IN THE SUPREME COURT OF FLORIDA
CASE NO. 86,210

LIZZIE MAE HARRIS, WANDA M. TOWNSEND and ELLIS TOWNSEND,

Appellants,

vs.

DALE WILSON, JAMES JETT, LARRY LANCASTER, PATRICK McGOVERN and GEORGE BUSH, as constituting the Board of Clay County Commissioners; CLAY COUNTY, a Political Subdivision of the State of Florida,

Appellees.
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First DCA Case No. 93-3445

L.T. Case Nos. 92-2585-CA and 93-0409-CA

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PRELIMINARY STATEMENT

This brief is submitted by Amici Curiae Florida Association of Counties, Florida Association of County Attorneys, and Florida League of Cities, Inc. in support of Clay County.

Amici Curiae adopt and incorporate by reference the arguments contained in Clay County's Answer Brief concerning the Sarasota County v. Sarasota Church of Christ, 20 Fla. L. Weekly S600 (Fla. Dec. 21, 1995) opinion, homestead protections, special benefit, fair apportionment, and special assessment service programs.

STATEMENT OF THE FACTS AND CASE

Amici Curiae adopt the statement of the Facts and Case of the Appellee, Clay County.

ARGUMENT

CLAY COUNTY'S SOLID WASTE DISPOSAL SPECIAL ASSESSMENT IS CONSISTENT WITH THE FLORIDA CASE LAW EVOLUTION OF SPECIAL ASSESSMENTS.

Amici Curiae approve and adopt the constitutional and case law analysis contained in the Clay County Answer Brief. The recent decision of this Court in Sarasota County v. Sarasota Church of Christ, 20 Fla. L. Weekly S600 (Fla. Dec. 21, 1995), crystallizes the legal requirements for imposing a valid special assessment under the unique constitutional and statutory home rule concepts of the 1968 Florida Constitution.

The distribution of police and taxing powers between the State of Florida and local governments in the 1968 constitutional revision fundamentally altered the focus of the constitutional analysis for valid special assessments. This realignment of police and taxing powers resulted from two choices by the 1968 constitutional revisors.

First, the 1968 Constitution granted all counties and municipalities, either by direct constitutional grant or by legislative authorization, expanded power to legislate by ordinance on any subject matter not preempted by the Legislature.[1] Second,

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[1] For charter counties, the power of local self-government is a direct constitutional grant upon the approval of a charter by the electors. Art. VIII, § 1(g), Fla. Const. For non-charter counties and municipalities, the expansive power of local self-government awaited implementing legislation. Art. VIII, §§ 1(f) and 2(b), Fla. Const. The Florida Legislature responded and granted comprehensive home rule powers to counties in section 125.01, Florida Statutes, and to municipalities in section 166.021, Florida Statutes.

all forms of taxation other than ad valorem taxation were preempted to the State except as provided by general law. Art. VII, § 1, Fla. Const.

Not only did these fundamental changes sharply contrast with local government police and taxing powers which existed under the 1885 Florida Constitution, but these changes also influenced the language which courts used in analyzing the constitutionality of special assessments.

A. Constitutional Analysis Of A Special Assessment Under the 1885 Florida Constitution.

No provisions relating to the general power of counties comparable to Article VIII, sections 1(f) and (g), Florida Constitution (1968), existed in the 1885 Florida Constitution. Article VIII, section 1, Florida Constitution (1885), merely provided, "The State shall be divided into political divisions to be called counties." Additionally, Article IX, section 1, Florida Constitution (1885), stated, "The Legislature shall provide for a uniform and equal rate of taxation. . . ."

This brief mention of counties in Article VIII, section 1, Florida Constitution (1885), and the posture of implementing general legislation placed counties, before the 1968 Florida Constitution, in an area of strict and limited power. All county power had to be found in an express grant from the Legislature and no implied power could be inferred that would result in the exercise of any power not expressly conferred by the State. See

Amos v. Mathews, 126 So. 308 (Fla. 1930); and Molwin Inv. Co. v. Turner, 167 So. 33 (Fla. 1936).

