IN THE SUPREME COURT OF FLORIDA
CASE NO. 83,103

STATE OF FLORIDA,
ET.AL.,

Appellants,

vs.

THE CITY OF PORT ORANGE,
FLORIDA,

Appellee.

_____/

BRIEF OF AMICUS CURIAE SARASOTA COUNTY

On Appeal from the Seventh Judicial Circuit Court,
In and For Volusia County, Florida
Case No. 93-32202-CI-CI

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PRELIMINARY STATEMENT

The central issues in this case are (1) whether a municipality may, under its home rule powers, impose a service charge or user fee (here denominated a "transportation utility fee") against existing developed property, to defray that portion of its road costs attributable to such property, (2) whether such a service charge or user fee must be characterized as a tax, and (3) under the facts of this case, whether the transportation utility fee imposed by the City of Port Orange is valid.

Sarasota County has asked permission to appear as amicus curiae to address the first two principal issues in this case and to emphasize the distinctions between service charges and special assessments. These issues are of vital importance not only to Florida's municipalities, but to all local governments in the state.

Although service charges and special assessments are both available to a municipality exercising its home rule powers, the organic and statutory distinctions between service charges and special assessments are important to local government finance. The significance of these distinctions is accentuated by sections 197.3631 and 197.3632, Florida Statutes, which empower local governments to collect special assessments on the ad valorem tax bill. This collection method is of particular importance to counties, which typically do not have an effective alternative collection mechanism such as the ownership or control of a utility which provides service and sends bills to all developed property

within its boundaries. The Legislature has recognized the relationship between a special assessment lien and constitutional protection of homestead property by restricting the tax bill collection method to special assessments meeting the constitutional requirements to become a lien against homestead property.[1] The ad valorem tax bill collection method is not available for those service charges which do not meet the legal requirements for classification as a special assessment.[2]

This brief will address the home rule power of municipalities and counties to impose appropriate service charges or special assessments to fund transportation facilities and services. Amicus Sarasota County will defer to the City of Port Orange for argument related to the specific structure of its transportation utility fee.

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[1] Section 197.3631, Florida Statutes, authorizes local governments to collect "non-ad valorem assessments" on the ad valorem tax bill. Section 197.3632(1)(d) defines non-ad valorem assessments to include "only those assessments which can become a lien against a homestead as permitted in s. 4, Art. X of the State Constitution."

[2] As recognized in Charlotte County v. Fiske, 350 So.2d 578 (Fla. 2d DCA 1977), the term "special assessment" is a broad one and embraces many terms all of which meet the Florida case law requirement for a lawful special assessment. See argument under Point III.

STATEMENT OF THE CASE AND FACTS

As this brief will address the home rule power of municipalities and counties to impose appropriate service charges or special assessments to fund transportation facilities and services, Amicus Sarasota County will accept the City of Port Orange's statement of the case and facts.

SUMMARY OF ARGUMENT

When determining whether a Florida municipality possesses the power to perform a certain governmental act, the inquiry is not whether a specific grant of power exists, but whether there is any express prohibition against the act. This is the effect of Florida having adopted home rule, which fundamentally altered the relationship between the Florida Legislature and local governments. Where under the Florida Constitution of 1885 local government power was limited to whatever the Legislature granted, the 1968 Constitution began a revolution. The Municipal Home Rule Power Act, Chapter 166, Florida Statutes, completed the constitutional design. In that act, the Legislature broadly granted power to municipalities. This grant includes the power to create service charges or user fees.

Service charges and user fees are not taxes, but charges for facilities or services provided by a local government. The service charges or user fees must be just and equitable although the municipality may charge different rates to different classes of customers, as long as the classification scheme is not arbitrary or unreasonable. There is no special benefit to the property required for a service charge or user fee.

Special assessments, however, are distinguishable from service charges and user fees. In order to have a valid special assessment, there must be a special benefit to the property assessed. The benefit need not be direct or immediate but must be substantial, certain and capable of being realized within a

reasonable time. The special assessment then must be fairly and reasonably apportioned among the benefited properties.

