IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,254

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

Petitioners,

vs.

PALM BEACH COUNTY, JOE TOM BOYNTON and ROBERT D. APELGREN,

Respondents.

On Petition from the District Court of Appeal Fourth District

No. 81-1553

PETITIONERS' INITIAL BRIEF

M. A. GALBRAITH, JR.
201 W. Palmetto Park Road
Boca Raton, Florida 33432
305/395-1110

Attorney for Petitioner
City of Boca Raton

NASON, GILDAN & YEAGER, P.A.
Post Office Box 3704
West Palm Beach,
Florida 33402
305/686-3307

- and -

PAUL M. SULLIVAN, JR.
Suite 816, Forum III
1655 Palm Beach Lakes Blvd.
West Palm Beach,
Florida 33401
305/683-6377

Attorneys for Petitioner
Village of North Palm Beach

John A. DeVault, III
BEDELL, DITTMAR, DeVAULT, PILLANS
& GENTRY Professional Association
1500 Barnett Bank Building
Jacksonville, Florida 32202
904/353-0211

- and -

W. Peter Burns
STEEL, HECTOR, DAVIS, BURNS
& MIDDLETON
205 Worth Avenue
Palm Beach, Florida 33480
305/655-5311

Attorneys for Petitioner
Town of Palm Beach

CARL V. M. COFFIN
200 Second Street
Post Office Box 3366
West Palm Beach, Florida 33402
305/655-6811

Attorney for Petitioner
City of West Palm Beach

TABLE OF CONTENTS

Page

STATEMENT OF THE ISSUES

STATEMENT OF THE CASE 4

I. Sheriff's Road Patrol and Detective Division. 6

II. Local County Roads. 17

III. Neighborhood Parks. 22

ARGUMENT. 24

I. The District Court misused the "substantial, competent evidence" standard to improperly substitute its view for that of the trial court 24

II. The District Court incorrectly interpreted and improperly applied the Briley, Wild test to the facts in this case. 29

A. The evidence presented at trial was sufficient to permit the trial court to conclude that the services challenged provided no "real and substantial benefit" to residents or property of these municipalities 35

B. In evaluating the road patrol service, the District Court was unduly influenced by the decision in Alsdorf II 40

III. The trial judge properly considered opinion testimony on the ultimate issues to be decided. 44

CONCLUSION. 48

TABLE OF AUTHORITIES

Page

Cases

Alsdorf v. Broward County, 373 So.2d 695 (Fla.4th DCA 1979), cert.denied, 385 So.2d 754 (Fla.1980). . . . . passim

Alsdorf v. Broward County, 333 So.2d 457 (Fla.1976), on remand, 46 Fla.Supp. 38 (Cir.Ct. Broward County, 1977), aff'd, 373 So.2d 695 (Fla.4th DCA 1979), cert. denied, 385 So.2d 754 (Fla.1980). . . . . passim

Burke v. Charlotte County, 286 So.2d 199 (Fla.1973). 26,27

City of St. Petersburg v. Briley, Wild & Associates, Inc., 239 So.2d 817 (Fla.1970). . . . . passim

City of Ormond Beach v. County of Volusia, 383 So.2d 671 (Fla.5th DCA 1980). 26,27

Crain & Crouse, Inc. v. Palm Bay Towers Corp., 326 So.2d 182 (Fla.1976). 3,25

Delgado v. Strong, 360 So.2d 73 (Fla.1978). 3,25

Gifford v. Galaxie Homes, Inc., 223 So.2d 108 (Fla.2d DCA 1969) 45

Greenwood v. Oates, 251 So.2d 665 (Fla.1971). 29

Herzog v. Herzog, 346 So.2d 56 (Fla.1977). 3,25,26, 28

Hollywood Beach Hotel Co. v. City of Hollywood, 329 So.2d 10 (Fla.1976). 3,25

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TABLE OF AUTHORITIES (Cont'd)

Page

Cases, (Cont'd)

Millar v. Tropical Gables Corp., 99 So.2d 589 (Fla.3d DCA 1958) 45

North v. State, 65 So.2d 77 (Fla.1952), aff'd, 346 U.S.932 (1954) 45

Palm Beach County v. Town of Palm Beach, 8 FLW 377 (Fla.4th DCA 1983). . . . . passim

Sarasota County v. Town of Longboat Key, 400 So.2d 1339 (Fla.2d DCA 1981). 26,27

Shaw v. Shaw, 334 So.2d 13 (Fla.1976) 3,25

South Venice Corp. v. Caspersen, 229 So.2d 652 (Fla.2d DCA 1969) 47

United States v. Clardy, 612 F.2d 1139 (9th Cir.1980). 46

United States v. McCauley, 601 F.2d 336 (9th Cir.1979). 46

United States v. McCoy, 539 F.2d 1050 (5th Cir.1976), cert.denied, 431 U.S.919 (1977). 46

Westerman v. Shell's City, Inc., 265 So.2d 43 (Fla.1972) 3,25,27

Constitutions, Statutes and Rules

Florida Constitution, Article VIII, Section 1(h). 1,32,34, 39

Fla.Stat. § 90.702 (1981) 46

Fla.Stat. § 90.703 (1981) 44

Fla.Stat. § 90.704 (1981) 46

Fla.Stat. § 125.01(1)(q) 1981 33,34

Fla.Stat. § 125.01(6) (1981). 4,33,39

TABLE OF AUTHORITIES (Cont'd)

Page

Constitutions, Statutes and Rules (Cont'd)

Fla.Stat. § 125.01(7) (1981). 4

Fla.Stat. § 334.03(14) (1981) 17

Fla.Stat. § 334.03(15) (1981) 17

Fla.Stat. § 334.03(16) (1981) 17

Fla.Stat. § 334.03(17) (1981) 37

Fla.Stat. § 334.03(23) (1981) 17

Fla.Stat. § 335.04(3) (1981). 38

Other Authorities

20 Am.Jur. Evidence, § 782. 45

J. Weinstein, Weinstein's Evidence,
¶ 704[02] 46

Comment, Toward Solving the Double
Taxation Dilemma Among Florida's
Local Government: The Municipal
Service Taxing Unit,"
8 Fla.St.U.L.Rev.749 (1980). 33

1966 Revisory Commission to the
1968 Florida Constitution,
Transcript Excerpts Relating
to Article VIII, § 1(h), vol. 50 32,33

Florida House of Representatives
Committee on Community Affairs
Legislative Summary: General
Bills of the 1974 Session. 32,33

STATEMENT OF THE ISSUES

I. Whether the District Court misused the "substantial, competent evidence" standard to improperly substitute its view of the evidence for that of the trial court.

II. Whether the District Court incorrectly interpreted and improperly applied the Briley, Wild test to the facts in this case.

A. Whether the evidence presented at trial was sufficient to permit the trial court to conclude that the services challenged provided no "real and substantial benefit" to residents or property of these municipalities.

B. Whether the District Court was unduly influenced by its prior decision in Alsdorf II.

III. Whether the trier of fact in a double taxation case may consider opinion testimony on the ultimate issue to be decided.

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 and THE VILLAGE OF NORTH PALM BEACH, a municipal corporation,

Petitioners,

vs.

PALM BEACH COUNTY, JOE TOM BOYNTON AND ROBERT D. APELGREN,

Respondents.

On Petition from the District Court of Appeal, Fourth District

No. 81-1553

PETITIONERS' INITIAL BRIEF ON THE MERITS

This double taxation case was brought against Palm Beach County* by four municipalities on behalf of their citizens pursuant to the provisions of Article VIII, Section 1(h) of the Florida Constitution:

> "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."

The purpose of this constitutional prohibition was first enunciated by this Court in City of St. Petersburg v. Briley, Wild & Associates, Inc., 239 So.2d 817, 822 (Fla.1970):

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* The individual respondents are intervenors who reside in municipalities and own substantial property in the unincorporated area of Palm Beach County.

> "[T]he purpose of . . . this provision . . . is to prevent double taxation of municipally-situated property for a single benefit. . . . [T]he people in adopting it, intended to prevent future taxation by counties of city-located property for services from which the owners of said property received no real or substantial benefit."

Following a three-day trial involving highly conflicting lay and expert testimony, the trial judge entered extensive findings of fact and held that each of the following four challenged services or programs:

1) Sheriff's Road Patrol;

2) Sheriff's Detective Division;

3) County Engineering Department -- all services, for the construction and maintenance of county roads and bridges not on the classified county road system; and

4) County Parks and Recreation Department -- construction and maintenance of neighborhood parks and recreation areas (Town of Palm Beach and City of West Palm Beach, only)

failed to provide a "real or substantial benefit" to petitioners' residents under the test articulated by this Court in *Briley, Wild*.

