IN THE
SUPREME COURT OF FLORIDA

CASE NO. 65,347

ESCAMBIA COUNTY, FLORIDA,

Petitioner,

vs.

CITY OF PENSACOLA, a municipal corporation,

Respondent.

RESPONDENT'S ANSWER BRIEF

ON ORDER ACCEPTING DISCRETIONARY JURISDICTION TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

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EXPLANATION OF REFERENCES

Petitioner, Escambia County, will be referred to as "the County." Respondent, City of Pensacola, will be referred to as "the City."

The following symbols will be used: (A. ____) refers to pages in the appendix to this brief; (CB ____) refers to pages in the County's initial brief; (R. ____) refers to pages in the record; (PX ____) refers to the City's exhibits; (DX ____) refers to the County's exhibits.

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STATEMENT OF THE CASE AND OF THE FACTS

The County has relegated its factual recitations largely to the Argument section of its brief, and we will follow the County's outline, as to the factual issues it discusses. However, the County excludes any discussion of the history of the double taxation dispute between the City and the County. This history shows that the County led the City along for a three-year period, dangling the possibility of an amicable compromise. The City, acting responsibly, refrained from litigation, only to see the compromise scuttled at the last minute by the political maneuvers of two members of the County Commission. We believe that it is important to recite here the history of this dispute, which the County's brief does not address.[1/]

1. The City brings the double taxation problem to the County's attention.

On October 18, 1978, the City sent its first double taxation resolution to the County. (PX 46). This resolution, in section 2, listed those services which, in the City's opinion, provided no real and substantial benefit to City residents, and were funded from countywide revenues. While the County did not comply with the statutory requirement of

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1/ Throughout this litigation, the County has characterized this as a "political" dispute and implied that it really should not be in court at all. See, e.g., CB 7-8. This history demonstrates that the City resorted to the courts only when it had completely exhausted the available "political" remedies.

responding to the City resolution within 90 days, the County did appear to respond City Attorney Caton's suggestion "to discuss the matter on an amicable basis." (PX 46). Furthermore, as set forth in the County's response of March 15, 1979 (PX 56), the County retained Richard Kelton of the firm of Southern-Kelton and Associates, Inc. "to conduct an independent and impartial review and analysis of Escambia County finances and operations, to ascertain the validity of any claims submitted through 'Resolution No. 82-78.'"

2. The County hires an impartial expert to study the problem.

Mr. Kelton, an expert hired by the County whose testimony was introduced at trial by the City (R. 196 to 237), has performed numerous double taxation studies for local governments in Florida (R. 197), and has testified in Court as a double taxation expert. (R. 201). He was retained by Escambia County "in effect to analyze the resolution which the City had presented and to assist the County in preparing the response to that resolution." (R. 207). Prior to retaining Mr. Kelton, County Administrator Kendig did a background check, and determined that Southern-Kelton & Associates was "a reliable, reputable firm to engage." (R. 43).

In order "to expedite analysis and to make maximum use of staff resources to make sure a bang-up job was done," an advisory committee, consisting of the County Administrator, the County Comptroller, the County Attorney

and the County Budget Officer, was appointed to aid Mr. Kelton. (R. 58).

In determining whether double taxation exists, it is necessary first to determine whether a particular challenged service provides "real and substantial benefit" to City residents or property. If the service does not provide real and substantial benefit, it must then be determined if the service is funded from "non-countywide" revenues. (See generally discussion at pages 12-13 below). Mr. Kelton studied both of these issues. (R. 206).

Concerning the question of benefit, Mr. Kelton concluded that the Sheriff's road patrol and the County local roads (the two services at issue here) provided no real and substantial benefit to Pensacola residents or property. (R. 209; 219). In making his determination as to the road patrol, Mr. Kelton performed a statistical analysis of the road patrol's responses to calls for assistance and determined that only a minute number of the calls "occurred from within, or in assistance to the City of Pensacola." (R. 210). Mr. Kelton also held discussions with Sheriff's personnel, concerning "the basic policies of the Sheriff's office with regard to road patrol zones as to where those patrol zones were drawn, what the routine patrol activities of the officers assigned to those zones were." (R. 210). He concluded that the road patrol and investigation divisions of the Sheriff's office "act as the police force for the unincorporated area of Escambia County." (R. 215).

As to roads, Mr. Kelton looked at the State DOT classification of county-maintained roads, and determined that roads classified by the DOT as local roads serve "the property which abuts those roads." (R. 217).

Because this County-hired expert determined that certain County services provided no real and substantial benefit to City residents, he was required to determine whether such services were funded from non-countywide revenues. Since his Report was concluded prior to the adoption of section 125.01(7), Fla. Stat. (1983), it was limited to a consideration of the use of ad valorem revenues.[2/] Because other County revenues, such as gasoline taxes, cigarette taxes, and federal and state revenue sharing, were sufficient to pay for the complained-of services, the Report concluded that "based on the Manatee decision, that there is no double taxation." (R. 231) Manatee County v. Town of Longboat Key, 365 So.2d 143 (Fla. 1978).

3. City and County staff jointly study the problem.

Soon after the Kelton Report was concluded, the Legislature, responding to the Manatee decision, adopted §125.01(7). This new section prohibited the use of all countywide funds, not just ad valorem taxes, to pay for

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2/ Section 125.01(7) and the Manatee decision are discussed in greater detail later in this brief.

County services which provided no real and substantial benefit to City residents or property. Recognizing that §125.01(7) rendered the Kelton Report's exclusive reliance on non-ad valorem revenue sources obsolete, the City, on July 12, 1979, adopted and sent to the County a new resolution, incorporating by reference the prior resolution, pointing out the effect of §125.01(7) on the Kelton analysis, and requesting appropriate action by the County to eliminate the problem. (PX 48).

During the Summer and Fall of 1979, a "series of discussions regarding items of common interest" (including double taxation) were held between City and County staff. (Letter of City Attorney Caton, PX 48.) During this period, the 1979-1980 County budget was adopted, and it created a small Municipal Service Taxing Unit (MSTU,) funded by a 0.35 mill ad valorem tax, which was at least some response to the City's concerns. The County specifically referred to the MSTU in its response to the City's resolutions. (PX 59). County Administrator Kendig testified at trial that the MSTU in the 1978-1979 budget was only partially funded, and that his intention was to "seek adequate funding for the MSTU in later years." (R. 100). In his testimony, Mr. Kendig confirmed that, in the Fall of 1979, the County "wanted the City to be patient because [the County was] trying to work things out." (R. 99).

The dialogue continued after the adoption of the 1978-1979 budget. On December 27, 1979, County Manager

Kendig and City Manager Steve Garman promulgated two joint memoranda on the issue. (PX 49 and 50).

