SUPREME COURT OF FLORIDA
CASE NO. 84,414

SARASOTA COUNTY,

Appellant,

vs.

SARASOTA CHURCH OF CHRIST, INC., ET AL.,

Appellees.
_____/

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
CASE NO. 93-01902

AMENDED BRIEF OF AMICI CURIAE FLORIDA ASSOCIATION OF COUNTIES, INC., FLORIDA ASSOCIATION OF COUNTY ATTORNEYS, INC., AND FLORIDA LEAGUE OF CITIES, INC.

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STATEMENT OF THE CASE AND FACTS

In 1989, Sarasota County (the "County") adopted Ordinance No. 89-117[1] which created a stormwater utility and imposed special assessments to fund the stormwater improvements and services (the "stormwater ordinance"). The stormwater ordinance imposed special assessments on all developed properties but not on undeveloped property or property without physical improvements. Before the County adopted the stormwater ordinance, stormwater management was funded through ad valorem taxes. Church property is exempt from ad valorem taxes but not from special assessments; consequently, a number of churches (the "Churches") within the County objected to the special assessment and filed suit against the County. The service area included all the unincorporated area of the County and the municipal areas of the City of Sarasota with the consent of the City.

The Churches challenged the special assessment on grounds that (1) the assessed stormwater management services and improvements provided no special benefit to the Churches' property and (2) the cost of funding the stormwater utility was not fairly and reasonably apportioned among the assessed properties. The circuit court agreed with the Churches and struck the stormwater ordinance as an invalid special assessment.

The County appealed the circuit court's invalidation of the special assessment for the stormwater utility but the Second

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[1] Attached hereto as Appendix "A."

District Court of Appeal adopted the circuit court's final judgment, almost verbatim. One notable difference between the circuit court's judgment and the appellate court's opinion is that the Second District Court of Appeal, in two instances inserted bracketed references to the stormwater ordinance, which seemed to limit its invalidation to the specific ordinance in question:

> 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.
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> * * *
>
> Stormwater management services [as planned and funded by Sarasota County Ordinance No. 89-117] . . . are not a valid special assessment[.]

Sarasota County v. Sarasota Church of Christ, 641 So.2d 900, 902-903 (Fla. 2d DCA 1994).

The County filed several post-opinion motions in an effort to convince the Second District Court of Appeal that it had overlooked or misunderstood certain principles of Florida local government law.[2] Specifically, the County moved for a rehearing and argued that whether a particular service meets the special benefit requirement depends on if the service has a "logical relationship"

[2] These motions are attached hereto as Appendix "B."

to the use or value of the property assessed.[3] The thrust of the motion for clarification was that, if the opinion was limited to the apportionment method before the circuit court, the use of bracketed language was too subtle a basis for such a factual distinction in light of the language used, which appeared to construe the special benefit requirement as prohibiting the funding of stormwater management services by special assessments. Furthermore, the County asked the court to clarify whether it invalidated special assessments for stormwater services in all cases or just in the manner implemented by the County under Ordinance No. 89-117. Finally, the County moved for certification of the following question to this Court:

> Do stormwater management services bear a logical relationship to property to permit the funding of such services by special assessments imposed in conformity with the requirements for a valid special assessment summarized in City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992)?

The Second District Court of Appeal denied each of these motions and refused to certify the suggested question.

Consequently, the County filed jurisdictional briefs, asking this Court to invoke discretionary jurisdiction. This Court granted jurisdiction on February 23, 1995.

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[3] The County also argued that the court overlooked the implicit finding of special benefit in Chapter 403, Florida Statutes, which authorizes special assessments for stormwater services within benefit areas.

SUMMARY OF THE ARGUMENT

The management of stormwater and the acquisition and construction of stormwater facilities are the types of services and improvements that possess a logical relationship to property to permit funding by special assessments under the special benefit requirement. City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992). Whether the stormwater assessments funded by Ordinance No. 89-117 satisfy the fair and reasonable apportionment requirement is a factual issue whose resolution is unclear from the opinions of the circuit court and the Second District Court of Appeal.

The Second District Court of Appeal's merging of the special benefit and fair apportionment requirements for valid special assessments jars the predictability of prior Florida precedent. Such a misapplication of the special benefit requirement is also contrary to statutory authorizations for local governments to fund stormwater management programs, particularly the unambiguous authorization to levy stormwater assessments contained in section 403.0893, Florida Statutes. This statutory authority to impose stormwater assessments is essential for local governments to meet the comprehensive planning mandates contained in the Local Government Comprehensive Planning and Land Development Regulation Act, Chapter 163, Florida Statutes.

The Second District Court of Appeal's attempt to "draw a line in the sand" between valid and invalid special assessments based on whether the special assessments are imposed for improvements or services is fundamental error and was drawn in reliance upon a

reversed circuit court decision. Whether a special assessment imposed for services is valid turns upon compliance with the special benefit and fair apportionment requirements grounded firmly in Florida case law.

The Second District Court of Appeal's use of bracketed language as an inference to limit its opinion to the facts of the apportionment methodology contained in Ordinance No. 89-117 is ambiguous and does not alleviate the erroneous statements in the opinion on the special benefit requirement and the power of local governments to impose assessments for those services that provide the requisite special benefit. In addition, the Second District Court of Appeal's opinion creates confusion among local governments as to whether the opinion was limited to stormwater assessments, as funded and financed by Sarasota County Ordinance No. 89-117, or whether the opinion was more far-reaching and holds that stormwater assessments as a matter of law, regardless of the apportionment method used, cannot be financed by special assessments.

