes). Appellants' argument fails on both issues.

At the time of the trial in this cause, the Project had not been permitted by DEP. Many of Appellants arguments below prematurely addressed aspects of the Project that are more appropriately argued in an administrative forum, after a notice of intent to issue such a permit in released, and with the participation of DEP. In fact, the Appellants herein are indeed currently challenging such a notice of intent, as they provide in their Initial Brief. Among the issues raised as to the expected permit, Appellants raised a takings argument based on where they

anticipated the Erosion Control Line (ECL) would be set for the Project, and also based on a perceived loss of their littoral or riparian rights following the establishment of this line. At the time of trial, the ECL line had not been set by the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees").[7]

Under state statutes, the ECL is set for a beach restoration project to act as the new property line separating state owned land from upland property. §§ 161.141-161.211, Fla. Stat. (2009). In locating the ECL, the Board of Trustees is "guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible." § 161.161(5), Fla. Stat. (2009). Once the ECL line is recorded, the common law no longer operates "to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or any other natural or artificial process." § 161.191(2), Fla. Stat. (2009). However, section 161.201, Florida Statutes, expressly preserves the upland owners' littoral rights.

The statutory ECL procedures were challenged before this Court recently in Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102 (Fla.

[7] The proposed permit actually does not establish on ECL, but rather requires a preconstruction mean high water line to be established.

2008). In that case, the issue was whether the Beach and Shore Preservation Act unconstitutionally deprived upland owners of littoral rights without just compensation. The Court answered this question in the negative, determining that the right to accretion under Florida law was a contingent right, and that the littoral right of access to the water was protected by the Act. The Court also emphasized that the Act worked to achieve a reasonable balance between public and private interests in the shore. Id.

The decision of the Florida Supreme Court was recently upheld by the United States Supreme Court in Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 177 L. Ed. 184 (June 17, 2010). In unanimously affirming the decision of this Court, the Supreme Court concluded that the decision was consistent with background principles of state property law. Therefore, the argument raised by Appellants in this cause as to whether there is a taking at all is suspect.[8]

However, Appellants also argue that under certain circumstances, the Project at issue would cause a taking of private property through the improper location of

[8] Appellants' Initial Brief was filed prior to the decision of the United States Supreme Court and clearly were assuming a different result.

the ECL for the Project by the Board of Trustees.[9] However, such an issue is properly addressed in separate proceedings, with the participation of DEP and the Board of Trustees, and is not relevant to this bond validation. Pursuant to section 161.141, Florida Statutes, the legislature has declared "that there is no intention on the part of the state to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property." Additionally, even if a court does determine that a beach restoration project results in an unreasonable exercise of the state's police power constituting a taking without just compensation, the agency would have the option to either issue the permit and pay appropriate monetary damages, or to agree to modify its decision to avoid an unreasonable exercise of police power. § 161.212(3), Fla. Stat. (2009).

Appellants creatively argue on appeal that "for the potential bonds to pass constitutional muster they must contain an explicit restriction preventing any MSBU funds from being used to compensate any landowner for a taking." (Initial Brief at 17). However, there is no such requirement in the law, and Appellants provide no authority in support of this specific argument. Further, this argument is expressly linked to the issue of whether the Beach and Shore Preservation Act

[9] This argument at best can only apply to Appellant Oceania Owners' Association, whose members are allegedly owners of littoral property. None of the other Appellants own property to the mean high water line.

facially deprives property owners of their littoral property rights. As this takings argument has been rejected by this Court and affirmed by the United States Supreme Court, there is no basis for Appellants' argument here.

Though no taking is present in this matter, there is no requirement that prohibits the use of assessments for acquisition of property, regardless of the manner that it is acquired. There is absolutely no express limitation on which local revenue sources may be used to compensate a property owner whose property is taken by eminent domain. The test is whether that revenue may be expended to fund the costs of the Project, and not who contributes to that particular revenue source. As long as a special assessment is used to provide a service or improvement which provides the requisite benefit, then that is all that is required. To accept Appellants' argument would lead to absurd results. For example, property owners also pay ad valorem taxes, sales taxes and a wide variety of other revenues. Under their argument, no tax revenue could be used to pay for property taken by eminent domain, because they had contributed to the revenue stream.

Further, in their argument on this point, Appellants heavily imply, through their citation and discussion of Parrish v. Hillsborough County, 123 So. 830 (Fla. 1929), that the entire expense of the Project will be borne by the abutting property owners. However, the record below clearly reflects that the Bonds will be supported by *both* special assessments *and* Tourist Development tax dollars. In

addition, State funds are expected to fund a portion of the Project on Okaloosa Island. It is contemplated that the special assessments will only fund approximately 24% of the Project for Okaloosa Island, and 36% of the Project for Western Destin. See Ocean Beach Hotel Co. v. Town of Atlantic Beach, 2 So. 2d 879 (Fla. 1941) (distinguishing Parrish where the special assessment did not provide the entire cost of construction for a seawall). The particular mix of revenues used is solely within the budgetary discretion of the Board of County Commissioners, limited only by restrictions on the use of a particular revenue source. For these reasons, Appellants arguments should be rejected.

II. THE COUNTY COMPLIED WITH ALL PROCEDURAL REQUIREMENTS FOR VALIDATION OF THE BONDS.

The procedures relevant to a bond validation are established by statute. Pursuant to section 75.03, Florida Statutes:

> As a condition precedent to filing of a complaint for the validation of bonds or certificates of debt, the county, municipality, state agency, commission or department, or district desiring to issue them shall cause an election to be held to authorize the issuance of such bonds or certificates and show prima facie that the election was in favor of the issuance thereof, or, when permitted by law, adopt an ordinance, resolution or other proceeding providing for the issuance of such bonds or certifications in accordance with law.

