IN THE SUPREME COURT OF FLORIDA

CITY OF BOCA RATON, FLORIDA

Appellant,

vs. NO. 77,468

STATE OF FLORIDA, et al.,

Appellees.

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BRIEF OF AMICUS CURIAE FLORIDA LEAGUE OF CITIES

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PRELIMINARY STATEMENT

The central issues in this case are whether municipalities may, under their home rule powers, impose special assessments, whether a special assessment is a tax, and, under the facts of this case, whether the City of Boca Raton's special assessment is valid. The Florida League of Cities asked permission to appear as amicus curiae to address the first two principal issues in this case, which are of vital importance not only to Florida's municipalities, but to all local governments in the state.

STATEMENT OF THE CASE AND FACTS

Amicus accepts the Appellant's statement of the case and facts.

SUMMARY OF ARGUMENT

When determining whether a Florida municipality possesses the power to perform a certain governmental act the inquiry is not whether a specific grant of power exists, but whether there is any express prohibition against the act. This is the effect of Florida having adopted home rule, which fundamentally altered the relationship between the Florida Legislature and local governments. Where under the Florida Constitution of 1885 local government power was limited to whatever the Legislature granted, the 1968 Constitution began a revolution. The Municipal Home Rule Power Act, Chapter 166, Florida Statutes, completed the constitutional design. In that act, the Legislature broadly granted power to municipalities. This grant included the power to create special assessments, which some courts have recognized, but the trial court it this case did not.

The trial court misapprehended the relationship between the 1968 Constitution's Article VII, which governs taxation, and Article VIII, which governs local government powers. There is no conflict between the two provisions, or between Chapter 166 and Article VII. The trial court misperceived that a special assessment, so long as it is properly imposed, is not a tax, and is not treated as a tax. For generations, Florida courts have distinguished between special assessments and taxes, and the trial court ignored these clear precedents. The court also ignored the fact that special assessments are inherently local in their

application, and therefore are peculiarly a local legislative decision.

The fact that Chapter 170 is specific authority under which local governments may make special assessments does not mean it is the sole method available. That chapter clearly is intended to be a supplementary and alternative method, as one section specifically declares. This Court has declared similar language in another statute to render its procedures and strictures not mandatory.

ARGUMENT

POINT I

FLORIDA MUNICIPALITIES POSSESS THE CONSTITUTIONAL AND STATUTORY POWER TO IMPOSE SPECIAL ASSESSMENTS BY ORDINANCE.

Under the 1885 Florida Constitution, all municipal powers were dependent on a specific delegation of authority by the Legislature in a general law or special act.

> The Legislature shall have power to establish, and to abolish, municipalities to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time.

Section 8, Article VIII, Florida Constitution (1885).

This requirement of an express legislative grant was a reflection of the prevailing nineteenth century local government theory known as "Dillon's Rule".[1] Under this approach to municipal power: "[t]he authority of local governments in all matters, including those previously local, was limited to that expressly granted by the Legislature, or that which could be necessarily implied from an express grant." Sparkman, The History and Status of Local Government Powers in Florida, 25 U. of Florida, L.R. 271, 282 (1973). To find a municipal power to legislate, the search was

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[1]The term "Dillon's Rule" is named after a treatise on municipal corporations by J. Dillon. See Malone v. City of Quincy, 62 So. 922 (1913), for a typical application of Dillon's Rule by the Florida Supreme Court.

for an express delegation of authority from the Legislature in a general law or special act.[2]

A. In the Municipal Home Rule Power Act, the Legislature Granted Broad Powers of Government to Municipalities.

The 1968 revision to the Florida Constitution abolished and buried Dillon's Rule and unleashed a Florida revolution in municipal home rule power.

> POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. . . .

Article VIII, section 2(b), Florida Constitution (emphasis supplied). The constitutional revision signaled a dramatic reversal of the source of municipal legislative power from Tallahassee to the city hall.