Finally, the Second District Court of Appeal's stated preference that stormwater management services are services whose revenue should be raised only with taxes represents an obvious interference with the legislative choice of local governments in violation of fundamental separation of power concepts.

ARGUMENT

I. STORMWATER MANAGEMENT SERVICES POSSESS A LOGICAL RELATIONSHIP TO PROPERTY SUFFICIENT TO MEET THE SPECIAL BENEFIT REQUIREMENT FOR A VALID SPECIAL ASSESSMENT.

A. Introduction.

The requirements for determining the legal sufficiency of a special assessment were recently and clearly articulated by this Court:

> There are two requirements for the imposition of a valid special assessment. First, the property assessed must derive a special benefit from the service provided. [cits. omitted]. Second, the assessment must be fairly and reasonably apportioned among the properties that receive the special benefit. [cits. omitted]. Thus, a special assessment is distinguished from a tax because of its special benefit and fair apportionment.

City of Boca Raton v. State, 595 So.2d 25, 29 (Fla. 1992) (emphasis added).

Whether a particular service meets the special benefit requirement is usually a matter of law. The question to be asked is whether the service or improvement has a logical relationship to the use, enjoyment, or value of property or whether the service is a general governmental function without any logical relationship to property. For example, in Crowder v. Phillips, 1 So.2d 629 (Fla. 1941), this Court held that a hospital was not a service or improvement which could be funded by special assessments:

> That a hospital is a distinct advantage to the entire community because of its availability to any person who may be injured or stricken with disease cannot be gainsaid, but there is no logical relationship between the construction and maintenance of a hospital, important as it is, and the improvement of real estate situated in the district.

Id. at 631 (emphasis added); see also Whisnant v. Stringfellow, 50 So.2d 885 (Fla. 1951) (held that a county health unit could not be funded by special assessments since the services providing such improvements had no "logical relationship" to property).

Thus, general governmental services are constitutionally required to be funded by taxes, not special assessments, because general governmental services fail to meet the special benefit to property requirement for special assessments. General governmental services have no logical relationship to property and thus exclusively serve the general public good. In the words of this Court:

> [A] legally imposed special assessment is not a tax. Taxes and special assessments are distinguishable in that, while both are mandatory, there is no requirement that taxes provide any specific benefit to property; instead, they may be levied throughout the particular taxing unit for the general benefit of residents and property. On the other hand, special assessments must confer a special benefit upon the land burdened by the assessment.

City of Boca Raton v. State, 595 So.2d 25, 29 (Fla. 1992).

Because of the long history of special assessments in Florida, the answer to the question whether a particular service provides the requisite special benefit or possesses a logical relationship to property is usually found in established case law. On the other

hand, the answer to the question whether a particular service meets the "fair and reasonable apportionment" requirement[4] is always a factual issue.

The inherent factual nature of the fair and reasonable apportionment requirement explains the different results in St. Lucie County-Fort Pierce Fire Prevention and Control Dist. v. Higgs, 141 So.2d 744 (Fla. 1962), Fire District No. 1 of Polk County v. Jenkins, 221 So.2d 740 (Fla. 1969), and South Trail Fire Control Dist., Sarasota County v. State, 273 So.2d 380 (Fla. 1973). In each case, fire protection services were funded by special assessments. In St. Lucie County-Fort Pierce Fire Protection, the court invalidated the special assessment because the assessed costs were apportioned on the basis of property value; thus the fair and reasonable apportionment requirement was not met. The assessed value of property was not reasonably related to the potential need for fire protection services. In contrast, under different apportionment methods, the special assessments for fire protection services were upheld in Polk County and Sarasota County. Fire protection services are the type of services that meet the special benefit test as a matter of law under this clear case precedent. The validity of an assessment for fire control services turns on whether the assessment costs are fairly and reasonably apportioned.

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[4] This requirement for a valid special assessment is met when the service is fairly and reasonably apportioned among the properties that receive the special benefit in a manner commensurate with the property's use and enjoyment.

The Second District Court of Appeal upheld the imposition of special assessments to fund fire and related services based upon this clear case precedent.[5] However, the Second District Court of Appeal inconsistently held that stormwater management services "do not meet the definition of a special assessment" under the following reasoning:

> 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.

641 So.2d at 902. This reasoning, analyzing the use of stormwater assessments to fund stormwater management services, evidences a fundamental misunderstanding of the requirements for a valid special assessment and the consistent Florida case law construing the nature of such requirements.

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[5] Additionally, the Second District Court of Appeal in this case seemed to uphold the validity of fire services based upon their longevity. "The second obstacle . . . on this issue is rooted in the history of how many churches have paid for fire and rescue services for the past 20 years or more. They have paid, seemingly without protest for fire and rescue services via one form or another of special assessment." 641 So.2d at 902. Historical imposition alone does not alter the Florida case law requirements for a valid special assessment.

B. Florida Case Precedent Supports Funding Stormwater Management Services By Special Assessments.

The Second District Court of Appeal's failure to follow the Florida case law which defines the type of services providing special benefits to property is illuminated by its statements characterizing the nature of special assessments:

- Churches should only pay for special assessments that are in "the form of improvements abutting or contiguous to church property" such as sewer lines, sidewalks, and street lights.
- Beginning in the late 1960's, Florida courts held "without altering the definition of a special assessment, and without further explanation" certain services to be special assessments. "This transition seemed to strain the definition and historical meaning of a special assessment."
- Stormwater management services "benefit the community as a whole and provide no direct benefit, special benefit, increase in market value" to the property assessed.

