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

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

On March 27, 1991, Appellee SARASOTA CHURCH OF CHRIST, INC. (hereinafter "the CHURCHES") filed a class action to declare invalid non-ad valorem assessments imposed by Appellant, SARASOTA COUNTY (hereinafter "SARASOTA") for fire and rescue services and for SARASOTA's Stormwater Environmental Utility.[1] (Record p. 1). The CHURCHES' Complaint asserted that the state legislature exempts churches from ad valorem taxation, Florida Statutes § 196.192(1), and that the non-ad valorem assessments to fund SARASOTA's stormwater utility and SARASOTA's fire and rescue services were, in reality, taxes from which the CHURCHES are exempt. (Record p. 83-86).

SARASOTA's storm water utility and non-ad valorem assessment were created by SARASOTA ordinance number 89-117. (Record p. 255). The ordinance was adopted in reliance on Sections 403.0893 and 403.031(17), Florida Statutes, where the state legislature expressly provides for the funding of stormwater utilities by non-ad valorem assessments based on a property owner's contribution to the need for the stormwater system. Numerous other local governments in the state of Florida have adopted similar stormwater ordinances using non-ad valorem assessments. (Transcript p. 240-42, 263).

The action was certified as a class action by order filed July

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[1] The complaint was amended to include eight additional named Plaintiffs. (Record p. 81). One of these Plaintiffs, Christ Lutheran Church, withdrew as a Plaintiff. (Transcript p. 78).

23, 1992 (Record p. 95-102). The class consists of religious organizations or entities owning real property within Sarasota County used exclusively for religious purposes. (Record p. 95).

The case proceeded to non-jury trial. The pleadings at issue were the Second Amended Complaint of the CHURCHES (Record p. 81-88) and the Answer and Affirmative Defenses of SARASOTA. (Record p. 89-93).

On April 27, 1993, a Final Judgment was entered. (Record p. 453-459). The Final Judgment declared that the non-ad valorem assessments for SARASOTA's fire and rescue services were valid but that the non-ad valorem assessments for SARASOTA's stormwater utility were invalid. The Final Judgment asserted that revenues to fund SARASOTA's stormwater utility should be raised through the taxation method. (Record p. 458). The Final Judgment ordered a refund of all monies paid by the CHURCHES for the stormwater assessment. (Record p. 458). The Final Judgment was amended on May 21, 1993, to reflect that the terms of the Final Judgment covered the members of the class as well as the named Plaintiffs. (Record p. 460-462).

SARASOTA filed a Notice of Appeal of the Final Judgment, as amended, to the Second District Court of Appeal. (Record p. 463). The CHURCHES filed a Notice of Cross Appeal concerning the assessments for fire and rescue services. (Record p. 464-465). The Second District rendered its decision on September 6, 1994. (Appendix, item #2). The Second District's decision adopted, with certain minor modifications, the Trial Court's Final Judgment as

its decision. The Second District's decision relies on a circuit court opinion from Madison County, Foxx v. Madison County, case #90-161-CA (Appendix item #5), that was reversed, in part, by the First District Court of Appeal. Madison County v. Foxx, 636 So.2d 39 (Fla. 1st DCA 1994). The part reversed in Foxx was the same part relied on by the Second District in its decision.

SARASOTA filed a Notice to invoke the discretionary jurisdiction of this Court pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv). This Court accepted jurisdiction by Order dated February 23, 1995.

STATEMENT OF THE FACTS

The SARASOTA Stormwater Environmental Utility (hereafter "the Utility") was created by the adoption of Sarasota County Ordinance number 89-117 after public hearings. (Record p. 255-276, 312; Transcript p. 288-89). The preamble to Ordinance number 89-117 (Record p. 255-256) and the express legislative declaration and public policy set forth in Section 403.021(1)-(6), Florida Statutes, describe the increased needs, costs and concerns for the development of stormwater management programs[2] and the utilization of effective stormwater management systems[3] to control stormwater pollution discharge and to prevent or reduce flooding. The Federal Clean Water Act, 33 U.S.C. § 1342(p)(3)(B)(iii), and Section 403.0891, Florida Statutes, require local governments to implement stormwater programs.

