

IN THE SUPREME COURT OF FLORIDA

Case No. SC09-1893

Lower Case No.: 3D09-2357 3D09-1960, 50-2008-CA-031975XMB

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Petitioner,

vs.

MICCOSUKEE TRIBE OF INDIANS,
et al.,

Respondents.

**NEW HOPE'S SUGGESTION OF LACK OF SUBJECT MATTER
JURISDICTION TO ENTERTAIN SFWMD'S
PETITION TO INVOKE ALL WRITS JURISDICTION¹**

SFWMD has filed a petition² with this Court based upon its all writs power to reach down and pull-up a case currently pending before the District Court of Appeal, Third District,³ for resolution by this Court. Respondents, New Hope Sugar Company and Okeelanta Corporation (together "New Hope"), respectfully

¹ New Hope and Okeelanta are addressing only the issue of subject matter jurisdiction at this time and not addressing the issues raised in the petition on the merits, as such would only be appropriate if this Court were to issue a rule.

² South Florida Water Management District's ("SFWMD") Petition to Invoke All Writs Jurisdiction.

³ *New Hope Sugar Company v. South Florida Water Management District*, Case No. 3D09-2357. That Third District case is consolidated with the related *Miccosukee Tribe of Indians v. South Florida Water Management District*, Case No. 3D09-1960.

raise with the Court the Suggestion that it lacks subject matter jurisdiction to grant SFWMD's request. While New Hope has file a motion before the Third District to certify that same case to this Court as one involving a question of great public importance requiring immediate resolution by this Court, and has requested that this Court stay this action pending either disposition by the Third District of that case or transfer of that case to this Court, New Hope does not believe that the Court has the subject matter jurisdiction to bring the Third District case to its docket unless the Third District certifies the case to the Court. *See Fla R. App. P. 9.030(A)(1)(b).*

SFWMD asks this Court to issue a writ under its "all writs" power so that it can "protect and exercise its mandatory and exclusive jurisdiction over a [bond validation appeal] currently pending before the Court,"⁴ But, in so doing, SFWMD seems to overlook the fact that the all writs power *does not create* jurisdiction that does not otherwise exist pursuant to Article V of the Constitution of Florida and implementing legislation, and that there does not exist subject matter jurisdiction in this Court to entertain the Third District case, which involves an issue over which the District Courts of Appeal have primary jurisdiction under Florida Rule of Appellate Procedure 9.030 and section 120.68, Florida Statutes, *absent a*

⁴ *New Hope Sugar Company v. South Florida Water Management District*, Case No. SC09-1818.

certification of a question of great public importance by the District Court of Appeal.

As a result, New Hope continues to believe that the best approach is for this action to be stayed pending the Third District's decision on appeal, or its decision to certify the issue to this Court. New Hope has no problem with both cases being decided by this Court, but New Hope does not want to face a situation where this Court, which is ever vigilant of limitations on its jurisdiction, takes the case and then later decides that it did not have subject matter jurisdiction. In New Hope's view, it is much better to make sure that the vehicle used to review the lower case comports with this Court's jurisdiction.

ARGUMENT

The appeal before the Third District involves judicial review under section 120.68, Florida Statutes, of the dismissal by SFWMD staff attorneys⁵ of New Hope's Petition for Formal Administrative Hearing. The formal hearing was

⁵ The petition at issue in the Third District appeal sought a hearing to develop a record on disputed issues of material fact, and to have an Administrative Law Judge issue a recommended order for final decision by the SFWMD Governing Board. The petition was dismissed by SFWMD staff attorneys without ever going to the Governing Board for action. It is very important to note that even if the Court takes on the Third District case, total resolution of the matter will not be possible, as a ruling in New Hope's favor will result in the need for a DOAH hearing, followed by agency review and the possible undoing of the entire transaction. There are matters that require evidentiary review that are not yet ripe for appellate determination.

requested to address, and develop a complete administrative record regarding, a series of SFWMD decisions stemming from its intended purchase of landholdings of United States Sugar Corporation (“USSC”). SFWMD, through an assistant general counsel, summarily denied New Hope’s request for a formal administrative hearing, notwithstanding the presence of several important disputed issues of material fact.⁶

