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## THE POTENTIAL FOR ABUSE IN DEVELOPER-CONTROLLED COMMUNITY DEVELOPMENT DISTRICTS

Paul D. Asfour\*

### OVERVIEW

Depending upon one's point of view, Florida Community Development Districts ("districts") either contribute to marginal, undesirable development<sup>1</sup> or are the best way to manage growth in Florida.<sup>2</sup> That debate will probably continue to rage. However, the scope of this article is not to question whether districts are either a positive or a negative for growth management, but rather to discuss their potential for abuse and mismanagement on the part of the developers that control them through the developer elected boards of supervisors (boards). This article will discuss the various statutes that control both the districts and their respective boards. In addition, this article will recommend changes to certain sections of those statutes to better protect the residents, who are subject to the districts' control, from developers who put profit and personal gain above the best interests of the districts they control and the districts' residents, who have little or no recourse in challenging decisions of the developer controlled boards.

Most homebuyers who purchase homesites located in developments with an established district are ignorant of what a district is, much less what a district is authorized to do, even though homebuyers are provided with documents which require disclosure.<sup>3</sup> For example, homebuyers may not be aware that they are potentially paying twice for projects and infrastructure within the district. A district is authorized to issue bonds, which may be, and generally are, secured by the land within its boundaries.<sup>4</sup> Those bonds may attach to each separate parcel based upon its size.<sup>5</sup> The larger the parcel, the greater the debt.<sup>6</sup> The parcels can be either undeveloped or platted and developed.<sup>7</sup> When individual lots are sold to

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1. Julian Conrad Juergensmeyer, *Infrastructure and the Law: Florida's Past, Present and Future*, 23 J. LAND USE & ENVTL. L. 441, 450 (2008) (citing Thomas J. Wilkes, Jr., *The Delusion That Tax-Exempt Financing for Developers Improves Growth Management*, 10 FLA. ENVTL. & URBAN ISSUES 8 (1983)).

2. *Id.* (citing Ken van Assenderp, *Community Development Districts: An Alternative Way for the Private and Public Sectors to Enhance Growth Management*, 11 FLA. ENVTL. & URBAN ISSUES 14 (1983)).

3. Michael Van Sickler & Janet Zink, *The Hidden Costs of Living*, ST. PETERSBURG TIMES (Dec. 12, 2003), [http://www.sptimes.com/2003/12/12/Northoftampa/The\\_hidden\\_costs\\_of\\_l.shtml](http://www.sptimes.com/2003/12/12/Northoftampa/The_hidden_costs_of_l.shtml).

4. FLA. STAT. § 190.011(9) (2009); FLA. STAT. § 190.016 (2009).

5. *See* FLA. STAT. § 190.016(1).

6. FLA. STAT. § 190.016(2); FLA. STAT. § 190.003(8)(f) (2009).

7. *See* FLA. STAT. § 190.012 (2009).

homeowners, those homeowners assume the balance of the principal on their portion of the total bond issue.<sup>8</sup> Of course, they must also pay interest on the outstanding principal.<sup>9</sup>

As previously stated, the proceeds from the bond issue pay for projects in the district, including the infrastructure (such as water and sewer), underground utilities, as well as golf courses and other amenities.<sup>10</sup> These are major selling points to potential homebuyers, and the premium added to the cost of their homesite reflects the value of the amenities and infrastructure.<sup>11</sup> That supports the argument that homebuyers are paying for those improvements twice—once in the premium on the purchase price of their homesite, and twice when homebuyers assume and repay their portion of the bond issue, which is secured by their property. Residents also pay for the annual maintenance costs of the district, through either assessments or ad valorem taxes.<sup>12</sup> The amount of those assessments or taxes is determined by a five-member board of supervisors, which is comprised initially of either owners or employees of the developer.<sup>13</sup>

Ignorance about what a district is and what it can and cannot do is not always bliss, as some homebuyers have discovered.<sup>14</sup> There is little to no risk on the developer with the establishment of a district, since homeowners would ultimately be responsible for any miscalculations.<sup>15</sup> That is one reason why districts have become increasingly popular as a development mechanism in Florida.<sup>16</sup>

## I. ESTABLISHMENT OF COMMUNITY DEVELOPMENT DISTRICTS

Community Development Districts were created under the Uniform Community Development District Act of 1980, chapter 190, *Florida Statutes*, which provided a uniform procedure, under general law, to establish an independent special district as an alternative method to finance and manage basic services for community development.<sup>17</sup> The statute also provided for the operation, exercise of power, and termination procedure for the district.<sup>18</sup> While amended over the years, chapter 190 has remained fundamentally unchanged since it was enacted.<sup>19</sup>