Section 403.0893, Florida Statutes, authorizes local governments to create stormwater utilities to construct, operate and maintain stormwater systems. A stormwater utility is defined in Section 403.031(17), Florida Statutes, as:

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[2] A stormwater management program is defined in Section 403.031(15), Florida Statutes, as the institutional strategy for stormwater management, including urban, agricultural, and other stormwater.

[3] A stormwater management system is defined in Section 403.031(16), Florida Statutes, as 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.

> ...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....

Section 403.0893, Florida Statutes, expressly provides that the non-ad valorem levy, collection and enforcement method of Chapter 197, Florida Statutes, can be used by local governments to collect non-ad valorem assessments to plan, construct, operate and maintain one or more stormwater utilities within a county or municipality.

SARASOTA Ordinance No. 89-117 utilized Chapter 403, Florida Statutes, as well as the procedure set forth in Sections 197.3631 and 197.3632, Florida Statutes, to create the Utility and to provide for the funding of SARASOTA's stormwater management program through non-ad valorem assessments to property owners based on each property owner's contribution to the need for the System. (Record p. 257).

The following findings and determinations were made by the County Commission in Section 2 of the Ordinance:

> (a) Those elements of the SYSTEM which provide for the collection, treatment, conveyance, and disposal of stormwater are of benefit and provide services to all real property within the County including property not presently served by the physical elements thereof.
>
> (b) The costs of operating and maintaining the SYSTEM and financing necessary repairs, replacements, improvements, and extensions thereof should be, to the extent practicable, allocated in relationship to the respective stormwater contributions of individual parcels of land.
>
> (c) The stormwater management assessment defined herein is necessary and proper for funding of stormwater management within Sarasota County.

(d) The Board of County Commissioners, sitting as the Sarasota County Land Development Regulation Commission, has reviewed the proposed ordinance and has found that it is consistent with the Sarasota County Comprehensive Plan.

(Record p. 257).

Section 6 of Ordinance No. 89-117 authorizes the stormwater management assessment on each developed property within the boundaries of the Utility. (Record p. 263). Section 12 of the Ordinance establishes a Stormwater Environmental Utility Trust Fund for the deposit of all fees, charges and revenues collected by the Utility. All fees, charges and revenues are required to be used exclusively for stormwater management purposes, including the following:

(a) Design, drainage basin planning, development review, stormwater studies and programs, securing required environmental permits, aerial photography, and other miscellaneous services.

(b) Operation, maintenance, repair and replacement of the SYSTEM.

(c) Funding of pollution abatement devices constructed on stormwater systems discharging to surface waters of the COUNTY.

(d) Costs of UTILITY administration.

(e) Capital improvements and debt service financing.

(Record p. 271-272).

Developed properties are classified for purposes of assessment

into two major classes, residential[4] and non-residential developed properties. Residential developed properties are assessed at a flat rate of one equivalent residential unit ("ERU") for each individual dwelling unit existing on the property. An ERU is the Sarasota County average horizontal impervious surface area for detached single family dwelling units using data from the Sarasota County Property Appraiser's office. (Transcript p. 265). An ERU was computed to be 2,582 square feet. (Transcript p. 265). An impervious area is a hardened, watertight surface including such items as roofs, patios, porches, driveways and sidewalks. (Transcript p. 265). The ERU is multiplied by an adjustment factor to determine the flat rate to be assessed on each residential developed property. The adjustment factor is based on the contribution of stormwater runoff by the property. The ERU flat rate for the fiscal year beginning October 1, 1990, was $38.25. (Record p. 274-76).

Assessments for nonresidential developed properties are based on the actual amount of horizontal impervious area for a particular property compared to the base ERU rate. (Record p. 264). The total horizontal impervious area is determined (e.g., 25,820 sq. ft.). This number is then divided by the average impervious area of an ERU (e.g., 2,582 sq. ft.). The quotient is the number of ERUs that are represented by the nonresidential developed property

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[4] There is a subcategory of residential developed properties covering smaller dwelling units such as condominium units and mobile homes. This subcategory is charged a percentage of the flat rate paid by other residential developed properties. (Transcript p. 265-266).