Likewise, under the 1885 Florida Constitution, all municipal powers were dependent on a specific delegation of authority by the Legislature in a general law or special act.

> The Legislature shall have power to establish, and to abolish, municipalities to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time.

Art. VIII, § 8, Fla. Const. (1885).

With legislative authority being required for any county or municipality to act, the primary source of county power was a special act.[2]

This requirement of an express legislative grant was a reflection of the prevailing 19th century local government theory known as "Dillon's Rule."[3] Under this approach to municipal power, "[t]he authority of local governments in all matters, including those previously local, was limited to that expressly granted by the Legislature, or that which could be necessarily implied from an express grant." Sparkman, The History and Status of Local

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[2] Examples of the time demand on the Legislature to focus on issues of local authority are: (1) the number of local bills introduced in the 1965 Legislative Session was 2,107 and (2) the number of population acts enacted had grown to 2,100 by 1970 with over 1,300 having been enacted since the effective date of the 1960 census. Sparkman, The History and Status of Local Government Powers in Florida, 25 U. Fla. L. Rev. 271, 286 (1973).

[3] The term "Dillon's Rule" is named after a treatise on municipal corporations by J. Dillon. See Malone v. City of Quincy, 62 So. 922 (Fla. 1913) (a typical application of Dillon's Rule by the Florida Supreme Court).

Government Powers in Florida, 25 U. Fla. L. R. 271, 282 (1973). To find a municipal power to legislate, the search was for an express delegation of authority from the Legislature in a general law or special act. The amount and source of power was essentially the same for both municipal and county governments.

Under the 1885 Florida Constitution, a special act could also grant the power to tax as well as serve as the source of local government authority. No general law authorization of taxation was required. Article IX, section 3, Florida Constitution (1885), provided, "No tax shall be levied except in pursuance of law," and Article IX, section 5 stated:

> The Legislature shall authorize the several counties and incorporated cities or towns in the State to assess and impose taxes for county and municipal purposes, and for no other purposes, and all property shall be taxed upon the principles established for State taxation.

Thus, because both counties and municipalities could be authorized to exercise police and taxing powers by special act, ordinarily, no constitutional concern arose as to the method of imposing special assessments.[4] This lack of a need for a constitutional distinction between taxes and special assessments resulted in the use of imprecise language by courts. See, e.g., Martin v. Dade Muck Land Co., 116 So. 449 (Fla. 1928), appeal dismissed, 278 U.S. 560 (1928) (the term "special assessment ad

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[4] In addition, few special assessment cases raised issues under the 1885 Constitution concerning the homestead protection from forced sale because both taxes and assessments were exempted.

valorem tax" was used in upholding a charge for drainage improvements).

Likewise, the lack of any constitutional need for a general law authorization for a tax focused the constitutional analysis predominately on what is now described as the "fair apportionment test."[5] The analysis in most 1885 constitutional cases concerned whether a special assessment apportionment, based on the assessed value of property, was an attempt to avoid or evade the constitutional homestead exemption from ad valorem taxes.[6] Thus, the major cases relied upon by the Appellants are all pre-1968 Florida Constitution cases in which the issue was one of fair apportionment: whether the charge apportioned, based upon assessed value, was an ad valorem tax and thus an attempt to avoid or evade the constitutional tax exemption to which homesteads were entitled at the time of the decision.

For example, in City of Ft. Lauderdale v. Carter, 71 So.2d 260 (Fla. 1954), the City of Ft. Lauderdale "levied an ad valorem tax upon all real property . . . to be used to defray the expenses of garbage, waste, and trash collection." Id. at 261. This Court held the charge to be a tax, not a "special assessment," because it

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[5] A separate "special benefit test," as articulated by this Court in City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992), was generally not at issue in cases decided under the 1885 Florida Constitution since a county or a municipality did not possess the home rule power to impose a special assessment. Thus, whether the charge was a special assessment within its home rule power or a tax constitutionally preempted to the State, was not an issue.

