IN THE SUPREME COURT OF FLORIDA
CASE NO. 63,254

TOWN OF PALM BEACH, a municipal corporation, CITY OF WEST PALM BEACH, a municipal corporation, CITY OF BOCA RATON, a municipal corporation, THE VILLAGE OF NORTH PALM BEACH, a municipal corporation,

Petitioners,

vs.

PALM BEACH COUNTY,

Respondent.

On Petition from the District Court of Appeal, Fourth District (No. 81-1553)



# RESPONDENT'S REPLY BRIEF ON THE MERITS

Robert L. Nabors, Esquire
NABORS, POTTER, McCLELLAND, GRIFFITH & JONES, P.A.
605 South Palm Avenue
Post Office Box 37
Titusville, FL 32781-0037
(305) 269-9700

Charles F. Schoech, Esquire
County Attorney
Palm Beach County
Post Office Box 1989
West Palm Beach, FL 33402
(305) 837-2225

ATTORNEYS FOR RESPONDENT

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## EXPLANATION OF ABBREVIATIONS AND SYMBOLS

Respondent shall be referred to collectively as "the Respondent" and as "the County".

Petitioners shall be referred to collectively as "Petitioners" or "Petitioner municipalities".

The Fourth District Court of Appeal will be referred to as "the District Court".

The following abbreviations shall be used to reference the Record on Appeal and the Appendix of Appellees:

1. "App I" shall refer to the Appendix I to the Reply Brief on the Merits of Respondent Palm Beach County: Selected Pleadings, Evidence and Cases.
2. "App II" shall refer to Appendix II to the Reply Brief on the Merits of Respondent Palm Beach County: Excerpts from Trial Transcript.
3. "R" shall refer to the Record on Appeal.
4. "Ex" shall refer to Exhibits in Evidence.
5. "p" or "pp" shall refer to the page numbers of either Appendix to the Reply Brief on the Merits of Respondent Palm Beach County or to the Record on Appeal.
6. "T" shall refer to Transcript of Testimony. Reference "T 450/12-20" shall refer to Page 450, Line 12 through Line 20.

## STATEMENT OF THE ISSUES

Respondent has rephrased the Statement of Issues utilized in Petitioners' Initial Brief and added an issue. Points I and II as follows are responsive to Points I and II of Petitioners' Initial Brief. Point III as follows is responsive to Point III of Petitioners' Initial Brief. Point IV as follows is a new issue of Respondent.

### POINT I

WHETHER THE "REAL AND SUBSTANTIAL BENEFITS" TEST ESTABLISHED BY CITY OF ST. PETERSBURG V. BRILEY, WILD & ASSOCIATES, INC., 239 So.2d 817 (Fla. 1970) WAS CORRECTLY INTERPRETED AND APPROPRIATELY APPLIED BY THE DISTRICT COURT IN THIS CASE?

### POINT II

WHETHER THE FINDINGS OF FACT BY THE TRIAL COURT THAT THE CHALLENGED SERVICES WERE PROVIDED IN VIOLATION OF ARTICLE VIII, SECTION 1(h), FLORIDA CONSTITUTION AND SECTION 125.01(7), FLORIDA STATUTES, WAS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND WHETHER THE TRIAL COURT ERRED IN THE APPLICATION OF LAW TO THE EVIDENCE AS TO SUCH CHALLENGED SERVICES?

### POINT III

WHETHER THE TRIAL COURT'S CONSIDERATION OF EXPERT TESTIMONY ON THE ISSUES IN THIS CASE WAS IN ERROR?

### POINT IV

WHETHER THE CONDITION IMPOSED BY THE TRIAL COURT ON THE STAY PENDING REVIEW OF THE FINAL ORDER ON APPEAL WAS LAWFUL?

## STATEMENT OF THE CASE

Much of the Statement of the Case in Petitioners' Initial Brief is argumentative, overstated or misleading. A summary response will be made here to such portions. In addition, Respondent will set forth the proceedings relating to Point IV under Respondent's Statement of the Issues. The evidence and testimony at trial will be discussed in detail under the argument under each Point rather than in this Statement of the Case.

On pages 2 and 13 of their Initial Brief, Petitioners characterize the testimony before the trial court as "highly conflicting lay and expert testimony" and as "fiercely conflicting expert and lay testimony". No basis in the record is established for such self-serving conclusion. The evidence and testimony before the trial court was not disputed or contradicted by the parties at trial[1]. What was fiercely debated at trial was whether the undisputed evidence and testimony of various factors of benefit received by residents and property within the Petitioner municipalities was inconsequential or real and substantial under the established constitutional test. The dispute at trial and on appeal is not over the facts but the application

[1]The only exception being that Respondent Palm Beach County demonstrated at trial that the evidence presented by Petitioners and relied on by the trial court as to the sheriff's road patrol and detective division was evidence of the minimum number of recorded incidents of direct benefit. Such evidence of Petitioners was limited to written incident reports of the Sheriff of activities occurring directly within the boundaries of the municipalities or direct assistance to municipal police departments. In addition to presenting evidence of factors of indirect benefit, Respondent Palm Beach County presented undisputed evidence of direct benefit to municipal residents and property not reflected in such written incident reports occurring both within the boundaries of the Petitioner municipalities and in the unincorporated areas. Such evidence was recognized by the District Court on page 9 of its Opinion (App I p 47).

by the trial court of the constitutional test to essentially undisputed testimony and evidence.

Petitioners' statement on page 6 of their Initial Brief that the Final Report of the Fair Tax Council concluded that the law enforcement services provided by the Sheriff's road patrol were of no substantial benefit to municipal residents is in error. The Fair Tax Council concluded that 40% of the law enforcement services provided by the Sheriff's road patrol provided substantial benefit county-wide and 60% was of substantial benefit to the "urban unincorporated area" only. (Plaintiffs' Ex. 30, pp 16-17). The urban unincorporated area referred to by the Fair Tax Council is the unincorporated urban corridor along the boundaries of the municipalities and east of the Turnpike. The decision by the Fair Tax Council to eliminate the Sheriff's detective division from consideration as a potential dual tax violation was a deliberate decision by the Council and not an oversight. (Plaintiffs' Ex 30, pg 15).

Petitioners' assertion that the Sheriff does not engage in routine patrol within municipal areas and that investigations are handled by the municipal police departments is misleading and conveniently omits any reference to the recognized policy of the Sheriff resulting from the conflict of dual law enforcement responsibility within the municipal areas. Sheriff Wille testified that as chief law enforcement officer within Palm Beach County he has full authority and responsibility to make arrests and conduct investigations in all parts of the county and that such dual law enforcement responsibilities between the Sheriff

and the municipal police departments presents practical operational difficulties in providing effective law enforcement within Palm Beach County. (App II pp 102-105). To overcome the conflict resulting from such dual jurisdiction and authority, Sheriff Wille has established a standing policy that his deputy sheriffs under normal circumstances notify the municipal police of an arrest or investigation in the municipal areas. The rationale of such standing policy is to enhance effective cooperation among the various law enforcement agencies within the county, and to insure the safety of all law enforcement officers. (App II pp 103-105). The wisdom of such a policy was recognized by the municipal police chiefs[2].

The statement by Petitioners on page 7 of their Initial Brief that all of the witnesses of the Petitioner municipalities testified that their respective municipal police departments "...have the manpower and facilities for complete investigative functions" is overstated and misleading.[3]

Petitioners state without qualification on page 8 of the Initial Brief that Sheriff Wille had estimated in 1977 that 10%

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[2]Police Chief Joseph A. Terlizzese, Police Chief for the Appellee Town of Palm Beach, acknowledged the wisdom of this standing policy and testified that he would not want the sheriff's law enforcement personnel within his Town unless they first contacted him or one of the members of his police department since in other jurisdictions there have been instances "...where people have been shot or deputy sheriff undercover personnel have been mistaken as criminals...." (App II p 74). Chief John H. Jamason, Police Chief of the Appellee City of West Palm Beach, stated that the Sheriff was more "professional" than to come within his City without some kind of cooperation from his department and stated that without such a policy you "...can endanger the officers working a case." (App II p 81).

[3]See argument on pages 32 and 33 under Point II.

of Sheriff's personnel was spent in the municipal areas of the County. Petitioners conveniently omit in their statement that this "guesstimate", as such percentage figure was characterized by Sheriff Wille, did not include any services of the detective division and any services received by specialized units of the Sheriff such as the SWAT team, crime scene investigation unit and polygraph unit. Petitioners conveniently omit in this statement that this guesstimate did not include any activities by the Sheriff's road patrol in the unincorporated areas involving residents and property of the municipalities, any consideration of the curtailment of crime by the Sheriff's road patrol in the unincorporated areas, or any consideration of the stand-by capability of the Sheriff in the event of an emergency within the municipalities. (T 435-14 - 435-16).

Petitioners argue on page 8 of the Statement of the Case in their Initial Brief that Sheriff Wille "reluctantly admitted" that he could not handle all calls under current manpower if the municipal police departments were abolished and that it is "apparent" that the Sheriff could not respond to all calls presently being responded to by the municipal police departments. Sheriff Wille testified that if a municipality abolished all or part of its police department he would be obligated to handle all crime calls in such municipality. He admitted that he would not respond to all the calls currently being responded to by the municipal police departments of the Petitioner municipalities since:

> "... the overwhelming majority, I am talking of 90 percent, of the calls received by a police department are nonpolice related." (App II p 122).