4. The County Administrator recommends a fully-funded MSTU to alleviate the problem, but the County Commission rejects the recommendation.

In September, 1980, following further discussions between City and County staff, County Administrator Kendig sent his 1980-1981 budget message to the Board of County Commissioners. This budget contemplated an MSTU to provide "funding for services directly delivered to" residents of the unincorporated area of the County. (PX 9). The County Administrator recommended funding $8,067,594 of the costs of the Sheriff's office, Road Operations, and Planning & Engineering from the MSTU. (R. 127).

1980 was the year of the Truth-in-Millage (TRIM) notices, and, as the County Administrator somewhat wryly testified, "[t]here was a very active constituency with regard to the issue of ad valorem taxes in Escambia County." (R. 116). The TRIM notices sent out in September showed an increase in MSTU funding of 777%. (R. 131). Before the political firestorm ended with the adoption of a budget in December (two months after the fiscal year has begun), MSTU funding had been reduced from $8,067,594 to $1,173,526. (R. 146).

In spite of the political pressures, three County Commissioners voted to adopt County Administrator Kendig's

proposed budget, which would have mitigated, if not solved, the problem. However, there was a statutory requirement of a 4/5 vote to adopt the budget, and the proposed budget was defeated. (R. 144). The fact remains, however, that the County Administrator and a majority of the County Commission at least implicitly accepted the conclusion of their own expert that the complained-of services provided no real and substantial benefit to City residents and should be funded from non-countywide revenues.

5. The City makes a final attempt to settle the dispute amicably.

Recognizing the political forces at work during the County's tortured budget process in the Fall of 1980, the City adopted and sent to the County resolution 67-80, dated November 26, 1980, and resolution 70-80, dated December 11, 1980. (PX 52 and 53). Additionally, the City and County stipulated in writing that the City's forbearance from filing a lawsuit prior to the final adoption of the County 1980-1981 budget would not foreclose a later suit by the City directed at that budget. (PX 61; A. 177).

When the County failed to take any steps to remedy the problem, and after the adoption of the 1981-1982 County budget which continued and exacerbated the problem, it became apparent that litigation was the only means by which the City could require the County to comply with the Florida Constitution and statutes, and thereby protect the rights of

City citizens. On November 21, 1981, after the County had utterly ignored its statutory duty to respond to the City's double taxation resolution directed at the 1981-1982 County budget,[3/] the City filed this lawsuit. (A. 46).

ARGUMENT

The County's brief is broken into three sections, dealing with the following issues: the application of the "real and substantial benefits" test; the Sheriff's road patrol; and County local roads. Our response to points two and three is necessarily factual, because the County's brief on these points is factual. The legal arguments in point one relate to both points two and three.

I.

THE TRIAL COURT AND THE DISTRICT COURT CORRECTLY INTERPRETED THE LAW OF DOUBLE TAXATION, AND THE TRIAL JUDGE'S FINDINGS OF FACT ARE CLOTHED WITH A PRESUMPTION OF CORRECTNESS.

A. The law of double taxation.

In the period following World War II, Florida experienced very rapid growth. One result of this growth was the development of tensions between units of local government, arising out of a tax inequity which occurred in cases where the population in the unincorporated portions of a county

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3/ Resolution 38-81, PX 55.

became sufficiently concentrated to require, or demand, municipal-type services. Where previously a few main County highways had been adequate for the needs of rural areas, a system of local streets became necessary to give new sub-division residents access to their homes. Where a small sheriff's office had been adequate to serve the needs of small, mostly rural populations, the new sub-divisions wanted a full line of municipal-type police services.

City residents, already paying city taxes to fund their own local streets and municipal police departments, understandably did not want their county taxes to subsidize these same services to unincorporated area residents. In some cases, city residents sued to redress what they viewed as a serious inequity. See, for instance, Dressel v. Dade County, 219 So.2d 716 (Fla. 3d DCA 1969), cert. dismissed 226 So.2d 402 (Fla. 1969). However, the existing law was not sufficient to deal with the problem, and the inequities continued.[4/]

It was against this background that the Constitution of 1968 was written. The Constitutional Revision Commission, the Legislature, and the people of Florida who voted to adopt the new Constitution provided, in Article VIII, §1(h),

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4/ The County unconvincingly tries to paint Article VIII, §1(h) as some sort of bizarre anomaly: "The only provision in which benefit is a requirement for taxation is Article VIII, Section 1(h)...." (CB 4). The fact is that Article VIII, §1(h), and its implementing legislation, are the only grounds upon which this suit was based.

a legal basis for resolving the tensions, thus arming the courts with the power to correct double taxation:

> Taxes-limitation. 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.

This provision was first construed by this Court in City of St. Petersburg v. Briley, Wild & Associates, Inc., 239 So.2d 817 (Fla. 1970). In that case, this Court focused on the meaning of the phrase "exclusively for the benefit of the property or residents in unincorporated areas," and reviewed in some detail the historical background of the provision in order to determine the meaning of the constitutional language. Finding that an excessively literal reading of the word "exclusively" would do violence to the intent of the framers of the 1968 Constitution, this Court concluded:

> To interpret the language used in this provision to mean that the County could tax city-located property for minute benefits rendered to such property would do violence to the intent and purpose of the framers and of the people in adopting the 1968 Constitution. It is evident from such historical background 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. 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 822-823).

Thus the term "real and substantial benefit," which remains the touchstone of double taxation jurisprudence in Florida, entered the legal lexicon.

The phrase appeared again in this Court's opinion in Alsdorf v. Broward County, 333 So.2d 457 (Fla. 1976) ("Alsdorf I"), where this Court held that Article VIII, §1(h) is "self-executing, and that with or without legislative interpretation the courts will be required to draw the lines between acceptable and prohibited municipal taxation." (333 So.2d at 460).

Quite clearly, however, legislative implementation of Article VIII, §1(h) was desirable, and the Legislature did implement the Constitutional provision by the passage of c. 74-191, which added §125.01(6) to Florida Statutes. That section permits the governing body of a city, by resolution, to identify services which it believes provide no real and substantial benefit to city residents. The county commission is required to respond within 90 days, and either reject the city's complaint, or "develop appropriate mechanisms" to alleviate the problem.

In Manatee County v. Town of Longboat Key, cited above, this Court, recognizing that Article VIII, §1(h) only refers to County ad valorem taxation, ruled:

> We hold that Article VIII, Section 1(h) applies only to property taxation. We are aware of the possibility that with this holding, counties may use revenues not derived from property taxation exclusively for projects benefiting residents and property in unincorporated areas causing a serious imbalance in benefits received between county and municipal property owners and residents. The Legislature must address this possibility. (365 So.2d at 148; emphasis added.)

