Filing # 147024181 E-Filed 04/04/2022 06:05:18 PM

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA

FLOW WAY COMMUNITY DEVELOPMENT DISTRICT

Plaintiff,

v. CASE NO: 11-2020-CA-004147-0001-XX

TAYLOR MORRISON OF FLORIDA, INC., TAYLOR MORRISON ESPLANADE NAPLES, LLC, ANDREW MILLER, JOHN WOLLARD, STEPHEN REITER, ADAM PAINTER, CHRISTOPHER NIRENBERG, and ESPLANADE GOLF & COUNTRY CLUB OF NAPLES, INC.,

Defendants.
_____/

DEFENDANTS/COUNTER-PLAINTIFFS' ANDREW MILLER, JOHN WOLLARD, STEPHEN REITER, ADAM PAINTER, AND CHRISTOPHER NIRENBERG'S MOTION FOR SUMMARY JUDGMENT AS TO ALL COUNTS DIRECTED AGAINST THEM (COUNTS II AND IV OF PLAINTIFF/COUNTER-DEFENDANT'S FLOW WAY COMMUNITY DEVELOPMENT DISTRICT'S FOURTH AMENDED COMPLAINT)

COMES NOW Defendants/Counter-Plaintiffs, ANDREW MILLER, JOHN WOLLARD, STEPHEN REITER, ADAM PAINTER, and CHRISTOPHER NIRENBERG (the "**Former Supervisors**"), by and through its undersigned counsel, and pursuant to Rule 1.510, Florida Rules of Civil Procedure, and moves this Court for entry of summary judgment as to all counts directed against them, Counts II and

IV of Plaintiff/Counter-Defendant, FLOW WAY COMMUNITY DEVELOPMENT DISTRICT (the "**CDD**") Fourth Amended Complaint filed on January 20, 2022 (the "**Complaint**"), and as grounds therefore state:

PRELIMINARY STATEMENT

Sovereign immunity requires dismissal of the CDD's claims against the Former Supervisors. The CDD's Complaint includes two counts against the Former Supervisors, the first framed in declaratory judgment (Count II) and the second alleging a breach of fiduciary duty (Count IV). Both counts allege that the Former Supervisors improperly voted as members of the CDD's governing body to accept donation of certain preserve land (the "Preserves"). And both counts seek to impose personal liability on the Former Supervisors for costs incurred by the CDD associated with the CDD's ownership and maintenance of the Preserves. Sovereign immunity, however, protects the Former Supervisors from liability for damages in civil suits for alleged negligent or wrongful acts taken while acting within the scope of their office except to the limited extent immunity has been waived.

In this case, sovereign immunity requires the dismissal of the CDD's claims against the Former Supervisors for three independent reasons that each warrant summary judgment: 1) the Former Supervisors' actions fall within the scope of discretionary or judgmental governmental functions that are immune from private civil suits for damages regardless of any waiver; 2) the CDD is precluded from suing

the Former Supervisors in their individual capacities because the CDD has no basis to allege the Former Supervisors acted in bad faith or with malice as required by section 768.28(9), Florida Statutes; and, 3) the CDD's claims fall outside the limited waiver of sovereign immunity in section 768.28(1), Florida Statutes, which has only waived immunity as to suits seeking recovery of money damages for "injury or loss of property, personal injury, or death."

There is no genuine dispute as to any of the material facts relevant to these three issues. Therefore, the Former Supervisors are entitled to summary judgment against the CDD and dismissal from this lawsuit.

UNDISPUTED FACTS WARRANTING SUMMARY JUDGMENT

Nature of the CDD's Claims Against the Former Supervisors: Counts II and IV

1. Counts II and IV of the CDD's Complaint allege that the Former Supervisors prematurely or inappropriately voted to accept conveyance of the Preserves for ownership and maintenance by the CDD. *See, e.g.*, Compl. ¶¶ 74-7, 100.

2. The Former Supervisors served in the past as public officials constituting the governing body of the CDD, the CDD's "Board of Supervisors." Compl. ¶¶ 6-10; Ex. 1 ¶ 2; Ex. 2 ¶ 2; Ex. 3 ¶ 2; Ex. 4 ¶ 2.

3. The Former Supervisors were acting in their official capacity as the CDD's governing body when they voted to accept conveyance of the Preserves. Ex. 1 ¶ 5; Ex. 2 ¶ 5; Ex. 3 ¶ 5; Ex. 4 ¶ 5.

4. The Complaint names the Former Supervisors in their individual capacities, not in their official capacities. Compl. ¶¶ 6-10

5. Count II of the Complaint alleges a claim for declaratory judgment against the Former Supervisors as to the propriety of the conveyance of the Preserves. Compl. ¶¶ 67-89.

