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Florida Judge Refuses to Validate Poinciana CDD Bonds.

BRADENTON, Fla. – A Florida judge declined to validate bonds proposed by two community development districts, saying they failed to properly apportion special assessments they planned to charge homeowners.

Polk County Circuit Judge Randall McDonald found the Poinciana CDDs' assessment rate schedule to be "arbitrary and capricious."

In denying the districts' request to issue $102 million of tax-exempt bonds, McDonald said Friday there was no proof that homeowners paying a higher assessment fee would have greater access to the amenities being purchased than homeowners paying a lower fee.

Solivita is a retirement community in Polk County, about 25 miles south of Orlando.

"The court finds no testimony or record evidence of higher valued or additional special benefits, which the districts intended to retain or add of which there was a correlating higher cost and, consequently, justified the homeowners being specially assessed at different rates," McDonald said in a 25 page decision.

The uneven assessment scheme was one of several arguments residents in the Solivita retirement community near Orlando, led by Brenda Taylor and Bill Mann, used to challenge the bond validation by the CDDs.

The judge rejected their other arguments, including their contention that the purchase price for existing amenities being bought with bond proceeds was inflated.

The CDDs planned to use $73.7 million of bond proceeds to purchase amenities such as pools and parks from the developer, Avatar Properties, and its parent AV Homes. AV Homes was also selected to build a new wellness center and a performing arts center for an additional $11.2 million.

The bonds would have been backed by assessments on homeowners' tax bills over 30 years.

Taylor and Mann appreciated the ruling regarding the special assessments, said J. Carter Andersen, an attorney with Bush Ross PA.

"That is a victory for all Solivita residents and gives the CDD Supervisors a second chance to decide to not pay $73.7 million for community amenity properties – the same properties that the residents argue in the class action case the developer is required to turn over to the homeowners association in just a few years," Andersen said.

The assessments were based on a schedule of "club fees" charged by AV Homes that varied depending on when homes were purchased.

"The only basis for the club fee scheme – and sole basis upon which the districts' supervisor boards approved to specially assess the homeowners at different rates – is the developer's original

subjective decision to implement the club fee scheme," McDonald wrote.

He cited testimony from a July 18-21 trial in which the chairmen of the Poinciana CDD boards said they did not recall consultants explaining how the club membership fees were set.

Michael Eckert, attorney for the CDDs, said the boards of supervisors will meet jointly on Sept. 20 to decide how they will respond to the ruling. The Florida Supreme Court would hear any appeal.

"Throughout the entire transaction, the district boards and developer have publicly stated their intent is for residents to pay no more in debt special assessments than they were paying in club fees," said Eckert, with Hopping Green & Sams PA.

Homeowners are charged according to four different levels of club membership fees based on when homes were purchased, he said. To structure the bond transaction and make the special assessments no more than the club membership fee each owner paid, Eckert said the developer agreed to make an "assessment equalization payment via a reduction in the purchase price" to pay down assessments for certain owners prior to the issuance of the bonds.

"Since the amounts in club membership fees were different for various properties based on when residents bought, not everyone would receive the same credit and some would receive no credit from the assessment equalization payment," he said.

Eckert also said an alternative to the assessment schedule that was employed would have required the developer to make the equalization payment after the bonds were issued, "but that would result in what the district believed to be unnecessary transaction costs."

"Nevertheless, the court took exception to the structure because it concluded that although the methodology consultant found that all units benefited equally from the project there was no rational basis for having different assessments levied on the various properties pre-issuance," he said. "This was the sole reason cited by the court for denial of the validation."

On the various elements of the law necessary to validate the bonds, Eckert said the court found that the Poinciana districts had the legal authority to issue the bonds and levy special assessments to secure the bonds, and that the CDDs demonstrated a valid public purpose for issuing the debt.

"The court expressly rejected the notion that the developer improperly controlled, unduly influenced, or coerced the boards and their consultants," he said.

Residents argued that emails and other communications showed evidence that the developer exerted improper control over the districts.

