OA 6-5-95

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

SARASOTA COUNTY,

Petitioner,

vs. Case No. 84,414

SARASOTA CHURCH OF CHRIST, INC. et al.,

Respondents.

APPEAL FROM THE SECOND DISTRICT
COURT OF APPEAL

RESPONDENTS'/APPELLEES' BRIEF

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PREFACE

The Petitioner/Appellant is the Defendant, SARASOTA COUNTY, and will be referred to as the COUNTY.

The Respondent/Appellee is the Plaintiff, SARASOTA CHURCH OF CHRIST, INC., et al., and will be referred to as the CHURCHES.

The following symbols will be used:

R - Record

T - Transcript

STATEMENT OF THE CASE

As a supplement and correction to the COUNTY'S Statement of the Case, the CHURCHES would relate the following:

In the Final Judgment of the Circuit Court the Honorable James Whatley was much more thorough than the COUNTY'S suggestion that he simply asserted that funding for stormwater management should be raised through taxes and ordered a refund of the illegal special assessment (Petitioner's Brief, p 2).

The Trial Court's Final Judgment was, in fact, a thoroughly drafted opinion which not only traced the history and evolution of special assessments, but applied the law of special assessments to the facts of this case as found by the Trial Court (R 453 - 459, Petitioner's Appendix, Item #3). In so doing, the Court specifically found that stormwater services (as funded by the COUNTY'S special assessment)

> 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 an 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.

(R 456-457, Petitioner's Appendix, Item #3).

The Trial Court also expressed in its opinion the legitimate public policy concern that should such services as stormwater management be routinely allowed to be funded by special assessments, the exemption which CHURCHES are afforded from ad valorem taxation would become "largely illusory" (R 457,

Petitioner's Appendix, Item #3).

The Second District Court of Appeal, in adopting as well as affirming the Trial Court's opinion, observed the clear presentation and articulation of the issues by the Trial Court. The sole modification made by the District Court was to limit the breadth of the opinion by inserting the bracketed words "as planned and funded pursuant to Sarasota County Ordinance No. 89-117" after references to the subject "stormwater management services" (Petitioner's Appendix, Item #2).

The COUNTY further mis-states the reliance by the Second District Court of Appeal on a circuit opinion from Madison County, Foxx v. Madison County, case #90-161-CA (Petitioner's Appendix Item #5), by adopting Judge Whatley's Final Judgment. The COUNTY'S statement that the part relied upon was reversed in Madison Co. v. Foxx, 636 So.2d 39 (Fla. 1st DCA 1994), is misleading. The First District court of Appeal in Madison County v. Foxx, 636 So.2d 39 (Fla. 2DCA 1994), did not reverse that portion of Judge Peach's decision upon which the lower courts in the case at bar relied. More correctly, the First District held that Judge Peach's "line in the sand" was premature, since the issue of benefits was in part factual, and thus not appropriate for summary judgment. Judge Whatley's "line in the sand" in the case at bar was drawn after a full and fair trial. (R 457-458, Petitioner's Appendix Item #2).

Finally, contrary to the COUNTY'S statement, there was no testimony or evidence in the record of the COUNTY'S reliance

upon Sections 403.0893 and 403.031(17), Florida Statutes, in determining its funding method. Further, the COUNTY'S expert cited only three other local governments using non-ad valorem assessments; the COUNTY'S reference to numerous other local governments is not only misleading, but has no probative value toward any issue in this case. (T 241-242).

STATEMENT OF THE FACTS

The COUNTY relies heavily in its Statement of Facts upon the declarations of Chapter 403, Florida Statutes, and Ordinance No. 89-117 regarding the benefits of stormwater management utilities. As apparent from the lack of citations to the transcript of the trial, however, it is clear that such legislative declarations were not paramount or on the tongues of the COUNTY'S witnesses at trial.

On the other hand, the CHURCHES presented substantial evidence of the non-existence of any special benefit resulting from the stormwater management utility. The CHURCHES established their position by first producing representatives of the Plaintiff CHURCH property owners, each of whom testified as follows:

1. That from 1990 to date, their CHURCHES had not received any benefit with respect to their payment of the stormwater district assessments (T 36,66,193).

2. That the CHURCHES received no direct benefit from their payment of the stormwater district assessments (T 36, 65,193).

3. That the CHURCHES received no special benefit from their payment of the stormwater district assessments (T 37, 65, 193).

4. There was no corresponding increase in the value of their CHURCH property as a result of their payment of the

stormwater district assessments (T 37, 65-66, 193).

5. There was no pro rata or proportional benefit to their CHURCH property as the result of their payment of the stormwater district assessments (T 37, 66, 193-194).

6. There has not been any flooding on their CHURCH property (T 45, 65).

7. That the CHURCH properties in issue were being used exclusively for religious purposes (T 39, 55-56).

In lieu of several other CHURCH representative witnesses, the Court accepted a stipulation between the COUNTY and the CHURCHES that such further testimony would also establish that (1) The CHURCHES were assessed; (2) they have paid the assessment under protest; (3) there was no direct benefit to their property; (4) there was no special benefit to their property; (5) there was no increase in the value of their property; and (6) there was no proportionate benefit relative to the amounts they paid for the assessments (T 77, 86, 88).

In furtherance of carrying their burden of proof the CHURCHES presented Richard William Bass as an expert witness. Mr. Bass is President of Bass Associates, Inc., a professional organization of land planners, economists, and real estate appraisers (T 98). He has a Bachelor of Science degree in Urban Planning and Environmental Management with additional relevant education at the Georgia Institute of Technology, the Appraisal Institute, the Society of Real Estate Appraisers, and the National Society of Environmental Consultants (T 98).

He is active in numerous professional planning, economic, environmental consulting and real estate appraisal organizations including the American Planning Association, American Marketing Association, American Economics Association, National Association of Business Economists, National Society of Environmental Consultants, and National Institute of Real Estate Appraisers (T 99).

He holds professional designations as an Environmental Assessment Consultant, a Certified Review Appraiser, and further designations from the American Institute of Certified Planners (T 100). He is licensed by the State of Florida as a Florida Real Estate Broker and State Certified General Real Estate Appraiser and is a State accredited affiliate of the Appraisal Institute (T 101). He has previously been qualified and testified as an expert witness by State Circuit Courts and Federal Courts in the areas of planning, economics, and appraising (T 101). He has professional experience as a preparer of comprehensive plans and zoning codes for several Florida communities, regularly serves as a consultant to local governments, and regularly performs economic analyses, market analyses, feasibility studies, and a wide range of real estate appraisals (T 101-103). Communities which have employed Mr. Bass for his expertise include Charlotte County, Collier County, DeSoto County, and the cities of Sarasota, Longboat Key, Palm Beach, Punta Gorda, and Palatka (T 101-102).

Mr. Bass was offered and accepted by the Trial Judge as a

qualified expert in the fields of real estate appraising, real estate economics, fiscal analysis, fiscal regulatory planning, land planning, and land development regulations (T-103).

No COUNTY witness was thus thoroughly qualified, proffered by the COUNTY, or accepted by the Trial Judge.

Mr. Bass testified regarding his investigation and analysis of the stormwater special assessment and its potential benefit to the CHURCH properties (T 104 et. seq.). In doing so, he not only reviewed paired sales analyses (T 148), sales taking place between 1985 through 1992 (T 148), but he also conducted a blind survey of seven other appraisal firms in Sarasota County (T 141-142) which confirmed his opinions given in this cause that the stormwater assessment resulted in no measurable increase in property value or otherwise relating to property in Sarasota County (T 147). His specific analysis focused not only on the concept of market value, but evaluation (T 145) and the larger concept of value (T 113, 117), defining value as relating to present and future benefits of ownership of property (T 113-117).