Section 166.021, Florida Statutes, the Municipal Home Rule Power Act, completed the constitutional design of the novel municipal home rule concept. As recognized by this Court, section 166.021 was

> a broad grant of power to municipalities in recognition and implementation of the provisions of Art. VIII, section 2(b), Fla. Const. It should be so construed as to effectuate that purpose where possible. It

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[2]An example of the time demand on the Legislature to focus on issues of local authority: (1) the number of local bills introduced in the 1965 Legislative Session was 2,107; and (2) the number of population acts enacted had grown to 2,100 by 1970 with over 1,300 having been enacted since the effective date of the 1960 census. Sparkman, supra, page 286 and note 110 at page 286.

> provides, in new F.S. section 166.021(1), that municipalities shall have the governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services; it further enables them to exercise any power for municipal services, except when expressly prohibited by law.[3]

City of Miami Beach v. Forte Towers, Inc., 305 So.2d 764, 766 (Fla. 1974) (Dekle, J., concurring).[4] To reaffirm and emphasize the broad constitutional deferral of municipal legislative power, section 166.021(4), Florida Statutes, further provides:

> The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.[5]

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[3]Under section 166.021(3) this broad grant of home rule power to legislate by ordinance any subject matter upon which the state Legislature may act is denied to: (1) subjects of annexation, merger, and exercise of extraterritorial power of municipalities which require general or special law pursuant to section 2(c), Article VIII, the Florida Constitution; (2) any subject expressly prohibited by the Constitution; (3) any subject expressly preempted to state or county government by the Constitution or by general law; and (4) any subject preempted to a county pursuant to a county charter.

[4]In Forte Towers this Court apparently unanimously agreed that the Municipal Home Rule Power Act empowered a city to enact a rent control ordinance, though it split on whether the ordinance was properly imposed.

[5]Section 166.021 was enacted by Chapter 73-129, Laws of Florida, in response to the narrow municipal home rule interpretation in City of Miami Beach v. Fleetwood Hotel, Inc., 261

(Emphasis supplied). As Justice Dekle recognized in Forte Towers, 305 So.2d at 766, the empowering provision to municipalities to legislate by ordinance is:

> the provision of new F.S. section 166.021(1) which expressly empowers municipalities to "exercise any power for municipal purposes, except when expressly prohibited by law." . . . [T]he intent of this chapter was largely to eliminate the "local bill evil" by implementing the provisions of Art. VIII, section 2, Fla. Const.

This liberal construction of municipal home rule has been consistently followed by the Court:

> Article VIII, section 2, Florida Constitution, expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services. The only limitation on that power is that it must be exercised for a valid "municipal purpose." It would follow that municipalities are not dependent upon the Legislature for further authorization. Legislative statutes are relevant only to determine limitations of authority.

State v. City of Sunrise, 354 So.2d 1206, 1209 (Fla. 1978).

A comparison of municipal power under the 1885 and 1968 Florida Constitution was made by the Court in Lake Worth Utilities v. City of Lake Worth, 468 So.2d 215 (Fla. 1985).

> Thus, [under the 1885 Florida Constitution] the municipalities were inherently powerless, absent a specific grant of power from the

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So.2d 801 (Fla. 1972). The Court in Forte Towers, Inc. stated that it had to consider whether Chapter 73-129 necessitates a change in the Fleetwood Hotel decision and stated "I believe that it does, and that municipalities now are empowered to enact such ordinances by virtue of new Ch. 73-129." 305 So.2d at 766, Dekle, J., concurring.

> legislature. The noblest municipal ordinance, enacted to serve the most compelling municipal purpose, was void, absent authorization found in some general or special law.
>
> The clear purpose of the 1968 revision embodied in article VIII, section 2 was to give the municipalities inherent power to meet municipal needs.

Id. at 217.

To determine the home rule power of a municipality to legislate by ordinance the search today is not for specific legislative authorization. The search is for a general or special law that is inconsistent with the subject matter of the proposed ordinance. Absent an inconsistent law, a municipality has the complete power to legislate by ordinance for any municipal purpose.[6]

The trial court ignored the clear precedent set out above, the intent of Article VIII, section 2(b), the Florida Constitution, and the plain language of section 166.021 and held on page 5 of the Final Judgment:

> Boca Raton lacks the power to specifically assess without a specific grant of the authority from the legislature.
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> * * *
>
> By passing Chapter 166 the State did not grant specific statutory authority to municipalities to levy special assessments.

