SUPREME COURT OF FLORIDA

Case No. 77,468

CITY OF BOCA RATON, FLORIDA,

Appellant,

v.

THE STATE OF FLORIDA, and the TAXPAYERS, PROPERTY OWNERS and CITIZENS OF THE CITY OF BOCA RATON FLORIDA, including NON-RESIDENTS OWNING PROPERTY OR SUBJECT TO TAXATION THEREIN, et al.,

Appellees.

ANSWER BRIEF OF APPELLEE/CROSS APPELLANT ASTRAL INVESTMENT, INC.

On Appeal From The Circuit Court Of The Fifteenth Judicial Circuit In And For Palm Beach County, Florida

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

PREFACE

This is an appeal from a Final Judgment dated January 22, 1991, of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

Appellant, CITY OF BOCA RATON, FLORIDA, will be referred to herein as "BOCA RATON."

Appellee, THE STATE OF FLORIDA, will be referred to herein as the "STATE."

Appellee, ASTRAL INVESTMENT, INC., will be referred to herein as "ASTRAL."

Collectively, Appellees will be referred to herein as "Appellees."

Appellant's Appendix will be cited herein as "A.__."

The STATE's Appendix will be adopted by ASTRAL and cited herein as "App-S. V.__, T.__, p.__."

STATEMENT OF THE CASE

ASTRAL supplements the Statement of the Case provided by BOCA RATON only as necessary for completeness and accuracy.

BOCA RATON'S Complaint sought to validate up to $21,000,000.00 in Special Assessment Improvement Bonds, Series 1990 (Visions 90 Project) ("Bonds") on the authority of Art. VIII, Fla. Const., and Chapter 166, Fla.Stat. (1989). A.1-69. In its Response to Order to Show Cause and Answer to Complaint, the STATE demanded that BOCA RATON show compliance with Chapter 170, Fla.Stat. A.74. ASTRAL'S Response to Order to Show Cause and Answer and Affirmative Defenses to Complaint ("Answer") denied BOCA RATON'S authority to issue the Bonds pursuant to Chapter 166, Fla.Stat. (1989). A. 78-84.

In its Affirmative Defenses, ASTRAL alleged that the special assessment was actually an ad valorem tax and, thus, illegal pursuant to the Florida Constitution without a corresponding vote of the electors. A.78-80. ASTRAL also raised BOCA RATON'S failure to comply with Chapter 170, Fla.Stat. (1989), in attempting the special assessment. A.80. The Appellees raised additional defenses, including the lack of any special benefit to the parcels to be assessed ("Assessed Parcels"), the lack of proportionality between the special benefits and the special assessments, and the unconstitutional exclusion of certain parcels from the assessments. A.80, 105-6, 112.

At trial, BOCA RATON acknowledged it made no attempt to comply with Chapter 170, Fla.Stat. (1989), in attempting issuance of the Bonds. App-S. V.I, T.6, p.318. BOCA RATON urged that Chapter 166, Fla.Stat., the City Charter, and Ordinance 3851 ("Ordinance") provided sufficient authority for issuance of the Bonds. App-S. V.I, T.6, p.319.

The Appellees argued the invalidity of BOCA RATON'S Bonds on several grounds: (1) on the basis of the preemption in Art. VII, §1(a), Fla. Const. (1968), BOCA RATON is without authority to issue the Bonds in the absence of compliance with Chapter 170, Fla.Stat. (1989), or other general law, App-S., V.I, T.6, pp.341-342, 369, 371; (2) the special assessments are ad valorem taxes prohibited by the Fla. Const., App-S. V.I, T.6, pp.341, 369, 380; (3) the special assessments are not in proportion to and less than the value of special benefits to be received by the Assessed Parcels, App-S. V.I, T.6, pp.343, 351-353, 356, 372; and (4) the ad valorem assessment method adopted by BOCA RATON denies equal protection to the owners of the Assessed Parcels, App-S. V.I, T.6, pp.8, 344, 366-367, 370-371, 373, 382.

On January 22, 1991, the trial court entered its Final Judgment. A.95-101. Relying upon Art. VII, §1(a), Fla. Const. (1968), the Final Judgment finds Boca Raton lacks the power to specially assess without a specific grant of authority from the Legislature and further finds that Chapter 166, Fla.Stat. (1989), does not constitute such specific grant of authority.

A.99. The Final Judgment also incorporates the following findings of fact:

A. The ad valorem assessment is not a tax, it is an assessment.

B. The assessments are directly proportional to the special benefits to be provided each parcel and the benefits are in excess of the assessments.

C. The improvements are properly treated as a single project. Improvements need not necessarily be abutting, adjoining or even completely within the District.

D. Excluded parcels would at most receive only insignificant special benefits.

E. All notice provisions required by law have been fulfilled.

Following entry of Final Judgment, BOCA RATON filed its Notice of Appeal. A.115. The Appellees have cross-appealed.

STATEMENT OF THE FACTS

ASTRAL offers its Statement of the Facts only to supplement and correct the facts submitted by BOCA RATON as necessary.

A. BOCA RATON's Development Project.

In the early '80's, BOCA RATON created the Community Redevelopment Agency ("Agency") to oversee redevelopment of the downtown district or Downtown Development of Regional Impact ("DDRI"). T.289. The DDRI is an irregularly shaped parcel of land bordering U.S. 1 between Southeast 11th Street and Northeast 6th Street. App-S. V.II, T.1, p.27, Exh.C. Following its establishment, the Agency expended over two million tax increment dollars received from DDRI property owners for studies of the proposed redevelopment. App-S. V.I, T.5, pp.290-291.

The plan ultimately approved by BOCA RATON involved over 4,500,000 square feet of additional development in the DDRI, including a 30-acre development of regional impact at the north end of the DDRI which is known as Mizner Park. App-S. V.I, T.5, pp.301-302. Pursuant to Florida's Growth Impact Act, the Treasure Coast Regional Planning Council approved BOCA RATON's development plan and a Development Order ("Order") requiring that certain infrastructure improvements be accomplished prior to commencement of the development. App-S. V.I, T.1, pp.47-48. The infrastructure improvements required by the Order include transportation improvements, intersection improvements, drainage, water and sewer construction, and beautification as far away as northern Broward County. App-S. V.I, T.2, pp.46-49.

Many of the required improvements are completely outside the DDRI. App-S. V.I, T.2, pp.53-58, 61-63; A.28-34.

B. Financing Necessary Infrastructure for BOCA RATON's Development Project.

Following issuance of the Order, BOCA RATON conducted a series of studies designed to identify an appropriate financing method for the proposed improvements and infrastructure development. App-S. V.I, T.3, p.108. During the process, BOCA RATON'S legal counsel recommended that BOCA RATON comply with Chapter 170, Fla.Stat. (1989), if it intended to finance the improvements through special assessments. App-S. V.I, T.3, p.182; App-S. V.II, T.3, pp.1-3.