Mr. Bass concluded that there was no relation whatsoever between the stormwater assessments made to the CHURCH properties and any benefit or value those properties might receive (T 128, 130). Further, Mr. Bass concluded that as a result of paying the stormwater special assessment the CHURCH properties received no direct benefit, no special benefit, no corresponding increase in value, no pro rata benefit, and no proportional benefit in

relation to the amount of the stormwater assessment during the years in issue (T 151-152).

In light of the COUNTY'S allegation that a reduction in flood insurance rates constitutes a special benefit, it should be noted that there exists no evidence in the record that any of the CHURCHES bought or owned flood insurance.

The evidence further established that stormwater services in Sarasota County were paid for through ad valorem taxes prior to the 1989 stormwater utility ordinance (T 110, 120). Services that benefit the community as a whole historically are funded by ad valorem taxes (T 149). On the other hand, the nature of a special assessment is such that individual properties particularly benefitted are specifically assessed so that the community as a whole, that does not benefit, does not share in that expense (T 149). A special assessment is typically an assessment for a special purpose to benefit a specific area (T 138). In order for a benefit to be sufficient to justify the levying of a special assessment, that benefit must be unique to a property or properties within the defined area of the assessment (T 178).

While the COUNTY alleged in its Statement of Facts that the evidence showed that the method of collecting the special assessments was fair and equitable, such conclusion was only the opinion of Mr. Marchand and his employees at the Stormwater Management Utility, as paraphrased by the Court at page 281 of the transcript. However, a number of factors particularly point

out the clear unfairness (T 122) of the assessment method, for example:

1. The fact that vacant land owners are not assessed notwithstanding their actual contribution of stormwater runoff (including pesticides and pollutants), the drainage benefits received by such vacant property, the fact that such vacant land is receiving essentially the same or greater benefits than they received when they paid for stormwater management via ad valorem taxes prior to the subject ordinance, and that specific examples of stormwater run-off from vacant property causing environmental problems were cited by COUNTY witnesses (T 120, 306, 307, 346).

2. The fact that residential assessments are uniform, notwithstanding the wide variation in impervious square footage of such residential units, which variations are considered in assessing commercial property (T 122).

3. The fact that newer developments are fully assessed, even though they are required by separate regulations to provide retention areas sufficient to prevent any greater stormwater run-off than pre-development status (T 125, 127).

4. The fact that certain CHURCH parcels would, because of their location, never directly benefit from the Stormwater Services (T 151).

Thus, while the COUNTY states that the Trial Judge made no adverse finding or declaration as to the apportionment issue, the above sample of evidence clearly shows questionable apportionment. Apportionment would be especially difficult when

a special benefit is non-existent. More importantly, once the Court has found no special benefit as its primary ruling, determinations on the issue of apportionment are superfluous.

The witnesses upon which the COUNTY relies reflect significant bias. Mr. Marchand is an employee of Sarasota County and is Manager of the very Stormwater Management Utility his testimony is intended to justify, and his salary is paid by the very special assessment ordinance he was asked to create and which is under attack by the CHURCHES (T 214, 221, 298). Mr. Priede conducted the study which resulted in the Stormwater Management System and the special assessments to fund same (T 331), and is under retainer with the COUNTY not only to provide such studies but to provide testimony to support same (T 331, 348, 349). Both are civil engineers only, with no further qualifications in areas of real property valuations, analysis, or fiscal analysis (T 213, 327).

Mr. Marchand testified to the importance of understanding the concept of major drainage basins (T 216), that such basins operate as "systems" within themselves (T 217), and that Stormwater Management is directed by federal requirements, Chapter 403, Florida Statutes, and good engineering practice to look at drainage on a drainage basin area type approach (T 217-218). Each basin is distinct and must be viewed individually (T 301, 302); each basin encompasses a defined area of real property and can be identified by drawing lines (T 303); if stormwater management services were stopped each basin would

have its own individual problems (T 315); and improvements in one sector do not necessarily benefit residents in another sector (T 318). Even though there are over twenty distinct, individual basins in Sarasota County, and it is possible to have a special assessment district identified with particular basins, the Stormwater Management District in question covers the entire unincorporated area of Sarasota County (T 260, 267, 301, 303). Mr. Priede also testified to the better management aspects of a basin plan (T 334).

Mr. Marchand clarified the usage of the special assessment funds, testifying that such funds were being used for maintenance, regulatory functions, planning, and addressing federal regulations as well as capital improvement programs (T 222, 223). However, very little of the special assessment funds go toward capital improvements (T 292). In fiscal year 1991, only $12,000.00 of a 5.5 million dollar budget went toward actual capital improvements (T 294). In 1992 only $204,000.00 of a 4.8 million dollar budget (plus surplusage of 2 million dollars unused from the 1991 budget) went toward actual capital improvements (T 237, 297). Again, such capital improvements in one sector do not necessarily benefit residents in another sector (T 318). Further, the capital improvements which are performed are not related in any way to the source of funding, but rather are determined based solely on 1) the priorities of the Stormwater Management Utility, establishing that there is no direct relation between any benefit and the source of funds,

2) the Utility's determination of where such improvements are needed, establishing that there are identifiable needs (T 314). Finally, the ditch maintenance paid for by the special assessment only applies to major COUNTY systems, and not the local roadside swales or roadside gutters adjacent to residences and businesses which feed into them (T 299).

There is no plan or schedule for the stormwater management special assessment to ever terminate or for the Utility to ever go out of existence (T 318). The Stormwater Management Utility could function in exactly the same fashion as it does now even though revenues were collected through ad valorem taxes (T 226). The record is devoid of reference to a specific or direct benefit or value which in any way corresponds or relates to the impact of the assessment. Further, no evidence was adduced to show any benefit other than benefits generic to the community as a whole.

SUMMARY OF ARGUMENT

The presumptions in favor of legislative declarations, as asserted by the COUNTY, have been applied only in cases regarding apportionment methodology. The case at bar is clearly a special benefits case, not an apportionment case. Presumptions in favor of legislative declarations as to the existence or non-existence of special benefits appear only to apply to capital improvements and improvements abutting property assessed. Such presumptions vanish when property other than that abutting an improvement is assessed, and any such assessment can only be upheld by a showing of actual benefits. In the case at bar, there exist few capital improvements, none abutting CHURCH property, and the lower courts found no special benefits sufficient to validate the special assessment.

Even if this Court rules that a presumption exists, the CHURCHES have successfully rebutted the presumption by substantial evidence at the trial level. Further, once no special benefit has been found to exist, this Court has not in the past required an additional judicial finding of arbitrary action or plain abuse by the assessing authority.

To the extent the COUNTY relies upon Chapter 403, Florida Statutes, if at all, it has failed to draft, plan and fund its ordinance consistent with the clear mandates of Chapter 403. To find the COUNTY'S ordinance valid under Chapter 403 would require an interpretation of Chapter 403 which is unconstitutionally over broad.

Further, evidence at the trial in this cause conclusively established the insufficiency of the ordinance to satisfy the special benefits test as traditionally evolved and recently interpreted by this Court. To the extent the lower court rulings, and findings of fact in support thereof, are presumptively correct, there has been no adequate showing of an abuse of the lower courts' discretion.

The COUNTY, under the reality of revenue pressures, has creatively labeled that which is a tax, a special assessment, in violation of established constitutional limitations and case law precedent.