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[6]Similar broad powers of self government have been granted to counties, both charter and non-charter. Sections 1(f) and (g), Article VIII, the Florida Constitution, as implemented by section 125.01, Florida Statutes. See State v. Orange County, 281 So.2d 310 (Fla. 1973); and Speer v. Olson, 367 So.2d 207 (Fla. 1979).

Also ignored were post-1968 cases approving the imposition of assessments by municipal ordinance and the clear legislative intent stated in Chapter 73-129, Laws of Florida, which enacted section 166.021, Florida Statutes.[7]

In Stein v. City of Miami Beach, 250 So.2d 289 (Fla. 3d DCA 1971), the court was construing a municipal ordinance imposing special assessments for solid waste collection and disposal.[8] The court upheld the imposition of the special assessment lien against the benefited real property without any discussion of the need for specific authority from the Legislature.

In Stone v. Town of Mexico Beach, 348 So.2d 40 (Fla. 1st DCA 1977) cert. denied 355 So.2d 517 (Fla. 1978), the legislative authority for the imposition of special assessments for garbage collection was clearly a home rule municipal ordinance. The ordinance was challenged on the basis that the Town of Mexico Beach "was without authority to collect the charges and to impose liens

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[7]The flawed underpinning of the trial court's requirement of specific legislative authority for a municipality to impose special assessments is its contention that a special assessment is a tax. See argument under Part II of this Amicus Brief.

[8]The decision is clear that the special assessments were imposed pursuant to municipal ordinance codified in the Code of the City of Miami. What is unclear from the opinion is whether the ordinance was adopted pursuant to the home rule power granted by section 167.005, Florida Statutes, the predecessor to section 166.021, or a specific special or population act applicable to the City. The strong inference is that the ordinance was adopted pursuant to home rule power since the code citation does not reference any specific statutory authority. It is the custom in municipal code codification to cite specific special or population act authority for a code provision in addition to the enabling ordinance when the ordinance is adopted pursuant to specific legislative authority.

for failure to pay such charges." Id. at 41. The court upheld the special assessments imposed by home rule municipal ordinance, remarking:

> [A]ppellants argue the Town of Mexico Beach does not have the legal authority to impose a lien on the property owned by appellants for nonpayment of garbage collection charges. This argument too is without merit. The exact point has previously been decided contrary to appellants' objections. Stein v. City of Miami Beach, 250 So.2d 289 (Fla. 3d DCA 1971) upheld an ordinance of the City of Miami Beach which provided for the imposition of special assessment liens upon real property following nonpayment by the owners of such property for garbage fees.

Id. at 42.

Additionally, Chapter 73-129, Laws of Florida, in creating section 166.021, repealed ten chapters of Florida Statutes not needed as a result of the statute's broad grant of constitutional home rule authority. Among the sections repealed was section 167.01, Florida Statutes, which was specific general authority for municipalities to impose special assessments for streets, sewers and similar improvements. Thus, specific authority to assess from the Legislature, while necessary prior to section 166.021's implementation of the 1968 constitutional revision, was both superfluous and contrary to the revolutionary concept of municipal home rule enacted by Chapter 73-129. The home rule philosophy inherent in the repeal of unnecessary specific legislative authority was reinforced in section 166.042(1), Florida Statutes, which states:

> It is the legislative intent that the repeal by chapter 73-129, Laws of Florida, of

> chapters 167, 168, 169, 172, 174, 176, 178, 181, 183, and 184 of Florida Statutes shall not be interpreted to limit or restrict the powers of municipal officials, but shall be interpreted as a recognition of constitutional powers. . . . It is, further, the legislative intent that municipalities shall continue to exercise all powers heretofore conferred on municipalities by the chapters enumerated above, but shall hereafter exercise those powers at their own discretion, subject only to the terms and conditions which they choose to prescribe.