Among the several methodologies considered was an ad valorem assessment prorated according to the inventory of total assessed property values in the DDRI as established by the Palm Beach County Property Appraiser. App-S. V.I, T.3, p.118. The ad valorem assessment method, known as a variable assessment, requires an annual adjustment of the special assessment based upon the value of nonexempt property within the DDRI. App-S. V.I, T.3, p.169. The special assessments will vary from year to year with the value of the Assessed Parcel. App-S. V.I, T.2, p.88. The urban economic consulting firm hired by BOCA RATON felt that the ad valorem assessment method would result in a higher monetary gain to vacant property or property containing a small building subsequently sold to developers. App-S. V.I, T.3, p.184.

BOCA RATON ultimately selected the ad valorem assessment method for the DDRI redevelopment program ("Visions 90 Project"). App-S. V.I, T.3, pp.115, 188, 238. On May 22, 1990, BOCA RATON, relying only upon Art. VIII, §2, Fla. Const., and Chapter 166, Fla.Stat. (1989), enacted the Ordinance. Initial Brief, p.4; A.7-20. The Ordinance purports to authorize construction of certain improvements required by the Order ("Improvements") and to finance such Improvements "by levying and collecting special assessments on ... abutting, adjoining, contiguous or other specially benefited property ... ." A.7.

Pursuant to §2 of the Ordinance, BOCA RATON enacted Resolution No. 129-90 ("Bond Resolution") on May 22, 1990. A.35-69. Section 2.02 of the Bond Resolution authorizes the issuance of Bonds in an amount not to exceed $21,000,000.00 to finance the costs of the Improvements. A.45. Also on May 22, 1990, BOCA RATON approved and adopted Resolution No. 128-90 ("Project Resolution") providing that the bonds could be paid by variable, ad valorem assessments. A.21-34.

C. Claimed Benefits To Existing Improved Properties Of the New Infrastructure.

Attached to the Project Resolution as Exhibit A is a list of the 25 Visions 90 Project Improvements to be financed at least partially through the special assessments. A.23, 28-32. Included in the Improvements are road expansion, drainage, intersection improvements, lighting, street furniture, landscaping, sidewalks and beautification. A.30. The Improvements are

the infrastructure improvements required for BOCA RATON's DDRI project by the Order. App-S. V.I, T.2, pp.76-77. The Improvements are largely noncontiguous. Only two of the Improvements abut the ASTRAL property. App-S. V.I, T.2, p.54. Many of the Improvements are wholly outside the DDRI. App-S. V.I, T.2, pp.56-63.

Of the approximately 344 acres included in the DDRI area, only 147 acres owned by approximately 163 property owners are subjected to the special assessment up to $21,000,000.00. App-S. V.I, T.5, p.302. Certain residences are exempted from the special assessments even though they would benefit by the Improvements. A.24; App-S. V.I, T.2, pp.64, 70, 86. Government-owned property with development rights, also exempt, would benefit if the property was within the development controlled by the Order. App-S. V.I, T.3, p.216.

Among the planned new developments for which the Improvements are necessary is Mizner Park, the 30-acre development owned by BOCA RATON. App-S. V.I, T.5, p.302. Twelve of the 30 acres comprising Mizner Park are leased to a private development company for development. The 18-acre Mizner Park area retained by BOCA RATON is not subject to the special assessments even though the Improvements will benefit not only BOCA RATON'S portion of Mizner Park, but also that portion leased to the private developer. App-S. V.I, T.5, p.302.

BOCA RATON'S urban economic consultant for the Visions 90 Project testified that development cost savings, parking cost

savings, impact fee savings for new development, land value gain, enhanced rents, and enhanced sales were the six advantages to the Assessed Parcels. App-S. V.I, T.3, pp.125-127. However, BOCA RATON's project manager for the Visions 90 Project did not know if the Improvements were necessary for the already developed Assessed Parcels and felt the existing infrastructure was adequate since the properties were currently operating. App-S. V.I, T.2, pp.77-78. No special benefit of "development cost savings" is realized by already developed properties. App-S. V.I, T.3, p.178. Any benefit to developed properties such as ASTRAL'S could not be predicted exactly. App-S. V.I, T.3, p.145. Vacant property would receive a higher proportional benefit over time and could not be developed without the infrastructure Improvements included in the Visions 90 Project. App-S. V.I, T.3, pp.148, 195. The purpose of the Improvements was to create development capacity for new developments on vacant parcels in accordance with the Order, rather than to enhance development capacity for existing developments. App-S. V.I, T.3, p.267.

An increase in the rental rates might not be available to every Assessed Parcel. App-S. V.I, T.3, pp.127, 195. The variable assessment plan would have a negative effect on leasing in the DDRI because prospective tenants could not be told how much the future assessments would be. App-S. V.I, T.6, p.301. Many tenants in the DDRI already plan to leave their present locations and move to Mizner Park. App-S. V.I, T.6, p.302.

SUMMARY OF ARGUMENT

Art. VII, §1(a), Fla. Const. (1968) reserves to the State all forms of taxation except as provided by general law. A special assessment is a form of taxation, even if not strictly categorized as a tax. Neither Art. VIII, §2(b), Fla. Const. (1968), nor Chapter 166, Fla.Stat. (1989), authorizes the special assessments attempted by BOCA RATON. Although Chapter 170, Fla.Stat. (1989), authorizes the special assessments without requiring special application to the Legislature, BOCA RATON did not take advantage of the Chapter. The trial court properly denied validation of the Bonds in light of BOCA RATON'S reliance upon Chapter 166, and its failure to comply with the requirements of Chapter 170.

The special assessments, as attempted by BOCA RATON, are an ad valorem tax. BOCA RATON acknowledges that it utilized an ad valorem assessment methodology which necessitates readjustment of the assessment each year and precludes prepayment and even realistic projection of the yearly assessment. The ad valorem special assessment, based upon the value of the Assessed Parcels rather than the value of the special benefit to the Assessed Parcels, violates Art. VII, Fla. Const.

The special assessments attempted by BOCA RATON are not directly proportional to the special benefits to be provided the Assessed Parcels. The uncontradicted evidence adduced at trial refuted the conclusory findings of proportionality as stated in the Project Resolution and the project reports.

Further, the uncontradicted trial evidence refuted the conclusory finding that the value of the special benefit to each Assessed Parcel is in excess of the special assessment with respect to that parcel.

