

STONE & GERKEN, P.A.

ATTORNEYS AT LAW

MEMORANDUM

To: Sumter Landing Community Development District Board of Supervisors

From: Kevin M. Stone, District Counsel

Re: Obligation to replace project-wide improvements

Date: August 5, 2022

Sumter Landing Community Development District (SLCDD) is obligated by the Interlocal Agreement for Project Wide Improvements (the “Interlocal”) to “maintain” project-wide improvements owned by certain community development districts (each a “CDD”) in The Villages south of CR 466 (an area called the “Project”). I have been asked whether SLCDD’s *maintenance* obligation requires it to *replace or rebuild* a project-wide improvement which is damaged, deteriorated beyond repair, or past useful life. In my opinion, SLCDD is obligated to replace such an improvement because it was the reasonable intent of the parties.

The CDDs joined the Interlocal as a means of maintaining project-wide improvements, intending that the maintenance would include necessary repairs and replacements to keep the improvements in their existing state. The CDDs have acted in accordance with this intent since the beginning, when the Interlocal only had two participants – Village CDD No. 5 and SLCDD. Other CDDs subsequently joining had a clear view of how the arrangement had been operating, making the newer parties’ intentions even more obvious.

Each CDD in the Interlocal has only one material source of revenue to pay for all activities relating to the improvements it has acquired or constructed. This is each CDD’s “maintenance” assessment. In this light, virtually everything a numbered district has ever done since original acquisition/construction is within that district’s internal definition of “maintenance.” Each CDD maintains its own local (i.e., non-project-wide) improvements (including making necessary replacements) with “maintenance” assessment dollars and has promised to contribute other “maintenance” assessment dollars to the project wide fund to be used by SLCDD to maintain the project-wide improvements. The CDDs in the Interlocal at any given time since 2003 have consistently reviewed and approved payments into the project-wide fund based on SLCDD project-wide fund budgets identifying replacements, and each CDD has made the payments with “maintenance” assessment funds. For example, in the current year, a significant portion of the budget is dedicated to replacement of landscaping, fencing, and road surfaces.

Clearly, the CDDs intend to include necessary project-wide improvement replacements within the scope of SLCDD’s “maintenance” obligation. This was a reasonable

understanding. First, and most significantly, the meaning of “maintenance” in the Interlocal corresponds with the meaning of “maintenance” in the CDDs’ budgets and assessment resolutions. Furthermore, replacement-as-maintenance is not a novel concept. In the footnote are examples of court holdings that local governments or property managers were required to replace assets pursuant to a “maintenance” obligation.¹

In short, the failure of SLCDD to make necessary replacements of improvements would violate the reasonable expectations of the parties to the Interlocal.

Numbered districts construct/acquire improvements with tax exempt special assessment bonds.

Much of the community infrastructure in The Villages is owned by certain CDDs referred to as “numbered” districts. When a new area in The Villages is developed for residential use, a numbered district is formed to construct/acquire the associated public infrastructure improvements including, but not limited to, roads, drainage, landscaping, and recreation trails. The construction/acquisition is financed with the proceeds of tax-exempt bonds issued by the new numbered district. A benefit special assessment² to repay the bonds, often called a bond assessment, is levied when the bonds are issued.

Numbered districts must operate, maintain, repair, replace and renew their infrastructure.

Each numbered district is responsible for the improvements it has constructed/acquired with bond proceeds.³ It must maintain, preserve, and keep the infrastructure, or cause the same to be maintained, preserved, and kept, in good repair, working order and condition; further, each numbered district must, from time to time make, or cause to be made, all necessary and proper repairs, replacements and renewals so that at all times the operations of the infrastructure improvements may be properly and advantageously conducted.⁴ Not only are these the clear and proper responsibilities of the local government in custody of the infrastructure for the benefit of the community, but they are also contract obligations under the terms of the master trust indentures associated with each numbered district’s bonds.