On pages 11 and 12 of the Statement of the Case in their Initial Brief, Petitioners grossly misstate the "contentions" of Respondent at trial and on appeal. The heart of this appeal and the contention of Respondent Palm Beach County at trial is that total reliance by Petitioners and the trial court on quantitative evidence of direct benefit is in disregard of the Briley, Wild test. Any factor of indirect benefit and all factors of direct benefit that could not be conveniently quantified is ignored by Petitioners and the trial court.

Proceedings Imposing Stay Pending Review of The Final Order on Appeal

After Respondent filed its Notice of Appeal the trial court, pursuant to a motion filed by the Petitioner municipalities under Fla. R. App. P. 9.310(b)(2), imposed a condition on the otherwise automatic stay (App I pp 79-81). Such stay order required Respondent Palm Beach County to set aside in a reserve contingency account from "countywide" revenues an amount sufficient to remit to the Petitioner municipalities the cost of providing the challenged services during county fiscal year 1981/1982, which monies were required to be paid over to the Petitioners in the event the final order was affirmed on appeal (App I p 80). This stay order was affirmed by the District Court without opinion. (App I p 82).

The trial court set the amount of the reserve contingency fund at $4,200,000 to be included in the fiscal year 1981/1982 budget of Respondent Palm Beach County. (App I pp 83-85). Respondent Palm Beach County filed a motion to review the order of the trial court setting the escrow amount and oral argument was held before the District Court on July 16, 1982.

This Court reversed the District Court in City of Lauderdale Lakes v. Corn, 415 So.2d 1270 (Fla. 1982). The District Court opinion in the City of Lauderdale Lakes v. Corn case[4] was the precedent relied on by the trial court in the order imposing the stay and the District Court in affirming such order.

Based on the decision of this Court in the City of Lauderdale Lakes v. Corn case, Respondent Palm Beach County filed a motion to vacate the condition imposed on the stay. Such motion was denied by the trial court and Respondent Palm Beach County filed a motion for review in the District Court (App I pp 86-88). Such motion and the motion for review of the order setting the escrow amount were pending in the District Court when the original Opinion in this case was published by the District Court. In the original Opinion the District Court held that the issues presented in the two pending motions were rendered moot by the decision on the ultimate issues and the trial court was "... directed to release and satisfy any conditions that were imposed by virtue of the stay granted below". (App I p 35). In the order of the District Court substituting its opinion dated January 26, 1983 and certifying the question that is the subject of this Petition, the District Court stayed the mandate until this Court makes a final determination, the effect of which is to continue the condition imposed on the stay by the trial court (App I p 37).

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[4] 371 So.2d 1111 (Fla. 4th DCA 1979)

## ARGUMENT

### POINT I

### THE "REAL AND SUBSTANTIAL BENEFIT" TEST ESTABLISHED BY CITY OF ST. PETERSBURG v. BRILEY, WILD & ASSOCIATES, INC. 239 SO.2d 817 (Fla. 1970) WAS CORRECTLY INTERPRETED AND APPROPRIATELY APPLIED BY THE DISTRICT COURT IN THIS CASE.

#### The Constitutional and Statutory Limitation of Article VIII, Section 1(h), Florida Constitution And Section 125.01(7), Florida Statutes

To place the issues and argument in this cause in proper perspective, it is essential to understand that generally there does not exist under the state constitution or law a requirement that a particular parcel of property receive a benefit from an authorized tax for the common good. The fact that the benefit of an authorized tax to a particular taxpayer is remote or doubtful, or his tax burden heavy, is immaterial against an authorized tax for a public purpose. Hunter v. Owens, 86 So. 839 (Fla. 1920); Dressel v. Dade County, 219 So.2d 716 (Fla. 3rd DCA 1969). No concept of taxation requires a taxpayer or group of taxpayers to receive a dollar's worth of benefit for a dollar's worth of taxes.

The only provision in which benefit is a requirement for taxation is Article VIII, Section 1(h), Florida Constitution, which provides as follows:

> "Property situate within municipalities shall not be subject to taxation for services rendered by the county

exclusively for the benefit of the property or residents in unincorporated areas."[5]

The first Florida Supreme Court decision construing this novel constitutional provision was City of St. Petersburg v. Briley, Wild & Associates, Inc., 239 So.2d 817 (Fla. 1970). In the Briley, Wild case, the county had levied taxes county-wide to obtain funds to construct and expand sanitary sewerage facilities in the unincorporated areas. None of the owners of city-located property could physically use the expanded treatement plant even though they bore the burden of the ad valorem tax.

This Court in the Briley, Wild case rejected the broad interpretation that the word "exclusively" in Article VIII, Section 1(h), Florida Constitution required that the benefit to municipal property and residents be direct and primary in order for it to be authorized and held on page 823:

> "It is true that the benefits may not be direct in the sense that the owners of city-located property will physically use the expanded treatment plant, lines and lift stations. But we reject the argument of appellants that in order to avoid the proscription of Article VIII, Section 1(h) it is necessary that any benefit to municipalities be direct and primary. We hold that the proper interpretation of the language of this section of the Constitution does not require a direct and primary use benefit from a particular service to city-located property in order to remove the same from the proscription of the constitutional provision. It is sufficient to authorize county taxation of such property

[5]The Florida Supreme Court in Manatee County v. Town of Longboat Key, 365 So.2d 143 (Fla. 1979) held that the prescription of Article VIII, Section 1(h) applied only to property taxation and not to revenues of a county not derived from property taxation. The Florida Supreme Court in the Manatee County case also held that the statutory tests under Section 125.01(6), Florida Statutes, and Article VIII, Section 1(h) were the same. Section 125.01(7), Florida Statutes was adopted in response to the decision in the Manatee County case and applied the constitutional test to all county revenues except those derived from or on behalf of the unincorporated area of a county.

> if the benefits accruing to the municipal areas are found to be real and substantial and not merely illusory, ephemeral and inconsequential. That it was not the intent of the framers of this provision of the Constitution to require a direct benefit to city-located property in order to avoid the proscription is evidenced by the fact that attempts to amend the provision to substitute the words 'directly' and 'primarily' for the word 'exclusively' were defeated before the proposition was submitted to the people for approval." (Emphasis added)

Having forged these rules of construction this Court held that the resulting elimination of pollution in the waters of the county due to the improved sewerage facilities was a real and substantial benefit to city-situate property even though physical use of the facilities was totally unavailable to such city residents and property.

The second case construing the provisions of Article VIII, Section 1(h), Florida Constitution, is Burke v. Charlotte County, 286 So.2d 199 (Fla. 1973). In the Burke case, the county levied taxes county-wide to provide funds for the construction and surfacing of roads and drainage facilities not within the boundaries of any municipality. Faced with a suit under Article VIII, Section 1(h), by municipal taxpayers, this Court found in favor of the county on the basis that such public works projects were of a real and substantial benefit to the municipal residents at least as great as those obtained by municipal residents from the services before the court in the Briley, Wild case with the following language beginning on page 200:

> "The ordinance under attack authorizes the levy of a tax against municipal property to 'provide for the construction, reconstruction, repair, paving, repaving, hard surfacing and re-hard surfacing of roads . . . in any area in said County which is not within the limits of any municipality. . . .' As noted by the trial judge, one of the plaintiffs 'admitted in his deposition that good roads in the County would in

some manner be of some benefit to himself and other residents of the City of Punta Gorda.' In view of this and other evidence in the record, we are of the opinion that the benefits, actual and potential, to be derived by the municipal residents in the instant case are at least as great as those derived by the municipal residents in Briley."

In Alsdorf v. Broward County, 373 So.2d 695 (Fla. 4th DCA 1979), the court affirmed the findings of the trial court that the challenged services on appeal of the sheriff's road patrol and library services did provide real and substantial benefit to municipal residents and reaffirmed the constitutional test on page 698 as follows:

"The benefit to the city need not be direct and primary. It is only necessary that the benefit not be illusory or inconsequential."[6]

This Alsdorf decision is the first case to set forth the factors of benefit to be considered in applying the constitutional test to services provided by a sheriff. The court set forth such factors of benefit on page 700 as follows:

"Among many other things, it was shown that the Sheriff's road patrol generally enforced the law in the entire county. The Sheriff served as the chief officer of both the county and circuit courts. In doing so, the road patrol assisted civil deputies in service of process and was involved in service of and enforcement of any court order, whether it related to a municipal resident or a resident living in an unincorporated area. In addition, all of the Sheriff's vehicles were intentionally driven and maintained in such a fashion so as to increase the visibility of the police presence in the municipalities. It was shown and is uncontested on appeal that the Sheriff's road patrol assisted the city police forces when called upon to do so. Further, by limiting crime in the unincorporated

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[6]This Court in Alsdorf v. Broward County, 333 So.2d 457 (Fla. 1976) had remanded the issues to the trial court and held that the provisions of Article VIII, Section 1(h) were self-executing with or without legislative guidelines.

areas adjoining the municipalities the road patrol was of substantial assistance to the municipal police and residents in the contiguous cities."

As to the challenged library services, the court in the second Alsdorf case made the following comment on page 699:

"The fact that appellants might prefer a different system as a matter of policy does not mean that the municipal residents themselves do not receive real and substantial benefit."

This quote by the court from the second Alsdorf case emphasizes the distinction between political and policy questions and the constitutional test. The question of the equitable allocation of revenues and the comparative benefit between classes of residents and various areas of a county are political and legislative questions and not legal ones if the benefit provided by the county service to municipal residents and property is real and substantial and not mere illusory, ephemeral and inconsequential.