ARGUMENT

I. FLORIDA MUNICIPALITIES MAY EXERCISE HOME RULE POWER UNLESS EXPRESSLY PROHIBITED BY LAW.

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

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

Art. VIII, § 8, Fla. Const. (1885).

This requirement of an express legislative grant was a reflection of the prevailing nineteenth century local government theory known as "Dillon's Rule."[3] Under this approach to municipal power: "[t]he authority of local governments in all matters, including those previously local, was limited to that expressly granted by the Legislature, or that which could be necessarily implied from an express grant." Sparkman, The History and Status of Local Government Powers in Florida, 25 U. Fla. L. Rev. 271, 282 (1973). To find a municipal power to legislate, the search was for an express delegation of authority from the Legislature in a general law or special act.[4]

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[3] The term "Dillon's Rule" is named after a treatise on municipal corporations by J. Dillon. See for example Malone v. City of Quincy, 62 So. 922 (Fla. 1913).

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

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

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

Art. VIII, § 2(b), Fla. Const. (emphasis added). The constitutional revision signaled a dramatic reversal of the source of municipal legislative power from Tallahassee to the city hall.[5]

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

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census. Sparkman, supra, p. 286.

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

> a broad grant of power to municipalities in recognition and implementation of the provisions of Art. VIII, § 2(b), Fla. Const. It should be so construed as to effectuate that purpose where possible. It provides, in new F.S. § 166.021(1), that municipalities shall have the governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services; it further enables them to exercise any power for municipal services, except when expressly prohibited by law.[6]

City of Miami Beach v. Forte Towers, Inc., 305 So.2d 764, 766 (Fla. 1974) (Dekle, J., concurring).[7] To reaffirm and emphasize the broad constitutional deferral of municipal legislative power, section 166.021(4), Florida Statutes, further provides:

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

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

> The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.[8]

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

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

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

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[8] Section 166.021, Florida Statutes, was enacted by Chapter 73-129, Laws of Florida, in response to the narrow municipal home rule interpretation in City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla. 1972). The Court in Forte Towers stated that it had to consider whether Chapter 73-129 necessitates a change in the Fleetwood Hotel decision and stated "I believe that it does, and that municipalities now are empowered to enact such ordinances by virtue of new Ch. 73-129." 305 So.2d at 766 (Dekle, J., concurring).

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

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

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

> Thus, [under the 1885 Florida Constitution] the municipalities were inherently powerless, absent a specific grant of power from the legislature. The noblest municipal ordinance, enacted to serve the most compelling municipal purpose, was void, absent authorization found in some general or special law.
>
> The clear purpose of the 1968 revision embodied in article VIII, section 2 was to give the municipalities inherent power to meet municipal needs.

Id. at 217.

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

complete power to legislate by ordinance for any municipal purpose.[9]

Amicus is aware of no general or special law inconsistent with properly imposed service charges to finance local government facilities or services. Appellant's search for affirmative statutory authority is unnecessary. (Initial Brief, p. 20)

In contrast to the constitutionally sanctioned liberal delegation of regulatory home rule power is the specific reservation of the power to tax reserved to the State in the 1968 constitutional revision. While the Legislature is constitutionally directed to provide by law for the levy of ad valorem taxes by counties and municipalities, all other forms of taxation are preempted to the State except as provided by general law.[10]

However, all municipal revenue sources are not taxes requiring general law authorization under Article VII, section 1, Florida

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[9] As previously noted, both charter and non-charter counties have comparable home rule powers to legislate for county purposes.

[10] In Article VII, section 1(a), of the 1968 Constitution provides:

> No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law.

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

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

Constitution. The judicial inquiry when a revenue is derived by ordinance is whether the charge is a tax under Florida case law. If so, general law authorization is required under the tax preemption provisions of Article VII, section 1, Florida Constitution. If not a tax under Florida case law, the imposition of the fee, charge or assessment by ordinance is within the constitutional and statutory municipal home rule power.