The 25 Improvements do not constitute a single project. The Improvements are primarily noncontiguous. Only two abut the ASTRAL property. The Improvements are separate and distinct and benefit distinct parcels, many of which are not assessed. The several elements of extensive improvements must be assessed separately.

The parcels excluded from the special assessment would receive more than insignificant special benefits. Exclusion of public property and certain residences from the special assessments and imposition on the Assessed Parcels of the cost of benefits to the excluded parcels is a violation of equal protection requirements. The evidence at trial showed that the benefit to the excluded parcels is in many instances no different that the benefit to the Assessed Parcels. In some instances the benefit to the excluded parcels is greater than the benefit to the Assessed Parcels. In general, the benefit to be achieved from the Improvements is a general benefit to the entire region and not a special benefit to the Assessed Parcels.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN RULING THAT BOCA RATON LACKS THE POWER TO SPECIALLY ASSESS WITHOUT A SPECIFIC GRANT OF AUTHORITY FROM THE LEGISLATURE.

A. The Trial Court Correctly Found That Art. VII, §1(a), Fla. Const. (1968) Preempts All Forms Of Taxation Other Than Ad Valorem Taxes To The State.

In this bond validation proceeding, the trial court was first asked to determine whether BOCA RATON, a municipality, has the power to specially assess by virtue of Art. VIII, Fla. Const., and Chapter 166, Fla.Stat. (1989) ("Municipal Home Rule Powers Act"). In finding that BOCA RATON did not have such powers, the trial court relied upon the language of Art. VII, §1(a), Fla. Const. (1968), which 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. (Emphasis added.)

The commentary by Talbot "Sandy" D'Alemberte notes that the final sentence of the Section was included for the first time in the 1968 Constitution. The narrow issue before this Court, resolved in favor of ASTRAL and the other Appellees by the trial court, is whether a special assessment is a "form of taxation" within the meaning of that final sentence.

The conclusion that special assessments are a form of taxation is consistent with the opinions expressed in authoritative treatises and by this Court. In Rinker Material Corporation v.

Town of Lake Park, 494 So.2d 1123, 1125 (Fla. 1986), a decision post-dating enactment of the 1968 Constitution, this Court implicitly recognized that special assessments are "forms of taxation" which are preempted to the state by Article VII, Section 1(a) of the 1968 Constitution. Special assessments, to be valid and enforceable, "must be made pursuant to legislative authority and the method prescribed by the Legislature must be substantially followed." By limiting valid special assessments to those authorized by the Legislature, this Court acknowledged the preemption of special assessments to the state as a form of taxation.

While the last sentence of Art. VII, §1(a) of the current Constitution is new, the concept that special assessments are a form of taxation is not. Article 10, §7 of the 1885 Constitution also included special assessments within the scope of "taxation." The first $5,000 of the assessed valuation of a homestead was exempted from "all taxation, except for assessments for special benefits... ." Art. VII, §6 of the 1968 Constitution contains identical language. The exception is necessary only because special assessments are a form of taxation. Clearly, the drafters of the Florida Constitution comprehend within the scope of "forms of taxation" the types of special assessments attempted by BOCA RATON.

Special assessments have historically been treated as a form of taxation in Florida, and this must have been in the minds of the drafters of the 1968 Constitution. In City of

Coral Gables v. Coral Gables, Inc., 119 Fla. 30, 160 So. 476, 479 (1935), this Court determined the validity of special assessment liens imposed by the City of Coral Gables. The Court determined the special assessments to be a tax within the meaning of §7 of Article 9 of the 1885 Constitution in finding the assessments to be invalid. "Section 7 of article 9 in effect provides that no tax shall be levied for the benefit of any chartered company of the state ... ." (Emphasis added.)

Again, in Lainhart v. Catts, 73 Fla. 735, 75 So. 47, 52, (1917), this Court recognized that a special assessment "is a peculiar species of taxation distinct from the general burden imposed for state, county and municipal purposes, in that it is a local or special charge placed upon the land ...." (Emphasis added.) See also State v. Caldwell, 160 Fla. 355, 35 So.2d 642 (1948). In Lainhart, the Court noted that §§2, 3, and 5 of Art. 9, the antecedent of Art. VII of the 1968 Constitution, made no reference to special assessments. That omission is cured in the current Constitution, which, by adding the phrase "forms of taxation," specifically references the "species of taxation" recognized by Lainhart and Caldwell.

A special assessment is a peculiar species of tax levied under the municipality's power of taxation. See Jackson v. City of Lake Worth, 156 Fla. 452, 23 So.2d 526 (1945); City of Gainesville v. McCreary, 66 Fla. 507, 63 So. 914 (1913). "Assessments for local improvements form an important part of the system of taxation." Atlantic Coast Line R. Co. v. City of

Lakeland, 94 Fla. 347, 115 So. 669, 676 (1927).

This Court's consistent treatment of special assessments as a form of taxation comports with the opinions of commentators. In Cooley on Taxation, Vol. 1, 3d Ed., page 546, the author refers to "taxation in the form of local assessments." (Emphasis added.)

Florida's Attorney General in current opinions has also recognized that special assessments are a form of taxation. "Florida case law indicates that special assessments are levied under the taxing power and are a 'peculiar species of taxation.'" 1990 Op. Att'y Gen. Fla. 090-52 (July 10, 1990), quoting Caldwell, 35 So.2d at 644. See also 1989 Op. Att'y Gen. Fla. 089-85 (November 22, 1989) ("Special assessments, although not strictly a tax, are in the nature of a tax and are levied under the taxing power"); 1985 Op. Att'y Gen. Fla. 085-90 (October 30, 1985) ("While special assessments are distinguishable from taxes, they are levied under the taxing power and are, in a broad sense, a peculiar species of taxes"); 1980 Op. Att'y Gen. Fla. 080-87 (November 10, 1980) ("[S]pecial assessments are a peculiar species of taxation").

In arguing that a special assessment is not a form of taxation within the scope of Art. VII, §1(a), BOCA RATON relies upon two cases which have no reference to the language of the 1968 Constitution: Whitney v. Hillsborough County, 99 Fla. 628, 127 So. 486 (1930); Lainhart v. Catts, 75 So. at 47. The critical last sentence of the Section is unique to the 1968

Constitution. There was no "similar provision" in the 1885 Constitution. Sections 2, 3 and 5 of Article 9 of the 1885 Constitution, the predecessor to Article VII, applied only to general taxation for state, county and municipal purposes. Whitney, 127 So. at 491; Lainhart, 75 So. at 54.