Responding to this judicial suggestion, the Legislature passed c. 79-87, which created §125.01(7), applying the concept to all County revenues:

> (7) No county revenues, except those derived specifically from or on behalf of a municipal service taxing unit, special district, unincorporated area, service area, or program area, shall be used to fund any service or project provided by the county where no real and substantial benefit accrues to the property or residents within a municipality or municipalities.

In Manatee County and other cases, this Court has also ruled that cities have standing to bring double taxation lawsuits on behalf of their citizens (Manatee County); that a court of equity has the power to require a county to eliminate double taxation which the court finds to exist (Manatee County); and that money judgments against counties are not, in general, available for double taxation

during past tax years.5/ (Manatee County). The Second District has also held that, while a court of equity may order a county to eliminate double taxation, it may not direct the county to follow a particular course to reach the judicially-ordered result. Sarasota County v. Town of Longboat Key, 353 So.2d 569 (Fla. 2d DCA 1977), rev'd in part, 375 So.2d 847 (Fla. 1979).

The law of double taxation today, therefore, is as follows: it is unconstitutional and contrary to statute for a county to use any county revenues, except those derived specifically from the unincorporated area of the County, to pay for any service or program which provides no real and substantial benefit to municipal residents; if a county refuses to eliminate such "double taxation"6/ upon demand by a city, the city may sue to require the elimination of the double taxation; if, after trial, the court finds double taxation to exist, it must direct the county to develop an appropriate mechanism to eliminate it.

"Municipal-type" services

As set forth above, Article VIII, §1(h), and §125.01(6), Fla. Stat. (1983), were adopted in response to

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5/ In the courts below, we argued (unsuccessfully) that Manatee County does not bar an award of damages to the City here.

6/ Since the adoption of §125.01(7), the term "double taxation" is a misnomer, since the prohibition now extends to all county revenues, not just tax revenues. The term double (or dual) taxation persists, however, both in the cases and in legal parlance.

the post-war boom in suburban growth, with the concomitant demand by unincorporated area residents for municipal-type services. Today, county governments, particularly in urbanized counties like Escambia County, are both regional governments for all citizens within their boundaries, and also municipal governments for their citizens living in the unincorporated area. In their first capacity they provide countywide services -- the courts, the jails, the countywide road network, and so on -- for which all county citizens should justly pay. In their second capacity, they provide municipal services -- in particular, police services, and construction, maintenance and repair of local streets -- which should be paid for by the citizens receiving the real and substantial benefit of those services.

This distinction is given constitutional recognition in Article VII, §9(b) of the Florida Constitution, which permits ten mills of County taxation for "county purposes," and an additional ten mills of taxation for "municipal purposes." It is recognized again in §125.01, Fla. Stat. (1983), a section which is peculiarly relevant to double taxation cases.[7/] One of the legislatively-prescribed methods for

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7/ Section 125.01 was amended in 1974 by c. 74-191, which added section 125.01(1)(q), discussed in the text. The Legislative Summary of the Florida House of Representatives of General Bills of the 1974 Session states, as to c. 74-191, 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." (A. 43).

elimination of double taxation is the creation of an MSTU -- a municipal service taxing unit -- to raise revenue from unincorporated area residents in order to pay for municipal-type services enjoyed by those residents. The purpose of such units is made particularly clear by §125.01(1)(q), Fla. Stat. (1981), which authorizes county governments to:

> (q) Establish, 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. (Emphasis added).

The transcript of the 1966 Revision Commission[8/] which drafted the 1968 Constitution makes it very clear that the "municipal-type" services which the Commissioners had in mind included exactly the sorts of services at issue in this lawsuit. Consider, for instance, the following colloquy

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8/ Relevant excerpts from the transcript are attached as part of the Appendix. (A. 10). In order to determine the meaning of the Constitutional section, the Court is "privileged to look at the background of this particular provision." Briley Wild, cited above, 239 So.2d at 822.

between Mr. Martin, the chief proponent of the provision, and Senator John E. Mathews, Jr., of Jacksonville:

> MR. MATHEWS: 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. (A. 16-17)
>
> * * *
>
> MR. MATHEWS: 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. (A. 17-18).

This and other sections of the transcript[9/] show a clear intent that "municipal-type" services, including in

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9/ See, for instance, A. 11; 23; 29-30; 37-38.

particular police protection and local county roads, should be paid for by the people who receive the benefits of these services. See also Comment, Toward Solving the Double Taxation Dilemma Among Florida's Local Governments: The Municipal Service Taxing Unit, 8 Fla.St.U.L.Rev. 749 (1980).

B. Standard of review.

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 re-evaluate 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 taxation cases where each challenged service raises peculiar factual questions, 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 v. Broward County, 373 So.2d 695, at 700-701, (Fla. 4th DCA 1979), cert. denied 385 So.2d 754 (Fla. 1980) ("Alsdorf II"); Manatee County v. Town of Longboat Key, 352 So.2d 869, 872 n. 4 (Fla. 2d DCA 1977), rev' d in part on the other grounds, 365 So.2d 143 (Fla. 1978).

Recognizing that Judge Gordon's ruling against the City on the issue of the Sheriff's investigation division was based upon competent, substantial evidence, we did not appeal that ruling (although we disagreed with it). The County, however, apparently believes that it is entitled to a third bite at the apple in this Court, on factual as well as legal issues, and so recites its view of the evidence on the road patrol and the local roads in excruciating detail. While we urge this Court to recognize that the resolution of factual disputes was a task reserved to the trial court (and secondarily to the District Court), we have little choice but to respond to the County's biased presentation of

disputed factual matters. We note, however, that -- with the sole exception of Palm Beach County v. Town of Palm Beach, 426 So.2d 1063 (Fla. 4th DCA 1983), ctfd. question ans., remanded, 9 Fla. Law Weekly 448 (Fla., opinion filed October 18, 1984) (discussed in detail below) -- the common thread among the decisions of various appellate courts in double taxation cases is that the trial court's determination of a "real and substantial benefit" question has always been upheld. In every case (except Palm Beach) 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., cited above; Burke v. Charlotte County, 286 So.2d 199 (Fla. 1973); Alsdorf II, cited above; Manatee County v. Town of Longboat Key, cited above; Sarasota County v. Town of Longboat Key, 400 So.2d 1339 (Fla. 2d DCA 1981); City of Ormond Beach v. County of Volusia, 383 So.2d 671 (Fla. 5th DCA 1980).

In his final judgment, Judge Gordon recognized the factual nature of the case:

> The decision of the dual taxation case rests on the peculiar facts of each case and each budget year . . . . [T]he trial judge must carry the burden of determination based on the realities of each case and the courts have not evolved a philosophic position to solve what is essentially a factual problem . . . . [I]t is therefore the duty of the trial judge to resolve the facts based on the evidence before him. (R. 1807; A. 7).

