IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 77,468

CITY OF BOCA RATON, FLORIDA,
Appellant,
Cross Appellee,
v.
THE STATE OF FLORIDA, et al.,
Appellee,
Cross Appellant.

On Appeal from a Bond Validation in the Circuit Court in and for Palm Beach County, Florida
Case No.: CL 90-10167 AN

ANSWER BRIEF OF APPELLEE, CROSS APPELLANT

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PREFACE

For purposes of this brief, the Appellant, Cross Appellee, City of Boca Raton, Florida, will be referred to as the "City"; the Appellee, Cross Appellant, State of Florida, will be referred to as the "State"; and the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, will be referred to as the "Trial Court".

The abbreviations "App." shall refer to the Appendix to the City's brief; "App-S." shall refer to the Appendix to the State's brief; "V." shall refer to Volume Number; "T." shall refer to the Index Tab Number; and "P." shall refer to the Page Number.

STATEMENT OF THE CASE AND OF THE FACTS

The State generally agrees with the Statement of the Case as outlined in the City's Initial Brief. The Facts as presented by the City, however, warrant further clarification.

First of all, in order to fully appreciate the context in which this controversy arose, it is helpful to view this case from an historical perspective, i.e., to determine the genesis of the Improvements which the City proposes to finance with the proceeds of not to exceed $21,000,000 Special Assessment Improvement Bonds, Series 1990 (Visions 90 Project) (the "Bonds").

In approximately 1982, the downtown area of Boca Raton was determined to be "blighted" and the Boca Raton Community Redevelopment Agency (the "CRA") was formed. (App.:P.5; and App.-S:V.I T.5 P.289-292).

In 1987, the CRA filed with the City an application for development approval for a Downtown Development of Regional Impact (the "DDRI"). The application was reviewed by the various governing agencies involved, and was eventually approved subject to a plan which would provide for the necessary improvements to be made to accommodate the increased development of over 4,500,000 square feet. It was this plan which gave rise to the Visions 90 Program for which the City sought validation of the Bonds at issue here. (App.:P.6; and App.-S:V.I T.2 P.74-77, T.3 P.161-163, 266-267, V.II T.1).

Without these improvements, new development would not be permitted. However, it is not only the new development which will be assessed for the cost of these improvements, but also existing, previously developed properties will be assessed under the Visions 90 Program. This is true even though the existing, previously developed properties do not require these improvements. (App.-S: V.I T.3 P.77-78, 134, 147, 151-163, 180-181, 249-250, 267-268, T.6 P.319-320).

Secondly, the City has stated that the proceeds of the Bonds will be used to finance the cost of Improvements as defined in Ordinance No. 3851, but no further explanation of these Improvements or their location is provided in the City's Brief.

These Improvements fall into six (6) basic categories:

(1) the acquisition, construction, reconstruction, etc., of improvements related to streets, boulevards, alleys and sidewalks, and also including street lighting, traffic and pedestrian signals, landscaping and irrigation, pedestrian furniture and trash disposal units;

(2) the construction, reconstruction, repair, renovation, excavation, grading, stabilization and upgrading of features of a comprehensive stormwater management system;

(3) the construction or reconstruction of water distribution facilities;

(4) the drainage and reclamation of wet, low, or overflowed lands;

(5) the provision of offstreet parking, parking garages, or similar facilities; and

(6) the provision of mass transportation systems.

(App.:P.7).

Most of the Improvements are to be located in various areas of downtown Boca Raton, the Downtown Development District ("DDD"). (App.:P.28-32). However, these areas are not necessarily contiguous and, in fact, some of the areas which will receive Improvements are not even located within the City, let alone the DDD. (App.-S:V.I T.2 P.46-49, 53-58, 89-90, 94-95).

In addition, each of these areas is to receive a different combination of and a different degree of the Improvements. (App.:P.28-32, and App.-S:V.I T.3 P.149-150, 165-167, 175-178, 218-219, 263-264, 267; T.4 P.285; T.5 P.302-304, 311).

No consideration is given to these differences in determining whether the amount which is specially assessed against each of the properties in these different areas is proportionate to the amount, if any, of special benefits to be received by such properties from the Improvements.

Likewise, no adjustment is made to the assessment against a particular parcel of property for increases in property values which result from factors other than the Improvements. (App.-S:V.I T.3 P.189-192, 222-224).

Next, the City states that pursuant to its Ordinance No. 3851, Section 6, it adopted Resolution 128-90, and determined to use an alternate method of apportioning and levying special assessments.

However, it is not explained that such alternate method is an ad valorem method based on the values of the so-called benefitted properties. (App.:P.12-15, 23-24; and App.-S:V.I T.3 P.118, 143, 168, 189-192, 238-240, 260).