This distinction was also recognized by the Second District Court of Appeal in Manatee County v. Town of Longboat Key, 352 So.2d 869 (Fla. 2nd DCA 1977) at page 872:

"The framers of our Constitution must have recognized that there are many county services which provide an indirect yet real benefit to city dwellers. There is no need to be concerned with how much more benefit from this type of service county property owners may receive when compared to city property owners because these are not services which are rendered exclusively for the benefit of the counties. The only services which must be considered are those rendered by the county which result 'in no real or substantial benefits to the municipal property owners.'"

The term "double taxation" is a misnomer. The issue is not that since a municipality provides a service, its residents and property cannot be taxed doublely for a similar service provided by the county. The fact that residents and property in the unincorporated areas benefit from the duplicated service provided

by the municipalities is immaterial in the constitutional analysis. There is always a disparity of benefit received between residents, property and areas, both unincorporated and municipal. As recognized in City of Ormond Beach v. County of Volusia, 383 So.2d 671 (Fla. 5th DCA 1980) at page 674:

> "There are numerous instances where there is a disparity of services between one area of a county and another. Municipalities have their own police but city residents are also taxed for the services of the Sheriff. Cities maintain their own road system, but properties within the city can also be taxed for maintenance and installation of county roads outside of the city. Many residents may never use the services of the Sheriff or travel the county roads, but they are available for use by the city resident as well as those who live outside the city." [7]

The Decision by the District Court in this Case.

Petitioners attempt to elevate their argument into one of broad public policy by arguing that under the "mechanical test" adopted by the District Court a municipality can never win a double taxation suit and that as a result of the District Court opinion the burden of proof of a municipality is now "impossible". Such argument reveals a fundamental misunderstanding of the

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[7] In the City of Ormond Beach case the court held that the challenged library services did provide requisite benefit to residents and property within the municipal areas.

Briley, Wild real and substantial benefit test as such test has been consistently applied by all subsequent courts.[8]

There is no narrowing or altering of the Briley, Wild test in the District Court opinion. The reality that Petitioners seek to avoid is a focus on the undisputed evidence and testimony of quantified direct benefit presented by them at trial. Such undisputed evidence and testimony does not meet the requirements of the Briley, Wild test as such test has been consistently applied and developed. The Petitioners simply failed to meet their burden of proof by relying almost exclusively on a "double taxation" expert to assert conclusions that the challenged services did not provide real and substantial benefit when such expert failed to have even the most fundamental understanding of the Briley, Wild test. Leaping to the conclusion that no municipality can now sustain the established burden of the Briley, Wild test is unwarranted. Evidence and testimony limited solely to the most minimal factors of quantified direct benefit does not

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[8]Petitioners attempt to bolster their argument by citing the authorization by the Legislature for the creation by all counties of the taxing vehicle of municipal service taxing units. It is crucial to recognize the difference between the limitations of the constitutional and statutory standard and the statutory authority granted all counties in creating municipal service taxing units under Section 125.01(1)(q), Florida Statutes. Article VIII, Section 1(h), Florida Constitution, and Section 125.01(7), Florida Statutes are limitations on the power of a county to levy countywide taxes or to appropriate countywide revenues. Section 125.01(1)(q), Florida Statutes, by authorizing the creation of a municipal service taxing unit, is a grant of additional taxing power to a county to isolate all or a portion of the burden of the cost of a service in the unincorporated areas only. A board of county commissioners may not be legally required to create a municipal service taxing unit under the constitutional and statutory standard but could politically decide such a levy is more equitable within the discretion of the board.

stand muster under the Briley, Wild test as such test has been consistently applied by all courts applying the test at different times to different facts.

The Briley, Wild real and substantial benefit test obtained flesh and meaning by application to specific fact patterns initially by this Court in the Briley, Wild case and by this Court and others thereafter. Such court application has been consistent resulting in the emergence of stability and predictability in this area of complex local government relationships. The maverick opinion is that of the trial court.

As to the services provided by the Palm Beach Sheriff, the Petitioners limited their focus to the geographic boundaries of the municipalities and to documented assistance to municipal police officers. Such myophia ignores the total law enforcement service provided by the Sheriff throughout an urban county where the municipal boundaries are not confining walls to its mobile citizenry. The blinders of the Petitioners and the trial court to all factors of benefit not represented by this minimal evidence of quantified direct benefit was recognized by the District Court as a rejection of the Briley, Wild test. Compounding the inadequacy of the proof presented by Petitioners at trial is their primary reliance on an "expert" who could parrot but not understand the Briley, Wild test.

As to the challenged roads, the Petitioners urged a convenient state road classification system developed for other purposes to avoid the holding of this Court in the Burke case. Their efforts to sustain their burden of proof based on such

state classification system consisted of several hours of office effort by their "expert" to insure that he had a correct listing of roads![9]

The adoption by the trial court of the evidence and testimony of quantified direct benefit presented by Petitioners to conclude that the challenged services failed to provide the requisite benefit under the Briley, Wild test is a jolt to all prior precedent. The new test of quantified direct benefit urged by Petitioners and adopted by the trial court would create a true "mechanical test" in abrupt departure from the Briley, Wild case. The fatal flaw of Petitioners, their expert and the trial court is total reliance solely on the most minimal evidence of quantified direct benefit to municipal residents and property.

As to the road patrol and detective division of the Sheriff, the quantitative data of the Petitioners relied on by the trial court is the Assist Chart and the Grid Code Chart.[10]

As to the Assist Chart the District Court held:

> "Plaintiffs prepared and introduced into evidence charts based on two types of records maintained by the sheriff's department. One chart illustrates the number of times during a specified fiscal year that an 'assist' to the police of a named city was recorded by a deputy and the percentage of the sheriff's total law enforcement activity consisting of such assists.
>
> "The county, on the other hand, presented evidence indicating that the statistical data relied on in the preparation of this chart was unreliable, pointing out that, according to various individual reports introduced by the county, many 'assists' were not reported by the assigned deputies. Additionally, the county argued that the cold statistics do not accurately reflect the amount of time, effort, or money expended on a particular 'assist'." (App I pp 46-47).

[9] See argument under Point III of this Reply Brief.

[10] (App I p 78)

As to the the Grid Code Chart the District Court held:

> "The second chart introduced by the municipalities is based upon the number of times the sheriff's office responded to areas designated by a grid code of which certain grids correspond to the four plaintiff municipalities. Thus, there is a record of each time a deputy responds to a call within the geographical limits of one of the municipalities.
>
> "This data, however, reflects only direct contact within a municipality's boundaries; it does not show a contact where other activity of benefit actually occurred in the unincorporated areas. For example, property stolen in one of the municipalities but recovered in the county (or in another municipality) would only be accorded the grid code of the location where recovery occurred. The same reasoning would apply to a kidnaping or a murder where the crime was committed within a city but the suspect is apprehended elsewhere. Accordingly, the statistics are not a completely accurate reflection even of direct benefits received by the municipalities from the sheriff's office. The charts do have probative value to the extent that they demonstrate a minimum number of contacts." (Emphasis added) (App I p 47).

In explaining the quantified direct benefit nature of the evidence relied on by the Petitioners, their expert and the trial court the District Court held:

> "Another factor that arises in the present case and one that we considered in Alsdorf, is the undeniable benefit to the municipalities of activity of the sheriff's road patrol and detective division resulting in reducing the crime rate in the unincorporated areas and particularly in the eastern urban corridor adjacent to these municipalities, lessening the potential spill-over of that criminal activity. There are, in addition, more remote but potential benefits in the form of the backup capability of the sheriff's department available in time of emergency or particular need and the crime deterrant factor resulting from the visibility of marked sheriff's patrol vehicles in and around the municipalities.
>
> "As the latter examples demonstrate, not every benefit that the municipalities derive from the road patrol and detective division are quantifiable, as that term has been used by the parties throughout this appeal. The direct and demonstrable benefits when coupled with these unquantifiable benefits compel the conclusion that, in total, the municipalities enjoy a real and substantial benefit from the

sheriff's road patrol and detective division. We therefore conclude that the trial court's holding to the contrary is not supported by substantial competent evidence." (Emphasis added) (App I pp 47-48)

The District Court in quoting the language of this Court in the Briley, Wild case that framed the constitutional test held as follows:

"...we suggest that one factor which distinguishes our holding from that of the trial court is in differing perceptions of the quantum and quality of benefit that is entailed in the concept of 'real and substantial'.

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In Briley, Wild the City of St. Petersburg was not to be connected into the sewer system, thus there was no direct benefit. In the present case both direct and indirect benefits are involved. Applying the foregoing standard we have therefore concluded that there was not substantial competent evidence to support findings that the services and programs referenced by the complaints filed in this cause did not provide real and substantial benefits to the respective municipalities." (Emphasis Court's) (App I p 52).

Not all benefits received by residents and property from governmental services can be quantified. Services by government involve a complex web of human activities and resulting benefits based on the individual needs of people and property which ignores artificial jurisdictional boundaries. The trial court focused solely on direct and primary benefit as a method of analysis. Such analysis and focus was rejected by this Court in the Briley, Wild case and by all other courts applying the constitutional standard.

## POINT II

THE FINDINGS OF FACT BY THE TRIAL COURT THAT THE CHALLENGED SERVICES WERE PROVIDED IN VIOLATION OF ARTICLE VIII, SECTION 1(h), FLORIDA CONSTITUTION AND SECTION 125.01(7), FLORIDA STATUTES WAS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND THE TRIAL COURT ERRED IN THE APPLICATION OF LAW TO THE EVIDENCE AS TO SUCH CHALLENGED SERVICES.

The District Court Applied the Correct Standard of Appellate Review.