As discussed below, Judge Gordon had competent, substantial evidence to support his findings of fact, and these findings amply support his conclusions of law. Particularly where, as here, the services challenged are precisely of the sort which the framers of Article VIII, §1(h) had in mind, the factual findings of the trial judge must be accepted by this Court.

C. Effect of the Palm Beach case.

In our view, the decisions of the trial and district court here are in complete harmony with the recent decision of this Court in the Palm Beach case. Palm Beach does not change in any way the law of double taxation as set forth above. Rather, Palm Beach simply states that the trial judge there misapplied that law to the particular facts presented to him at trial.

Here, both Judge Gordon (when he denied the County's petition for rehearing), and the First District Court of Appeal, had the benefit of the Fourth District's opinion in Palm Beach. Both courts found that the facts presented by the City of Pensacola were sufficiently dissimilar from those presented by the cities in Palm Beach to justify distinguishing the two cases. In affirming the Fourth District's decision in Palm Beach, this Court has not said anything that makes the decision here legally inconsistent

with Palm Beach. Indeed, this Court reaffirmed the essentially factual nature of double taxation cases:

> As the district court has previously noted, any decision concerning article VIII, section 1(h) "is limited to the facts, taxable years, and circumstances of [the] particular case . . ." Alsdorf v. Broward County, 373 So.2d 695, 701 (Fla. 4th DCA 1979), cert. denied, 385 So.2d 754 (Fla. 1980). Accordingly, any decisions concerning the dual taxation issue must be carefully scrutinized to ascertain the facts existing in the individual county.
>
> (9 Fla. Law Weekly at 449).

We hope to demonstrate below that the trial judge and the First District correctly applied the law of double taxation, and were eminently justified in factually distinguishing this case from Palm Beach.

II.

JUDGE GORDON'S FACTUAL DETERMINATION THAT THE SHERIFF'S ROAD PATROL PROVIDES NO REAL AND SUBSTANTIAL BENEFIT TO CITY RESIDENTS OR PROPERTY IS BASED ON COMPETENT, SUBSTANTIAL EVIDENCE.

Contrary to the County's assertion (CB 14), our case on the road patrol consisted of a great deal more than the testimony of Mr. Chambers and Chief Goss, the statistical study of recorded complaints, and the Sheriff's patrol district map. There was, for instance, the testimony of Richard Kelton, the double taxation expert hired by the County (but not, for obvious reasons, used by the County at trial), that in his opinion, based upon his exhaustive

analysis of the factual background, the Escambia County Sheriff's road patrol "did not provide real and substantial benefit." (R. 209).[10/] There was the testimony of Captain Norman Silcox, commander of the road patrol, that the road patrol "operates as the police officers for the unincorporated areas," and "does not give police protection within the city." (R. 240). And there was the testimony of Dr. George Kelling, executive director of the program in criminal justice policy management of the Kennedy School of Government at Harvard University, that "the visibility gained from having sheriff's patrol cars drive through areas of the city would be minimal. Research would suggest that citizens wouldn't recognize it as an increase in terms of the total patrol force of the com- munity. Crime would not go down. Citizen fear would not be reduced. And citizen satisfaction with police services would not be increased." (R. 325).

The expert testimony of Mr. Chambers, and the statistical study performed by Dr. Sherry, were of course central to our case. In order to put this testimony in proper perspective, it is necessary to review the

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10/ We recognize that Palm Beach makes such opinion testimony on the ultimate legal issue inadmissible. However, it does not render inadmissible Mr. Kelton's analysis of the benefit provided by the Escambia County Sheriff's road patrol, and that analysis was certainly properly considered by Judge Gordon.

qualifications of these experts, and the tasks assigned to them by the City.

Robert F. Chambers

Mr. Chambers is the President of Planned Management Corporation in Tampa. (R. 479). Planned Management is "a management research and systems development consulting firm, primarily dealing with local and state government agencies." (R. 484). In addition to studying the issue of double taxation in Escambia County, Planned Management has conducted studies of double taxation in Hillsborough County in late 1976 and again in 1982, in Lee County, in Polk County, in Brevard County, and in St. Lucie County. (R. 488).

In conducting his study of possible double taxation in Escambia County, Mr. Chambers devoted approximately 600 hours of his own time, and an additional 300-400 hours of staff time. (R. 492). Mr. Chambers sat in at a majority of the depostions taken, reviewed the County's service delivery patterns, the County's budgets, the County's overall organizational structure, and the funding sources for County services, "looked at a tremendous number of records that reflect where and how services are delivered," and "had extensive numbers of interviews with County staff." (R. 491).

Mr. Chambers was retained by the City in November of 1981. He was asked to "conduct a study of the County services as they existed at that time within the Escambia County government, and to determine if and to what extent double taxation might exist." (R. 491). He was not directed to find that double taxation in fact existed (R. 491), and indeed after completing his study he determined that several County services which the City had listed in its resolution either were of countywide benefit, or were funded entirely from non-countywide revenues. (R. 501-504). The City made no claim for these services at trial.

Concerning those services which he did conclude resulted in double taxation -- that is, the Sheriff's road patrol and investigation divisions, and the County local roads -- Mr. Chambers determined that the total identified costs of these services in 1981-1982 exceeded the non-countywide revenues available to pay for them by $6,515,812. (R. 552). Mr. Chambers recognized that this figure was only an approximation, but noted that the size of the figure confirmed that double taxation, in a substantial amount, existed in Escambia County. (R. 555). An exact figure was not, of course, critical, because of Judge Gordon's order striking the City's claim for damages.

David L. Sherry

David L. Sherry, the Chairman of the Department of Mathematics and Statistics at the University of West

Florida, has a B.A. in mathematics from Wheeling College, and an M.A. and Ph.D. in mathematics from the University of Pittsburgh. (R. 435). He has extensive experience in the design of statistical samples. (R. 435 - 436).

Dr. Sherry was retained by the City in March, 1982, "to determine to what respect the operations in the Sheriff's Department involved the City of Pensacola." (R. 437). The nature of the statistical studies performed by Dr. Sherry, with the assistance of his wife, Margaret, is described in greater detail below.

A. Nature of the Road Patrol.

The road patrol has approximately 125 patrol deputies. (R. 238). The patrol operates out of substations at Century, Cantonment, Big Lagoon and Pensacola Beach, all located in the unincorporated area of the County. (R. 282).

The patrol districts do not encompass any portion of the City of Pensacola. (R. 239). Patrol district lines are changed from time to time, based upon population changes. (R. 239). However, only unincorporated area population is considered in drawing patrol district lines; City population is not counted. (R. 139).

The primary purpose of the road patrol is to respond to and make initial investigation of calls for service. (R. 240). Patrol deputies are equipped with a cruiser car, and various police paraphernalia. (R. 240).