On appeal, the District Court of Appeal reversed the trial court's findings as to each of the challenged services holding that there was " 'a lack of substantial competent evidence' to support a finding of 'no real and substantial benefit.' " *Palm Beach County* v. *Town of Palm Beach*, 8 FLW 377, 380 (Fla.4th DCA 1983). In reaching its determination, the District Court acknowledged 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.' " 8 FLW at 380.

The District Court, recognizing the importance of this decision to all of the municipalities and counties in the State, and that "taxing entities and the taxpayers of the State of Florida are entitled to equitable and fair and uniform treatment under the taxing statutes regardless of the district in which they may reside or be located" (8 FLW at 381), certified to this Court as a question of "great public importance":

> "Whether the 'real and substantial benefits' test established by City of St. Petersburg v. Briley, Wild & Associates, Inc., 239 So.2d 817 (Fla.1970) has been correctly interpreted and appropriately applied in this case." 8 FLW at 381.

Because the District Court has, by its opinion, re-evaluated the evidence and substituted its judgment for that of the trial court, contrary to the consistent admonitions of this Court [Delgado v. Strong, 360 So.2d 73 (Fla.1978); Herzog v. Herzog, 346 So.2d 56 (Fla.1977); Shaw v. Shaw, 334 So.2d 13, 16 (Fla.1976); Hollywood Beach Hotel Co. v. City of Hollywood, 329 So.2d 10, 15 (Fla.1976); Crain & Crouse, Inc. v. Palm Bay Towers Corp., 326 So.2d 182 (Fla.1976)]; and because it has incorrectly interpreted and improperly applied the Briley, Wild test to the facts in this case, this Court should answer the certified question in the negative, and reinstate the Final Judgment entered by the trial court.

STATEMENT OF THE CASE

Pursuant to the statutory provisions implementing the constitutional prohibition against double taxation, [Fla. Stat. §§ 125.01(6), (7) (1981)],* each of the cities filed resolutions with the Board of County Commissioners of Palm Beach County alleging that the services under challenge here, and numerous others, provided no real or substantial benefit to the residents and property owners of those cities. (PX 32-36). After the County Commissioners rejected each of the cities' petitions, the cities filed separate complaints in the Circuit Court beginning in October 1978.

While these cases were pending in the Circuit Court, the Board of County Commissioners of Palm Beach County created the Palm Beach Fair Tax Council** and directed that Council to

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* Under Section 125.01(6), Florida Statutes, a municipality may by resolution identify county services or programs rendered specially for the benefit of unincorporated areas from countywide revenues and petition the governing board of the county to develop mechanisms to finance the service or program in the next fiscal year, either from taxes levied by a special benefit district, from special assessments or service charges, or by remitting to the municipality the cost of the service or program contributed by the petitioning municipality.

** The members of the Council included two city residents recommended by the Municipal League: Richard Simmons, City Manager, West Palm Beach, and Herbert L. Gildan, Attorney, North Palm Beach; two unincorporated area residents appointed by the County Commissioners: George Wedgworth, President, Sugar Cane Growers Cooperative of Florida, and Sam Caplan, retired, suburban West Palm Beach; and one member unanimously chosen by the other four members: Robert H. Kirkpatrick, Executive Director of the Forum Club and former publisher of the "Palm Beach Post." The Council was administratively assisted by the County Administrator and advised by the County Attorney (PX 30).

determine which of those services challenged by the cities in their resolutions and complaints provided a countywide benefit, and which were rendered for the exclusive benefit of the unincorporated areas of the County (PX 28). Following receipt of voluminous documents, reports and oral testimony over a period of seven months, the Fair Tax Council prepared a unanimous Final Report, introduced at trial (PX 30), which concluded that the services of the Sheriff's Road Patrol and the construction and maintenance of roads and bridges not on the classified road system "were of no substantial benefit to municipal residents" (PX 30 at 13).* The Council attempted to fashion a compromise political solution to the inequities they unanimously found existed, and included those recommendations as a part of their Final Report to the Board of County Commissioners (PX 30). The Board of County Commissioners rejected the Council's recommendations (PX 29). Thereafter, the cases, which had previously been consolidated, were promptly reset for trial before Circuit Judge John D. Wessel in January 1981 (R 882-84).**

By pretrial stipulation, petitioners agreed to remove from

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* The Council did not consider the investigative services of the Sheriff's Department (PX 30 at 15); it reached the conclusion that the County Parks were of a countywide benefit (PX 30 at 15).

** "R __" refers to the pleadings contained in the record on appeal; "T __" refers to the transcript of trial testimony; and "App __" refers to the appendix to this brief. "PX __" and "DX __" refer to plaintiffs' and defendant's exhibits.

consideration some fourteen programs and services previously identified in the resolutions and pleadings of the cities (R 978-79), leaving only four services or programs, admittedly financed from countywide revenues, at issue.

I. <u>Sheriff's Road Patrol and Detective Division.</u>

Petitioners challenged two separate services provided by the Palm Beach County Sheriff: road patrol and detective. Those services are independently identified and segregated in the Sheriff's budgets under "Law Enforcement" for each of the four Sheriff's substations (PX 8).

Palm Beach County Sheriff Richard Wille, Chief Deputy Charles McCutcheon and Inspector Edward O'Brien described the structure and activities of the Sheriff's Department. The road patrol deputies and the detectives work out of four substations which are geographically distributed throughout the County (T 416, 469-70).

Inspector O'Brien agreed that a principal function of the road patrol was to operate as the police force for the unincorporated areas of Palm Beach County (T 519-20). Deputies are deployed into zones within the unincorporated area based on the number of calls received within each area (T 380-81). If an incident requires any length of time to solve or work, it is turned over to a detective because the road patrol deputies are to respond to continuous calls for service (T 379, 470). Said

Inspector O'Brien:

> "The only distinction [between road patrol and detectives] really is the fact that they [detectives] conduct follow-up criminal investigations to a greater degree." (T 470.)

The road patrol is a "response-to-call" service (T 417). However, when a person calls for help from one of the four municipalities, he is referred by the Sheriff's dispatcher to the appropriate municipal police department (T 404). Sheriff Wille established the policy that if a deputy or detective is to enter a municipality for any purpose, the municipal police department is to be first notified (T 382-83). Regarding the police chiefs of these municipalities, Sheriff Wille said, "We are equals" (T 383). This policy of jurisdictional integrity is best illustrated by Chief Deputy McCutcheon's candid testimony:

> "We want to establish jurisdiction. We don't want to do any more than we have to. So we make sure it is occurring within the city or within the county before we go ahead and investigate the accident." (T 441.)

Police Chief Joseph Terlizzese of the Town of Palm Beach, Police Chief John Jamason of the City of West Palm Beach, Boca Raton City Manager James Zumwalt and North Palm Beach Director of Public Safety John Atwater each testified that their respective departments have the manpower and facilities for complete investigative functions (T 281, 310-15, 330-35, 341-42). The only facility shared by all departments is the Sheriff's crime

lab, which is separate from the Detective Division and not challenged in this litigation (T 530). The Sheriff provides no routine patrol in these cities (T 283, 314, 425). Detective investigations are handled by the municipal police departments (T 315, 331).

In 1977, Sheriff Wille estimated that Sheriff's personnel spent 90% of their time in the unincorporated areas and 10% of their time throughout all of the 37 municipalities in Palm Beach County (T 408-09; PX 37). The time spent in municipalities which have full-service police forces (such as the petitioners here) was admittedly much less than the time spent in those municipalities which have small or no police forces and for which the Sheriff's office provides total law enforcement services (T 414; PX 37, 38).

While the Sheriff testified that if municipal police departments were abolished he would be "obligated" to respond to calls within the cities (T 389), he reluctantly admitted his present manpower would not permit him to handle all such calls (T 405-07, 419-22). It is apparent that the Palm Beach County Sheriff's Department, already pressed to the limit of its capacity, could not additionally handle the more than 140,000 complaints presently responded to annually by the police departments of the four cities (PX 16; App 15, 16).