Other decisions and opinions cited by BOCA RATON are inapposite. Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976), involved impact fees and not special assessments. Home Builders and Contractors Association of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County, 446 So.2d 140 (Fla. 4th DCA), pet. review denied, 451 So.2d 848 (1984), appeal dismissed, 469 U.S. 976, 105 S.Ct. 376, 83 L.Ed.2d 311 (1981), also involved a regulatory impact fee. Both are within the police power, not the taxing power, of the government.

Any superficial similarity between impact fees and special assessments disappears under analysis. The special assessments sought to be levied in this case are not fees "transfering to [a] new user ... a fair share of the costs new use ... involves." Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So.2d at 317, 318. (Emphasis added.) In fact, this scheme would do the opposite. It would unfairly transfer to old users the costs for infrastructure necessitated by new development. The scheme of BOCA RATON is antithetical to the philosophy of impact fees. Impact fees are not taxes because the new user, not existing users, receive the

special benefit and therefore should bear the cost. Here, BOCA RATON as a public developer is making the same claim made unsuccessfully by the private developers in the impact fee cases -- that existing users are receiving the benefit of new infrastructure, and therefore should bear the cost through taxation. That argument has failed before, and should fail now.

In Lake Howell Water and Reclamation District v. State, 268 So.2d 897 (Fla. 1972), the question was not whether the assessment was a tax. The question was whether it was an ad valorem tax requiring a vote pursuant to Art. VII, §12, or merely a pro rata allocation of cost. The Court noted that historically, assessments by drainage districts have never been deemed ad valorem in nature. This ended the inquiry as to Section 12. Nothing in the Lake Howell opinion addresses whether or not a special assessment is a "form of taxation" within the final sentence of Article VII, Section 1(a), nor is there any discussion of whether the drainage district complied with applicable general law authorizing the assessment.

City of Miami v. Brinker, 342 So.2d 115, 116 (Fla. 3d DCA 1977), held that a demolition lien was not a special assessment lien, and thus not a tax lien payable from a tax sale. Presumably, if the demolition lien was a special assessment, it would be a tax lien. Thus, this case supports the Appellees.

To the extent 1974 Op. Att'y Gen. Fla. 074-24 (January 31, 1974) and 1974 Op. Att'y Gen. Fla. 074-244 (August 9, 1974) appear to opine that special assessments are not within the

scope of Art. VII, §1(a) of the 1968 Constitution, they are inconsistent with and superseded by later opinions on the subject by Florida's Attorney General. See 1990 Op. Att'y Gen. Fla. 090-52 (July 10, 1990); 1989 Op. Att'y Gen. Fla. 089-85 (November 22, 1989); 1985 Op. Att'y Gen. Fla. 085-90 (October 30, 1985).

Cases and treatises referencing the law in other states cannot be relied upon to construe language in the Florida Constitution. There is no doubt a municipality may be given a constitutional grant of power to levy any form of taxation, including special assessments. In Cook v. City of Addison, 656 S.W.2d 650 (Tx. App. 1983), the court held that the Texas Constitution gave a home rule city power to do anything the legislature could authorize. Florida, however, has not authorized such power. The Supreme Court of Colorado, in Reams v. City of Grand Junction, 676 P.2d 1189 (Colo. 1984), merely held that Grand Junction had the power to specially assess pursuant to a constitutional "power to levy taxes." Again, Florida has not granted such broad power to municipalities.

B. The Trial Court Correctly Found That Home Rule Does Not Grant Municipalities Specific Statutory Authority To Levy Special Assessments.

The home rule "revolution" did not change the character of special assessments as a form of taxation, nor did it vitiate Art. VII, §1(a), Fla. Const. (1968). If accepted, BOCA RATON's argument would create a conflict between Art. VIII and Art. VII, §1(a). This Court has already determined that no such conflict exists. In City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1, 3 (Fla. 1972), this Court, relying upon Art. VII, §1 of the 1968 Constitution, held that any municipal tax, except an ad valorem tax, which is not authorized by general law must necessarily fail despite the concept of home rule. As BOCA RATON does in this case, the City of Tampa argued that Art. VIII of the 1968 Constitution controls over Art. VII, §1. This Court rejected the argument. Neither the language of Art. VIII in general nor of Art. VIII §6 states that the purpose of the article is to supersede other provisions of the Constitution of 1968 specifically dealing with taxation and limitations thereon. Id. at 5.

BOCA RATON'S and the Amicus Florida League of Cities' entire analysis with respect to the historical context of home rule powers, and the changes effected by the 1968 Constitution, may be answered by broadening the historical context to encompass Art. VII, §1(a), the greatest portion of which was added to the Constitution contemporaneously with the emergence of municipal home rule. The last sentence of Art. VII, §1(a)

of the 1968 Constitution was meant to balance the broad grant of municipal powers found in Art. VIII of the 1968 Constitution. While municipalities now have "inherent" power, they do not have "absolute" or "supreme" power. The power of the Legislature remains all-pervasive. Lake Worth Utilities v. City of Lake Worth, 468 So.2d 215, 217 (Fla. 1985).

Specifically, Art. VII, §1(a) of the 1968 Constitution was included to limit the power of municipalities to tax at random. Article VIII recognizes that limitation in providing that municipalities may "exercise any power for municipal purposes except as otherwise provided by law." Art. VIII, §2(b), Fla. Const. (1968). In the absence of the limiting language in Art. VII, §1(a), municipalities would have exactly the power urged by BOCA RATON - the power to specially assess merely upon a finding of special benefit. BOCA RATON's construction of the Constitution renders meaningless the limitation in Art. VII, §1(a), in violation of elementary rules of construction. Birdsong Motors, 261 So.2d at 5.

The language of former Chapter 167, Fla.Stat. (1971) exhibits the fallacy in BOCA RATON'S argument. Section 167.005 recognized the broad home rule powers granted to municipalities by Art. VIII, §2(b) of the 1968 Constitution. Nevertheless, §167.01, Fla.Stat. (1971) specifically authorized a municipality to specially assess in certain limited circumstances. That authority may still be exercised pursuant to Chapter 170. If Art. VIII, §2(b) of the 1968 Constitution

is as broad as BOCA RATON suggests, there would have been no necessity nor reason for §167.01, Fla.Stat. (1971), or the current Chapter 170. Such conclusion contravenes the presumption that the Legislature intends each word of its enactments. Pinellas County v. Woolley, 189 So.2d 217 (Fla. 2d DCA 1966).