The patrol division operates as the police force for the unincorporated area of the County, and does not give police protection within the City. (R. 240). Patrol deputies are comparable to patrolmen in a municipal police department. (R. 280). According to Pensacola Police Chief Gross, requests for assistance received by the Sheriff from City residents are normally referred to the City police department, just as requests to the City police department from unincorporated-area residents are referred to the Sheriff. (R. 297). On cross-examination, Lou Reiter, the County's law enforcement expert, confirmed that a request for assistance from a City resident is referred to the City police department unless the caller makes a specific request for a deputy sheriff. (R. 1095-1096). Judge Gordon accepted this testimony and included it in the final judgment. (R. 1803).

In order to measure the benefits provided by the road patrol to City residents, Dr. Sherry was retained to do a statistical analysis of the Sheriff's recorded activities. (R. 437). After investigation, Dr. Sherry based his analysis on the complaint numbers assigned by the Sheriff to each recordable incident handled by the Sheriff's office. Mr. Kelton, the County's first expert, confirmed that such a study would be "a fair and usuable sample for double taxation purposes of the work done by the Sheriff's Department." (R. 211).

As described by Captain Grant, the head of the Sheriff's support services division, a complaint card is generated and a complaint number is assigned, "any time that a call is received through communications, whether it be by telephone or by an officer in the field, or whatever, and some action is going to be taken on a particular complaint. This card is generated and assigned a complaint number. And that number follows a case all the way through to final disposition." (R. 284). Thus, as Captain Grant confirmed, "there will be a complaint number assigned for each recordable police activity." (R. 284).

In making his statistical study, Dr. Sherry looked at two periods: September, 1981 through March, 1982 (six months); and September, 1980 through September, 1981 (twelve months). (R. 437). He then conducted a statistically valid review of complaint numbers during this period.[11/] For each complaint number sampled, there would be at least a "Miscellaneous Incident Report" card ("MIR"), showing the location of the incident and the nature of the disposition. (R. 456). In cases where there was some follow-up activity,

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11/ During the twelve-month period, approximately 77,000 complaint numbers were issued by the Sheriff. (R. 438). Dr. Sherry determined that, to do a statistically reliable sample, he would need to review the data on approximately 1000 complaint numbers. (R. 438). Eventually, he sampled every seventy-fifth number, giving a sample size of 1043. (R. 439). The County does not appear to contest the statistical reliability of the sample.

there might also be a "deputy field report." (R. 456). In the case of each sampled number, the MIR's were examined for the location of the incident, and the deputy field reports were analyzed, and all addresses on the report were copied. (R. 439). From the addresses on the MIRs and the deputy field reports Dr. Sherry determined how many complaint numbers either involved incidents occurring within the City, or incidents where the victim of the crime, or the owner of involved property, was a City resident. (R. 439).

The sample revealed that 3.7 percent of all complaint numbers related to incidents which either occurred within the City, or which involved a City victim or owner. (R. 441). Using the identical methodology, the six-month study revealed that 3.8 percent of the complaint numbers in that study related to incidents which either occurred within the City, or involved a City victim or owner. (R. 442). These numbers included, because of City locations, such services as funeral escorts (R. 442), and service calls, and these services were counted as a "benefit" to City residents. (R. 442).

The documents which formed the basis for this study -- that is, the MIR cards and deputy field reports for the sampled complaint numbers -- were copied by Dr. Sherry's assistant (Margaret Sherry) and introduced in evidence. (R. 808; DX 95). The County suggests in its brief (CB 19) that

Dr. Sherry's study is not valid, because there were allegedly other files he did not review. The testimony concerning the existence of other, non-duplicative files is, at best, inconclusive. However, if the County felt that other Sheriff's files concerning the same complaint numbers might have shed more light on the question of benefit, the County certainly had sufficient opportunity to review whatever other files there might be and attempt to impeach Dr. or Mrs. Sherry's testimony. This they did not do. Rather, they hypothesize what these phantom files might have shown, had they been reviewed. (CB 22, n.14). Surely it is not error for a trial judge to accept hard facts over unsubstantiated speculation.12/

In addition to his study of complaint numbers, Dr. Sherry performed a study of traffic tickets issued by the road patrol, and determined that 2.8% of the tickets were confirmed to have been issued in the City. (R. 511, CB 19). By thus reviewing the complaint number reports and the traffic citations, all recorded activities of the road patrol were traced. (Testimony of Captain Grant, R. 286).

12/ We are not attempting to shift the burden of proof to the County. We are simply saying that we presented competent, substantial proof tending to show lack of benefit, and the trial judge was entitled to accept that proof to the extent it was not effectively eliminated either by cross-examination or by the County's case-in-chief. The evidence by which the County attempted to impeach the testimony is simply insufficient to require the trial judge to disregard or discredit Dr. Sherry's statistics.

Dr. Sherry's figures certainly support, if they do not compel, the conclusion that the recorded activity of the road patrol provides only a minuscule benefit to City residents and property.

Apparently recognizing this, the County sought to discredit the City's case in three ways: through the testimony of an individual road patrol deputy as to the benefits he allegedly provides to the City; by an attempt to expand the concept of "benefit"; and by an attempt to show "indirect benefits" allegedly not picked up by the City's statistics. These attempts simply do not withstand analysis.

The testimony of deputy Scherer (CB 15-16) was that he had given "probably a couple hundred" traffic citations in the City during a three-year period, and "would assist a City police officer potentially in trouble on the average of once a night or 'maybe every other night.'" (CB 16; R. 1019). God bless him if it's true, but the fact remains that his traffic citations would have been picked up in Dr. Sherry's study of traffic citations, and the assists to City officers would have been picked up in the study of complaint numbers (a "back-up" to the City police department is assigned a complaint number, according to Captain Grant, R. 289). Thus, deputy Scherer's testimony in no way affects

the weight of the City's statistical evidence.[13/]

County witness Randy Young testified that, in addition to the categories of benefit used by David Sherry, an incident should be deemed of benefit to City residents or property if it involved a City resident or a transient (i.e. anyone not a resident of Escambia County) as a victim, witness, suspect, or property owner. (R. 1158-1159). He then applied these criteria only to those complaint number files in Dr. Sherry's 12-month sample which contained deputy field reports, because those files with MIRs only, in his opinion, did not "provide complete information . . . ." (R. 1158).