To deny a refund to the CHURCHES in this cause would violate existing case law and public policy, would be in contravention to the evidence presented, and would prevent the only remedy available to the CHURCHES consistent with constitutional due process requirements.

RESPONDENTS' ARGUMENT

I. THE LOWER COURTS GAVE DUE REGARD TO THE LEGISLATIVE DETERMINATIONS OF BENEFITS, FOUND SUCH DETERMINATIONS UNSUPPORTED BY COMPETENT EVIDENCE AND CONTRADICTED BY SUBSTANTIAL EVIDENCE, AND PROPERLY INVALIDATED THE SPECIAL ASSESSMENT FOR STORMWATER MANAGEMENT.

A. INTRODUCTION

The predominant issue in this case at trial and on appeal is whether the CHURCHES, as contestants to the COUNTY ordinance, should be required to pay the COUNTY'S special assessment for stormwater management. Subsumed within this inquiry is whether the COUNTY ordinance funding stormwater management (Ordinance No. 89-117) was an appropriate assessment under Florida law. Since the CHURCHES are exempt from ad valorem taxation[1], which method was heretofore used in funding stormwater management (T 221), the CHURCHES would be exempt from the ordinance if it were found to be a tax as opposed to a valid special assessment.

B. PRESUMPTIONS IN FAVOR OF GOVERNMENTAL DECLARATIONS ARE NOT APPLICABLE TO SPECIAL BENEFIT CASES WHICH DO NOT INVOLVE CAPITAL OR ABUTTING IMPROVEMENTS, OR APPORTIONMENT ISSUES.

The COUNTY brief suggests the existence of strong

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[1]The CHURCHES, as parties in this cause, use their real property exclusively for religious purposes (T 39,55-56). Article VII, Section 3(a) of the Florida Constitution provides in part: "Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes are exempted by general law from taxation". Chapter 196.192, Florida Statutes, provides that "All property owned by an exempt entity and used exclusively for exempt purposes shall be totally exempt from ad valorem taxes". Chapter 196.012(1), Florida Statutes, defines exempt use of property as predominant or exclusive use of property by an exempt entity for religious purposes. Therefore, the CHURCHES in this cause are exempt from ad valorem taxation.

presumptions in favor of the governmental declarations of benefits in support of its special assessment (Petitioner's Brief p 12-14). However, a close look at the cases cited indicates such presumptions do not apply in the case at bar.

Initially, it is well recognized that in order for a special assessment to be valid, there must be both a special benefit derived by the property assessed, and the assessment must be fairly and reasonably apportioned. City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992). Not all cases deal with both issues, and more often than not a case will turn on only one of these two issues.

South Trail Fire Control District v. State, 273 So.2d 380 (Fla. 1973), for example, is clearly an apportionment case, with this Court responding to the contestant's primary claim,

> Whether a determination of benefits accruing to business and commercial property by the Legislature is constitutional when the property is assessed on an area basis and all other property in the tax district is assessed at a flat rate basis and the evidence shows that the special assessments paid by business and commercial property as a result are discriminatory when compared to other property.

South Trail Fire Control District v. State, 273 So.2d at 382.

The existence of an underlying benefit was not an issue in the South Trail case. It is with respect to the issue of discriminatory apportionment in South Trail that our COUNTY quotes this Court's language of conclusiveness of presumptions (Petitioner's Brief, p 13). This Court follows that quote selected by the COUNTY with the following language:

But the power of the Legislature in these matters is

> not unlimited. There is a point beyond which it cannot go, even when it is exerting the power of taxation. It cannot by its fiat make a local improvement of that which in its essence is not such an improvement, and it cannot by its fiat make a special benefit to sustain a special assessment where there is no special benefit.

South Trail Fire Control District v. State, 273 So.2d at 383.

This Court in South Trail recognized that the issue of apportionment of the assessment is one where a great deal of controversy and disputed evidence may occur, and governmental determinations should be given some preference. South Trail Fire Control District v. State, 273 So.2d at 383. The same issue regarding apportionment was confronted by this Court in Meyer v. City of Oakland Park, 219 So.2d 417 (Fla. 1969), which supports the presumption in favor of governmental apportionment methodology, and which this Court cited heavily in its South Trail decision, but which case the COUNTY chose not to cite in its brief.

The case at bar is clearly not an apportionment case, as the lower courts never reached the issue of apportionment in their decisions. The lower courts decided determinitively that there was no special benefit to properties assessed by the stormwater special assessment (R 453-459, Petitioner's Appendix, Items #2 and #3). Thus, there was no need for the lower courts to address the issue of apportionment.

The COUNTY also relies upon the case of Martin v. Dade Muck Land Co., 116 So. 449 (Fla. 1928), which is also predominantly an apportionment case, in asserting its presumption theory.

Furthermore, the language in Dade Muck quoted by the COUNTY in its brief on page 13, was specific with regard to its reference to the benefit of "public improvements contemplated, and the method of special assessments and anticipated benefits" (emphasis added). Following that quote, this Court went on to say:

> Administrative determinations under Legislative authority as to improvements to be made and as to the method, rate, or amount of special assessments to be imposed, or as to contemplated benefits to and the apportionment of burdens on, the property so specially assessed, are not conclusive.

Martin v. Dade Muck Land Co., 116 So. at 464.

A more clear delineation between improvements which may enjoy some presumption of validity and those which clearly do not is articulated in the third and final apportionment case relied upon by the COUNTY, Atlantic Coast Line R.R. v. City of Gainesville, 91 So. 118 (Fla. 1922). In the Atlantic case, this Court invalidated an assessment against Atlantic Coast Line Railroad Company because the Court found no benefit proportionate to the amount assessed. Atlantic Coast Line R.R. v. City of Gainesville, 91 So. at 123.

In so finding, this Court said:

> . . .if property other than that actually abutting the improved street is assessed for such improvements, the presumption of benefit from the improvements which attaches to land abutting on the street, vanishes as such an assessment could only be upheld by showing that the property derived actual benefit from the improvements. (Emphasis added)

Atlantic Coast Line R.R. v. City of Gainesville, 91 So. at 121.

Thus, the presumption of validity upon which the COUNTY

relies arises only when the governmental determination concerns apportionment of a special benefit (as in South Trail and Meyer), upon capital improvements (which, in Martin v. Dade Muck Land Co., made "lands all over the district more useful for high development" 116 So. at 467), and upon improvements which actually abut the assessed property (as in Atlantic Coast Line R.R. Co. v. City of Gainesville, supra).

On the other hand, in several cases in which this Court has invalidated special assessments for simple lack of existence of a special benefit, there have been no references to such presumptions of validity of governmental declaration. Fisher v. Board of County Commissioners of Dade County, 84 So.2d 572 (Fla. 1956); Whisnant v. Stringfellow, 50 So.2d 885 (Fla. 1951); State ex rel. Clark v. Henderson, 188 So.351 (Fla. 1939); St. Lucie County-Fort Pierce Fire Prevention and Control District v. Higgs, 141 So.2d 744 (Fla. 1962); Crowder v. Phillips, 1 So.2d 629 (Fla. 1941); City of Fort Lauderdale v. Carter, 71 So.2d 260 (Fla. 1954).

At best, this Court has merely recognized that such governmental determinations of the special benefits of a program which does not involve abutting property or capital improvements should be given due weight and consideration by the courts, but are by no means conclusive. Fire District No. 1 of Polk County v. Jenkins, 221 So.2d 740 at 742 (Fla. 1969); Martin v. Dade Muck Land Co., 116 S. 449 at 464 (Fla. 1928).

