OA 6-5-95

017

SUPREME COURT OF FLORIDA

CASE NO: 84,414

FILED
SID J. WHITE
APR 17 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

SARASOTA COUNTY, FLORIDA,

Petitioner,

vs.

SARASOTA CHURCH OF CHRIST, et al.,

Respondents.
_____/

**BRIEF OF AMICI CURIAE,
QUINTON DRYDEN, GEORGE ALFORD, AND LEON NETTLES**

Larry E. Levy
Fla Bar No: 047019
Law Offices of Larry E. Levy
Post Office Box 10583
Tallahassee, Florida 32302
904/222-7680

Counsel for amici curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Florida Constitution:

Florida Statutes:

Other Authorities:

PRELIMINARY STATEMENT

The petitioner, Sarasota County, Florida, will be referred to herein as the "county." The respondents, Sarasota Church of Christ, et al., will be referred to collectively herein as the "churches." The amici, Quinton Dryden, George Alford, and Leon Nettles, will be referred to herein collectively as the "amici." The amici, Florida Association of Counties, Inc., Florida League of Cities, Inc., and Florida Association of County Attorneys, Inc., will be referred to collectively herein as the "associations."

STATEMENT OF THE CASE

The amici do not disagree with the statement of the case set forth in the county's initial brief and that of the churches, and the amici adopt the statement of the case of the churches.

The circuit court found that, since the churches had paid charges for fire and rescue services without protest for 20 years or more, the county's affirmative defense of estoppel was well taken. The circuit court held that the charge for stormwater management services was not a valid special assessment. This holding was adopted with minor changes by the district court. Subsequently, this court accepted jurisdiction.

STATEMENT OF THE FACTS

Much of the county's statement of the facts includes recitations of statutory provisions. The trial court found that the stormwater management services were not valid special assessments based on the evidence. The district court affirmed and adopted the trial court's final judgment with minor modifications. The district court stated:

> The remaining issue is that of stormwater management services. Unlike fire and rescue services, the Plaintiff, Churches, never paid for stormwater management services until Sarasota County passed Ordinance No. 89-117. . . . This Ordinance changed the payment of such services from a tax base, from which churches are exempt, to a special assessment base, from [sic] which churches are compelled to pay. Ironically, vacant land owners paid for stormwater management services when the collection was via a tax but are now exempt from paying under the special assessment format.

Sarasota County v. Sarasota Church of Christ, Inc., 641 So.2d 900, 902 (Fla. 2d DCA 1994)(emphasis added). Thereafter, the court stated:

> Stormwater management services are, without question, both necessary and essential. However, such services [as planned and funded pursuant to Sarasota County Ordinance No. 89-117] benefit the community as a whole and provide no direct benefit, special benefit, increase in market value or proportionate benefit regarding the amount paid by any particular land owner. No evidence was presented of any direct or special benefit to any of the church properties involved in this lawsuit. Accordingly, these stormwater management services do not meet the definition of a special assessment. It is interesting to view Defendant's Exhibit B which confirms

> stormwater management revenues for fiscal 1991 exceeded expenditures by 50% (e.g., $2,000,000.00).

Sarasota Church of Christ, 641 So.2d at 902 (emphasis added).

The trial court also made the following observation which was quoted in the district court's decision:

> If services are allowed to routinely become special assessments then potentially the exemption of Churches from taxation will be largely illusory. For example, a review of Plaintiff's . . . [evidence] reveal[s] that the significant majority of items presently comprising the ad valorem tax base are services by nature. A domino effect could ensue if special assessments are continually expanded to include generic services. . . .
>
> Judge John W. Peach, in the Third Judicial Circuit, seemed to draw the proverbial "line in the sand" on this issue in his recent Opinion. The *Foxx* case dealt with special assessments and the homestead exemption. A pertinent portion of Judge Peach's decision states the following:
>
> > ". . . The charges levied actually provide only a general benefit to the community and property throughout the county as a matter of law as opposed to a special benefit to any particular property and accordingly the charges are not special assessments or assessments for special benefits as that term is used in the Constitution." Page 12
>
> Without this "line in the sand" the tax exempt status for churches will, in all likelihood, disappear.

Sarasota Church of Christ, 641 So.2d at 903.

No evidence was presented that the assessed property benefited in any manner differently from other property.

SUMMARY OF ARGUMENT

The county's stormwater management fee imposed only on residential developed property and non-residential developed property is not a valid special assessment. Through county ordinance 89-117 the county has attempted to shift the cost of a particular function or system, from an ad valorem tax base, where all property owners pay, to a funding mechanism where only a described few pay the entire cost.

Neither chapter 403, Florida Statutes (1987), and specifically section 403.031(17), nor section 403.0893(3), Florida Statutes (1987), authorized the levy made by the county in ordinance 89-117. Neither the statute, the ordinance, nor the finding contained therein, are rendered non reviewable by the courts. Similarly, the county's labeling of its charge as a special assessment or non-ad valorem assessment does not prevent judicial inquiry into the nature of the charge applying established case law and recognizing constitutional limitations and protections. If a county or city can, through labeling, foreclose such issue from judicial review then a county or city can simply label all its charges special assessments and circumvent all the constitutional millage limitations and protections for homesteads.

County-wide stormwater management is of general benefit to all persons and property in the county which should be funded through ad valorem taxes. Section 403.0893(3), Florida Statutes (1993), contemplates a fee on an acreage basis of tracts of land

to alleviate flooding in stormwater situations, not a financing vehicle for county-wide stormwater management systems.

The basis of the levy, developed surface impervious areas in square feet, is actually a charge having no relationship or benefit to the property. Presumably, all property and persons in the county receive a general benefit through stormwater management, but no property is specially benefited differently. The county's fee seemingly attempts to measure contribution to stormwater flow by impervious surface square feet areas. In other words, it appears to try to charge for relative contribution to the need for stormwater services. This is not evenly remotely an acceptable basis for measuring property enhancements upon which to base special assessments. A charge made for water or electricity use is a proprietary charge and not a sovereign imposition. The county's fee seems to be a charge for relative system use which would be in the nature of a utility charge as referenced in section 403.031(17). Thus, it could not be a special assessment within the purview of Article VII, Section 6, and Article X, Section 4, Florida Constitution. Because vacant land pays nothing, the fee is wholly arbitrary.

The county has not acted in good faith within the purview of Gulesian v. Dade County, 281 So.2d 325 (Fla. 1973). Due process requires that persons paying an illegal assessment under duress be provided the remedy of refund. The county is not entitled to keep the fruits of its illegal levy coerced through use of the non-ad valorem methodology provided in section

197.3632, Florida Statutes (1993). See McKesson v. Division of Alcoholic Beverages & Tobacco, 110 S.Ct. 2238 (1990).

ARGUMENT

The county asserts three points where it contends the district court's decision is in error. These are:

> 1. That the state and county's legislative determinations that the stormwater management services are special assessments and provide a special benefit are conclusive and are not judicially reviewable;
>
> 2. That the county ordinance through which the charge for stormwater management services was imposed meets the special benefit test; and
>
> 3. That refunds should not be allowed.

The amici suggest that all three of the county's contentions are without merit.

I. LEGISLATIVE DETERMINATIONS OF THE STATE AND COUNTY THAT STORMWATER MANAGEMENT SERVICES ARE VALID SPECIAL ASSESSMENTS AND PROVIDE A SPECIAL BENEFIT ARE NOT CONCLUSIVE.

The county argues that (1) through the enaction of chapter 403, the legislature has found that stormwater management fees are valid special assessments, and that this finding is not judicially reviewable; and (2) that county ordinance 89-117 made legislative findings that the fees were special assessments and that the assessed property received a special benefit and that this finding also is not judicially reviewable.