By thus restricting the sample only to a portion of the Sheriff's reported activities, and by relying upon a patently ridiculous definition of "benefit," Mr. Young

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13/ In any event, the figures cited by Deputy Scherer are a bit hard to swallow. If he works 5 nights a week, 50 weeks a year, and gives an assist to a City police officer on the average of 3 nights per week, he should have given a total of 150 assists (and so received 150 complaint numbers for back-up) during the period of Dr. Sherry's 12-month sample. During that period, there were 77,000 total complaint numbers assigned, and 3.7% of these, or approximately 2850, were counted by Dr. Sherry as being of City benefit. "Back-up" calls would of necessity involve a City location and so be counted by Dr. Sherry as being of City benefit. It would appear, therefore, that Deputy Scherer's back-up calls, alone, would have amounted to 150 of the total of all 2850 "City benefit" calls, or about 5% of all such calls. As to traffic citations, the figures are even more startling. Dr. Sherry's testimony was that 6000 citations were issued during the year his sample covered, and 2.8% were definitely within the City. (R. 444-445). Thus, during that year, approximately 168 total citations were issued by the Sheriff in the City. If Deputy Scherer was issuing about 67 a year in the City during that period (a total of 200 in 3 years) then he was personally responsible for about 40% of the Sheriff's citations issued in the City.

managed to come up with higher figures for "benefit" than had Dr. Sherry. Certainly the trial judge was within his range of discretion in paying little or no attention to a study based upon a concept of "benefit" that would suggest that a City resident is "benefited" by getting arrested for disorderly behavior by a Sheriff's deputy in a rural area of Escambia County; or that City residents are benefited by the arrest of a hitchhiker from New Orleans, on his way from Mobile to Tallahassee on I-10; or that City residents are benefited if a deputy Sheriff recovers a car stolen from a resident of Boulder, Colorado and driven by the thief to rural Escambia County.

The inclusion of the "witness" category in Mr. Young's test is perhaps the most telling example of the lengths to which Mr. Young went to achieve favorable statistics. Under Mr. Young's testimony (R. 1301-1302), if a resident of Fairbanks, Alaska was driving on a dirt road in rural Escambia County, and came upon an unincorporated area resident drunk, and -- in a fit of temperate outrage -- called the Sheriff and had the drunk arrested for public intoxication, City residents and property would be benefited, because of the moral satisfaction the transient would receive from seeing justice done. Similarly, if a resident of Mobile witnessed a car accident (not involving City residents) on I-10, and the accident was investigated by a road patrol deputy, the incident would, according to Mr

Young, be of benefit to City residents.[14/]

As to the "indirect benefits" mentioned by the County (CB 24-25), the fact is that most of these "benefits" would be picked upon in Dr. Sherry's figures. Thus, assistance to investigators would be listed in Dr. Sherry's figures if the matter being investigated occurred within the City, or involved a City victim or property owner.

Similarly, assists by the Sheriff to the City police department are assigned complaint numbers and so would appear in Dr. Sherry's figures. (See discussion at p. 27 above.)

As to benefits which are truly "unmeasureable," the alleged benefit most often mentioned is "the crime deterrent

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14/ Besides rejecting Mr. Young's testimony because his definition of "benefit" was obviously intended solely to maximize his percentages, Judge Gordon was also entitled to reject Mr. Young's entire testimony because of the gross, flagrant error in one of the exhibits essential to his conclusions. While the County seeks to pass off this error as "inadvertent" and one which "did not alter the thrust of [the] testimony" (CB 28, n.23), the fact of the matter is that Mr. Young sought to use the exhibit (DX 14) to show that the Sheriff has issued vast numbers of DUI/DWI citations inside the City of Pensacola -- a clear benefit to Pensacola residents. (R. 1164). Mr. McClelland, counsel for the County, attempted to use the exhibit for the same purpose in his cross-examination of Mr. Chambers. (R. 612). Problem was, as Mr. Young reluctantly conceded on cross-examination, the great majority of the dots on the map in fact represented DUI/DWI arrests by the Pensacola Police Department and the Florida Highway Patrol, not the Escambia County Sheriff's Department. (R. 1332- 1342). In fact, a review of defendant's exhibit 17 will show that out of a total of 263 tickets represented by Mr. Young as having been issued by a "patrol division deputy" (R. 1332), over 100 were in fact issued by the Highway Patrol, 100 were issued by the City Police Department, and 64 were issued by the Sheriff -- and of these 64, only 10 were issued by the Sheriff within the City. (R. 1336).

factor resulting from the visibility of marked sheriff's patrol vehicles in and around the municipalities." Palm Beach County v. Town of Palm Beach, 426 So.2d 1063 (Fla. 4th DCA 1983) ctfd. question ans., remanded, 9 Fla. Law Weekly 448 (Fla., opinion filed October 18, 1984); see also Alsdorf II, cited above, 373 So.2d at 700 ("In addition, all 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.") Here, however, the record contains the testimony of both Dr. Kelling (R. 324), and Chief Goss (R. 299), that visibility of marked police vehicles simply has no deterrent effect on crime.

This Court's holding in Palm Beach, of course, focused on "unquantifiable" benefits provided by the Palm Beach County road patrol. To demonstrate the factual differences between the proof offered here and the proof offered in Palm Beach, it is helpful to compare the discussion of "unquantifiable" benefits in this Court's opinion in Palm Beach with the evidence concerning the same benefits offered here. In Palm Beach, this Court stated:

> [Palm Beach County] presented numerous former and present police officers who testified to benefits which are extant but non-quantifiable. For instance, the respondents presented evidence that reduction of crime in the urban unincorporated corridor between the turnpike and the municipalities' boundaries will necessarily have some spillover effect by curtailing the movement of crime into the cities. Testimony was presented concerning the ever-present standby capability of the sheriff's department, which is available to assist any municipality in times of emergency or when requested. Municipal residents often

> travel in the unincorporated areas and thereby temporarily fall within the protective jurisdiction of the sheriff. Whenever called upon by a municipality, though historically infrequently, the sheriff's patrol and detective divisions have responded.
>
> In addition, it is undisputed that the assist chart prepared by petitioners reflects only the minimum number of times a deputy-sheriff has entered a municipality to give aid or assistance to municipal residents. The sheriff stated that many noncrime municipal assists are likely to be unreported by deputies. The petitioners concede that the assist chart does not reflect time, money or effort expended in each assist. The evidence at trial was substantial that the majority of reported intermunicipality assists involved nonroutine matters requiring above average expenditures of deputy time, money and expertise. Finally, the quantified assist chart failed to fully account for assists such as the recovery by the sheriff's office of property stolen in a municipality.
>
> (9 FLa. Law Weekly at 449-450).

As to the "spillover effect," there was similar testimony here. It hardly seems likely that any professional law enforcement officer would testify that effective law enforcement in one jurisdiction does not aid law enforcement in contiguous jurisdictions. However, when questioned on this point, Dr. Kelling testified that "there is simply no [empirical] evidence which would suggest that activities in one are would have a substantial impact in other areas." (R. 326). Indeed, since testimony on the issue is at best conjecture, we might just as easily conjecture that criminals would stay out of the City and prey only upon the

unprotected citizens in the County if the road patrol were discontinued. This hypothesis is no more or less plausible than the County's hypothesis.