Pursuant to section 75.03, the County adopted their bond resolution prior to filing the Validation Complaint. Accordingly, the County was in compliance with the condition precedent provided by section 75.03.

Appellants argue, however, that the County failed to comply with a condition precedent because of the procedures it used in adopting Resolution 08-125. Although this is not the condition precedent contemplated by section 75.03, the County nevertheless also complied with the procedures set forth in its special assessment ordinance. Under Ordinance No. 07-71, the County sets forth a procedure for the imposition of a special assessment within the boundaries of the MSBU. Under the ordinance, an initial assessment resolution is adopted solely for the purpose of directing the provision of various notice requirements that are to be completed prior to the consideration of the final assessment resolution. Section 6 of Ordinance No. 07-71 provides as follows:

> SECTION 6. INITIAL ASSESSMENT RESOLUTION. The initial proceeding for the Assessment Areas and imposition of an Assessment shall be the Board's adoption of an Initial Assessment Resolution. The Initial Assessment Resolution shall (A) describe the real property to be located within the Assessment Area; (B) describe the Local Improvement or Related Service proposed for funding from proceeds of the Assessments; (C) estimate the Capital Cost, Service Cost, or Project Cost in the event Obligations are to be issued; (D) describe with particularity the proposed method of apportioning the Capital Cost, Service Cost, or Project Cost among the parcels of real property located

> within the proposed Assessment Area, such that the owner of any parcel of property can objectively determine the number of Assessment Units and the amount of the Assessment; (E) describe the provisions, if any, for acceleration and prepayment of the Assessment; (F) describe the provisions, if any, for reallocating the Assessment upon future subdivision; and (G) include specific legislative findings that recognize the fairness provided by the apportionment methodology.

(Plf. Ex. 2 at 6).

The Board scheduled a hearing on the assessment for August 7, 2008. Both published and mailed notice was completed more that twenty (20) days prior to the August 7th hearing and in each of these notices, the public was notified that both the proposed assessment roll and the methodological report were available for inspection. (Plf. Ex. 12). Further, the mailed notice actually notified the property owner of the maximum amount that there assessment would be should the proposed final assessment resolution be adopted by the Board. (Plf. Ex. 3; IB App. Order at 13-14). As all of the requirements and conditions precedent for consideration of the Final Assessment Roll, as required by Ordinance 07-71, had been satisfied prior to the August 7, 2008 hearing, there was no need for a separate hearing for adoption of an Initial Assessment Resolution for that purpose.

The Board, in adopting the Final Assessment Resolution, also expressly determined that it shall also constitute the Initial Assessment Resolution. The Board determined as follows:

> This Resolution shall constitute both the Initial and Final Assessment Resolution, as contemplated under the Ordinance. The board specifically approves the apportionment methodology contained in the Okaloosa County Feasibility Study for Beach Restoration on Okaloosa Island and the City of Destin Final Report dated October 1, 2007. That study, and the methodology contained therein, is hereby incorporated by reference. The Board hereby finds that notice by mail to each property owner subject to the Assessment and by publication has been provided in accordance with the Ordinance and Florida law.

(Plf. Ex. 3 at 8). Appellants' argument is not that the requirements of an Initial Assessment Resolution had not occurred, but rather that a separate hearing was required. Under these circumstances, as all the requirements that would be required by the Initial Assessment Resolution had been satisfied, the County had the authority to adopt Resolution 08-125 as both the Initial and Final Assessment Resolution. Appellants' argument on this point is without merit.[10]

III. COMPETENT SUBSTANTIAL EVIDENCE SUPPORTS THE BOND VALIDATION WAS NOT PREMATURE.

Recognizing the limited scope of bond validation procedures, this Court has routinely determined that matters raised outside this limited review are collateral and not to be addressed. "The function of this Court in a bond validation

[10] Appellants also argue that the County's later adoption of its Amended and Restated Initial Assessment Resolution in 2009 (Resolution 09-105) constituted an admission that the procedure used in 2008 was flawed. However, the procedure was changed to avoid further conflicts, not because Resolution 08-125 was adopted incorrectly. (Tr. Vol. III at 422).

proceeding is to determine whether the authorizing body has the power to act and whether it exercises that power in accordance with the purpose and intent of the law." State v. City of Miami, 379 So. 2d 651, 654 (Fla. 1980). Issues such as the determination of need of a project, its financial feasibility, or the business judgment of the governmental entity are collateral matters beyond the scope of review. See Partridge v. St. Lucie County, 539 So. 2d 472, 473 (Fla. 1989); State v. Manatee County Port Authority, 171 So. 2d 169, 171 (Fla. 1965); Town of Medley v. State, 162 So. 2d 257, 258-59 (Fla. 1964).

The County has consistently maintained that many of the issues raised by Appellants regarding the permits for the Project, which had not been issued at the time of trial, were collateral to the bond validation proceeding, and were more appropriately addressed within the administrative process. The issues raised by Appellants include such items as the quality of sand to be placed on the beach. In addition, Appellants argued that the ECL for the Project would effect a taking of their private property rights even though no ECL had been set at the time of the proceedings below. (IB App. CC). The County argued below that these issues were not ripe for adjudication, that they were more properly the subject of an administrative action regarding any proposed permit, and were collateral to the bond validation proceeding. The trial court ultimately agreed in its Final

Judgment, holding that these issues were collateral to the bond validation proceeding. (IB App. Order at 20).

