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

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE CHURCHES DO NOT HAVE A CONSTITUTIONAL EXEMPTION FROM AD VALOREM TAXATION

On page 15 of the CHURCHES' answer brief, at footnote 1, the CHURCHES claim that they are constitutionally exempt from ad valorem taxation quoting Article VII, Section 3(a) of the Florida Constitution as follows: "[s]uch portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes are exempted by general law from taxation." (emphasis added) Article VII, Section 3(a) of the Florida Constitution actually provides: "[s]uch portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation." (emphasis added) The misquote is significant because there is no exemption from taxation granted by the Florida Constitution to the CHURCHES. It is up to the Florida Legislature to provide by general law for such an exemption. The Florida Legislature has granted an exemption to the CHURCHES from ad valorem taxation pursuant to Section 196.192(1), Florida Statutes. This same Legislature provided for and expressly authorized the funding of SARASOTA's Stormwater Environmental Utility (hereinafter "the Utility") by non-ad valorem assessments based on each property owner's contribution to the need for the Utility. See Florida Statutes §§ 403.031(17), 403.0893.

II. THE DETERMINATION OF THE EXISTENCE OF SPECIAL BENEFIT IS A QUESTION OF LEGISLATIVE FACT WHICH IS CONCLUSIVE ABSENT A CLEAR AND FULL SHOWING OF ARBITRARY ACTION OR A PLAIN ABUSE

Judicial review of assessments is limited. Florida has adopted the general rule that the question of the existence and extent of special benefits is a question of legislative fact which is conclusive absent a clear and full showing of arbitrary action or a plain abuse. South Trail Fire Control District v. State, 273 So.2d 380, 383 (Fla. 1973) (fire protection services). See also Fire District No. 1 of Polk County v. Jenkins, 221 So.2d 740, 741-2 (Fla. 1969) (fire protection services); State v. Warren, 57 So.2d 337, 341-3 (Fla. 1951) (maintenance of canals for drainage); Martin v. Dade Muck Land Co., 95 Fla. 530, 116 So. 449, 464-5 (1928) (drainage district); Atlantic Coast Line R.R. v. City of Gainesville, 83 Fla. 275, 91 So. 118, 121-22 (1922) (road improvements). 70A Am.Jur.2d, Special or Local Assessments, § 26, p. 1151.

The CHURCHES attempt to discount this general rule by stating that the rule only applies to the second element of an assessment - apportionment. (Answer brief, pages 15-19). The CHURCHES' argument disregards the plain language of the South Trail case and disregards the plain holdings of many decisions from this Court that the general rule applies to both elements of an assessment.

The plain language of this Court in South Trail, supra, 273 So.2d at 383, was that "[t]he question of the existence and extent of special benefit...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...." (emphasis added) The plain language of South Trail applies to the first element of an assessment - special benefit.

The plain holdings of this Court further illustrate the flaw in the CHURCHES' contention. First, in Fire District No. 1 of Polk County, 221 So.2d 740 (Fla. 1969), both elements of an assessment for fire protection services were at issue. After describing the benefits of fire protection and stating that the benefits need not be direct or immediate, this Court quoted with approval Martin v. Dade Muck Land Co., supra, 116 So. at 464, and stated, in part, that where "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...." Id at 742. This Court then held that the Appellee failed to show that the legislative determination was arbitrary or oppressive and reversed the lower court.

Second, in State v. Warren, 57 So.2d 337 (Fla. 1951), the Respondents contended that they received no benefits from a drainage district since their property was located within a Station that had a self-contained drainage unit. This Court stated:

> Lack of benefits cannot form a defense to or the means of attack on tax liability to a

> drainage district under a statute providing that the taxes are for a special benefit to the lands involved unless there is a clear showing of abuse of discretion on the part of the Legislature. In Bannerman v. Catts, 80 Fla. 170, 85 So. 336, 343, we said: "It is a well-settled principle that the legislative determination of the benefits derived or the necessity and advisability of a local or special assessment is conclusive and not subject to review by the courts unless it is so devoid of any reasonable basis as to be essentially arbitrary and an abuse of power." (emphasis added)

Warren, supra at 342. After quoting portions of Martin v. Dade Muck Land Co., supra, 116 So. at 465, this Court then briefly examined the question of benefits and stated:

> It seems to us that were it not for the District drainage system the waters might percolate even more onto the Station lands. It is also reasonable to assume that the District handles water which percolates from the Station lands. We do not believe the allegations of the amended return are sufficient to show that the Legislative determination of benefits was an abuse of legislative authority.