641 So.2d at 901-902.

County services, as well as public improvements, can provide special benefit to property. Charlotte County v. Fiske, 350 So.2d 578 (Fla. 2d DCA 1977). The concept of special benefit does not require that the benefit to property be direct. Fire Dist. No. 1 of Polk County v. Jenkins, 221 So.2d 740 (Fla. 1969). No requirement for a valid special assessment exists that an improvement must be contiguous to or abutting on the benefited property. City of Hallandale v. Meekins, 237 So.2d 318 (Fla. 4th

DCA 1970). The benefit required for a valid special assessment consists of more than simply an increase in market value, and includes both potential increases in value and the added use and enjoyment of the property. Meyer v. City of Oakland Park, 219 So.2d 417 (Fla. 1969).

As case precedent has evolved, any distinction between the use of special assessments for the funding of services and improvements has disappeared. The law in Florida is clear: a service can be funded by special assessments so long as the service confers the requisite special benefit on the assessed property.

For example, in Charlotte County v. Fiske, 350 So.2d 578 (Fla. 2d DCA 1977), the court rejected a challenge to a special assessment which Charlotte County imposed to provide solid waste collection and disposal services on the basis that the assessment funded a service rather than a public improvement. The court noted:

> We summarily dispose of this third reason, viz., that the ordinance imposes a special assessment without construction of a public improvement, by saying that the construction of a public improvement is not necessary. The "improvement" involved may well be simply the furnishing of or making available a vital services, e.g., fire protection or, as here, garbage disposal.

350 So.2d at 580. Special assessments for fire control services have also been held to provide a special benefit to property in several Florida decisions. Fire Dist. No. 1 of Polk County v.

Jenkins, 221 So.2d 740 (Fla. 1969); and South Trail Fire Control Dist., Sarasota County v. State, 273 So.2d 380 (Fla. 1973).[6]

The benefit derived by the service or improvement need not be direct, nor is the benefit limited to the existing use of the property. This Court in Fire Dist. No. 1 of Polk County stated:

> It is not necessary that the benefits be direct or immediate, but they must be substantial, certain, and capable of being realized within a reasonable time.

221 So.2d at 741 (emphasis added).

Furthermore, the Second District Court of Appeal's focus on a perceived lack of special benefit resulting from "no increase in market value" was simply misplaced. A myriad of potential factors flow from a particular service or improvement to property that constitute special benefits within the framework of Florida case law. For example, this Court has recognized the "many benefits" which the availability of fire protection services provide to property:

> Fire Insurance premiums are decreased; public safety is protected; the value of business property is enhanced by the creation of the Fire District; a trailer park with fire protection offers a better service to tenants, which would reflect in the rental charge of the spaces.

Fire Dist. No. 1 of Polk County v. Jenkins, 221 So.2d 740, 741 (Fla. 1969). In Meyer v. Oakland Park, 219 So.2d 417 (Fla. 1969),

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[6] Assessments for fire protection services and solid waste disposal services have recently been upheld by several circuit courts. Hancock v. Gadsden County, Case No. 92-1222 (Fla. 2d Cir., May 3, 1993) and Harris v. Clay County, Case No. 92-2585 (Fla. 4th Cir., Sept. 7, 1993).

property owners challenged special assessments on the basis that no increase in the value of their land would result from the proposed sewer improvements. This Court rejected such a narrow view of special benefit and held as follows:

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

219 So.2d at 420.

Nor is the benefit derived by property from a service or improvement a general benefit merely because the service or improvement is provided to a widespread geographic area. A stormwater management program, by its nature, is not confined to a small geographic area in the way traditional special assessments, such as those for water and sewer lines, are. However, neither the scope of the assessment program nor the size of the area containing benefited property is controlling. For example, most special assessments for solid waste disposal or fire control services are imposed either countywide or within the entire unincorporated area of the county. The legal test for the validity of a special assessment is whether the service or improvement is of a nature and type that has a logical relationship or nexus to property, not the extent of the area assessed.

Although stormwater management systems and services possess some unique characteristics, they also have similarities to other services and improvements which special assessments have traditionally funded. To the extent that a parcel of property

discharges stormwater runoff, the collection and treatment of such discharge is similar to the collection, treatment, and discharge of wastewater originating from the use of the property. The only functional difference is that wastewater is within a closed loop utility system, while a defined stormwater management program is a collection and discharge program implemented by a managed surface drainage system. Thus, the costs of such managed stormwater drainage system are assessed against the property contributing to the need for the local government to manage the stormwater burden.

The special benefit concept embodied in a stormwater management system assessment is also similar to the special benefit provided to property by solid waste disposal and collection services. The removal and disposal of solid waste generated by the use and enjoyment of an improved parcel of property does not directly increase the market value of the property in the manner required under the Second District Court of Appeal's flawed reasoning. Similar to the discharge of stormwater, the use and enjoyment of property creates a solid waste burden that the local government must fund. Solid waste management programs, like stormwater management services, relieve the burden that is peculiar and unique to the property assessed and the required public expenditures to manage the solid waste or stormwater burden provide the requisite special benefit.

The imposition of a special assessment to provide for solid waste disposal is not a novel issue in the State of Florida. Both the Second and Third District Courts of Appeal have upheld special

assessments for solid waste disposal. See 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 Florida Legislature has also clearly contemplated the funding of solid waste disposal services through special assessments. The statutory method for the collection of non-ad valorem assessments on the ad valorem tax bill contained in section 197.3632, Florida Statutes, was enacted as part of the Solid Waste Management Act of 1988. See Ch. 88-130, Laws of Fla.[7]

The special benefit which a solid waste assessment confers is the relief of a specific burden caused by the use and enjoyment of property. Simply stated, using property generates solid waste. A special assessment provides funding so that local governments can relieve property of the solid waste burden which is generated by the use and enjoyment of that property.