(e.g. #10 ERU's). This quotient is multiplied by the flat rate (e.g. 10 x 38.25 = $382.50). This formula creates a direct relationship between the method of assessing a non-residential unit and the average residential unit. The equation is set forth in the example below:

> 25,820 ÷ 2,582 = 10 (number of ERUs)
> 10 x $38.25 (flat rate for ERU) = $382.50
> (amount of non-residential assessment)
> (Transcript p. 265-66).

Church properties are within the nonresidential class. (Transcript p. 267). There is no exemption for Church properties. (Record p. 312). The amount of assessments for the Church properties vary depending on the amount of horizontal impervious area for the particular Church property.[5]

The CHURCHES protested the failure of SARASOTA to provide an exemption to CHURCHES claiming that the assessment was a tax and that CHURCHES are exempt from taxes. (Record p. 285-287, 291-293). SARASOTA did not provide the exemption because Church properties contribute to stormwater runoff just like other developed properties (Transcript p. 279; Record p. 312); a non-ad valorem assessment based on each property owner's contribution to the need for the System is a much more fair and equitable way to pay for the System (Transcript p. 221, 278-79; Record p. 315); and, Church properties are not exempt from payment of non-ad valorem

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[5] The assessments for the 1990 fiscal year for the Utility ranged from $107.10 for Northside Church of Christ (Record p. 323) to $1,365.53 for Sarasota Church of Christ. (Record p. 295-296). The assessments were reduced in subsequent years. (See e.g. Record p. 295-296, 298, 299 and 320-322).

assessments. (Record p. 315-318).

The CHURCHES then filed this action. At trial, there was competent evidence presented of special benefits arising from the Utility, including the following:

1. Control and treatment of the stormwater discharged from each developed property. Each owner of developed property specially benefits because SARASOTA's control and treatment of the stormwater runoff removes a specific burden associated with each such property owner's use and enjoyment of the property. The stormwater utility is necessitated by improvements on the owner's property that have impervious surfaces. (Transcript p. 221-22, 268-70).

2. Flood protection and prevention. This special benefit is reflected in the absence of a problem, for example, less water pollution and less flooding. If you do not provide the service then property owners will have problems with flooding and water pollution. (Transcript p. 271, 257).

3. Reduction in flood insurance premiums. (Transcript p. 468-69).[6]

Church properties receive these special benefits (Transcript p. 278-79, 243-44).

The Trial Court took the case under advisement. On April 27,

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[6] Mr. Wells Purmort, an insurance agent, testified that SARASOTA received a 5% reduction in flood insurance premiums beginning October of 1992. (Transcript p. 468-69). The Trial Court refused to permit J.P. Marchand, a licensed civil engineer and head of Sarasota's Stormwater Department, to testify as to the 5% reduction together with additional reductions in flood insurance premiums preliminarily approved for October of 1993. The proffer of counsel for SARASOTA was that Mr. Marchand deals directly with FEMA who sets the flood insurance rates, that part of Mr. Marchand's duties include submittals to FEMA to obtain reductions in flood insurance rates and that SARASOTA received a preliminary approval for a second 5% reduction in flood insurance rates as a direct result of SARASOTA's stormwater management program. (Transcript p. 272-273, 275-278).

1993, the Trial Court entered a Final Judgment in favor of the CHURCHES and against SARASOTA on the validity of the stormwater assessments. (Record p. 458). The Trial Court did not find that the stormwater assessment was imposed in bad faith or that the assessment was arbitrary or a plain abuse. The Trial Court simply found that while stormwater management services were necessary and essential, that the services benefit the community as a whole and that there was no evidence presented of any special benefit. (Record p. 456-57). The Trial Court declared the stormwater assessment invalid on this finding of no special benefit[7] and asserted that SARASOTA should collect revenue for stormwater management services through the taxation method. The Trial Court ordered a refund to the CHURCHES. (Record p. 458).

SARASOTA appealed this portion of the Final Judgment to the Second District Court of Appeal. (Record p. 463). The Second District Court of Appeal adopted, with certain minor modifications, the Trial Court's Final Judgment as its decision. (Appendix, item #2).

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[7] In reaching its holding that SARASOTA's stormwater assessment was invalid, the Trial Court only found against SARASOTA on the first requirement - special benefit. The Trial Court did not make any adverse finding or declaration as to the second requirement - fair apportionment. There was substantial competent evidence to support fair and reasonable apportionment (Transcript p. 221, 264-267, 278-79, 283-84, 287-88).