C. ANY PRESUMPTION IN FAVOR OF LEGISLATIVE DETERMINATIONS ARE NOT CONCLUSIVE AND HAVE BEEN OVERCOME BY SUBSTANTIAL EVIDENCE.

The COUNTY brief before this Court relies heavily on the declarations and determinations of benefits made by the Florida Legislature in Chapter 403, Florida Statutes, and by the COUNTY in its Ordinance No. 89-117 (Petitioner's Brief p 12-17). Significant concerns exist as to whether these legislatively declared benefits are sufficient special benefits to particular property (as opposed to generic benefits to the community as a whole) to support a special assessment, and if so, whether the declared benefits actually exist in fact. The lower courts herein made a factual finding that such benefits were generic, and did not exist as special benefits (R 453-459, Petitioner's Appendix, Items #2 and #3).

The COUNTY fails to recognize, however, that should this Court rule such a presumption exists, there is a well accepted process for judicially testing the integrity of such rebuttable, inconclusive declarations, and the CHURCHES have complied with this process. Atlantic Coast Line R.R. v. City of Gainesville, 91 So. 118 (Fla. 1922); South Trail Fire Control District v. State, 273 So.2d (Fla. 1973) at 383; Fisher v. Board of County Commissioners of Dade County, 84 So.2d 572 (Fla. 1956); Fire District No. 1 of Polk County v. Jenkins, 221 So.2d 740 (Fla. 1969); Martin v. Dade Muck Land Co., 116 S. 449 (Fla. 1928).

In Atlantic Coast Line R.R. v. City of Gainesville, 91 So. 118 (Fla. 1922), this Court recognized the limits on Legislative

declarations:

> While the statements found in many of the cases would seem to imply that the Legislature has sole and exclusive discretion in the determination of this question, it is nevertheless clear that there are some limits to this discretion. If no such limits exist, the power of local assessment would be but another name for arbitrary exaction and confiscation . . . the Courts will interfere only when it is shown conclusively that the Legislature is wrong in making the determination which it has made . . . the question of benefit to the property owner is not a judicial question unless the Court can see that no benefit can exist and this absence of benefit is so clear as to admit of no dispute or controversy by evidence. (Emphasis added)

Atlantic Coast Line R.R. v. City of Gainesville, 91 So. 118 at 121-122 (quoting Page & Jones on Taxation by Assessment).

The result envisioned by the above quote is exactly that which was found by the Trial Court and the District Court of Appeal in the case at bar when they both ruled that stormwater services as planned and funded by Ordinance No. 89-17 provided no benefits to church property sufficient to meet the definition of a special assessment (Petitioner's Appendix, Items #2 and #3).

In Fisher v. Board of County Commissioners of Dade County, 84 So.2d 572 (Fla. 1956) this Court revisited the presumption in favor of Legislative declarations and stated:

> A "special benefit assessment" must be levied according to the particular benefits received by the real property in question and in order to sustain the assessment, there must be some proof of the benefits other than the dictum of the government agency.

Fisher v. Board of County Commissioners of Dade County, 84 So.2d 572 at 576 (Fla. 1956)

The Trial Court and District Court in the case at bar specifically found "no evidence was presented of any direct or special benefit to any of the church properties involved in this lawsuit" (Petitioner's Appendix, Items #2 and #3).

This Court further stated in Fisher that:

> The question of whether property abutting upon a street is in fact specially benefitted by the paving of the street does not rest exclusively in the judgment or upon the 'ipse dixit' of the municipal officer or officers, if there are more than one, who asserts authority over municipal affairs, but it is a question of fact to be ascertained and established as any other fact.

Fisher v. Board of County Commissioners of Dade County, 84 So.2d 572 at 576 (Fla. 1956), citing Atlantic Coast Line R.R. v. City of Lakeland, 115 So. 669 (Fla. 1922)

In the case at bar, the Trial Court found as a matter of fact, and the District Court of Appeal affirmed, that such benefits as were governmentally declared did not exist (R 456, Petitioner's Appendix, Items #2 and #3).

D. TESTING THE INTEGRITY OF GOVERNMENTAL DECLARATIONS.

The COUNTY further suggests that this Court has declared a litmus test for the integrity of any Legislative declaration of benefits, by suggesting that a Court should not substitute its own opinion and judgment for that of the Legislature in the absence of a clear and full showing of arbitrary action or a plain abuse. (Petitioner's Brief p 12-15) The COUNTY relies heavily on language cited in South Trail and Dade Muck, and suggests that since the Trial Court and District Court herein

did not specifically rule that there existed "arbitrary action" or "plain abuse", then ruling that the special assessment was invalid was an improper substitution of judgement (Petitioner's Brief, p 12-15).

Yet, in the case at bar, one must ask how could the Legislative declarations of the COUNTY be otherwise described when both Trial and Appellate Courts find the existence of no special benefit.

The COUNTY employs the use of legal and common dictionaries to define these commonly understood words (Petitioner's Brief, p 14). Borrowing these definitions, and considering the lower courts have found, by virtue of the evidence, no special benefit, the CHURCHES' position could be stated as follows: The declarations of benefits by the government constituted conduct ("action") evidently and clearly ("plain") not founded in the nature of things, or without adequate determining principal ("arbitrary") and an improper use ("abuse") of its authority (See Petitioner's Brief p 14). An easier way to say this is: Despite the Legislative declarations, this Court finds no special benefit. The lower courts could not have been any clearer in making such a statement in their respective opinions (R 453-459, Petitioner's Appendix, Items #2 and #3).

Is it necessary for the Court to write the words "arbitrary action" or "plain abuse" when such findings are so inherent in the greater finding of no special benefit? This Court did not deem such words necessary in Fisher v. Board of County

Commissioners of Dade County, 84 So.2d 572 (Fla. 1956); Whisnant v. Stringfellow, 50 So.2d 885 (Fla. 1951); State ex rel. Clark v. Henderson, 188 So.351 (Fla. 1939); St. Lucie County-Fort Pierce Fire Prevention and Control District v. Higgs, 141 So.2d 744 (Fla. 1962); Crowder v. Phillips, 1 So.2d 629 (Fla. 1941); City of Fort Lauderdale v. Carter, 71 So.2d 260 (Fla. 1954).

E. THE COUNTY ORDINANCE FAILS TO COMPLY WITH THE BASIC TENETS OF CHAPTER 403, FLORIDA STATUTES.

The COUNTY attempts to further support its position establishing a special benefit by reliance upon the Legislative declarations of the benefits of stormwater services included in Chapter 403, Florida Statutes (Petitioner's Brief, p 16). Yet, their reliance thereon belies the clear language and intent of Chapter 403, and exposes the inconsistencies between Chapter 403 and the planning and funding of Ordinance No. 89-117.

From the definition of "stormwater system" at §403.031(16) through the stormwater funding references in §403.0893, the "systems" are defined as systems "designed and constructed" and funded to "plan, construct, operate and maintain" stormwater systems.

This emphasis on construction should not be ignored, as it has been in the COUNTY'S stormwater ordinance. For example, in fiscal year 1991 only $12,000.00 (constituting one stormwater project) of a 5.5 million dollar budget went toward construction of capital improvements (T 294, 296). In 1992 only $204,000.00 (constituting two stormwater projects, of over 4.8 million

dollars budgeted (plus surplusage of 2 million dollars unused from the 1991 budget) went toward actual capital improvements (T 237, 295, 297).