Notwithstanding the County's argument that these issues were collateral, the County presented substantial evidence below regarding the permit expected from DEP for the Project. The County provided the testimony of both the Coastal Management Coordinator for the County, Jim Trifilio, who was hired to oversee the completion of the Project, as well as the coastal engineer contracted to design, obtain proper permitting for, and to construct the Project, Michael Trudnak.

Mr. Trifilio testified generally regarding the location of the Project and need for the Project. He also testified that the Project would be subject to State approval, including the quality of the sand that would be used to renourish the beach. (Tr. Vol. I at 61-63). Although he could not testify as to what the State would ultimately approve, the same sand source, or borrow site, which would be used for the Project is also being used for a beach restoration project located in nearby Eglin Air Force Base, subject to separate permit. DEP had already approved this borrow site for Eglin. (Tr. Vol. II at 138).

Similarly, Mr. Trudnak, the coastal engineer for the County testified that he expected the Project would be permitted (Tr. Vol. II at 197). More specifically, he discussed at length the rigorous process that was used to identify the sand source for the Project, and that the sand color and shell content of this sand source met the

requirements of DEP. Mr. Trudnak testified that the sand used for the Project would need to be approved by the State, that the sand for the Project is "very nearly the same as the sand on the beach," and would be acceptable to DEP (Tr. Vol. II at 162, 197).

In addition to the issue of the sand source, Mr. Trudnak testified at length as to the storm damage reduction benefit that the Project would provide. The volume of sand on the beach is "critical" to the amount of protection from storms. (Tr. Vol. II at 146). In recent years, this portion of the beach has been impacted by hurricanes causing much erosion. Currently, the beach is both narrower and at a lower elevation. (Tr. Vol. II at 146). Although in the past, portions of these beaches had naturally accreted, as a result of frequent storms, the areas had not been able to recover from the storm erosion. (Tr. Vol. II at 147-48). The structures located at Destin Pointe and Jetty East are the most vulnerable, but all areas within the Project have been designated as critically eroded by DEP. (Tr. Vol. II at 151, 185-86). There could be a significant impact to property with a 50-year storm event. (Tr. Vol. II at 156) The Project was being designed to protect against such a storm. (Tr. Vol. II at 157). Although the quantity of sand placed in front of the various properties may differ, the protection from the Project will be the same. (Tr. Vol. II at 158). Mr. Trudnak also testified that the ECL had not been set and, even if set, would not change the construction of the Project. (Tr.

Vol. II at 160-61). Appellants put on no expert witness to contradict the testimony of Mr. Trudnak on these permit issues.

However Appellants would have this Court believe that the County put on no evidence regarding the permit. Instead of providing this Court with a complete transcript, Appellants attach only short excerpts of the trial testimony as appendices to the Initial Brief, but argue that the County "made no showing whatsoever in the validation proceeding that the regulations for the environmental permits would be met." (Initial Brief at 24). Clearly, this argument is without merit, given the above testimony.

The permit issues are collateral to the bond validation proceedings. To allow the litigation of permit issues in a bond validation proceeding deprives DEP of its statutory authority. By contrast, there is an established process available to Appellants to raise these issues which would allow the participation of the agency charged with the permit issuance responsibilities. The Appellants certainly will have the opportunity to address issues such as sand quality and any ECL in administrative proceedings regarding the proposed issuance of a permit by DEP, after the notice of intent issues. See Chapter 161, Fla. Stat.; Chapters 62B-41 and 62B-49, Fla. Admin. Code. Appellants are currently doing just that, and cannot have it both ways—either the bond validation proceeding is determinative of these

issues or they are collateral issues outside the scope of such a proceeding, as the Final Judgment concluded.

Appellants cite a 1972 case from this Court in support of their argument on this point. Hillsboro Island House Condo. Apartments, Inc. v. Town of Hillsboro Beach, 263 So. 2d 209 (Fla. 1972). In Hillsboro Island, property owners challenged a bond validation related to a beach erosion project as violative of the Town Charter. These property owners argued that the bond issue was premature because the project cannot be undertaken without approval of outside authorities under Chapter 161, Florida Statutes. The Town Engineer testified that the necessary permissions should be forthcoming. The Court noted that "Appellants have presented little adverse evidence; their main thrust is simply that the permissions have not yet been secured. Although we find that under the circumstances this issue can be satisfactorily disposed of, we caution that it is a vital and decisive issue in litigation of this nature." Id. at 212.

Similar to the facts in Hillsboro Island, the County put on evidence from the coastal engineer that substantial work had been done towards the Project, and the permit was expected. Appellants presented no expert testimony to the contrary. This is competent substantial evidence that the bond validation was not premature.

Additionally, although Hillsboro Island addressed a bond validation related to anti-erosion measures under Chapter 161, Florida Statute, this case was decided

in 1972. At that time, the predecessor to the Administrative Procedure Act (APA), had more stringent standing requirements. See Phibro Resources Corp. v. State Dep't of Envtl. Reg., 579 So. 2d 118, 121 (Fla. 1st DCA 1991) (explaining that unlike the prior version of the Act, "in order for one now to gain access to the procedures furnished under section 120.57 of the 1974 APA, such person need not necessarily show that his or her legal rights or duties were litigated or determined in formal or informal proceedings"); Patricia A. Dore, Article: Access to Florida Administrative Proceedings 13 Fla. St. U.L. Rev. 965, 1071 (1986) (providing "[b]y developing the new phrase 'substantial interests' to replace the old 'legal rights, duties, or privileges,' the drafters intended a more expansive availability of adjudicatory proceedings to result under the 1974 Act than had been the case under the 1961 Act and the other laws used as models for the new Florida Act.").