Lastly, the City made provisions for only certain property owners for exclusions from the assessments, and for "Deferrable Assessments". Houses of worship and parcels zoned R 1D and R 3, i.e., residential parcels, are specifically excluded from assessment. Government-owned property, including the City's, is also excluded by virtue of the fact that such property does not appear on the tax rolls. (App.:P.24; and App.-S.:V.I T.3 P.139, 142, 188, 196-199, 212, 262-263, T.4 P. 302-304). Deferrable Assessments, which provide that the assessments upon certain parcels may be deferred for up to fifteen (15) years, are available only to:

(1) parcels in commercial zones on which are located existing (as of the date of the adoption of Resolution No. 128-90) single-family residential units; and

(2) parcels on which are located existing (as of the date of the adoption of Resolution No. 128-90) commercial businesses that are 100% owner-occupied, and the building is (i) the principal place of business, (ii) under single ownership, and (iii) the size of the building does not exceed 7,500 gross square feet.

(App.:P.25).

The City has based its decisions to issue the Bonds and levy the assessments on its belief that it had the "home rule" power to do so, and that Chapter 166 of the Florida Statutes and Article VIII, Section (2)(b) of the Florida Constitution provided sufficient authority. The City did not take Article VII into consideration.

The City also chose to disregard its legal counsel's opinion that Chapter 170 should be utilized to make the assessments for the Visions 90 Project. (App.-S:V.II T.3).

SUMMARY OF ARGUMENT

POINT I.

The authority to levy special assessments in Florida is an exercise of the "taxing power". As such, it is governed by Article VII, Section 1(a) of the Florida Constitution, which preempts all forms of taxation, other than ad valorem taxes, to the State.

Article VIII, Section 2(b) of the Florida Constitution and Chapter 166 of the Florida Statutes do not supersede Article VII, Section 1(a), and do not provide the City with the requisite authority to levy special assessments.

POINT II.

An enforced exaction against property owners which is based on the value of their property; which is not fixed in amount, but rather varies from year to year; and which is not proportionate to any special benefit inuring to that property from identified improvement projects to be constructed within the area of the exaction, is an ad valorem tax. As such, it is subject to all the conditions and restrictions imposed upon the levy of such a tax.

POINT III.

Residential parcels and those used for houses of worship stand to reap the same benefits, including increased developmental rights, as the other parcels of property located within the assessment area. No logical basis exists for their exclusion from assessment.

As for the "Deferrable Assessments," the City has not shown the basis on which it relies to treat only a specified class of property in a preferential manner.

"Equal protection" concepts require that all classes be treated equally. Therefore, the City's arbitrary decisions to treat certain classes of property differently than others should not be upheld.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY FOUND THAT THE CITY WAS NOT AUTHORIZED UNDER ITS HOME RULE POWERS TO LEVY THE SPECIAL ASSESSMENTS TO FINANCE THE ISSUANCE OF THE BONDS.

Chapter 75, Florida Statutes (1989), outlines the basic procedures to be followed in bond validation proceedings. This includes Section 75.02, entitled Plaintiff, which enables municipalities, among others, to seek a determination of their

> ...authority to incur bonded debt or issue certificates of debt and the legality of all proceedings in connection therewith, including assessment of taxes levied or to be levied...

Section 75.02, Fla. Stat. (1989).

It also includes Section 75.04, entitled Complaint, which prescribes the contents of the plaintiff's complaint.

> The Complaint shall set out the plaintiff's authority for incurring the bonded debt or issuing certificates of debt, the holding of an election and the result when an election is required, the ordinance, resolution, or other proceeding authorizing the issue and its adoption, all other essential proceedings had or taken in connection therewith, the amount of the bonds or certificates to be issued and the interest they are to bear...

Section 75.04, Fla. Stat. (1989).

In the case sub judice, the City invoked Chapter 75 of the Florida Statutes and sought validation of the Bonds. In so doing, the City filed its Complaint which set out, inter alia, its alleged authority to issue the Bonds; and the Ordinance and Resolutions which it adopted. It is the Ordinance and Resolutions which authorize the issuance of the Bonds to finance the Improvements,

which provide that the Bonds are payable from special assessments, and which determine to use an ad valorem method to prorate the assessments among the properties in the Downtown Special Assessment District. (App.:P. 1-6).

The issue, then, of the validity of these assessments is a proper one for these validation proceedings. See also, City of Ft. Myers v. State, 95 Fla. 704, 117 So. 97, 101 (1928) (general rule that assessments cannot be attacked in validation proceedings does not apply where the validity or status of the bond is made to depend on the validity of the assessment rather than the power of the municipality to issue them).

The City sets out Article VIII, Section 2(b) of the 1968 Florida Constitution, and Chapter 166 of the Florida Statutes as its authority to issue the Bonds and to impose the ad valorem assessments, the proceeds of which are to be pledged for the payment of the Bonds. (App.:P.2-5, 7-9, 23-25, 35, 38, 41-43).