The issue on appellate review is not whether there is any evidence to support a finding by a trial court, but whether such evidence was competent and substantial and whether the findings by the lower court constitute a correct application of the law to the evidence presented. As stated in Adams v. McDonald, 356 So.2d 864 (Fla. 1st DCA 1978) at page 866:

> "We recognize our obligation not to substitute our judgment for that of the trial court where such judgment is supported by substantial evidence and is based upon a proper view of the applicable law. However, where the judgment is not supported by substantial evidence and is contrary to the law of this state as pronounced by our appellate courts, we have no other alternative but to reverse."

In Northwestern Nat. Ins. Co. v. General Elec., 362 So.2d 120 (Fla. 3rd DCA 1978), the court stated at page 123:

> "We are fully aware of the weight that must be given to a trial judge's findings of fact on appeal. Though findings arrive at this court with a presumption of correctness, it is the duty of an appellate court to reverse where a decision is based upon a finding that represents a misapplication of the law governing the facts disclosed."

See also Dixson v. Kattel, 311 So.2d 827 (Fla. 3rd DCA 1975), where the court stated at page 828:

> "Generally, appellate courts will not disturb findings of the trier of facts, but if such findings are contrary to the manifest weight of the evidence, or are contrary to the legal effect of the evidence, the reviewing court has not only the authority and power, but also the duty, to reverse."

In Oceanic Intern. Corp. v. Lantana Boatyard, 402 So.2d 507 (Fla. 4th DCA 1981) the court at page 511, incorporated the following additional principles of appellate review from In re Estate of Donner, 364 So.2d 742 (Fla. 3rd DCA 1978):

* * *

> "We are not however bound by the trial court's legal conclusions where those conclusions conflict with established law. * * * A finding of fact by the trial court in a non-jury case will not be set aside on review unless there is no substantial evidence to sustain it, unless it is clearly against the weight of the evidence, or unless it was induced by an erroneous view of the law. A finding which rests on conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion. * * * When the appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts, then the decision is 'clearly erroneous' and the appellate court will reverse because the trial court has 'failed to give legal effect to the evidence' in its entirety." (Emphasis added).

The court in the Oceanic Intern. Corp. case applied the above principles of appellate review to a finding of the trial court, concluded that a finding of the trial court was not supportable and reversed the trial court on each finding.

The principles of appellate review quoted above are particularly significant since the conclusion of the trial court in this case rests on essentially undisputed evidence. This case is not a case in which a trial judge or a jury reconciled conflicting evidence or testimony or where witnesses demeanor and credibility was a factor in the findings of fact as was the issue in Shaw v. Shaw, 334 So.2d 13 (Fla. 1976) and the other cases on appellate review cited by Petitioners. The evidence and testimony painted a picture for the trial court and was not in conflict. The issue in this case is whether the trial court applied correctly the Briley, Wild real and substantial benefit test to such evidence and testimony and whether the trial court neglected independent analysis by relying on testimony and evidence presented by an

"expert" who held an erroneous concept of such test.

Evidence and Testimony of the Petitioner Municipalities on the Road Patrol and Detective Division of the Sheriff Relied on by the Trial Court.

Real and substantial benefit has no inherent meaning utilized in a vacuum. The Petitioners' expert witness, Mr. Richard Kelton has not read the court decisions. The data upon which he and the trial court relied is based upon a misconception of the Briley, Wild test.

The evidence presented by the Petitioner municipalities to meet their burden of proof consisted of the Assist Chart and the Grid Code Chart and the opinion testimony of Mr. Richard Kelton as a "double taxation expert". The only other evidence conceivably bearing on the services provided by the Sheriff was the patrol district map and the self-serving testimony, later qualified, of the police chiefs that their police departments were full service police departments.[11]

The case reports that formed the basis of the data in the Assist Chart and the Grid Code Chart are divided into the categories of crime and non-crime reports. As a matter of policy, a written report is prepared for every crime category but not for

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[11] The testimony of Mr. Robert Joseph de Grazia was of mixed assistance to the Petitioner municipalities. Its purpose was to counter any benefit received by city residents and property from use of marked vehicles by deputies who were allowed to use such vehicles while off duty. Mr. de Grazia's testimony that routine patrol by police officers in marked vehicles has no deterrent effect on crime undermines the major complaint of the Petitioners that the Sheriff's patrol division does not perform routine patrol within the municipalities. The testimony of Mr. de Grazia was not mentioned by the trial court or the District Court.

every non-crime category. If the incident did not generate a written report the incident would not appear in the computer runs that provided the data included in the Assist Chart and the Grid Code Chart.[12] (App II p 89). The decision to file a written report in a non-crime category is made by the deputy sheriff.[13] (App II p 94).

As to the data contained in the Grid Code Chart, Inspector O'Brien testified that the grid code selected to insert into a written report is based upon "where the event went down" - where the deputy sheriff responded to or where the incident occurred. (App II p 151). Inspector O'Brien testified that there is not any relationship between the grid code assigned and where the crime was committed, where the individual was arrested, where the investigation is conducted or where the property is recovered since the grid code assigned is the geographical area where the

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[12]Mr. Gary Corn, Supervisor of the Data Processing Department of the Sheriff, testified that for the month of November, 1980, twenty percent of the more than 8000 activities assigned a case number were for non-crime complaints in which no report was written by the deputy sheriff. (App II p 91). Since none of these activities generated a written report, none would appear on the computer run constituting the data incorporated into the Assist Code Chart and the Grid Code Chart.

[13]Inspector Edward O'Brien, the officer in charge of the patrol and investigation division of the Sheriff testified that there are no written instructions to the deputy sheriffs when to write a report for a non-crime category, and the decision varies among deputy sheriffs and with work conditions. If the deputy sheriffs are busy, the task of writing the report goes "...by the wayside." (App II p 149). If the deputy sheriff is off duty he normally would not write a report and the more experienced or "seasoned" the deputy sheriff, the less likely he is to write a report. (App II pp 149, 162, 170). As summarized by Inspector O'Brien in his testimony:

> "No police officer enjoys doing reports. If he can slide by, he is going to." (App II p 149).

deputy sheriff is sent or where the activity by the deputy sheriff occurred.[14] (App II pp 153, 157).

As to the data contained in the Assist Chart, Inspector O'Brien testified that there are no written instructions to the deputy sheriff as to how to decide when to designate an activity as an assist to a municipality.[15] (App II p 148).

Unless the activity resulted in a written report in which the deputy sheriff inserted an assist code or grid code of one of the Petitioner municipalities, such quantitative data represented by the Grid Code Chart and the Assist Chart gave no consideration to any benefit as a result of the following:

1. Investigations of crime or arrests in the unincorporated areas or in other municipalities involving property or residents of the Petitioner municipalities, (App II pp 51, 60);

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[14] As an example, Inspector O'Brien testified that if a vehicle owned by a resident of the Petitioner Town of Palm Beach is stolen and recovered by a deputy sheriff in the City of Belle Glade, the grid code for Belle Glade would be inserted in the written report. If a runaway juvenile whose parents reside in the Petitioner Town of Palm Beach is located in the unincorporated area, then the grid code for the unincorporated area would be inserted in the written report. If a detective arrests a drug dealer in the City of Juno Beach who was involved in the sale of drugs in the Petitioner Village of North Palm Beach, the grid code of Juno Beach would be inserted in the written report. If the Mayor of the Petitioner City of Boca Raton was kidnapped and found and released as a result of the actions of the law enforcement personnel of the Sheriff in the City of Belle Glade, the grid code for Belle Glade would be inserted in the written report. (App II p 151). None of the above activities would appear in the computer run of the grid code data which data was incorporated into the Grid Code Chart.

[15] Inspector O'Brien and Mr. Kelton identified several written reports where the activities performed by the deputy sheriff were substantially identical and where one was designated as an assist and one was not. (App II pp 21-24, 158-159, 161).

2. Assistance to residents of the Petitioner municipalities while in the unincorporated areas or in other municipalities, (App II pp 52, 59);

3. Recovery of stolen property owned by residents of the Petitioner municipalities in the unincorporated areas or in other municipalities, (App II pp 51, 58);

4. Effective enforcement of laws and curtailment of crime in the unincorporated areas and other municipalities, (App II p 53);

5. The standby capability of the Sheriff to provide assistance to municipal police departments or residents of the Petitioner municipalities when needed or requested, (App II p 54).

Mr. Kelton admitted that the total number of activities incorporated in the Assist Chart and the Grid Code Chart was an unimpeachable floor and that there could not be any less activity by the Sheriff in relation to the residents or property of the Petitioner municipalities. (App II p 50).

Based solely on the data in the Assist Chart and the Grid Code Chart, Mr. Kelton was permitted to state his expert opinion that the services provided by the road patrol and detective division provided no real and substantial benefit to residents and property within the Petitioner municipalities.[16]

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[16] In his Report dated February, 1980, Plaintiffs' Exhibit 9, and delivered to the municipalities, Mr. Kelton arrived at the identical conclusion based solely on the data included in the Assist Chart for fiscal year 1978-1979 and a period of nine months in fiscal year 1977-1978 of the County (App II p 26). Mr. Kelton admitted at trial that he did not utilize in his Report the data in the Grid Chart for such years since the data was "unreliable". (App II pp 26, 47-48). Such "unreliable" data was included in the Grid Code Chart introduced into evidence at trial and was relied upon by Mr. Kelton as the basis of his opinion at trial.

Mr. Kelton testified that he had talked with no operational law enforcement officers of the Sheriff in forming his opinion. The sole basis for his opinion testimony was a review of the case reports constituting the Assist Chart and the Grid Code Chart.