In each year that the stormwater management special assessment has been levied by the COUNTY, the majority of funds have been expended for maintenance of an existing system of major ditches, ponds and lakes (T 292). Of the 1992 budget, another million dollars was budgeted toward "master planning" and half a million was budgeted toward "administration" (T 293, 294). It is difficult to imagine that this is an example of what the Florida Legislature intended when it imposed upon the Department of Environmental Regulation, the Water Management Districts, and local governments "the responsibility for the development of mutually compatible stormwater management programs" (§403.0891, Florida Statutes).

More importantly, in order to understand what was contemplated by the Florida Legislature in drafting the provisions of Chapter 403, Florida Statutes, one must look to the concept of a stormwater system.

The Sarasota County Stormwater Management District, as established by Ordinance No. 89-117, may be a district in the general sense of a geopolitical area, but it hardly constitutes a stormwater system. COUNTY Engineer, J. P. Marchand, testified as to the importance of understanding stormwater systems on a drainage basin basis (T 216, et seq.). A "system" is synonymous with a major water basin, flood basin or drainage basin. There

exist over twenty distinct, identifiable, and individual drainage basins in Sarasota County, however the stormwater district provided by the COUNTY ordinance includes the entire geopolitical area of Sarasota County without regard to basin areas (T 301-303). Since each basin is distinct and must be viewed individually (T 301-302), and each basin has its own individual problems (T 315), independent of other basins (T 318), a basin is naturally designed as a system within itself. It can be defined geographically (T 303) and is therefore much more appropriate for a special assessment district than the drawing of a line around an entire county. The COUNTY'S consulting engineer, Mr. Priede, also commented on the better management aspects of a basin plan in his testimony (T 334).

Reviewing Chapter 403, Florida Statutes, after acknowledging the natural role of basins in stormwater management, one finds innumerable references to the concept of more than one system within a county. Section 403.0893(1) references that a county may "create one or more stormwater utilities . . . and maintain stormwater systems". Each further subsection of §403.0891 references plurality when discussing stormwater management systems or benefit areas.

Section 403.0891(3), Florida Statutes, in fact, speaks of assessing property owners within "benefit areas" (on a per acreage fee, notably unlike the assessment at issue), and continues:

> Any benefit area containing different land uses which receives substantially different levels of stormwater

> benefits shall include stormwater management system benefit sub-areas which shall be assessed different per acreage fees from sub-area to sub-area based upon a reasonable relationship to benefits received.

This subsection clearly contemplates the designation of areas and sub-areas which benefit differentially, and provides for an assessment to such areas and sub-areas commensurate with the benefits received therein.

Nothing in Ordinance No. 89-117, or in its planning or operation, reflects the sensitivity to the identification of specially benefitted areas necessary to validate its assessment as appropriate under the law.

Chapter 403, Florida Statutes, contemplates the very same requirements of special benefits and reasonable apportionment as do the history of Florida cases concerning the validity of special assessments being:

> imposed upon the theory that the portion of the community which is required to bear it receive some special or peculiar benefit in the enhancement of value of the property against which it is imposed as a result of the improvement made with the proceeds of the special assessment.

State ex rel. Clark v. Henderson, 188 So. 351 (Fla. 1939); Whisnant v. Stringfellow, 50 So.2d 885 (Fla. 1951); City of Fort Lauderdale v.Carter, 71 So.2d 260 (Fla. 1954); Fisher v. Board of Commissioners of Dade County, 80 So.2d 572 (Fla. 1956); City of Boca Raton v. State, 595 So.2d 25 (Fla 1992).

The COUNTY has attempted to impose a stormwater special assessment under the guise of Chapter 403, Florida Statutes, and now attempts to justify a special benefit by borrowing

declarations from Chapter 403. Yet the COUNTY fails to minimally comply with that which Chapter 403 envisions when it suggests the possible use of a special assessment for stormwater management. To argue that Chapter 403 is broad enough to authorize the kind of special assessment set forth in Ordinance No. 89-117, is to allow an unconstitutionally over broad interpretation of that statute.

F. THE TRIAL AND DISTRICT COURT RULINGS WERE APPROPRIATE SUBSTITUTIONS OF GOVERNMENTAL JUDGMENT AFTER FULL AND FAIR TRIAL.

The Trial Court and District Court of Appeal properly found that the COUNTY'S stormwater management system, as planned and funded by Ordinance N. 89-117, factually failed to suffice as a basis for special assessments (R 453-459, Petitioner's Appendix, Items #2 and #3).

In doing so the Court did not improperly substitute its judgment for that of the government, rather, it considered the declarations of the ordinance and found no evidence to support the declared benefits as anything but generic to the community as a whole. It considered the declarations of Chapter 403, Florida Statutes, and found not only a lack of evidence to support same, but an inconsistency between the tenets of Chapter 403 and the planning and funding of Ordinance No. 89-117. Finally, it considered the testimony of the COUNTY'S witnesses, and found that such evidence merely supported the finding that the services provided benefits to the community as a whole, with

no direct or special benefit to any of the CHURCH properties[2] (R 456-457, Petitioner's Appendix, Items #2 and #3).

G. THE COUNTY LABELS AS A SPECIAL ASSESSMENT THAT WHICH IS CLEARLY A TAX.

By continuing to assert and rely upon its governmental declarations as a basis for establishing a special benefit, with no more evidence than was presented to and found lacking by the lower courts, the COUNTY magnifies the labeling aspects of its declarations.

This Court, in State v. City of Port Orange, 19 Fla.L.Weekly S563 (Fla. 1994), held that "the power of a municipality to tax should not be broadened by semantics which would be the effect of labeling what the city here is collecting a fee rather than a tax". State v. City of Port Orange, 19 Fla.L.Weekly at S563.

The COUNTY in the instant case has done the same as did the city of Port Orange by labeling a tax as a special assessment and attempting thereby to broaden its taxing authority. City of Port Orange, supra. This Court has held that "doubt as to the powers sought to be exercised must be resolved against the municipality and in favor of the general public". State v. City of Port Orange, 19 Fla.L. Weekly at S563, quoting City of Tampa v. Birdsong Motors, Inc., 261.So.2d 1 (Fla. 1972). Such doubt, in addition to the presumption of correctness of the findings

[2] The COUNTY'S reliance upon a reduction in flood insurance (Petitioner's Brief, p 16) is immaterial to this cause, as there was no evidence that any of the plaintiff churches purchased or were insured under any such flood insurance policies.

of the lower courts (see this Brief, pages 31-32, should result in an affirmation of the lower courts' rulings.

II. THE SARASOTA STORMWATER ORDINANCE NO. 89-117 PROVIDES NO SPECIAL BENEFIT TO PROPERTY SUFFICIENT TO JUSTIFY A SPECIAL ASSESSMENT.

A. THE JUDGMENT AND FINDINGS OF FACT OF THE LOWER COURTS ARE CLOTHED IN A PRESUMPTION OF CORRECTNESS.

To the extent the questions presented in this appeal constitute issues of fact, this Court must apply its well settled rule that a judgment of the Lower Court, as well as the findings of fact in support thereof, are clothed with a presumption of correctness. Florida Power & Light v. Ahearn, 118 So.2d (Fla. 1960); Chase v. Cowart, 102 So.2d 147 (Fla. 1958); Herzog v. Herzog, 346 So.2d 56 (Fla. 1977).