See also City of Temple Terrace v. Hillsborough Association for Retarded Citizens, Inc., 322 So.2d 571 (Fla. 2d DCA 1975) aff'd 332 So.2d 610 (Fla. 1976), wherein the court concluded that the municipal power to zone, while repealed by Chapter 73-129, Laws of Florida, was to be found in section 166.021, Florida Statutes.

Additional support for the home rule power of a municipality to impose special assessments is found in section 197.3631 as follows:

> Section 197.3632 is additional authority for local governments to impose and collect non-ad valorem assessments supplemental to the home rule powers pursuant to ss. 125.01 and 166.021 and chapter 170, or any other law.

Section 197.3631, Florida Statutes (Supp. 1990).[9] This statutory recognition of municipal home rule power to impose special assessments under section 166.021 is the latest in a constant and consistent statement of legislative intent in affirmation of broad municipal home rule.

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[9]Section 197.3632(1)(d) defines non-ad valorem assessment as "those assessments which ... can become a lien against a homestead as permitted in s. 4, Art. X of the State Constitution." See pages 20 through 22 of this amicus brief for the Florida case law requirements for the imposition of a valid special assessment.

Home rule is essential to the governance of a modern and rapidly growing Florida in facilitating more effective and responsive local government. Local elected officials are more familiar with local problems and can react quickly to address local needs. The concept of home rule also streamlines the labor of the Legislature by freeing it from time-consuming attention to local details and permitting it to focus its energy on statewide issues.

B. Court Decisions Decided Prior to the Municipal Home Rule Power Act or Construing Specific Special or General Laws Are Inapplicable in Determining the Scope of Municipal Home Rule Power.

The home rule concepts unleashed by the 1968 constitutional revision jarred traditional thinking on municipal power and rendered fundamentally inapplicable the precedential value of pre-1968 judicial decisions on municipal power. Decisions prior to the 1968 constitutional revision and the implementing language of section 166.021 are required to be read within the statutory and constitutional framework under which they were decided. Otherwise, the legal analysis misses the mark demanded by the new municipal home rule concepts. All pre-1968 judicial decisions on municipal home rule are fundamentally suspect and of minimum precedential value under the provisions of the 1968 Florida Constitution. This fundamental fact of municipal life was stressed by the Legislature in its enactment of section 166.021(4):

> The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature ... to remove any limitations, judicially imposed or otherwise,

> on the exercise of home rule powers other than those so expressly prohibited.

(Emphasis supplied) It is difficult to imagine any stronger statement that the Legislature intended to move the source of municipal legislative power from the Legislature to the local city councils.

Thus, black-letter statements in prior judicial opinions that "municipalities have no inherent power to levy assessments" is simply old law to be ignored by the mandate of the 1968 constitutional revision. Examples of pre-1968 judicial decisions on municipal power to levy special assessments that are clearly inapplicable today include: Carr v. City of Kissimmee, 86 So. 701 (Fla. 1920) (paving special assessment); Anderson v. City of Ocala, 91 So. 182 (Fla. 1922) (street and sidewalk special assessment); City of Coral Gables v. Coral Gables, Inc., 160 So. 476 (Fla. 1935) (street and sidewalk special assessment); Simpson v. City of Brooksville, 188 So. 794 (Fla. 1939) (streets and curbs special assessment); and Snell Isle Homes, Inc. v. City of St. Petersburg, 199 So.2d 525 (Fla. 2d DCA) cert. denied 204 So.2d 210 (Fla. 1967) (sewer, streets and drainage special assessments).[10]

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[10]The result of parroting pre-1968 judicial decisions in blind obedience to the past and in ignoring the home rule revolution of the present is found in a number of Opinions of the Attorney General. See, e.g., 1990 Op. Att'y Gen. Fla. 090-52 (July 10, 1990); 1990 Op. Att'y Gen. Fla. 090-39 (May 11, 1990); 1983 Op. Att'y Gen. Fla. 083-64 (September 27, 1983); and 1982 Op. Att'y. Gen Fla. 082-9 (February 23, 1982)("absent specific authority therefor, no valid special assessments or liens therefor may be imposed by a municipality."). Each of these opinions cites as authority prior opinions or those inapplicable pre-1968 decisions on municipal power under a Dillon's Rule era.

