

# **Bond Case Briefs**

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## **Florida CDDs Rebuke Residents Opposing Bond Deal.**

BRADENTON, Fla. – Two central Florida community development districts contend their residents used “sophistry” in trying to persuade a judge not to approve the district’s bonds, attorneys said in final briefs.

Circuit Judge Randall McDonald is expected to decide in coming weeks whether to validate up to \$102 million of bonds at the request of the Poinciana CDDs, created to finance infrastructure for the Solivita development near Orlando.

The ruling will follow a July 18-21 trial in which McDonald heard residents claim that most of the debt will be used to buy overvalued amenities in Solivita from developer AV Homes, which retained ownership of the amenities it wants to sell to the CDDs.

“The districts’ evidence at trial demonstrated that all elements required for validation were met,” said a closing brief filed Monday by the CDDs attorney, Douglas M. Smith with Hopping Green & Sams PA.

“The districts’ proposed amenity acquisition and the issuance of bonds and levy of assessments to repay the bonds is eminently reasonable under the circumstances.”

Smith said the bond issue complies with Florida law, even though the residents apparently wanted the supervisors of the two CDD boards to negotiate a different deal.

“But they [the residents] cannot point to anything legally wrong with the transaction,” Smith wrote. “So they employ sophistry to try to convince this honorable court to give them what they want.”

The elected CDD supervisors plan to use \$73.7 million of bond proceeds to buy 17 existing amenities such as pools and parks. AV Homes charges Solivita residents a club fee annually to use the facilities, filings said.

Residents opposing the bond deal, who will be charged assessments on their tax bills to pay the debt service for 30 years, contend that the CDDs improperly inflated the values of the amenities, most of which are between 10 and 15 years old.

Opponents, in their Aug. 11 closing brief, contended that “a bond validation at the expense of residents should not be a vehicle to permit AV [Homes] to cash in on millions of dollars of illegal assessments.”

“It cannot be the law that this court is required to validate bonds that are not based on fair value but rather are based on an arbitrary target amount specifically intended to allow a developer to cash out 30 years’ worth of illegal fees it was never really entitled to collect,” said the residents’ attorney, J. Carter Andersen with Bush Ross PA.

Under Florida’s Homeowners’ Association Act, Andersen contended, AV Homes has illegally collected club membership fees from residents that exceeded the proportionate share of the

expenses of owning and operating the amenities.

The purchase price of the existing facilities was set by calculating the present value of 30 years of fees the developer intended to collect from residents, he said.

“Through this bond validation proceeding, AV is attempting to monetize its illegal profit stream by selling the amenities facilities to the two community development districts that AV established for Solivita,” Andersen wrote.

Andersen also contended that AV Homes worked with bond underwriters, MBS Capital Markets, to calculate “an enormous target purchase price for the amenities – a price based not on fair market value but instead on the profit stream AV expected to receive” from the club fees.

“AV paid and controlled the consultants the districts’ boards of supervisors relied on when they agreed to AV’s target price,” Andersen said. “With the help of the districts’ counsel, the districts’ manager, and the districts’ engineer – whose fees relating to the amenities purchase were also paid by AV – MBS and AV were able to monitor the consultants’ work and control the conclusions of the consultants’ reports.”

At the same time, he said the districts’ boards “mistakenly” thought their consultants were independent from AV.

Andersen also said that at least one CDD supervisor, LeRue “Skip” Stellfox, was concerned about getting an independent property appraiser to value the price for the amenities, citing a 2009 article in The Bond Buyer about an Internal Revenue Service investigation into the purchase of overvalued amenities in the Village Center CDD, which is about 80 miles north of Solivita.

The IRS concluded that the Village CDD was not a political subdivision because its board was, and would always be, controlled by a developer rather than by residents or other publicly elected officials.

Andersen alleged that AV Homes “selected most of the residents who currently serve as supervisors” for the Poinciana CDDs.

The Village investigation ultimately led the IRS to propose a controversial new definition for political subdivisions that can issue tax-exempt bonds, a determination that remains unresolved today.

“The Internal Revenue Service’s dealings with the Villages in connection with an unrelated transaction has no bearing on this case,” argued Smith, Poinciana CDD’s attorney. “Suffice it to say, federal income tax law is not at issue in a bond validation, nor is another CDD’s dealings with the IRS relevant to whether state requirements for bonds and special assessments have been met.”

Smith said his final argument focused on four main points – the valid public purpose to the project; the “irrelevance of fair value” under Florida law; the validity of the district’s valuation; and the validity of the assessment allocation.

The public purpose, he said, is to construct new amenities and to acquire existing amenities for the benefit of the lands in the districts, giving the community control over the amenities and their upkeep, and providing funds for reserves and replacement.

“There is no doubt that the public purpose is valid,” Smith said, adding that the districts used “sound business judgment” and engaged independent professionals to evaluate the purchase proposal by AV

Homes.

The district supervisors ultimately concluded the transaction was in the best interests of the districts and their residents, he said, noting that the court is not empowered to “second-guess” the legislative decisions of the CDD boards.

“This court’s role is not to evaluate the viability of the project, its financial feasibility, or other collateral matters,” he said. “Its sole role is to assure itself that the actions of the boards comport with the modest legislative thresholds for validating bonds and special assessments, i.e., that the boards did not act arbitrarily and capriciously.”

In arguing against validation, Andersen said the CDD bonds did not meet the requirements of a lawful public purpose, compliance with Florida law, or the fair and reasonable apportionment of special assessments.

“Under the public-purpose requirement, if the primary beneficiary of a project is a private party, then the bonds may be validated only if the public interest is present and sufficiently strong,” he said.

Smith said the closing arguments of the resident opponents failed to sum up evidence or testimony presented or testimony at trial.

“What their closing does exemplify, however, is four classic fallacies: contextomy (taking words out of context); proof by verbosity (barraging the reader with so many “facts” one cannot reasonably respond to all); shotgun argumentation (raising every issue under the sun to con the reader into thinking something must be wrong); and argument by repetition (repeating falsities so many times that the listener begins to believe they are true),” Smith said.

William Mann and Brenda Taylor are the lead defendants opposing the CDD bond validation, though other Solivita residents have donated funds for the legal challenge. Resident Martin Kessler is also an opponent, representing himself.

The judge may hand down a ruling in the validation case before Labor Day, according to participants in the trial.

The Florida Supreme Court would hear an appeal, if filed.

In a separate case, Solivita homeowners are suing AV Homes and its subsidiary, Avatar Properties Inc., for violating the state’s Homeowners’ Association Act for what they allege are the illegal collections of club membership fees.

Circuit Judge Andrea Teves Smith denied a motion to dismiss the class-action case on Aug. 4.

## **The Bond Buyer**

By Shelly Sigo

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