Warren, supra at 342-3.

Finally, in Martin v. Dade Muck Land Co., 116 So. 449 (Fla. 1928), land owners contested an assessment from the Everglades drainage district which covered many cities and counties including Okeechobee, Clewiston, Belle Glade, Deerfield, Pompano, Davie, part of Fort Lauderdale, Dania, Hialeah and part of Miami. The complainants owned developed residential property in Coral Gables which was elevated more than other areas in the District. The complainants contended that they received no benefit from the drainage district since their property was elevated. This Court

held that the land owners were nevertheless benefited. This Court stated:

> In the absence of a flagrant abuse of legislative power or of purely arbitrary legislative action, which invades organic property rights, the state may by statute establish drainage district and tax lands therein for local improvement; and none of such lands may escape appropriate taxation for the local improvement solely because they will not receive direct or exactly equal benefits, where no arbitrary and oppressive action is clearly and fully shown.

Martin, supra at 465.

While Martin did involve a "special assessment ad valorem tax" for a drainage district, this Court has consistently applied the rationale of Martin in assessment cases on this issue. See South Trail, supra, 273 So.2d at 383; Fire District of Polk County, supra, 221 So.2d at 742.

The CHURCHES also contend on page 19 of the answer brief that there are other special benefit cases which do not specifically make a finding of arbitrary action or plain abuse and, therefore, the rule does not apply to the special benefit element. However, there is no indication that the litigants in those cases raised the issue presented in this case at the trial level or on appeal. Furthermore, each of those cases found that the constitutionally protected homestead exemption was violated.

The State Legislature and the Board of County Commissioners of Sarasota County acting in their legislative capacities determined by direct legislative enactments that land owners who contribute to the stormwater problem by increasing the amount of stormwater that is put into the system and by permitting rain water containing

pollutants into the system benefit from the system since it controls and treats the stormwater problems which these properties create. These findings of legislative fact establishing benefit to such property owners based on their contribution to the need for the system should not be set aside by the Courts absent a finding of arbitrary action or plain abuse. South Trail Fire Control District v. State, 273 So.2d 380, 383 (Fla. 1973); Fire District No. 1 of Polk County, 221 So.2d 740, 741-2 (Fla. 1969); State v. Warren, 57 So.2d 337, 341-3 (Fla. 1951); Martin v. Dade Muck Land Co., 95 Fla. 530, 116 So. 449, 464-5 (1928); Bannerman v. Catts, 80 Fla. 170, 85 So. 336, 343 (Fla. 1920).

There was no finding by the Lower Courts of arbitrary action or a plain abuse. The Lower Courts simply found, in their opinions, that while these services were necessary and essential that there was no evidence presented of any special benefit. It is quite clear that the Lower Courts substituted their opinion of what a special benefit should be in determining that there was no special benefit rather than reviewing and analyzing whether the legislative determinations of benefit and the confirming testimony at trial were arbitrary and a plain abuse.

In this case, there was no finding by the Lower Courts of any arbitrary action or plain abuse by the state legislature or by the local legislative body and, there was no evidence presented at trial of any arbitrary action or plain abuse. The decisions of the Lower Courts should be reversed.

III. THE RECORD IS REPLETE WITH EVIDENCE OF SPECIAL BENEFIT

SARASOTA contends that the record in this case is replete with evidence of special benefit. A summary of this evidence is set forth on pages 9 and 16 of SARASOTA's initial brief and includes the control and treatment of the stormwater runoff from each owner's property (including church properties), flood prevention and reduced flood insurance premiums.[1] Despite the evidence of special benefit presented, the Lower Courts disregarded this testimony and found that there was "[n]o evidence...presented of any direct or special benefit to any of the church properties involved in this lawsuit." The legal issue thus presented is:

> Whether state and local legislative determinations that stormwater services benefit owners of developed properties because such properties contribute to the need for the services is so devoid of any reasonable basis as to be essentially arbitrary and an abuse of power.