Mr. Kelton admitted that all of the activities incorporated in the Assist Chart and the Grid Code Chart represented either direct assistance to the municipal police departments or activities occurring directly within the boundaries of such municipalities. (App II p 55). This distilled data of the most minimum direct benefit was the basis of the opinion testimony of Mr. Kelton that the services of the road patrol and detective division of the Sheriff did not provide real and substantial benefit to residents and property of the Petitioner municipalities.

Mr. Kelton admitted that he had never read the language from the landmark Briley, Wild case in which this Court developed the constitutional test and in which this Court rejected the contention that such test contained any requirement of direct and primary use. (App I p 56).

Referring only to the Assist Chart and the Grid Code Chart the trial court concluded that "...any assistance rendered by the Sheriff to or in any or all municipalities (by) ...the County are accounted by these records." (App I p 15). The fact that the trial court relied solely on activities incorporated into the Assist Chart and the Grid Code Chart is illustrated by the following conclusion:

> "It is difficult for this court to conclude, based on this evidence, that the Sheriff's road patrol and detective division has anything more than an inconsequential benefit to the four municipalities involved herein." (Emphasis Added) (App I p 16).

In relying solely on such quantitative evidence, the trial Court was clearly influenced by the fact that Respondent Palm Beach County did not come forth with its quantitative data in opposition. As stated by the trial court:

> "The County claims the records are insufficient. Their position is that they can maintain records of such quantitative nature but do not have to stand behind those records and, indeed, they can attack their own record-keeping ability. This Court cannot accept such an untenable position. These records show the following law enforcement activity in the municipalities and the County." (App I p 15).

The testimony presented by Respondent of the inaccuracy of the records of the Sheriff as documentation of benefit is not only a tenable position but also illustrates the weakness of the position of the Petitioner municipalities in relying solely on quantitative data.[17] The rejection of such testimony on a misunderstanding of the legal custodian of such records is clear error.

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[17] First, the Petitioner municipalities have the burden of proof in this cause to identify the challenged services and to prove that such services do not provide the requisite real and substantial benefit. Second, the Board of County Commissioners of Palm Beach County does not maintain the records of the Palm Beach County Sheriff. The independent constitutional office of sheriff maintains the records and the sheriff is not a party in this cause. Third, the request for Production of Documents by both Petitioner Town of Palm Beach and Petitioner Village of North Palm Beach requested either complaints of the Palm Beach County Sheriff in the Petitioner municipalities or "...within the territorial limits of the Village of North Palm Beach." The computer runs introduced as Plaintiffs' Exhibits 12, 13 and 14 which provided the data incorporated into the Assist Code Chart and the Grid Code Chart were in response to such requests. Last, Respondent Palm Beach County on December 5, 1980, served on all parties a Notice of Clarification and Explanation of Documents produced, pointing out the inaccuracies of the data on such computer runs. (App I pp 58-60).

## Evidence and Testimony Establishing Real and Substantial Benefit of the Road Patrol and Detective Division of the Sheriff

The impact of the Final Order is that no taxes or revenues derived from or allocated to residents or property within the four Petitioner municipalities pay any of the cost of the road patrol or detective functions of the Palm Beach County Sheriff. All of the costs for such law enforcement services are paid by taxes or revenues derived from residents of property in the unincorporated areas or within the boundaries of the other 31 municipalities that are not a party in this cause.

The fact that the trial court relied solely on the quantitative evidence represented by the Assist Code and Grid Code Chart is clear. The trial court discounted the testimony and evidence of benefit received by residents of the Petitioner municipalities from the recovery of stolen property on the rationale that "... there were no statistics, other than those compiled by the Plaintffs' experts, which substantiated the quantity." (App I p 18). The trial court ignored this testimony of benefit as well as the testimony and evidence presented by Respondent of the benefit received from the effective enforcement of law in the adjacent unincorporated areas of the Petitioner municipalities with the following statement:

> "The generalized nature of this testimony makes its credibility suspect and conclusionary at best." (App I p 18).

The approximately 30 examples testified to by Inspector O'Brien of incidents of involvement by the road patrol and detective division of the Sheriff reveals a pattern of law enforcement activity that is blind to jurisdictional boundaries and citizen's residence.

Inspector O'Brien emphasized that such incidents were examples that occur in unincorporated areas involving residents and property of municipalities as well as within the boundaries of the municipality itself. The examples given were not intended to be an exhaustive number. He further testified that incidents similar to the examples occurred "quite frequently" and "very often". (App II pp 159; 161; 168; 170; 178; 179).[18]

Inspector Edward O'Brien testified that the primary functions of the detectives are criminal investigations of all types and they work throughout the county. In response to a question as to whether or not in making such criminal investigations the detectives confine themselves to the unincorporated areas of the county, Inspector O'Brien responded emphatically: "Absolutely not."[19] (App II p 144).

Chief Deputy Charles McCutcheon testified that while he was police chief of Petitioner City of Boca Raton, a particular benefit of the detective division was the exchange of intelligence information in attempts to complete investigations and secure an arrest. (App II p 140). Sheriff Wille testified that the law enforcement personnel

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[18]Such examples involve a wide range of law enforcement and public safety activities: arrests of individuals for driving while intoxicated (App II p 156); investigation of suspicious persons (App II p 163); canine searches of stores for armed robbery and burglary suspects (App II p158); rape investigations (App II p 160); traffic control at accident scene (App II p 167); location and return of teenage runaways (App II p 164); investigation of worthless checks (App II p 168); and numerous other activities.

[19]Sheriff Wille related a major investigation by the detective division of the Sheriff of a murder within the Petitioner Village of North Palm Beach while he was Police Chief, that lasted over several weeks and included extensive crime scene searchers. (App II p 106). Inspector O'Brien testified to the "Kerisler" murder and a multi-million dollar night deposit robbery which were major investigations by the detective division of the Sheriff within the Petitioner Town of Palm Beach in which extensive manpower and hours (continued on next page)

of the Sheriff are in continual contact with their constituents within the municpalities to exchange information and notify each other of the existence and status of investigations. (App II p 131).

Sheriff Wille stated unequivocably that the overall activity level of the law enforcement personnel, including the presence of personnel and number of responses was "definitely" much higher in the unincorporated area urban corridor along the boundaries of the municipalities than in the unincorporated areas west of the Turnpike and the "overwhelming majority" of the activities of his department occur in such urban corridors. (App II pp 121-122, 133). All of the law enforcement personnel that testified at trial recognized the benefit of effective law enforcement in the unincorporated areas to residents and property within the Petitioner municipalities.

The presence of the deputy sheriffs in the county is enhanced by a general order of the Sheriff that allows selected deputies to use their green and white marked vehicle for off-duty purposes. (App II pp 113-114; Defendant's Exhibit 12). Sheriff Wille emphatically stated that all deputy sheriffs are required to take action while off duty if something occurs that requires a law enforcement response.[20] (App II p 114).

Sheriff Wille testified that criminals do not recognize municipal boundaries and that an arrest by the road patrol or detective

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were expended over a period of several months. Inspector O'Brien also testified to a major investigation by the detective division of the Sheriff in the Petitioner City of Boca Raton involving the murder of two Boca Raton high school students. This testimony was given as examples of major investigation and was not intended to be exclusive. (App II pp 180-181).

20The presence of deputy sheriffs in the green and white marked vehicles is particularly pronounced in Petitioner City of West Palm Beach in that the county jail is located within the City and the central substation is adjacent to the boundaries of the City.

division of the Sheriff in unincorporated areas takes the criminal element off the streets and eliminates the commission of crimes to residents and property within municipalities.[21]

Chief Deputy McCutcheon testified that based on his 25 years of experience with the City of Boca Raton Police Department, effective enforcement of law in the unincorporated areas was a benefit to a municipality since "... criminals don't take notice of the city boundaries and they wouldn't have a safe refuse in which to go into afterwards." (App II p 139).

Police Chief Terlizzese of Petitioner Town of Palm Beach admitted that effective law enforcement in the unincorporated areas benefitted his City since without it "... you would have anarchy and chaos and you would have a lawless situation which could definitely have a negative impact on the city." (App II p 77).

All of the law enforcement witnesses, including all the municipal police chiefs, recognized the standby capacity of the Sheriff in the event of a law enforcement emergency or civil disturbance as a benefit to the Petitioner municipalities and the testimony is uncontradicted that the Sheriff always provides assistance to the municipal police departments when requested. (App II pp 75, 82, 84, 87, 136).

Chief Deputy McCutcheon testified that since he had been employed by the Sheriff in February 1980, the Sheriff had implemented an emergency plan of calling off duty road patrol and detective personnel to respond to areas where a possible riotous situation was expected and that such plan had been activated on

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21Both Chief Jamason of Petitioner City of West Palm Beach and Mr. Atwater of Petitioner Village of North Palm Beach agreed with this testimony. (App II pp 83, 86).

approximately three potentially riotous occasions.[22] (App II p 143). He further testified that while he was Police Chief for the Petitioner City of Boca Raton, the standby capability of the Sheriff to assist his police department in the event of a civil riot or criminal emergency was "very important" since the police department of the City did not have sufficient personnel to deal with a riotous situation. (App II p 138).

In discounting this testimony, the trial court stated:

> "The generalized nature of this testimony makes its credibility suspect and conclusionary at best. In the view of the Court, it would be analogous to saying the FBI, the National Guard, and the Army play a substantial role under the constitutional mandate to apply the benefits derived from the county taxation of municipal property for services in the unincorporated areas. This argument and theory is illusory."[23] (emphasis added) (App I p 18).

Significantly the trial court not only rejected the testimony but the theory that curtailment of crime and effective enforcement of law in the unincorporated areas can be a benefit to the municipal areas. Such rejection is in direct opposition to the decision of the court in the second Alsdorf case.