8. FLA. STAT. § 190.016(1)(b), (5).

9. FLA. STAT. § 190.036 (1980).

10. FLA. STAT. § 190.012(1)(a)–(b), (2)(a) (2009).

11. Eran Ben-Joseph, *Land Use and Design Innovations in Private Communities*, LINCOLN INSTITUTE OF LAND POLICY, LAND LINES ARTICLE, Vol. 16 No. 4 (Oct. 2004), [http://www.lincolninst.edu/pubs/971\\_Land-Use-and-Design-Innovations-in-Private-Communities](http://www.lincolninst.edu/pubs/971_Land-Use-and-Design-Innovations-in-Private-Communities).

12. FLA. STAT. § 190.021(1)–(2) (2009).

13. FLA. STAT. § 190.006(1)–(2)(a) (2009).

14. Van Sickler & Zink, *supra* note 3.

15. *Id.*

16. *Id.*

17. FLA. STAT. § 190.002(3) (1980).

18. *Id.*

19. See Henry Kenza van Assenderp & Andrew Ignatius Solis, *Dispelling the Myths: Florida's Non-Ad Valorem Special Assessments Law*, 20 FLA. ST. U. L. REV. 823, 827 (1993).

Which governmental entity approves a new district depends on the number of acres included within its boundaries.<sup>20</sup> The Florida Land and Water Adjudicatory Commission has the authority to grant a petition for the establishment of a district if the number of acres equals or exceeds 1,000.<sup>21</sup> If the total acreage is less than 1,000, the county commission of the county that has jurisdiction over the majority of the land in the area where the district will be located, grants the petition for its establishment.<sup>22</sup> On the other hand, if all of the land in the area of the proposed district is within the boundaries of a municipal corporation, the municipal corporation assumes the duties of the county commission and grants the petition.<sup>23</sup>

However, if all of the land is within the territorial jurisdiction of two or more municipalities, even if less than 1,000 acres, the petition for the creation of the district shall be granted by the Florida Land and Water Adjudicatory Commission.<sup>24</sup>

The petition requesting the establishment of the district must include the designation of five persons who would serve as the initial members of the district's board of supervisors until replaced by elected members.<sup>25</sup> Initially, the term "elected members" is somewhat of a misnomer, since the board members are elected by the landowners, i.e. the developer, and will not be elected by the residents of the district for several years.<sup>26</sup> Therein lies the primary area for concern.

## II. BOARDS OF SUPERVISORS

A meeting of the landowners of the district is required within ninety days following the establishment of the district for the purpose of electing five supervisors to the Community Development District Board of Supervisors.<sup>27</sup> Each landowner is then permitted to cast one vote per acre of land owned by the landowner within the district for each available elected position.<sup>28</sup> Of course, the developer will initially own most of the land.<sup>29</sup> Therefore, the developer will have the most votes to cast, essentially electing the entire board.<sup>30</sup>

However, if the initial board chooses to exercise its ad valorem taxing power, authorized by section 190.021, *Florida Statutes*, it must call an election in which the members of the board will be elected by qualified electors of the district.<sup>31</sup> In

20. FLA. STAT. § 190.005(1)(a)1–2 (2012).

21. FLA. STAT. § 190.005(1).

22. FLA. STAT. § 190.005(2).

23. FLA. STAT. § 190.005(2)(e).

24. *Id.*

25. FLA. STAT. § 190.005(1)(a)3.

26. *See id.*; FLA. STAT. § 190.006(1) (2009).

27. FLA. STAT. § 190.006(2)(a).

28. FLA. STAT. § 190.006(2)(b).

29. *See id.*

30. *Id.*

31. *See* FLA. STAT § 189.4051(1)(a) (1997).