See e.g. Bannerman v. Catts, 85 So. 336, 343 (Fla. 1920).

Despite this clear legal issue, the CHURCHES devote many pages of their answer brief to a discussion of presumptions of correctness of the findings of the Trial Court and the weighing of

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[1] Unlike Fisher v. Board of County Commissioners of Dade County, 84 So.2d 572 (Fla. 1956) there is competent substantial evidence of special benefit to support the state and local legislative findings of fact concerning benefit. In Fisher, the only evidence to support the findings of fact was a county engineering report which did not even fully support the legislative findings. There was no affirmative testimony, as present in this case, from professional civil engineers and a licensed insurance agent to provide independent testimony to support the legislative findings of fact. (T. 221-2, 257, 268-71, 278-79, 243-44, 308, 311-14, 468-70).

evidence by the Trial Court. (Answer brief, p. 20-2, 28-9, 31-2) However, the Trial Court did not weigh the evidence, it simply determined in its opinion that there was no evidence of any special benefit to the CHURCHES as a result of the stormwater services. As set forth in SARASOTA's initial brief on pages 18 through 22, stormwater services do provide special benefits sufficient to sustain an assessment.

IV. RESPONDENTS CONFUSE THE SPECIAL BENEFIT AND APPORTIONMENT ELEMENTS OF AN ASSESSMENT

Despite the concession by the CHURCHES that "[t]he case at bar is clearly a special benefits case, not an apportionment case," (Answer Brief p. 13), the CHURCHES spend considerable portions of their Answer Brief discussing apportionment issues. For example, the CHURCHES discuss: the Utility's allocation of its budget between planning, design, maintenance, operation and construction; the geographical boundaries of the Utility; and, whether there should be an apportionment based on water basins within SARASOTA. (Answer Brief p. 24-8, 36-42) These issues are all apportionment issues and do not control the issue of whether there was evidence presented of special benefit. The Lower Courts never made any finding against SARASOTA on the apportionment issue. This case is a special benefits case. (Answer Brief p. 13) There was substantial competent evidence of special benefit. The decisions of the Lower Courts should be reversed.

V. REVENUE PRESSURES DID NOT LEAD TO SARASOTA'S STORMWATER ASSESSMENT

On pages 29 through 30 and 42 through 43 of the Answer Brief, the CHURCHES contend that SARASOTA was reacting to revenue pressures when it decided to fund the Utility by non-ad valorem assessments. There was no evidence presented of any "revenue pressures" in SARASOTA which would support such a contention. The testimony was unrebutted that a non-ad valorem based assessment was used to fund the Utility because it was a more fair and equitable way to pay for stormwater services by looking to the contribution which each land owner's property makes to the need for the Utility. (T. 221) While this Court in State v. City of Port Orange, 650 So.2d 1 (Fla. 1994) recognized revenue pressures at all levels of government in Florida, there are no such revenue pressures evident from the record in this case or which exist in SARASOTA. Unlike the user fees in City of Port Orange, the stormwater non-ad valorem assessments are expressly authorized by Chapter 403, Florida Statutes. There was no creativity, just pursuit of legislatively authorized funding mechanisms to handle the increased stormwater runoff caused by developed property which would otherwise result in flooding and pollution.

VI. IN THE EVENT THE COURT SHOULD OVERRULE OR SUBSTANTIALLY RECEDE FROM EARLIER INTERPRETATIONS OF FLORIDA LAW REGARDING ASSESSMENTS, AND SHOULD DECLARE SARASOTA'S ASSESSMENT TO BE INVALID, IT WOULD NOT BE APPROPRIATE TO ORDER A REFUND OF THE ASSESSMENTS, WHICH WERE IMPOSED IN GOOD FAITH RELIANCE ON PRIOR LAW.

The invalidation of Ordinance No. 89-117 would represent a dramatic change in the interpretation of Florida law regarding assessments; therefore, any such decision should be applied prospectively. Contrary to the CHURCHES' suggestion, the propriety of the prospective application of the Court's decision in this case is governed by Florida law, not by federal law. State courts are free to limit the retroactive operation of their own interpretations of state law. See Great Northern Railway Company v. Sunburst Oil & Refining Company, 287 U.S. 358, 364-66; 77 L.Ed. 360; 53 S.Ct. 145 (1932).