Chapter 166, Florida Statutes (1989), the Municipal Home Rule Powers Act, was promulgated pursuant to the authority granted by Article VIII, Section 2(b), Florida Constitution (1968). No taxing power is contained in that Article, so none could be granted in Chapter 166.

While these provisions grant home rule power to municipalities for municipal purposes, except as otherwise provided by law, they do not grant the City totally unrestricted powers as the City would have this Court believe. Art. VIII, § 2(b), Fla. Const. (1968), and § 166.021(1), Fla. Stat. (1989). This was recognized in Lake

Worth Utilities v. City of Lake Worth, 468 So.2d 215, 217 (Fla. 1985), where the Court stated

> The clear purpose of the 1968 revision embodied in Article VIII, section 2 was to give the municipalities inherent power to meet municipal needs. But "inherent" is not to be confused with "absolute" or even with "supreme" in this context. The legislature's retained power is now one of limitation rather than one of grace, but it remains an all-pervasive power, nonetheless.

The specific limitation with which we are here concerned is the limitation of the City's taxing power, as expressed in Article VII, Sections 1(a) and 9(a), of the Florida Constitution.

Article VII, Section 1(a), states

> 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. (Emphasis supplied).

Art. VII, § 1(a), Fla. Const. (1968)

Section 9(a) of that same Article further states

> 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, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution. (Emphasis supplied).

Art. VII, § 9(a), Fla. Const. (1968)

These provisions of Article VII were not superseded by Article VIII, Section 2(b), of the Florida Constitution. Therefore, the constitutional grant of home rule power to the City must be read in light of constitutional limitations on the taxing power of the City, to give effect to both Articles.

This Court recognized this rule of construction in City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1, 5 (Fla. 1972), where it was stated

> An elementary rule of construction is that if possible, effect should be given to every part and every word of the Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous or meaningless or inoperative. Thus a construction of the Constitution which renders superfluous or meaningless any of the provisions of the Constitution should not be adopted by this Court.

See also, State ex rel. West v. Butler, 70 Fla. 102, 69 So. 771 (1915).

Nowhere in Article VIII, Section 2(b) of the Florida Constitution, or Chapter 166 of the Florida Statutes, is there a specific grant of taxing power to the City of the kind which the City has attempted to exert in this case.

Part III of Chapter 166, Florida Statutes (1989), deals with municipal finance and taxation, and it would be here, if anywhere in Chapter 166, that we would expect to find the City's taxing authority. The only 2 provisions which might be applicable are Sections 166.201 and 166.211(1), Florida Statutes (1989).

Section 166.201, Florida Statutes (1989), states that

> A municipality may raise, by taxation and licenses authorized by the constitution or general law ...amounts of money which are necessary for the conduct of municipal government... (Emphasis supplied.)

With respect to ad valorem taxes, Section 166.211(1), Florida Statutes (1989), states that

> Pursuant to Article VII, s. 9 of the state constitution, a municipality is hereby authorized, in a manner not inconsistent with general law, to levy ad valorem taxes on real and tangible personal property within the municipality in an amount not to exceed ten (10) mills, exclusive of taxes levied for the payment of bonds and taxes levied for periods of not longer than two years and approved by a vote of the electors.

It is apparent that neither of these provisions constitute a grant to the City of the taxing power necessary for the imposition of the ad valorem assessments in this case. In fact, Section 166.201, Florida Statutes (1989), speaks to taxation which is authorized by the constitution or by general law, and the ad valorem assessments in this case were not authorized by the constitution nor by general law.

According to this Honorable Court

> Taxation by a city must be expressly authorized by either the constitution or grant of the Legislature, and <u>any doubts</u> as to the powers sought to be exercised <u>must be resolved against the municipality</u> and in favor of the general public. (Emphasis supplied.)

<u>City of Tampa v. Birdsong Motors, Inc.</u>, <u>supra</u>, at 3; citing <u>Certain Lots, etc. v. Town of Monticello</u>, 159 Fla. 134, 31 So.2d 905 (1947).

The Court went on to say

> Statutes authorizing a municipality to tax are to be strictly construed, are not to be extended by implication, and are not to be enlarged so as to include any matter not specifically included, even though said matter may be closely analogous to that included.

<u>City of Tampa v. Birdsong Motors, Inc.</u>, <u>supra</u>, at 3; citing <u>City of Miami v. Kayfetz</u>, 158 Fla. 758, 30 So.2d 521 (1947).

The Court further explained that, prior to the adoption of the 1968 Constitution, a city could be authorized to impose taxes by special or local act, such as its Charter; but after the adoption of the 1968 Constitution, except for ad valorem taxes, the authorization for a city to levy any tax may be granted only by general law. In addition

> Any tax not authorized by general law must necessarily fall by virtue of the preemption clause of Fla. Const. Art. VII, § 1 (1968).

City of Tampa v. Birdsong Motors, Inc., supra, at 3.