As to the "back up" or "standby" capacity of the Sheriff, the fact is that it is not "unquantifiable" -- we measured in in our statistics. As noted above, Captain Grant's testimony (R. 289) shows that back-up calls are assigned complaint numbers. The County has not even suggested that the years we measured were in any way unrepresentative of the ordinary activities of the road patrol. Thus, the statistics confirm that the "back-up" capability of the Sheriff does not, in practice, provide a real and substantial benefit to City residents or property.

Similarly, the protection of City residents travelling in the unincorporated area was measured here. MIR cards and Deputy Field Reports both show the address of the complainant or victim, and these addresses were checked by Dr. Sherry and counted as a benefit if the complainant or victim was a City resident.

As to property stolen in a municipality and recovered in the County, our statistics (unlike those in Palm Beach) showed the recovery as a benefit if the owner of the property was a City resident.

Clearly then, as to reported activities of the Sheriff, our statistics were far more complete than those in Palm Beach. We included "back-up" calls; we included assists to municipal residents while in the unincorporated

area; we included calls in the unincorporated area involving crimes having a City victim; and we included calls where the owner of recovered property was a City resident.

The bulk of a Deputy Sheriff's time, of course, is not spent answering recorded calls. On that point, at least, we agree with the County. (CB 22). The County appears to argue, however, that all this "non-quantifiable" time must be assumed to be of real and substantial benefit to City residents. Such a position is utter nonsense. The road patrol does not purport to patrol, or otherwise provide police services, within City limits. Therefore, to the extent that road patrol deputies engage in activities which do not generate a complaint number (routine patrol being the most significant such activity), the activities are almost certain to occur in the unincorporated area, and benefit citizens of that area.[15/] If anything, therefore, the statistics generated by Dr. Sherry's study exaggerate, rather than understate, the "benefit" provided by the road patrol to City residents or property, because they emphasize the rare cases when a road patrol deputy actually ventures into the City and provides a service.

The final judgment explicitly reflects that Judge Gordon considered all of the benefits, including "indirect

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15/ The County's law enforcement expert, Mr. Reiter, conceded that he would expect road patrol deputies to spend "the vast bulk of their efforts" in their assigned zones. (R. 1104). These zones do not include any portion of the City.

benefits," which the County argued were provided by the road patrol, and found that such benefits, taken together, were not real and substantial. The District Court's decision confirms that Judge Gordon's analysis was consistent with the Fourth District's opinion in Palm Beach. (448 So.2d at 10). For reasons set forth above, this factual finding is based upon competent, substantial evidence and so must be affirmed.

III.

JUDGE GORDON'S DETERMINATION THAT THE COUNTY LOCAL ROADS PROVIDE NO REAL AND SUBSTANTIAL BENEFIT TO CITY RESIDENTS OR PROPERTY IS BASED ON COMPETENT, SUBSTANTIAL EVIDENCE.

Section 335.01, Fla. Stat. (1983) divides all public roads in the state into four categories:

1) the state highway system;

2) the state park road system;

3) the county road systems; and

4) the city street systems.

Pursuant to §336.02, Fla. Stat. (1983), the Board of County Commissioners of each County is responsible for the "general superintendence and control of the county roads and structures within their respective counties ...." The "county road system" placed by Chapter 336 under the supervision of the Board of County Commissioners is defined by §334.03(23), Fla. Stat. (1983) as follows:

(23) "County road system."--The county road

system of each county shall consist of all collector roads in the unincorporated areas and all extensions of such collector roads into and through any incorporated areas, all local roads in the unincorporated areas, and all urban minor arterials not in the state highway system.

The terms "collector roads," "local roads," and "urban minor arterial roads" are, in turn, defined by §334.03(16), (17), and (21) as follows:

> (16) "Collector road."--A route providing service which is of relatively moderate average traffic volume, moderately average trip length, and moderately average operating speed. These routes also collect and distribute traffic between local roads or arterial roads and serve as a linkage between land access and mobility needs.
>
> (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.
>
> * * *
>
> (21) "Urban minor arterial roads."--Routes which generally interconnect with, and augment, urban principal arterial routes and provide service to trips of shorter length and a lower level of travel mobility. Minor arterial routes include all artierials not classified as principal and contain facilities that place more emphasis on land access than the higher system.

In order to assign to the various governmental bodies their respective responsibilities, the Legislature adopted §335.04, Fla. Stat. (1983), which requires the State Department of Transportation ("DOT"), not later than October 1, 1977, to adopt a plan for the functional classification

of all roads, and to classify every public road every five years, beginning no later than July 1, 1982. The DOT has functionally classified the roads in Escambia County, and the County now has the responsibility to construct, maintain and repair all roads functionally classified as "county roads."

The City contended, and Judge Gordon found, that the County roads classified as "local roads" by the DOT provide no real and substantial benefit to City residents or property. Such roads are, by statutory definition, all located in the unincorporated area of the County, and have "low average traffic volume, short average trip length or minimal through-traffic movements, and high land access for abutting property." §334.03(16), Fla. Stat. (1983). The statutory definition, that is, fully supports Mr. Chambers' statement that the purpose of local roads is "to access the abutting properties that those roads go into and out of." (R. 522).

Mr. Royace Pitts, District Manager for the DOT's Third District (which includes Escambia County) testified to the manner in which the roads in Escambia County were classified by the DOT. First, the DOT commissioned Wilbur Smith & Associates to prepare a study of highway classification systems in Florida. (R. 368). This study, entitled "1990 Land Use and Functional Highway Classification Systems in Florida," was introduced in evidence as PX 63. The study, and its back-up and explanatory material, was used by the DOT during its statutorily-mandated classification of

roads in Escambia County. (R. 368-369). Using the study, the DOT went on to study individual roads in each County and, as testified to by Mr. Pitts, "we took maps and sketched lines on them, went out and reviewed them, and then came up with a decision as to whether or not that we thought in our best engineering judgment that it should be a collector road or --" (R. 371). These maps were then reviewed in Tallahassee, and local hearings were advertised. In Escambia County, no local hearing was held because "[n]o one showed for the public hearing." (R. 372). Since the classification has been made, the County has not availed itself of its statutory right to seek reclassification of any road. (R. 374).

In reaching his conclusion that the local roads present a double taxation problem, Mr. Chambers reviewed the DOT classification of roads in Escambia County, and the Wilbur Smith report, rode the roads in the County (R. 530), and participated in interviews of Mr. Pitts and other DOT personnel. (R. 520-521). PX 94, 95 and 96 are schematic diagrams taken from the Wilbur Smith report, and used by Mr. Chambers to demonstrate, in a very graphic way, the nature of local roads, and the fact they benefit the people who live on them. (R. 521-525).