¹ A county’s obligation to “maintain” culverts, bridges, and similar structures includes the obligation to replace the structures. Montezuma Valley Irrigation Co. v. County of Montezuma 486 P.3d 428 (Colo. App. Div II 2020) (at 432, “‘Maintain’ is defined as ‘to keep in an existing state (as of repair, efficiency, or validity).’ *Merriam-Webster Dictionary*, <https://perma.cc/W57GNN5T>. This definition suggests that maintaining a structure would include undertaking anything necessary to repair, restore, or replace it so as to keep it in existence.”) The duty of a city to ‘maintain’ streets and keep them in repair includes an obligation to replace a bridge that had washed out. Herbert v. City of Richland Center, 582 N.W.2d 462 (Wis. 1953). The obligation of a condominium association to “provide, maintain, and care for lawn and shrubbery” did not require management to make new additions, but did require management to replace shrubbery and sod as needed; further the obligation in the maintenance agreement to “furnish the necessary repairs to preserve the exterior appearance of said building against ordinary wear and tear” required both repair and replacement of monument and other signs exterior to the building in place at the inception of the agreement. Bay Management, Inc. v. Beau Monde, Inc., 366 So.2d 788 (Fla 2d Dist. 1978).

² Authorized by Chapter 190.021(2), Florida Statutes

³ With limited exceptions that are not material to this opinion; some infrastructure improvements constructed/acquired by a numbered district (e.g., certain roads) have been, according to plan, dedicated to the county for maintenance.

⁴ Paraphrasing Sec. 807 of typical master trust indenture

Numbered districts levy “maintenance assessments” to pay all expenses other than debt service.

Each CDD has the authority to assess lands within its boundaries for maintenance and operation functions⁵ and, in fact, the CDDs each levy such “maintenance assessments” on assessable lands in their borders. The expenses to be paid from maintenance assessments are calculated for each budget year and then allocated among the assessable properties in each CDD. After construction/acquisition, virtually all the money a numbered district receives or spends comes from (1) collected bond assessments (restricted for debt service on the bonds) and (2) collected maintenance assessments (spent on maintenance, operations, repairs, replacements, and renewals, including all associated administrative and overhead costs of the district). In other words, except for budget disbursements from the debt service fund (i.e. paying bonds and related costs), all of the activities of each numbered district are paid for with “maintenance” assessments.

For years, when the numbered district supervisors have used the word “maintenance,” to describe assessments and annual budget disbursements, they have meant something broad enough, at least, to encompass all the work and associated expenses to keep improvements in good repair, working order and condition, and to make all necessary and proper repairs, replacements, and renewals. In their actions, the numbered district supervisors have evidently reasoned that maintenance assessments could be spent as necessary to keep the improvements in their existing state, including making replacements and renewals. The CDDs have fulfilled their ongoing infrastructure replacement and renewal duties using “maintenance” assessments and have never sought a revenue source such as an ad valorem tax or alternative capital special assessment to supplement the budget.

Some infrastructure improvements are maintained for the benefit of properties “project-wide.”

After acquisition/construction, some of a CDD’s improvements are, by their nature, local (i.e., non-project-wide) improvements maintained for the exclusive special benefit of properties within that CDD; however, other improvements are collectively used and enjoyed by residents and property owners throughout the Project. Among numbered district supervisors, the improvements in the second category are called project-wide improvements. For both categories of improvements – local and project-wide – all ongoing expenses are paid from “maintenance” assessments.

Project districts made an interlocal agreement to jointly deal with Project Wide Improvements.

Since August 2003, each new “numbered” community development district in the Villages project has joined into the Interlocal. The Interlocal, first established between Village CDD No. 5 and SLCDD, was designed to establish an equitable cost sharing arrangement for maintenance of “Project Wide Improvements” (as designated in the Interlocal) which were project-wide improvements identified as providing a benefit all residents of the Project. This was a long-term arrangement to pool risk and resources for common benefit. New numbered districts have joined after completing acquisition/construction, and two commercial districts, SLCDD and Brownwood Commercial Development District also participate.