Clearly, under Florida law, the special benefit requirement encompasses the concept of the relief of a burden which is special and unique to the property assessed. The planning, construction, and maintenance of a drainage system to control and manage stormwater generated from property relieves a burden which is special and unique to the property in its present or intended use. Such drainage services and improvements facilitate the use and

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[7] That only constitutionally imposed special assessments can be collected on the ad valorem tax bill is clear from the definition of non-ad valorem assessment in section 197.3632(1)(d), Florida Statutes, which "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."

enjoyment of property within the Florida law requirement of special benefit and are the types of services or improvements that are capable of being reasonably and fairly apportioned based upon relative contributions of property to the need for the stormwater management program. In the Court's words, "The term 'benefit,' as regards validity of improvement assessments . . . embraces . . . potential or actual or added use and enjoyment of the property." Meyer v. Oakland Park, 219 So.2d at 420. Furthermore, the Florida Legislature has stated that "any property owner who contributes to the need for stormwater management systems . . . is deemed to benefit from such systems and programs."[8]

The legal requirements for the imposition of a special assessment are different from those for a valid user fee. State of Florida v. The City of Port Orange, 19 Fla. L. Weekly S563 (Fla. 1994). The fundamental distinction is that a special assessment, like a tax, is an enforced contribution while fees are "paid by choice in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the

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[8] § 373.4592(8)(h), Fla. Stat. (Supp. 1994). See, infra, detailed discussion of legislative approval of special assessments for stormwater management programs.

charge.[9] 19 Fla. L. Weekly at S563. This fundamental distinction was recognized by the Court in City of Boca Raton as follows:

> A legally imposed special assessment is not a tax. Taxes and special assessments are distinguishable in that, while both are mandatory, there is no requirement that taxes provide any specific benefit to the property.

595 So.2d at 29. The Court, in City of Port Orange, was not faced with determining the validity of a special assessment:

> The ordinance states that the fees collected from any property must not be in close proximity to such property or provide a special benefit to such property that is different in type or decree from benefits provided to the community as a whole.

19 Fla. L. Weekly at S563 (emphasis added).

While no Florida case directly construes the validity of a special assessment for a stormwater management program other than the opinion of the Second District Court of Appeal in this case, the Court, in an early case, faced a challenge to a "special assessment ad valorem tax" for drainage by a landowner "at the top of the hill."[10] In Martin v. Dade Muck Land Co., 116 So. 449

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[9] This Court in City of Port Orange also recognized the different judicial presumption of validity when a tax is construed as opposed to a special assessment. Taxes must be expressly authorized by the Florida Legislature and doubt as to the power to tax is resolved against the local government. In contrast, the apportionment of benefit in a special assessment is a legislative function and if reasonable persons differ on whether the property is benefitted, the findings of the local government are sustained. City of Boca Raton v. State, 595 So.2d 25, 30 (Fla. 1992).

[10] Although the charge is characterized as a "special assessment ad valorem tax" and was apportioned uniformly based upon assessed value, the Court applied the special benefit concept incorporated under current Florida law requirements for a valid special assessment. It was common in early Florida cases applying traditional special assessment concepts to use the term "special

(Fla. 1928), appeal dismissed, 278 U.S. 560 (1928), the landowner argued that the land to be assessed was high and thus received no special benefit from the drainage program:

> It is, in substance, alleged that complainants' lands lying within the Everglades drainage district are located upon an elevated ridge which is drained by gravity; that such lands are highly improved and of great value, but are not, and never have been, in need of artificial drainage to carry rain falling on said elevation, and could not receive any benefit whatsoever from the construction of drains, canals, levees, dikes, or other drainage works upon or adjacent thereto.

116 So. at 454. The Court upheld the assessment as follows:

> All lands in a duly and fairly formed drainage district may be specially assessed for drainage purposes, if they reasonably may be benefited directly or indirectly by drainage operations; and no land in the district is exempt from a just special assessment merely because it may not receive a direct or an exactly equal benefit from the drainage, where no arbitrary rule resulting oppressively has been applied.

116 So. at 464 (emphasis in original).

While Florida has not directly considered the issue of special benefits to property for stormwater management services, other jurisdictions have. In Long Run Baptist Association v. Louisville and Jefferson County Metropolitan Sewer District, 775 S.W.2d 520 (Ky.App. 1989), the precise issue before this Court was considered.

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assessment tax" since there was no Florida constitutional imperative to distinguish between a tax and a special assessment. Likewise, many of the early special assessments discussed in Florida cases prior to the 1968 constitutional revision were apportioned based upon assessed value because of the absence of constitutional restriction on such apportionment methodology.

The court upheld a service charge for stormwater drainage against challenges by a church association that the charge was an impermissible tax. The church association argued that some property owners assessed by the District received no benefit from the system because those owners either constructed their own drainage system or their stormwater naturally drained into the Ohio River. Additionally, the church association argued that whatever benefits were derived from the stormwater services were incapable of measurement, and, at best, were indirect benefits. The court rejected all their arguments and upheld the stormwater assessment.

To distinguish stormwater management services by holding, as a matter of law, that such services fail to provide the special benefit is irrational and destructive of the settled pattern in Florida case law on the requirements for a valid special assessment.

C. Florida Statutory Law Expressly Authorizes Stormwater Management Services To Be Funded By Special Assessments.

The Second District Court of Appeal overlooked several critical legislative declarations in holding that stormwater management services failed to provide a special benefit to property. The most startling omission is the direct legislative authorization contained in Chapter 403, Florida Statutes, for local governments to impose special assessments to provide for stormwater management systems.