In a later case, this Court continued its reasoning and stated that

> ...the State, through the legislative branch of the government, possesses an inherent power to tax, and a municipality may exercise a taxing power only to the extent to which such power has been specifically granted to it by general law.

Belcher Oil Company v. Dade County, 271 So.2d 118 (Fla. 1972).

While the State possesses inherent taxing power, municipalities do not. Neither, as was stated earlier, do municipalities possess such power by virtue of the home rule provisions of Article VIII, Section 2(b) of the 1968 Florida Constitution and Chapter 166 of the Florida Statutes. See, City of Hollywood v. Davis, 154 Fla. 785, 19 So.2d 111, 114 (1944); City of Coral Gables v. Coral Gables, Inc., 119 Fla. 30, 160 So. 476, 478 (1935); Snell Isle Homes, Inc. v. City of St. Petersburg, 199 So. 2d 525, 527 (Fla. 1967); City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1, 3 (Fla. 1972); City of Miami v. Brinker, 342 So.2d 115, 116 (Fla. 3rd DCA 1977); 1974 Op. Att'y Gen. Fla. 074-379

(Dec. 9, 1974); 1980 Op. Att'y Gen. Fla. 080-87 (Nov. 10, 1980); 1982 Op. Att'y Gen. Fla. 082-9 (Feb. 23, 1982); 1985 Op. Att'y Gen. Fla. 85-90 (Oct. 30, 1985).

The City contends that these assessments are not taxes and are, therefore, not subject to the constitutional restraints imposed upon the exercise of taxing powers. Even assuming, arguendo, that these assessments are not taxes, the City is mistaken in its belief that the constitutional restraints are not applicable here.

It has long been settled that special or local assessments form an important part of the system of taxation and are made in pursuance of taxing power. Marshall v. C.S. Young Construction Co., 94 Fla. 11, 113 So. 565, 567 (1927); Anderson v. City of Ocala, 83 Fla. 344, 91 So. 182 (1921); Atlantic Coast Line Railroad Co. v. City of Lakeland, 94 Fla. 347, 115 So. 669, 676 (1928). Special assessments are in the nature of a tax. Day v. City of St. Augustine, 104 Fla. 261, 139 So. 880, 885 (1932). Such assessments are burdens in the form of taxation. Swanson v. Therrell, 112 Fla. 474, 150 So. 634, 636 (1933). While an assessment is not, strictly speaking, a tax, it is a burden levied under the power of taxation. Jackson v. City of Lake Worth, 156 Fla. 452, 23 So.2d 526, 528 (1945). These assessments have even been called a "peculiar species of taxation". State ex rel. Board of Supervisors of South Florida Conservancy Dist. v. Caldwell, 160 Fla. 355, 35 So.2d 642, 644 (1948); 1984 Op. Att'y Gen. Fla. 84-48 (May 8, 1984); 1985 Op. Att'y Gen. Fla. 85-101 (Dec. 16, 1985). See also, 1980 Op. Att'y

Gen. Fla. 080-87 (Nov. 10, 1980); 1985 Op. Att'y Gen. Fla. 85-90 (Oct. 30, 1985); 14 McQuillan, Municipal Corporations § 38.01 (1987).

Even the City, in its Closing Argument at the Validation Hearing, acknowledged the fact that

> ...special assessments are levied pursuant to the taxing power...

(App.-S:V.I T.6 P. 331).

This characterization of assessments as an exercise of taxing power was not expressly changed or superseded by the adoption of the 1968 Florida Constitution. Neither can such a change be implied where it would render Article VII, Sections 1(a) and 9(a) of the Constitution meaningless. City of Tampa v. Birdsong Motors, Inc., supra.

The City's Brief presented a very interesting, albeit substantially irrelevant, historical overview of municipal powers under both the 1885 and 1968 Florida Constitutions, of the "Reservation of Authority Rule", and of "Dillon's Rule". This overview, however, only summarily addresses the real issue here - which is the constitutional preemption of the taxing power to the State under Article VII of the 1968 Florida Constitution.

The City's comparisons of its taxing powers to those of counties and special districts, are unfounded. For example, Section 125.01(1)(r), Florida Statutes (1989), is a general law which specifically authorizes counties to levy and collect special assessments. Likewise, for example, with respect to water control districts, Section 298.36, Florida Statutes (1989), grants these

districts the authority to levy taxes to pay for the benefits which have been assessed against lands in the district. Further, for example, with respect to safe neighborhood improvement districts, Sections 163.506(1)(d), 163.508(3)(c), and 163.511(1)(c), provide the general law authority for such districts to make assessments.

The City goes to great lengths to convince this Court that, although revolutionary changes were made to municipalities' home rule powers, no changes were effectuated to taxing power. This is misleading and unpersuasive.

The City cites Lake Howell Water and Reclamation District v. State, 268 So.2d 897 (Fla. 1972), for this proposition. Lake Howell is not on point. Even the quoted portion of that case which is included in the City's Brief states that the Court was speaking to the issue of whether or not special assessments were subject to the same restrictions as ad valorem taxes.