Even decisions decided since 1968 must be read within the current constitutional and statutory framework of municipal home rule in order to be understood. For example, in City of Miami v. Brinker, 342 So.2d 115, 117 (Fla. 3rd DCA 1977), the following statement appears: "First, municipalities have no inherent power to levy special assessments and before special assessments may become valid, they must be made pursuant to the method provided by the legislature." Brinker turned on the construction of a 1947 special act that provided a statutory method for imposing special assessment liens by the City of Miami. The most radical exponent of municipal home rule will agree that substantial compliance with legislative procedure established for the imposition of special assessments is required. The fundamental difference is that in Brinker, the method of special assessment imposition was prescribed by special act.[11] Under section 166.021 the method of special assessment imposition is prescribed by ordinance. Regardless of the legislative vehicle utilized the method prescribed for imposition must be substantially followed.

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[11]The City's special assessment for demolition was imposed under Chapter 24314, Laws of Florida (1947). See also Rinker Materials Corporation v. Town of Lake Park, 494 So.2d 1123, 1125 (Fla. 1986), where this Court, when faced with whether the procedure for imposition of a special assessment under Chapter 170, Florida Statutes, was substantially complied with stated: "In order that such assessments be valid and enforceable they must be made pursuant to legislative authority and the method prescribed by the Legislature must be substantially followed."

POINT II

A LAWFULLY IMPOSED SPECIAL ASSESSMENT IS NOT A TAX REQUIRING GENERAL LAW AUTHORIZATION UNDER SECTION 2 OR SECTION 9, ARTICLE VII, THE FLORIDA CONSTITUTION.

A. Article VII, Florida Constitution, is Neither a Source of nor a Limitation on the Home Rule Power of a Municipality to Impose Special Assessments.

Article VII of the 1968 Florida Constitution is not a source of taxing power. Other than the mandatory authorization to levy ad valorem taxes within the stated millage limits, Article VII grants no taxing power to local governments. Rather, it is a limitation on the power to tax, whether imposed by ordinance or special act. All taxes other than ad valorem tax are preempted to the state except as authorized by general law.

To place the taxing power of a municipality into proper perspective, it is essential to focus on the difference in the taxation provisions in the 1885 and the 1968 Florida Constitution. Article IX, section 3 of the 1885 Florida Constitution, provided: "No tax shall be levied except in pursuance of law," and Article IX, section 5 provided:

> The Legislature shall authorize the several counties and incorporated cities or towns in the State to assess and impose taxes for county and municipal purposes, and for no other purposes, and all property shall be taxed upon the principles established for State taxation.

In contrast, Article VII, section 1(a) of the 1968 Florida Constitution provides:

> No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of

> taxation shall be preempted to the state except as provided by general law.

In Article VII, section 9(a), the 1968 Constitution provides:

> Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes . . . .

Under the 1885 Florida Constitution, if a special act did not change the method of assessment or collection, a county could be authorized by special act to levy a tax.[12] In contrast, under the 1968 Florida Constitution, all taxes, other than ad valorem taxes, are preempted to the State. The 1968 Florida Constitution expressly authorized counties to levy ad valorem taxes but preserved state-wide legislative discretion as to the levy of all other taxes by constitutionally requiring a general law authorization.[13]

The fundamental flaw in the trial court's legal analysis was its misplaced concern on the 1968 constitutional revision's preemption of all forms of taxation other than the ad valorem tax to the state.

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[12]Section 20, Article III, 1885 Florida Constitution, like section 11(a)(2), Article III, 1968 Florida Constitution, prohibits special acts relating to the assessment and collection of taxes.

[13]Thus, if an assessment is to be treated no differently than a tax, as the trial court held, then City of Miami v. Brinker and numerous other cases were wrongly decided because they allowed the imposition of assessments based on special acts. See, e.g., City of Naples v. Moon, 269 So.2d 355 (Fla. 1972); City of Titusville v. Board of Public Instruction of Brevard County, 258 So.2d 836 (Fla. 4th DCA 1970); Fire District No. 1 of Polk County v. Jenkins, 221 So.2d 740 (Fla. 1969).