The county's position is succinctly stated as follows:

> To permit the Second District's opinion to stand would permit the judiciary to invade the legislative domain and authorize the judiciary to legislate in violation of the separation of powers doctrine set forth in Article II, Section 3 of the Florida Constitution. (Petitioner's Initial Brief at 17)

The contention that either the legislative enactment of parts of chapter 403 or the county's pronouncements in its ordinance are not judicially reviewable is wholly without merit.

In Consolidated Land Co. v. Tyler, 88 Fla. 14, 101 So. 280 (1924), this court rejected the contention that a legislative determination of the boundaries of a municipality was not judicially reviewable. If an act of the legislature fixing the boundaries of a municipality can be judicially reviewed, and such boundary set aside in whole or in part, then certainly the courts can review any legislative finding or declaration in an enactment which results in a deprivation of rights reserved and protected elsewhere in the constitution. In Tyler, this court invalidated the legislative determination of municipal boundaries on due process grounds. At bar, that which the lower court invalidated constituted a violation of due process, Article I, Sections 1 and 9, and Article VII, Section 3, Florida Constitution, which exempts churches (religious property) from ad valorem taxation.

Most recently, this court invalidated an attempt by the City of Port Orange to "label" a certain charge a "transportation utility fee" and circumvent constitutional protections stating:

> The City of Port Orange (the city) enacted a "Transportation Utility Ordinance," City of Port Orange Ordinance No. 1992-11, creating a

> "Transportation Utility" of the City and adopting a "transportation utility fee" relating to the use of city roads. The fee is imposed upon the owners and occupants of developed properties within the City. No fees are imposed on undeveloped property. Any unpaid fee becomes a lien upon the property until such fee is paid. The costs to be defrayed by the fee are the City's expenses relating to the operation, maintenance, and improvement of the local road system. The circuit court limited these costs to capital projects.

State of Florida v. City of Port Orange, 650 So.2d 1, 2 (Fla. 1994)(emphasis added). Continuing the court stated:

> Integral to the financing agreement here under review is the pledge of what the bond ordinance labels "transportation utility fees." Thus, we must determine whether the pledge of the transportation utility fees is a pledge of tax revenue or is a pledge of user charges or fees.

City of Port Orange, 650 So.2d at 3. Thereafter the court stated:

> The circuit court ruled that the transportation utility fee is a valid user fee, not a tax, and the City is authorized under municipal home rule powers to impose and collect the fee. We do not agree. We reverse the decision of the circuit court. We hold that what is designated in the bond ordinance as a transportation utility fee is a tax which must be authorized by general law.

City of Port Orange, 650 So.2d at 3 (emphasis added). The court distinguished between user fees and taxes stating:

> User fees are charges based upon the proprietary right of the governing body permitting the use of the instrumentality involved. Such fees share common traits that distinguish them from taxes: they are charged in exchange for a particular governmental service which benefits the party

> paying the fee in a manner not shared by other members of society, *National Cable Television Assn. v. United States*, 415 U.S. 336, 341, 94 S.Ct. 1146, 1149, 39 L.Ed.2d 370 (1974); and they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge.

City of Port Orange, 650 So.2d at 3 (emphasis added).

In the case at bar, the county's attempted creativity circumvents the constitutional exemption for religious property. If the courts can review and hold invalid a city's ordinance which labels a charge a "transportation utility fee" and which contains numerous self-serving findings and statements then it can do likewise with a county ordinance attempting the same type circumvention.

Like the transportation utility fee, the stormwater management fee or assessment is imposed on developed property only. The fee amount is fixed through a convoluted formula based on surface areas of improvement. This is pure and simply a tax based on surface area. Water flows from higher elevation to lower elevation. The rate structure makes no attempt to measure special benefit to property but simply decides on the amount of a charge to be levied against all developed property only, to fund the county's program. The only thing accomplished was a changing of the funding source from ad valorem taxation to this new charge.

The county's contention with regard to chapter 403 will be addressed first. Beginning at page 4 of its brief the county quotes part of the definition of a "stormwater utility" found in

section 403.031(17), Florida Statutes (1993). That which it omits is pertinent. Section 403.031(17) states in its entirety:

> (17) "Stormwater utility" means the funding of a stormwater management program by assessing the cost of the program to the beneficiaries based on their relative contribution to its need. It is operated as a typical utility which bills services regularly, similar to water and wastewater services.

(Emphasis added.) In 1989, the definition was numbered (16) and became (17) in 1990, but the language was not changed.

Two significant facts emerge from the language omitted by the county. First, the term being defined is "stormwater utility," which in turn refers back to a "stormwater management program" which is defined in section 403.031(15), Florida Statutes (1993). The program is defined as the institutional strategy for stormwater management which requires reading subsection (16) which defines "stormwater management system." So, "stormwater utility" relates to the funding of a stormwater management system.

Second, the definition clearly states that the funding is to be operated "as a typical utility which bills services regularly, similar to water and wastewater services." The operation of a utility is a purely proprietary function and the charge made for such service, be it electricity, water and sewer, or garbage pickup, is a purely proprietary charge for a service rendered. See Gwin v. City of Tallahassee, 132 So.2d 273 (Fla. 1961); Saunders v. City of Jacksonville, 25 So.2d 648 (Fla. 1946); and Chardkoff Junk Co. v. City of Tampa, 135 So. 457 (Fla.

1931). This means that the funding contemplated is not a special assessment because special assessments are not proprietary charges, but are forced charges imposed by an exercise of sovereignty. See Cooley on Taxation, which states:

> The difference between a special assessment and a tax are that (1) a special assessment can be levied only on land; (2) a special assessment cannot (at least in most states) be made a personal liability of the person assessed; (3) a special assessment is based wholly on benefits; and (4) a special assessment is exceptional both as to time and locality. The imposition of a charge on all property, real and personal, in a prescribed area, is a tax and not an assessment, although the purpose is to make a local improvement on a street or highway. A charge imposed only on property owners benefited is a special assessment rather than a tax notwithstanding the statute calls it a tax.
>
> The power to levy such assessments is undoubtedly an exercise of the taxing power, ...

Ch. 1, sect. 31 at page 106.

Chardkoff Junk Co., which involved the operation of an incinerator, includes numerous other examples where government activities were considered proprietary and these include the use of a cart in hauling dirt or trash for a city, repairing and cleaning of the streets, disposal of garbage, and the operation of a municipal electric company.

If a charge is like a utility charge it cannot be a special assessment because special assessments are part of the sovereign power which only the sovereign can exercise. Both taxes and special assessments are forced charges founded in sovereignty while proprietary charges are founded in contract and

receipt of specific services paid for by the charges. In Klemm v. Davenport, 129 So. 904 (Fla. 1930), the terms "tax" and "special assessment" are defined. See also Clein v. Lee, 200 So. 693 (Fla. 1941), and St. Lucie Estates v. Ashley, 105 Fla. 535, 141 So. 239 (1932), which held that taxes could not be the subject of set-off because they are forced charges, nonpayment of which does not give rise to the creation of a "debt.".

Recognizing this essential difference, in Turner v. State ex rel. Gruver, 168 So.2d 192 (Fla. 3d DCA 1964), the court held that a waste fee imposed by ordinance was not a tax but was a charge imposed for a special service and, accordingly, failure to pay same resulted in the creation of a "debt" (debtor/creditor-ex contractu relationship), and hence a person could not be imprisoned for nonpayment because the Florida Constitution prevented incarceration for debt. It stated as follows:

> The rule generally recognized is that taxes and excises including license fees are not debts within the meaning of a constitutional prohibition against imprisonment for debt. The obligation placed by the Metro code on landowners to pay a charge for garbage and waste collection and disposal is not a tax but is a charge imposed for a special service performed to the owner by the county, and as such it constitutes a debt within the guarantee of § 16 of the Declaration of Rights against imprisonment for debt.