> We find nothing therein that places special assessments for local improvements under the restrictions pertaining to ad valorem taxes. (Emphasis Supplied).

Lake Howell Water and Reclamation District v. State, Id, at 899.

For purposes of this argument, Point I, we will agree that special assessments are not generally subject to the restrictions applicable to ad valorem taxes. This does not change the fact that

> All other forms of taxation shall be preempted to the state except as provided by general law. (Emphasis Supplied).

Art. VII, § 1(a), Fla. Const. (1968).

Even the commentary to the 1968 Constitution by Talbot "Sandy" D'Alemberte notes that this last sentence of Article VII, Section 1(a), was not a part of the 1885 Florida Constitution.

As was stated in City of Miami v. Kayfetz, supra at 524,

> ...the power to tax is the power to destroy...

Such an extraordinary power must be protected. Article VII provides the protection, and does so in clear, concise language which requires that the authority for municipalities to exercise taxing power, other than for ad valorem taxes, must come from either the Constitution or general law.

The general law provision which seems to be applicable in this situation and which was recommended to the City by its legal counsel, is Chapter 170, Florida Statutes (1989). (App.-S:V.II T.3). It is uncontroverted, however, that the City chose not to use Chapter 170, and instead relied on the home rule provisions of Article VIII, Section 2(b) of the Florida Constitution and Chapter 166 of the Florida Statutes. (App.:P. 1-6; and App.-S:V.I T.6 P. 318-319, 389).

Since the City did not use the general law provisions of Chapter 170, and since it has not cited any other provision of general law which grants it the taxing power necessary to impose these assessments, the City's attempt to impose these assessments must fail.

Further, since the Bonds which are here at issue are dependent upon the validity of these assessments, the issuance of the Bonds

should not be validated and the Judgment of the Trial Court denying validation should be affirmed.

Almost as an aside, the City next contends that the assessments in this case are based on the City's police power and that the assessments are regulatory in nature. This appears to be an attempt by the City, after it missed the boat on the taxing power issue, to now set sail in a leaky raft.

This issue is absent from the City's arguments to the Trial Court, and it is apparent that this issue is being raised on appeal as an afterthought, or as a "last ditch" attempt to save this bond issue.

This argument by the City is without merit. The testimony at the Validation Hearing clearly reflects that the only purpose for issuing these Bonds and, therefore, for making these assessments, is to complete the Visions 90 Project.

The City's focus at the Validation Hearing, in fact, was on attempting to prove the validity of the assessments by showing the benefits to be received from the Improvements. These benefits were delineated into six (6) major categories:

(1) reduced development project approval costs;

(2) reduced on-site parking construction costs;

(3) reduced cost sharing of area-wide and on-site infrastructure costs for new projects;

(4) increased land values;

(5) premium rents; and

(6) increased retail sales.

(App.-S:V.II T.2 P.II-6 through II-13, IV-6)

It cannot reasonably be argued now that these benefits are related to an exercise of police power by the City.

Further, this new argument by the City bolsters the State's position in Points II and III of this Brief. If there are no "special" benefits then there is no foundation on which to base the assessment, no foundation on which to base the exclusions, and no foundation, however thin, on which to base any distinction between the assessment and a "tax".

POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE AD VALOREM ASSESSMENT PROPOSED BY THE CITY TO PAY FOR THE BONDS IS NOT A TAX.

The State is aware of, and does not disagree with, the general rule that special assessments are not, strictly speaking, taxes, even though special assessments are exertions of the taxing power. Several cases outline the distinctions between these different exertions of the taxing power.

> 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 different principles.

Klemm v. Davenport, 100 Fla. 627, 129 So. 904, 907 (1930); Whisnant v. Stringfellow, 50 So.2d 885 (Fla. 1951).

Further,

> (A special assessment) 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.

Klemm v. Davenport, supra; Whisnant v. Stringfellow, supra; City of Orlando v. State, 67 So.2d 673 (1953).

A crucial factor in distinguishing between a tax and a special assessment is that a special benefit must be received by the property being assessed.

This Court, in South Trail Fire Control District, Sarasota County v. State, 273 So.2d 380, 383 (Fla. 1973), stated that

> The term "benefit," as regards validity of improvement assessments, does not mean simply an advance or increase in market value, but embraces actual increase in money value and also potential or actual or added use and enjoyment of the property.

The factors in determining benefit include the property's

> physical condition, nearness to and remoteness from residential and business districts, desirability for residential or commercial purposes, and many other peculiar to the locality where the lands improved are located.

South Trail Fire Control District, Sarasota County v. State, Id, citing Meyer v. City of Oakland Park, 219 So.2d 417 (Fla. 1969).

Another crucial factor in distinguishing assessments from taxes is that an

> ...assessment must represent a fair proportional part of the total cost of the improvement.