McDonald said he did not find evidence that the developer improperly controlled the district boards and consultants during negotiations "to secure their predetermined purchase price to maximize their profits."

"Beyond the expectant negotiated give-and-take and intimate cooperation and communication between individuals and entities involved in a complex real estate purchase and bond issuance process, at best it appears to the court that the developer may have engaged in tactics of persuasion on its behalf to maximize profits," McDonald said.

McDonald also said he found no harm in the fact that the private developer is a primary beneficiary by selling the existing amenities to the districts.

“The public purpose for purchasing and constructing the existing and prospective amenities is not overwhelmed by the districts’ boards’ acquiesce to the developer’s firm stance on its targeted purchase price,” he said.

On other points, Eckert said that McDonald rejected other arguments made by the residents, including an interpretation of Florida law as it pertains to “fair value” and an argument that existing club membership fees could not be valued as part of the transaction.

The residents contended that the “club plan scheme” is illegal, and as such could not support an income-based approach for purchasing the amenities.

McDonald said the legality of the club plan was collateral to the bond validation, and declined to rule on the issue.

A separate, class-action lawsuit has been filed by Bush Ross on behalf of Solivita residents challenging the club plan and the fees imposed by the developer for the use of amenities in the community.

“In their class-action lawsuit against Avatar Properties and AV Homes, [the residents] are seeking an order that the club fee scheme is illegal, and requiring that the property be turned over to the homeowners with no payment at all,” Andersen said.

Andersen said the suit contends that the club plan violates the Florida Homeowners Association Act.

In the validation case, Eckert said the judge upheld the districts’ use of the income-based approach to value the sale of existing amenities, saying it was not arbitrary or capricious.

Residents had claimed that the CDDs planned to use the inflated price of $73.7 million to buy 17 existing amenities by using the income approach to capitalize the developer’s club membership fees over three decades.

The residents hired Urban Economics Inc., a state certified real estate appraiser, which found the market value of the amenities to be $19.25 million.

McDonald said the income approach to valuing the amenities was not arbitrary or capricious.

“The court finds defendants’ objection of plaintiff’s using an income based valuation methodology, rather than an alternative valuation methodology such as market value based on cost approach, is not sufficient in and of itself to invalidate bond issuance,” McDonald said. “For the court, the dispute of valuation methodologies allowed for reasonable people’s different opinion thereon.”

Solivita resident Martin Kessler, who represented himself without an attorney in opposing the bond validation, said he may not have lost the case but he did not win, either.

“By that I mean the judge did not agree with my arguments on a particular section of Chapter 190,” he said, referring to the Florida law that governs community development districts.

Kessler, 93, had argued that his interpretation of Chapter 190 required the Poinciana CDD and similar districts to perform a “just value” analysis of any real estate or property to be purchased from a contractor, engineer or any person. The CDDs argued that the “fair value” clause of Chapter 190 had no bearing on the case.

McDonald agreed with the CDDs, and said that obtaining a licensed appraiser was not a legal

requirement for the district boards to consider the choice of consultant and valuation method. He also said the developer is entitled to seek payment for its income stream when negotiating the sale of property.

“This case only serves to highlight the many reasons why I believe Chapter 190, Florida Statutes, needs to be revised to prevent cases like this one from coming to district courts in the future,” Kessler said.

Daniel Fleming, a shareholder at Gray Robinson and lead attorney in the class-action litigation for AV Homes and Avatar Properties, said they were pleased with McDonald’s ruling supporting the actions of the CDDs, even though the bonds were not validated because of the assessments.

“Our client, AV Homes, looks forward to working with the CDDs to address the court’s concern so that the transaction can proceed,” Fleming said in a statement. “Regarding the class-action litigation, we continue to believe that the claims raised in that matter are without merit and we plan to vigorously defend our client against them.”

Fleming also said that claims by Andersen that Avatar is required to turn over club assets to the homeowners are “highly misleading and inaccurate.”

“Mr. Anderson’s contentions have not been substantively ruled upon by any court and we contend that they are directly inconsistent with Florida law,” Fleming said.

The Bond Buyer

By Shelly Sigo

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