Turner, 168 So.2d at 193 (emphasis added).

All these cases recognize a clear distinction between the sovereign taxing power of which special assessments are a

part and proprietary charges which cannot lien a homestead because Article X, Section 4, Florida Constitution, prevents lien for debt from attaching to the homestead.

The constitutional protections were recently recognized in the courts decision in City of Port Orange wherein the court stated:

> Finally, we recognize the revenue pressures upon the municipalities and all levels of government in Florida. We understand that this is a creative effort in response to the need for revenue. However, in Florida's Constitution, the voters have placed a limit on ad valorem millage available to municipalities, art. VII, § 6, Fla. Const.; made homestead exempt from taxation up to minimum limits, art. VII, § 9, Fla. Const.; and exempted from levy those homesteads specifically delineated in article X, section 4 of the Florida Constitution. These constitutional provisions cannot be circumvented by such creativity.

650 So.2d at 4 (emphasis added).

The county next references section 403.0893, Florida Statutes (1993), and specifically the language in section 403.0893(3), Florida Statutes (1993), which authorizes the use of the non-ad valorem collection method as provided in chapter 197, Florida Statutes (1993). This language was added in 1989 through chapter 89-279, section 34, Laws of Florida.

The county and associations argue that this amounts to a legislative finding that is not judicially reviewable. Both also contend that this language expressly authorized county ordinance 89-117, and the levies provided therein. Both contentions are without merit. The statute uses the word "fees"

and never mentions special assessments. It provides for the assessment of a "per acreage fee" and for different "per acreage fees" within subareas. The statute provides:

> (3) Create, alone or in cooperation with counties, municipalities, and special districts pursuant to the Interlocal Cooperation Act, s. 163.01, one or more stormwater management system benefit areas. All property owners within said area may be assessed a per acreage fee to fund the planning, construction, operation, maintenance, and administration of a public stormwater management system for the benefited area. Any benefit area containing different land uses which receive substantially different levels of stormwater benefits shall include stormwater management system benefit subareas which shall be assessed different per acreage fees from subarea to subarea based upon a reasonable relationship to benefits received. The fees shall be calculated to generate sufficient funds to plan, construct, operate, and maintain stormwater management systems called for in the local program required pursuant to s. 403.0891(3). For fees assessed pursuant to this section, counties or municipalities may use the non-ad valorem levy, collection, and enforcement method as provided for in chapter 197.

§ 403.0893(3), Fla. Stat. (1993)(emphasis added). The court below noted:

> Ironically, vacant land owners paid for stormwater management services when the collection was via a tax but are now exempt from paying under the special assessment format.

Sarasota Church of Christ, Inc., 641 So.2d at 902. The county's assessment is imposed against developed residential and non-residential units based on the unit of measure characterized as

the "base ERU." It is not a per acreage fee authorized by section 403.0893(3).

So, contrary to the statements made by the county and the associations, the statute does not authorize the assessments made by the county in its ordinance.

The obvious result and presumed intended purpose of the county in its ordinance and levy was to transfer the cost of a county-wide stormwater management service from an ad valorem tax base to a charge which could circumvent ad valorem tax organic limitations and restrictions. Instead of everybody paying for the cost of stormwater management through an ad valorem tax levy, the cost of operation was shifted to only the owners of developed property.

With regard to ordinance 89-117, the county and associations contend that the findings of the county in its ordinance are not judicially reviewable. Such contention is without merit for the same reasons pointed out in the brief addressing the statute and the reasons set forth hereafter.

First, the title to the ordinance states in part that it provides for "the creation of a stormwater utility." The briefs of both the county and the associations quote section 403.031(17), for the definition of "stormwater utility" and, as pointed out earlier, this states that such "stormwater utility" "is operated as a typical utility which bills services regularly, similar to water and waste water services." These are proprietary charges for utilities and the county has not levied

such charges but has attempted to levy "assessments" which are part of the sovereign taxing power.

The ordinance recites that the county is in the process of preparing a county-wide stormwater management plan. A county-wide plan provides only a general benefit to everyone, property owners and non-property owners. On page 2 of the ordinance it states:

> WHEREAS, Section 403.0893(3), Florida Statutes (1987), authorizes the COUNTY to create a stormwater facility benefit area and to assess a fee to fund the construction, operation, maintenance and administration of a public stormwater facility which serves the benefitted area; and

Sarasota County Ordinance No. 89-117. This references section 403.0893(3), but that statute only authorizes a per acreage fee and this the county did not levy, so it did not comply with the statute at all. The body of the ordinance makes it clear that the levy is against residential units not vacant acreage land areas.

The amici suggest that the purpose is clear. Only residential units receive homestead exemption and the thrust of the county's levy is to assess these type properties. This subterfuge is thinly veiled. The county wants to raise money and wants the homeowners to have to pay it without the benefit of homestead tax exemption. All developed property in the county is divided into two classes which are (1) developed residential property, and (2) non-residential developed property. See

ordinance 89-117, section 6. The county's purpose of requiring only developed property "pay the cost" is glaring.

It is noted that the ordinance does not require that the stormwater assessment be collected pursuant to section 197.3632. See ordinance 89-117, section 8.

The terms and declarations of this ordinance are no more nonreviewable by the courts than any other county or city levy. Significantly, not referenced in either the county's or associations' brief is the definition found in section 197.3632(1)(d), Florida Statutes (1993), which provides:

> "Non-ad valorem assessment" means only those assessments which are not based upon millage and which can become a lien against a homestead as permitted in s. 4, Art. X of the State Constitution.

This should specifically focus counties and cities on the risk of labeling all charges for services "special assessments" to avoid constitutional restrictions and protections. The use of the non-ad valorem collection method does not permit creative labeling and nomenclature as a vehicle for circumventing constitutional protections. If creative labeling could be effectively used for this purpose, the counties and cities will readily determine that all their proprietary charges are special assessments and the homestead protection from debt and homestead and church exemptions will evaporate.

II. THAT THE CHARGE LEVIED BY THE COUNTY PURSUANT TO ORDINANCE 89-117 IS NOT A VALID SPECIAL ASSESSMENT BUT IS INSTEAD AN ATTEMPT TO FUND A SPECIAL COUNTY-WIDE FUNCTION THROUGH THE LEVY OF AN ASSESSMENT ONLY ON DESIGNATED PROPERTIES AND IS A TAX.

Beginning at page 19 of its brief, the county states the special benefit in its charge is similar to that found in Charlotte County v. Fiske, 350 So.2d 578 (Fla. 2d DCA 1977), and Gleason v. Dade County, 174 So.2d 466 (Fla. 3d DCA 1965). The associations also cite these cases and state that these hold that garbage collection fees are valid special assessments. (Associations' brief at pages 11-15) Neither of these cases stand for the proposition asserted and do not support the county's position.

Fiske involved a garbage collection fee or charge and no constitutional issue, such as infringement of either of the two homestead protections or circumvention of the constitutional 10-mill cap, was raised. For special assessments to be valid there must exist (1) a special benefit flowing to the property different from that flowing to other property generally, and (2) the charge must be fairly apportioned.