BOCA RATON's in terrorem argument that the trial court decision wrenches power out of municipalities and other governmental authorities created by special act is both irrelevant and incorrect. This Court has refused to whittle away at the organic law by a process of judicial erosion which could destroy beneficient constitutional safeguards. Fisher v. Board of County Commissioners of Dade County, 84 So.2d 572 (Fla. 1956). The constitutional safeguard now before this Court is equally inviolative. Moreover, the result of the trial court's decision is not disastrous. Special taxing districts are usually authorized by general law to specially assess. See, e.g., §298.36, Fla.Stat. (1989). All municipalities may avail themselves of Chapter 170. The concerns of BOCA RATON and the Florida League of Cities that the decision of the trial court is anti-home rule are unwarranted, because the principles of home rule and the practical means to exercise it remain unaffected by the trial court's ruling.

BOCA RATON and the Amicus Florida League of Cities argue that municipalities are authorized by Chapter 166, Fla.Stat.

(1989) to specially assess in the absence of any other statutory scheme. Chapter 166 is not so broad. Unless that act expressly provides that municipalities may make special assessments, the preemption of Article VII, §1(a) still prohibits such action.

The express provisions actually demonstrate that the power to specially assess is not granted by Chapter 166. BOCA RATON relies upon the general language of §§166.021(1) and (2) as the delegation of authority to specially assess. However, the following clause, subsection (3) of §166.021, excludes certain subjects from the powers granted a municipality. Among the subjects excluded are any "expressly preempted to the state or county government by the constitution or by general law ...." §166.021(3)(c), Fla.Stat. (1989). Further, the next clause, subsection (4) of §166.021 provides that the section should not be construed to grant any powers which are expressly prohibited by the Constitution. Article VII, §1(a) of the 1968 Constitution expressly preempts to the state all "forms of taxation" except as provided by general law. A special assessment is a form of taxation. Therefore, the express language of subsections (3)(c) and (4) indicate that this general law does not provide special assessment powers.

A grant of taxation authority should not be lightly implied. City of Miami v. Kayfetz, 158 Fla. 758, 30 So.2d at 521 (1947). When the Legislature intended in Chapter 166 to confer taxation power, it did so expressly. Section 166.211,

Fla.Stat. (1989), authorizes a municipality to levy ad valorem taxes pursuant to Article VII, §9 of the Constitution. Sections 166.221, 166.222 and 166.231 provide further authorization for other forms of municipal funding. None authorizes special assessments. It is not a logical construction of the sections, read in pari materia, that some forms of municipal taxation and funding would be specifically authorized by the Legislature, but special assessment authority must be somehow implied. The conspicuous absence of authorization shows that the Legislature did not intend municipalities to have such power. See also, §125.01, Fla.Stat. (1989) (authorizing counties to levy special assessments in certain circumstances); §190.022, Fla.Stat. (1989) (authorizing community development districts to specially assess for particular purposes).

In 1980 Op. Att'y Gen. Fla. 080-87 (November 10, 1980), Florida's Attorney General found nothing in Chapter 166, Fla.Stat., authorizing the levy of special assessments against extra-territorial property benefiting from extra-territorial improvements. In 1985, the Attorney General again found that taxing and assessment power requires enabling legislation not contained within the broad grant of home rule power to a non-charter county implemented by Chapter 125, Fla.Stat. In the absence of enabling legislation pursuant to Article VII, §1(a), Fla. Const., a government unit or agency has no power to levy special assessments. 1985 Op. Att'y Gen. Fla. 085-90

(October 30, 1985). Home rule powers do not include the power to levy special assessments absent specific statutory authority. 1989 Op. Att'y. Gen. Fla. 089-85 (November 22, 1989) (Emphasis added.)

BOCA RATON and the Amicus also argue that the inclusion of powers previously granted by Chapter 167, Fla.Stat. (1971) into Chapter 166 provides the necessary authority. However, §167.005, Fla.Stat. (1971), granted a municipality only those powers comprehended by Art. VIII, §2(b) of the 1968 Constitution. Chapter 166 now includes these powers but the power to tax is not among them.

The express but limited power to levy special assessments previously conferred upon municipalities by Chapter 167 was specifically revoked in 1973. Only the general intent language of §166.042(1), Fla.Stat. (1989) is offered by BOCA RATON and the Amicus as statutory authority for municipal special assessments. Importantly, this section does not re-enact by incorporation any part of Chapter 167. As such, it cannot be a general law authorizing a tax in compliance with the constitutional requirement. Section 167.11, Fla.Stat. (1971), if re-enacted by non-specific implied incorporation, would be violated by these special assessments because that section required the assessment to be a fixed amount, and that the improvements be completed before the assessments were levied.

The Amicus purports to find special assessment authority in Chapter 197. Section 197.3632, Fla.Stat. (1989) offers only a

mechanism for collection of authorized non-ad valorem assessments. It does not grant any authority, or support the proposition that §166.021 provides such authority. As demonstrated by the conjunctive language of §197.3631, the special assessment power recognized by §197.3632 is granted by Chapter 170.

BOCA RATON has a mechanism to accomplish its goals, without having to petition the Legislature, if it follows mandated procedures. Chapter 170, Fla.Stat. (1989), while recognizing municipal authority to make improvements financed by ad valorem taxation, regulatory and other fees and public service taxes, all as authorized by Chapter 166, Fla.Stat. (1989), specifically authorizes special assessments as an alternative method of funding local municipal improvements.

Chapter 170, Fla.Stat. (1989), gives a municipality reasonable and controlled power to specially assess for a broad range of improvements. The Chapter also provides the necessary protection from arbitrary taxation. Chapter 170 contains procedural and substantive safeguards to ensure that only proper projects become the subject of special assessments, and that the cost is allocated fairly.

The unrestrained authority arrogated by BOCA RATON has none of the procedural safeguards incorporated into Chapter 170, Fla.Stat. (1989). BOCA RATON's reliance upon implied authority totally avoids the statutory requirements built into Chapter 170 for public protection.

The existence of Chapter 170 is authority that Chapter 166 does not authorize special assessments. If, as BOCA RATON suggests, Chapter 166, Fla.Stat. (1989), authorizes special assessments, then there is no need for Chapter 170, Fla.Stat. (1989). Faced with a choice of compliance with Chapter 166, Fla.Stat. (1989), or Chapter 170, Fla.Stat. (1989), every municipality would make the obvious decision to comply with the less rigorous statutory scheme. The Legislature is presumed not to enact useless legislation. The trial court correctly found that the powers granted a municipality in Chapter 166, Fla.Stat. (1989), by virtue of Art. VIII, §2(b), Fla. Const., do not include the power to specially assess.

II. THE SPECIAL ASSESSMENTS ARE AN AD VALOREM TAX WHICH IS INVALID UNDER ARTICLE VII, §12 OF THE FLORIDA CONSTITUTION.

The trial court erred in finding that BOCA RATON's special assessment is not an ill-disguised ad valorem tax. Properly treating the special assessment as an ad valorem tax, the Ordinance is invalid for failure to submit the matter for referendum pursuant to Art. VII, §12 of the Florida Constitution.