SUMMARY OF ARGUMENT

CHURCHES are not exempt from the payment of assessments, charges and fees unless there is an express exemption provided to the CHURCHES under general law. Chapter 403, Florida Statutes, and Ordinance No. 89-117 do not provide exemption from payment of assessments by Church properties for the reason that Church properties contribute to the stormwater problem giving rise to the need for SARASOTA's stormwater management system.

Chapter 403, Florida Statutes and Ordinance No. 89-117 contain express findings and determinations of special benefit to the owners of property that contribute to the need for SARASOTA's stormwater management system. The courts below disregarded these express findings and determinations in concluding that there was no special benefit. The courts below also disregarded competent evidence of special benefit and case precedent which is controlling and decisive on the special benefits issue in this case. The courts below substituted their own opinions and judgments for that of the state legislature, the county commission and controlling case precedent to reach their conclusions.

In the unlikely event that this Court affirms the Final Judgment, a refund should not be permitted in favor of the class of CHURCHES. The Final Judgment should only be given prospective effect. SARASOTA acted in good faith and in reliance on express state legislative authority in establishing the Utility and in funding the Utility with non-ad valorem assessments.

ARGUMENT

I. THE LOWER COURTS IMPROPERLY SUBSTITUTED THEIR JUDGMENT FOR THAT OF THE STATE AND LOCAL LEGISLATURES IN DETERMINING THAT SARASOTA'S STORMWATER ORDINANCE DID NOT PROVIDE SPECIAL BENEFITS AND COULD NOT BE FUNDED BY NON-AD VALOREM ASSESSMENTS.

As summarized most recently by this Court in City of Boca Raton v. State, 595 So.2d 25, 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 (1922). 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.

The determination of the existence and extent of special benefits is a question of legislative fact and is conclusive on all property owners in the absence of a clear and full showing of arbitrary action or a plain abuse. South Trail, supra at 383; Atlantic Coast Line R.R., supra at 122; Martin v. Dade Muck Land Co., 116 So. 449, 464 (Fla. 1928). See also Madison County v. Foxx, 636 So.2d 39 (Fla. 1st DCA 1994) (whether special assessments confer special benefits is a mixed question of law and fact-citing South Trail opinion). The reason for this rule is that the establishment of a special assessment through laws and ordinances takes place as a result of a peculiarly legislative process in which the courts should not intrude absent a plain abuse of that process. Atlantic Coast Line R.R. v. City of Gainesville, supra at 122.

In determining that an assessment for fire protection and rescue services was valid, this Court in South Trail, supra at 383, quoted with approval the following discussion from 48 Am.Jur., Special or Local Assessments, § 29, pp. 588-589):[8]

> The question of the existence and extent of special benefit resulting from a public improvement for which a special assessment is made is one of fact, legislative or administrative rather than judicial in character, and the determination of such question by the legislature or by the body authorized to act in the premises is conclusive on the property owners and on the courts, unless it is palpably arbitrary or grossly unequal and confiscatory, in which case judicial relief may be had against its enforcement...

This Court then stated:

> A matter of this kind depends largely upon opinion and judgment as to what will, or will not, prove a benefit to the district and the Court should not substitute its opinion and judgment for that of the Legislature in the absence of a clear and full showing of arbitrary action or a plain abuse.

South Trail, 273 So.2d at 383 (emphasis added).

In Martin v. Dade Muck Land Co., 116 So. 449, 464 (Fla. 1928), this Court stated:

> Where the public improvements contemplated, and the method of the special assessments and the anticipated benefits, are determined by direct legislative enactment, such determinations will not be disturbed by the courts, unless an abuse of power or purely arbitrary and oppressive action is clearly shown in appropriate proceedings...

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[8] The provision can now be found in the American Jurisprudence Second Edition at 70A Am.Jur. 2d, Special or Local Assessments, § 26, p. 1151.

See also Atlantic Coast Line R. Co. v. City of Gainesville, 83 Fla. 275, 91 So. 118, 122 (1922).