6. The essential allegations of Count II are that the Former Supervisors' actions in voting to accept conveyance of the Preserves was inconsistent with certain permit provisions related to the Preserves, that the conveyance is thus void ab initio, and that because of this action the CDD incurred damages in the form of costs associated with ownership and maintenance of the Preserves. Compl. ¶¶ 37, 42, 75, 77, 79.

7. The Former Supervisors are no longer members of the CDD's Board of Supervisors and they have no continuing interest in the CDD, the development therein, or the Preserves. Ex. 1 ¶ 15; Ex. 2 ¶ 15; Ex. 3 ¶ 15; Ex. 4 ¶ 15.

8. The CDD has asserted that the Former Supervisors are nonetheless interested parties to Count II because the CDD believes it would be entitled to seek damages from the Former Supervisors if judgment is rendered for the CDD on its

declaratory judgment claim. *See* Plaintiff's Response in Opposition to Defendants' Motions to Dismiss, at 11-12 (filed May 18, 2021) ("The [Former Supervisors] are necessary and indispensable parties to the action because they were the individuals serving on the CDD Board at the time of the ultra vires actions having been committed, thereby making each [Former Supervisor], at that time, personally liable for the resulting damages.").

9. Count IV of the Complaint alleges the Former Supervisors breached some fiduciary duty to the CDD by inappropriately or prematurely voting to accept conveyance of the Preserves. Compl. ¶¶ 99-111.

10. The essential allegation of Count IV is that the Former Supervisors' vote to accept the Preserves breached fiduciary duties to the CDD and resulted in the CDD incurring damages in the form of costs associated with ownership and maintenance of the Preserves. Compl. ¶¶ 37, 42, 106, 109.

The CDD's Power, Purpose, and the Preserves

11. The CDD is a "local unit of special-purpose government." § 190.003(6), Fla. Stat.; Compl. ¶ 16.

12. CDDs exist to finance, manage, construct, operate, and maintain infrastructure and services for community development. *See generally* §§ 190.002; 190.012, Fla. Stat.

13. The CDD's "Board of Supervisors" is its governing board and is authorized to exercise the powers granted the CDD under Chapter 190, Florida Statutes. §§190.003(4); 190.006(1), Fla. Stat.

14. Relative to the Preserves, Chapter 190 includes, among other things, the power and authority to:

a. "acquire, by purchase, gift, devise, or otherwise, and to dispose of, real and personal property, or any estate therein;" § 190.011(1), Fla. Stat.

b. finance, fund, acquire, own, operate, and maintain conservation areas, mitigation areas, wildlife habitat, and water management and control facilities. § 190.012(1)(a), (f), Fla. Stat.

15. In 2013, the CDD filed a bond validation suit in Collier County Circuit Court. *Flow Way Community Development District v. The State of Florida, et al.,* Collier County Case No. 13-CA-2657 (Fla. 13th Cir. Ct., Oct. 30, 2013) (Final Judgment).

16. The Final Judgment in that case (attached here to as Exhibit 5) validated the CDD's adopted "Capital Improvement Plan," holding:

> The District was established for the purpose of financing and managing the acquisition, construction, installation, maintenance, and operation of community development facilities, services, and improvements within and without the boundaries of the District, to consist of, among other things, the design, acquisition and construction of certain

> roadways, water management control, sewer and wastewater management, landscape/hardscape, irrigation, water supply and recreational facilities, and other improvements permitted by the Act (the "Capital Improvement Program"), all as more specifically described in the Flow Way Community Development District Master Engineer's Report of the District Engineer attached as Exhibit C to the Complaint and made a part thereof, which Capital Improvement Program was approved by the District Board in the Bond Resolution hereinafter referred to.
>
> * * *
>
> [T]he District has power to plan, finance, acquire, construct, reconstruct, equip and install, in one or more stages, the Capital Improvement Program.

Ex. 5 at 3, 11.

17. As identified by the Final Judgment, the details of the CDD's Capital Improvement Plan are specifically described in its adopted Master Engineer's Report (attached here to as Exhibit 6). As validated by the Final Judgment, the Master Engineer's Report expressly contemplated the CDD owning, operating, and maintaining the Preserves, comprising wetlands and conservation/preservation areas within and without the boundaries of the CDD including as part of an integrated water management system. *See generally*, Ex. 6.