(1) Definitions—As used in this section:

addition, all elected board members must themselves be qualified electors of the district.<sup>32</sup> That election would then be held in conjunction with a primary or general election unless the district bears the cost of the election.<sup>33</sup>

Choosing to assess ad valorem taxes means that the developer, the initial landowner, could lose control of the district to those who may not have the best interests of the developer in mind.<sup>34</sup> Consequently, it would be to the advantage of the developer to choose not to assess ad valorem taxes, but instead to assess non-ad valorem annual charges for the district's operating expenses.<sup>35</sup>

Eventually, regardless of whether a district decided to levy ad valorem taxes, the qualified electors of the district will have the opportunity to elect the board of supervisors for the district.<sup>36</sup> When the election occurs depends on the total number of acres within the district and how long the district has been in existence.<sup>37</sup> Section 190.006(3)(a)(2)(a), *Florida Statutes*, states:

[C]ommencing [six] years after the initial appointment of members or, for a district exceeding 5,000 acres in area or for a compact, urban, mixed-use district, [ten] years after the initial appointment of members, the position of each member whose term has expired shall be filled by a qualified elector of the district, elected by qualified electors of the district.<sup>38</sup>

However, there is a caveat to this section. Members of the board shall continue to be elected by landowners if,

in the [sixth] year after the initial appointment of members, or [ten] years after such initial appointment for districts exceeding 5,000 acres in area or for a compact, urban, mixed-use district, there are not at least 250 qualified electors in the district, or for a district exceeding 5,000 acres or for a compact, urban, mixed-use district, there are not at least 500 qualified electors.<sup>39</sup>

Following the sixth or tenth year, when a district reaches 250 or 500 qualified electors, respectively, the positions of two of the five landowner elected board

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(a) "Qualified elector" means any person at least 18 years of age who is a citizen of the United States, a permanent resident of Florida, and a freeholder or freeholder's spouse and resident of the district who registers with the supervisor of elections of a county within which the district lands are located when the registration books are open.

*Id.*

32. FLA. STAT. § 190.006(3)(a)1 (2009).

33. *Id.*

34. FLA. STAT. § 190.006(3)(a)2a.

35. *See* FLA. STAT. § 190.021(3) (2009).

36. FLA. STAT. § 190.006(3)(a)2a.

37. *Id.*

38. FLA. STAT. § 190.006(3)(a)2a (2009).

39. *Id.*

members, whose terms are set to expire, must be filled by qualified electors of the district, elected by qualified electors of the district.<sup>40</sup> The landowner elected member whose term is expiring shall continue to be elected by the landowners.<sup>41</sup> As terms expire after the first election at which qualified electors of the district are elected, members of the board must be qualified electors of the district, and will be elected by qualified electors of the district.<sup>42</sup>

The number of qualified electors is determined by the supervisor of elections of the county in which the district is located on or before the first of June each year.<sup>43</sup> Official records of the county property appraiser and tax collector are also used in making the determination.<sup>44</sup> Elections are nonpartisan and must be conducted in the same manner prescribed by law for holding general elections.<sup>45</sup> The newly elected board members will assume office on the second Tuesday following the general election.<sup>46</sup> That does not necessarily mean that the newly elected board members will meet on that day or even within the next couple of months,<sup>47</sup> because the statute does not mandate that a meeting be held on the second Tuesday following the election.<sup>48</sup> The statute simply states, “As soon as practicable after each election or appointment, the board shall organize . . . .”<sup>49</sup>

For the first few years following the grant of the petition to establish a district, the landowner, or developer “elects” the members of the board.<sup>50</sup> Even though the required number of years has passed and the number of qualified electors reaches the minimum number for the election of board members by qualified electors, the developer will continue to control the board for two more years, since the developer will have elected three of the five members.<sup>51</sup> Consequently, the developer will control the actions of the board for at least eight or twelve years, depending upon the size of the district.<sup>52</sup> Some would argue that the developer does not control the board, since it is an elected body and must make decisions independent of the developer.<sup>53</sup> It suffices to say, those people need a “reality check.”

Adding to the possible manipulation of the district by the developer-controlled board is how the Florida statutes have exempted members of those boards from ethical requirements to which other elected officials are bound.<sup>54</sup> Section 190.007(1), *Florida Statutes*, states: “It shall not be a conflict of interest under

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40. FLA. STAT. § 190.006(3)(a)2b.

41. *Id.*

42. *Id.*

43. FLA. STAT. § 190.006(3)(a)2d.

44. *Id.*

45. FLA. STAT. § 190.006(3)(b).

46. *Id.*

47. FLA. STAT. § 190.006(6).

48. *Id.*

49. *Id.*

50. *See* FLA. STAT. § 190.006(2)(a).

51. *See* FLA. STAT. § 190.006(2)(b).

52. FLA. STAT. § 190.006(3)(a)2a.

53. *See* FLA. STAT. § 190.005(1)(a)3 (2012); *see* FLA. STAT. § 190.007(1) (2007).