As set forth above, the Second District adopted the Trial Court's final judgment as its decision. The Final Judgment makes specific findings on which the declaration of invalidity of the non-ad valorem assessment is based. No part of the Final Judgment finds, addresses or even mentions arbitrary action or plain abuse by SARASOTA. "Arbitrary" is defined in Black's Law Dictionary, revised, 4th Edition (1968) as follows:

> Means in an "arbitrary" manner, as fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic;... without fair, solid and substantial cause; that is, without cause based upon the law;...not governed by any fixed rules or standard.

See University of Miami v. Militana, 184 So.2d 701, 703 (Fla. 3rd DCA 1966) (quoting Black's Law Dictionary). The term "action" is defined in Black's Law Dictionary, supra, as "conduct; behavior; something done; the condition of acting; an act or series of acts."

"Plain" is defined as evident, clear, manifest, obvious, conclusive, beyond question or doubt. Russell v. State, 71 So. 27, 28 (Fla. 1916). "Abuse" is defined in Webster's Ninth New Collegiate Dictionary (1988) as:

> A corrupt practice or custom; improper use or treatment - misuse; a deceitful act; deception...

It is obvious from a review of the definitions of arbitrary

action and plain abuse that the Second District and the Trial Court never found or determined that SARASOTA acted arbitrarily or, that it was a plain abuse by SARASOTA to collect revenues for the stormwater utility by a non-ad valorem assessment. The Second District simply affirmed the Trial Court's own opinion that there was no special benefit to property owners from the stormwater utility. This finding is insufficient as a matter of law under the established judicial precedent from this Court. South Trail Fire Control District v. State, 273 So.2d 380, 383 (Fla. 1973); Martin v. Dade Muck Land Co., 116 So. 449, 464 (Fla. 1928); Atlantic Coast Line R.R. v. City of Gainesville, 83 Fla. 275, 91 So. 118 (Fla. 1922). The determination of no special benefit by the courts below was made in the face of the following determinations by the local legislative body:

1. that the System facilities providing for the collection, treatment, conveyance and disposal of stormwater "are of benefit and provide services to all real property within the County;"
2. that the costs of operating and maintaining the System "should be to the extent practicable, allocated in relationship to the respective stormwater contributions of individual parcels of land;" and
3. that the stormwater management assessment is "necessary and proper for funding of stormwater management within Sarasota County."

(Record p. 257).

The determination by the courts below was made in the face of the following clear, express state legislative declarations:

1. section 403.031(17), Florida Statutes, which specifically authorizes local governments to establish stormwater utilities and to assess "the cost of the program to the beneficiaries based on their relative contribution to its need" (emphasis added);

2. sections 403.021(1)-(6), Florida Statutes, which describe the increased needs, costs and concerns for the development of stormwater management programs and the utilization of effective stormwater management systems to control stormwater pollution discharge and to prevent or reduce flooding; and

3. section 403.0893, Florida Statutes which provides that the non-ad valorem levy, collection and enforcement method of Chapter 197, Florida Statutes, can be used by local governments to collect non-ad valorem assessments to plan, construct, operate and maintain one or more stormwater utilities within a county or municipality.

These legislative declarations and findings were also supported by competent evidence that the Utility provided special benefits to property owners, including the following:

1. control and treatment of the stormwater discharged from developed properties (Transcript p. 221-22, 268-70);

2. flood protection and prevention (Transcript p. 271, 257); and

3. reduced flood insurance premiums (Transcript p. 468-69).

While the CHURCHES did produce testimony from a land planner and appraiser that there were no special benefits from the utility (Transcript p. 151)[9], it was improper for the courts below to disregard the determinations by the local legislative body, disregard the express declarations by the State legislative branch, disregard competent evidence of special benefits and simply determine the existence and extent of special benefits as a judicial fact rather than as a legislative fact.

In cases challenging the existence and extent of special benefits necessary to sustain a special assessment, an express finding by the Trial Court of arbitrary action or a plain abuse is required. South Trail, supra; Atlantic Coast Line R.R., supra. There was no such finding by the Trial Court in this case; and, there is no evidence of arbitrary action or a plain abuse in the record to support such a finding. To permit the Second District's opinion to stand would permit the judiciary to invade the legislative domain and authorize the judiciary to legislate in violation of the separation of powers doctrine set forth in Article II, Section 3 of the Florida Constitution. Chiles v. Children A, et. al., 589 So.2d 260, 263-4 (Fla. 1991); Pepper v. Pepper, 66 So.2d 280, 284 (Fla. 1953). The Second District's opinion should be reversed.