In Fiske, no first prong challenge was involved. Only the reasonableness of the apportionment was challenged. The arguments made are set forth at page 580 and no first prong issue is made. This is evidenced because the court uses the terms "service charges" and "special assessments" interchangeably. The court stated:

> 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 collectible 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 assessments." In point, indeed, such charges for garbage disposal were denominated "waste fees" in a Dade County ordinance interpreted by our sister court in the Third District Court in *Turner v. State ex rel. Gruver*, wherein they were defined not as a form of taxes but as "special charges" imposed for a "special service" performed by the county.

Fiske, 350 So.2d at 580 (footnotes omitted, emphasis added).

The charge involved in Fiske was a service charge for garbage collection. This is clear because the waste collection company continued to provide garbage pickup to commercial users by contract. That the county is simply acting as collection agent for the garbage company was recognized as follows:

> It is to be further noted at this point that the ordinance was enacted upon a legislative finding that there was an inordinate amount of littering on the public rights of way in the area affected; that the entire $51.00 assessment was payable to the contract franchisee Englewood Disposal Company and no profit inured to the county; and that it was legislatively determined by the county that commercial properties be omitted from the assessment, and be required to arrange otherwise for garbage disposal services, because of the widely varying production of garbage among such commercial properties.

Fiske, 350 So.2d at 579 (emphasis added).

Fiske cites Turner which held that a garbage fee was ex contractu, hence proprietary and not part of the taxing power. Special assessments are part of the taxing power. The Fiske court did not have to decide if the charges were valid special assessments because the issue was not presented. But, by citing Clein, Gleason, and Turner, the court is recognizing that the charges were actually service charges. In Turner, the court held that the waste fee was a charge for a special service and that failure to pay gave rise to a debt, because the charge was not a part of the taxing power, but ex contractu. Fiske cites Gleason and Gleason cites both Turner and Clein.

In Clein, the court held that the city could not be compelled to furnish the garbage service free to the affected taxpayers. Just like a garbage collection franchisee, if the bill is not paid it does not have to pick up the garbage. This is purely proprietary. In Gleason, the court cites from Turner and states:

> It should also be pointed out that there is no question of "taxation" and that the law relating to "taxation" is inapplicable here. The case of Turner v. State, Fla.App. 1964, 168 So.2d 192, held that a waste fee was not a tax, but was a charge imposed for a special service.

Gleason, 174 So.2d at 467. In Gleason, the only question resolved by the court concerned the superiority of the lien and no challenge was made to the validity of the liens or the charges giving rise to same and the law relating to taxation was specifically determined to be inapplicable with the court citing

Turner which had held that a waste fee was a proprietary service charge.

Thus, Gleason is recognizing that a waste fee is not a form of taxation but is a charge for a service rendered and, therefore, proprietary. Thus, the statements by the county and associations that Fiske and Gleason held that special assessments for garbage collection are valid is wholly incorrect. To the contrary, by citing Turner, Clein, and Gleason, which also cited Turner and Clein, Fiske, it is recognizing that the levy is not a special assessment, which is part of the taxing power, but is a service charge.

In Fiske, the contract franchisee billed the customers under contract. Because private entities cannot exercise the sovereign taxing power, it is crystal clear that its billings could not be special assessments. Thus, when the county elected to collect the $51.00 fee for the franchisee and remit it to him, it could only be collecting the same type fee the franchisee was collecting which was a service charge for garbage collection. Turner, cited in Fiske, squarely recognized this by holding that nonpayment of a garbage fee gave rise to the existence of a "debt." Debt only arises by contract/proprietorship, not from an exercise of the taxing power of which special assessments are a part, which are sovereign forced charges. See Ashley, infra.

Because the constitution exempts churches from taxation, just like it protects homesteads from debt, and because a charge for services rendered is a payment for debt, the non-ad

valorem collection method could not be used and the church property could not stand forfeit for nonpayment of the charge. If a charge creates a "debt" within the purview of the Declaration of Rights protection from imprisonment for debt, then it is certainly a "debt" within the homestead protection from debt found in Article X, Section 4, and cannot be a special assessment so as to circumvent the religious exemption. Turner.

At page 20 of its brief, the county cites Martin v. Dade Muck Land Co., 116 So. 449 (Fla. 1928), which involved a charge characterized as a "special assessment ad valorem tax" apportioned uniformly based on assessed value. The amici point out that until the homestead tax exemption was adopted in 1934, it generally was not necessary for courts to distinguish between assessments for special benefits and ad valorem taxes for special purposes. See Weigel v. Broward County Port Auth., 152 Fla. 70, 10 So.2d 815 (Fla. 1943); State v. South Lake County Special Road & Bridge Dist. in Lake County, 145 Fla. 210, 198 So. 832 (Fla. 1941); State v. City of Delray Beach, 140 Fla. 132, 191 So. 188 (Fla. 1939); State ex rel. Clark v. Henderson, 137 Fla. 666, 188 So. 351 (Fla. 1939); State ex. rel. Ginsberg v. Dreka, 135 Fla. 463, 185 So. 616 (Fla. 1939); Fleming v. Turner, 122 Fla. 200, 165 So. 353 (Fla. 1936); State ex rel. Sovereign Camp W.O.W. v. Boring, 121 Fla. 781, 164 So. 859 (Fla. 1935); Folks v. Marion County, 121 Fla. 17, 163 So. 298, 102 A.L.R. 659 (Fla. 1935).

Henderson addressed both the 1934 and the 1938 constitutional amendments which provided for homestead tax

exemption and recognized the concept of assessments for special benefits as follows:

> The school district tax under section 8, Article XII, is not a special assessment for benefits within the meaning of section 7 of Article X, adopted in 1934, and section 7, Article X as amended in 1938; and therefore such school district tax is not excluded from the provisions of section 7, and amended section 7, of Article X which exempt stated homesteads "from all taxation, other than special assessments for benefits" or "from all taxation, except for assessments for special benefits." Consequently the constitutionally designated classes of homesteads are exempt from school district taxes. Questions of policy are foreclosed by the quoted organic provisions, the Federal Constitution not being thereby violated.

Henderson, 188 So. at 354. It held that the district's tax for schools was not a special assessment.

Prior to the constitutional amendment in 1934 providing for homestead tax exemption, except for special assessments for benefits, it was not necessary to distinguish between ad valorem taxes for special purposes sometimes referred to as special tax assessments and special assessments, assessments for special benefits or special assessments for benefits.

However, cases arising after 1934 and 1938 did have to make this distinction which required departure from the Dade Muck Land rationale. See Bair v. Central and Southern Fla. Flood Con. Dist., 144 So.2d 818 (Fla. 1962); and St. Lucie County-Fort Pierce Fire Prevention and Con. Dist. v. Higgs, 141 So.2d 744 (Fla. 1962). In Bair, the court stated:

> The imposition of a levy uniformly throughout the district necessarily and, we think,

> properly upon this record implies a finding of benefits accruing in some fashion either direct or indirect to all real property located therein, and the cited cases clearly control the question of valid relationship between such benefits and the levy on the particular parcels here involved, more properly characterized as an ad valorem tax for special purposes rather than a special assessment on an ad valorem basis: "For a general, common, public benefit to a taxing unit as a whole, lands in the taxing unit may be reasonably assessed [on an ad valorem basis] by legislative authority, even though the lands as such are not immediately or directly benefited by the public improvement, when the assessment is not an abuse of authority."

144 So.2d at 820 (footnotes omitted, emphasis added). Dade Muck Land is referenced in a footnote because it too involved a uniform levy throughout the district on an ad valorem basis. Higgs reached the same conclusion stating:

> We agree with the learned circuit judge that the levy is a tax and not a special assessment for the reason he gave, namely, that no parcel of land was *specially* or peculiarly benefited in proportion to its value, but that the tax was a general one on all property in the district for the benefit of all. Our view harmonizing with that of the circuit judge, it follows that we also accept his conclusion that the first $5000. of each homestead is exempt because only in the case of special assessments could it be reached.
>
> To be legal, special assessments must be directly proportionate to the benefits to the property upon which they are levied and this may not be inferred from a situation where all property in a district is assessed for the benefit of the whole on the theory that individual parcels are peculiarly benefited in the ratio that the assessed value of each bears to the total value of all property in the district. This point was definitely

> settled by this court in Fisher v. Board of County Commissioners of Dade County, supra.