The root of the misunderstanding of the trial court on the issue is found in Mr. Kelton's expert opinion and the data on which it was based. When asked if he considered the enforcement of law in the unincorporated areas and the elimination of crime as a benefit, Mr. Kelton responded that he had heard such "arguments" but that since he could not

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22One occasion was when the jury was announcing its decision in the "McDuffy" case in Dade County. Another occasion was in anticipation of a possible riotous condition at the county courthouse in connection with the "Barnes' trial". (App II p 143).

23This analogy of the trial court underscores its fundamental misunderstanding of the constitutional standard.

"quantify" such data he did not include it in his "... calculation of services to municipalities". (App II p 15). Incredibly, when asked if the recovery of a stolen car owned by a resident of a municipality in the unincorporated area by the Sheriff was a benefit to the resident, Mr. Kelton characterized it as an "individual benefit". (App II p 63). Incredibly, when asked if effective law enforcement in a high crime area ten feet outside a municipality is a real and substantial benefit to an individual resident at the border of a municipality, Mr. Kelton responded: "I am not sure". (App II p 64).

All benefits are individually received by residents and property. A single area of benefit received by municipal residents or property from a county service may be inconsequential, but a "bundle" of single benefits ultimately become real and substantial and not inconsequential under the real and substantial constitutional test. The total benefits included in such a bundle of benefits can all be indirect as in the Briley, Wild case or a combination of direct and indirect benefits as was recognized by this District Court in its Opinion. In contrast, the trial court's opinion places sole reliance upon direct and quantifiable benefits.[24] Reliance by this trial court on such opinion testimony and the data on which it was based is in error.

Reliance by each Petitioner municipality on the services provided by both the road patrol and detective division of the Sheriff varies.

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24Such direct benefit analysis of the facts in the Briley, Wild case by this Court would result in 0% of the sanitary sewer service in such case directly benefitting residents and property within the municipalities. Even through none of the city-located property in the Briley, Wild case could connect to the county sewer system since it was located solely in the unincorporated areas, this Court found the requisite indirect benefit to municipal residents and property by the elimination of pollution in the waters of the county.

Sheriff Wille testified that when he was first police chief the Petitioner Village of North Palm Beach utilized the detective division of the Sheriff on all felony investigations. (App II p 106). He also related several occasions while he was police chief where the Sheriff assisted in riots and civil disturbances in the Village. On one occasion, the chief deputy and other law enforcement personnel of the Sheriff spent two nights on surveillance within the Village with the Village police. (App II pp 106).

Mr. John Atwater, the Director of Public Safety of the Petitioner Village of North Palm Beach, testified that the Sheriff conducts all investigations of bad checks, performs all polygraph examinations and assists in crime scene investigations within the Village. All such functions are performed by deputy sheriffs in the road patrol or detective division of the Sheriff. Mr. Atwater further testified that the police department of the Village does not have the capability and manpower to handle large civil disturbances. (App II p 84). Mr. Atwater, in reviewing a memorandum to him from a Village detective sergeant, admitted that when additional manpower or equipment not possessed by the Village are needed for investigation, he must be able to depend on the "cooperative efforts" of the Sheriff. (App II p 87; Defendant's Exhibit 9).

Chief Deputy Sheriff Charles McCutcheon was police chief for Petitioner City of Boca Raton for ten years prior to February 1980. He was a member of the police department for approximately 24 years and served as a patrolman and detective prior to becoming police chief. (App II p 134). Chief Deputy McCutcheon testified that when he was police chief of the City, the decision to duplicate a function provided by the Sheriff was never based on the fact that the Sheriff

had failed to provide the service but rather on the decision by the City to "... provide maybe a little better service ..." (App II p 141).

Police Chief Joseph Terlizzese of Petitioner Town of Palm Beach testified on two occasions in which he had requested assistance from the Sheriff's canine unit and the bomb squad when similar units of the Town police department were not available. (App II p 73).

Chief Terlizzese also admitted that the Town police department was a large force for a city of its size and that the general attitude of the residents of Petitioner Town of Palm Beach is that they would rather have more police service than not enough. He admitted that the Petitioner Town of Palm Beach was unique in demanding such a high level of law enforcement. (App II p 76). Chief Terlizzese admitted that in a homicide investigation where there was a need for a "follow-up investigation" he would ask for assistance from the detective division of the Sheriff since the forensic specialists of its detective division were better trained and more experienced. (App II p 78).

Sheriff Wille testified that if any of the Petitioner municipalities or any municipality eliminated a law enforcement function that duplicated a function being provided by the Sheriff or abolished all or part of its police department, that he as chief law enforcement officer, would "... be obligated to respond to any call for services." (App II pp 110-111). In the event any of the Petitioner municipalities were to eliminate its police department entirely, Sheriff Wille testified that he would not handle all the calls currently being handled by the municipal police department since 90% are "nonpolice related" and he would limit his response to calls relating to criminal activity only. (App II p 122). Sheriff

Wille testified that if he did not have sufficient funds to provide such services, he would seek additional funding from the Board of County Commissioners of Palm Beach County.[25] (App II pp 111-112).

A unilateral political decision by a municipality to provide a higher level of service does not automatically render the providing of the county service unlawful. The decision to duplicate a service is based upon the perceived need and the political judgment of the governing body of the municipality for additional services.

The result of the Final Order is that the residents or property within the four Petitioner municipalities pay none of the costs of the road patrol and detective division of the Sheriff. Residents and property of the Petitioner municipalities contribute nothing toward the services summarized above which are provided or available to the municipal police departments or provided within the four Petitioner municipalities.

Under the final order, none of the residents and property within the Petitioner municipalities would pay anything toward the cost of the 40% of the road patrol of the Sheriff that the Fair Tax Council found provided benefit county-wide. (Plaintiff's Exhibit 30 p 17).

Sheriff Wille as the chief law enforcement officer of the County has law enforcement responsibility and jurisdiction county-wide. He cannot avoid such constitutional duty regardless of artificial boundaries imposed by a municipal decision to duplicate a law enforcement

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25Section 30.49(10), Florida Statutes, provides a statutory procedure for a sheriff to apply to the board of county commissioners for funds in addition to those provided in his budget in the event of an emergency. If the board of county commissioners disapproves the request, the Sheriff may apply to the Administration Commission for the appropriation of additional amounts.

service. The demand for a higher level of police presence by residents of a municipality and the necessity for the establishment of a law enforcement deployment policy by the Sheriff in recognition of such dual law enforcement responsibilities does not relieve the constitutional duty of the Sheriff to enforce the law throughout the County.

The Findings of Fact and Conclusions of Law of the Trial Court as to the Construction and Maintenance of Roads and Bridges Not on the Classified County Road System

Mr. Kelton was permitted to state his expert opinion that any roads not on this "county connected road system" did not provide real and substantial benefit to residents and property within the Petitioner municipalities. (App II p 31). Other than Plaintiffs' Exhibits 19[26] and 20,[27] the only factual basis for this opinion was a generalized characterization of such roads by Mr. Kelton as either unpaved shell rock rural roads or subdivision streets that serve abutting property owners.[28] (App II p 31).

Mr. Kelton obtained his "knowledge" about the roads in the County solely from an office examination of Plaintiffs' Exhibits 19 and 20 and attendance at the deposition of the County Engineer and his assistant. (App II pp 36, 66). Mr. Kelton estimated that he

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26Plaintiffs' Exhibit 19 constitutes maps of the recent classification of state and county roads by the State of Florida Department of Transportation.

27Plaintiffs' Exhibit 20 is an inventory of all roads maintained by the County.

28The characterization of the roads at issue by Mr. Kelton prior to stating his expert opinion comprises but 12 lines in the trial transcript. (App II p 31).

spent a maximum of one and one-half to two hours reviewing Plaintiffs' Exhibit 20. The purpose of such review was to cross check it with Plaintiffs' Exhibit 19 to insure that all roads were included on Exhibit 19. (App II pp 37-38). Mr. Kelton admitted that Plaintiffs' Exhibit 20 has no information concerning the number of cars that use a road, the number of people living on property abutting the road or whether the abutting property is commercial or residential. (App II p 37).

When asked what "quantitative" date he relied on to base his expert opinion, he responded:

> "A. We did not attempt to measure traffic volume on those roads. What we obviously did was look at the quantitative data, if you will, of the ownership of the abutting property.
>
> Q. What data did you look at in terms of ownership? Did you go out and physically look at any of the roads?
>
> A. No, sir.
>
> Q. Did you examine any plats or anything as to where subdivisions were?
>
> A. No, sir.
>
> Q. What data did you determine that they were residential?
>
> A. What we did was identify the total road system of the county and separate the two." (App II p 35).

On voir dire prior to stating his opinion on benefit received by roads of the County, Mr. Kelton testified that he was familiar with the Burke decision in general terms only; that he had not read the opinion of this Court; and that it was his understanding that the roads at issue in the Burke case were "... on the County connected

system and provided a county-wide transportation network". (App II p 7). Not only had Mr. Kelton not read the salient language of this Court in applying the real and substantial benefit test to the identical service on which he was stating an opinion but also his "general" understanding of the facts in the Burke case is erroneous.[29]

Mr. Kelton's awkward attempt to justify his expert opinion on his general understanding that the roads before the court in Burke provided a county-wide transportation system strikes at the heart of the credibility of Mr. Kelton as an expert witness on this issue. This fundamental misunderstanding of the legal concepts at issue on this challenged service permeates the data and testimony of Mr. Kelton and the Final Order which relied on and accepted it.[30]

Mr. Herbert Kahlert, County Engineer for Appellant, identified 13 roads or segments of roads not on the classified county road system as reflected on Plaintiffs' Exhibit 19 which have traffic volumes that are comparable to those roads on such classified county road system. (App II pp 183-184). Mr. Kahlert also testified that the 13 roads identified were comparable to roads on the classified county road system in that they connected with similar type roads

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29The tax challenged in the Burke case funded special improvements under a county ordinance that encompassed any road "... not within the limits of any municipality ..." In addition, the tax could be used under the ordinance for paving and surfacing of dirt roads.