Section 403.031(17), Florida Statutes, defines a stormwater utility as:

> 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.

Under Florida law, all local governments must provide a stormwater management system within their jurisdictions.[11] In addition, the Local Government Comprehensive Planning and Land Development Regulation Act requires counties to include a drainage element within their comprehensive plan.[12] Section 163.3177(6)(c), Florida Statutes, states:

> (6) In addition to the requirements of subsections (1) - (5), the comprehensive plan shall include the following elements:
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[11] The term "stormwater management system" is defined in section 403.031(16), Florida Statutes, as:

> "Stormwater management system" means a system which is designed and constructed or implemented to control discharges which are necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use, or reuse water to prevent or reduce flooding, overdrainage, environmental degradation and water pollution or otherwise affect the quantity and quality of discharges from the system.

[12] Ch. 163, Part II, Fla. Stat.

> (c) A general sanitary sewer, solid waste, drainage, potable water, and natural groundwater aquifer recharge element correlated to principles and guidelines for future land use, indicating ways to provide for future potable water, drainage, sanitary sewer, solid waste, and aquifer recharge protection requirements for the area.

§ 163.3177(6)(c), Fla. Stat. (emphasis added). Further, section 403.0891, Florida Statutes, imposes upon the Department of Environmental Protection, water management districts, and local governments "the responsibility for the development of mutually compatible stormwater management programs." Thus, the obligation of each local government to plan and provide for a stormwater management program is mandated by Florida law. In this case, the County adopted Ordinance 89-117 to include the State's mandate, contained in Chapter 403, within its comprehensive plan.

In recognition of the mandate of Florida law and the benefits derived by properties subject to a stormwater management system, the Legislature adopted section 403.0893, Florida Statutes, which expressly authorized local governments to impose special assessments and collect them in the manner provided for ad valorem taxes pursuant to the non-ad valorem collection procedures contained in Chapter 197, Florida Statutes.[13] Section 403.0893, Florida Statutes, provides:

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[13] Although counties and municipalities have the authority to impose special assessments pursuant to their home rule powers, the express authorization by the State is a recognition of the special benefit to property derived from a stormwater management system.

> **403.0893 Stormwater funding; dedicated funds for stormwater management.--** In addition to any other funding mechanism legally available to local government to construct, operate, or maintain stormwater systems, a county or municipality may:
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> * * *
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> (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.

Id. (emphasis added).

The conclusion that the Legislature contemplated the use of traditional special assessments for the funding of stormwater management systems is reinforced by the express statutory authorization of section 403.0893, Florida Statutes, to collect such assessments pursuant to the uniform method for the collection of non-ad valorem assessments contained in Chapter 197. Section 197.3632(1)(d), Florida Statutes, defines a non-ad valorem

assessment to mean only those assessments which are not based upon millage and which can become a lien against a homestead as permitted in Article X, section 4, Florida Constitution.[14] Accordingly, Ordinance 89-117 specifically references section 403.0893, Florida Statutes, as its authority to impose the stormwater management assessment and the challenged stormwater assessment was collected pursuant to the non-ad valorem collection procedures contained in Chapter 197.

How the Second District Court of Appeal could hold, as a matter of law, that a special assessment for stormwater management services cannot meet the special benefit requirement for a valid special assessment without distinguishing the clear legislative authority provided in section 403.0893, Florida Statutes, is difficult to understand. Such an omission is obvious error.

The Legislature has also authorized the use of special assessments as a funding mechanism for the stormwater management program mandated for restoration of the Everglades through section 373.4592(8), Florida Statutes (Supp. 1994). In language similar to section 403.0893, Florida Statutes, the governing board of the South Florida Water Management District is authorized to impose a special assessment within a confined geographic area "to fund the planning, acquisition, construction, financing, operation, maintenance, and administration of stormwater management systems

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[14] Article X, section 4, Florida Constitution, excepts homestead property from forced sale under process of any court "except for the payment of taxes and assessments thereof."

for the benefited area."[15] On the nature of the special benefit to property received by stormwater management services, the Legislature has determined:

> The Legislature hereby determines that any property owner who contributes to the need for stormwater management systems and programs . . . is deemed to benefit from such systems and programs, and such benefits are deemed to be directly proportional to the relative contribution of the property owner to such need.

§ 373.4592(8)(h), Fla. Stat. (Supp. 1994). The circuit court's finding that no special benefit was derived by properties from a stormwater management system flies in the face of these express legislative determinations.

II. THE LINE BETWEEN THOSE SERVICES WHICH MAY BE CONSTITUTIONALLY FUNDED BY SPECIAL ASSESSMENTS AND THOSE WHICH MAY NOT IS CLEARLY DEFINED IN FLORIDA CASE LAW.

The driving force in the reasoning of the Second District Court of Appeal is illustrated by the following:

> 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. . . .

641 So.2d at 903. As support for the Second District Court of Appeal's declared fear of unbridled imposition of special

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[15] § 373.4592(8)(a), Fla. Stat. (Supp. 1994).

assessments by local government, it relied on the reversed circuit court decision in Madison County v. Foxx, 636 So.2d 39 (Fla. 1st DCA 1994). The circuit court in Madison County held that special assessments could not be used to fund services and were limited to the funding of capital projects. In its opinion, the Second District Court of Appeal agreed with the sentiments and flawed reasoning of the Madison County circuit court that special assessments are not to be used to fund services as follows:

> Without this "line in the sand" the tax exempt status for churches will, in all likelihood, disappear.