The concern of the Hillsboro Island case was the availability of an avenue to address those issues. That is no longer an issue with the expanded APA standard, as the current version of the APA provides standing where a party's "substantial interests" are determined by an agency. § 120.57, Fla. Stat. (2009). As Appellants have acknowledged they have brought administrative challenges to the Project under Chapter 120, Florida Statutes; Appellants not only have an available remedy to raise these issues but are in fact pursuing those challenges.

The County filed its bond validation complaint before the Project was permitted by DEP, but after much work had been done towards the permitting of the Project. Once the Project is permitted, the County by statute has a limited time to commence construction of the Project. See § 161.211, Fla. Stat. (2009). It would be practically impossible for the County to meet this deadline if a bond validation proceeding, particularly where it is challenged, cannot be brought until final permitting of the Project is received by the regulatory agency. The bond validation proceeding was not premature in this case, and Appellants' argument on this point should be rejected.

IV. THE PROJECT SERVES A PUBLIC PURPOSE AND CONFERS A SPECIAL BENEFIT ON PROPERTIES WITHIN THE MSBU.

In the present case, the Project serves a public purpose, and also provides a special benefit to property within the MSBU. However, contrary to the suggestion of Appellants, the paramount public purpose test is not applicable in this case. Appellants seem to imply that because the Bonds are partially to be repaid by special assessments, which require a special benefit to property, that this would constitute an unlawful pledge of public credit for private purposes. However, the degree of benefit derived by third parties is not the type or extent of benefit as implicate the provisions of Article VII, section 10 of the Florida Constitution. See Jackson-Shaw Co. v. Jacksonville Aviation Auth., 8 So. 3d 1076, 1097 (Fla. 2008)

(providing that "[a]s we have defined credit and the lending of credit, the constitutional prohibition contemplates not just the use of public funds but the imposition of a new financial liability and a direct or indirect obligation to pay a debt of a third party"); Northern Palm Beach County Water Control Dist. v. State, 604 So. 2d 440 (Fla. 1992) (concluding there was no violation of Article VII, section 10, Florida Constitution, because the proposed bond issue supported by special assessments for road improvements did not involve the district using its taxing power or pledging public credit to aid a private person or entity and a public purpose was involved).

As the paramount public purpose test is inapplicable, the County need only show that the Project serves a public purpose. Under this 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." Jackson-Shaw Co., 8 So. 3d at 1095. This test can be met in this case. The Florida Legislature has by statute clearly delineated the public purpose of beach restoration:

> **161.088 Declaration of public policy respecting beach erosion control and beach restoration and nourishment projects.**—Because beach erosion is a serious menace to the economy and general welfare of the people of this state and has advanced to emergency proportions, it is hereby declared to be a necessary governmental responsibility to properly manage and protect Florida beaches fronting on the Atlantic Ocean, Gulf of Mexico, and Straits of Florida from erosion and

> that the Legislature make provision for beach restoration and nourishment projects, including inlet management projects that cost-effectively provide beach-quality material for adjacent critically eroded beaches. The Legislature declares that such beach restoration and nourishment projects, as approved pursuant to s. 161.161, are in the public interest. . . .

§ 161.088, Fla. Stat. (2009). Additionally, this Court has also recognized the important public purpose of restoration of critically eroded shoreline. Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1115 (Fla. 2008) (providing "the Act promotes the public's economic, ecological, recreational, and aesthetic interests in the shoreline"). Clearly beach restoration serves a public purpose.[11]

Appellants again cite to the Hillsboro Island case for the proposition that special assessments are not appropriate in this case and that only general obligation bonds can be used to fund a beach restoration project. 263 So. 2d 209. However, Hillsboro Island does not stand for this proposition. In Hillsboro Island, it was argued that special assessments should fund the project because *only* the property owners along the Atlantic shore would be benefited by the beach erosion project.

[11] Even if it is applicable, the Project would provide a paramount public purpose. This Court's decision in Orange County Industrial Development Auth. v. State, 427 So. 2d 174, 179 (Fla. 1983), cited by Appellants is clearly distinguishable, as it involved the issuance of bonds for the construction of a television station to be owned by a private party. The Court concluded such a facility would serve a paramount *private* purpose.

In rejecting this argument, the Court cited the unique geography of the town, which was "sandwiched between the ocean and the Intracoastal Waterway, and is 600 feet wide at its widest point." Id. at 212. The court concluded that a serious incursion of Atlantic waters would threaten the existence of the entire town. Id.

As discussed *infra*, the Project provides a special benefit to those properties within the MSBU. It is therefore appropriate to use special assessments to fund the Project. See City of Treasure Island v. Strong, 215 So. 2d 473 (Fla. 1968) (upholding a special assessment for a beach erosion groin system, notwithstanding the fact that the City had failed to make such legislative determinations of special benefit); Ocean Beach Hotel Co. v. Town of Atlantic Beach, 2 So. 2d 879 (Fla. 1941). As in City of Treasure Island, the degree and extent of the benefit is clear and obvious. It is up to the business judgment of the County as to how to fund the Project, and such business judgment is a collateral matter not subject to challenge in a bond validation proceeding. Appellants' contention that the Project may only be funded by general obligation bonds is without merit.