141 So.2d at 746 (emphasis added). Any consideration of Dade Muck Land must be made recognizing that it was decided in 1928 prior to the homestead amendment.

The stormwater management service for which the stormwater assessment is levied provides a general benefit only. It is simply a charge made against improved property to fund a county-wide function. The county has simply decided certain developed property shall pay the entire cost of the system. Elimination of stormwater and pollution benefits persons not property. Pollution curtailment benefits people and health generally, not property similar to the health units in Whisnant v. Stringfellow, 50 So.2d 885 (Fla. 1951).

Recently the Fifth District Court of Appeals reached a similar conclusion in Hanna v. City of Palm Bay, 579 So.2d 320 (Fla. 5th DCA 1991), which involved the "validity of a special assessment and whether it can be utilized for the purpose of street resurfacing in selected areas of the City of Palm Bay, Florida." 579 So.2d at 321. The court stated:

> It is undisputed that the "construction, reconstruction, repair, paving, repaving, hard surfacing, rehard surfacing, widening, guttering and draining of streets, boulevards and alleys" is authorized by Florida Statute 170.01(1)(a). The question is whether the assessed abutting property owners have been provided "a benefit which is different in type or degree from benefits provided to the community as a whole." *See* § 170.01(2), Fla.Stat. (1989).

Hanna, 579 So.2d at 321 (emphasis added). Thereafter, the court stated:

> Upon consideration of the various cases presented by the parties to this appeal, we are constrained to agree with the appellants that there is no authority for the proposition that a city-wide repaving project can be financed by special assessments against abutting property owners on the theory that each such owner somehow receives a benefit therefrom different in type or degree from the benefit provided to the community as a whole. Obviously, that is not true.

Hanna, 579 So.2d at 322 (emphasis added). Continuing the court stated:

> We agree with the succinct exposition of the applicable law as set forth in the appellants' Initial Brief:
>
> > When a public improvement imposes a benefit upon individual homeowners no different than that which is imposed upon the community at large, the individual homeowners cannot be made to bear the burden of the cost of the improvement. *City of Fort Myers v. State*, [95 Fla. 704] 117 So. 97 (Fla.1928). This legal premise is based upon two important policy considerations. First, because the Florida Constitution sets forth an exception to the homestead exemption for improvements that specifically benefit the homestead, the requirement of a special benefit conferred must be rigorously adhered to in order to avoid the circumvention of the constitutional exemption from forced sale of the homestead. *Fisher v. Board of County Commissioners*, 84 So.2d 572 (Fla.1956). A second important policy consideration is that there exists no need for voter approval

> when a public improvement project is funded by virtue of special assessments, and the cost of the improvement is not spread among all of those who use the services of the City by use of ad valorem tax revenues, fees, and other revenue sources and; rather, the individual, affected homeowners, who have no vote in the levy of the assessment, are held responsible for the full cost of the improvement. It is imperative, therefore, that only improvements that provide a special and peculiar benefit to affected property owners are funded through such a revenue vehicle.

Hanna, 579 So.2d at 322 (emphasis added). Thereafter Hanna cites Higgs, cited previously herein, stating:

> Furthermore, even if a benefit is conferred upon particular parcels of property, if the benefit is the same or similar to that which is conferred upon the community at large, the individual homeowner may not be assessed for a prorata cost of the improvement, and a special benefit may never be inferred on the theory that all similar situation parcels were benefited in the in the ratio that such parcels relate to the total value of all improved parcels.

Hanna, 579 So.2d at 322 (emphasis added). At bar, the county has simply allocated costs for the entire system to specified property.

The county references testimony stating that property value is enhanced and that property benefits when pollution is reduced. The elimination of pollution benefits people, whether owners of property or not. See Stringfellow, and Crowder v. Phillips, 1 So.2d 629 (Fla. 1941). In Stringfellow, this court held that a charge to finance a county health unit was not an

"assessment for special benefits" in the constitutional sense. It cited Crowder stating:

> See also Crowder v. Phillips, 146 Fla. 428, 1 So.2d 629, 631, in which it was indicated that an improvement for which an "[assessment] for special benefits" is made must bear some logical relationship to the enhancement of the value of the real estate located in the taxing district.
>
> A county health unit is the source of benefits to all the people of the county. It is, in fact, as much "a current governmental need" and "as essential to the public welfare as police protection, education or any other function of local government." State of Florida v. Florida State Improvement Commission, Fla., 48 So.2d 165, 166. But there would appear to be no "special or peculiar benefit" to the real property located in the county by reason of its establishment--no "logical relationship" between its establishment and the improvement of the real estate situated in the county. It benefits everyone in the county, regardless of their status as property owners. It is a "governmental need" for which the taxing power of the county may be obligated. State v. Florida State Improvement Commission, supra.

Stringfellow, 50 So.2d at 885, 886 (emphasis added). Any enhancement to property values generally, which might exist, results from the existence of drainage and not from the manner of financing same. If the system was financed wholly from ad valorem taxes the benefits would be exactly the same. None of the proffered testimony suggested that the benefit was different because of the funding mechanism. Furthermore, all vacant land is excluded even though section 403.0893(3), by referring to acreage fees on an acreage basis, seems to be squarely

contemplating vacant, unimproved lands not residential units and other developed property.

Two other cases cited by the county and the associations require comment. Those are South Trial Fire Con. Dist. v. State, 273 So.2d 380 (Fla. 1973); and Fire Dist. No. 1 of Polk County v. Jenkins, 221 So.2d 740 (Fla. 1969). In neither of these cases was constitutional homestead or exemption involved. South Trail involved the following question:

> The Owners say the primary question is one of discrimination in that business and commercial property owners were paying 17.2% of the total assessments, while the value of their property was only 10.8% of all of the property in the district and they receive only 6% of the actual services of the district. The percentage of benefit was attempt to be shown by analyzing the number of fire calls. However, the evidence indicates that 34% of the structural fires in 1971 occurred in commercial structures. The Chief of the First District testified that the average would be around 27% to 28% of all structural fires, which is well above the 17% of the cost borne by the commercial property owners.

South Trail, 273 So.2d at 382. The only matter at issue was the method of apportionment. This was a second prong challenge. The court stated:

> Apportionment of the cost of a public improvement is essential to the validity of the assessment therefor, and the assessment must represent a fair proportional part of the total cost of the improvement. The assessment must not be in excess of the proportional benefits as compared to other assessments on other lots and tracts affected by the improvement. See McQuillin, Volume XIV, Municipal Corporations, § 38.121 (1970). The manner of the assessment is immaterial and may vary within the district, as long as

> the amount of the assessment for each tract is not in excess of the proportional benefits as compared to other assessments on other tracts.

South Trail, 273 So.2d at 384.

Jenkins also only involved an apportionment or second prong challenge. The contentions in Jenkins are set forth as follows:

> Jenkins filed his complaint in the Circuit Court contending that the special assessment provisions of the Act violated Article IX, Section 13 of the Florida Constitution, F.S.A., relating to assessment of mobile home spaces and that the Act in its application to mobile home parks was arbitrary, confiscatory, discriminatory and disproportionate. Jenkins sought a refund of the assessment previously paid, plus interest, and an injunction prohibiting the Fire District from levying special assessments pursuant to the above Special Act upon his mobile home rental spaces.