Sarasota County, 641 So.2d at 903.

The circuit court decision in Madison County, relied upon by the Second District Court of Appeal in the instant case, was reversed by the First District Court of Appeal in Madison County v. Foxx, 636 So.2d 39 (Fla. 1st DCA 1994):

> Regarding appellee Foxx's contention that special assessments may not be used to fund services, but only capital improvements, we note that a similar argument was considered and rejected by the court in Charlotte County v. Fiske, 350 So.2d 578, 580 (Fla. 2d DCA 1977). Moreover, we cannot overlook the considerable Florida case law that has permitted the imposition of special assessments, even when no capital improvements were involved. See e.g. South Trail Fire [Control] Dist., Sarasota County v. State, 273 So.2d 380 (Fla. 1973); [Fire] Dist. No. 1 of Polk County v. Jenkins, 221 So.2d 740 (Fla. 1969).

636 So.2d at 49-50. Like the Madison County circuit court it relied upon, the Second District Court of Appeal erred in

overlooking the considerable Florida case law that has permitted the imposition of special assessments for services.

The bright line between services which may be funded by special assessments and those which may not is the special benefit requirement articulated in City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992). Decades of Florida case law exists which critically examines special assessment programs and ensures that valid assessments meet two criteria: that the assessed properties receive a special benefit from the service provided and that the assessment is fairly and reasonably apportioned among the benefited properties. When special assessments meet these two criteria, whether the assessments fund services or improvements, the assessments may be constitutionally imposed.

To borrow the language of the circuit court, the "line in the sand" under the special benefit requirement is whether the service or improvement provides a general benefit to the entire community or a special benefit to the property assessed. If the benefit provided by a service or improvement is a general benefit to the entire community, the source of funding must be taxes, not special assessments. However, if the service or improvement provides a special benefit, then special assessments are available as a revenue source to the local government. The selection from available revenue sources to fund an essential service is solely a decision within the legislative discretion of the local government.

Whether a particular service provides the requisite special benefit is determined by analyzing the Florida case law defining

the special benefit concept as it has evolved over time. A large body of law exists that defines which local government services or improvements provide the requisite special benefit for a valid special assessment. Many assessed services and improvements have been upheld as providing the requisite special benefit. Among these are: garbage disposal, Charlotte County v. Fiske, 350 So.2d 578 (Fla. 2d DCA 1977); sewer improvements, City of Hallandale v. Meekins, 237 So.2d 318 (Fla. 4th DCA 1970) and Meyer v. City of Oakland Park, 219 So.2d 417 (Fla. 1969); fire protection, South Trail Fire Control Dist., Sarasota County v. State, 273 So.2d 380 (Fla. 1973) and Fire Dist. No. 1 of Polk County v. Jenkins, 221 So.2d 740 (Fla. 1969); street improvements, Atlantic Coast Line R. Co. v. City of Gainesville, 91 So. 118 (Fla. 1922) and Bodner v. City of Coral Gables, 245 So.2d 250 (Fla. 1971); parking facilities, City of Naples v. Moon, 269 So.2d 355 (Fla. 1972); and downtown redevelopment improvements, City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992).

Thus, as a product of past judicial labor, a wide range of local government services or improvements have been determined to provide the requisite special benefit to property. Beyond the outer limits of this range of services and improvements that provide the requisite special benefit, are those general governmental services or improvements which have no special or logical relationship to property in its actual or intended use. These general governmental programs may be essential and may provide a general benefit to all residences and property but not

possess a logical relationship to individual parcels of property within the special benefit requirement for a valid special assessment. Clear examples of generalized governmental improvements and services not possessing a logical relationship to the use and enjoyment of property are judicial complexes and indigent health care services. While judicial functions are essential and beneficial to the community in general, they are not of a nature that their service delivery encompasses a logical or special relationship to property. Likewise, indigent health care services are programs for the common good of a society, not services with a logical relationship to property. These general governmental programs are beyond the outer limits of Florida case law upholding valid special assessments--beyond the range of services that provide special benefit to property.

However, the presence of a service or improvement within the range of local government services which provide special benefit to property is just the first test for a valid special assessment. The costs to be assessed are further required to be fairly and reasonably apportioned among the property receiving the special benefit. The failure to meet the fair apportionment requirement of a valid special assessment renders the proposed assessment invalid, regardless of the degree of special benefit the service or improvement provides.

Special assessments in several cases have been invalidated because of the apportionment method used even though the service or improvement possessed the requisite special benefit to property.

Fisher v. Board of County Comm'rs of Dade County, 84 So.2d 572 (Fla. 1956) (roads and storm sewers); St. Lucie County-Fort Pierce Fire Prevention and Control Dist. v. Higgs, 141 So.2d 744 (Fla. 1962) (fire control services); and City of Fort Lauderdale v. Carter, 71 So.2d 260 (Fla. 1954) (solid waste disposal). In each of these cases, the apportionment method was based on the assessed value of the property. Such a method fails to constitute a fair and reasonable apportionment of the cost of the assessment program among property in a manner commensurate with the special benefit received. In each case no logical relationship existed between the value of the property and the service or improvement provided. The opinion of the Second District Court of Appeal never reached the method of apportionment and found the Sarasota County stormwater assessment invalid as a matter of law. This holding is fundamental error.

III. THE CIRCUIT COURT AND THE SECOND DISTRICT COURT OF APPEAL IN THIS CASE CONFUSED THE TWO REQUIREMENTS FOR A VALID SPECIAL ASSESSMENT.