V. THE SPECIAL ASSESSMENT FOR THE PROJECT COMPLIES WITH THE SPECIAL BENEFIT TEST.

Counties are clearly authorized to issue special assessment bonds for financing public improvements so long as the special assessments satisfy two criteria required by Florida law. See Citizens Advocating Responsible Envtl.

Solutions, Inc. v. City of Marco Island, 959 So. 2d 203 (Fla. 2007). First, the assessed property must derive a special benefit from the improvement or service provided by the assessment.[12] See City of North Lauderdale v. SMM Props., Inc., 825 So. 2d 343 (Fla. 2002); City of Naples v. Moon, 269 So. 2d 355 (Fla. 1972); Atlantic Coast Line RR. Co. v. City of Gainesville, 91 So. 118, 121 (Fla. 1922) (special assessments are "charges assessed against the property of some particular locality because that property derives some special benefit from the expenditure of the money"). Second, the special assessment must meet the "fair apportionment" test, that is, the costs of providing the improvements must be fairly and reasonably apportioned among the benefited properties. See State v. City of Boca Raton, 595 So. 2d 25, 30 (Fla. 1992).

A. THE CIRCUIT COURT APPLIED THE APPROPRIATE DEFERENCE TO THE LEGISLATIVE FINDINGS OF THE COUNTY.

In determining whether these two criteria have been satisfied, courts properly defer to the enacting body's legislative findings unless the decision was

[12] Appellants repeatedly cast the test in the context of their "direct special benefit." However, the test is solely whether a special benefit is derived by the property. Numerous assessments have been upheld as a result of the presence of benefit which would not be deemed to be "direct." For example, the availability of services for fire assessments or increased use or enjoyment are both recognized special benefits which would not necessarily be deemed direct.

arbitrary. In City of Boca Raton, the Florida Supreme Court summarized this standard as follows:

> We note that the City made specific findings that the improvements would constitute a special benefit to the subject property, that the benefits would exceed the amount of the assessments, and that the benefits would be in proportion to the assessments. The apportionment of benefits is a legislative function, and if reasonable persons may differ as to whether the land assessed was benefited by the local improvement, the findings of the city officials must be sustained.

595 So. 2d at 30. See also Citizens Advocating Responsible Envtl. Solutions, Inc., 959 So. 2d at 206-207 ("The City's legislative findings, namely that the service to be provided by the special assessment confers a special benefit on the land burdened by the assessment, and that costs are properly apportioned among the properties receiving the benefit, are entitled to presumption of correctness and will be upheld unless arbitrary."); Sarasota County v. Sarasota Church of Christ, 667 So. 2d 180, 184 (Fla. 1995) ("The standard is the same for both prongs; that is, the legislative determinations as to the existence of special benefits and as to the apportionment of the costs of those benefits should be upheld unless the determination is arbitrary.").

In the present case, the County made numerous legislative findings that the Project provided a special benefit to real property located within the MSBU. As

stated in Resolution 08-192, the County made the following legislative finding as to the presence of a special benefit from the Project:

> (D) The Project provides a special benefit to all property located within the MSBU including improving and securing road access, protecting the natural environment associated with the beach, providing enhanced storm protection, protecting and enhancing the market value and marketability of properties within the MSBU, and enhancing the use and enjoyment of such property through the provision of the aesthetic and recreational beach amenities. The Project will provide property owners within the MSBU with a greatly expanded beach area for their use and enjoyment. The presence of the beach also serves as a primary motivator for people to live in the MSBU or to visit properties in the MSBU.

(Plf. Ex. 5 at 8-9).

Each of the specific findings of special benefit determined by the Board is recognized indicia of special benefit so as to be a basis for the levy of a special assessment. See Meyer v. City of Oakland Park, 219 So. 2d 417 (Fla. 1969); City of Winter Springs v. State, 776 So. 2d 255 (Fla. 2001); State v. Sarasota County, 693 So. 2d 546 (Fla. 1997); City of Hallandale v. Meekins, 237 So. 2d 318 (Fla. 4th DCA 1970); City of Boca Raton, 595 So. 2d 25; Atlantic Coast Line RR. Co., 91 So. 118; City of Treasure Island, 215 So. 2d 473; Ocean Beach Hotel Co., 2 So. 2d 879 ; Moon, 269 So. 2d 355.

Further, the County also made legislative determinations as to the fairness of the apportionment methodology. Resolution 08-192, in regards to the apportionment methodology, made the following findings:

> (E) Since the benefits received by properties from the Project vary depending on the type of benefit and proximity to the Project, with all properties receiving a recreational benefit and with beachfront properties receiving a storm protection benefit, it is fair and reasonable for the County to establish separate Areas and apportion a share of the Capital Cost among the Areas.
> (F) The Board finds that the treatment of hotel and commercial facilities within the boundaries of the MSBU is fair and reasonable based upon the respective benefits derived from the Project. Any differences between the treatment of Property types is based upon reasonable and appropriate differences existing between these properties.
> (G) The Board hereby finds and determines that the Assessments to be imposed in accordance with this Resolution provide an equitable method of funding the construction of the Project by fairly and reasonably allocating the cost to specially benefitted property based upon the relative degree of benefit attributable to each parcel.

(Plf. Ex. 5 at 9).

Based upon established law, these legislative findings are entitled to deference by the trial court absent a determination that they are palpably arbitrary. Sarasota Church of Christ, 667 So. 2d 180. As such, all legislative determinations are entitled to a presumption of correctness and should be upheld if supported by competent, substantial evidence in the record. Id. Appellants also suggest that

there was no "competent and substantial evidence" supporting the legislative findings of the Board. This argument fails. Contrary to the Appellants' argument, there was substantial, competent evidence supporting the legislative findings of the Board of County Commissioners, the existence of which is discussed in the next subsection.