Jenkins, 221 So.2d at 741. These were the only issues raised. The court rejected these contentions stating:

> The basis of apportionment upon the property subject to special assessments in this case is without unjust discrimination among those specially assessed, nor are the assessments burdensome and oppressive in their operation upon the lands affected.

Jenkins, 221 So.2d at 742.

Thus, both Jenkins and South Trail involved apportionment challenges, not the issue of whether the charge was a valid special assessment. Accordingly, neither had to address the constitutional issues presented at bar--that the charge is not a valid special assessment.

Succinctly put, the county has simply sought to finance a county-wide stormwater management system in a manner which allows it to circumvent the 10-mill cap and all constitutional tax exemptions and use a system of collection which allows it to select certain developed property to stand forfeit for nonpayment.

The court below held that the label attached to the charge did not control and that the stormwater fee was not a valid special assessment. The amici submit that this decision is correct and is amply supported by the record.

III. WHERE THE COUNTY COLLECTED MONEY THROUGH THE LEVY OF A CHARGE HELD TO BE INVALID AND UNLAWFULLY ASSESSED, PERSONS PAYING SUCH CHARGE ARE ENTITLED TO REFUND OF THE AMOUNTS PAID.

At page 23 of its brief, the county states that even if the stormwater management service assessment is invalid, that ordering refunds is a "drastic remedy" which should not be resorted to. It then cites Gulesian v. Dade County School Bd., 281 So.2d 325 (Fla. 1973), and Alsdorf v. Broward County, 373 So.2d 695 (Fla. 4th DCA 1979), and argues that it acted in good faith relying on section 403.0893 and states that "an order requiring a refund would be to punish SARASOTA for its good faith efforts."

The flip side of this coin is that the county would be able to take a person's money (property) illegally and keep and use it even though it acted unlawfully. The county would have

this court "punish" the churches by keeping their money paid pursuant to an unlawful assessment. If this view were adopted, then the county could act with impunity under any scheme it chose to circumvent tax exemption provided by the Florida Constitution, and know that as long as it could claim that it acted in good faith it would be immune from the due process requirement of refund of illegal assessments. In this case, the churches and their class members would have won the case but obtained no remedy. Due process requires a remedy.

The holding in Gulesian will be discussed first. It does not support the county's position because both the factual and legal background were different. The situation in Gulesian was indeed unique.

Gulesian is not even remotely similar to the instant case. In Gulesian the school board acted pursuant to a constitutional statute which specifically authorized the levy for millage in excess of the 10-mill cap for specific purposes. The law, chapter 71-263, Laws of Florida, was enacted to reinstate the 10-mill cap found in the Florida Constitution, which had been invalidated by a Federal District Court, and to permit a limited levy in excess of that cap for specific purposes. The supreme court explained this stating:

> We are particularly impressed with the second finding of the trial judge stated just above, and with the arguments advanced in support thereof by Appellee and several intervening school boards. It appears therefrom that on February 24, 1971, the U.S. District Court for the Southern District of Florida held that the limitation of millage

> elections to freeholders contained in Article VII, Section 9(b) of the 1968 Florida Constitution was unconstitutional. The Federal District Court further held that the freeholder provision was inseparable from the remainder of the text and struck down Section 9(b) in its entirety. The Court also held F.S.Section 236.25, F.S.A. invalid.
>
> While this decision of the U.S. District Court was on appeal and prior to its modification by the United States Court of Appeals for the Fifth Circuit, the Florida Legislature enacted Chapter 71-263, effective June 24, 1971, amending Section 236.25, to reinstate the 10-mill "cap" but permitting levies in excess of 10 mills if made for certain specific purposes set forth in the amendatory statute.

Gulesian, 281 So.2d at 327 (emphasis added). The court noted that the school board had acted in "strict compliance" with chapter 71-263, which was valid at the time of enaction stating:

> The Dade County School Board in strict reliance upon the enabling authority of Chapter 71-263, levied the .82 mills in excess of 10 mills for the purpose of funding its deficit in state matching of teachers retirement funds, then estimated at $7,700,000. Pursuant to this levy the sum in controversy, $7,300,000, was collected, deposited in the Board's general funds and paid to the State to cover the deficit in retirement matching.

Gulesian, 281 So.2d at 327 (emphasis added).

The supreme court thereafter points out that, on March 31, 1972, the Fifth Circuit Court of Appeals reversed the District Judge by holding that the offensive language in article VII, section 9(b), could be excised from the remainder, which included the 10-mill cap, thus reinstating the constitutional 10-

mill cap on school taxes. This had the effect of rendering chapter 71-263 unconstitutional. It stated:

> On March 31, 1972 the Fifth Circuit Court of Appeals held Section 9(b) of Article VII of the Florida Constitution not to be invalid in its entirety, but could be sustained by simply excising the offending provision relating to freeholder elections. The effect of this decision was to recognize the constitutional 10-mill cap limitation as valid, rendering invalid in the process--at least prospectively--the permissive provisions of F.S. Section 236.25, F.S.A., as amended for excess levies.

Gulesian, 281 So.2d at 327 (emphasis added).

Thus, the factual situation in Gulesian was totally different from that in the case at bar. The school board in Gulesian had totally complied with the 1971 law in its levy. Suit was initiated for refund after the Federal court's ruling reinstating the 10-mill cap.

In the instant case, the county did not comply with the Florida Constitution because it labeled its charge a special assessment to circumvent the constitutional tax exemption for churches. The county created the ordinance through which it purported to act and that certainly cannot supply a basis for its claimed "good faith" because it is tainted with the same illegal purpose as the assessment and is derived through the same motive.

As pointed out under point II, section 403.893(3) does not expressly sanction the county's assessment. It expressly permits acreage fees only and that is not what was levied. This type charge connotes charges for large vacant land tracts and subareas and the county ordinance expressly excluded all vacant

land. So, the county certainly did not act in compliance with section 403.0893. This statute does not authorize the county's assessment.

Furthermore, the statute quoted, in part by the county on page 5 of its brief, does not authorize the county's action. It states that the "stormwater utility" "is operated as a typical utility which bills services regularly, similar to water and wastewater services." These type charges are proprietary fees and not forced charges imposed through sovereignty. So, the county did not act pursuant to this provision either.

The Alsdorf case also is not appropriate. That case involved a suit by mayors of several cities in Broward County who were plaintiffs in a suit contending that the county was taxing county wide for services furnished only in the unincorporated areas of the county. The court held that part of these contentions were valid and that "the only taxes improperly collected were in the area of emergency medical services and neighborhood parks," and that "the emergency medical services programs were only improperly collected in those towns which had rejected the county-wide programs and were providing their own emergency programs." The court stated:

> In the instant situation the evidence is clear that the county exercised good faith and there is no assertion to the contrary. Further, there was total failure of proof as to the amounts of taxes in question or as to identification of those who should receive refunds.

Alsdorf, 373 So.2d at 701. This is not true in the instant case. The mayors could not show those who had paid too much or how much because of the nature of the issues. Alsdorf was not brought by taxpayers.