18. The validated Master Engineer's Report states in pertinent part that:

> . . . In addition to the development, the District intended, pursuant to Section 190.012(1)(f), Florida Statute, to exercise all powers with regard to the mitigation lands as outlined in the County Ordinance. The "Wetland

Preserve" and "Upland Preserve" areas, which are outside of the District boundary, are depicted in the EXHIBIT 8 of the County Ordinance. A copy of which is provided in the Appendix as EXHIBIT 5.

The District also intended, pursuant to Section 190.012(1)(a), Florida Statute, to exercise all powers on the water management improvements depicted as "Flow-Way Conveyance" (also shown on EXHIBIT 5). . . . These water conveyance improvements provide the necessary legal positive outfall to drain the lands of the District. These conveyances were also a condition for the issuance of the South Florida Water Management District's Environmental Resource Permit 11-02031-P (Application No. 000518-10, 060524-2, and 120425-8).

* * *

3.4 SURFACE WATER MANAGEMENT

. . . The surface water management system is designed and constructed in accordance with County and South Florida Water Management District Standards for flood protection, stormwater quality treatment and attenuation. Approximately 215 acres of wetlands and conservation/preservation areas within the District boundary, approximately 969 acres of wetlands and conservation/preservation areas outside the District Boundary and the Flow Way Conveyance are incorporated as an integrated part of the stormwater management system. The Master Surface Water Management is shown in EXHIBIT 9. The surface water management system will be owned, operated and maintained by the District.

Ex. 6 at 5, 11.

The Former Supervisors' Action to Accept Conveyance of the Preserves

19. The Former Supervisors approved conveyance of the Preserves that are the subject of this litigation by a vote to adopt Resolution 2018-14 (the "**Resolution**") at a regular meeting of the Board of Supervisors held on September 18, 2018.[1] Ex. 1 ¶ 5; Ex. 2 ¶ 5; Ex. 3 ¶ 5; Ex. 4 ¶ 5.

20. The Former Supervisors did not prepare the Resolution or its exhibits. Ex. 1 ¶ 6; Ex. 2 ¶ 6; Ex. 3 ¶ 6; Ex. 4 ¶ 6.

21. The Former Supervisors did not direct the CDD's staff to prepare the Resolution or its exhibits. Ex. 1 ¶ 7; Ex. 2 ¶ 7; Ex. 3 ¶ 7; Ex. 4 ¶ 7.

22. To the best of the Former Supervisors' knowledge and belief, the Resolution and its exhibits were prepared by the professional staff that served the CDD and Board at that time, including Mr. Jim Ward, the CDD's manager; Mr. Greg Urbancic, the CDD's legal counsel; and Mr. Jeremy Fireline, the CDD's Engineer. Ex. 1 ¶ 8; Ex. 2 ¶ 8; Ex. 3 ¶ 8; Ex. 4 ¶ 8.

23. The Resolution's purpose was to evidence the CDD's agreement to accept conveyance of certain property from Taylor Morrison Esplanade Naples, LLC, which property was identified in the Resolution as "Preserve Tracts" comprising approximately 1,024.82 acres. Ex. 1 ¶ 9; Ex. 2 ¶ 9; Ex. 3 ¶ 9; Ex. 4 ¶ 9.

[1] Former Supervisor Stephen Reiter was not present for this meeting and did not participate in the Board of Supervisor's vote.

24. The Former Supervisors voted to approve the Resolution based on the CDD's basic purposes and powers and in reliance on the CDD's professional staff, including:

a. That (as reflected in the Resolution) the CDD exists for the essential purpose of constructing, installing, operating, financing, and/or maintaining systems, services, and facilities for community development to the benefit of the development known as Esplanade Golf and Country Club of Naples;

b. That (as reflected in the Resolution) the CDD has the specific power as part of its essential purpose to acquire real property and to construct, install, operate, finance, and/or maintain on- and off-site systems, facilities, and infrastructure for stormwater/floodplain management, conservation, mitigation, and wildlife habitat; and

c. The CDD engineer's certification that is attached as an exhibit to the Resolution (the "**Engineer's Certification**"), which:

   i. certified that all approvals and permits for ownership, operation, and maintenance of the Preserve Tracts had been obtained, or could reasonably be expected to be obtained;

ii. certified that the Preserve Tracts being conveyed were part of the CDD's planned projects as reflected in the CDD's adopted Master Engineer's Report dated August 2013 ("**Engineer's Report**"); and

iii. certified that as part of the CDD's planned projects, the Preserve Tracts specifically benefited the property within the CDD's boundaries and/or were reasonably and logically related to the purposes of the CDD and specifically benefited property within the boundaries of the CDD as described in the Engineer's Report. Ex. 1 ¶ 10; Ex. 2 ¶ 10; Ex. 3 ¶ 10; Ex. 4 ¶ 10.