A special assessment is an enforced contribution imposed upon the theory that the portion of the community 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." City of Fort Lauderdale v. Carter, 71 So.2d 260, 261 (Fla. 1954), quoting State v. Henderson, 137 Fla. 666, 188 So. 351, 354 (1939). A special assessment must bear a proportionate relationship to the cost of the service to be rendered as to any burdened property and must be as a result of a special benefit to that property. Id. at 260. See also §170.02, Fla.Stat. (1989); St. Lucie County - Fort Pierce Fire Prevention and Control District v. Higgs, 141 So.2d 744 (Fla. 1962).

Municipalities must specify the amount of the special benefit to each lot or tract. §170.06, Fla.Stat. (1989); City of Treasure Island v. Strong, 215 So.2d 473 (Fla. 1968); City of Fort Myers v. State, 95 Fla. 704, 117 So. 97 (1928); City of

Hallandale v. Meekins, 237 So.2d 318 (Fla. 4th DCA 1970), aff'd, 245 So.2d 253 (Fla. 1971). The absence of such a determination constitutes a jurisdictional defect in the assessment proceeding. Treasure Island, 216 So.2d at 479.

Historically, special assessments are not based upon the value of the property to be assessed. Rather, a special assessment is based on the pro-rata benefit to the individual assessed parcel. Lake Howell Water & Reclamation District v. State, 268 So.2d 897, 898 (Fla. 1972). Section 197.3632(1)(d), Fla.Stat. (1989), defines a special assessment as one "not based upon millage."

Ad valorem taxation, on the other hand, is based upon the assessed value of the land. §197.001, Fla.Stat. (1989). It is constitutionally limited to a uniform rate within each taxing unit. Art. VII. §2, Fla. Const. (1968). Presently, §166.201(1), Fla.Stat. (1989), authorizes municipalities to levy ad valorem taxes in an amount not to exceed 10 mills pursuant to Art. VII, §2 of the Constitution. However, bonds are only payable from ad valorem taxes if approved by a vote of the electors who are owners of non-exempt property within the taxing unit. Art. VII, §12, Fla. Const.

The "special assessment" attempted by BOCA RATON has the attributes of an ad valorem tax, not a special assessment. In Fisher v. Board of County Commissioners of Dade County, 84 So.2d 572 (Fla. 1956), this Court had before it the validity of exactly the type of assessment attempted by BOCA RATON. Dade

County determined to construct certain improvements to be financed ultimately by assessments levied proportionate to the ad valorem assessed value of the charged parcels. Although the county engineer conclusorily opined that the improvements would be of special benefit to all the assessed parcels and the cost would not be in excess of the benefit, this Court ruled that there was nothing in the record to show any attempt to evaluate the benefits to each assessed property. In reversing the trial court's validation of the bonds, the Court held that an ad valorem evaluation procedure without particular regard to special benefits accruing to each property for the particular improvements to that property was invalid. Id. at 574.

> Although the County Engineer submits the "opinion" that special assessments on all real property within the district ... should be in proportion to "the assessed valuation of such real property" because in his opinion "this is the proportion to the benefit to be received", ... it is readily apparent that "no exact valuation of benefits has been made."

Id. at 575. (Emphasis in original.) See also, Atlantic Coastline R. Co. v. City of Lakeland, 94 Fla. 347, 115 So. 669, 675 (1927). "The question of whether property abutting upon a street is in fact specially benefited ... does not rest exclusively in the judgment or upon the 'ipse dixit' of the municipal officer or officers ... ." Based upon the failure to determine special benefit, the Court determined the assessment to be an improper ad valorem tax.

A second reason for invalidation of the bonds in Fisher was that Dade County had merely estimated the cost of annual maintenance and street lighting. As a result, there was no upper limits on the annual assessment necessary to support maintenance of the improvements. The corresponding necessary increase in the annual assessment convinced the Court that the plan was actually an ad valorem assessment. "Nothing could be more typical of pure ad valorem taxation." Fisher, 84 So.2d at 574.

BOCA RATON's funding plan is infected with the same infirmities as the one before this Court in Fisher. Section 6 of the Ordinance authorizes BOCA RATON to pro rate and levy variable assessments each year based only upon the value of the Assessed Parcels as shown on the property tax assessment roll of the Palm Beach County Property Appraiser. A.12, 23-24. Section 6(b) of the Ordinance requires only that the resolution authorized by the Ordinance estimate the cost of the Improvements. A.13.

Section 6(a) of the Project Resolution conclusorily opines that the Improvements will benefit the Assessed Parcels. A.23. Section 7(b) of the Project Resolution, also in the absence of any factual foundation, finds that the special benefits for each lot or tract will be in excess of and in proportion to the special assessment imposed upon that lot or tract. There is no analysis of the particular benefit to or assessment on each of the Assessed Parcels. In fact, BOCA RATON's urban economic

consultant admitted that such an analysis had not even been done. App-S. V.I, T.3, pp.145-46, 268-69.

As in Fisher, the charge which BOCA RATON intends to impose does not bear any proportionate relationship to the benefit to any particular property. In Fisher, this Court rejected a burden of taxes in the absence of a specific finding of special benefit. BOCA RATON's attempt is no less invalid. Proportionability of prospective special benefit is based upon an expected "marketplace adjustment" via changes in assessed value. App-S. V.I, T.3, p.167. However, BOCA RATON's urban economic consultant admitted it was impossible to predict marketplace adjustments with certainty. App-S. V.I, T.3, p.167.

The assessments will vary from year to year together with the value of the property. App-S. V.I, T.3, pp.88, 118, 239. Any gain in the value of a particular property, even if unrelated to the Improvements, will result in a higher special assessment. App-S. V.I, T.3, pp.169, 189-191. The assessments are impossible to prepay because of the yearly adjustment based upon valuation. App-S. V.I, T.3, pp.269-270. In fact, even the projected assessment for the first year is only an estimate. There is no way at this time for the owners of the Assessed Parcels to know how much the assessment will be. App-S. V.I, T.2, p.86. "Nothing could be more typical of pure ad valorem taxation." Fisher, 84 So.2d at 574.

The lack of proportionability and the lack of predictability demonstrate that the assessment in this case is an ad valorem tax. In the absence of a referendum, such a tax may not be imposed to pay bonds. Art. VII, §12, Fla. Const.

III. THE SPECIAL ASSESSMENTS ARE NOT DIRECTLY PROPORTIONAL TO AND LESS THAN THE SPECIAL BENEFITS TO BE PROVIDED EACH PARCEL

The assessments are not proportionate and less than the benefits. In fact, the assessments are inversely proportional in that the most benefited parcels are charged the least, and the improvements will ultimately be detrimental to many assessed parcels.