B. THE IMPROVEMENTS FUNDED BY THE SPECIAL ASSESSMENTS PROVIDE A SPECIAL BENEFIT TO PROPERTY.

In order to satisfy the first requirement for a valid special assessment, the property subject to the special assessment must receive a special benefit from the improvement or service. However, the special assessment need not provide a "unique benefit"; "rather the test is whether there is a 'logical relationship' between the services provided and the benefit to real property." Lake County v. Water Oak Mgmt. Corp., 695 So. 2d 667, 669 (Fla. 1997); City of Boca Raton, 595 So. 2d at 29 ("special assessments must confer a specific benefit upon the land burdened by the assessment").

A special benefit can be derived by property through a variety of means. As stated in Meyer:

> The term "benefit," as regards validity of improvement assessments, does not mean simply an advance or increase in market value, but embraces actual increase in money value and also potential or actual or added use and enjoyment of the property. Vacant lots and lands,

> may, and usually do, receive a present special appreciable benefit from the construction of a sewer in proximity with and accessible by them for sewerage purposes sufficient to sustain an assessment made on the basis of benefits. A reasonable approach to the question of best possible use is a determination of what can be done with the property by improvements which are reasonably attainable and which can enhance the value under all present circumstances or those foreseeable in the very near future.

219 So. 2d at 420. In fact, in Meyer, the Florida Supreme Court upheld a special assessment imposed on both improved and unimproved property to fund sewer improvements stating that the benefit need not be immediate -- as sewer improvements to unimproved property provided no immediate benefit -- but, must be substantial, certain, and capable of being realized within a reasonable time. Id.

In City of Hallandale, the Court determined:

> Clearly, there is no necessary correlation between the special benefit conferred upon property by a sanitary sewer system servicing the property and the present use being made of such property. The special benefit is the availability of the [sewer] system and is permanent, but the use to which the property is put is usually temporary and changes from time to time.

237 So. 2d at 322 (emphasis added).

A special benefit has been found to be derived from a variety of services and improvements to real property, including water, sewer, downtown redevelopment, road, street lighting, beach restoration, and even parking. See Meyer, 219 So. 2d

417; City of Boca Raton, 595 So. 2d 25; Atlantic Coast Line RR. Co., 91 So. 118; Ocean Beach Hotel Co., 2 So. 2d 879; Moon, 269 So. 2d 355; Rushfeldt v. Metro. Dade County, 630 So. 2d 643, 645 (Fla. 3d DCA 1994). In particular, a special benefit has previously been determined to be provided by a beach erosion groin system. City of Treasure Island, 215 So. 2d 473.

The purpose for which the County seeks to impose the special assessments at issue is the restoration and renourishment of certain beach areas which have been the subject of critical beach erosion. There was competent, substantial evidence to support the Court's finding of special benefits. The Project is necessary to protect many of the properties from structural damage as a result of the extreme erosion that these areas have experienced. (Tr. Vol. II at 155-158). This type of improvement is a classic example of the type which courts have repeated found the presence of a special benefit. The Project will not only enhance the taxable value of property but its marketability. (Tr. Vol. II at 256-257). Further, the Project will increase the use and enjoyment of the properties through the provision of recreational amenities and through the addition of dry sand for the use of those property owners. (Tr. Vol. II at 165-169). The project also will provide storm damage protection for up to a 50-year storm event. (Vol. II at 155-158). More importantly, for several of the properties, the Project will provide the

ultimate special benefit by saving several of the structures from eventual destruction.

Appellants suggest that property which is classified as critically eroded as a result of their inclusion for the continuity of a project somehow do not receive a special benefit.[13] This is contrary to the record. Even those areas which have existing dune protection will benefit from the renourishment project. The project will provide protection from a 50 year storm event, notwithstanding that DEP classifies threat to upland property based on a 25 year storm event. Fla. Admin. Code R. 62B-36.006; (Tr. Vol. II at 151-52; Plf. Ex. 14). Those properties which have existing dune protection will be given a greater degree of protection from the damages of multiple storm events. (Tr. Vol. II at 199-200). This was even conceded by Roland Guidry, representative of Oceania, in his testimony. (Tr. Vol.

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[13] Rule 62B-36.002(4), F.A.C., defines "critically eroded shoreline" as:

> (4) "Critically Eroded Shoreline" is a segment of shoreline where natural processes or human activities have caused, or contributed to, erosion and recession of the beach and dune system to such a degree that upland development, recreational interests, wildlife habitat or important cultural resources are threatened or lost. Critically eroded shoreline may also include adjacent segments or gaps between identified critical erosion areas which, although they may be stable or slightly erosional now, their inclusion is necessary for continuity of management of the coastal system or for the design integrity of adjacent beach management projects.

IV at 584-585). This benefit is in addition to the wide variety of other benefits derived from the project.

Further, an economic analysis, which only took into consideration the direct cost benefits of the project in the context of physical damage that would be spared by the added storm protection, showed that the benefits greatly exceeded the cost. (Tr. Vol. III at 453-458; Plfs. Ex. 25). The benefits were approximately 21 to 44 million, and the costs ranged from approximately 11 million to 14 million. (Tr. Vol. III at 453; Plfs. Ex. 25 at 14). This analysis presented a conservative estimate of benefit. (Tr. Vol. III at 456-57).