To analyze the assistance rendered to the cities' residents by the Sheriff's Department, petitioners' expert Richard

Kelton* first reviewed, for each of the years for which data was available, the Departmental Assist Summary, which reflects each instance where a deputy records an assist to another law enforcement unit.** These summaries demonstrate that substantially less than 1% of the Sheriff's total law enforcement activities during each of the relevant years rendered assistance to these municipalities. Kelton summarized that information in charts which were introduced as a part of PX 16:

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* Richard Kelton, President of Kelton and Associates, a firm specializing in management assistance to Florida local governments, holds a master's degree in public policy (T 59). He worked in local government, both city and county, for more than thirteen years, including three years as the County Administrator for Pasco County (T 61-62), and spent between 800 and 850 hours conducting an analysis of dual taxation in Palm Beach County (T 79).

** The District Court apparently proceeded under the erroneous impression that this Departmental Assist Summary included only assists physically rendered _within_ a municipal boundary, for it criticized the use of these records, like the Grid Code Summary, saying:

> "This data, however, reflects only direct contact within a municipalities' boundaries; it does not show a contact where other activity of benefit actually occurred in the unincorporated areas." 8 FLW at 379.

To the contrary, Inspector O'Brien's testimony at trial demonstrated that many of the assists recorded by the deputies and appearing in the Assist Summary occurred _outside_ the municipal boundaries, and involved such things as the recovery in the unincorporated area of a vehicle stolen from within a city. _See_ T 512-18 and DX 4, PX 12.

Palm Beach County Sheriff's Department

Total Complaints/Assists to Municipalities
(FY 1977-78; 1978-79; 1979-80)
(PX 16, Charts 1, 2 and 3)

	FY 1977-78		FY 1978-79		FY 1979-80	
Total Complaints Responded to by Sheriff's Department, Countywide:	65,291		77,158		88,817	
Total Assists by Sheriff's Department to:	No.	%	No.	%	No.	%
Boca Raton	36	0.06	18	0.02	26	0.03
North Palm Beach	16	0.02	12	0.02	15	0.02
Palm Beach	17	0.03	5	0.01	5	0.01
West Palm Beach	114	0.17	72	0.09	109	0.12
Total	183	0.28%	107	0.14%	155	0.17%

To confirm the findings based on the Sheriff's Departmental Assist Summary, Kelton reviewed for fiscal year 1979-80 a computer run showing the location of all responses by the Sheriff's Department according to grid code or geographic location. Kelton's staff manually reviewed each report bearing a grid code located within one of these four municipalities. After culling out the reports that did not come from the road patrol and the detective division taken together, and the reports listing incidents not related to these cities, Kelton located only 240 incidents within the four municipalities to

which those divisions responded during the entire year (PX 16, Chart 4). These responses by both services, taken together, represent less than two-tenths of one percent of the law enforcement activity within the plaintiff cities, broken down as follows:

Law Enforcement Activity Within Municipalities
FY 1979-80 (PX 16, Chart 4)

	(1) No. By Police Dept.	(2) Total No. By Sheriff	(3) Patrol & Detect. By Sheriff	(4) Total (1+2)	(5) Percent By Police Dept. (1÷4)	(6) Percent By Sheriff Patrol & Detect. (3÷4)
Boca Raton	34,727	119	46	34,846	99.66	0.13
North Palm Beach	5,764	67	30	5,831	98.85	0.51
Palm Beach	19,391	22	5	19,413	99.89	0.03
West Palm Beach	82,236	255	159	82,491	99.69	0.19
Total	142,118	463	240	142,581	99.68	0.17

After analyzing this evidence the trial judge concluded:

> "It is apparent from the above charts that, of the 142,581 recorded law enforcement activities within the municipalities, the four municipalities which claim no substantial or real benefit had a total of 240 assists from the patrol and detective divisions, which means their participation is less than one-fifth of one percent. It's difficult for this Court to conclude, based upon this evidence, that the Sheriff's road patrol and detective division adds anything more than an inconsequential benefit to the four municipalities involved herein." (App 16.)

In addition to contending that the Sheriff's records were

inaccurate and unreliable, the County attempted to overcome the effect of this carefully analyzed statistical information, taken from the Sheriff's own records, by contending: that because "crime knows no boundaries," the presence of the road patrol in the unincorporated areas had some "spill-over" benefits to the cities; that the use of Sheriff's vehicles by patrol deputies while off-duty benefited the residents of these cities; that the standby capacity of the Sheriff's Department, if called on by the municipalities, was of benefit; and that plaintiff's expert had failed to consider these indirect, unquantifiable benefits in reaching his conclusions. (See, e.g., T 49-51, 589-94, 598-600, 609-12.)

By his findings the trial judge expressly rejected the County's attempts to discredit the records of the Sheriff's Department and the County's attacks on petitioners' expert:

> "This expert testified and summarized the compilation of this data, which is supported by the greater weight of the evidence and is also supported by the Sheriff's own statement that the records of their Department are an important part of the job of Sheriff. Although there was extensive cross-examination of this expert by counsel for the Defendant, his testimony withstood it admirably.
>
> "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." (App 15.)

In reaching his conclusions, the trial judge carefully

considered the contentions advanced by the County and, noting the fiercely conflicting expert and lay testimony regarding each contention, rendered the following findings:

> "The Sheriff maintains there is property which was stolen from municipalities that was recovered in an unincorporated area, but there were no statistics, other than those compiled by the Plaintiffs' experts, which substantiated the quantity. In addition, the Defendant maintains that crime knows no boundaries and the mere presence of the road patrol in the unincorporated areas is of benefit to these four municipalities.
>
> "The generalized nature of this testimony makes its credibility suspect and conclusionary at best. In the view of the Court, it would be analagous 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.
>
> "There was also testimony to the effect that the Sheriff's patrol deputies take their automobiles home, and this creates a presence which is of some protective value to the four municipalities. There was no evidence, whatsoever, to support the implication that any of the deputies lived in these municipalities, and, in fact, the Sheriff justified this type of utilization to the County Commission as an effort to reduce maintenance costs to the County. Furthermore, the expert testimony was in conflict regarding this issue;* the former chief of Boca Raton Police Department indicated the City of Boca Raton rejected this concept because law enforcement benefits were tenuous due to the fact that most of the police officers do not reside in that jurisdiction. Accordingly, we can accord little weight to that concept.

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* The cities presented as a police expert Robert Joseph de Grazia, former Police Commissioner of Boston and a consultant for the Police Executive Research Forum, who testified on the basis of his own experience and upon the basis of the famous Kansas City Study, that the random, routine patrolling by police officers has no deterrent effect on crime (T 242-60).

> "The Defendant maintains the standby capacity of the Sheriff is a benefit. Many of the municipalities stated that if the standby capacity were needed, it would be called from a neighboring municipality and not from the Sheriff's Office. There is no evidence that this standby capacity was used, or has ever been called upon. Its benefit is ephemeral." (App 18.)

Upon the basis of these findings, the trial judge concluded:

> "The greater weight of the evidence, indeed the clear and convincing force of the evidence, supports the position of the four municipalities that the road patrol and detective division of the Sheriff of Palm Beach County adds no real or substantial benefit to the municipalities of the Town of Palm Beach, City of Boca Raton, City of West Palm Beach, and the Village of North Palm Beach. Any benefits which exist are, at best, inconsequential." (App 19.)

On appeal, the District Court reversed the findings of the trial court as to these services, as with each of the other programs at issue, holding that as to each there was " 'a lack of substantial competent evidence' to support a finding of 'no real and substantial benefit.' " 8 FLW at 380.

While the District Court recognized that "[t]he record supports the conclusion that the primary purpose of the sheriff's road patrol division is to operate as a police force for the unincorporated areas of Palm Beach County"; that the road patrol does not regularly patrol within the four municipalities; that "the road patrol is a response-to-call service"; and that a person calling for assistance from within a city "is ordinarily referred to the appropriate municipal police

department" the District Court held that the trial judge placed too much emphasis on the "quantifiable" benefits rendered by the road patrol and detective divisions in reaching his findings, and failed to consider the unquantifiable benefits. 8 FLW at 379

As to the Departmental Assist Summary, the District Court noted that the County "presented evidence indicating that the statistical data relied on in the preparation of this chart was unreliable," that many " 'assists' were not reported by the assigned deputies," and that these statistics "do not accurately reflect the amount of time, effort, or money expended on a particular 'assist.' " 8 FLW at 379.* As to the Grid Code Summary, the District Court noted that this is a record of "each time a deputy responds to a call within the geographical limits of one of the municipalities." 8 FLW at 379. The District Court found that

> "[t]his data, however, reflects only direct contact within a municipalities' 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 . . . .") Id.**

Thus, the Court held that while the "charts do have probative

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* The District Court's opinion, however, fails to note that the trial judge carefully considered, and rejected, the credibility of the County's evidence in this regard (App 18).