54. *See* FLA. STAT. § 190.007(1).

chapter 112 for a board member or the district manager or another employee of the district to be a stockholder, officer, or employee of a landowner or of an entity affiliated with a landowner.”<sup>55</sup> This section is unambiguous. The Florida Legislature made it perfectly clear that a stockholder, officer, employee, or other entity affiliated with a development company could also be a board member of a community development district.<sup>56</sup> In other words, the statute allows the developer to *stack the deck* in his favor and initially “elect” all five board members.<sup>57</sup>

However, section 190.007(1), *Florida Statutes*, is not specific about “voting” conflicts of interest.<sup>58</sup> Instead it refers the reader to chapter 112, *Florida Statutes*, which governs public officers and employees.<sup>59</sup> Section 112.3143(3)(a), *Florida Statutes*, specifically deals with voting conflicts.<sup>60</sup> Since board members are either elected or appointed, they fall within the definition of “public officer” as it is used in that section.<sup>61</sup>

Section 112.3143(3)(a), *Florida Statutes*,<sup>62</sup> is very clear; it forbids any county, municipal, or other local public officer from voting in an official capacity on any matter that would “inure to his or her special private gain or loss,” or on one which would inure to the private gain or loss of any employer or parent organization or subsidiary of a corporation that employs him or her,<sup>63</sup> with certain exceptions spelled out in section 112.312(2), *Florida Statutes*.<sup>64</sup> One can obviously conclude that section 112.3143(3)(a), *Florida Statutes*, includes any individuals with a percentage ownership in the development company.<sup>65</sup>

However, the Legislature saw fit to add an exception to section 112.3143(3)(a), *Florida Statutes*, in section 112.3143(3)(b) which states: “However, a commissioner of a community redevelopment agency created or designated pursuant to [section] 163.356 or [section] 163.357, or an officer of an independent special tax district elected on a one-acre, one-vote basis is not prohibited from voting, when voting in said capacity [emphasis added].”<sup>66</sup> This exception is a tremendous concession to developers, one which has caused the most problems, especially since board members are ethically required to act in the best interests of the district.<sup>67</sup>

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55. FLA. STAT. § 190.007(1).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*; see also FLA. STAT. § 112 (2013).

60. See FLA. STAT. § 112.3143(3)(a) (2013).

61. See FLA. STAT. § 112.3143(1)(b).

62. FLA. STAT. § 112.3143(3)(a).

63. *Id.*

64. *Id.*; see also FLA. STAT. § 112.312(2) (2013).

65. See FLA. STAT. § 112.3143(3)(a).

66. FLA. STAT. § 112.3143(3)(b).

67. FLA. STAT. § 112.311(6) (2013).

It is declared to be the policy of the state that public officers and employees, state and local, are agents of the people and hold their positions for the benefit of the public. They are bound to uphold the Constitution of the United States and the State Constitution and to perform efficiently and faithfully their duties under the laws of the federal, state, and local governments. Such officers and employees are bound to observe, in their official acts, the

The State of Florida saw the potential for abuse when it challenged section 190.006, *Florida Statutes*, by claiming the statute was a violation of the Equal Protection Clause, since it allowed voting on a one-vote-per-acre basis instead of a one-person, one-vote basis.<sup>68</sup> In *State v. Frontier Acres Community Development District Pasco County*, the State argued that “the powers granted special districts created under the authority of chapter 190 . . . invoke the equal protection requirement of one-person, one-vote as established in *Reynolds v. Sims*.”<sup>69</sup> In *Reynolds*, “the United States Supreme Court held that the [E]qual [P]rotection [C]lause imposes certain limitations on legislation establishing voters’ qualifications.”<sup>70</sup>

The United States Supreme Court extended the one-person, one-vote principle to state political subdivisions that exercised general governmental functions.<sup>71</sup> In *Hadley v. Junior College District*, the Court held that even though the powers exercised by the Junior College District were not as broad as those held by the county commissioners, the powers were general enough to apply the one-person, one-vote principle.<sup>72</sup> However, the Florida Supreme Court agreed with *Frontier Acres* when it claimed that *Reynolds* does not apply to special districts created under chapter 190, since those districts “do not exercise the general governmental functions contemplated by *Reynolds*.”<sup>73</sup> In addition, *Frontier Acres* emphasized the limited powers granted to it under chapter 190 and furthermore, the “disproportionate effect district operations have on landowners.”<sup>74</sup> The Florida Supreme Court continued by stating:

A community development district created under chapter 190 does not exercise general governmental functions. Its activities, however, have a disproportionate effect upon the landowners of the district because they are the ones who must bear the initial burden of the district’s costs. Under these circumstances, it is reasonable for the Florida [L]egislature to have concluded that these landowners, *to the exclusion of other residents* [emphasis added], should initially elect the board of supervisors. We therefore conclude that nothing in the equal protection clause precludes the [L]egislature from limiting the voting for the board

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highest standards of ethics consistent with this code and the advisory opinions rendered with respect hereto regardless of personal considerations, recognizing that promoting the public interest and maintaining the respect of the people in their government must be of foremost concern.

