OA 6-5-95

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

SARASOTA COUNTY,

Petitioner,

vs. Case No. 84,414

SARASOTA CHURCH OF CHRIST, INC., et al.,

Respondent.
_____/

APPEAL FROM THE SECOND DISTRICT
COURT OF APPEAL

BRIEF OF AMICUS CURIAE FLORIDA LEGAL SERVICES, INC.

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STATEMENT OF INTEREST OF AMICUS CURIAE
FLORIDA LEGAL SERVICES, INC.

Florida Legal Services, Inc. (FLS) is the statewide support office for all legal services and legal aid offices serving Florida's poor. The overall mission of FLS is to serve as a leader in the delivery of high quality legal services to the poor and to organize and provide support to legal services providers throughout the state of Florida. There are currently twelve federally funded legal services programs and ten bar sponsored programs providing general legal services to the poor in their local service areas.

A significant role of FLS is to assist providers in identifying problems having a statewide impact on the poor, and to coordinate strategies addressing these issues. In this capacity, FLS is keenly aware of the damaging impact unfettered special assessments will have on Florida's poor homeowners.

Clientele for legal services providers are individuals or families living at or below 125% percent of the poverty level. According to the 1990 census, 2,195,612 persons or approximately 17% of the total population in Florida meet this financial standard. Approximately 22%, or 1,126,244, of all households in Florida have very low incomes, defined as households with incomes below 50% of the applicable median family income.[1] Among Florida's poor are homeowners and an estimated 46,000 homeless, an increase

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[1]1-Division of Housing and Community Development, Department of Community Affairs, Draft, State of Florida Consolidated Plan, at 4-4 (March 1995).

of 15% from 1992-93 to 1993-94.[2] No doubt these numbers will continue to increase at high rates if governments continue to expand the boundaries of special assessments. In Florida, we have taken special care to protect the family home by enacting homestead protection laws which enable the poor to keep their homes. We must keep our eyes on this prize when scrutinizing special assessments.

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[2] 2-Id. at 5-1.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae adopt the Statement of the Case and Facts of Respondent Sarasota Church of Christ, Inc.

SUMMARY OF ARGUMENT

The Appellants and their amici are attempting to change the standard of review for a special assessment, substituting a standard which will allow an assessment for any legitimate local government function, and thus subverting all constitutional and statutory limitations on local taxes. This redefinition of special assessments should be rejected by this court with respect to any assessment, most especially where the assessment overrides constitutional tax exemptions. This Court should clearly establish the criteria for special assessments, rejecting cases which blur the necessary distinctions.

ARGUMENT

I. THE STANDARD OF ARBITRARINESS AND ABUSE APPLIES TO APPORTIONMENT, AND NOT TO THE EXISTENCE OF A BENEFIT

South Trail Fire Control District v. State, 273 So.2d 380 (Fla. 1973) involved a challenge by owners of commercial property to the method by which a fire prevention assessment was levied on commercial property as opposed to other property, and to the resulting disproportionate amount that was paid by owners of commercial property. There was countervailing evidence that there were more fires in commercial property, and that the costs of fire control in commercial property were greater, than in the other types of property subject to the assessment. In that context, this Court said:

> In Ch. 70-933, Laws of Florida, the Legislature made a specific finding that the maximum rates of assessment set forth therein were "found, determined and declared to be reasonable and in such amounts as not to exceed the benefits accruing to said property within the district." A matter of this kind depends largely upon opinion and judgment as to what will, or will not, prove a benefit to the district, and the Court should not substitute its opinion and judgment for that of the Legislature in the absence of a clear and full showing of arbitrary action or a plain abuse. id. at 383.

Similarly, in Atlantic Coast Line R. Co. v. City of Gainesville, 83 Fla. 275, 91 So. 118 (Fla. 1922) the issue was whether the railroad right of way through the center of a street

could be assessed as abutting property, and thus required to pay a highly disproportionate share of a paving project. This Court stated:

> But where there has been an arbitrary and unwarranted exercise of the legislative power or some denial of the equal protection of the laws in the method of exercising it, the courts are open to protect the constitutional rights of landowners from arbitrary and wholly unwarranted legislative action. id. at 122.

The Court determined that the apportionment scheme before it violated that standard.