The County's expert, Mr. Kelton, had also reached the conclusion that the local roads in Escambia County

provided no real and substantial benefit to City residents or property. (R. 217-219). The methodology of Mr. Kelton's study of this issue was similar to, although not nearly as thorough as, Mr. Chambers' study. Mr. Kelton did not, for instance, review the Wilbur Smith Report, or interview the DOT personnel who made the road classifications.

Based upon the evidence presented at trial, Judge Gordon found the following facts as to the County local roads:

> Services provided by the Escambia County Road Operations Department on roads classified as local roads by the Florida Department of Transportation, whether located in an urbanized or rural area of the County, provide no real and substantial benefit to the citizens or property within the City of Pensacola under the requirements of Article VIII, §1(h), Florida Constitution and §125.01(7), Florida Statutes ... . Local roads ... are those roads which mainly serve as subdivision roads and are used primarily by persons going to and from places of residence. When traveling through unincorporated areas of the County, citizens of the City of Pensacola will not customarily utilize the subdivision or local roads but are likely to use arterial and collector roads. Local roads primarily serve abutting property owners. All of the County's local roads are contained in the unincorporated areas of the County. Primary benefits of local roads are to the people who live on them.
>
> Mr. Victor Poteat testified for the County that the local roads in the "Pensacola urbanized area" may be used by City residents, but it appears to the Court that the primary beneficiaries of the local roads are the people who live on them. Indeed, it is the urbanization of the unincorporated areas surrounding Pensacola which has given

> rise to the need for a system of local County roads, principally subdivision roads, and the clear purpose and actual use of those roads is to provide access for unincorporated area residents.
>
> Based upon all the evidence presented, the Court concludes that County local roads provide no real and substantial benefit to City residents or property. This finding applies to all County departments engaged in planning, engineering, construction and maintenance of these local roads and drainage projects. These include the Road Operations Department and that portion of the Planning and Engineering Department which relates to and supports the road function.
>
> The City of Pensacola is part of a large urbanized area. A significant portion of the major employers, shopping and medical facilities in the Pensacola area are located outside the City limits of Pensacola. As the County contends, road access to and from these facilities do unquestionably provide a real and substantial benefit to the citizens and property of the City of Pensacola. The Court finds, however, that the overwhelming majority of travel to and from these places is done on arterial or collector roads which the City here admits do provide a real and substantial benefit. Local roads, on the other hand, do not customarily enhance or facilitate travel by City residents to and from the places mentioned. (R. 1804-1805).

As with the road patrol, the County's brief as to local roads seeks a third bite at the factual apple. Thus, the County spends 3 pages (CB 44-46) reviewing the testimony of Victor Poteat, who was tendered and accepted solely as an expert in traffic engineering, not traffic planning. (R. 659). The County does not point out that Mr. Poteat did not

weather cross-examination particularly well,[16/] and does not point out that Judge Gordon explicitly considered, and rejected, Mr. Poteat's conclusions in the final judgment. (R. 1805).

Similarly, the County discusses (CB 48) Paul Hazucha's testimony concerning the environmental benefits of drainage projects on local roads, but entirely fails to note that, on cross-examination, Mr. Hazucha was forced to admit that the environmental problem (siltation) which was corrected had been caused initially by the building of the local roads which the drainage projects served. (R. 713; 720). Some benefit.

To the extent the County seeks to make a legal argument, the argument appears to be based on Burke v. Charlotte County, and Palm Beach County v. Palm Beach, both cited above. As to Burke, the plaintiff there challenged expenditures on all County roads in the unincorporated area, not just local roads. The trial court found that the entire system of County roads was of benefit, and the Supreme Court

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16/ Mr. Poteat, for instance, made a very big deal of the "Escambia County urbanized area" allegedly delineated in the Pensacola Urban Area Traffic Study (PUATS). He failed to note, however, until cross-examined, that the urbanized area delineated in PUATS contains large sections of Santa Rosa County as well, and indeed extends east of Milton. (R. 695-699). The "urbanized area" used by Mr. Poteat conveniently excluded any portion of Santa Rosa County.

affirmed. As we agree that county-maintained collector and minor arterial roads are of countywide benefit, we have no quarrel with Burke; it is simply not applicable here.

As to Palm Beach, it does not appear that the Plaintiff cities offered explicit proof concerning the classification of local roads by the DOT; indeed, it appears that the opinion of the cities' expert witness was the sole basis for the cities' case on local roads. As set forth above, the City here had far more than Mr. Chambers' testimony; based upon all the evidence presented, Judge Gordon made explicit factual findings (R. 1805) concerning the nature of local roads, and the use, or rather non-use, of local roads by City residents. The County does not even attempt to suggest that these explicit findings are without support in the record, and indeed the findings are supported by, among other things, concessions made by Mr. Poteat on cross-examination.[17/] Thus, whatever the deficiencies in proof in Palm Beach, those deficiencies have been overcome here.

17/ Mr. Poteat testified about "traffic attractors" in the unincorporated area, and sought to convey the impression that these attractors would draw City residents onto County local roads. On cross-examination, however, Mr. Poteat conceded that "a large number" of the attractors are in fact located on collector or arterial roads. (R. 687). Thus, City residents would not use local roads to get to the attractors.

As this Court noted in Palm Beach, it is permissible for a city to challenge all local roads, instead of individual local roads. Unlike the District Court in Palm Beach, this Court recognizes that the DOT and the Florida statutes treat County local roads as a system, separate from collectors and minor arterials. It is the service provided by this system of roads which Pensacola here challenges, as specifically provided for in section 125.01(6)(a), Fla. Stat. (1983). Where, as here, the developed and accepted statutory standards, applied by disinterested state bodies, combine with testimony of locally-knowledgeable officials to show that the County service or program which provides a road system is meant to serve unincorporated-area residents and in fact does serve such residents, the County cannot defeat the City's case by suggesting that an insignificant portion of the service is of benefit to municipal residents. Given the proof here, Judge Gordon's ruling was amply supported and must be affirmed.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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-and-

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this Respondent's Answer Brief and Appendix thereto have been furnished, by mail, to THOMAS R. SANTURRI, ESQ. County Attorney, 14 West Government Street, Pensacola, Florida 32501; ROBERT L. NABORS, ESQ., P.O. Box 37, Titusville, Florida 32781; BARBARA STAROS HARMON, ESQ., Department of Legal Affairs, The Capitol, Room 1104, Tallahassee, Florida 32301; and MILES DAVIS, ESQ., Beggs & Lane, Blount Building, Pensacola, Florida 32501, this 4th day of December, 1984.

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By: W. Peter Burns
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