** This ignores the fact that Inspector O'Brien gave numerous examples of assists in the unincorporated areas which were included in Kelton's data (T 512-18).

value to the extent that they demonstrate a minimum number of contacts," they "are not a completely accurate reflection even of direct benefits received by the municipalities from the sheriff's office." 8 FLW at 379.

The District Court also cited dicta from its earlier opinion in Alsdorf v. Broward County, 373 So.2d 695 (Fla.4th DCA 1979), cert.denied, 385 So.2d 754 (Fla.1980) ("Alsdorf II"), regarding the Broward County road patrol, and asserted that the Palm Beach County road patrol and detective division provided certain "unquantifiable benefits" to the municipal residents:

> "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 deterrent factor resulting from the visibility of marked sheriff's patrol vehicles in and around the municipalities." 8 FLW at 379.

Upon this basis, the District Court concluded:

> "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." 8 FLW at 379.

II. Local County Roads.

Palm Beach County has, pursuant to statute, responsibility for the construction and maintenance within the County of all "minor arterial" roads not on the state highway system, and all "collector" roads, both within the unincorporated area and within the municipalities, together with all "local" roads in the unincorporated area. Fla.Stat. § 334.03(23) (1981). At trial, these minor arterials and collectors, because they had been functionally classified by the State Department of Transportation pursuant to statute [Fla.Stat. § 334.03(14) (1981)], were together referred to as the "classified" county road system (T 174-75, 268-69, 536.) Petitioners never contested the fact that these classified roads, which by statutory definition "generally interconnect with" the state road system and "collect and distribute traffic between local roads" [Fla.Stat. § 334.03(15), (16) (1981)], do provide a real and substantial benefit to all persons within Palm Beach County (T 174-75, 275-76).

In addition to these classified roads, the County Engineering Department also has responsibility for construction and maintenance of local or non-classified roads located within the unincorporated areas of Palm Beach County. Fla.Stat. § 334.03 (23) (1981). These roads are of two types: residential subdivision streets and unpaved shellrock roads (T 175-76). It is these non-classified local roads which petitioners contended do not provide a real or substantial benefit to their residents.

The local roads which are located in the unincorporated areas and maintained by the County Engineering Department are analogous to the municipal subdivision streets which are maintained by the various cities (T 269-72). There was testimony that if an improvement were to be made for roads of this type, only the abutting property would be assessed, because it is this property that the roads benefit (T 176).

Former County Engineer George Frost testified that the local or non-classified road system basically serves abutting property (T 269-70). Each municipality constructs and maintains its own local roads, as does the County in the unincorporated areas (T 271-72). He also testified <u>without objection</u> that, in his opinion, the local county roads provide no real and substantial benefit to the residents of the Town of Palm Beach (T 272).

County Engineer Herbert Kahlert did not take issue with the conclusions drawn by Kelton and Frost as to the lack of benefit from the local county roads to persons not residing in the unincorporated areas (T 176, 272). Kahlert did, however, list some 13 roads which he felt had traffic volumes comparable to some of the roads on the classified road system (T 536-38). He did not venture an opinion as to whether this volume came from abutting property owners, from other persons in the unincorporated areas, from residents of these municipalities or from elsewhere. On cross-examination, Kahlert admitted that although traffic counts had been taken on these non-classified

roads, his testimony was not based on that data (T 542), and that the area surrounding at least one of his 13 roads (Hood Road) was primarily vacant and that the road led to nowhere (T 550-51).

After analyzing the evidence on this issue, the trial judge found:

> "Evidence indicates that the County has a system of classified and non-classified roads. The testimony indicates that these non-classified roads are mainly those subdivision roads maintained and in existence primarily for the benefit of abutting property owners. There is some testimony that, by utilization of these roads, one could go from point A to point Z, over a rather circuitous route; however, most of the roads, as were indicated, are unpaved. 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.
>
> "After carefully reviewing the evidence, this Court finds the engineering road and bridge administration surveys and designs, and land acquisition for the maintenance and operation of those roads and bridges, not on the classified system and provide no real or substantial benefit to the residents of the four plaintiff/municipalities." (App 19.)*

The District Court acknowledged that petitioners had not challenged the benefits provided their citizens by the county-wide network of classified roads, but only those local or subdivision roads, known as the non-classified system, within

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* The Fair Tax Council had also concluded that the monies spent for construction and maintenance of county roads and bridges <u>not</u> on the classified county road system was "of no substantial benefit to the municipal residents" and that this service should be "funded by excusing the tax burden of municipal residents" (PX 30 at 13).

the unincorporated area. 8 FLW at 380. The Court further recognized that "[t]here are surely dirt roads and subdivision streets in the county which are of absolutely no benefit to any municipality," but noted that the County Engineer had

> "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 . . . [and that these] 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." 8 FLW at 380.

The District Court noted "two problems . . . with the treatment of this issue in the trial court." 8 FLW at 380. The first was characterized as "one of classification." While acknowledging that there "are surely dirt roads and subdivision streets in the county which are of absolutely no benefit to any municipality," the Court held that because the proof was "not sufficient to show that <u>all</u> roads in the unclassified system" failed to provide a real and substantial benefit, the "municipalities cannot prevail on this record."* 8 FLW at 380.

The second problem noted by the Court was "in the manner of proof." 8 FLW at 380. The District Court held that plaintiffs' expert [Kelton] improperly based his conclusion

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* The District Court's opinion ignores the fact that the State Department of Transportation, not petitioner, rendered the classifications relied on and that the trial judge, having heard the County Engineer's testimony (both direct and cross-examinations), specifically found that his "testimony did not negate the fact that [these non-classified roads] were for the benefit of the abutting property owners who utilize them" (App 19).

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," solely "upon maps of the D.O.T. and a listing of road reclassifications (from the old state secondary road system) . . . [without any] information about the number of vehicles using the individual roads, the number of people living on the roads, or the characteristics of abutting property." 8 FLW at 380. The District Court criticized Kelton for not having "physically examine[d] any of the roads . . . ." Id.* Moreover, the District Court held that Kelton [and presumably Frost, too, although there was no objection to his testimony (T 272)], was improperly permitted to express an opinion on a legal conclusion -- i.e., whether the local roads provided a "real and substantial benefit" -- and that the trial court, to whom this "determination is reserved", "may have been unduly persuaded by the expert testimony in this regard." Accordingly, the District Court reversed as to this issue also. 8 FLW at 380.

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* In its opinion, the District Court overlooked the fact that former County Engineer Frost also testified as to this issue. When asked about his physical observations, Frost testified:

> "Q In your work as an employee of the Board of County Commissioners of Palm Beach County, have you actually got out and walked on and observed those roads within the unincorporated areas of Palm Beach County?
>
> "A Yes, sir. Not only walked on them, I built a lot of them." (T 270.)

III. Neighborhood Parks.*

The County's neighborhood parks were identified by John Dance, Director of Parks and Recreation for Palm Beach County (Dance's deposition was admitted into evidence as PX 27). Dance testified that the County has about 50 parks (PX 27 at 11) consisting of seven "regional" parks with 200 acres or more (PX 27 at 6-7); 10 to 12 "community" parks (PX 27 at 10-11) of 30 to 50 acres (PX 27 at 9); and 30 "neighborhood" parks (PX 27 at 14). In classifying the parks, Dance utilized the standards promulgated by the National Recreational and Park Association (NRPA) (PX 27 at 7), tailored somewhat to fit the reality of Palm Beach County (PX 27 at 6). These standards describe a "regional facility" as having 500 acres (PX 27 at 6), a "community park" as having a 15-minute driving radius (PX 27 at 8) and a "neighborhood park" as a small facility "within walking distance" of its users (PX 27 at 10). There are no County neighborhood parks in either Palm Beach or West Palm Beach (PX 27 at 13-14).

Kelton identified the County's neighborhood parks as

> "small parks ranging in size up to about 5 acres, they service a radius of about one and a half miles, one-quarter to one-half mile, and serve a population of one to two thousand people." (T 179.)

Bob Burdett, West Palm Beach Director of Recreation,

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* This service was challenged by the Town of Palm Beach and West Palm Beach only (the other petitioners having acknowledged a benefit to their residents from this service).

confirmed that the main criterion for classifying a park as "neighborhood" is that it be within the user's walking distance. He further testified that the County does not maintain any neighborhood park within West Palm Beach or within walking distance of the City (T 306). George Frost identified the several park facilities maintained by the Town of Palm Beach and testified that the neighborhood parks located in the unincorporated areas, all several miles from Palm Beach, provide no benefit to the Town's residents (T 273-74). Both Frost and Burdett testified, without objection, that in their opinion the County neighborhood parks do not benefit the residents of their cities (T 274, 306).