*Id.*

68. *State v. Frontier Acres Cmty. Dev. Dist. Pasco Cnty.*, 472 So. 2d 455, 456 (Fla. 1985).

69. *Id.* (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)).

70. *Id.*

71. *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 59 (1970).

72. *Id.*

73. *Frontier Acres*, 472 So. 2d at 456.

74. *Id.*

of supervisors by temporarily excluding those who merely reside in the district.<sup>75</sup>

The initial burden the court mentioned is either the assessments or the ad valorem taxes imposed on the developer's property included in the district.<sup>76</sup> Of course, until a developer sells the property within the development, the developer must pay the assessments or ad valorem taxes imposed on that property.<sup>77</sup> The developer chooses that risk.<sup>78</sup> However, the developer will also reap the benefits when it sells the property to those who may not be fully aware of what a developer-controlled district can and cannot do during the time the developer unilaterally controls the district.<sup>79</sup> Nevertheless, that is no justification for why home buyers should be unprotected.

Legislatures make mistakes when passing legislation that favors one interest over another, especially when that legislation does not protect the parties who may eventually bear the burden of bad law. It is an entirely different matter when courts ratify those mistakes. Unfortunately, when courts render bad opinions, they sometimes use language that demonstrates a complete lack of understanding of the major problems that could arise as a result of their decisions. Those who "merely reside in the district"<sup>80</sup> are those who have invested in the community, and will be there long after the developer has departed. These residents must then bear the burden of the unprincipled developers who poorly managed the district, leaving the residents to pick up the pieces.<sup>81</sup>

The following sections will discuss the potential areas of abuse in developer-controlled districts, followed by recommended changes to the statutes that would help alleviate the problems of abuse.

### III. ELECTIONS OF SUPERVISORS TO COMMUNITY DEVELOPMENT DISTRICTS

The primary problem is how the initial board members are chosen. It goes without saying that any changes in the selection process will be a major shift in policy, and it is unclear whether the Legislature has the motivation to make that shift, especially with the powerful building industry ready to pounce on any legislation that might weaken their hand in the high stakes game of land development.

As previously stated, section 190.006, *Florida Statutes*, details how board members are elected, both initially and when control gradually shifts to the residents.<sup>82</sup> A relatively easy fix to most of the problems caused by developer-controlled boards—and the one problem that would cause the most consternation

75. *Id.* at 457.

76. *See* FLA. STAT. § 190.006(3)(a)1.

77. *See* FLA. STAT. § 190.006(3).

78. *Id.*

79. *Id.*

80. *Frontier Acres*, 472 So. 2d at 457.

81. *See* FLA. STAT. § 720.303(1) (2013).

82. FLA. STAT. § 190.006.

for developers—would be to have the county commissioners, or city council members if the district is located within a municipality, appoint three members of the initial board. Those members would be appointed by the commissioner or council members in whose constituency the district is located. The appointed members would be required to be residents of that commission or council constituency, and therefore, would have a vested interest in ensuring that the district does what is in the best interests of the residents living within the district, as well as the surrounding communities. The appointed members, of course, would be subject to the same laws and ethics rules as those who are elected.<sup>83</sup> Such a change would remove control of the district from the developer and place it in the hands of those whose only obligation is to the district and its constituents, not to the developer.

#### IV. FLORIDA'S GOVERNMENT IN THE SUNSHINE LAW

The fact that the initial board of supervisors is comprised of both owners and employees of the developer adds another dimension to the problem, violations of Florida's Sunshine Law.<sup>84</sup> Florida's Sunshine Law, Section 286.011(1), *Florida Statutes*, prohibits discussion among board members about matters that could come before the board for a vote.<sup>85</sup> The penalty for knowingly violating the statute is a misdemeanor of the second degree.<sup>86</sup>

The reality is that since many board members who were elected by the developer also work together, most likely in the same office, the probability that they are discussing board business when they are outside of public meetings is high, especially when one of the board members, the chairman in all likelihood, employs and supervises the others. Unfortunately for the public, but fortunately for those who violate the statute, Sunshine Law violations are very difficult to prove. They generally require one of the participants to report the others, which is highly unlikely in this situation.<sup>87</sup> Consequently, potential violations of the Florida Sunshine Law would be minimized by the appointment of three of the five board members.