South Trail Fire Control District, Sarasota County v. State, supra, at 383. See also, City of Fort Lauderdale v. Carter, 71 So.2d 260 (Fla. 1954).

The amount of the special benefit to each parcel must be determined, except in cases where the benefit is assumed because the improvement by its nature is designed to specially benefit abutting property or property within the protective proximity of the improvement. City of Treasure Island v. Strong, 215 So.2d 473 (Fla. 1968); City of Hallandale v. Meekins, 237 So.2d 318 (Fla. 4th DCA 1970), aff'd 245 So.2d 253 (Fla. 1971). See also § 170.06, Fla. Stat. (1989).

In this case, the benefits are detailed as follows:

(1) reduced development project approval costs;

(2) reduced on-site parking construction costs;

(3) reduced cost sharing of area-wide and on-site infrastructure costs for new projects;

(4) increased land values;

(5) premium rents; and

(6) increased retail sales.

(App.-S:V.II T.2 P. II-6 through II-13, IV-6).

These benefits are to inure to the assessed parcels of property in 25 separate locations involving 25 distinct projects. (App.:P.28-32). These areas are not necessarily contiguous, and the different projects do not necessarily abut each of the assessed parcels of property. Nor can it be said that all assessed parcels of property are located within the "protective proximity" of the 25 projects, in fact, some of the projects are located outside the entire assessment area. (App.-S:V.I T.2 P.46-49, 53-58, 63, 89-90, 94-95). In addition, the 25 projects consist of different combinations of and different degrees of Improvements. (App.:P.28-32; and App.-S:V.I T.3 P.149-150, 165-167, 175-178, 218-219, 263-264, 267: T.4 P.285; T.5 P.302-304, 311).

Given these facts, there should have been a determination of the special benefits to inure as a result of each project. City of Treasure Island v. Strong, supra, at 479 (Fla. 1968). There was no such determination here.

To use a specific example, the parcel of property owned by one of the Intervenors, Astral Investment, Inc., ("Astral"), is only abutted by two of the projects. (App.-S:V.I T.2 P.54). These two projects are identified as CRA-1 and CRA-8, and involve the expansion of Mizner Boulevard/N.E. 2nd Avenue, which includes drainage, water, sewer, mast arm signals, landscaping, street furniture, street lighting and sidewalks; and the provision of water, sewer, mast arm signals, landscaping, street furniture, sidewalks to Palmetto Park Road from Dixie Highway to N.E. 5th Avenue, respectively. (App.:P.28-29)

None of the other 22 projects abut Astral's property. At least 5 of the projects are located partially or totally outside the boundaries of the DDD. (App.-S:V.I T.2 P.63). Some projects include only road expansion; others include water, sewer, drainage, landscaping, street furniture, street lighting and sidewalks; still others include only beautification and lights. (App.:P.28-32).

Astral's property is fully developed and will not receive three of the six outlined benefits of these projects, viz., reduced development project approval costs, reduced on-site parking construction costs, and reduced cost sharing of area-wide and on-site infrastructure costs for new projects.

As for the three remaining benefits, increased land values, premium rents, and increased retail sales, there is only speculation that these benefits will inure to Astral's property. In fact, there was testimony at the Validation Hearing by a real estate broker/property manager that rents for existing developments

have decreased due to the increased new development; and that retail sales for the existing developments will also be adversely affected. (App.-S:V.I T.5 P.288,301). Given these two factors, it is hard to imagine that the land values for the existing developments would be increased.

A special assessment cannot be sustained simply by a declaration of the City of the existence of special benefits, where none, in fact, exists. South Trail Fire Control District, Sarasota County v. State, supra, at 383.

In addition, this Court has stated that

> To be legal, special assessments must be directly proportionate to the benefits to the property upon which they are levied and this may not be inferred from a situation where all property in a district is assessed for the benefit of the whole on the theory that individual parcels are peculiarly benefitted in the ratio that the assessed value of each bears to the total value of all property in the district.

St. Lucie County-Fort Pierce Fire Prevention and Control District v. Higgs, 141 So.2d 744, 746 (Fla. 1962); citing Fisher v. Board of County Commissioners of Dade County, 84 So.2d 572 (Fla. 1956).

The situation in the instant case is not much different from that in the Fisher case, Id., where there was no exact evaluation of benefits to be received, just the opinion of the engineer that benefits to the property would be in proportion to the assessed valuation of the property.

Here, some analysis was done on the basis of six (6) "prototypical" parcels of property. (App.-S:V.II T.2 P.V-31). Even this analysis showed that the ratio of benefits to assessments

would vary from 7.1 to 1.00 for an existing developed parcel in one location to 17.9 to 1.00 for a vacant parcel in a different location. (App.-S:V.II T.2 P.V-30, V-31). This is not taken into account, though, in determining the assessments. Neither were adjustments made for fluctuations in property values which resulted from factors other than the Improvements. (App.-S:V.I T.3 P.189-192, 222-224). Rather, all of the Improvements and projects were lumped together to form the one grand Visions 90 Project.