The CHURCHES' attack on Ordinance No. 89-117 is based on Florida law. Thus, any decision invalidating the Ordinance would constitute the Court's own interpretation of Florida law, with which federal courts will not interfere. See Michigan v. Long, 463 U.S. 1032, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1983) (interpreting the rule that federal courts will decline jurisdiction over an appeal from a decision of a state's highest court, where the state court relies upon an adequate and independent state ground).

By contrast, in McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 110 L.Ed.2d 17, 110 S.Ct. 2238 (1990), and in James B. Beam Distilling Company v. Georgia, 501 U.S--, 115 L.Ed.2d 481, 111 S.Ct. -- (1991), the tax which was at

issue had been invalidated under the federal Commerce Clause, not state law. Similarly, the tax at issue in Harper v. Virginia Dept. of Taxation, 509 U.S. --, 125 L.Ed.2d 74, 113 S.Ct. -- (1993) was held to be invalid because it violated the federal constitutional doctrine of intergovernmental tax immunity. The court in Harper recognized the importance of the distinction between decisions interpreting state law and those interpreting federal law, stating: "Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law [citing Great Northern R. Co.] cannot extend to their interpretations of federal law." Harper, 125 L.Ed.2d at 88.

This Court has consistently applied decisions such as one which would invalidate Ordinance No. 89-117 prospectively, at least since Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973) (holding that where the school board adopted an invalid tax in good faith reliance on a presumptively valid statute and would suffer hardship in the event of a refund, a refund would be inappropriate). The CHURCHES contend, citing Coe v. Broward County, 358 So.2d 214 (Fla. 4th DCA 1978), that Gulesian carves out only a narrow exception to a taxpayer's right to a refund. Yet, just one year after Coe was decided, this Court again declined to order the refund of an invalid tax, stating, "One of the major considerations in such a determination is whether the taxing authority acted in good faith." Alsdorf v. Broward County, 373 So.2d 695, 701 (Fla. 1979).

Florida law relating to the propriety of a refund of invalid

taxes or assessments is further elucidated by National Distributing Co. Inc. v. Office of the Comptroller, 523 So.2d 156 (Fla. 1988). Although the U.S. Supreme Court's decision in McKesson invalidates the holding of National Distributing Co., which denied the refund of a tax which was invalid under the federal Commerce Clause, the case remains a valid expression of the law in this state relating to the prospective application of decisions based on Florida law. See, e.g., City of Miami v. Bell, 634 So.2d 163, 166 (Fla. 1994)(citing National Distributing Co. as authority for the prospective application of the decision).

Based on the equitable factors weighed by the Court in National Distributing Co., the equities of this case favor the denial of a refund. All of the funds collected through Ordinance No. 89-117 during the relevant time period have been expended by SARASOTA in operating, maintaining, or improving the stormwater management system. The order of a refund would therefore place an unreasonable burden on SARASOTA, which would be forced to replace the already expended funds while at the same time attempting to develop a new funding source for the stormwater management system. The taxpayers of SARASOTA would likely be required to pay for a refund of the old assessment with new taxes.

A refund would be a windfall for the CHURCHES, which have already received the benefits of SARASOTA's stormwater management system and the improved service and maintenance which the special assessment made possible.

Most importantly, SARASOTA enacted Ordinance 89-117 in good

faith reliance on Chapter 403, Florida Statutes, and on the substantial body of Florida case law upholding assessments for essential county services.

In the unlikely event that this Court invalidates Ordinance No. 89-117, the ruling should be applied prospectively and a refund should not be granted.

CONCLUSION

SARASOTA's stormwater assessment is a valid assessment in accordance with law. The Lower Courts improperly invalidated the assessment by substituting their own opinions as to whether special benefits existed, rather than determining whether the state and local legislative bodies acted arbitrarily and abusively in determining that special benefits existed.

The record was replete with evidence of special benefit. The record was devoid of any evidence of arbitrary action or plain abuse. SARASOTA's stormwater assessment is valid and the Lower Court's decisions should be reversed.

In the unlikely event that this Court determines that SARASOTA's stormwater assessment is invalid, SARASOTA requests that such decision be applied prospectively only and that a refund be denied to the CHURCHES.

Dated:_____

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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 the parties on the attached Service List, this 5th day of May, 1995.

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