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[9] This same witness also testified, contrary to established Florida case law, that there were no special benefits derived from fire and rescue services. (Transcript p. 151)

II. THE NON-AD VALOREM ASSESSMENT ADOPTED BY SARASOTA ORDINANCE #89-117 MEETS THE SPECIAL BENEFITS TEST FOR A VALID SPECIAL ASSESSMENT.

Aside from the failure of the courts below to give proper deference to the legislative branch, the courts below also misapplied Florida law and ignored competent evidence in concluding that SARASOTA's stormwater assessment was invalid. After properly identifying the two elements necessary to sustain a special assessment (special benefit and fair apportionment), the Second District stated:

> Stormwater management services are, without question, both necessary and essential. However, such services [as planned and funded pursuant to Sarasota County Ordinance No. 89-117] benefit the community as a whole and provide no direct benefit, special benefit, increase in market value or proportionate benefit regarding the amount paid by any particular landowner. 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. (brackets in original text, emphasis added).

As set forth on pages nine (9) and sixteen (16) above, the record is replete with evidence of special benefits derived from Sarasota's stormwater assessment. The special benefits include control and treatment of the stormwater runoff from each owner's property, flood prevention, and reduced flood insurance premiums. Under Florida law, these benefits have the appropriate nexus to an owner's property to constitute special benefits.

SARASOTA's control and treatment of stormwater runoff emanating from a landowner's property is tied in a substantial

manner to each landowner's property and constitutes a special benefit to the landowner. Each landowner with impervious surfaces on his property contributes to the stormwater problem by increasing the volume of stormwater that is put into the System and by permitting rainwater containing pollutants (such as residue from roofs, driveways and parking lots) into the System. (Transcript p. 221-222, 268-270). This stormwater must be controlled and treated. Landowners with larger amounts of impervious areas contribute more to the problem, receive a greater benefit from SARASOTA's control and treatment of the stormwater problem and, therefore, are charged a higher assessment under the ERU apportionment. This special benefit which landowners receive from SARASOTA's stormwater system is the very basis that the State legislature authorized and that SARASOTA relied on in establishing a stormwater assessment based on each owner's contribution to the need for the System.

This special benefit is similar to the special benefit recognized by the Second and Third Districts for solid waste collection and disposal from a landowner's property. Charlotte County v. Fiske, 350 So.2d 578 (Fla. 2nd DCA 1977); Gleason v. Dade County, 174 So.2d 466 (Fla. 3rd DCA 1965). There is a special benefit derived from solid waste collection and disposal from a landowner's property because collection and disposal of the solid waste relieves a specific burden caused by the use and enjoyment of the property. Similarly, SARASOTA's stormwater assessment relieves the specific burden of treating and controlling the stormwater runoff created by impervious surfaces on the improved property.

Flood prevention is closely tied to the control and treatment of stormwater runoff and is a further special benefit to the properties assessed. While the properties at lower elevations obviously benefit from the flood control aspects of the System, the developed properties at higher elevations containing impervious surfaces increase the volume of stormwater runoff and thereby create the need for the System and receive special benefits therefrom. (Transcript p. 312-313, 226-227).

The Florida Supreme Court in an early case was faced with 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 (Fla. 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

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[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 assessment.

> 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.

The reduction of flood insurance premiums for property owners is another special benefit derived from SARASOTA's stormwater utility. These reductions in flood insurance premiums were a direct result of the creation and operation of SARASOTA's stormwater utility. Reductions in insurance premiums for properties have consistently constituted a special benefit under Florida law. Fire District No. 1 of Polk County v. Jenkins, 221 So.2d 740, 741 (Fla. 1969) (decrease in fire insurance premiums is special benefit).