II. A LAWFULLY IMPOSED SERVICE CHARGE OR USER FEE IS NOT A TAX REQUIRING GENERAL LAW AUTHORIZATION UNDER SECTION 1 OR 9, ARTICLE VII, THE FLORIDA CONSTITUTION.

A service charge or user fee is not a tax. A municipality may charge for the facilities and services it provides. Florida case law requires that service charges and user fees be just and equitable.[11] The municipality may charge different rates to different classes of customers, as long as the classification scheme is not arbitrary or unreasonable.[12]

The actual use of the facility or service is not a requirement for the proper imposition of a fee. In Stone v. Town of Mexico Beach, 348 So.2d 40 (Fla. 1st DCA 1977), cert. denied, 355 So.2d 517 (Fla. 1978), the garbage collection fees were challenged on the bases that the ordinances were unreasonable in their application and were contrary to constitutional standards in that the ordinances did not distinguish between occupied and unoccupied premises, but charged a flat rate regardless of occupation and proof of any production of garbage. The fees were held to be constitutional where the ordinance imposed a flat rate, regardless of use, for the collection and disposal of garbage. Id. at 42.

Appellant argues strenuously that the City cannot "turn its streets into a fee generating enterprise" in derogation of the public's "inherent right to travel." (Initial Brief, p. 20).

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[11] See Edris v. Sebring Utilities Commission, 237 So.2d 585 (Fla. 2d DCA 1970).

[12] See State v. City of Miami Springs, 245 So.2d 80 (Fla. 1971); and City of New Smyrna Beach v. Fish, 384 So.2d 1272 (Fla. 1980).

Appellant also argues that the City has "erected a toll gate at the driveway of each dwelling and commercial business." (Initial Brief, p. 36). This inflammatory rhetoric is designed to direct attention away from the fundamental question: has the City properly exercised its inherent authority to impose a service charge for the facilities and services it provides?

A more productive legal analysis is the comparison of the transportation utility fee to a transportation impact fee. In Home Builders v. Board of County Commissioners of Palm Beach County, 446 So.2d 140 (Fla. 4th DCA 1983), rev. denied, 451 So.2d 848 (Fla. 1984), the transportation impact fees were challenged on the basis that the fees were a tax imposed by ordinance in violation of Article VII, section 1(a), Florida Constitution. The impact fees were held not to be a tax in Home Builders since the county ordinance met the tests established in Broward County v. Janis Development Corp., 311 So.2d 371 (Fla. 4th DCA 1975), and Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976).

The applicable tests for impact fees have been summarized in Hollywood, Inc. v. Broward County, 431 So.2d 606 (Fla. 4th DCA 1983), rev. denied, 440 So.2d 352 (Fla. 1983):

> [R]easonable dedication or impact fee requirements are permissible so long as they offset needs sufficiently attributable to the subdivision and so long as the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents. In order to satisfy these requirements, the local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision. In order to satisfy this latter requirement, the ordinance must specifically earmark the funds collected for use in acquiring capital facilities to benefit the new residents.

431 So.2d at 611.

Where a municipality has the ability to finance the "new growth" portion of a road improvement by imposing an impact fee on new residents, it logically follows that the municipality should have the ability to finance that portion of a road improvement required to serve existing development by imposing a service charge or user fee on existing residents. The idea of an impact fee is to place the cost of the facilities necessary to serve new development on the new residents. The cost of road improvements needed to serve existing development may likewise be placed on the existing development which is using the facilities.

Appellant's opposition to the transportation utility fee is apparently based upon a perceived distinction between governmental and proprietary activities.

> The services of building and maintaining the roads are a governmental duty, just like police and fire protection. Such duties are owed, service charge free, to the citizens of the State. Since the duty is owed to the public at large, the costs of raising revenue for the construction and maintenance of the streets is by taxation.

(Initial Brief, pp. 22-23). The suggestion that a municipality cannot impose a service charge or user fee for "governmental" activities is clearly inconsistent with the prior decisions of this Court and the established practice of local governments in Florida.