As to this issue the trial judge concluded:

> "A neighborhood park is a small park within walking distance within the community in which it is located. It is up to approximately five acres in size and is designed to service only the neighborhood in which it is located.
>
> "The City of Boca Raton and the Village of North Palm Beach do not challenge this issue, and it applies only to the Town of Palm Beach and the City of West Palm Beach.
>
> ". . . .
>
> "The Court, having reviewed the evidence concerning the neighborhood parks, finds the neighborhood parks provide no real or substantial benefit to the City of West Palm Beach and the Town of Palm Beach, except for Byrd Park [which, as the trial judge noted, no longer exists]. Accordingly, Palm Beach County is in violation of the constitutional prohibition of taxing residents of these two municipalities for services which are of no benefit or use to them. The benefits ascribed are, at best, illusory." (App 20.)

The District Court acknowledged that the two municipalities challenging this service -- the Town of Palm Beach and the City West Palm Beach -- had no county-operated neighborhood parks within their boundaries [or, in fact, within walking distance thereof]. 8 FLW at 380. The District Court further recognized that the only opinion testimony presented supported the trial court's finding that these "neighborhood parks" provided no real or substantial benefit to the residents of these two municipalities, but the Court nevertheless reversed the holding because the cities presented "no statistical data as to park attendance, residence of park users or other relevant factors . . . ." Id. Judge Downey dissented as to this issue only, stating:

> "The testimony of John Dance, the Director of Parks and Recreation for Palm Beach County, Robert A. Burdett, Director of Recreation for the City of West Palm Beach, and George Frost, Town Manager for the Town of Palm Beach, in my judgment, provide sufficient evidentiary support to demonstrate that neighborhood parks in the unincorporated areas of the county render real benefits only to the residents of the areas in close proximity to the parks." 8 FLW at 381.

ARGUMENT

Point I

The District Court misused the "substantial, competent evidence" standard to improperly substitute its view of the evidence for that of the trial court.

It is well settled that the findings of a trial judge sitting without a jury are clothed with a presumption of

correctness and that "the prevailing rule in this jurisdiction [is] that an appellate court cannot reevaluate the evidence and substitute its judgment for that of the trial court." Hollywood Beach Hotel Co. v. City of Hollywood, 329 So.2d 10, 15 (Fla.1976).

As this Court noted in Shaw v. Shaw, 334 So.2d 13, 16 (Fla.1976):

> "It is clear that the function of the trial court is to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses appearing in the cause. It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it . . . . Subject to the appellate court's right to reject 'inherently incredible and improbable testimony or evidence,' it is not the prerogative of an appellate court, upon a de novo consideration of the record, to substitute its judgment for that of the trial court."

Accord, Delgado v. Strong, 360 So.2d 73 (Fla.1978); Crain & Crouse, Inc. v. Palm Bay Towers Corp., 326 So.2d 182 (Fla. 1976); Westerman v. Shell's City, Inc., 265 So.2d 43 (Fla. 1972); Herzog v. Herzog, 346 So.2d 56 (Fla.1977).

This principle has particular importance in double tax cases where each challenged service raises peculiar "factual questions" in each case, and where the determination of "real and substantial benefit" depends on the nature of the petitioner city, the nature of the defendant county, and numerous other relevant circumstances existing during the tax years in

question. Alsdorf II, 373 So.2d at 700-701; Manatee County v. Town of Longboat Key, 352 So.2d 869, 872 n.4 (Fla.2d DCA 1977), rev'd in part on other grounds, 365 So.2d 143 (Fla.1979) ("Manatee County").

Prior to the District Court's decision, the common thread among the decisions of various appellate courts in double taxation cases was that the trial court's determination of a "real and substantial benefit" question had always been upheld. In every case where the issue decided on appeal was whether the trial court's ruling was based on competent, substantial evidence, the appellate court has affirmed the trial court's ruling. See City of St. Petersburg v. Briley, Wild & Associates, Inc., 239 So.2d 817 (Fla.1970); Burke v. Charlotte County, 286 So.2d 199 (Fla.1973); Alsdorf v. Broward County, 333 So.2d 457 (Fla.1976), ("Alsdorf I"), on remand, 46 Fla. Supp. 38 (Cir.Ct. Broward County, 1977), aff'd, 373 So.2d 695 (Fla.4th DCA 1979), cert.denied, 385 So.2d 754 (Fla.1980); Manatee County; Sarasota County v. Town of Longboat Key, 400 So.2d 1339 (Fla.2d DCA 1981) ("Sarasota County"); City of Ormond Beach v. County of Volusia, 383 So.2d 671 (Fla.5th DCA 1980).

These cases are in keeping with the rule that "in appellate proceedings, the trial court's findings of fact are shielded from attack and are clothed with a presumption of validity." Herzog v. Herzog, 364 So.2d 56, 58 (Fla.1977).

The appellate courts, in affirming trial court rulings in double taxation cases, have not been swayed by the fact that trial courts have reached different conclusions about similar services. Thus, the Fifth District in City of Ormond Beach affirmed the trial court's conclusion that the Volusia County library system did provide a real and substantial benefit to Ormond Beach resident, whereas the Second District, in Sarasota County, per curiam, affirmed the trial court's conclusion that the Sarasota County library system provided no real and substantial benefit to the Town of Longboat Key. Similarly, the Second District in Manatee County affirmed the trial court's holding that road and bridge expenditures were being "rendered exclusively for the benefit of the residents or property owners of unincorporated areas," (352 So.2d at 872); likewise, that Court in Sarasota County, per curiam, affirmed the trial court's conclusion that local roads in Sarasota County provided no real and substantial benefit to the residents of the Cities of Sarasota, Venice, North Port and Longboat Key, while the Supreme Court in Burke affirmed the trial court's conclusions that the Charlotte County roads (albeit a more broadly defined system of county roads) did provide a real and substantial benefit to the residents of Punta Gorda.

While ostensibly couching its reversal upon the "lack of substantial competent evidence" to support the trial court's findings, the District Court's opinion, in actuality, holds that the trial judge failed to give proper weight to the

evidence presented. As to the road patrol and detective divisions, the District Court found that "[t]he direct and demonstrable benefits when coupled with these unquantifiable benefits* <u>compel the conclusion</u> that, in total, the municipalities enjoy a real and substantial benefit from the sheriffs' road patrol and detective division." 8 FLW at 379 (emphasis added). The District Court reached this conclusion in spite of its recognition that

> "Based on its view of the evidence in the present case the trial court found that the municipalities did not enjoy a real and substantial benefit from the Palm Beach County Sheriff's road patrol and detective division." 8 FLW at 379.

Similarly, the District Court noted:

> "The able trial judge obviously concluded that there was substantial competent evidence to support a finding that any benefit shown did not measure up to his perception of the standard of 'real and substantial.' " 8 FLW at 380.

These statements, combined with the failure of the District Court to articulate any legal rule which the trial court misapplied, show beyond any question that the District Court simply disagreed with Judge Wessel's factual determinations. Such a holding directly controverts the "substantial competent evidence" standard of review.

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* Clearly, in his opinion the trial judge considered these "unquantifiable" benefits in reaching his determination (App 18), but he failed to grant them the weight the District Court deemed appropriate.

> "Clearly, it is not a function of an appellate court to substitute its judgment for that of the trier of fact, be it a jury or a trial judge. Accordingly, although an appellate court might have reached a different conclusion had it been the initial arbitor of the factual issues, if a review of the record reflects competent, substantial evidence supporting the findings of the chancellor, the judgment should be affirmed." Greenwood v. Oates, 251 So.2d 665, 669 (Fla.1971).

Point II

The District Court incorrectly interpreted and improperly applied the Briley, Wild test to the facts in this case.

This Court initially construed the constitutional prohibition against double taxation in City of St. Petersburg v. Briley, Wild & Associates, Inc., 239 So.2d 817 (Fla.1970). Reviewing the history of the Constitutional Revisory Commission, the Court recognized that the evil sought to be remedied was the taxation of municipally-located property for services rendered by the county which result in no real or substantial benefit to such property (239 So.2d at 822), and found that the framers of the provision, and the electors in adopting it

> "intended to prevent future taxation by counties of city-located property for services from which the owners of said property received no real or substantial benefit." 239 So.2d at 822.