25. While the Former Supervisors were employees of Taylor Morrison-affiliated entities at the time of their vote, they were not coerced or enticed in any way by such relationship in their vote to approve the Resolution. Ex. 1 ¶ 11; Ex. 2 ¶ 11; Ex. 3 ¶ 11; Ex. 4 ¶ 11.

26. Rather, their votes relied on the Resolution and its exhibits as prepared by the CDD's staff and upon their understanding and belief that it was appropriate for the CDD to own and maintain the Preserves as part of the CDD's basic reasons for existence: to finance, construct, own, operate, and/or maintain the improvements, facilities, and services required for development of the property within the CDD. Ex. 1 ¶ 12; Ex. 2 ¶ 12; Ex. 3 ¶ 12; Ex. 4 ¶ 12.

27. It was the Former Supervisors' practice to rely on the CDD's professional staff to provide advice and counsel on matters before the Board of Supervisors, and none of the Former Supervisors recall any objections or warnings from the CDD staff regarding the CDD accepting the donation of the Preserves. Ex. 1 ¶ 13; Ex. 2 ¶ 13; Ex. 3 ¶ 13; Ex. 4 ¶ 13. Nor do the minutes from the Board of Supervisor's September 18, 2018 meeting indicate any objections or warnings from the CDD's staff. *See, e.g.,* Ex. 1, Attach. B.

28. None of the Former Supervisors voted to approve the Resolution in bad faith or with any malicious purpose. Ex. 1 ¶ 14; Ex. 2 ¶ 14; Ex. 3 ¶ 14; Ex. 4 ¶ 14.

SUMMARY JUDGMENT LEGAL STANDARD

The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510. [T]he "issue" must be one of *material* fact. Issues of nonmaterial facts are irrelevant to the summary judgment determination… A material fact, for summary judgment purposes, is a fact that is essential to the resolution of the legal questions raised in the case." *Continental Concrete, Inc. v. Lakes at La Paz III ltd. Partnership*, 758 So. 2d 1214, 1217 (Fla. 4th DCA 2000). The Supreme Court stated in its 2021 amendment to Rule 1.510 that the test for material facts in dispute is "whether the evidence presents a sufficient disagreement to require submission to a jury." *In re Amendments to Florida Rule of Civil*

Procedure 1.510, 317 So. 3d 72, 75 (Fla. 2021). The standard of summary judgment does not require the Former Supervisors to disprove the CDD's case but rather they must either (1) provide evidence contrary to the CDD's claims or (2) demonstrate that CDD lacks the necessary evidence to prove its case. *Id.* Finally, the existence of a genuine factual dispute is whether a jury could return a verdict for the nonmoving party. *Id.* The purpose of the summary judgment standard is aimed at the just, speedy and inexpensive determination of every action. *Id*.

ARGUMENT FOR ENTITLMENT TO SUMMARY JUDGMENT

Sovereign immunity entitles the Former Supervisors to summary judgment and dismissal of the CDD's claims. Sovereign immunity from private civil suits for damages is the rule, not the exemption. *Pan–Am Tobacco Corp. v. Dep't of Corrs.*, 471 So.2d 4, 5 (Fla.1984). This includes the CDD as an independent special district authorized by the State of Florida. *See, e.g., Canaveral Port Auth. v. Dep't of Revenue*, 690 So. 2d 1226, 1233 (Fla. 1996) (Overton, J., dissenting) ("special districts are entitled to sovereign immunity under the provisions of section 768.28, Florida Statutes"); Op. Att'y Gen. Fla. 2000-52 (2000) (opining that special districts created pursuant to law or ordinance fall within the statutory definition of "state agencies or subdivisions" subject to section 768.28, Florida Statutes). Only the legislature can waive sovereign immunity. 28 Fla. Jur. 2d Government Tort Liability § 6. An "agency or other entity within the protective mantle of sovereign

immunity is powerless to personally waive that immunity in a particular case if the legislature has not otherwise acted." *Id.* Where relief is precluded by the defense of sovereign immunity, the court lacks subject-matter jurisdiction to grant the relief sought. 28 Fla. Jur. 2d Government Tort Liability § 77.