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, Inc. v. Louisville and Jefferson County Metropolitan Sewer District, 775 S.W.2d 520 (Ky. App. 1989), the precise issue before this Court was considered. The Court upheld a service charge for a countywide stormwater drainage system against challenges by a church association that the charge was an impermissible tax. The church association had 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, they argued

that whatever benefits were derived from the stormwater services were incapable of measurement, and, at best, were indirect benefits. The Court rejected these arguments and held that the stormwater service charge was valid and was not an illegal tax. See also, Zelinger v. City and County of Denver, 724 P.2d 1356 (Colo. 1986) (storm drainage service charge was valid special assessment - not a tax). Contrary to the opinions of the courts below, the record demonstrates the link between property throughout the County and the special benefits received from SARASOTA's stormwater utility. This evidence was disregarded by the courts below. Sarasota's stormwater assessment contains the requisite special benefits necessary to validate the assessment. The Second District's opinion should be reversed.

III. REFUNDS OF IMPROPERLY IMPOSED ASSESSMENTS ARE A DRASTIC REMEDY IN A CLASS ACTION WHERE THE ASSESSMENTS ARE IMPOSED IN GOOD FAITH.

In the event that this Court determines that SARASOTA's stormwater assessment is invalid, the issue of refunds must be addressed. The entry of an order requiring the refund of taxes and assessments is a drastic remedy. In determining the propriety of a refund of an assessment, the court's primary consideration is whether the local government relied, in good faith, on statutory or other governmental authority in levying the assessment. Gulesian v.Dade County School Board, 281 So.2d 325 (Fla. 1973); Alsdorf v. Broward County, 373 So.2d 695, 701 (Fla. 4th DCA 1979). In this case, SARASOTA relied, in good faith, on the express legislative provision of Section 403.0893, Florida Statutes, which authorizes non-ad valorem assessments for stormwater management systems. It further relied on a consistent line of Florida case law which has upheld the validity of assessments for services of a similar nature. Moreover, the Trial Court specifically observed that SARASOTA acted in good faith. (Transcript p. 47, 568-69). The effect of an order requiring a refund would be to punish SARASOTA for its good faith efforts.

The Supreme Court of the United States has set out criteria for giving a court decision prospective effect. Those criteria are particularly applicable to this case:

> First, the decision to be applied nonretroactively [i.e. prospectively] must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied or by deciding an issue of first impression whose resolution was

> not clearly foreshadowed. Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Linkletter v. Walker, [381 U.S. 618, 629]. Finally we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." Cipriano v. City of Houma, [395 U.S. 701 at 706].

Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).

In this case, SARASOTA relied in good faith on clear precedent from this Court, including the South Trail opinion, and on a specific legislative scheme set forth in Section 403.0893, Florida Statutes, designed to fund stormwater management programs. One obvious purpose and major effect of the clear precedent from this Court was to grant deference to the legislature in its legislative functions to adopt ordinances and raise revenues for various services and improvements. If this Court recedes from its precedents and gives a refund to the Church class, the potential financial impact of other and further class action lawsuits for refunds in SARASOTA and throughout the State would be catastrophic.

Under such circumstances, if the assessment for SARASOTA's stormwater management system is declared invalid, the Final Judgment should only be given prospective effect and a refund not be permitted. Alsdorf v. Broward County, 373 So.2d 695, 701

(Fla. 4th DCA 1979). Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971).

CONCLUSION

The non-ad valorem assessment to fund SARASOTA's stormwater management system is a valid assessment in accordance with law. The opinions of the courts below depart from established case precedent, contravene express legislative findings of special benefit, disregard competent evidence of special benefits and substitute the opinions of the courts of what a special benefit should be. The opinions of the courts below, if permitted to stand, would rain confusion down upon the effort to control and treat stormwater pollution and flooding throughout the state. Respect for judicial precedent and legislative discretion require the reversal of the portion of the Second District's opinion which declares that SARASOTA's stormwater assessment is an invalid assessment and that SARASOTA should collect revenue for stormwater management services through the taxation method.

If this Court affirms the declarations of the courts below, then that portion of the opinion ordering a refund should be reversed to avoid a torrent of litigation and to eliminate the potential for severe adverse financial impact on SARASOTA and other local governments throughout the state of Florida.

Dated March 20, 1995.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to I.W. Whitesell, Jr., Esq., 1605 Main Street, Suite 705, Sarasota, Florida 34236 and to Stephen F. Ellis, Esq., 1800 2nd Street, Suite 806, Sarasota, Florida 34236, this 20th day of March, 1995.

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