Upon those findings, this Court held as follows:

> "We, therefore, hold that Article VIII, Section 1(h) of the 1968 Constitution of Florida prohibits the taxation of municipally-situate property by the County for any services rendered by the County where no real or substantial benefit accrues to city

> property from such services. Conversely, this provision permits such taxation where such service is found to be of real and substantial benefit to such property." 239 So.2d at 822-23.

At issue in Briley, Wild was whether a sewage treatment plant to be used primarily by the unincorporated areas of Pinellas County provided a "real and substantial" benefit to the residents of St. Peterburg and Clearwater who would not physically use those facilities. This Court rejected the extreme positions which would accord either a literal interpretation to the term "exclusive" or require a "direct and primary" benefit to permit taxation, and adopted instead the test which continues to serve as the touchstone in dual taxation cases:

> "It is sufficient to authorize county taxation of such property if the benefits accruing to the municipal areas are found to be real and substantial and not merely illusory, ephemeral and inconsequential." 239 So.2d at 823.

There this Court upheld the trial court's finding that the elimination of pollution and prevention of disease provided by the sewage plant would provide a real and substantial benefit to residents of those municipalities as well as to residents of the county. In so holding, this Court was careful to distinguish between the services in the area of public health and those of other types:*

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* As examples of services which might be rendered by the county for its citizens which would be of no consequential benefit to the citizens in a [footnote continued on following page]

> "The evidence before the trial court indicates that the contamination of the waters of Pinellas County which occurs in the unincorporated areas contaminates waters located in the incorporated areas through the natural process of flow. Disease originating in the unincorporated areas resulting from improperly-treated sewage can and will readily spread throughout the county. Protection against such contamination and disease is not merely an incidental or collateral benefit which would result to the incorporated areas of the county by the correction of the problem in the unincorporated areas." 239 So.2d at 824.

Obviously concerned that in Briley, Wild this Court had upheld the finding of a real and substantial benefit solely upon the basis of indirect benefits to the residents of the City of St. Petersburg, the District Court in the instant case concluded that the existence of "both direct and indirect benefits" compelled a finding that each of the services at issue here provide the requisite benefit to these cities. 8 FLW at 381. We respectfully urge that the District Court has misconstrued this Court's opinion. In Briley, Wild, this Court rejected the contention that the service must provide "a direct and primary use benefit" to escape the dual tax prohibition (239 So.2d at 823), but made plain that a service providing only a "slight" or "minute [benefit] in quantity or qual-

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* [footnote continued from preceding page] municipality, this Court cited:

> 1) libraries in the unincorporated area for the use and benefit of area residents;
>
> 2) park or recreational facilities for residents of the immediate area; and
>
> 3) fire fighting facilities set up for the benefit of an unincorporated area (239 So.2d at 824).

ity" (239 So.2d at 822) would not satisfy the real and substantial benefit test. Thus, the mere existence of any direct benefits, no matter how minute, coupled with questionable indirect or "unquantifiable" benefits, does not "compel" the result mandated by the District Court in this case. Indeed, in our mobile society, virtually any county service will provide some benefit, both direct and "unquantifiable," to residents of municipalities. Under the District Court's mechanical test, the existence of such benefits would mean that cities could never win double taxation cases. Such a result would be clearly contrary to the intent of the framers of Article VIII, § 1(h). Originally construing the provision, this Court noted the extensive debate as to its purpose before the Revisory Commission* and the House of Representatives, and stated:

> "An examination of the minutes of both bodies leads us to conclude that the purpose . . . [of] this provision . . . is to prevent double taxation of municipally-situated property for a single benefit." Briley, Wild, 239 So.2d at 822.

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* An excerpt from the transcript of the Revisory Commission includes the following colloquy between Mr. Martin, the chief proponent of the provision, and Senator John E. Mathews, Jr., of Jacksonville:

> "MR. MATTHEWS: Mr. Martin, isn't all you are trying to do is make the tax picture fair, so that people that live inside the city and pay city taxes for certain purposes don't have to also pay county taxes rendered by the county to people outside the county?
>
> "MR. MARTIN: Yes, sir, exactly. [footnote continued on following page]

In 1974, the Florida Legislature enacted Ch. 74-191, Laws of Florida, providing the mechanism for cities to identify, by resolution, county services from which the cities received no real and substantial benefit [Fla.Stat. § 125.01(6) (1981)], and providing the mechanism of a "municipal service taxing unit" to provide revenue to pay for such services [Fla.Stat. § 125.01(1)(q) (1981)]. In its "Legislative Summary," the House Committee on Community Affairs stated, in describing the Act, that

> "the main focus of the bill, is its attempt to deal with the problem of 'double taxation.' Its intent is to make those who are receiving municipal services bear the financial burden, rather than continue to force city residents to carry the load for the unincorporated area residents." (App 74.)

[footnote continued from preceding page]

". . . .

"MR. MATTHEWS: May I use as an illustration and ask you, we've got this problem in Duval County, we have attempted to solve it by what we call an omnibus bill, and what we did was pass -- create a special tax district consisting of all the territory in unincorporated area and authorize that special tax district through the commissioners of the county commission to levy a tax on people and property outside the municipalities for street lights, for fire protection, for police protection and for recreational purposes and for a health department, knowing that the city duplicated those functions for people inside the city. Isn't that what you are trying to get at?

"MR. MARTIN: Yes, sir, exactly." (App 47-48.)

<u>See generally</u>, Comment, <u>Toward Solving the Double Taxation Dilemma Among Florida's Local Governments: The Municipal Service Taxing Unit</u> 8 <u>Fla.St.U.L.Rev.749</u> (1980).

The purpose of the municipal service taxing units authorized by Ch. 74-191 is made clear by the statute which permits counties to

> "[e]stablish, and subsequently merge or abolish those created hereunder, municipal service taxing or benefit units for any part or all of the unincorporated area of the county, within which may be provided fire protection, law enforcement, beach erosion control, recreation service and facilities, water, streets, sidewalks, street lighting, garbage and trash collection and disposal, waste and sewage collection and disposal, drainage, transportation, and other essential facilities and municipal services from funds derived from service charges, special assessments, or taxes within such unit only." Fla.Stat. § 125.01(1)(q) (1981) (emphasis added).

This history makes it abundantly clear that both the framers of the 1968 Constitution and subsequent legislatures have viewed "municipal-type" services as the particular focus of Article VIII, § 1(h), and have included within such "municipal-type" services police protection, local roads and local parks -- exactly the services at issue here. The framers recognized that the benefits provided by such services to municipal residents could vary from county to county, and so did not attempt to create a hard-and-fast rule with respect to such services. But it surely does violence to the legislative intent to establish a burden of proof which makes it impossible for cities to mount an effective attack on the funding of such services from countywide revenues.

A. The evidence presented at trial was sufficient to permit the trial court to conclude that the services challenged provided no "real and substantial benefit" to residents or property of these municipalities.

The data compiled by Kelton from the County's own records conclusively demonstrates that the amount of assistance rendered these cities' residents by the Sheriff's road patrol and detective divisions equals substantially less that 1% of the total law enforcement activity of those units (PX 16). There can be no question that such statistics clearly justify the trial court's finding that the nominal assistance rendered by the road patrol and by the detective division to these municipalities and their residents constitutes only "slight" or "minute" benefits under the standard defined in Briley, Wild. Even if the Sheriff's estimate -- that approximately 10% of the time of the road patrol is spent in all of the incorporated areas, with a greater proportion of that time in those cities that have no police departments -- is used, the benefit to those four municipalities must still be termed "slight" or "minute."

Moreover, the existence of the alleged indirect or "unquantifiable" benefits relied on by the County, and accepted by the District Court, was either substantially controverted by the cities' evidence, or was unsupported by any evidence at trial.

For example, in discussing the road patrol the District Court hypothesized that the Sheriff provides a "backup capability." 8 FLW at 379. In so stating, the Court entirely ignored the testimony of Chief Terlizzese and Chief Jamason (specifically referred to by Judge Wessel in the final judgment) that they have <u>never used</u> this capability, and that they call upon other <u>municipal</u> departments for any aid they require (T 283-84, 314).

Similarly, the District Court refers to "the crime deterrent factor resulting from the visibility of marked sheriff's patrol vehicles in and around the municipalities," (8 FLW at 379), in spite of the expert testimony of Robert de Grazia that patrol by marked police vehicles provides no crime deterrent effect whatsoever (T 241-55).