[6] Such ad valorem tax exemption did not apply to "assessments for special benefits." Art. X, § 7, Fla. Const. (1885); Art. VII, § 6(a), Fla. Const. (1968).

failed to meet what is now described as the fair apportionment test. The charge "d[id] not attempt to bear any proportionate relationship to the cost of the service to be rendered to any particular property." 71 So.2d at 261.

Similarly, in Fisher v. Dade County, 84 So.2d 572 (Fla. 1956), a special assessment for street improvements was held to be an ad valorem tax, not a special assessment, because the costs were apportioned among all property "in proportion to the assessed valuation of such real property." Id. at 574. This Court held, "Nothing could be more typical of pure ad valorem taxation." Id. The obvious failure to meet what is now described as the fair apportionment test in an attempt to avoid the homestead exemption from ad valorem taxation does not lend any support to the Appellants' argument. Obviously, street improvements can be funded by special assessments if the fair apportionment test is met.

Finally, in St. Lucie County-Ft. Pierce Fire Prevention and Control Dist. v. Higgs, 141 So.2d 744 (Fla. 1962), St. Lucie County was granted the authority to levy a tax for fire protection at a rate limited to eight mills of assessed value. Again, this Court held that a legislative declaration that the tax was a special assessment did not avoid its characterization as a tax because the amount imposed against each parcel was "apportioned in proportion to its value." Id. at 746. The assessment failed because it did not meet what is now described as the fair apportionment test. But see Fire Control No. 1 of Polk County v. Jenkins, 221 So.2d 740 (Fla. 1969), and South Trail Fire Control Dist., Sarasota County v.

State, 273 So.2d 380 (Fla. 1973) (special assessments for fire control services were upheld; the method of apportionment was not based upon the assessed value of the benefiting property). This fundamental constitutional distinction is overlooked in the second dissent in the Sarasota County v. Sarasota Church of Christ case when the following quote from Fisher v. Dade County, 84 So.2d 572 (Fla. 1956), is cited:

> When we subject the proposed "assessment" suggested by this record to the test announced by the precedents, we cannot avoid the conclusion that it is purely and simply an ad valorem tax and that it lacks all the elements of an "assessment for special benefits" within the contemplation of the constitutional provision that permits such a levy against homesteads although it is clothed with all of the elements of ad valorem taxation. [cits. omitted].

20 Fla. L. Weekly at 602 (emphasis added).

The charge in Fisher v. Dade County was apportioned based upon assessed value and, under any examination, constituted an ad valorem tax. Therefore, designation of the charge as a "special assessment" was error since the charge failed to meet the fair apportionment test under the two prong test for a valid special assessment articulated by this Court in City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992).[7]

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[7] However, this Court in City of Boca Raton v. State, did uphold the special assessment there even though it was apportioned on an ad valorem basis. Unlike City of Ft. Lauderdale, St. Lucie County-Ft. Pierce Fire Prevention and Control Dist., and Fisher, this Court concluded in City of Boca Raton that the cost of the downtown redevelopment improvement program was most fairly apportioned among the benefited properties in relation to their value. 595 So.2d at 31-32. A direct relationship between the proposed improvements and property values existed.

B. Constitutional Analysis Of A Special Assessment Under The 1968 Florida Constitution.

This Court in City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992), clearly stated the two requirements for a valid special assessment:

> 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. [cit. omitted] Second, the assessment must be fairly and reasonably apportioned among the properties that receive the special benefit. [cit. omitted] Thus, a special assessment is distinguished from a tax because of its special benefit and fair apportionment.

Id. at 29.