The assertions of the COUNTY in their brief consistently call on this Court to review findings of fact. Even the "legislative fact" of the governmental declarations of benefit in this cause comes to this Court having been found wanting by the Trial Court. For the COUNTY to suggest that their special assessment supports such governmental declaration, or more importantly, meets the special benefit test of the long tradition of Florida special assessments, consequently calls into question the Trial Court's discretion and findings in these matters.

Not only is the Trial Court's ruling, and findings of fact in support thereof, presumed correct, such presumptions are entitled to the benefit of all reasonable inferences that can be drawn from the evidence viewed in a light most favorable to the CHURCHES, and will not be disturbed unless an abuse of

discretion is clearly shown. Maule Industries, Inc. v. Seminole Rock & Sand Co., 91 So.2d 307 (Fla. 1956); Videon v. Hodge, 72 So.2d 396 (Fla. 1954); Torres v. Van Eepoel, 98 So.2d 735 (Fla. 1957).

B. A REVIEW OF FLORIDA CASE LAW DEFINES TRADITIONAL CONCERNS OF THE FLORIDA SUPREME COURT RELATING TO THE INTEGRITY OF SPECIAL ASSESSMENT.

The prevailing standard for the determination of validity of special assessments has most recently been stated by this Court in City of Boca Raton v. State, 595 So.2d 25, at page 29 (Fla. 1992):

> 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. Atlantic Coast Line R.R. v. City of Gainesville, 83 Fla. 275, 91 So. 118 (1992). Second, the assessment must be fairly and reasonably apportioned among the properties that receive the special benefit. South Trail Fire Control Dist. v. State, 273 So.2d 380 (Fla. 1973). Thus, a special assessment is distinguished from a tax because of its special benefit and fair apportionment.

This Court has also repeatedly recognized a clear delineation between taxes and special assessments when it found:

> A tax is an enforced burden of contribution imposed by sovereign right for the support of the government, the administration of the law, and to execute the various functions the sovereign is called on to perform. A special assessment is like a tax in that it is an enforced contribution from the property owner, it may possess other points of similarity to a tax but it is inherently different and governed by entirely different principles. It is imposed upon the theory that that portion of the community which is required to bear it receives some special or peculiar benefit in the enhancement of value of the property against which it is imposed as a result of the improvement made with the proceeds of the special assessment.

State ex rel. Clark v. Henderson, 118 So. 351 (Fla. 1939); Whisnant v. Stringfellow, 50 So.2d 885 (Fla. 1951); City of Fort Lauderdale v. Carter, 71 So.2d 260 (Fla. 1954); Fisher v. Board of County Commissioners of Dade County, 84 So.2d 572 (Fla. 1956); City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992).

Traditionally, by employing these distinguishing characteristics, several special assessments have been found invalid. In Atlantic Coast Line R.R. v. City of Gainesville, 91 So. 118 (Fla. 1922), this Court found the city assessment against the railroad company for paving outside a two foot perimeter from the existing rails to be arbitrary and unwarranted in that the railroad company received no special benefit. 91 So. at 121.

In City of Ft. Myers v. State, 117 So. 97 (Fla. 1928) this Court affirmed the Trial Court's refusal to validate a bond issue for constructing a variety of storm sewers, catch basins, and other pavement projects, finding that where there were several unconnected and distinct constructions or programs for improvement purposes, there should be a finding of special benefits as to each program separately. 117 So. at 104.

In State ex rel. Clark v. Henderson, 188 So. 351, this Court invalidated a special assessment levy by a special tax school district, finding such a levy to be a tax for a uniform governmental function. 188 So. at 352.

In Crowder v. Phillips, 1 So.2d 629 (Fla. 1941), this Court held that a special assessment levied to fund the Leon County

Hospital tax district, was a tax, specifically finding that there was 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". 1 So.2d at 631.

In Whisnant v. Stringfellow, 50 So.2d 885 (Fla. 1951), this Court held that a county health unit could not support a special assessment, again citing the need for a logical relationship between the improvement funded by the special assessment and the enhancement of the value of real estate located within the taxing district. 50 So.2d 885.

In City of Fort Lauderdale v. Carter, 71 So.2d 260 (Fla. 1954) this Court affirmed the Trial Court's injunction against a city assessment for waste and trash collection, citing as reasons the fact that the tax was levied against all the real property in the city without distinguishing between occupied, vacant, residential or commercial property; thus there was a lack of proportionate relationship between the assessment and the improvement, and there was no special or peculiar benefit to any specified portion of the community. 71 So.2d at 261.

In Fisher v. Board of County Commissioners of Dade County, Fla., 84 So.2d 572 (Fla. 1956) this Court reversed the Trial Court's bond validation regarding the construction and maintenance of paving and street lighting improvements, finding that the only evidence to support the special benefit requirement was a report from the county engineer who admitted

that no exact valuation of benefits had been made. 84 So.2d at 576. The Court further ruled that the question of whether a particular property is specially benefitted by an improvement does not rest exclusively in the judgment of the municipal officers, but is a question of fact to be ascertained and established as any others, and with proof other than the dictum of the governing agency. 84 So.2d at 576.

Each of the above cases reflects concerns this Court has had in maintaining the integrity of the characteristics of special assessments. In the instant case, the COUNTY'S stormwater management special assessment fails to satisfy such Supreme Court concerns. For example:

(1) The stormwater assessments are funding a county-wide program with a variety of projects, benefiting a variety of individual basins within the county, unrelated to any benefit received by any other basins within or areas of the county (T 318), City of Ft. Myers v. State, 117 So. 97 (Fla. 1928).

(2) There is no logical relationship between the stormwater assessment made to the CHURCHES' properties and enhancement in value those properties might receive (T 128, 129, 130). Whisnant v. Stringfellow, 50 So.2d 885 (Fla. 1951); Crowder v. Phillips, 1 So.2d 629 (Fla. 1941).

(3) The COUNTY'S stormwater assessment is levied against all improved real property within the COUNTY, and there is no special or particular benefit to any specified portion of the community which is not also a benefit to the community as a

whole (T 151, 152). City of Fort Lauderdale v. Carter, 71 So.2d 260 (Fla. 1954).

(4) The only evidentiary support for the COUNTY'S determination of special benefits is its own COUNTY Engineer's testimony, and the testimony of the COUNTY Consultant on the stormwater project (T 214, 221, 298, 331, 348, 349). Fisher v. Board of County Commissioners, 84 So.2d 572 (Fla. 1956).

C. THE LOWER COURTS PROPERLY FOUND SUBSTANTIAL EVIDENCE TO JUSTIFY A FINDING OF NO SPECIAL BENEFIT RELATING TO THE COUNTY'S STORMWATER SPECIAL ASSESSMENT, CONSISTENT WITH RECENT CASE LAW, AND PROPERLY RULED THE ASSESSMENT INVALID.

In City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992), this Court upheld a special assessment for downtown redevelopment. The issue on appeal was not so much the special benefit issue as the issue of city authorization to levy a special assessment, which this Court found to exist. Only secondarily did the Court consider the special benefits issue, and affirm the Trial Court's findings that the assessment was directly proportional to the special benefits to be provided to each parcel. 595 So.2d at 25-30.

The case of City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992), is factually a good case for comparison to the case at bar. In City of Boca Raton the improvement was downtown redevelopment, including construction of a wide range of specifically enumerated improvements in the infrastructure. In the instant case, the project is county-wide with no specifically enumerated improvements or areas of improvement,

with extraordinarily minor actual construction, but a great deal of uniform governmental services such as maintenance, planning, regulatory functions, and addressing federal regulations (T 222, 223).