> Article VII, section 1(a) has preempted all forms of taxation other than ad valorem taxes to the State. Article VIII, section 2(b) of the Florida Constitution does not supersede Article VII, section 1(a) of said Constitution. Chapter 166 of the Florida Statutes does not supersede Article VII, section 1(a) of the Florida Constitution.

Final Judgment at page 5. Such statements reflect a fundamental misunderstanding of constitutional and statutory home rule and of the differences between the provisions of the 1885 Florida Constitution and the 1968 revision.[14] There is simply no conflict between the taxation limitations of Article VII, section 1 and the municipal home rule powers of Article VIII, section 2.[15]

All municipal revenue sources are not taxes requiring general law authorization under Article VII, section 1, the Florida Constitution. The judicial inquiry when a revenue is derived by ordinance is whether the charge is a tax under Florida case law. If so, general law authorization is required under the tax preemption provisions of Article VII, section 1. If not a tax under Florida case law, the imposition of the fee, charge or

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[14]It is important to note that under the 1968 Constitution a special act cannot authorize a tax since Article VII, section 1 specifically requires general law authorization. Most special assessments at issue in the pre-1968 cases cited previously were authorized by special act. The 1968 constitutional framework replaces a municipal ordinance with a special act as the primary source of municipal authority.

[15]Such statements also reflect a misplaced reliance on the pre-1968 cases that analyzed special assessments as being imposed under the "taxing power" of the state, though they were not actually taxes. See, e.g. Anderson v. City of Ocala, 91 So. 182 (Fla. 1922). These cases reflect the Dillon's Rule approach wherein all power came from the state. They are of no assistance in construing the 1968 Constitution, and the concept of the taxing power of the state is meaningless today.

assessment by ordinance is within the constitutional and statutory municipal home rule power.

An analogous legal debate is seen in a challenge to the validity of impact fees. In Home Builders v. Board of County Commissioners of Palm Beach County, 446 So.2d 140 (Fla. 4th DCA 1983), the transportation impact fees were challenged on the basis that the fees were a tax imposed by ordinance in violation of Article VII, section 1(a), the Florida Constitution. The impact fees were held not to be a tax in Home Builders since the county ordinance met the tests established in Broward County v. Janis Development Corp., 311 So.2d 371 (Fla. 4th DCA 1975), and Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976).

Likewise, if a special assessment ordinance ensures that the special assessment to be imposed will meet the special-benefit and fair-apportionment tests established by Florida case law for a valid assessment, it is not a tax. If the charge is a lawfully imposed special assessment, the judicial focus is on whether the methods prescribed by the home rule ordinance was substantially followed, not on whether the special assessment is a tax.[16]

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[16]A special assessment is lawfully imposed under Florida case law if: (1) the improvement or service funded provides the requisite benefit to the property assessed; and (2) the cost of the improvement or program is apportioned fairly among the classifications of property based upon such benefit. In addition, as discussed previously, the special assessments must be imposed in substantial compliance with the procedure established in the implementing ordinance. See the detailed discussion of Florida case law in the following subsection.

B. A Legally Imposed Special Assessment is not a Tax.

Taxes and special assessments are distinguishable in that, while both are mandatory, there is no requirement that taxes provide any specific benefit to property; instead, they may be levied throughout the particular taxing unit for the general benefit of residents and property. Special assessments, however, must confer a specific benefit upon the land burdened by the assessment. City of Naples v. Moon, 269 So.2d 355 (Fla. 1972). Even decisions predating the 1968 Florida Constitution recognized that the benefit requirement distinguishes a tax from a special assessment. See, e.g., City of Fort Lauderdale v. Carter, 71 So.2d 260 (Fla. 1954). As one early case put it:

> A "tax" is an enforced burden of contribution imposed by sovereign right for the support of the government, the administration of the law, and to execute the various functions the sovereign is called on to perform. A "special assessment" is like a tax in that it is an enforced contribution from the property owner, it may possess other points of similarity to a tax, but it is inherently different and governed by entirely different principles. It is imposed upon the theory that that portion of the community which is required to bear it receives some special or peculiar benefit in the enhancement of value of the property against which it is imposed as a result of the improvement made with the proceeds of the special assessment. It is limited to the property benefitted, is not governed by uniformity, and may be determined legislatively or judicially.
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> * * *
>
> [I]t seems settled law in this country that an ad valorem tax and special assessment, though cognate in immaterial respects, are inherently different in their controlling aspects. . . .