The CDD's Complaint includes two counts against the Former Supervisors framed in declaratory judgment (Count II) and breach of fiduciary duty (Count IV). The relief sought against the Former Supervisors in both counts is an award for damages for costs incurred by the CDD because of the Former Supervisors' allegedly inappropriate or premature vote as members of the CDD's governing body to accept conveyance of the Preserves.[2] Doctrines of sovereign immunity preclude

---

[2] While framed as a claim for declaratory judgment, the Former Supervisors only possible interest as parties to Count II would stem from the CDD's claim for money damages from the individual Former Supervisors as supplemental relief. The individually named Former Supervisors are not parties whose interests will otherwise be affected by any declaration of rights sought by the CDD in Count II and are not potential future claimants whose presence is necessary to adjudicate any rights, powers, or privileges alleged by the CDD to be in dispute in Count II. § 86.091, Fla. Stat. (the proper parties to a declaratory judgment action are those persons "who have or claim any interest which would be affected by the declaration."); *Retail Liquor Dealers Asso. v. Dade Cty.*, 100 So. 2d 76, 77 (Fla. 3d DCA 1958) ("It is essential that the party defendant in a declaratory action be the party or parties whose interest will be affected by the decree.").

The essential decree sought in Count II is that transfer of the Preserves to the CDD was improper under certain permits. Compl. ¶¶ 73-80. However, the Former Supervisors have no interests over which the Court would need to exercise its jurisdiction in order render a declaratory judgment as to the existence, or nonexistence, of "any immunity, power, privilege, or right" as regards the transfer of the Preserves. § 86.011(1), Fla. Stat. Thus, the absence of the Former Supervisors as parties to Count II would not expose the CDD to the threat of future litigation by

the relief the CDD seeks against the Former Supervisors for three separate reasons, any one of which would independently warrant summary judgment for the Former Supervisors: 1) the Former Supervisors' decision to accept the Preserves falls within the scope of discretionary or judgmental governmental functions that are excluded from civil suits for money damages regardless of any waiver of sovereign immunity; 2) even if the Former Supervisors' actions fell within the scope of governmental actions potentially subject to waiver, the CDD cannot seek to hold the Former Supervisors individually liable or even name them as defendants because the CDD has no basis to allege the Former Supervisors "acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights,

---

the Former Supervisors on this matter. *See, e.g.*, *Citizens Prop. Ins. Corp. v. Ifergane*, 114 So. 3d 190, 196 (Fla. 3d DCA 2012) (finding dismissal of party in declaratory relief action property where party's absence posed no threat of future litigation by a potential claimant).

Further, jurisdiction over the Former Supervisors is not necessary to grant any possible valid relief sought by the CDD. Thus, the presence of the Former Supervisors is entirely unnecessary to grant the CDD's request that the deeds conveying the Preserves be vacated or set aside. Compl., at 14, ¶ b. The CDD does not allege, nor could it allege, that the Former Supervisors were parties to such deeds or have any authority in their individual capacities over the parties thereto.

Thus, the CDD's only basis for suggesting the Former Supervisors are proper parties to Count II is its assertion that they would be personally liable for damages to the CDD if declaratory judgment is rendered in the CDD's favor. *See* Plaintiff's Response in Opposition to Defendants' Motions to Dismiss, at 11-12 (filed May 18, 2021) (arguing the Former Supervisors are necessary and indispensable parties to Count II because they should be "personally liable for the resulting damages."). However, for each of the three independent reasons presented herein, there are no grounds to seek damages against the individual Former Supervisors.

safety, or property," as required by section 768.28(9), Florida Statutes; and 3) independent of the forgoing faults, the CDD's claims would be precluded in any event because the damages sought by the CDD constitute economic damages that are outside the limited waiver of immunity in section 768.28(1), Florida Statutes.

I. The Former Supervisors' Decision to Accept the Preserves Constitutes the Discretionary or Judgmental Exercise of Governmental Authority for Which There Can be no Liability in a Private Civil Suit for Damages

The Former Supervisors' vote to exercise the CDD's basic powers and authority and accept conveyance of the Preserves constitutes basic judgmental or discretionary government activity that cannot form the basis for the CDD's claims for monetary damages against the Former Supervisors. Certain basic, discretionary or judgmental governmental actions have always been precluded from private civil suits for damages based on the constitutional separation of powers. *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 917 (Fla. 1985) ("For there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct. For certain basic judgmental or discretionary governmental functions, there has never been an applicable duty of care."); *Dalehite v. United States*, 346 U.S. 15, 57, 73 S.Ct. 956, 979, 97 L.Ed. 1427 (1953) (Jackson, J., dissenting) ("Of course, it is not a tort for government to govern . . ."). "This is so because certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the

wisdom of their performance." *Commercial Carrier Corp. v. Indian River Cty.*, 371 So. 2d 1010, 1022 (Fla. 1979). "Judicial intervention through private tort suits into the realm of discretionary decisions relating to basic governmental functions would require the judicial branch to second guess the political and police power decisions of the other branches of government and would violate the separation of powers doctrine." *Trianon Park*, 468 So. 2d at 918.