Special assessments must be directly proportionate to the benefits resulting to each assessed parcel and must be less than the value of the benefit conferred. Higgs, 141 So.2d at 744; §170.02, Fla.Stat. (1989); A.9: Ord. §4. Special assessments not directly proportionate and less than special benefits are constitutionally infirm as a taking of private property without just compensation. Utley v. City of St. Petersburg, 107 Fla. 6, 144 So. 58 (1932). Proportionality may not be inferred 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." Higgs, 141 So.2d at 746.

In order to avoid any invalidity or impropriety in the assessment process, the amount of the special benefit to each parcel must be specified. Strong, 215 So.2d at 473; City of Fort Myers, 117 So. at 105; §170.06, Fla.Stat. (1989). The specific statement of special benefit allows the trial court to determine from the record whether the benefits to each parcel

are proportional to and in excess of the assessments. City of Fort Myers, 117 So. at 105.

Exactly the type of special assessments attempted by BOCA RATON in this case were rejected by this Court in Fisher, 84 So.2d at 577.

> [A]ttempt is made to justify the annual "assessment" on the opinion . . . that . . . all property in the district will benefit in proportion to the ad valorem valuation of the property as it fluctuates from year to year despite the fact that [the engineer] obviously has no knowledge at all as to what such ad valorem valuations will be in future years, and without any specific determination whatsoever as to the valuation of benefits to particular parcels that might result from the proposed improvements.

There is only the "dictum of the governing agency" and of BOCA RATON's urban economic consultant with respect to projected benefit to six "prototypical" parcels. Despite BOCA RATON's attempt to avoid the impact of Fisher, there is no particular regard to special benefits accruing to each particular parcel as mandated by Fisher, 84 So.2d at 574, to support the benefit analysis.

In this case, there is a total absence of substantial evidence that the assessments are proportionate to the benefits, or that any benefit will be in excess of the assessment. Indeed, there is no evidence that the assessed parcels will even benefit by the Improvements. Section 6(a) of the Project Resolution states mere conclusions regarding the benefits projected for the Assessed Parcels. A.23. The projected benefits of the Improvements include increased

development capacity, reduced cost of development, and increased land and rental values. BOCA RATON's "Benefit Evaluation" includes parking cost savings, impact fee savings, and long-term retail gains. App-S. V.I, T.3, p.127, App-S V.II, T.2, pp.11-6 to 11-13. However, the "Incidence of Burden" Analysis prepared for BOCA RATON showed that the projected benefits to already developed properties are speculative at best. "The owners of existing ... facilities could realize three distinct potential categories of benefits ... ." (Emphasis added.) App-S. V.II, T.4, p.11.

At trial, BOCA RATON's representatives admitted that the already developed Assessed Parcels, including the ASTRAL property, had no need of the infrastructure improvements and would not realize a "development cost benefit." App-S. V.I, T.3, pp.77, 178. The availability of increased rents was also not confirmed with respect to every property. App-S. V.I, T.3, p.195. A property in close proximity to a large new development would benefit substantially more than property elsewhere in the DDRI. App-S. V.I, T.3, pp.147-150. The estimated parking cost savings is as a result of a change in the parking requirements for new development rather than the Improvements themselves. App-S. V.I, T.3, p.127; App-S, V.II, T.2, pp.11-7 to 11-9.

The Improvements primarily benefit the vacant parcels while the developed parcels are paying the greatest share. In fact, the entire analysis prepared for BOCA RATON showed that the

real purpose behind the Improvements was to allow development of the undeveloped parcels in the DDRI. App-S. V.I, T.2, p.48. The ad valorem method of assessment is actually inversely proportional to the benefits of the Improvements. Vacant parcels, while subject to the lowest ad valorem assessment, stand to gain the most benefit. App-S. V.I, T.3, p.184. In recognition of this inverse proportionality, this Court has held that ad valorem assessments may not be used as the basis for special assessments unless adjustment is made for the benefit received by the assessed property in its particular circumstances from the improvement. City of Naples v. Moon, 269 So.2d 355 (Fla. 1972).

There is evidence that the special assessments, rather than resulting in benefit to the Assessed Parcels, will actually result in detriment in some instances. Rentals may actually decrease because of the increased availability of rental space, including the planned 30-acre Mizner Park Project. App-S. V.I, T.5, pp.301-302. Tenants are already planning to leave because landlords cannot predict the impact of the assessment upon rental rates. App-S. V.I, T.5, pp.301-302. Benefit of other Improvements is questionable. For instance, the ASTRAL property is not at all improved by any of the drainage planned by BOCA RATON through the Improvements. App-S. V.I, T.4, pp.280-285.

BOCA RATON attempts to avoid showing the assessments to be proportional by relying upon "marketplace adjustment." This

"marketplace adjustment" hypothesises that the Improvements will cause the development of the most benefited vacant parcels, which in turn will increase their assessed value, and which in turn will eventually cause equalization over a 20-year period. By its nature, this theory is speculative. App-S, V.II, T.2, p.18. Any economic factor may break the chain and prevent any adjustment. Even if the optimistic speculation is accurate, the equalization would not occur for several years. Mizner Park alone is not projected to be completed until 15 years after completion of the infrastructure improvements. App-S. V.I, T.3, p.130. The anticipated development, if it does occur, would be in direct competition with the already improved parcels. While at the end of this sanguine scenario both previously developed and properties anticipated to be developed would pay similar amounts, those amounts would be for infrastructure required primarily by the anticipated new development. In the final analysis, "marketplace adjustment" is an euphemism for requiring one landowner to bear the development cost of his competitor.

IV. THE NON-ADJOINING, NON-ABUTTING IMPROVEMENTS ARE NOT A SINGLE PROJECT.

The trial court erroneously found that the Improvements of the Visions 90 project can be treated as a single project and assessed only against the Assessed Parcels. A.100. The 25 Improvements consist of several distinct construction projects and programs. A.28-32. The Project Resolution itself utilizes the plural and refers to the location and description of the "projects." A.28. Each project is separately scheduled in Exhibit A to the Project Resolution. A.28-32. Nothing unifies the projects except that they are required to offset the impacts of BOCA RATON's development. The 25 separate projects include improvement and construction of drainage, water, sewer, street signals, landscaping, street furniture, street lighting, sidewalks and street widening on various streets throughout the region. The Improvements involve major intersections and arteries and drainage throughout the region. App-S. V.I, T.2, p.48, 50. The Improvements extend as far away as Broward County. App-S. V.I, T.2, p.49. Not a single drainage improvement improves the ASTRAL property. App-S. V.I, T.4, pp.284-285. Many of the specific beautification projects, such as benches and landscaping, are planned for areas many blocks from the ASTRAL property. A.30: CRA 10, 11, 12, 13.