Klemm v. Davenport, 129 So. 904, 907, 908 (Fla. 1930).[17]

As established by case law, there are two requirements for the imposition of a valid special assessment. One, the property assessed must derive a special benefit from the service provided. City of Naples v. Moon, 269 So.2d 355 (Fla. 1972); Atlantic Coast Line R. Co. v. City of Gainesville, 91 So. 118 (Fla. 1922) (special assessments are "charges assessed against the property of some particular locality because that property derives some special benefit from the expenditure of the money." Id. at 118). Two, the assessment must be fairly and reasonably apportioned among the properties that receive the special benefit. South Trail Fire Control District, Sarasota County v. State, 273 So.2d 380 (Fla. 1973); Parrish v. Hillsborough County, 123 So. 830 (Fla. 1929). If special assessments follow the guidelines set forth in these and other Florida cases, they will be considered as distinct from ad valorem taxes, even though they have many of the same elements as ad valorem taxes. City of Naples v. Moon, 269 So.2d 355 (Fla. 1972).

Since a special assessment is distinguished from a tax by the special benefit and fair apportionment tests established in Florida case law, it is necessary to examine the specific factual

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[17]That assessments and taxes are distinct is demonstrated in Article X, section 4, Florida Constitution, which excepts from the homestead exemption "the payment of taxes and assessments."

circumstances of any particular assessment or charge to determine whether it is a tax or a special assessment.[18]

A similar situation applies to impact fees, the validity of which depend on how they are established. This Court and others have held that if an impact fee fails to meet the unique Florida case law applicable to its imposition, it is a tax and therefore, pursuant to Article VII, it needs general law authorization to be valid. If it does meet those criteria, it is not a tax, and Article VII is not implicated. If it does meet the criteria, the home rule power of the municipality (or county) is sufficient authority to impose it.

C. The Lawful Imposition of a Special Assessment is Inherently a Local Legislative Decision.

The clear intent of the drafters of the 1968 Florida Constitution is that local problems be solved locally. That is why municipalities and counties were given broad home rule powers (and also why ad valorem taxes, which are inherently local, were made the exclusive province of local governments). There are several good reasons why (and no good reason why not) special assessments should be imposed by local ordinance, rather than state statute.

First, because of special assessments' benefit and apportionment requirements, findings of fact are essential before

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[18]The trial court in this case reached the paradoxical conclusion that the special assessment was not a tax, yet violated Article VII. Final Judgment at page 6. If it is not a tax, then it may be imposed without general law authority, unless there is a specific prohibition in statute, constitution, or county charter. section 166.021(3), Florida Statutes.

an assessment can be imposed; those findings of local need and benefit could not be made by the Legislature, whereas they are uniquely suited for the governing body of a local government.

Second, special assessments are almost by definition local in that they confer specific identifiable benefits on individual parcels of land and the proceeds are used to fund specific local services. If local governments should have to ask the Legislature each time they want to make a local decision, home rule is an empty concept.

Third, approaching the Legislature each time a municipality wished to make a special assessment could mean costly delays, since the Legislature meets for a fraction of the year.

Fourth, if all local governments had to get the Legislature's approval each time they wished to make special assessments, much of the Legislature's limited time would be taken in solving purely local problems. Home rule took much of this responsibility away from the Legislature and freed it to deal with statewide concerns.

POINT III

CHAPTER 170, FLORIDA STATUTES, IS AN OPTIONAL AND NOT MANDATORY METHOD FOR A MUNICIPALITY TO IMPOSE SPECIAL ASSESSMENTS.

Chapter 170, Florida Statutes specifically grants municipalities the power to pass and collect special assessments that concern certain municipal services. It should not be considered the only method by which municipalities may levy assessments, however, for a number of reasons.