The analysis was not done for the purpose of quantifying all of the benefits of the Project, but only addressed physical damage from a potential storm event to structures. The extent of benefits would have been substantially more had the loss of minor structures, such as pools and patios been considered and recreational benefits.[14] (Tr. Vol. III at 457-458). The County satisfied the first prong of the special benefits test.

C. THE ASSESSMENTS WERE FAIRLY APPORTIONED AMONG THE BENEFITED PROPERTIES.

The County's special assessments also satisfy the second prong of the test for a valid special assessment, which requires the costs of the special assessments to

[14] Appellants' expert attempted to attack the benefits by applying a present value factor. However, even his analysis failed to consider the full extent of benefits.

be fairly and reasonably apportioned among the benefited properties. City of Boca Raton, 595 So. 2d at 29; Atlantic Coast Line RR. Co. v. City of Winter Haven, 151 So. 321, 323 (Fla. 1933).

In evaluating the apportionment methodology selected for a special assessment, various fundamental principles have evolved over the years. These guide the courts in consideration of the various apportionment approaches and whether they constitute a reasonable allocation. First, the law has clearly established the appropriate standard to be applied in the considerations of a challenge to the apportionment of a special assessment. That standard, as articulated by the Fifth District Court of Appeal requires:

> The apportionment of assessments is a legislative function, so if the evidence as to benefits is conflicting, as is generally the case, and is predicated on the judgment of expert witnesses, the findings of the city officials will not be disturbed. City of Gainesville v. Seaboard Coastline Railroad Co., 411 So. 2d 1339, 1340 (Fla. 1st DCA 1982). The property owner has the burden to rebut the presumption of correctness of special assessments and such presumption can be "overcome only by strong, direct, clear and positive proof." *Id.* The evidence presented at trial must be viewed in the light most favorable to the County. Rinker Materials Corp. v. Town of Lake Park, 494 So. 2d 1123 (Fla. 1986).

Workman Enters., Inc. v. Hernando County, 790 So. 2d 598, 600 (Fla. 5th DCA 2001).

Second, whether there are alternative methodologies which could have been utilized is largely irrelevant. In fact, there are numerous methodologies available for the apportionment of costs, each of which are valid. The validity is not determined by competing experts exercising their respective judgment, but ultimately by the legislative body. See id. at 600. As long as that selection by the governmental entity is not arbitrary, then the courts are required to give deference to that decision. Whether the property owners, or even the courts, believe that an alternative approach may be preferable is not relevant, only whether the methodology selected by the County is reasonable. City of Winter Springs v. State, 776 So. 2d 255, 260 (Fla. 2001).

Finally, in evaluating the apportionment of costs for the purpose of assessments, the Supreme Court has held that the legislative body should not be held to a standard of perfection because "[n]o system of appraising benefits or assessing costs has yet been devised that is not open to some criticism. None have attained the ideal position of exact equality . . . ." Meyer, 219 So. 2d at 419-20 (quoting City of Ft. Myers v. State, 117 So. 2d 97, 104 (Fla. 1928)). Every apportionment methodology is subject to the criticism or complaint that one category of property is treated more favorably than others. However the test in Florida is based upon the overall approach and whether the assumptions are fair

and reasonable under all of the circumstances, and not arbitrary; once found, the apportionment methodology should be upheld.

The Funding Feasibility Study, adopted by the County's Rate Resolution, sets forth in detail the apportionment methodology of the special assessment. (Plf. Ex. 6). The cost of the Project as it relates to the Destin Sub-Assessment Area is assessed only against the properties within the Destin Sub-Area. Similarly, the cost of the Project within the Okaloosa Island Sub-Assessment Area is only assessed against those properties within that Sub-Area. As a result, properties contributing assessment revenues to the Project pay only for those improvements that actually benefit their property.

As these areas were treated independently, the variety of revenues used to fund the respective Project areas varied.[15] The Study provided that because of the contributions of funding from both the State and the Tourist Development Tax, the special assessment would account for approximately twenty four percent (24%) of the project cost for Okaloosa Island, and approximately thirty six percent (36%) of the project cost for Destin. (Plf. Ex. 6 at 5). Appellants make references to the "flattening out" of the assessments between Sub Assessment Areas and seem to imply that the assessments must pay for all the costs of a project. This argument

[15] Ultimately, no state money was available for the funding of the Western Destin Project. Therefore, it will be funded only by assessment and TDC revenues.

represents a fundamental misunderstanding of special assessments and public financing. The costs for the improvements in each separate Sub Assessment Area are separately delineated and the different revenue sources which were available to fund the improvements in each area were identified. The Board of County Commissioners in its budgetary discretion sought to require property owners in each Sub Assessment Area to pay approximately the same amount annually for their assessments. Once that amount was determined, the Board then identified the other revenues to be used to provide the remainder. The equalizing of the assessments in each area was solely for the benefit of the property owners. There is nothing improper from allocating a variety of revenues to fund a public project or to seek to balance the assessment amounts among property owners. The only issue is whether the special benefit derived exceeds that amount.

Within each of the Sub-Areas, the assessment methodology is applied using a blended approach to apportion the above cost percentages. The methodology allocated sixty percent (60%) of the local cost of the Project within each Sub-Area based upon the benefits of Storm Damage Reduction, and forty percent (40%) of the local Project cost based upon recreational benefit. (Plf. Ex. 6 at 11; Tr. Vol. II at 243). This allocation was based on Coastal Tech's experience and judgment that the categories represent a reasonable, fair, and equitable distribution of costs. (Plf. Ex. 6 at 11).