For example, in St. Johns Co. v. Northeast Florida Builders Association, Inc., 583 So.2d 635 (Fla. 1991), this Court upheld the validity of an educational facility impact fee notwithstanding the Florida constitutional mandate of a uniform system of free public schools. Art. IX, § 1, Fla. Const. Despite the clear duty to provide public schools, this Court specifically approved an impact fee an alternative to ad valorem taxation. This is absolutely inconsistent with Appellant's assertion that duties to the public at large must be funded from taxes. (Initial Brief, pp. 22-23).

Impact fees have been used by Florida local governments for many years to fund a wide variety of facilities and services, many of which are governmental in nature. Examples include water and wastewater treatment facilities, fire and emergency medical services, parks, roads, law enforcement, schools and libraries.[13] Shrinking revenues have compelled local governments to exercise their home rule powers to create innovative funding alternatives.

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[13] Florida Advisory Council on Intergovernmental Relations, Impact Fee Use in Florida: An Update, July 1989, pp. 40-51.

Appellant's restrictive view of a municipality's funding options are inconsistent with existing law and established practice.

The Appellant states in its Initial Brief:

> The City has declared that there will be no special benefit to any particular piece of real property as all the properties in the City will benefit equally from the reconstruction and resurfacing of the City's streets. (Appendix 1, Section 2, p. 9 [Sec. 20-133(c)]).

(Initial Brief, p. 35). This statement distorts the City's position. The City did not make a legislative finding that there was no special benefit to any particular piece of real property. The City merely made a finding that the fees need not provide a special benefit to property:

> The fees collected from any property need not be spent in close proximity to such property, nor need they provide a special benefit to such property that is different in type or degree from benefits provided to the community as a whole.

(Ordinance Sec. 20-133(c)).

Although there is no special benefit to property required for a service charge or user fee, the special benefit requirement is an integral element of a special assessment and constitutes a fundamental distinction between service charges or user fees and special assessments.

III. A VALIDLY IMPOSED SPECIAL ASSESSMENT IS NOT A SERVICE CHARGE OR USER FEE AND MUST MEET MORE STRINGENT REQUIREMENTS THAN SERVICE CHARGES OR USER FEES.

If the Court were to conclude that the transportation utility fee approach employed by the City does constitute a tax, Amicus urges the Court to recognize that validly imposed special assessments for similar purposes may never the less be imposed, provided that they meet the more stringent requirements which apply to special assessments as opposed to service charges or user fees. The Court in City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992), sets forth the requirements for the imposition of a valid special assessment: (1) there must be a special benefit to the property assessed, and (2) the assessment must be fairly and reasonably apportioned among the properties that receive the special benefit.

A. Special Benefit Requirement

The Florida Supreme Court determined in Meyer v. City of Oakland Park, 219 So.2d 417 (Fla. 1969), that the benefit required for a valid special assessment consists of more than simply an increase in market value, including both potential increases in value and the added use and enjoyment of the property. In Meyer, the Court upheld a sewer assessment on both improved and unimproved property, stating that the benefit need not be direct or immediate but must be substantial, certain and capable of being realized within a reasonable time.

The benefit need not be determined in relation to the existing use of the property. In City of Hallandale v. Meekins, 237 So.2d 318 (Fla. 4th DCA 1970), aff'd, 245 So.2d 253 (Fla. 1971), the

Court indicated that the proper measure of benefits accruing to property from the assessed improvement was not limited to the existing use of the property, but extended to any future use which could reasonably be made.

Generally, the governing authority levying the special assessment must make a specific determination as to the special benefit received by the property to be assessed.[14] However, a specific finding by the governing body is not required in all cases. When a particular improvement, by its nature, is designed to afford special or peculiar benefits to property within the proximity of the improvement, it is presumed that special or peculiar benefits will accrue to the property. For example, street improvements have been found to inherently benefit abutting and other property. In Bodner v. City of Coral Gables, 245 So.2d 250 (Fla. 1971), the court held that there was no need for the city to make an express determination of special benefits inuring to property assessed for street improvements, as they were inherently beneficial.