First, Chapter 170 is specifically intended to be an alternative method, as its title, Supplemental and Alternative Methods of Making Local Municipal Improvements, demonstrates. Language in two sections confirms that the method in Chapter 170 was not meant to be exclusive. Section 170.19: "This chapter . . . shall be considered as an additional and alternative method for the financing of the improvements referred to herein." Section 170.21: "This chapter shall not repeal any other law relating to the subject matter hereof, but shall be deemed to provide a supplemental, additional and alternative method of procedure for the benefit of all cities, towns and municipal corporations of the state . . . ."

That Chapter 170 is not considered an exclusive means of making special assessments was reaffirmed last year when the Legislature passed amended section 197.3631. "Section 197.3632 is additional authority for local governments to impose and collect non-ad valorem assessments supplemental to the home rule powers pursuant to ss. 125.01 and 166.021 and Chapter 170, or any other law." Section 197.3631, Florida Statutes (Supp. 1990).

Second, this Court has recently construed a similar provision, section 159.14, Florida Statutes,[19] to find that counties had

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[19]Section 159.14 and section 170.21 are quite similar. Section 159.14 states:

> This part shall be deemed to provide an additional and alternative method for the doing of the things authorized hereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded in derogation of any powers now existing. This part, being necessary for the welfare of the

sufficient home rule power to issue bonds irrespective of the existence of Chapter 159. Taylor v. Lee County, 498 So.2d 424 (Fla. 1986). The County sought to issue bonds to finance the new bridge pursuant to its home rule authority. Taylor argued that since Chapter 159 specifically authorized the county to issue bonds, the county ordinance must rely on and conform to Chapter 159. The Court noted that Chapter 159 by its express terms provided supplemental and additional authority to that conferred by other laws. The Court concluded that Chapter 125 (the county home rule statute) provided the county ample authority to issue the bonds and held that in areas in which a non-charter county has the authority to act, it may choose between adopting an ordinance pursuant to its home rule power or adopting it pursuant to another statutory authority.

Third, Chapter 170 was enacted in 1923, fifty years before the Municipal Power Home Rule Act, so no legislative intent that it would be the sole method of passing special assessments can be inferred from its presence. The fact that it was not one of the many statutes repealed by Chapter 73-129 does not evince a similar

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> inhabitants of the counties and municipalities of the state, shall be liberally construed to effect the purposes thereof.

Section 170.21 reads:

> This chapter shall not repeal any other law relating to the subject matter hereof, but shall be deemed to provide a supplemental, additional, and alternative method of procedure for the benefit of all cities, towns and municipal corporations of the state, whether organized under special act or the general law, and shall be liberally construed to effectuate its purpose.

legislative intent, in the absence of language indicating that it is intended to be exclusive. Had the Legislature wished, it could have added such language when it passed Chapter 73-129 or any of the six times since 1973 it has amended one or more sections in Chapter 170.

CONCLUSION

The trial court was twenty years late for a revolution. Home rule, through the 1968 revision of the Florida Constitution and the Municipal Home Rule Powers Act (Chapter 166, Florida Statutes), has fundamentally changed the relationship between the state and local governments. Whereas before power was granted by the Legislature in a piecemeal fashion, now it has been broadly and generously granted in section 166.021, Florida Statutes.

Today, local governments have the power to govern unless such power is explicitly taken away by law. There is no express prohibition against a municipality imposing special assessments, so municipalities may impose them by ordinance, as the City of Boca Raton did in this case. The absence of an express legislative grant of the power to impose such assessments would only be important if special assessments were taxes. A long line of cases in this state has established that, if properly imposed, they are not taxes. Thus, the trial court's perception that imposing a special assessment by ordinance in some way implicated Article VII, Florida Constitution, was faulty. Whether a special assessment is or is not a tax is a factual question, to be determined by the test established in a long line of cases.

Amicus the Florida League of Cities urges this Court to reverse the trial court's Final Judgment to the extent that it denies municipal home rule power to impose special assessments and considers special assessments a form of taxation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the parties on the attached Service List, this 13th day of May, 1991.

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