30The testimony is unclear whether Mr. George Frost, Town Manager of Petitioner Town of Palm Beach was describing the same roads in his testimony as Mr. Kelton. Mr. Kelton identified the roads at issue as those not on the county connected road system as set forth in Plaintiffs' Exhibit 19. Mr. Frost was not familiar with the Plaintiffs' Exhibits 19 and 20 but assumed he and Mr. Kelton were describing the same system. (App II p 70). Mr. Frost was familiar with the classification utilized by the Department of Transportation. (App II p 70). However, on cross-examination, he testified that there could not be any road not on the "classified road system" with traffic volume of roads on such system. (App II p 71).

and were comparable in terms of size and width and the general neighborhoods in which they are located. (App II p 186).

Mr. Kahlert works with these roads day to day and the examples given by him illustrate the sterile and artifical division of roads that formed the basis of Mr. Kelton's expert opinion. The broadbrush approach utilized by Mr. Kelton ignores the realty of the character of the roads in the County and the holding of this Court in the Burke case. The 13 roads identified by Mr. Kahlert as roads not on the classified county road system that are comparable to roads that are on the classified county road system were given as examples and were not an exhaustive listing. (App II p 186). These 13 roads are neither unpaved shell rock roads nor subdivision streets as all roads not on the classified county road system were described by Mr. Kelton and Mr. Frost. For the trial court to conclude in the final order that roads on a state imposed classification system provide real and substantial benefit but the 13 roads identified by Mr. Kahlert do not is arbitrary and constitutes error.

There is nothing in the evidence before the trial court to distinguish this case from the facts and holding of this Court in the Burke case. Residents of the Petitioner municipalities travel the roads in the unincorporated areas. Residents of the unincorporated areas shop and work in the Petitioner municipalities. As an example, Petitioner Town of Palm Beach has approximately 330 employees and only one lives within the boundaries of the Town. (App II p 72).

Based on this evidence and testimony, the trial court concluded that the "... non-classified roads are mainly those subdivision roads maintained and in existence primarly for the benefit of abutting property owners." (App I p 19). The trial court discounted

the testimony of Mr. Kahlert as follows:

> "The County Engineer testified that some roads carry large quantities of traffic; however, this testimony did not negate the fact that they were for the benefit of the abutting property owners who utilized them. (App I p 19)."

The inescapable conclusion is that the trial court relied solely on the opinion testimony of Mr. Kelton.[31] The factual basis for such opinion testimony in the record is all but invisible. The conclusion by the trial court that the Plaintiff sustained their burden of proving that the challenged county roads do not provide real and substantial benefit is not supported by competent substantial evidence and results from an erroneous application of the constitutional standard.

The District Court summarized the testimony and evidence on this issue as follows:

> "An expert witness for the municipalities testified that the nonclassified roads do not provide any real and substantial benefit to the four municipalities because they do not provide an interconnecting transportation network, but serve only abutting property. The expert based his conclusion upon maps of the D.O.T. and a listing of road reclassifications (from the old state secondary road system). The witness did not physically examine any of the roads nor examine any plats nor did he make a determination as to whether the abutting property was commercial or residential. The only specific items of information about the roads available to the expert were the road number or name, the extent of the right-of-way, the section and township, the range, where the road begins, in what direction it runs, where the road terminates, and a book and plat number. He had no information about the number of vehicles using the individual roads, the number of

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31The comment by the District Court as to the function of an expert witness on page 49 of the Opinion was limited to the issue of roads.

people living on the roads, or the characteristics of abutting property.

"The County Engineer, testifying at trial, identified at least 13 roads or segments of roads not on the classified county road system which have traffic volumes comparable to those of classified roads. He also testified that the 13 roads were comparable to classified roads in that they connected with similar type roads and were alike in terms of size, width, and the general neighborhoods in which they are located." (App I pp 48-49).

The District Court held that Petitioners failed to meet their burden of proof as to roads under the constitutional test as follows:

"The foregoing brief summary is intended to highlight the two problems we have with the treatment of this issue in the trial court. The first difficulty we observe might be characterized as one of classification. There are surely dirt roads and subdivision streets in the county which are of absolutely no benefit to any municipality. The record supports that conclusion if common sense is not deemed a sufficient predicate. The problem is that the proofs are not sufficient to show that all roads in the unclassified system fall in that category. In fact, the evidence tends to support the conclusion that some unclassified county roads provide a real and substantial benefit. The municipalities have the burden of identifying the service and proving lack of benefit. They placed all their eggs in one basket when they chose to contest taxation on the basis of the classification system rather than on the basis of a number of specified roads and as a result the municipalities cannot prevail on this record.

"Secondly this issue raises problems in the manner of proof. Regardless of the expertise of the witness, generally, and his familiarity with legal concepts relating to his specific field of expertise, it is not the function of the expert witness to draw legal conclusions. That determination is reserved to the trial court. It was appropriate for the expert to testify regarding the existence of a benefit but it was for the court to determine whether that benefit was real and substantial under the statute and case law. It appears that the trial court may have been unduly persuaded by the expert testimony in this regard."(App I pp 49-50).

Petitioners' complaint that the District Court opinion requires "expensive and difficult-to-obtain proof that each and every road" is of "no benefit" is a gross misconstruction of the opinion of the District Court. This Court in the Burke case rejected the contention that all roads in the unincorporated area fail to provide the requisite benefit. Petitioners' attempt to superficially latch upon an existing state classification system developed for other purposes simply does not meet the burden of proof of the Briley, Wild test under the undisputed evidence and testimony presented to the trial court.

## The Findings of Fact and Conclusions of Law of the Trial Court as to Neighborhood Parks

The paucity of evidence and testimony to support the finding of the trial court that the construction and maintenance of neighborhood parks provide no real and substantial benefit is stunning.

Mr. Kelton testified that he reviewed no quantitative data on which to base his opinion on the absence of the requisite benefit from neighborhood parks to residents and property within Petitioner Town of Palm Beach and City of West Palm Beach.[32] (App II p 42). He had no data as to the users of any neighborhood park. (App II p 57). Mr. Kelton admitted that Respondent Palm Beach County "... has a pretty comprehensive park network." (App II p 32). Based solely on the information contained in a national parks study of park standards[33]

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32Petitioner City of Boca Raton and Village of North Palm Beach did not challenge the fact that neighborhood parks provide real and substantial benefit to residents and property within such municipalities.

33Plaintiffs' Exhibit 25.

and the deposition of Mr. John Dance, Director of Parks for the County,[34] Mr. Kelton stated his opinion that the neighborhood parks of the County provide no real and substantial benefit to residents and property within the Petitioner municipalities.[35] (App II p 32).

It is inconceivable that such evidence and testimony sustains the burden of proof required under the Briley, Wild test.

The District court recognized the inadequacy of such evidence and testimony as follows:

> "The trial court's determination that no real and substantial benefit existed could only have been based on the testimony of the one expert regarding the nationally accepted definition of the term "neighborhood parks" buttressed by other opinion testimony, because absolutely no statistical data as to park attendance, residence of park users or other relevant factors was introducted into evidence. This is not sufficient to carry the municipalities' burden of proving no real and substantial benefit." (App I p 50).

## POINT III

THE TRIAL COURT'S CONSIDERATION OF EXPERT TESTIMONY ON THE ISSUE IN THIS CASE WAS IN ERROR.

The threshhold considerations for admitting expert testimony

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34The deposition of Mr. John Dance was admitted into evidence but not read at trial. (Plaintiffs' Exhibit 27). Mr. Dance testified that all parks are open to the public and that the County has no records and has conducted no study as to the residence of the users of any park. (Plaintiffs' Exhibit 27, p 8, lines 21-25, p 27, lines 6-14). He also testified that the County provides matching capital funds on a fifty percent basis to each municipality to construct parks within the municipal areas.

35The only other testimony in the record before the trial court on the issue is that of Robert Burdett, Parks Director of Petitioner City of West Palm Beach. Mr. Burdett testified that he was "somewhat" familiar with the park system and that he visited "... some of the parks." (T 303/15-18). He admitted that some individuals within Petitioner City of West Palm Beach could get some benefit from a neighborhood park but that a neighborhood park was one within walking distance. (App II p 80).

in any trial are clearly stated by this Court in Buchman v. Seaboard Coast Line R.R. Co., 381 So.2d 229 (Fla. 1980) at page 230:

> "First, the subject must be beyond the common understanding of the average layman. Second, the witness must have knowledge as 'will probably aid the trier of facts in its search for truth'."

The essential facts determining whether a challenged service provides a benefit that is not illusory or inconsequential but is real and substantial are clearly within the grasp of the ordinary person. The function of the services provided by a county sewer plant, a library and a road system and the services performed by law enforcement personnel are easily explainable and understandable.

A trial court's discretion with respect to the admission of expert testimony is not unfettered. The Law Revision Council Note - 1976 to Section 90.702, Florida Statutes, warns that the most certain test for determining when experts may be used is the "common sense" inquiry of whether the untrained layman is qualified to determine the issue without enlightment from one with specialized knowledge.