This landmark decision is particularly significant because the two prong test which distinguishes a valid special assessment from a tax clearly evolved within the framework of the constitutional and statutory power of local self-government currently possessed by both counties and municipalities. The special assessment construed in City of Boca Raton v. State was imposed pursuant to a municipal home rule ordinance:

> Thus, a municipality may now exercise any governmental, corporate, or proprietary power for a municipal purpose except when expressly prohibited by law, and a municipality may legislate on any subject matter on which the legislature may act[.]

595 So.2d at 28. The conclusion as to the expansive home rule power of municipalities was preceded by a thorough discussion of the constitutional and statutory home rule authority envisioned in

the 1968 constitutional revision.[8] No general law authorization is required and a special assessment can be imposed by ordinance.[9]

Thus, under the allocation of police and taxing powers among the State and county and municipal governments provided in the 1968 constitutional revision, the special benefit requirement of the City of Boca Raton v. State two prong test has the same place in the constitutional scrutiny as the fair apportionment requirement. The services or improvements funded by a special assessment and imposed by ordinance must provide a special benefit to the assessed property regardless of the method of apportionment. If the service or improvement fails to provide the requisite special benefit by possessing no logical relationship to the use and enjoyment of the assessed property, the charge imposed is a tax. And, then under the 1968 constitutional revision, a general law authorization would

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[8] Additional decisions of this Court recognize similar expansive home rule concepts for non-charter counties. See State v. Orange County, 281 So.2d 310 (Fla. 1973); Speer v. Olsen, 367 So.2d 207 (Fla. 1978); Taylor v. Lee County, 498 So.2d 424 (Fla. 1986).

[9] The second dissent in Sarasota County v. Sarasota Church of Christ, 20 Fla. L. Weekly S600 (Fla. Dec. 21, 1995), seems to overlook this home rule principle in the following statement:

> Chapter 403, Florida Statutes (1989), provided Sarasota County with a structure and a vehicle for the funding of stormwater utilities which the County can utilize without the constitutional infirmities of this ordinance.

Id. at S603. Whether a special assessment is authorized by general law or county or municipal ordinance, the two prong test of "special benefit" and "fair apportionment" are required to be met. Otherwise the charge is a tax.

be required. Neither an ordinance nor a special act can pass constitutional muster for the authorization of a tax.

The merger in the 1968 constitutional revision of home rule authority with the preemption to the State of all taxing power except ad valorem taxation is the circumstance which elevates the special benefit requirement to its predominate place under current constitutional analysis. The bright line between a valid special assessment and a tax exists where the service or improvement to be funded satisfies the special benefit requirement or constitutes a general governmental service or improvement required to be funded from taxation. If the services and improvements meet the special benefit requirement, then the cost must be reasonably and fairly apportioned among the benefited properties to satisfy both prongs of the City of Boca Raton v. State requirement for a valid special assessment.

CONCLUSION

Amici Curiae urge this Court to affirm the opinion of the First District Court of Appeal as being consistent with the clear precedent on the constitutional and statutory power of counties and municipalities embodied in the 1968 constitutional revision and with the well established requirements for a valid special assessment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to GLORIA A. EINSTEIN, ESQUIRE, Jacksonville Area Legal Aid, Inc., 1488 Park Avenue, Orange Park, Florida 32073; APRIL CARRIE CHARNEY, ESQUIRE, Gulfcoast Legal Services, Inc., 1750--17th Street, Unit I, Sarasota, Florida 34234; LARRY E. LEVY, ESQUIRE, The Levy Law Firm, Post Office Box 10583, Tallahassee, Florida 32302; MARK ALIFF, ESQUIRE, Assistant Attorney General, Office of the Attorney General, Tax Section, The Capitol, Tallahassee, Florida 32399-1050; and ROBERT L. NABORS, ESQUIRE and VIRGINIA SAUNDERS DELEGAL, ESQUIRE, Nabors, Giblin & Nickerson, P.A., 315 South Calhoun Street, Barnett Bank Building, Suite 800, Post office Box 11008, Tallahassee, Florida 32302, this 8th day of March, 1996.

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