As in the Fisher case, Id., the assessment here is measured only by the assessed valuation of taxable property, the assessment will not be fixed at the time the initial levy is made, and, in fact, the assessment will fluctuate annually in proportion to changes in the properties' assessed valuations.

The Court in Fisher, Id., based on virtually identical facts, found that the assessment was actually an ad valorem tax.

Regardless of what the City names this exertion of taxing power, it clearly works as an ad valorem tax. The Court recognized this in Atlantic Coast Line Railroad Company v. City of Gainesville, 83 Fla. 275, 91 So. 118, 120 (1922), where the City was advised that

> Another authority counsel might have cited, but did not, is that of the monk Gorenflot, who at the instance of Chicot, the Jester, solemnly christened a chicken a carp, in order that he might partake of it on Friday without violating his religious obligations.

If viewed individually, each of these factors alone might not be sufficient to warrant reclassification of this assessment as a tax. However, when considered together, as a whole, it becomes

apparent that this so-called assessment is really an ad valorem tax.

The distinction between an ad valorem tax and an assessment is an important one for the City. An ad valorem tax levied by a municipality is generally subject to the total millage cap of 10 mills imposed by Article VII, Section 9(b) of the Florida Constitution (1968). If the ad valorem tax is levied for the payment of bonds, it is subject to approval by a vote of the electors who are the owners of freeholds not wholly exempt from taxation, if approved the millage cap is then not applicable. Art. VII, § 9(b), Fla. Const. (1968). In addition, Section 12 of that same Article further restricts the usage of bonds issued by municipalities, payable from ad valorem taxation, and maturing more than twelve months after the issuance of the bonds

> (a) to finance or refinance capital projects authorized by law and only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation; or
>
> (b) to refund outstanding bonds and interest and redemption premium thereon at a lower net average interest cost rate.

By labelling these levies as "assessments", the City subverts these constitutional restrictions on ad valorem taxes. Then, by basing these assessments on an ad valorem method, the City most importantly avoids the requirement of a determination of the specials benefits to inure to the assessed parcels of property.

The City is attempting to have "the best of both worlds". It should be required to choose one method or the other, i.e.,

assessment or tax, not develop some hybrid method with all the advantages and none of the restrictions.

POINT III

THE TRIAL COURT ERRED IN FINDING THAT THE PARCELS WHICH ARE EXCLUDED FROM THE PROPOSED AD VALOREM ASSESSMENT WOULD AT MOST RECEIVE ONLY INSIGNIFICANT SPECIAL BENEFITS AND ARE, THEREFORE, PROPERLY EXCLUDED FROM THE ASSESSMENT.

Section 7(a)(2)(i) of the City's Ordinance No. 128-90 provides that the houses of worship and parcels of property zoned R 1D and R 3, i.e., residential parcels, will be excluded from the assessment. The declared reason for the exclusion is that no special benefits from the Improvements will inure to these types of properties. (App.:P.24).

Although it is not specifically declared in the Ordinance, government-owned parcels will also be excluded from the assessment by virtue of the fact that these parcels do not appear on the real property tax assessment roll of the Palm Beach County Property Appraiser.

The testimony of the City's own witnesses proves that these exclusions were based on arbitrary decisions, and not on the lack of benefits to the excluded parcels.

Joseph Fletcher, the project manager for the Improvements, stated that residential properties located in projects CRA-21 and CRA-15, for example, will benefit from the drainage, water, sewer and paving Improvements to be made in those areas. (App.-S:V.I T.2 P.68-70).

When asked if houses, public buildings, and houses of worship would receive benefits, Mr. Fletcher answered by saying

> I would say the infrastructure improvements downtown will benefit everyone downtown. (Emphasis Supplied).

(App.-S:V.I T.2 P.85-86).

Robert J. Harmon, the urban economic consultant hired by the City for the Visions 90 Project, testified that the purpose of these Improvements is

> ...to enhance the entire downtown...

(App.-S:V.I T.3 P.161).

When asked why houses of worship and residences were excluded from the assessments, Mr. Harmon stated that, with respect to houses of worship,

> ...it's felt that it's just activity the committee did not want to have included.

(App.-S:V.I T.3 P.139). With respect to the residences, one of the reasons given by Mr. Harmon for exclusion was that

> ...there was a very small number of them, and they wanted to keep an incentive or keep as much residential in downtown as possible and even to attract some additional.

(App.-S:V. IT.3 P.139-140).

This exclusion is granted even though the residential properties are eligible for the increased development rights, and even though the residential properties will receive special, as well as general, benefits, as will the properties subject to the assessment. (App.-S:V.I T3 P.140-142, 196-198, 262-263).

The idea for these exclusions came from Mr. Harmon's case studies in other cities (App.-S:V.I T.3 P.140); and not from a

study based on the benefits, projects, and properties involved in this case.