There are other changes to the Florida Statutes that would provide district residents with some assurance that their interests are being protected. Those changes, while less drastic than removing the developer from control of the board through the appointment of three of the five members, would still eliminate some of the discretion that the boards now have in managing their respective districts.

District boards have a great deal of flexibility in setting district policies, as long as those policies do not violate any Florida Statutes.<sup>88</sup> Removing some of that flexibility, while leaving control of the districts in the hands of the developers, may

83. See FLA. STAT. § 112.311(6) (2013).

84. FLA. STAT. § 190.006; FLA. STAT. § 286.011 (2012) (commonly referred to as the Sunshine Law).

85. FLA. STAT. § 286.011(1).

86. FLA. STAT. § 286.011(3)(b).

87. See FLA. STAT. § 286.011.

88. See FLA. STAT. § 190.

be more palatable to the Legislature, if and when the Legislature considers changes to chapter 190, *Florida Statutes*.<sup>89</sup>

The following suggestions for changes to chapter 190, *Florida Statutes*, will not have much impact as long as the landowner/developer elects all members of the board. However, the changes will have some significance once section 190.006, *Florida Statutes*,<sup>90</sup>—which addresses the transition of control of the district from the developer to the residents—begins to take effect.

## V. DISTRICT BOARD MEETINGS

Section 190.006(3)(b), *Florida Statutes*, states: “Board members *shall* [emphasis added] assume the office on the second Tuesday following their election.”<sup>91</sup> However, the statute does not mandate that a meeting be held on that date.<sup>92</sup> The statute that addresses a meeting is section 190.006(6), *Florida Statutes*, which provides that, “[a]s soon as practicable after each election or appointment, the board shall organize by electing one of its members as chair and by electing a secretary, who need not be a member of the board, and such other officers as the board may deem necessary.”<sup>93</sup>

The problematic language in that section is “[a]s soon as practicable . . . .”<sup>94</sup> It does not mandate that a meeting be held by a specific date.<sup>95</sup> Therefore, it allows for a great deal of manipulation, especially if a policy has been previously adopted by the board, giving the chairman sole authority for calling meetings. The developer-controlled boards may delay that meeting, as some boards may not appreciate the fact that they must now share decision-making authority with residents, or make certain matters public that they wished to keep out of the public arena.

Furthermore, in addition to granting the chairman sole authority for calling meetings, board policy may also permit the chairman to make other decisions without board approval, such as executing documents, dealing with vendors, approving contracts, and other actions. That, of course, destroys the transparency with which a public board should operate. One fix for that problem would be to amend section 190.006(6), *Florida Statutes*, by deleting the language, “[a]s soon as practicable . . . .”<sup>96</sup> and replacing it with, “[w]ithin three weeks . . . .” Therefore, section 190.006(6), *Florida Statutes*, would read, in its entirety: “[No later than three weeks following each election or appointment,] the board shall organize by electing one of its members as chair and by electing a secretary, who need not be a member of the board, and such other officers as the board may deem necessary.”<sup>97</sup>

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89. *Id.*

90. *Id.*; FLA. STAT. § 190.006 (2009).

91. FLA. STAT. § 190.006(3)(b).

92. *See id.*

93. FLA. STAT. § 190.006(6).

94. *Id.*

95. *See id.*

96. *Id.*

97. *Id.*

That change would give the board one additional week following the election to hold its organizational meeting.<sup>98</sup> While the resident members would still be in the minority, that change would eliminate the potential for manipulation by developer-controlled boards by keeping the resident members from having any input in board business for an extended period of time following an election.

However, there is still a possibility that the developer-controlled board could keep the resident members from having input into board business by adopting a board policy that gives the chairman the authority to both call all meetings and to cancel previously scheduled meetings. For example, even though an organizational meeting was mandated, the chairman could cancel several previously scheduled regular meetings, thereby denying resident members the opportunity for participation in board business for several months following the election. Consequently, to avoid the potential for abuse, subsection (a) could be added to section 190.006(6), *Florida Statutes*, providing the following: “Boards shall meet no less than [ten] times per year, with no more than [sixty] days between meetings.”<sup>99</sup> That simple change would eliminate the possibility that developer-controlled boards could “freeze out” resident members for any significant period of time.