Finally, there was testimony to the effect that "crime knows no boundaries" (<u>e.g.</u>, T 319, 347). However, there is no more basis in this record for concluding, as did the District Court, that the reduction of crime in the unincorporated areas "lessen[s] the potential spillover of that criminal activity [into the cities]" (8 FLW at 379), than for accepting the equally logical conclusion that the failure to enforce the law in the unincorporated areas would result in a lessening of criminal activity in the cities because all criminals would move to the area without enforcement. The trial judge rejected either conclusion as speculative and unsupported by competent evidence:

> "[T]he defendant maintains that crime knows no boundaries and the mere presence of the road patrol in the unincorporated areas is of benefit to these four municipalities.
>
> "The generalized nature of this testimony makes its credibility suspect and conclusionary at best." (App 18.)

As to roads, the testimony was that the County roads here at issue (T 175-76, 272) are designated as "local roads" pursuant to § 334.03(17), Florida Statutes (1981), which provides:

> "(17) 'Local road.'--A route providing service which is of relatively low average traffic volume, short average trip length or minimal through-traffic movements, and high land access for abutting property."

Even without the testimony of Kelton, this statutorily-required designation by a disinterested agency of the State of Florida, taken together with the testimony of George Frost, former County Engineer (T 260-79), is more than sufficient to permit the finder of fact to find that the non-classified roads are the County equivalent of local city streets. The District Court's criticism that Kelton had not physically examined the roads and determined the nature of the abutting property overlooks the fact that former County Engineer Frost, who built many of these local roads, testified <u>without objection</u> that they provided access to a person's house or property and did not, in his opinion, provide any benefit to the residents or property of the municipal residents (T 269-72).

The District Court also noted that County Engineer Kahlert testified that some 13 of the non-classified roads had traffic volumes comparable to some of those on the classified system. Similarities between some "classified roads" and some "non-classified roads" will always exist regardless of where the line between the two is drawn. Such testimony certainly does not call into question Kelton's and Frost's testimony that the non-classified roads are designed for and benefit only abutting property, or their opinion testimony that such roads do not substantially benefit the municipal residents. At most, it suggests that these few roads might be added to the classified system in accordance with the statutory procedure. Fla.Stat. § 335.04(3) (1981). More importantly, the fact that a few roads, of several hundred miles of paved and unpaved local roads in Palm Beach County, are improperly classified does not mean that petitioners have failed to sustain their burden to demonstrate that the <u>local road system</u> is of no real and substantial benefit to the residents of these municipalities.

As to neighborhood parks, the evidence is clear that national park standards accepted and relied upon by the County Parks' Director Dance, define "neighborhood parks" as parks which are "mostly accessible by people within a, you know, walking distance" (PX 27 at 10). The evidence is undisputed that no County neighborhood parks are within municipalities (PX 24). It necessarily follows that the users of such parks are

unincorporated-area residents who can walk to them, and that the County neighborhood park system is, therefore, the equivalent of a system of local city parks.

In sum, the evidence demonstrated that the services in question here are municipal in nature, and fully supports the trial court's findings that the services were provided by the County specially for the benefit of its unincorporated-area residents. This conclusion is not altered because no evidence was introduced concerning each and every local road or each and every neighborhood park. Section 125.01(6)(a) speaks of a "service or program" provided by the County. The Constitution, Article VIII § 1(h), speaks of "services." The District Court made note of the difficult burden imposed on cities by the Briley, Wild test:

> "[T]he test . . . requires . . . the challenging municipality . . . [to] prove a negative. . . . Even in the simplest of transactions, the burden of proving a negative can be an onerous one." 8 FLW at 378.

While the cities recognize that the burden is an onerous one, the effect of the District Court's opinion, requiring that a municipality prove that every local road and every neighborhood park provides no real or substantial benefit to its residents, converts the cities' burden, both as to the identification of the service and the benefits rendered, from a preponderance of the evidence standard to one more analogous to the criminal

standard of proving no benefit beyond and to the exclusion of every reasonable doubt.

The evidence proved, as demonstrated above, that the County provides local roads and neighborhood parks as municipal-type services for the benefit of unincorporated-area residents. If cities are to be burdened with the necessity of proving, by use of traffic counts, user studies, or other such expensive and difficult-to-obtain proof that each and every road and each and every park is of no benefit to municipal residents, double taxation cases will take years of discovery, months of trial time and millions of dollars in expenses. To place such a burden on cities is contrary to the constitutional purpose. Where, as here, the developed and accepted standards, applied by disinterested state and national bodies, combine with testimony of locally knowledgeable officials as well as expert witnesses to show that the County service or program which provides a road system or a park system is meant to benefit unincorporated-area residents, and in fact does benefit primarily such residents, the County cannot defeat the cities' case by suggesting that an insignificant portion of the service is of some benefit to municipal residents.

B. In evaluating the road patrol service, the District Court was unduly influenced by its prior decision in Alsdorf II.

Having noted its admonition in Alsdorf II that its decision

"is limited to the facts, taxable years and circumstances of this particular case and should not be hailed as a precedent, providing 'carte blanche' approval of any tax levied on municipal property." (373 So.2d at 701),

the District Court surprisingly retreats and uses dicta from that opinion concerning the Broward County Road Patrol as the primary basis for setting aside Judge Wessel's factual findings concerning the Palm Beach County Sheriff's Road Patrol. See 8 FLW at 379. In so doing, the Court totally failed to recognize the fundamental procedural and factual differences between the two cases.

The trial judge in Alsdorf II found upon the evidence presented, that the Broward County Sheriff's Road Patrol provided a real and substantial benefit to municipal residents in that county. Procedurally, the cities on appeal "[did] not actually take issue with these factual determinations." 373 So.2d at 700. Thus, the recitations of benefit set forth in Alsdorf II were based entirely on the uncontroverted evidence presented to the trial judge by the intervenors in that case, which was not challenged on appeal. These recitations cannot be relied upon as the basis for reversing the contrary factual findings of a different judge, in a different county, concerning a different road patrol, in different cities, and on a vastly different record.

Sheriff Stack's "uncontroverted" testimony in the Alsdorf II trial was summarized by the District Court into five

principal parts:

> 1. "[T]he Sheriff's road patrol generally enforced the law in the entire county.
>
> 2. "[T]he 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.
>
> 3. "[A]ll 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.
>
> 4. "[T]he Sheriff's road patrol assisted the city police forces when called upon to do so.
>
> 5. "[B]y limiting crime in the unincorporated areas adjoining the municipalities the road patrol was of substantial assistance to the municipal police and residents in the contiguous cities." (373 So.2d at 700-01.)

While these same alleged benefits were also at issue in the instant case, the the cities here _did_ "take issue" with the existence of such alleged benefits in Palm Beach County, and Judge Wessel, after hearing conflicting evidence as to the issues, concluded that such benefits, to the extent they existed at all in Palm Beach County, were not "real and substantial."

The District Court ignored both the evidence offered by the cities concerning these alleged benefits and also the factual determinations of the trial court, which were based upon this evidence:

> 1. The Palm Beach County Sheriff's Road Patrol does _not_ "generally enforce the law in the entire county." To the contrary, the evidence was clear that the road

patrol "enforces the law" only in the unincorporated areas of the County, that the Sheriff does not have sufficient personnel or equipment to enforce the law throughout the County, and that the Sheriff refers calls from within cities to the appropriate municipal police department (T 515-20, 405-07, 404; App 16-17).

2. While there was no direct reference by either side of assistance by road patrol deputies to process servers, if such aid was performed it would doubtless have been included in Kelton's statistics showing <u>all</u> assistance by deputies within these municipalities.

3. As the testimony of Robert de Grazia showed, and as Judge Wessel specifically found, the benefits of the "visibility" of Palm Beach County Sheriff's vehicles in cities was ephermeral. All substations are located outside the four cities and no benefits from the operation of marked patrol vehicles in the four cities were substantiated (T 242-60; App 18).

4. The testimony of the various municipal police chiefs showed, as Judge Wessel specifically found, that the alleged "backup" or "standby" capability of the Palm Beach County Sheriff was simply never used by the cities. At some point the remoteness of a "potential" benefit must be deemed inconsequential (T 283-84; 314; App 18).

5. The testimony showed and Judge Wessel specifically found that the Palm Beach County Road Patrol did not provide real and substantial benefit to these municipal residents by patrolling the unincorporated areas of the County. Finding that the "generalized nature" of the County's testimony on this issue "makes its credibility suspect and conclusionary at best," Judge Wessel concluded that "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." (App 18).