The essential distinction is between the "discretionary planning or judgment phase, and the operational phase of government." *Commercial Carrier*, 371 So. 2d at 1019. The former constitute non-tortious activities, while the latter are potentially tortious. Legislative governmental functions are firmly non-tortious. *Trianon Park*, 468 So. 2d at 918-19, 921 (finding legislative functions to be clearly non-tortious because there has never been a common law duty of care with respect to exercise of legislative functions and the statutory waiver of sovereign immunity in section 768.28, Florida Statutes, did not create a new duty of care). In circumstances where it is less clear whether governmental activities are in the planning and judgment phase or the operational phase, Florida courts have relied on the four-part test developed in *Evangelical United Brethren Church v. State*, 407 P.2d 440 (1965). *See, e.g., Commercial Carrier*, 371 So. 2d at 1019.

Here, there is no genuine dispute as to the material facts constituting the Former Supervisors' activities at the center of the CDD's claims: the Former

Supervisors as members of the CDD's governing body voted to adopt a resolution accepting conveyance of the Preserves based on the legislative findings therein. This action constitutes the exercise of a legislative governmental function taken at the CDD's highest level and clearly falls within the discretionary planning or judgment phase and cannot be subject to a private civil suit for damages.

While not necessary, application of the four-part *Evangelical United* test confirms this conclusion:

(1) *Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?* Yes. The challenged act or decision in this case involves basic decisions regarding whether to undertake the management and finance of the Preserves as part of the CDD's Capital Improvement Program and in furtherance of the CDD's basic governmental purpose to manage and finance basic community development services.

(2) *Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?* Yes. The challenged acts in this case consist of the decision to undertake ownership and management of the Preserves as contemplated by the CDD's Capital Improvement Program. There is no decision more essential to the objectives of the CDD in this case than whether or not to undertake the

management and finance of elements of the Capital Improvement Program including the Preserves, which were specifically identified in the CDD's Master Engineer's Report as part of the CDD's Capital Improvement Program and anticipated to be owned and maintained by the CDD.

(3) *Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?* Yes, for the same reasons noted already.

(4) *Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?* Yes. Pursuant to the powers and authorities granted by Chapter 190 and the CDD's bond validation Final Judgment, the CDD has the power and authority to acquire, own, operate, and maintain the Preserves.

See, e.g., Commercial Carrier, 371 So. 2d at 1019 (If the four-part *Evangelical United* test "can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and non-tortious, regardless of its unwisdom.").

In sum, the Former Supervisor's vote at the heart of the CDD's Complaint constitutes a discretionary, non-tortious judgment that cannot sustain the CDD's

damages claims against the Former Supervisors. This circumstance is not different in kind from suggesting that individual members of a past city commission could be sued for damages in private civil actions over the wisdom of past decisions to build a road or operate a park. This has never been the law. *See, e.g., Dep't of Transp. v. Neilson*, 419 So. 2d 1071, 1077 (Fla. 1982) ("We also hold that the decision to build or change a road, and all the determinations inherent in such a decision, are of the judgmental, planning-level type. To hold otherwise, as expressed by the dissent, would supplant the wisdom of the judicial branch for that of the governmental entities whose job it is to determine, fund, and supervise necessary road construction and improvements, thereby violating the separation of powers doctrine."); *Avallone v. Bd. of Cty. Comm'rs*, 493 So. 2d 1002, 1005 (Fla. 1986) ("A government unit has the discretionary authority to operate or not operate swimming facilities and is immune from suit on that discretionary question."); *Milton v. Broxson*, 514 So. 2d 1116, 1119 (Fla. 1st DCA 1987) ("[I]t is a discretionary or planning level decision for a governmental entity to operate a recreational facility to accommodate organized softball games and spectators of such games . . . ."). For all the forgoing reasons, the Former Supervisors are entitled to summary judgment and dismissal of the CDD's claims.

II. The Actions of the Former Supervisors Were Not Taken in Bad Faith and Section 768.28(9)(a), Florida Statutes, therefore Requires their Dismissal

In addition to being entitled to summary judgment because the Former Supervisors' actions indisputably constituted a discretionary planning-level decision, the Former Supervisors are also entitled to summary judgment and dismissal of the CDD's claims under section 768.28(9)(a), Florida Statutes. Section 768.28(9)(a) provides that an action for damages alleged from the act or omission of a governmental officer, employee, or agent may only be filed against such individual where the "act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." Absent such bad faith or malicious purpose, "[t]he exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers is an action against the governmental entity, or the head of such entity in her or his official capacity . . . ." § 768.28(9)(a), Fla. Stat.*, see also Castellano v. Raynor*, 725 So. 2d 1197, 1198 (Fla. 2d DCA 1999) ("Section 768.28(9)(a) clothes governmental employees with individual immunity that is lost only as to torts committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights and safety.")