The argument against mandating a minimum number of appropriately spaced meetings is that boards should have the discretion to establish their own meeting dates and times.<sup>100</sup> That would be acceptable in an ideal world, where the best interests of the residents, who ultimately pay the bills, are kept at the forefront. Unfortunately, there is no such thing as an ideal world. Furthermore, not scheduling and keeping regular meetings deprives the residents from addressing the board in its entirety; although, the residents may contact individual board members.<sup>101</sup> However, as previously stated, individual board members are prohibited from discussing board business amongst themselves outside of a public meeting.<sup>102</sup> Therefore, the failure to schedule and hold regular meetings is a disservice to both the residents and the resident members of the board.

## VI. VOTING CONFLICTS OF INTERESTS

Section 112.3143(3)(b), *Florida Statutes*,<sup>103</sup> which addresses voting conflicts of interest, could also be revised to better protect the interests of the district’s residents. The statute permits an officer affiliated with the developer to vote on matters that come before the board, even though the actions taken will inure to his

98. See FLA. STAT. § 190.006(3)(b) (two weeks currently required in the statute).

99. See FLA. STAT. § 190.006(6).

100. See generally FLA. STAT. § 720.303(2).

101. FLA. STAT. § 720.303(1).

102. See FLA. STAT. § 286.011(1) (2012).

103. See FLA. STAT. § 112.3143(3)(b) (2013). “However, a commissioner of a community redevelopment agency created or designated pursuant to [section] 163.356 or [section] 163.357, or an officer of an independent special tax district elected on a one-acre, one-vote basis, is not prohibited from voting, when voting in said capacity.” (emphasis added).

benefit.<sup>104</sup> However, that vote is still clearly a conflict of interest, albeit a permissible one. But the statute does not draw the line between a vote that will inure to the officer's benefit versus one that will harm the district in some manner.<sup>105</sup> In other words, is a vote that will inure to an officer's benefit, but will also harm the district, permissible? Apparently so.<sup>106</sup> For example, a development includes not only land that can be developed for profit, but also land that cannot be developed, and is designated for the common use and enjoyment of all residents.<sup>107</sup> Those common areas may include roads, roadways, rights-of-way, community parks, and other common areas.<sup>108</sup>

Property taxes must be paid on the common areas, and those common areas must also be maintained.<sup>109</sup> The developer has that responsibility prior to turnover of the project to the residents.<sup>110</sup> Thereafter, the district, or the respective homeowners' association(s) within the development, will assume the responsibility.<sup>111</sup>

With that in mind, what if a developer approached the developer-controlled board and asked the board for permission to transfer some of the common areas to the district prior to turnover? This action would benefit the developer in two ways.<sup>112</sup> First, the developer would no longer have to pay assessments to the district;<sup>113</sup> and furthermore, it would no longer have to pay county ad valorem taxes.<sup>114</sup>

However, the detriment to the district would be twofold. The district could no longer collect assessments from the developer on the transferred common areas, and the district would have to assume the maintenance of those common areas.<sup>115</sup> Both would be detrimental to the district and the residents, who would have to make up for the lost revenue and assume the burden for maintenance of the property.<sup>116</sup>

Another example of a permissible voting conflict of interest that could cause financial harm to a district would include the collection of unpaid assessments on land owned by the developer.<sup>117</sup> A board has the authority to foreclose on any property for which assessments are not paid.<sup>118</sup> But what if the developer failed to pay its share of the assessments on time? The developer-controlled board would obviously vote to not foreclose on the developer-owned property. That vote would

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104. *See id.*

105. *Id.*

106. *See id.*

107. *See Flescher v. Oak Run Assocs.*, 111 So. 3d 929, 933 (Fla. Dist. Ct. App. 2013).

108. *Id.*

109. *See id.* at 931.

110. *See id.* at 933.

111. FLA. STAT. § 720.303(1).

112. FLA. STAT. § 720.303(1); *see also* FLA. STAT. § 720.308(1)(b) (2007).

113. FLA. STAT. § 720.308(1)(b).

114. FLA. STAT. § 720.303(1).

115. *Id.*

116. *See id.*

117. *See* FLA. STAT. § 190.011(14) (2009).