In City of Fort Myers v. State, 95 Fla. 704, 117 So. 97, 104 (1928), Fort Myers sought to validate street improvement bonds to be paid by special assessments. The improvements were in many instances remote from each other, disconnected or in

widely separated parts of the city, and of various sizes, dimensions and costs. Nevertheless, Fort Myers proposed to treat all the improvements as a single project. This Court upheld the trial court's refusal to validate the bonds:

> In an improvement program of the magnitude and variety of the that involved here, there should have been a specific finding of benefits both as to paving on the one hand and as to storm sewers, catch-basins, manholes and accessories on the other. In order words, where there are several unconnected and distinct constructions or programs for improvement purposes, there should be an adjudication or finding of benefits as to each program separately.

No authority supports inclusion of such wide-spread and diversified improvements within a single project and imposition of the total cost upon a small group of properties. If nonabutting, nonadjoining improvements are included in a single project, there must be a specific determination of the special benefit to each assessed lot or tract from each type of improvement. City of Fort Myers, 117 So. at 104.

In this case, BOCA RATON made no attempt to distinguish between any special benefit to each Assessed Parcel from paving improvements and any special benefit to each Assessed Parcel from drainage, beautification, or any other Improvement. The proposal is indistinguishable from that condemned by City of Fort Myers.

V. EXCLUDED PARCELS WOULD RECEIVE MORE THAN INSIGNIFICANT SPECIAL BENEFITS.

The Ordinance finds that the Improvements are "necessary for the public health, safety and general welfare of the City and its citizens. . ." A.7. (Emphasis added.) Nevertheless, the cost of the Improvements is not charged to the citizens, but is to be specially assessed only against certain properties within the DDRI. A.7. Excluded from the Assessed Parcels are certain residential parcels and government-owned property. A.24; App-S. V.I, T.3, pp.216-218. BOCA RATON's rationale in imposing costs up to $21,000,000 only on the Assessed Parcels is that the Assessed Parcels will realize a special benefit not realized by the excluded parcels. A.24.

The analysis applied by BOCA RATON is in direct violation of constitutional guarantees of equal protection and must be rejected. In Utley v. City of St. Petersburg, 106 Fla. 692, 144 So. 58, 59 (1932), this Court declared special assessments void where the entire cost of paving a street was assessed against only property owners on one side of the street. "[O]ur view is that such an assessment constituted an arbitrary discrimination against the property owner on the south side of the street and violated the equal protection clause of the Constitution. Const. U.S.Amend. 14."

In this case, BOCA RATON has just as arbitrarily designated some of the properties within the DDRI as those to be specially benefited by the Improvements. For instance, the residential properties in the DDRI, although excluded from the special

assessments, are eligible for increased development rights under the Order. App-S. V.I, T.3, p.140. In effect, a residential property, significantly improved after completion of the Improvements, obtains an enhanced value which is of substantial benefit to the residential property owner. Each exempted residential parcel benefits from improved drainage, beautification, water systems, transportation, pedestrian furniture and trash disposal. A.21. BOCA RATON's own consultant acknowledged the special benefits to the excluded residential parcels. App-S. V.I, T.3, pp.141-142. "We believe they would benefit. But the decision, as I said, of the committee was to have them exempted." App-S. V.I, T.3, p.142. It is patently unfair for the Assessed Parcels to pay for the improvements to the residential streets without requiring the most benefited owners, the residences bordering those streets, to share the burden.

Property outside the DDRI will also enjoy benefits from the Improvements while sharing none of the burden. App-S. V.I, T.3, pp.176-177. For instance, the Boca Raton Hotel and Golf Course, bordering but not in the DDRI, will receive the special benefits identified by BOCA RATON. App-S. V.I, T.3, p.177. Properties located near some of the potential highway improvements, outside the DDRI, will receive the same benefits. App-S. V.I, T.3, p.177. Even though no specific analysis of the area was done, BOCA RATON nevertheless concluded that the special benefits would be "incidental"

relative to the "magnitude of the benefits of downtown ...." A.77. No evidence in the record supports the conclusory distinction.

The greatest injustice is the exemption of government property, in particular the 18 acres of the Mizner Park development remaining under the control of BOCA RATON. App-S. V.I, T.5, p.303. This property would clearly benefit from the Improvements. Indeed, Mizner Park is a major reason the Improvements are required. Excluding BOCA RATON's portion of Mizner Park accomplishes a shifting of the cost of development to the existing facilities who must compete with the new development.

In effect, BOCA RATON has imposed the $21,000,000 cost of compliance with the Planning Council Order upon approximately 163 owners of approximately 147 acres in the DDRI. App-S. V.I, T.5, p.303. Meanwhile, the Improvements are as far-reaching as northern Broward County. App-S. V.I, T.2, p.48. BOCA RATON's expert acknowledged that any improvements in roads or transportation benefit everyone living in the area. App-S. V.I, T.2, pp.64, 70. As in City of Fort Myers, 117 So. at 106, some of the benefitted streets are main thoroughfares which serve the entire region. Any improvement to those streets is a general benefit to the entire area and not a special benefit to the Assessed Parcels. "To force an expensive improvement ... upon a few property owners, against their consent, and compel them to pay the entire expense, under the delusive pretense of a

corresponding specific benefit conferred upon their property, is a species of despotism that ought not to be perpetuated under a government which claims to protect property equally with life and liberty." Id., quoting Guest v. City of Brooklyn, 69 N.Y. 506.

CONCLUSION

For the foregoing reasons, the trial court's decision denying validation of the bonds should be affirmed.

Respectfully submitted,

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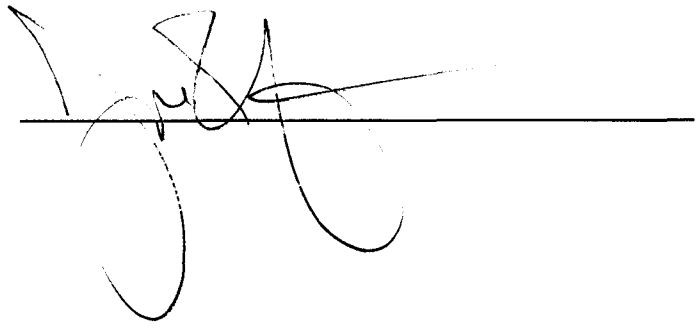
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 20th day of May, 1991 to counsel of record noted below.



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