The sixty percent is allocated only against beachfront properties as they will obtain the exclusive benefits from the Storm Damage Reduction. (Plf. Ex. 6 at 10-11; Tr. Vol. II at 243). For these properties, the cost is allocated among similar properties by taking into account various factors which are included in a point system. These factors are lot size, the number of units per lot, and the linear beach frontage. These factors were applied against each beachfront property. A fourth assessment factor was applied only to non-habitable beachfront commercial properties, based on their size. The higher the points total under the methodology, the greater the allocation of the cost to that property. (Plf. Ex. 6 at 12-14; Tr. Vol. II at 240-41).

The remaining forty percent of the cost is allocated within each Sub-Area on the basis of recreational benefits. Each property in the respective Assessment Sub-Area is allocated pro rata, on a per tax parcel basis. (Plf. Ex. 6 at 10-11). For Okaloosa Island, this initially translated into a recreational assessment of $64.58 per parcel; for Western Destin, $62.94 per parcel. (Plf. Ex. 5).

Though Appellants raise this ratio as an issue, the record reflects that it is consistent established practice in other projects and is approximately the ratio required in all federally funded beach restoration projects. (Tr. Vol. II at 244). Further, it is consistent with the primary purpose of the Project, which is to provide

storm protection. Appellants' own expert had no issue with this ratio. (Tr. Vol. VI at 822).

Appellants also complain about the treatment of hotels. For the recreational portion of the assessment, all properties, including hotels, are assessed pro rata, on a per taxable parcel basis, because all parcels will receive increased recreational opportunity. (Plf. Ex. 6 at 10). Accordingly, all parcels within the assessment area, including single family homes, condominiums, hotels and other commercial facilities, are all assessed the same recreational portion of the assessment, even those parcels which are off beach. Because this portion of the assessment was pro rata, the methodology did not examine parcel size, number of units, or other such factors which were examined for the storm damage reduction portion of the assessment.

Notwithstanding this similarity in treatment, Appellants argue that the recreational portion of the assessment leads to a disproportionate assessment on condominiums, when compared to hotels, because units are not included in the apportionment method. However, on the issue of hotels and other commercial property, the Board of County Commissioners considered the benefits derived from the Project and the distinctions that exist among property types, and made certain legislative findings as to the reasonableness of the assessments. (Plf. Ex. 5 at 9). Additionally, it should be noted that the number of rooms in each hotel was

taken into account for the calculation of the storm damage reduction portion of the assessment. But because the recreational benefit was assessed pro rata, based on increased recreational opportunity, a unit count was not included.[16]

Appellants also raise the issue as to the application of the storm damage reduction component. Condominium units which were not directly on the beach but were within the same condominium complex and had authority to utilize beach side amenities of that condominium which would be directly protected by the project were treated as being on the beach and the storm damage reduction component was applied to them. This is because the assessment program would protect all of those beach side amenities, or common elements, shared by the unit owners pursuant to their condominium ownership. (Tr. Vol. II at 261-62). Though some of the individual units within the condominium may have been off beach, they still receive the benefit of this storm damage reduction and appropriately were allocated a portion of those costs.

The methodology utilized is fair and reasonable under Florida Law. The approach attempts to balance the variety of benefits that are received by the

[16] It is illustrative to view the total assessment side by side. For example, the beachfront Ramada Hotel is assessed $20,541.92 per year for the Project. This can be compared to a unit in beachfront El Matador condominium, where the Donovans own property, which is assessed at $124.96 per unit per year. (Plf. Ex. 5). Both the hotel property and condominium units, as individual parcels, are assessed for the recreational and storm damage reduction portions of the assessment.

respective properties from beach restoration and renourishment and quantify those factors in the allocation of the costs. It considers the inherent differences in property uses and the degree of benefit that each receives from the Project. Merely because the Appellants believe that other factors should be considered or treated differently does not render the apportionment invalid. The approach utilized in the present case has balanced those factors and arrived at an allocation which is clearly reasonable and not arbitrary.

VI. THE PROJECT IS APPROPRIATELY FUNDED BY ASSESSMENTS DERIVED FROM WITHIN THE BOUNDARIES OF THE MSBU.

Appellants also argue that the beach restoration Project is outside the boundaries of the MSBU. The basis of this argument appears to be the strained view that to the extent that sand is added on the seaward side of the mean high waterline (MHWL), it would be State land and, therefore, outside of the boundaries of the MSBU. This argument is legally irrelevant. There is simply no requirement that the service or improvement funded by a special assessment be physically located within the boundaries of the MSBU. The test is whether the property within the boundaries of the MSBU derives a special benefit from the services or improvements funded by the assessments and not whether a portion of the project is on adjacent property outside of the unit. Appellants' allegations on these points are without legal significance.

CONCLUSION

The bonds in this case were properly validated by the trial court. Appellee, Okaloosa County, respectfully requests that this Court affirm the Final Judgment of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee and accompanying Appendix have been furnished by Hand Delivery to D. KENT SAFRIET, ESQUIRE, JOSEPH A. BROWN, ESQUIRE and JULIE M. MURPHY, ESQUIRE, Hopping Green & Sams, P.A., 119 South Monroe Street, Suite 300, Tallahassee, Florida 32301; and by UPS to WILLIAM B. BISHOP, ESQUIRE, Assistant State Attorney, 1-B 9th Avenue, Shalimar, Florida 32579, this 22nd day of July, 2010.

CARLY J. SCHRADER

CERTIFICATE OF FONT SIZE COMPLIANCE

I HEREBY CERTIFY that the foregoing Answer Brief of Appellee complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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