A permissive standard of review is necessary because an apportionment scheme is always subject to objection by those required to pay, because other allocation schemes can always be argued to be superior, and because endless litigation would result from a stricter standard. As stated by this Court in City of Ft. Myers v. State of Florida and Langford, 95 Fla. 704, 117 So. 97, 104 (Fla. 1928) "No system of appraising benefits or assessing costs has yet been devised that is not open to some criticism." However, this deference applies only to the apportionment method, which was at issue. The assessment in Fort Myers case was on abutting property for the construction of a sewer system, the classic type of special assessment in which benefit is presumed.

Special benefit is a separate prong from fair apportionment, and the same standard of review does not apply. The rationale for a special assessment is that the property owner receives, in exchange for the payment of the assessment, a special benefit to the property of equal or greater value. Otherwise, the assessment is a confiscation. Atlantic Coast Line, supra, at 121. A

reviewing court is capable of determining whether a particular assessment provides a special benefit. It is a "yes or no" question, not subject to an infinite variety of alternatives. Thus, there is no need to be as deferential in reviewing special benefits as in the apportionment area.

II. STRICTER SCRUTINY IS REQUIRED TO PROTECT CONSTITUTIONAL TAX EXEMPTIONS

Special assessments are not limited in amount, as are ad valorem taxes, Art. VII, § 9(b), Fla. Const. and they are applicable to property which is constitutionally exempt from ad valorem taxes. Art. VII, §§ 3 and 6. As such, they provide a vehicle to subvert the limitations which organic law places on local taxes, unless the courts are vigilant in limiting assessments to their proper functions.

This Court acknowledged the special role of constitutional exemptions, recognizing the general "principle that exemptions from taxes are frowned upon and each claim should be strictly construed." However, it held "[t]his rule does not apply where the question is raised by a municipality asserting the exemption by virtue of a statute duly passed pursuant to the Constitution. In the latter case, exemption is the rule and taxation is the exemption. [sic]" Saunders v. City of Jacksonville, 157 Fla. 240, 25 So.2d 648 (Fla. 1946).

If that vigilance is appropriate to the exemption for municipal property, which was the issue in Saunders, it is much more important to protect church property and homestead property,

whose constitutional exemptions embody even more cherished public policies.

III. THE STANDARD PROPOSED BY THE APPELLANTS WOULD PERMIT A SPECIAL ASSESSMENT FOR ANY LEGITIMATE LOCAL GOVERNMENT FUNCTION

Every property within the boundaries of a local government can be said to benefit in some way from any legitimate function of local government, if the definition of benefit is broad enough. In this case, the Appellants argue that even if a property has adequate natural drainage, it benefits from a stormwater system because the water from that property flows elsewhere, and thus creates a need for a stormwater system.

Similarly, one could argue that the existence of any building creates a possibility of burglary, and thus a need for law enforcement facilities, and thus the property could be assessed for the operation of a courthouse or a jail. Further, improved law enforcement would benefit the property, and may even reduce theft insurance rates, and thus a special assessment could be imposed for sending law enforcement officers to training in another state or a foreign country.[3]

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[3]The above reductio ad absurdum argument was conceived in connection with another assessment case, but not actually argued because it seemed farfetched. However Florida Statutes 163.514(16)(a) now provides for special assessments for neighborhood improvement districts for crime reduction. While that subsection requires a referendum, one can surely anticipate the arguments from local governments, based on City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992), that the statutory mechanism is not exclusive, that home rule powers permit special assessments for law enforcement, and that the courts should not substitute their judgment for that of local governments in the determination of such assessments.

Special assessments are simply too attractive a financing mechanism for local governments to permit a lax standard of judicial review. Special assessments are not subject to any percentage of assessed value; they do not require voter approval; they affect all the exempt property, thus broadening the tax base; and they are not included in the millage rate to which voters pay the most attention. The prevailing political and economic forces, combined with the legal standard the Appellants urge upon this Court, would result in precisely what the trial court in this case envisioned.

> If services are allowed to routinely become special assessments then potentially the exemption of Churches from taxation will be largely illusory. . . A domino effect could ensue if special assessments are continually expanded to include generic services. Quoted in the Court of Appeal opinion at 641 So.2d 903.

IV. THIS COURT SHOULD CLEARLY OVERRULE CHARLOTTE COUNTY V. FISKE

The current trend of using special assessments to subvert the limitations of ad valorem taxation rests on Charlotte County v. Fiske, 350 So.2d 578 (2d DCA 1977) which ignored a half-century of Florida jurisprudence maintaining a careful distinction between fees, assessments, and taxes, proclaiming:

> To begin with, while the ordinance before us speaks of the assessment involved as a 'special assessment' we are of the view that such a term is a broad one and may embrace various methods and terms of charges collectable to finance usual and recognized municipal improvements and services. Among such charges are what are sometimes called 'fees' or 'service charges' when assessed for special services. Moreover, these may take the *form* (at least for lien purposes) of special assessment. [emphasis in the original]
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> 350 So.2d at 580.