The Interlocal has been amended several times, most recently in 2019. However, the fundamentals of the arrangement have not changed. SLCDD has promised to coordinate and supervise maintenance of Project Wide Improvements financed by the project wide fund. In

⁵ Authorized by Section 190.021(3), Florida Statutes, to “maintain and preserve the facilities and projects of the district.”

return, each numbered district has obligated itself to pay a proportionate share of the costs into the project wide fund, upon receipt of an invoice from SLCDD.⁶ This proportionate share has historically been paid from maintenance assessments.

The CDDs use some of their “maintenance” assessment funds directly to replace local improvements that are not part of the project wide arrangement. The CDDs, by contributing another portion of “maintenance” assessment funds to the project-wide fund, have delegated and engaged SLCDD to undertake the same scopes of work with respect to project-wide improvements.

The CDDs understand maintenance to include all work to deal with project-wide improvements, and act accordingly.

Since the inception of the Interlocal, it has been clear that each CDD intends to divide the improvements it had constructed into two categories: local improvements and project-wide improvements. All work to manage the local improvements (including repair and replacement) is handled by the local CDD with a portion of the maintenance assessments. The same scope of work with respect to the project-wide improvements (including repair and replacement) is contractually delegated to SLCDD.

Each year, the CDD boards of supervisors, in public meetings, review the proposed project-wide fund budget and allocation and approve, by majority vote, payments into the project-wide fund. The SLCDD project-wide fund budgets have often identified infrastructure replacements, and each CDD has made the payments with “maintenance” assessment funds.

In 2013 SLCDD voluntarily established the Project Wide Advisory Committee (PWAC) with representatives from each numbered district to provide input, explore issues and provide advice and recommendations to the SLCDD board on issues related to its maintenance of Project Wide Improvements. The advice of the PWAC has been extremely influential on the actions of SLCDD as it has performed its duties under the Interlocal. The PWAC reviews and makes recommendations to SLCDD about how the project-wide funds should be sized and spent, and has often approved expenditures for replacements.

A distinction between “removal,” “demolition” and “reconstruction” on the one hand and “maintenance” on the other hand is a false dichotomy.

It has been suggested that a CDD cannot sell tax-exempt bonds for “maintenance,” but a CDD can sell bonds for “reconstruction,” and that therefore “reconstruction” and “maintenance” are mutually exclusive concepts – in other words that SLCDD’s duty to “maintain” does not require or allow it to “reconstruct” something. But this pre-supposes a narrow definition of “maintenance.” To be sure, tax-exempt bond proceeds must usually be used to finance capital assets and are not for working capital expenditures. However, reconstruction, renovation and rehabilitation are often financed with tax exempt bond financing and could, at the same time, be part of a local government’s “maintenance” plan. In any event, whether tax-exempt bonds can be used to pay for the maintenance of project-wide facilities is irrelevant – no one has suggesting using bond proceeds for that purpose.

⁶ The proportionate share is determined based on the “assessable acreage” of each District as determined in connection with the original levy of benefit assessments. Each numbered district, from inception, has used the “assessable acreage” of internal subdivisions identified at the time of bond issuance to apportion benefit assessments and maintenance assessments.

Another distinction was made between the procurement processes for “maintenance” versus “reconstruction.” There are all kinds of different activities required for “maintenance,” and a variety of procurement rules may apply to those different activities. Reconstruction is one kind of activity. The fact that the process for hiring a contractor for reconstruction is different from the process for hiring a lawn-mower does not have any bearing on whether either is a “maintenance” activity. The CDD and SLCDD will follow the legally required procedures for each kind of activity. It is the clear intent of the parties to the Interlocal contract that governs the meaning of the word “maintenance.”

For all of the foregoing reasons, my opinion, consistent with past practice and advice, is that SLCDD can and must keep improvements in their existing state, including through replacement or reconstruction where necessary, in order to comply with its Interlocal obligations.