In addition, these exclusions were seen to be a way to avoid any obstacles to implementation of the Visions 90 Project. Mr. Harmon testified that

> ...the objections that that normally small group of property owners has, and houses of worship have raised, have been obstacles to implementation.

(App.-S:V.I T.3 P.212).

The reasons given for the exclusion of government properties from the assessment, is that these properties are not sold and resold in the marketplace, so they normally would not benefit. These properties would, however, be serviced by the sewers, roads, and water lines. (App.-S:V.I T.3 P.142).

Included in the category of government properties is 18 acres of the 30 acre Mizner Park project. (App.-S:V.I T.5 P.302). Mizner Park is a new joint private/public development. It was one of the first developments to take advantage of the increased development rights afforded under what is now called the Visions 90 Project. Without the Visions 90 Project, the private developer of Mizner Park would never have received development approval without directly paying for the Improvements necessitated by the development. (App.-S:V.II T.2 P. IV-7).

There is no doubt that Mizner Park benefits from the Improvements, yet 18 acres of this development will be excluded from the assessments simply because it is owned by the City.

It is interesting to note that of the 344 acres which comprise the DDD, only approximately 147 acres will be subject to the assessments. (App.-S:V.I T.5 P.303-304).

In Martin v. Dade Muck Land Co., 95 Fla. 530, 116 So.449, 464 (1928), this Court stated

> ...special assessments must not, by reason of arbitrary action or unjust discrimination or otherwise, violate the due process or equal protection or other provisions of organic law.

Later, in Jinkins v. Entzminger, 102 Fla. 167, 135 So.785, 789 (1931), the Court went on to say that where the cost of special improvement is to be distributed according to assumed benefits

> ...if the effect is to impose a grossly unjust or unequal burden on some of the property taxed, though benefitted, relief will be given...

An assessment has been held void because its arbitrary discrimination violated the provisions of organic law guaranteeing equal protection to all. Art. XIV, U.S. Const. Utley v. City of St. Petersburg, 106 Fla. 692, 144 So.58 (1932) (assessment of property on only one side of street for the cost of paving strip of land which was acquired on that side of street, for purpose of street widening, constituted arbitrary discrimination).

The City's decision to provide exclusions from the assessments for houses of worship, residential properties, and government-owned properties was an arbitrary one which violates the constitutional guarantee of equal protection. The assessments must, therefore, be held void.

The City's decision to provide for "Deferrable Assessments" for only a specified class of property is also an arbitrary one and also violates the equal protection guarantee.

Deferrable Assessments are available only to:

(1) parcels in commercial zones on which are located existing (as of the date of the adoption of Resolution No. 128-90) single-family residential units; and

(2) parcels on which are located existing (as of the date of Resolution No. 128-90) commercial businesses that are 100% owner-occupied, and the building is (i) the principal place of business, (ii) under single ownership, and (iii) the size of the building does not exceed 7,500 gross square feet.

(App.:P.25).

Only parcels which meet these limited specifications are permitted to defer their assessments for up to 15 years, preferential treatment is not available to all of the assessed properties.

No specific authority exists for this preferential treatment in the City's Ordinance No. 3851 (App.:P7-20); and no testimony could be elicited from the City's "expert" witnesses as to the reasons for the preferential treatment (App.-S:V.I T.2 P.76, T.3 P.187, 198-199). Surprisingly, in fact, Mr. Harmon stated that the deferred payment plan for owner occupied businesses was not carried forward because

> ...<u>it wasn't reasonable</u>...
> (Emphasis Supplied)

(App.-S:V.I T.3 P.187,198-199).

The State agrees with Mr. Harmon that the Deferrable Assessments are not reasonable. Further, the City's decision, in Resolution No. 128-90, to provide these deferments to only a limited class of properties was an arbitrary one in violation of equal protection concepts. The assessments must also be held void because of the provision for these Deferrable Assessments.

CONCLUSION

For the reasons stated in Point I, the State of Florida respectfully submits that the Trial Court properly found that the City was not authorized under its home rule powers to levy the special assessments to finance the issuance of the Bonds.

The State further respectfully submits, based on the reasons stated in Point II, that the Trial Court erred in finding that the ad valorem assessment proposed by the City to pay for the Bonds is not a tax.

Additionally, the State respectfully submits, that based on the reasons stated in Point III, the Trial Court erred in finding that the parcels which are excluded from the proposed ad valorem assessment would at most receive only insignificant special benefits and are, therefore, properly excluded from the assessment.

Therefore, the State respectfully requests this Honorable Court to affirm the decision of the Trial Court denying validation of the Bonds; and to reverse the findings of the Trial Court that the ad valorem assessment, in the form proposed by the City, is not a tax and that the excluded parcels would at most receive only

insignificant special benefits and, are, therefore, properly excluded from the assessment.

Respectfully submitted,
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CERTIFICATE OF SERVICE

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