In addition to providing immunity from personal liability in any tort action for injury or damage allegedly suffered because of an act or commission in the scope of his or her employment or function, section 768.28 also prohibits such officers or agents from even being *named* as a party defendant in such an action. § 768.28(9)(a), Fla. Stat.; *Keck v. Eminisor*, 104 So. 3d 359, 366 (Fla. 2012) ("[I]f a Defendant who is entitled to the immunity granted in section 768.28(9)(a), Fla. Stat., is erroneously named as a party defendant and is required to stand trial, that individual has effectively lost the right bestowed by statute to be protected from even being named as a defendant.").

As used in section 768.28, "bad faith" is equated with actual malice. *Peterson v. Pollack*, 290 So. 3d 102, 109-10 (Fla. 4th DCA 2020). In turn, "malicious purpose" has been interpreted as meaning the conduct was committed with "ill will, hatred, spite, [or] an evil intent." *Id.* (internal citations omitted). To establish the "actual malice" required to waive sovereign immunity, a government official's conduct must be much more reprehensible and unacceptable than a mere intentional tort. *Carollo v. Platinum Advisors, LLC*, Fla.App. 3 Dist., 2021 WL 475263 (2021). Finally, "wanton and willful disregard of human rights, safety, or property" has been interpreted as "conduct much more reprehensible and unacceptable than mere intentional conduct" and "conduct that is worse than gross negligence." *Peterson,* 290 So. 3d at 109-10. Thus, "wanton" conveys "a conscious and intentional

indifference to consequences and with the knowledge that damage is likely to be done to persons or property" and "willful" may be interested to mean "intentionally, knowingly and purposely." *Id.* (internal citations omitted).

Simply put, the CDD has not identified any facts and cannot in good candor assert the existence of any facts creating a genuine dispute as to whether the Former Supervisors' actions were taken in bad faith equivalent to actual malice. As the CDD's Board of Supervisors, the Former Supervisors' vote to accept conveyance of the Preserves was within the fundamental powers and authorities granted to a CDD. Ownership and maintenance of the Preserves by the CDD was anticipated, expected, and validated as reflected in the CDD's bond validation Final Judgment. *See also* § 75.09, Fla. Stat. (bond validation final judgment "is forever conclusive as to all matters adjudicated against plaintiff and all parties affected thereby"). Further, the Former Supervisors' vote to accept conveyance of the Preserves was supported by the legislative findings and representations of the CDD's professional staff as reflected in the Board of Supervisor's adopted Resolution.

Nor does the fact that the Former Supervisors were employees of a Taylor Morrison-related entity at the time of their vote provide any colorable basis to suggest bad faith or actual malice. Indeed, the Legislature has provided in section 190.007, Florida Statutes, that "[i]t shall not be a conflict of interest under chapter 112 for a board member . . . to be a stockholder, officer, or employee of a landowner

or of an entity affiliated with a landowner." Thus, the Former Supervisors did not breach any duty owed in their capacity as public officials by being employed by any Taylor Morrison entity that owned and developed property within the CDD or any affiliate thereof. Further, the Legislature has explicitly declared that it shall not constitute a conflict for board members that have been elected by the landowners within the CDD to vote upon a measure that such board member knows would inure to the special private gain or loss of any principal, parent organization, or subsidiary by which he or she is retained. § 112.3143(3)(b), Fla. Stat.; § 190.006, Fla. Stat. (providing for election of supervisors by landowners within a community development district on a one-acre, one-vote basis).[3]

For all the forgoing reasons, the Former Supervisors are entitled to the protections afforded by section 768.28(9)(a) including immunity from any alleged

[3] The rationale for these exceptions is easily traced to the legislative objectives and policies that are at the heart of why community development districts exist: as a "method available for use by the private and public sectors . . . to manage and finance basic community development services" and to finance and manage the infrastructure and improvements necessary to service growth within the state. § 190.002(1)(a), (2)(b), Fla. Stat. In sum, community development districts are by design intended to be tools of development and by necessity developers. They are also by design intended to have governing boards initially elected by the landowners whose property is being developed (and thus could reasonably be expected to have some contractual or employment relationship with the landowners). And, finally, a community development district's governing board is by design intended to take votes to support development of the property within its boundaries to the benefit of the landowners within the district.

claim of individual liability for damages and the right not to be named as party defendants. Accordingly, summary judgment should be ordered for the Former Supervisors and they should be dismissed from this case.