No confusion exists within the State of Florida that special assessments must specially benefit the assessed properties and that the assessments must be fairly and reasonably apportioned among those benefited properties. City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992). However, much confusion exists as to the distinctions between the analysis for each prong. Quite often, attorneys and courts alike will cite a case for support of special benefit when careful examination of the case reveals that the case

really supports fair apportionment. Unfortunately, both the circuit court and the Second District Court of Appeal made this error as is illustrated by the circuit court's language in couching its "apportionment" discussion with "benefit" language.

The County's stormwater apportionment method focused solely on the projected stormwater discharge from improved parcels based upon the amount of "horizontal impervious area" (e.g., parking lots) assumed for each parcel. Unimproved property or property without any horizontal impervious area was not assessed and made no contributions to the funding of the stormwater program. The parcel apportionment was uniformly applied against all improved property to fund both improvements and services regardless of the property's location. The area assessed included the City of Sarasota and all of the unincorporated area of the County.

The specific amount of the assessment was calculated from a formula based on an equivalent residential unit ("ERU"), defined as:

> the statistical average horizontal impervious area of residential units. The horizontal impervious area includes, but is not limited to, all areas covered by structures, roof extensions, patios, porches, driveways, and sidewalks.

Ordinance No. 89-117, § 3. The assessment for developed nonresidential property was then calculated by multiplying one ERU by a ratio of the impervious area of the non-residential property and the impervious area of the ERU. Consequently, the formula for non-residential developed property like the Churches' property was the following:

$$\text{ERU rate} \times \frac{\text{parcel impervious area}}{\text{ERU impervious area}}$$

Ordinance No. 89-117, § 7(d).

At trial, counsel for the Churches argued that this methodology was not fair and reasonable. Throughout the circuit court proceedings, the judge appeared to find the County's apportionment methodology troublesome--not necessarily because the Churches were required to pay for stormwater services--but because the methodology was not fair and reasonable in relation to the benefit conferred by the stormwater management program. The Churches' closing statement and the court's interjections are illustrative:

> [MR. ELLIS:] They put the special assessment in, added the churches, added a lot more money, and now they have enough money to do planning and administration, not just capital improvements. And that's where the money is going, planning and administration, planning and administrative for the entire County or the entire district which is the entire County, unincorporated, and it is not appropriate for a special assessment.
>
> Is there a better way? Yes. I think we established on cross-examination that doing it by basin district might very well work because the basins have lives of their own, they have personalities of their own, they have particular problems, they may be similar problems, but you have the ad valorem tax for the planning and administration and then have a special assessment for the basins, the capital improvements that are necessary for the basins.
>
> THE COURT: Where churches would pay?
>
> * * *

> MR. ELLIS: Well, certainly, because I think you would be able to identify a particular improvement to a basin within which a church is located and within which you have received a particular benefit as a result of the capital improvement.
>
> THE COURT: And you . . . don't argue at the very least churches should pay for special assessments that improve their particular property from which they derive a benefit?
>
> MR. ELLIS: Yeah. . . . problem with that. [W]e don't have any
>
> * * *
>
> And I believe Mr. Marchand also testified on cross-examination that some parcels benefit more than others. There is no real correlation between the special assessment fee which is an exact figure and the benefit which is a generic benefit to the community as a whole.

Transcript, pp. 505-08.

The circuit court's concern for evidence of a fair and reasonable apportionment continued throughout the trial as the court exhibited its opinion that the stormwater ordinance's treatment of vacant property was not fair and reasonable. The following dialogue between the County's attorney and the court exemplifies the court's concern:

> THE COURT: Mr. Drews, do you see any problem in the stormwater ordinance where when it was a tax vacant land was taxed and churches were not, and when it became a special assessment churches were taxed and vacant land was not?

MR. DREWS: Your Honor, what I can say about that is, is that the present system provides a much more equitable and fair treatment of those issues, because, in fact, the churches, as the Court will hear testimony, the churches do receive benefits from the stormwater assessments, they should pay for those services[.]. . .

THE COURT: When this same revenue collection moved from the tax area to the special assessment area, churches now pay the special assessment that the didn't pay before, and vacant property owners pay nothing, when, in fact, they paid before.

MR. DREWS: Your Honor,--

THE COURT: Vacant property owners have been exempted now from stormwater special assessments.

MR. DREWS: They haven't been exempted, your Honor. What they have been is, to the extent, they are not given an assessment.

THE COURT: They don't pay anything.

MR. DREWS: They wouldn't pay an assessment based upon, again, the public hearings, the input, the recommendations of staff--

* * *

THE COURT: But they don't pay anything under these special assessments. If in one of these zones, one of these districts, there's a church here, and there's a vacant piece of property owned by Schlitz Malt Liquor next to it, okay, the special assessment for stormwater, the church under the existing scenario is going to pay; right?

* * *

MR. DREWS: That's correct. But please hear the testimony on why that distinction is made, because, again, that gets to the fairness, you know, issue, and all of which has been determined after public hearing--

> THE COURT: You see I'm waiting for a rational[e]. . . .

Transcript, pp. 173-76.

The court's ultimate conclusion was couched in "benefit" language but was clearly prefaced by "apportionment" concerns as the court stated:

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

Final Judgment, p. 4. Whether "vacant," undeveloped property should be subject to a stormwater special assessment is an apportionment question, not a benefit question. If, as under Ordinance No. 89-117, the special benefit is apportioned based on the amount of impervious area, the vacant, underdeveloped land will not be subject to the special assessment. However, one cannot thereby conclude that the vacant property is not specially benefited.