In City of Boca Raton the special assessments were finite and were to be paid over a period of years. 595 So.2d at 26. In the instant case there is no schedule for the special assessments to ever terminate (T 318).

In City of Boca Raton, the special assessments are apportioned among specifically identified and benefitted real property (not including churches) through a sophisticated self correcting ad valorem method. 595 So.2d at 30. In the case at bar, the property assessed is so assessed, not by virtue of any specifically calculated improvement to it, so much as an estimated contribution that each property makes to stormwater runoff generally, irrespective of whether that runoff creates a problem which must be addressed by the COUNTY (T 308, 309).

In City of Boca Raton, the improvements were properly treated as a single project. 595 So.2d at 27. In the instant case the Stormwater Utility is not a single project, but an ongoing governmental function including a wide variety of ever changing functions and projects.

In City of Boca Raton, this Court distinguished its ruling from Fisher v. Board of County Commissioners, 84 So.2d 572 (Fla. 1956), also a special improvements service district bond, in that in Fisher there was no credible evidence that the amount

of the benefit was related to the property valuation. City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992) at 31, 32. In the instant case, there is no evidence comparable to that in City of Boca Raton respecting the logical relationship which must exist between the assessment and the value of the improvements received by the assessed property.

By compiling the cases in which this Court has construed special benefits, one finds that special benefits are benefits accruing to land, not remote from the land assessed (City of Ft. Myers v. State, 117 So. at 104), which must enhance the value of the property (State ex Rel. Clark v. Henderson, 188 So. at 354), must be to a specified portion of the community as opposed to the community as a whole (City of Ft. Lauderdale v. Carter, 71 So.2d at 260), must be something other than the annual cost of estimated maintenance and improvements (Fisher v. Board of County Commissioners, 84 So.2d at 574), must be direct, proximate and reasonably certain of computation (Fisher v. Board of County Commissioners, 84 So.2d at 578), must be a fixed amount, not fluctuating from year to year as a result of increases in the cost of maintaining the improvement (Fisher v. Board of County Commissioners, 84 So.2d at 578), and 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 particularly benefitted (St. Lucie County-Fort Pierce Fire Prevention and Control District v. Higgs, 141 So.2d 744 (Fla. 1962) at 746).

In the instant case, the benefits of the Stormwater Management Utility are not to land, as they were in the case of Martin v. Dade Muck Land Co., 116 So. 449 (Fla. 1928). The Dade Muck case involved a taxing district formed by statute, for specific drainage improvements by a state agency, for the purpose of making submerged swamp land all over the district habitable and buildable; the assessments were nominal acreage and ad valorem taxes and were specifically distinguished from traditional special assessments; the improvements in the Martin case were clear, the benefits unquestionable, and this Court upheld the tax. Martin v. Dade Muck Land Co., 116 So. 449, at pages 464-469.

In the instant case, the property assessed is an entire County, the property is already habitable and buildable and the governmental service is not providing any benefit which the churches can even recognize, let alone calculate (T 36, 45, 65, 66, 193, 194, 267).

The Dade Muck case is further distinguished by virtue of this Court's ruling only weeks later in City of Ft. Myers v. State, 117 So. 97 (Fla. 1928) which invalidated a special assessment for the construction of storm sewers and catch basins. This Court obviously saw a great distinction between the capital project directly effecting habitability of lands throughout the Dade Muck district, and the variety of improvements (in many instances remote and unconnected with each other) in City of Ft. Myers. In the instant case, not only are

the programs funded by the special assessment remote and unconnected with each other, but they lack any resemblance to the construction program in City of Ft. Myers.

The evidence is clear that there is no increase in the value of property as a result of the Stormwater Management Utility funded by the assessment (T 147). Any benefit that does accrue is to the community as a whole as opposed to a specified portion of the community (R 456-457). The stormwater special assessment is nothing more than funding the estimated annual cost of administration, maintenance, and minor improvements, not a fixed amount but fluctuating from year to year as a result of increases in the cost of maintaining the improvements, and there is no direct, proximate or reasonably certain computation for any such benefit. In essence, the improvements suggested by the COUNTY as a result of their stormwater assessments are inferred from a situation where all improved real property in the COUNTY is assessed for the benefit of the community as a whole.

With no Florida case clearly supporting the COUNTY'S position, the COUNTY relies upon the Kentucky Court of Appeals case of Long Run Baptist Association, Inc. v. Louisville and Jefferson County Metropolitan Sewer District, 775 S.W.2d 520 (Ky. App. 1989). Again, the COUNTY finds principle upon which to rely without recognizing significantly distinguishing factors.

In the Long Run Baptist case, the Kentucky court initially determined that the levy in issue was a service charge, and not

a tax, since the district involved could not have constitutionally been delegated the authority to levy a tax. Long Run Baptist Association, Inc. v. Louisville and Jefferson County Metropolitan Sewer District, 775 S.W.2d 520 (Ky. App. 1989) at 522. In the instant case, the COUNTY not only has the authority to tax, but has in past years used its taxing authority to fund stormwater services (T 221).

The Kentucky Court of Appeals thereafter found that the service charge (not special assessment) was levied pursuant to a Kentucky Statute which was previously held to be constitutional by the Kentucky Supreme Court and which specifically provided the district its authority to establish charges to be collected from all the real property within the areas served by the facilities of the district. Long Run Baptist Association, Inc. v. Louisville and Jefferson County Metropolitan Sewer District, 775 S.W.2d 520 (Ky. App. 1989) at 522. Further, in response to their contestants' argument that some property owners received no benefit from the drainage district, the Appellate Court recognized that "in the case of a surface drainage improvement area, any property that geographically is a part of the watershed or drainage basin may properly be considered to be benefitted by the project". Long Run Baptist Association, Inc. v. Louisville and Jefferson County Metropolitan Sewer District, 775 s.W.2d 520 (Ky. App. 1989) at 522.

Once again, the COUNTY'S stormwater management utility is

a countywide utility defined by COUNTY lines, wholly unrelated to drainage basins. (T 267) The COUNTY'S statutory reliance upon Chapter 403, Florida Statutes, is tenuous at best as a result of their reliance upon political as opposed to appropriate geographic (i.e. drainage basins) borders. To the extent the COUNTY claims that Chapter 403 allows special assessments based upon purely political borders, the constitutionality of such interpretation does not enjoy the same precedent as does the Kentucky Statute in the Long Run Baptist case.

To rely upon the coincidence that the Kentucky case deals with churches and drainage service charges ignores the more prominent issues relating to the long tradition of special assessments in Florida and the questionable special benefits of a politically drawn stormwater utility.

D. GOVERNMENTAL CREATIVITY IN REACTION TO REVENUE PRESSURES SHOULD NOT BE ALLOWED TO CIRCUMVENT EXISTING CONSTITUTIONAL AND CASE LAW LIMITATIONS.

In the recent case of State v. City of Port Orange, Fla.L.Weekly S563 (Fla. 1994), this Court recognized an increasing effort on the part of local governments to alleviate the pressures of raising revenue by creative efforts, including "labeling". In that case, the Court recognized that the City of Port Orange was attempting to impose a tax under the guise of a user fee.

In the instant case, the COUNTY is attempting to impose a

tax under the guise of a special assessment in reaction to revenue pressures. Even Judge Whatley remarked on this pressure and the resulting guise, when he said:

> THE COURT: Now you're getting into what I thought all along was the underlying criteria, and that is budgetary problems and that, to me, has been the trump card here, that we have budgetary pressures placed on us from the federal government, et cetera. That is what I have suspected has led to this from the outset. Instead of addressing it in other manners and fashions, that's the way we've addressed it. (T 51).