III. The Economic Damages Sought by the CDD are Outside the Scope of State's Waiver of Sovereign Immunity in Section 768,28, Florida Statutes and thus Precluded

Separate and apart from the grounds for summary judgment articulated in sections I and II, the Former Supervisors are further entitled to summary judgment because the damages sought by the CDD do not fall within the ambit of the wavier of sovereign immunity in section 768.28, Florida Statutes. Section 768.28(1) provides a partial waiver of immunity for recovery of money damages for "injury or loss of property, personal injury, or death" caused by a negligent or wrongful act or omission. But, that waiver of immunity for money damages does not apply to claims for economic damages. *See City of Pembroke Pines v. Corr. Corp. of Am.*, 274 So. 3d 1105, 1110-13 (Fla. 4th DCA 2019) ("The waiver of sovereign immunity has not been extended to include the claim upon which CCA relies here—economic damages framed in counts for declaratory relief . . . ."); *see also County of Brevard v. Miorelli Engineering, Inc.*, 677 So. 2d 32, 34 (Fla. 5th DCA 1996) ("Fraud in the inducement causing only economic loss does not fit within any of those categories of injury or loss enumerated in [section 768.28].").

In *Pembroke Pines*, a landowner sought a declaratory judgment concerning the City of Pembroke Pines' refusal to provide the landowner's property with sewer and water service necessary for a proposed development. *Pembroke Pines*, 274 So. 3d at 1109-1110. The landowner also sought related supplemental relief to recover economic damages, including the purchase price and carrying costs associated with the landowner's property, payments made to third parties for professional fees and development work, and deprivation of the economic viability of the site for development. *Id.* On appeal, the Fourth District held that the landowner's declaratory judgment claim should have been dismissed on sovereign immunity grounds because the limited wavier of immunity in section 768.28 does not extend to claims for economic damages, including when framed as a count for declaratory relief. *Id.* at 1113.

Here, the damages and costs the CDD claims are the exact sort of economic damages the landowner in *Pembroke Pines* improperly claimed: carrying costs and expenses incurred as a function of the CDD's ownership and maintenance of the Preserves. Thus, in addition to the Former Supervisors' actions constituting a non-actionable planning-level decision and being immune because their vote was taken in good faith with no actual malice, the economic damages sought by the CDD remain outside the reach of section 768.28's waiver. Accordingly, the Former Supervisors are entitled to summary judgment and dismissal of the CDD's claims.

CONCLUSION

For all the forgoing reasons, the Former Supervisors are entitled to summary judgment as a matter of law as to all counts against them (Counts II and IV of the CDD's Complaint). First, the CDD is precluded from seeking damages in a civil suit from the Former Supervisors' for their exercise of discretionary, planning-level governmental functions. Second, the CDD cannot seek to hold the Former Supervisors individually liable or even name them as defendants because the CDD has no basis to allege the Former Supervisors acted in bad faith or with actual malice as required by section 768.28(9), Florida Statutes. Third, and finally, the CDDs' claims are precluded because the damages sought by the CDD constitute economic damages that are outside the limited waiver of immunity in section 768.28(1), Florida Statutes.

Dated this 4th day of April, 2022.

/s/ *Joseph A. Brown*
JOSEPH A. BROWN
Florida Bar No. 25765
KUTAK ROCK, LLP
107 W. College Ave.
Tallahassee, FL 32301
Tel: (850) 692-7303
Fax: (850) 692-7319
Primary Email:
Joseph.Brown@KutakRock.com
Secondary Email:
Kim.Hancock@KutakRock.com

KEVIN S. HENNESSY, ESQUIRE

Florida Bar No. 0602558
RICHARD P. GREEN, ESQUIRE
Florida Bar No. 0119530
LEWIS, LONGMAN & WALKER, P.A.
100 Second Avenue South, Suite 501-S
St. Petersburg, FL 33701
Tel: 727-245-0820
Fax: 727-290-4057
Primary Email:
khennessy@llw-law.com
rgreen@llw-law.com
Secondary Email:
jbissette@llw-law.com
jdavy@llw-law.com
Counsel for Defendants, Taylor Morrison of Florida, Inc., Taylor Morrison Esplanade Naples, LLC, Andrew Miller, John Wollard, Stephen Reiter, Adam Painter, and Christopher Nirenberg

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing pleading has been furnished by electronic mail via the Florida e-Portal system's transmission of the Notice of Electronic Filing on this 4th day of April, 2022 to all counsel of record.

/s/ Joseph A. Brown
Attorney