As a result, New Hope sought judicial review of the dismissal in the Third District, pursuant to section 120.68, Florida Statutes, requesting that the Third District remand the case and order SFWMD to grant New Hope a formal administrative hearing before an administrative law judge. The question before the Third District is whether SFWMD should have held a formal administrative hearing. The issue before this Court is narrower, relating only to the means of financing the acquisition. The ultimate questions raised in the Petition for Administrative Hearing at issue in the Third District would exist whether or not

⁶ These include, *inter alia*, whether the purchase comports with statutory requirements for SFWMD environmental land purchases, whether the determination that it serves the stated public purpose was arbitrary and capricious, whether SFWMD cancelled other important projects as a result of the USSC acquisition, and whether the detrimental impact to Everglades restoration from cancellation of important, legislatively mandated projects, and delay of other such projects, was properly considered.

bond validation is sought.⁷ Moreover, there is nothing in the Third District case that impinges upon this Court's bond validation case, nor are the orders to be reviewed even from the same tribunal.

This Court is entertaining a direct appeal from the circuit court. The action before the Third District is an appeal from an agency action and an agency, SFWMD. While the proceedings that flow from the Third District case could conceivably make moot a bond validation, the jurisdictional bases of the reviews of both cases are very different.

Florida Rule of Appellate Procedure 9.030 reflects the respective distinct constitutional and statutory jurisdiction of this Court and the District Courts of Appeal. Rule 9.030(b)(1)(c) deals with District Courts of Appeal jurisdiction over "administrative action if provided by general law." Consistent with the Rule, the Legislature has, by general law, provided that judicial review of final agency action shall be in the District Courts of Appeal. Fla. Stat. § 120.68(2)(a). Thus, the District Courts have broad general jurisdiction over final agency action of state administrative agencies, such as SFWMD.

⁷ The case before the Supreme Court would, however, become moot were the Third District to require a hearing and SFWMD, following that hearing, to decide not to proceed with the acquisition.

This Court, by contrast, has limited jurisdiction over administrative agency action. The Florida Rules of Appellate Procedure reflects direct jurisdiction in the Supreme Court only over “action of statewide agencies relating to rates or service of utilities...” Fla R. App. P. 9.030(A)(1)(a)(ii). Thus, the rules make a clear distinction between utility rate cases (typically from the Florida Public Service Commission), and all other types of agency action. There is no direct jurisdictional basis in the rule for this Court to review a final order of the SFWMD.

This Court does, however, have direct jurisdiction over “final orders entered in proceedings for the validation of bonds...,” such as the appeal of the 15th Judicial Circuit Court’s decision to validate \$650 million in certificates of participation (“COP’s”) for SFWMD to finance the USSC acquisition. While that case and the one before the Third District relate to the same ultimate purchase, they stem from different operative legal theories and proceed under different jurisdictional bases. The validity of the financing mechanism is not before the Third District. What is before that court is the question of whether an administrative hearing should have been afforded in the SFWMD’s administrative process.

There is no basis for this Court to exercise subject matter jurisdiction over a matter that the Florida Constitution as reflected in Rule 9.030 and section 120.68

vests in the District Courts of Appeal. And, the “all writs” power creates no such independent jurisdictional power.

The purpose of the Court’s “all writs” power is to determine all pending issues regarding a matter within the jurisdiction of the Supreme Court. It is not a basis to expand subject matter jurisdiction that does not otherwise exist. To do otherwise would make the jurisdictional rules meaningless and, in effect, create a common law certiorari power in this Court which does not exist.

None of the cases SFWMD cited to in its Petition to Invoke All Writs Jurisdiction say otherwise. *See Couse v. Canal Authority*, 209 So. 2d 865 (Fla. 1968)(Court issued all writs jurisdiction to determine the validity of a statute where it had erroneously sent the matter to the district court.); *Florida Senate v. Graham*, 412 So. 2d 360 (Fla. 1982)(Court issued all writs jurisdiction to determine apportionment period in Congress when it had to review that issue later in the year); *Rowe v. Pinellas Sports Authority*, 461 So. 2d 72 (Fla. 1984)(Court had all writs jurisdiction to determine declaratory action and bond validation proceeding where both actions were consolidated below and there was no pending district court proceeding).

SFWMD particularly relies on *Mize v. Seminole County*, 229 So. 2d 841 (Fla. 1969), as authority for this Court to command the Third District to transfer

the case before it to this Court. In *Mize*, the Court was faced with a situation where a validation of bonds was before the Supreme Court, while at the same time a declaratory action case resulted in a District Court *enjoining the issuance of the very same bond that was before this Court*. Holding that its jurisdiction would be frustrated unless it could bring before it the decision of the Fourth District to enjoin the bond issuance, this Court did so.