The reason for this exclusionary rule was succinctly stated in Mills v. Redwing Carriers, Inc., 127 So.2d 453 (Fla. 2d DCA 1961) at page 456:

> "... where the facts are such that the jury is competent, from common knowledge and experience, to form conclusions thereon, it is their province to do so, and to permit expert testimony in such an instance presents the potential danger that the jury may forego independent analysis of the facts and bow too readily to the opinion of an expert or an otherwise influential witness."

See also Smaglick v. Jersey Insurance Co. of New York, 209 So.2d 475 (Fla. 4th DCA 1968).

Although the Mills rationale was applied in a jury trial, it is no less applicable when the trier of fact is a judge.

The above quoted language from the Mills case is prophetic in this cause. The admission and consideration by the trial court of expert testimony and evidence founded on a misconception of the constitutional standard on issues within common understanding prevented independent analysis by the trial court and constituted fundamental error.

The second facet of the Buchman test requires the witness to have knowledge sufficient to assist the trier of facts in its search for the truth. Applied to this case, expert opinion must be premised upon a complete and accurate understanding of the constitutional test under Article VIII, Section 1(h), Florida Constitution. Upchurch v. Barnes, 197 So.2d 26 (Fla. 4th DCA 1967).

Buttressing this fundamental evidentiary rule is the Law Revision Council Note - 1976 to Section 90.703 of the Florida Evidence Code. The Council appropriately warns that the abolition of the "ultimate issue" exclusionary rule does not admit all opinion testimony and that:

> "... an opinion phrased in terms of inadequately explored legal criteria where there was not a sufficient foundation to show expertise in determining the legal effect of the facts could be excluded."

The record in this cause screams the conclusion that the expert witness of Petitioners, Richard Kelton, did not have any understanding of the constitutional test at issue as such test has been given meaning and substance by its application by courts to the fact pattern of prior cases. Mr. Kelton testified that the term real and substantial benefit means that the service must provide a "... significant benefit, quantifiable benefit." (App II p 6).

Mr. Kelton admitted he was not familiar with the facts of the Briley, Wild case. (App II p 2). The only knowledge that Mr. Kelton

demonstrated of the facts in the Briley, Wild case is that the service challenged was a sanitary sewer system. As to his "knowledge" of the issues involved in the Briley, Wild case, Mr. Kelton had never read the language utilized by this Court in creating the real and substantial benefit test. (App II p 4; T 105/3-4).

Mr. Kelton had never read Burke v. Charlotte County, 286 So.2d 199 (Fla. 1973), including the language of this Court describing the roads found to provide real and substantial benefit to the municipal residents and property in such case. (App II pp 7, 39). His understanding that the roads at issue in the Burke case were "... on the county connected system and provided a county-wide transportation network" is simply erroneous.

The only court cases Mr. Kelton had read construing the constitutional real and substantial benefit test was Alsdorf I and the Manatee decision of this Court. The issue in Alsdorf I was whether the provisions of Article VIII, Section 1(h), Florida Constitution, were self-executing. The issues in the Manatee case were issues of law with the primary issue being whether the provisions of Article VIII, Section 1(h), Florida Constitution, applied to revenues of a county not derived from property taxation. Thus, the only decisions read by Mr. Kelton yielded negligible insight into the application of the constitutional real and substantial benefit test to specific services.

Although Mr. Kelton stated he was familiar with the decision in Alsdorf II, he did not consider the elimination of crime in unincorporated areas as a factor of benefit since he could not "quantify" the data. (App II pp 15, 16). An "expert" with no knowledge of the facts to which the constitutional test has been

applied by prior courts is meaningless to a trier of fact.

The Analysis of Possible Double Taxation Report dated February 1980, and delivered to the Petitioner is replete with the erroneous legal premises upon which his analysis is based.[36] His use of the words "inequities", "fair and equitable" and "reasonably fair" in his Report graphically illustrate the extent and gravity of his flawed understanding of the "real and substantial benefit" constitutional standard and his lack of qualifications to give expert testimony with respect to the issues involved in this cause.

Mr. Kelton's misconception of the constitutional test goes beyond his opinion testimony on the ultimate issues in this cause. Such misconception infects the evidence and data presented to the trial as the basis of his opinion testimony. The fact that the trial court relied almost exclusively on such tainted evidence is unquestioned.

POINT IV

THE CONDITION IMPOSED BY THE TRIAL COURT ON THE STAY PENDING REVIEW OF THE FINAL ORDER ON APPEAL WAS NOT LAWFUL.

This Court in City of Lauderdale Lakes v. Corn, 415 So.2d 1270 (Fla. 1982) reversed the opinion of the Fourth District Court of Appeal[37] and held at page 1272:

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36Plaintiff's Exhibit 9. Page 10 of the Report, states that his firm was selected to determine "... whether inequities exist in the Palm Beach County budget and taxation systems". (App I p 62). On page 9 of the Report, the purported objective of the study was the "development of a revenue based and expenditure program which are (sic) fair and equitable to all county residents, property owners and taxpayers; whether incorporated or unincorporated". (App I p 63). On page 10 of the Report, it is asserted that one of the questions addressed in the study is: "Is the distribution of services reasonably fair when evaluated in the light of the revenues of the County?". (App I p 64). On page 68, the Report concludes that the approach used to identify double taxation "... is based upon the comparison of unincorporated revenues with unincorporated area expenditures". (App I p 71).

37The District Court opinion in City of (continued on next page)

> "While we agree that the court may require a bond of a public body under many circumstances, we cannot agree that supersedeas bond is proper for appellate review of legislative planning-level determinations. Requiring a bond in this situation would clearly chill the right of a governmental body to appeal an adverse trial court decision declaring invalid a legislative act."

This Court further held in the Corn case at page 1272 as follows:

> "We can conceive of no justification for this Court to require the government to pay for judicial review of legislative actions."[38]

The decision by the Board of County Commissioners of Respondent to fund the challenged services from county revenues other than those derived on behalf of the unincorporated areas is clearly a policy decision under a planning-level function under the rationale of the Corn case. Respondent Palm Beach County has been required to pay for its right to judicial review by the requirement of the trial court that it impose a required extra levy to fund the escrow reserve.

The stay order has also foreclosed the legislative alternative available to Respondent Palm Beach County under Section 125.01(6)(a), Florida Statutes.[39] The requirement to fund the escrow reserve arbitrarily selected the statutory mechanism of remission of the cost of the

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Lauderdale Lakes v. Corn, 371 So.2d 1111 (Fla. 4th DCA 1979) was the precedent relied on by the trial court in the stay order and the District Court in affirming such order.

38In the Corn case the trial court required the city to post a supersedeas bond for potential damages for delay to land developers during pending of appeal.

39Section 125.01(6)(a), Florida Statutes, provide various mechanisms to finance any activity found in violation of Article VIII, Section 1(h), Florida Constitution and Section 125.01(7), Florida Statutes. Such mechanisms include: the levy of taxes, assessments or service charges solely upon residents or property in the unincorporated areas, the establishment of a municipal service taxing unit or the remission of the identified cost of such services.

challenged services for Respondent and is unlawful per se under the holding of this Court in Manatee County v. Town of Longboat Key, 365 So.2d 143 (Fla. 1979):

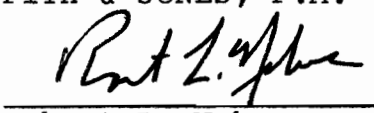
> "This troublesome area of the law cries out for further action, including the identification of workable formulas for determining the amount and time of remittance to muncipalities. We are now certain, however, that courts should not fashion formulas and make choices among alternatives for counties." (pp 147-148)

## CONCLUSION

The question certifed by the District Court should be answered in the affirmative and the condition imposed by the trial court on the stay should be declared unlawful.

Respectfully Submitted,

NABORS, POTTER, McCLELLAND,
GRIFFITH & JONES, P.A.

By: 
Robert L. Nabors

Charles F. Schoech, Esquire
County Attorney
Palm Beach County
Post Office Box 1989
West Palm Beach, Florida 33402

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery to the attorneys on the attached Service List this 20th day of April, 1983.

Robert L. Nabors
NABORS, POTTER, McCLELLAND,
GRIFFITH & JONES, P.A.
605 South Palm Avenue
Post Office Box 37
Titusville, FL 32781-0037
(305) 269-9700

Attorneys for Respondent
Palm Beach County

SERVICE LIST

JOHN A. DEVAULT, III, ESQUIRE
Bedell, Dittmar, DeVault, Pillans & Gentry
1500 Barnett Bank Building
Jacksonville, Florida 32202

W. PETER BURNS, ESQUIRE
Steel, Hector, Davis, Burns & Middleton
205 Worth Avenue
Palm Beach, Florida 33480

Attorneys for Petitioner Town of Palm Beach

---

CARL V. M. COFFIN, ESQUIRE
Citty Attorney
City of West Palm Beach
Post Office Box 3366
200 2nd Street
West Palm Beach, Florida 33402

Attorney for Petitioner City of West Palm Beach

---

M. A. GALBRAITH, JR., ESQUIRE
201 West Palmetto Park Road
Boca Raton, Florida 33432

Attorney for Petitioner City of Boca Raton

---

PAUL M. SULLIVAN, JR., ESQUIRE
Suite 816 Forum III
1655 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401

Attorney for Petitioner Village of North Palm Beach

---

PAUL C. WOLFE, ESQUIRE
Jones & Foster, P.A.
Post Office Drawer E
West Palm Beach, Florida 33402

Attorney for Intervenors

---

NASON, GILDAN & YEAGER, P.A.
Post Office Box 3704
West Palm Beach, Florida 33402

Attorneys for Petitioner Village of North Palm Beach

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