The Second District Court of Appeal's analysis is clouded by its focus on service assessments in its reach for a distinction between valid and invalid assessments. The court stated:

> Until the late 1960's special assessments seemed to exclusively encompass improvements as opposed to services. However, in the late 1960's and thereafter cases arose which, without altering the definition of a special assessment, and without further explanation, deemed certain services to be special assessments. This transition seemed to strain the definition and historical meaning of a special assessment.

Sarasota County v. Sarasota Church of Christ, 641 So.2d 900, 902 (Fla. 2d DCA 1994) (footnote omitted). As authority for the "historical meaning of a special assessment," the Second District Court of Appeal relied on St. Lucie County-Ft. Pierce Fire Prevention and Control District v. Higgs, 141 So.2d 744 (Fla. 1962). Specifically, the court[16] relied on the following for its holding that special assessments for services is improper:

> 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.

St. Lucie County-Ft. Pierce Fire Prevention, 141 So.2d at 746 (emphasis added).

Such reliance is misplaced. As discussed previously, the Court invalidated the special assessment in St. Lucie under the fair and reasonable apportionment requirement. No logical relationship existed between the value of property and the potential need for fire protection services. The mixing and

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[16] 641 So.2d at 902.

merging of the special benefit requirement and the fair and reasonable apportionment requirement drove the flawed reasoning of the Second District Court of Appeal.

IV. THE SELECTION OF A LEGALLY AVAILABLE FUNDING SOURCE FOR AN ESSENTIAL COUNTY SERVICE IS A LEGISLATIVE DETERMINATION ENTITLED TO JUDICIAL DEFERENCE.

This Court has many times confronted the proper role of the courts in reviewing the legislative determinations of local governments and has consistently concluded as follows:

> [Q]uestions of business policy and judgment incident to the issuance of revenue issues are beyond the scope of judicial interference and are the responsibility and prerogative of the governing body of the governmental unit in the absence of fraud or violation of legal duty.

Town of Medley v. State, 162 So.2d 257, 258-259 (Fla. 1964). See also Partridge v. St. Lucie County, 539 So.2d 472 (Fla. 1989); State v. Dade County, 142 So.2d 79 (Fla. 1962). In Town of Medley, the trial court denied validation of city bonds which were to be used for a variety of municipal services and improvements, including storm sewers on the basis that the court believed the proposed funding plan was unreasonable and that the plan would eventually deprive the town of "its traditional and necessary operating expenses." Id. at 258. The Supreme Court reversed, noting that these types of business judgment and policy issues "are beyond the scope of judicial interference and are the prerogative of the governing body of the governmental unit." Id. at 259. The Court further stated that a contrary holding would

> make an oligarchy of the courts giving them the power in matters such as this to determine what in their opinion was good or bad for a city and its inhabitants thereby depriving the inhabitants of the right to make such decisions for themselves as is intended under our system of government.

142 So.2d at 259.

In Partridge v. St. Lucie County, 539 So.2d 472 (Fla. 1989), appellant challenged the validation of special assessment bonds which were to finance street and drainage improvements. The appellant argued that the these improvements were unnecessary and unaffordable. The Court rejected this argument and concluded by saying, "The questions raised by appellants are essentially political questions which fall exclusively within the power of the Board of County Commissioners." Id. (emphasis added). See also DeSha v. City of Waldo, 444 So.2d 16, 19 (Fla. 1984) (where citizens who opposed funding arrangement for municipal services did so on policy grounds and were "merely seeking a second hearing in . . . Court of policy matters already decided, after proper public hearing and discussion.").

Furthermore, in City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992), the Supreme Court discussed the role of the court in analyzing the apportionment of a special assessment, and stated:

> At the outset, we note that the City made specific findings that the improvements would constitute a special benefit to the subject property, that the benefits would exceed the amount of the assessments and that the benefits would be in proportion to the assessments. The apportionment of benefits is a legislative function, and if reasonable persons may differ as to whether the land assessed was benefited by the local improvement, the findings of the city officials must be sustained. Rosche v. City of Hollywood, 55 So.2d 909 (Fla. 1952).

Id. at 30 (emphasis added).[17]

In the present case, the circuit court and the Second District Court of appeal clearly attempted to substitute their political and social judgment for that of the County. The 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.
>
> * * *

[17] Most recently, the Third District Court of Appeal in Key Colony No. 1 Condominium Assoc., Inc. v. Village of Key Biscayne, 20 Fla. L. Weekly D614 (Fla. 3d DCA, March 8, 1995), concluded that with a stormwater assessment, the plaintiffs need "to overcome a presumption of correctness of the [legislative] findings . . . and need[] to do so by strong, direct, clear and positive proof."

> 3. Stormwater management services [as planned and funded by Sarasota County Ordinance No. 89-117] . . . are not a valid special assessment and are, in fact, services whose revenues should be raised through the taxation method.

641 So.2d at 902-903.

The Second District Court of Appeal's implication that the County, because churches are exempt from ad valorem taxes but not special assessments, circumvented the Florida Constitution by imposing special assessments, is misplaced. Whether this Court, in its judgment, believes that a particular service should be funded in a particular manner is beyond its authority. The social, political, and financial decisions of the Board of County Commissioners in deciding to impose special assessments for stormwater management services is exclusively a legislative decision for the County. Once made, this Court's review is limited to whether such assessments are valid under the law of Florida and does not include an examination of the wisdom of the local government funding decision.

CONCLUSION

Amici Curiae request the Court to remand this case to the circuit court for a factual determination of whether the stormwater assessments funded and financed by Sarasota County Ordinance No. 89-117 were fairly and reasonably apportioned among benefited properties according to their relative contribution to the need for the stormwater improvements and services.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the parties on the attached Service List, this 11th day of April, 1995.

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