In *Mize*, the District Court issued a ruling that directly infringed upon this Court's power by issuing an order which enjoined the bonds that were before the Court in a validation proceeding. Here, New Hope is not requesting any relief in the Third District that would directly contradict a future ruling by this Court, or the prior ruling by the circuit court.

Since the sole issue before the Third District is whether or not SFWMD should have granted New Hope a formal administrative hearing, the Third District does not have to determine any issues brought up during the bond validation which would interfere with the exercise of this Court's jurisdiction. The issuance of bonds is not before the Third District. The only possible result in that case is that the matter will be remanded to SFWMD for an administrative hearing and a new decision by the Governing Board on whether to move forward with the USSC acquisition. While this could make the present case moot, this would only occur

were the Governing Board, on remand, to decide not to approve the acquisition.

In that case, it would be the new agency action, not any order or injunction by the Third District, that moots the subject matter.

To compare *Mize* and the other cited cases to one which deals not with the same bonds, nor with financing, and not with the same tribunals, but rather to whether or not the underlying purchase was proper, involving an administrative agency decision and not a directly-reviewable circuit court decision is simply non-availing. As much as SFWMD might wish it were not the case, the jurisdictional “end” does not justify the means.

**THE SUPREME COURT DOES NOT HAVE UNLIMITED “PULL-UP”
POWERS**

Also, this Court is unable to “pull up” this case via its all writs power because the Third District appeal does not interfere with the exercise of this Court’s jurisdiction. Here, assuming that this Court were inclined to validate the bonds, a ruling by the Third District that New Hope should have been given an administrative hearing will not “overrule” this Court’s opinion. Granted, were the Governing Board ultimately to decide not to proceed (after considering the results of the hearing and the Recommended Order) there would be no purpose to the validation and the Court would have wasted valuable judicial resources.

However, there is a distinct difference between deciding whether a hearing should be granted to challenge a project administratively, and whether the financing behind the project is proper. The latter is determined by the Circuit Court, acting under section 75.04, and ultimately by this Court in a direct appeal. The former was decided administratively by the agency staff and proceeds through the district courts under the judicial review process laid out in section 120.68.

This Court does, however, have discretionary jurisdiction over “orders and judgments of trial courts certified by the District Courts of Appeal” as requiring immediate resolution and “of great public importance.” Fla. R. App. P. 9.030(A)(1)(b). New Hope recognizes that there is a question as to whether this provision, applying only to “judgments of trial courts” can extend to an order of an administrative agency. We submit that the intent of the rule is to allow the District Courts of Appeal to pass important, time-sensitive questions to the Supreme Court, and that this can apply to agency action over which the District Court of Appeal has appellate jurisdiction.⁸ New Hope suggests that the procedure of Rule

⁸ Absent this approach, however, the only basis for jurisdiction of review of administrative action is under one of the criteria of Rule 9.030(a)(2)(A), all of which apply only *after* a District Court has entered a decision. Thus, were the Court to decide that it cannot review a District Court appeal under certification via Rule 9.030(A)(1)(B), or were the Third District not to certify the case, the best course of action would be to stay the validation appeal pending a decision of the Third District.

9.030(A)(1)(b) is the only proper basis under which this Court can acquire jurisdiction over the Third District appeal prior to a decision by that lower court.⁹

CONCLUSION

New Hope Sugar respectfully suggests to this Court that it does not have jurisdiction pursuant to art. V, section 3(b)(7), Fla. Const. and Fla. R. App. P. 9.030(a)(3) to order the District Court of Appeal, Third District, to transfer Case No. 3D09-2357 to this Court. However, it appears clear that this Court could accept a transfer from the Third District, and that this is precisely the type of situation where such action by the Third District would make a great deal of sense. But, if the Third District does not certify the case to this Court, New Hope does not see what the basis of jurisdiction would be for this Court to pull this case up.¹⁰

⁹ The Court will recall that the District Court of Appeal, First District, passed a number of cases during the 2000 election litigation directly to this Court because of the need for prompt review by this Court.

¹⁰ Should this Court determine to issue an order to show cause and exercise jurisdiction, New Hope respectfully requests time to more fully respond to the allegations in SFWMD's Petition To Invoke All Writs Jurisdiction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via Federal Express delivery, this 22nd day of October, 2009 to:

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