Given the wisdom of its initial admonition in <u>Alsdorf II</u>, and in view of the fundamental procedural and factual differences between the two cases, the District Court's reliance on

the dicta in Alsdorf II to reach its decision in this case, is difficult to comprehend. In any event, the reliance was misplaced and produced an unjust and improper result.

Point III

The trial judge properly considered opinion testimony on the ultimate issue to be decided.

In its brief filed in the District Court, the County argued that the testimony of the cities' principal expert should have been excluded because the issues were not beyond the common understanding of the average layman, and because the expert incorrectly applied the law. The District Court apparently rejected these conclusions but nevertheless held the trial judge erred in considering Kelton's opinion testimony on the ultimate issue as to whether the challenged services provided a "real and substantial benefit," stating:

> "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. (We do not overlook Section 90.703, Florida Statutes (1981), in reaching this conclusion.)" 8 FLW at 380.

While the District Court's opinion acknowledges the existence of Section 90.703, Florida Statutes (1981), which

permits opinion testimony on "an ultimate issue to be decided by the trier of fact," the opinion fails to apply that statute, flatly holding that it is improper for an expert witness "to draw legal conclusions." 8 FLW at 380.

Section 90.703 is consistent with this Court's opinion in North v. State, 65 So.2d 77, 88 (Fla.1952), aff'd, 346 U.S.932 (1954), which recognized the wisdom of permitting testimony going to the ultimate issue necessarily involving legal conclusions. There, this Court upheld the opinion testimony of a physician as to his opinion of the cause of the bruises and contusions on the victim's throat and adopted the position stated in 20 Am.Jur. 654, Evidence, § 782:

> " 'It is certainly contrary to the unmistakable trend of authority to exclude expert opinion testimony merely upon the ground that it amounts to an opinion upon ultimate facts. The modern tendency is to make no distinction between evidential and ultimate facts subject to expert opinion. The courts consider that it is more important to get to the truth of the matter than to quibble over distinctions in this regard which are in many cases impracticable.' " 65 So.2d at 88.

Accord, Millar v. Tropical Gables Corp., 99 So.2d 589, 591 (Fla.3d DCA 1958); Gifford v. Galaxie Homes, Inc., 223 So.2d 108, 111 (Fla.2d DCA 1969).

A number of the federal decisions (applying Federal Rule 704, which is identical to Section 90.703 except for the substitution of the word "includes" for "embraces") upholding

the admission of testimony involving "legal conclusions" are set out in Judge Weinstein's treatise on the Federal Rules of Evidence, J. Weinstein, Weinstein's Evidence, ¶ 704[02] at 704-10 at n.8, 9.*

Thus, while such testimony may be excluded where it will not assist the trier of fact (§ 90.702), or where the testimony is not supported by factual data (§ 90.704), it is wholly improper to exclude the testimony, as did the District Court in its opinion in this case, simply because it is based in part upon a "legal conclusion," or because it was "unduly persua[sive]." 8 FLW at 380.

The District Court has articulated no reason why opinion testimony on the ultimate issue should be excluded from consideration in double taxation cases when it is admissible in all other cases. Indeed, the unique and complex nature of such cases, and the fact that they are tried to a judge rather than by a jury, would indicate the desirability of admitting expert testimony in such cases. Clearly, in a non-jury trial, the judge has the authority to accept or reject opinion testimony

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* See, for example, United States v. Clardy, 612 F.2d 1139, 1153 (9th Cir.1980). (IRS agent permitted to testify in criminal jury trial that the "interest deduction [taken by defendant] is not deductible"); United States v. McCauley, 601 F.2d 336, 339 (9th Cir.1979) (government expert witness permitted to testify in criminal jury trial that defendant's machine gun was a weapon required to be registered by federal law); United States v. McCoy, 539 F.2d 1050, 1062 (5th Cir. 1976), cert.denied, 431 U.S.919 (1977) (FBI agent permitted to testify in criminal jury trial that certain bets were "lay-offs," a legal conclusion necessary to sustain the conviction).

and is not bound by the expert's conclusion. South Venice Corp. v. Caspersen, 229 So.2d 652, 656 (Fla.2d DCA 1969). As stated by Judge Weinstein: "In non-jury cases exclusion on [Federal Rule] 704 grounds is almost never justified." ¶ 702[02] at 704-12. Here, the District Court's opinion improperly rejects the opinion testimony in reaching its conclusion, and, without any basis in the record, finds that the learned trial judge was "unduly persuaded" by such testimony. 8 FLW at 380.

CONCLUSION

For the foregoing reasons, this Court should

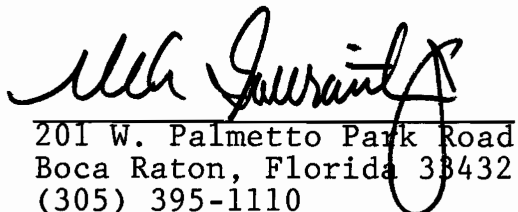
a) answer the certified question in the negative;

b) reverse the opinion of the District Court of Appeal; and

c) reinstate the final judgment entered by the trial court.

Respectfully submitted,

M. A. GALBRAITH, JR.



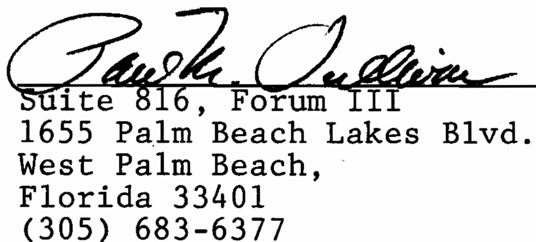
201 W. Palmetto Park Road
Boca Raton, Florida 33432
(305) 395-1110

Attorney for Petitioner
City of Boca Raton

NASON, GILDAN & YEAGER, P.A.
Post Office Box 3704
West Palm Beach,
Florida 33402
(305) 686-3307

-and-

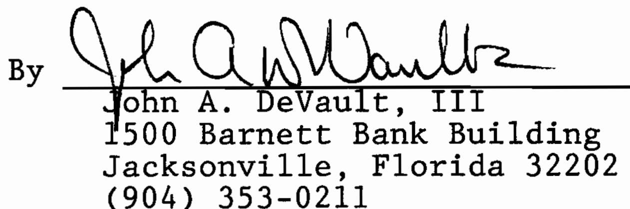
PAUL M. SULLIVAN, JR.



Suite 816, Forum III
1655 Palm Beach Lakes Blvd.
West Palm Beach,
Florida 33401
(305) 683-6377

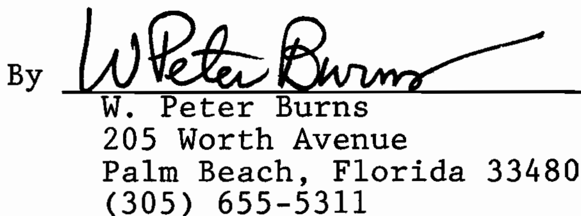
Attorneys for Petitioner
Village of North Palm Beach

BEDELL, DITTMAR, DeVAULT, PILLANS
& GENTRY Professional Association

By 
John A. DeVault, III
1500 Barnett Bank Building
Jacksonville, Florida 32202
(904) 353-0211

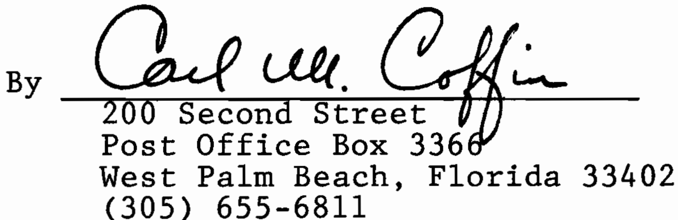
-and-

STEEL, HECTOR, DAVIS, BURNS
& MIDDLETON

By 
W. Peter Burns
205 Worth Avenue
Palm Beach, Florida 33480
(305) 655-5311

Attorneys for Petitioner
Town of Palm Beach

CARL V. M. COFFIN

By 
200 Second Street
Post Office Box 3366
West Palm Beach, Florida 33402
(305) 655-6811

Attorney for Petitioner
City of West Palm Beach

Certificate of Service

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished to:

Robert L. Nabors, Esquire
605 South Palm Avenue
Post Office Box 37
Titusville, Florida 32780

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

Attorneys for Defendant, Respondent, Palm Beach County

and to Paul C. Wolfe, Esquire
602 Flagler Court
Post Office Drawer "E"
West Palm Beach, Florida 33402

Attorney for Intervenor, Respondents

by United States Mail this 7th day of March, 1983.

Attorney