The instant case is controlled by Coe v. Broward County, 358 So.2d 214 (Fla. 4th DCA 1978). In Coe, Broward County made the same contention as Sarasota County in the instant case and the contention was rejected. After quoting from the supreme court's decision in Gulesian, the court stated:

> First, we believe the law to be that a taxpayer is normally entitled to a refund of taxes paid pursuant to an unlawful assessment. We construe the Supreme Court's ruling in *Gulesian* to have carved out a very narrow exception to the taxpayer's right to a refund.
>
> The point most emphasized by the Supreme Court in *Gulesian* was the good faith of the school board in making the assessment. There, a federal district court had struck down the entire provision in the state constitution which placed a 10 mill limit on tax assessments. After this decision the Florida Legislature passed specific legislation authorizing certain taxes in excess of 10 mills. The school board then levied and collected a tax in strict compliance with this legislative authority. Thereafter, the Fifth Circuit Court of Appeals reinstated the 10 mill limit, thereby invalidating both the legislation in question and the tax levied by the school board. It is clear that the school board acted at all times in accordance with the law as then interpreted by the courts and enacted by the legislature. A better case of good faith would be hard to find.

Coe, 358 So.2d at 216 (emphasis added). Thereafter the court commented:

> However, it appears from the record that no evidence was offered by either side on this issue to the trial court. And, since this court found the assessment to be contrary to the "obvious" intent of the legislature, we do not believe that good faith can be presumed. Further, we do not believe that the findings related to the surplus funds and their availability for emergencies, and the change in ownership of the property taxes, are sufficient to defeat the taxpayers' right to a refund.

Coe, 358 So.2d at 216 (emphasis added). Continuing the court stated:

> The remaining question is whether the finding by the trial court that a refund would result in a disproportionate expense to the county, as compared to the benefit to the average taxpayer, is insufficient in itself to support a denial of the refund. If this factor alone is to be determinative of the issue, then the taxpayer would almost never be entitled to refunds of illegally assessed taxes, since there will always be relatively high administrative costs in processing tax refunds. We do not feel the Supreme Court in *Gulesian* intended to so limit the rights of taxpayers. A taxing authority must demonstrate more than the mere expense of processing refunds in order to deny the taxpayers their right to a refund of illegally assessed taxes. The order of the trial court denying supplemental relief is hereby reversed with directions for further proceedings in accordance with this opinion.

Coe, 358 So.2d at 216, 217 (emphasis added). As can be seen, the district court reversed the trial court's denial of refund.

On remand, the trial court granted refund and again Broward County appealed. In Broward County v. Coe, 376 So.2d 1222 (Fla. 4th DCA 1979), the district court upheld the trial court's order granting refunds stating:

> This is the third appearance of this class action. Following receipt of the opinion and mandate rendered by this court in the second appeal, the trial judge entered a final judgment ordering a rebate of illegally collected taxes according to a plan of rebate. Appellants complain that the trial judge refused to allow appellants an opportunity to submit evidence of good faith in accordance with *Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla.1973). However, appellants had the opportunity to present evidence on the issue of good faith at the first evidentiary hearing prior to the last appeal. Appellants seek "two bites at the apple." The trial judge, by entering the final judgment correctly concluded that this court's prior opinion neither contemplated nor authorized a second evidentiary hearing. Our prior opinion found that there was no evidence of good faith as required by *Gulesian*. Ergo, the final judgment of the trial court complied with the decision and mandate of this court. Somewhere the curtain must ring down on litigation.

Broward County, 376 So.2d at 1223 (emphasis added).

Coe was cited in State, Dept. of Revenue v. Johnston, 422 So.2d 935 (Fla. 5th DCA 1982), rev. denied, 442 So.2d 550 (Fla. 1983), for the proposition that cost and inconvenience of doing a final tax roll or reconciliation of a final tax roll is not enough to avoid having to do same, stating that, if it was, none would ever be done.

Coe also was cited in Broward County Fla. Board of Co. Com'rs v Burnstein, 470 So.2d 793 (Fla. 4th DCA 1985), in which Broward County sought to avoid having to refund occupational license taxes paid pursuant to an invalid ordinance. The court stated:

> Appellant-county next argues that refunds should not be required because the funds

> generated by the tax have obviously long since been expended, at least for prior years. We reject this argument as well.
>
> In *Coe v. Broward County,* 358 So.2d 214 (Fla. 4th DCA 1978), *aff'd,* 376 So.2d 1222 (Fla. 4th DCA 1979), the county argued against refund because the collected taxes had already been spent. This court disagreed, reasoning that even if the refund costs the county a great deal compared to the benefits to the taxpayer, that factor alone is insufficient to deny the refund.
>
> > If this factor alone is to be determinative of the issue, then the taxpayer would almost never be entitled to refunds of illegally assessed taxes, since there will always be relatively high administrative costs in processing tax refunds. . . . A taxing authority must demonstrate more than the mere expense of processing refunds in order to deny the taxpayers their right to a refund of the illegally assessed taxes.
>
> 358 So.2d at 217. *See also Broward County v. Mattel,* 397 So.2d 457 (Fla. 4th DCA 1981)(county's argument that the subject funds had been disbursed to the municipalities and were no longer in the treasury was unsuccessful).

Burnstein, 470 So.2d at 795 (emphasis added).

In Colding v. Herzog, 467 So.2d 980 (Fla. 1985), the supreme court considered the validity of a Department of Revenue rule which had the effect of exempting from ad valorem taxation household goods and personal effects of residents while taxing those of nonresidents. The court's decision was made prospective only except for those taxpayers who had timely, judicially challenged the rule. Florida law requires that suits challenging an ad valorem property assessment must be made within 60 days

from the date the roll is certified. See section 194.171, Florida Statutes (1993); Markham v. Neptune Hollywood Beach Club, 527 So.2d 814 (Fla. 1988); Hirsh v. Crews, 494 So.2d 260 (Fla. 1st DCA 1986); Gulfside Vacations, Inc. v. Schultz, 479 So.2d 775 (Fla. 1st DCA 1985); rev. denied, 488 So.2d 530 (Fla. 1986); and Bystrom v. Fla. Rock Indus., Inc., 452 So.2d 1053 (Fla. 3d DCA 1984).

In the instant case, churches which paid the assessments have filed suit by class representation and the court has properly certified the class. If the county has received and used the money, it did so at its jeopardy.

For the reasons stated, Gulesian is not controlling and the churches are entitled to a refund and the lower courts correctly so ruled.

More recently, this court has addressed the question of refunds in beverage tax and impact fee cases. In McKesson, the United States Supreme Court reversed a Florida Supreme Court decision which had held the beverage tax levy invalid, but declined to order a refund. The cornerstone of the United States Supreme Court's holding is stated as follows:

> Under these cases, a State must provide procedural safeguards against an unlawful tax exaction because such exaction constitutes a deprivation of property under the Due Process Clause.

McKesson, 110 S.Ct. at 2241 (emphasis added). The action of the Florida Supreme Court was addressed as follows:

> The Supreme Court also affirmed the trial court's refusal to order a tax refund,

> declaring that "the prospective nature of the rulings below was proper in light of the equitable considerations present in this case." *Id.*, at 1010. The court noted that the Division of Alcoholic Beverages and Tobacco had collected the liquor tax in "good faith reliance on a presumptively valid statute." *Ibid.* Moreover, the court suggested that, "if given a refund, [petitioner] would in all probability receive a windfall, since the cost of the tax has likely been passed on to [its] customers." *Ibid.*

McKesson, 110 S.Ct. at 2244. In rejecting the state's contention that prospective relief was sufficient and that no refunds need to be ordered, the court stated:

> It is undisputed that the Florida Supreme Court, after holding that the Liquor Tax unconstitutionally discriminated against interstate commerce because of its preferences for liquor made from "'crops which Florida is adapted to growing,'" 524 So.2d at 1008, acted correctly in awarding petitioner declaratory and injunctive relief against continued enforcement of the discriminatory provisions. The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: if a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

McKesson, 110 S.Ct. at 2247 (emphasis added, footnotes omitted).