Floridians have placed a limit on ad valorem millage available to municipalities, Article VII, §9, Florida Constitution; have made homesteads exempt from taxation up to minimum limits, Article VII, §9, Florida Constitution; and have exempted the CHURCHES herein and other charitable, educational, literary and scientific organizations from the payment of ad valorem taxes, Article VII, §3(a), Florida Constitution, and Sections 196.192 and 196.012(1) Florida Statutes.

Such constitutional provisions, general laws, and the long tradition of the integrity of special assessments in Florida should not be circumvented by the COUNTY'S labeling as a special assessment that which is clearly a tax.

This Court should find that there has been no abuse of the Trial Court's discretion in its ruling or finding of fact, nor in the District Court's modification and affirmation of same, and should affirm the Lower Courts in this case.

III. A REFUND OF ILLEGALLY LEVIED SPECIAL ASSESSMENTS IS REQUIRED BY THE EVIDENCE, ESTABLISHED CASE LAW, CONSTITUTIONAL DUE PROCESS REQUIREMENTS AND MANIFEST FAIRNESS.

The issue of refunding the illegal assessments to the plaintiff CHURCHES is not an issue properly before this Court. While it was not an issue for which the COUNTY sought Supreme Court discretionary jurisdiction (see Jurisdictional Brief of Petitioner), they have nonetheless sought review of the District Court's affirmation of the Trial Court's finding.

The COUNTY suggests that even if this Court rules that the special assessments in this cause were improperly imposed, the CHURCHES who paid such assessments should not be awarded refunds from the COUNTY under the theory that the assessments were levied in good faith, and the remedy of Court ordered refunds is drastic.

It is most important to note, however, that while the COUNTY'S brief (p 23 - 24) alleges that the remedy of relief is drastic or catastrophic and that the COUNTY acted in good faith at all times, absolutely no references to the record or to the transcript are made for such allegations. That is because no such evidence was presented.

The record and transcript are in fact devoid of any references to any catastrophic results of the refund ordered. In fact, the two million dollar excess collected in the 1990 budget (T 237) more than exceeds any refund requested in this case. There is no evidence that the refund of assessments paid by the CHURCHES is any more than a minuscule percentage of the

COUNTY stormwater budget.

The record and transcripts are further devoid of any evidence or testimony of any good faith on the part of the COUNTY. References in the COUNTY'S brief (p 23) to the Trial Court's observations of good faith refer to comments by the Trial Court made during the opening and closing arguments to the effect that no one was accusing the COUNTY of malicious intent (T 47) or of being anti-church (T 568). The Court further and correctly observed that no matter how "sincere" the COUNTY may have been, the injury to the CHURCHES is not lessened thereby (T 569).

There is also no reference or request for relief in the COUNTY'S pleadings which form a basis for denying a refund to the CHURCHES even if the Court rules the assessments invalid (R 89-93).

Finally, there is no evidence that the COUNTY relied upon the provisions of Section 403.0893 Florida Statutes, or upon Florida case law in adopting the ordinance. In fact it was the clear testimony of Mr. Marchand that the reason the COUNTY chose the special assessment method of funding was simply because the COUNTY felt it was a more fair and appropriate way to do it (T 220, 221, 226).

In contrast, the CHURCHES would invite a review of Coe v. Broward County, Fla.App., 358 So.2d 214 (Fla. 4DCA 1978):

> First, we believe the law to be that a taxpayer is normally entitled to a refund of taxes paid pursuant to an unlawful assessment.[3] We construe the Supreme Court's ruling in Gulesian to have carved out a very

narrow exception to a taxpayer's right to a refund.

[3] New Smyrna Inlet Dist. v. Esch, Fla. 24, 137 So.1 (1931)

The Court in Coe further went on to find that good faith cannot be presumed in the absence of evidence. Coe v. Broward County, Fla.App., 358 So.2d 214 (Fla. 1978) at 216.

Finally, Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed 296 (1971), upon which the COUNTY relies heavily, has been severely limited by more recent United States Supreme Court decisions. James B. Beam Distilling Company v. Georgia, 501 U.S.---, 111 S.Ct. 2439, 115 L.Ed.481 (1991) and Harper v. Virginia Department of Taxation, 113 S.Ct. 2510, 125 L.Ed.2d 74, 61 USLW 4664, 16 Employee Benefits Cas. 2313 (1993). In these cases the United States Supreme Court recognized that its experiment with non-retroactive judicial decisions was inconsistent with the rule of retroactive operation which has governed judicial decisions for thousands of years, and which was reinstated in both Beam and Harper.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution compels the creation of a meaningful non-discriminatory remedy for contestants of an illegal tax who have no availability of pre-deprivation relief, and due process requires the State to provide refunds to successful litigants in such cases. Harper v. Virginia Department of Taxation, 113 S.Ct. at 2519-2520. (1993).

This Court's consideration of public policy should include a recognition that to deny the CHURCHES a refund is to deny them

the only tangible relief available to them. To deny a refund not only creates a windfall profit to the COUNTY despite its illegal action, but leaves the CHURCHES with no reimbursement for that which was taken from them without proper authority, and despite their efforts in invoking judicial review. Nor should this Court ignore the open court understanding between the Trial Court counsel for the COUNTY and the CHURCHES recognizing that the fees payable to the CHURCHES' attorneys would be from the refund alone (T 96). Plaintiffs in the position of the CHURCHES will be hard pressed to bring action to correct an illegal tax or assessment if their attorneys cannot rely upon a refund to finance their efforts.

Therefore, upon the basis of such existing case law, constitutional demands, public policy, and the lack of any evidence concerning good faith or catastrophic results, the Trial Court and District Court ordered refund should be affirmed.

CONCLUSION

The COUNTY has failed to establish that the lower courts abused their discretion sufficiently to overcome the presumption of correctness in which the lower courts' rulings are clothed.

There is no established case law suggesting that a legislative declaration of benefits alone carries any presumptive weight in a case such as the case at bar, where there exists no improvements to abutting property, and the lower courts' finding of no special benefit from the COUNTY programs makes any discussion of apportionment superfluous.

Even if there were a presumption of validity to legislative declarations, the CHURCHES have shown by competent substantial evidence that such declarations have no basis in fact. Further, the manner in which the COUNTY drafted, planned, and funded its ordinance is contrary to any constitutional interpretation of the statutory authority of Chapter 403, Florida Statutes.

The drafting, planning and funding of the COUNTY ordinance is further contrary to well established criteria for special assessments, as found in the long tradition of Florida Supreme Court cases on special assessments.

The COUNTY'S effort in this case is clearly a creative effort, in response to fiscal pressures, to circumvent existing constitutional and case law limitations on the government's power to levy taxes and assessments. Such attempts to label a tax as a special assessment, without adequate basis in factual special benefits to assess property, is clearly invalid.

A refund of this illegally imposed assessment to the CHURCHES is mandated not only by due process concerns, but by public policy and the Court's desire to construct a remedy which is manifestly fair. The COUNTY'S assertions notwithstanding, no evidence exists that requiring a refund is a drastic or catastrophic remedy, or that the COUNTY'S good faith is sufficient to deny monetary reimbursement to the CHURCHES.

Dated: April 10, 1995

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to **MICHAEL S. DREWS, ESQ., RICHARD E. NELSON, ESQ.** and **RICHARD L. SMITH, ESQ.**, of 2070 Ringling Boulevard, Sarasota, Florida 34237 by U.S. Mail this 10th day of April, 1995.

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