118. FLA. STAT. § 190.026 (2007).

benefit the developer, and ultimately the board members who are owners of the development company, but the vote is allowable under the statute.<sup>119</sup> However, as in the previous example, the vote would cause a financial detriment to the district and the residents, since a budget shortfall could result, thereby curtailing or even eliminating essential services.<sup>120</sup>

A simple solution would be to amend section 112.3143(3)(b), *Florida Statutes*,<sup>121</sup> as follows, in order to prohibit any allowable conflict of interest vote by a developer-controlled board that could cause financial harm to the district:

Section 112.3143(3)(b). However, a commissioner of a community redevelopment agency created or designated pursuant to section 163.356 or section 163.357, or an officer of an independent special tax district elected on a one-acre, one-vote basis, is not prohibited from voting, when voting in said capacity, *except when the vote could knowingly result in financial harm to the community redevelopment agency created or designated pursuant to section 163.356 or section 163.357, or an independent special tax district.*

*(c) Any commissioner of a community redevelopment agency or an officer of an independent special tax district found to have knowingly voted on a matter that resulted in financial harm to the community redevelopment agency or the special tax district, respectively, shall be guilty of malfeasance within the meaning of section 7, art. IV of the State Constitution, and be subject to removal by the Governor.*

*(d) A vacancy created by the removal of a commissioner of a community redevelopment agency or an officer of an independent special tax district elected on a one-acre, one-vote basis, as a result of violation of sub-section (c) above, shall be filled by a qualified elector of the community redevelopment agency or independent special tax district.*

That simple change would place the developer elected board members on notice that any actions that both harm the district and benefit the developer would be prohibited. Furthermore, any such vote would subject the officer to removal from office by the governor pursuant to article IV, section 7 of the Florida Constitution,<sup>122</sup> which is “independent of, and may not be impinged upon by, a statute.”<sup>123</sup>

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119. *See id.*

120. *See id.*

121. FLA. STAT. § 112.3143(3)(b) (2013).

122. FLA. CONST. art. IV, § 7.

123. *See Bruner v. Fla. Comm’n on Ethics*, 384 So. 2d 1339, 1340 (Fla. 1980).

To further guard against such abuse by a developer-controlled board, the vacancy created by removal of the officer would be filled by a qualified elector of the district, not another developer elected board member.

## VII. CONCLUSION

The Florida Legislature determined that since a developer was assuming most of the risks when developing property, it would allow obvious conflict of interest votes by developer-controlled boards.<sup>124</sup> The Florida Supreme Court agreed.<sup>125</sup> However, the Legislature failed to allow for the possible financial harm that a developer-elected board could cause a district and the residents within its boundaries, by permitting conflict of interest votes that resulted in financial harm to the district and the residents.<sup>126</sup>

Furthermore, the developer does not assume all the risks when a district is formed since it is shielded from liability by the district, which assumes many of the risks, while the developer reaps the benefits.<sup>127</sup> That makes it much easier for the developer to walk away from a troubled development, leaving the residents holding the proverbial bag.<sup>128</sup>

The 2013 Florida Legislative Session brought changes to chapter 112, *Florida Statutes*, by amending some sections and adding others.<sup>129</sup> The purpose for these changes was to expand and clarify the ethics rules for public officials in Florida.<sup>130</sup> The Florida Legislature also passed CS/HB 7119, which amended chapter 720, *Florida Statutes*, related to homeowners' associations.<sup>131</sup> Those changes implemented additional reporting requirements for both homeowners' associations and their officers and directors.<sup>132</sup> It also addressed record keeping requirements and dictated when a resident may be elected to a developer-controlled homeowners' association board.<sup>133</sup>

Such changes indicate that the Florida Legislature is willing and able to revise the way official business is conducted in Florida. Consequently, there is no reason to believe it cannot make changes to the way developer-controlled community development districts are managed in order to better protect the citizens subject to their control. The Florida Legislature created this problem, and the Florida Legislature can fix it.

In order to do so, however, the Florida Legislature must be willing to fend off attacks by the various special interest groups that will surely object to any changes

124. *Frontier Acres*, 384 So. 2d at 472.

125. *Id.*

126. *See* FLA. STAT. § 112.3143(3)(b).

127. *See* FLA. STAT. § 720.303(2).

128. *See* FLA. STAT. § 720.303(1).

129. *See generally* FLA. STAT. § 112.

130. *See* FLA. STAT. §§ 112.311(1)–(6) (2013).

131. *See generally* FLA. STAT. § 720.

132. *See* FLA. STAT. § 720.303(7), (13).

133. FLA. STAT. § 720.303(4); FLA. STAT. § 720.307(2) (2013).

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that would impair the ability developers have to do whatever they choose with districts they control.