At bar, the county's levies placed property owners in the position for 1989 of either paying the assessments or permitting a lien to be filed against their property, and for each year thereafter of either paying or having a certificate sold which could ultimately divest each of owner of their

property. This violates due process if the assessment is unlawful and no refund made. As the court stated:

> Our approach today, however, is rooted firmly in precedent dating back to at least early this century. *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 32 S.Ct. 216, 56 L.Ed. 436 (1912);

McKesson, 110 S.Ct. at 2248. Thereafter the court stated:

> In *Ward v. Love County Board of Comm'rs*, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920), we reversed the Oklahoma Supreme Court's refusal to award a refund for an unlawful tax. A subdivision of the State sought to tax lands allotted by Congress to members of the Choctaw and Chickasaw Indian Tribes despite a provision of the allotment treaty making the "'lands allotted . . . nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent.'" *Id.*, at 19, 40 S.Ct., at 420, quoting Act of June 28, 1898, § 29, 30 Stat. 491, 507. To avoid a distress sale of its lands, the Choctaw Tribe paid the taxes under protest and then brought suit in state court to obtain a refund. We observed that "it is certain that the lands were nontaxable" by the State and its subdivisions under the allotment treaty and, therefore, the taxes were assessed in violation of federal law. 253 U.S., at 21, 40 S.Ct., at 421. After finding that the Tribe paid the taxes under duress, *id.*, at 23, 40 S.Ct., at 421, we ordered a refund. We explained the State's duty to remit the tax as follows:
>
> "To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State." *Id.*, at 24, 40 S.Ct., at 422.

> See also *Carpenter v. Shaw*, 280 U.S. 363, 369, 50 S.Ct. 121, 123, 74 L.Ed. 478 (1930)(holding, in a case analogous to *Ward*, that "a denial by a state court of a recovery of taxes in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment").

McKesson, 110 S.Ct. at 2248-2249 (emphasis added).

More recently, the Florida Supreme Court followed the United States Supreme Court's decision in McKesson by ordering refunds of illegal impact fees in Department of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994). In that case, the court rejected the state's argument for a different remedy than refunds, stating that "the only clear and certain remedy is a full refund to all who have paid this illegal tax." Kuhnlein, 646 So.2d at 726.

Essentially, the county's argument is that its levy was a valid special assessment in the constitutional sense, and that its legislative findings declared in its ordinances are binding on the court. Failing that, the county contends that this court should relieve the county of the fiscal responsibility and consequences of its unlawful and unconstitutional conduct by declining to order refund or, in its words, to declare the ruling to be prospective only. If the court should declare the ruling prospective then the county is free to experiment again with impunity knowing that it will never have to face the consequences of its unlawful conduct.

The amici suggest that such a holding would be improper, resulting in a violation of due process, taking one's property unlawfully.

McKesson merely restated the fundamental principle long recognized that due process requirements prevent states from depriving a successful litigant of the remedy of refund of taxes collected through unlawful levies. To deprive such a litigant of his refund deprives him of his remedy, and permits government to violate fundamental law due process rights with impunity.

Any remaining question should have been firmly resolved by McKesson and Reich v. Collins, --- U.S. ---, 115 S.Ct. 547, --- L.Ed.2d --- (1994). McKesson reaffirmed a long line of cases reaching back to Ward v. Love County Board of Comm'rs, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920), that the states may not deny tax refunds as a remedy to taxpayers who successfully challenge a state's constitutional authority to impose an assessment paid under a coercive collection scheme. To deny a refund in such circumstances is a violation of due process since any exercise of any part of the sovereign taxing power is a taking of property. McKesson; Reich.

Florida has always adhered to a coercive pay now, determine validity later scheme. In sales tax, intangible tax, fuel tax, corporate income tax, documentary stamp tax, and all beverage and cigarette tax impositions, payment is coerced and section 215.26, Florida Statutes (1993), provides a three-year

time for seeking refund. No interest is allowed on refunds, however.

In ad valorem tax levies, a lien attaches January 1 (see section 192.042, Florida Statutes (1993)), and if not paid the taxes become delinquent on April 1 of the following year which is followed by the sale of a tax certificate if not paid, which results in the sale of a tax deed if not paid for a two-year period. See sections 197.122, 197.172, 197.422, 197.432, 197.502, 197.542, 197.552, Florida Statutes (1993). Section 197.082, Florida Statutes (1993), contains a four-year time period within which to seek refund of taxes if a claim is properly made under certain circumstances. Chapter 95, Florida Statutes (1993), also contains a four-year statute of limitations.

Use of the non-ad valorem collection method is authorized in section 197.3632, Florida Statutes (1993), which allows the county to use the same enforcement mechanism as exists for ad valorem taxes. That is, the lien attaches January 1 and can only be discharged by payment. Nonpayment results in 18 percent interest after the date of delinquency and permits a certificate to be sold on the property. This results in a tax deed being issued after two years. The county does not have to initiate any proceedings once nonpayment occurs because of the statutory lien/certificate/tax deed procedure in place. A more glaring example of a coercive statutory scheme or mechanism could hardly be found. But that is <u>exactly</u> why the county chose to

designate its charges for services as special assessments or non-ad valorem assessments. It allows use of the in place ad valorem collection statutory mechanism. To obtain relief through enjoining the issuance of the special assessment or tax deed, a taxpayer must post a bond equal to the amount of the disputed tax, interest, penalty and expense. Florida Rule of Civil Procedures 1.610. This is pure duress.

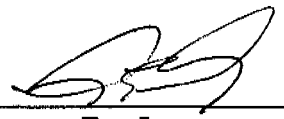
In Kuhnlein, refund of vehicle impact fees was sought pursuant to section 215.26, Florida Statutes, (3-year time period) and this court rejected the state's argument that class action would not lie because the statute requires application.

The county's special assessments at bar are forced assessments using the non-ad valorem collection methodology. The amici submit that the district court was correct in ordering refunds.

CONCLUSION

For the above and foregoing reasons the amici respectfully submit that the decisions of the trial court and the district court finding that the stormwater management fee/assessment levied by Sarasota County is not a valid special assessment and ordering the county to refund monies illegally collected is correct. Such decisions should be sustained based on the authorities stated herein.

Respectfully submitted,



Larry E. Levy
Fla Bar No. 047019
Law Offices of Larry E. Levy
Post Office Box 10583
Tallahassee, Florida 32302
904/222-7680

Counsel for amici Quinton Dryden, George Alford, and Leon Nettles

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U. Mail to **RICHARD E. NELSON, ESQUIRE**, Nelson, Hesse, et al., 2070 Ringling Boulevard, Sarasota, Florida 34237-7002; **JORGE L. FERNANDEZ, ESQUIRE**, 1549 Ringling Boulevard, Third Floor, Sarasota, Florida 34236; **ROBERT NABORS, ESQUIRE**, Nabors, Giblin & Nickerson, Post Office Box 11008, Tallahassee, Florida 32302; **EMELINE ACTON, ESQUIRE**, Florida Association of County Attorneys, Inc., Post Office Box 1110, Tampa, Florida 33601; **HARRY MORRISON, JR., ESQUIRE**, Florida League of Cities, Inc., Post Office Box 1759, Tallahassee, Florida 32302; **STEPHEN F. ELLIS, ESQUIRE**, 1800 2nd Street, Suite 806, Sarasota, Florida 34236-5904; **I. W. WHITESELL, JR., ESQUIRE**, 1605 Main Street, Suite 705, Sarasota, Florida 34236-5863; and **TOBY BUEL, ESQUIRE**, Three Rivers Legal Services, 817 West Duval Street, Lake City, Florida 32055 on this the 13 day of April, 1995.

Larry E. Levy