No authority is cited for the Court's view, except Gleason v. Dade County, 174 So.2d 466 (3d DCA 1965), which is cited for the proposition that a fee can take the form of a special assessment for lien purposes. However, the Gleason court considered only the relative priority of a lien in a foreclosure, not whether it was a valid special assessment.

The expansive view of special assessments expressed in the Fiske opinion is contrary to the long line of previous Florida jurisprudence, which holds that assessments are clearly distinguishable from taxes, and that they must be strictly limited to their proper purpose. City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992) at 29, citing Klemm v. Davenport 100 Fla. 627, 631-634, 129 So. 904, 907-908 (1930).

In fact, Fiske was cited only three times in published cases, before 1994, none of which involved a special assessment.[4] The case was cited for the broad latitude granted to administrative boards and local governments. Only recently has Fiske been widely cited in trial courts and pending appellate cases, as a way of bolstering many local governments' attempts to meet fiscal crises with new funding sources.

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[4]In two of the cases, the citations were for the general language about the discretion of administrative bodies. Furnams v. Santa Rosa Island Authority, 377 So.2d 983, 988 (Fla. 1st DCA 1980, concerning the leasing of public property, and Cohen v. School Board of Dade County, Fla., 450 S.2d 1238, 1241 (Fla. 3d DCA 1984) reviewing a travel allowance in a special education case. The last case involves the monthly rates charged to different classes of property for garbage collection service, but does not involve a special assessment. City of New Smyrna Beach v. Fish, 384 So.2d 1272, 1275 (Fla. 1980) reversing Fish v. City of New Smyrna Beach, 382 So.2d 307 (Fla. 1st DCA 1979).

The above-quoted language was cited to this Court repeatedly in State of Florida v. City of Port Orange, 650 So.2d 1 (Fla 1994) and, if followed, would have required approval of the "traffic utility fee" at issue in that case. This Court, however, invalidated that fee and ignored the supposed precedent of Fiske.

Appellants and their amici can be expected to emphasize the distinction between the fees involved in the Port Orange case, and the assessments at issue here. However, the bottom line for both is that the ongoing cost of a municipal service is imposed on property that would otherwise be exempt, it is enforced by a tax lien on the property, and it will result in the loss of that property if an exempt institution or family is unable to pay the cost. This Court should therefore make clear, in this case, as it did in Port Orange that "[t]hese constitutional provisions cannot be circumvented by such creativity." id. 19 Fla. L. Weekly at S564.

It is a legislative determination whether a new form of taxation should be allowed to supplement the existing ones. The Appellant is asking this Court to turn its back on a detailed constitutional and statutory system of tax limitations, and on accepted Florida jurisprudence, to follow an isolated and ill-reasoned case, and to validate the assessment at issue. Instead, this Court can take this opportunity explicitly to reject Fiske, and thereby to end uncertainty for the lower courts and for local governments about the requirements for special assessments. A clear pronouncement from this Court regarding Fiske will assist the many local governments which are considering additional assessments

to avoid invalid assessments, will give lower Courts guidance and will ultimately reduce the volume of litigation.

CONCLUSION

Recent cases in the lower courts have created uncertainty about the limits of special assessments, and about the scope of protection afforded by constitutional tax exemptions from the requirement to pay for ongoing municipal services. Local governments, in urgent need of revenue, have used this uncertainty to expand assessments, and have thereby evaded constitutional requirements on taxation. These assessments also jeopardize institutions and families with limited financial resources, which may lose their property if they cannot pay the assessments.

This Court should state, in the clearest possible terms, that special assessments are to be used only for capital improvements, rather than for open-ended services, and that local government must operate within the constitutional taxation framework, or seek legislative change.

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 United States Mail to I. W. WHITESELL, JR., ESQ. at 1605 Main Street, Suite 705, Sarasota, Florida 34236; STEPHEN F. ELLIS, ESQ. at 1800 2nd Street, Suite 806, Sarasota, Florida 34236; and RICHARD E. NELSON, RICHARD L. SMITH, MICHAEL S. DREWS at Nelson Hesse Cyril Smith Widman Herb Causey & Dooley, 2070 Ringling Boulevard, Sarasota, Florida 34237, this 10th day of April, 1995.

ATTORNEY

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