B. Apportionment Requirement

Once a determination has been made that an assessed improvement or service specially benefits the properties assessed, then the assessment must be "fairly and reasonably apportioned" among the benefited properties.[15] In South Trail Fire Control

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[14] City of Fort Myers v. State, 117 So. 97, 104 (Fla. 1928).

[15] City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992); and Parrish v. Hillsborough County, 123 So. 830 (Fla. 1929).

Dist., Sarasota County v. State, 273 So.2d 380, 384 (Fla. 1973), the Court upheld an apportionment scheme wherein business and commercial property was assessed on an area basis while other property was assessed on a flat rate basis. The Court held that the manner of the apportionment of the assessment is immaterial and may vary, provided that the amount of assessment for each property does not exceed the value of the proportional benefits it receives as compared to other properties.

The courts generally give deference to the legislative determination of a local government's apportionment methodology. In Rosche v. City of Hollywood, 55 So.2d 909, 913 (Fla. 1952), the Supreme Court of Florida stated:

> The apportionment of assessments is a legislative function and if reasonable men may differ as to whether land assessed was benefited by the local improvement the determination as to such benefits of the city officials must be sustained.

Subsequent case law continues to follow this rule, provided the basis for apportionment has some logical relationship to the benefit received.

In a recent case which deals with the quantum of municipal power of self-government to impose special assessments, the Court emphasizes how the relationship between local governments and the state legislature has changed. In City of Boca Raton, 595 So.2d 25 (Fla. 1992), the Supreme Court of Florida reversed a circuit court judge who had held that Chapter 166, Florida Statutes,

> [D]id not grant specific statutory authority to municipalities to levy special assessments. Municipalities have only been able to pass such assessments when the State[,] which holds this power[,] has specifically authorized municipalities to pass special assessments.

Id. at 27. The Supreme Court rejected this reasoning, reaffirmed the "vast breadth of municipal power," and concluded that municipal governments could "exercise any power for municipal purposes except when expressly prohibited by law." Id. at 28. Such municipal power, the Supreme Court held, includes the power to levy special assessments by ordinance.

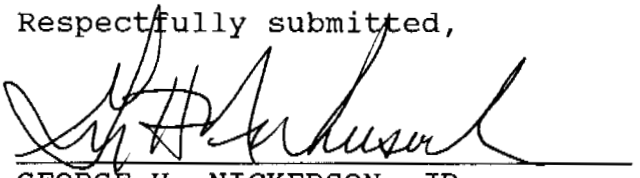
CONCLUSION

Home rule, through the 1968 revision of the Florida Constitution and the Municipal Home Rule Powers Act (Chapter 166, Florida Statutes), has fundamentally changed the relationship between the state and local governments. Before 1968, power was granted by the Legislature in a piecemeal fashion; whereas now power is broadly and generously granted through section 166.021, Florida Statutes. Today, local governments have the power to govern unless such power is explicitly taken away by law.

There is no express prohibition against a municipality imposing service charges or user fees, so municipalities may impose them by ordinance, as the City of Port Orange did in this case. The absence of an express legislative grant of the power to impose such fees would only be important if the charges were taxes. A long line of cases in this State has established that properly imposed service charges and user fees are not taxes. Whether or not a specific fee constitutes a tax is a factual question, to be determined by the tests established in a long line of cases.

If the Court were to conclude that the transportation utility fee approach employed by the City does constitute a tax, Amicus urges the Court to recognize that validly imposed special assessments for similar purposes may never the less be imposed, provided that they meet the more stringent requirements which apply to special assessments as opposed to service charges or user fees.

Respectfully submitted,



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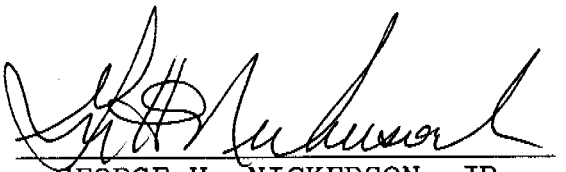
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the parties on the attached Service List, this 5th day of May, 1994.



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