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SUPREME COURT
STATE OF FLORIDA

CASE NO: 86,210

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JAN 29 1996
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LIZZIE HARRIS, WANDA M. TOWNSEND, and **ELLIS TOWNSEND,**

Petitioners,

vs.

Lower Docket No.: 93-3445

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,

Respondents.
_____/

BRIEF OF AMICUS CURIAE
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PRELIMINARY STATEMENT

Petitioners, Lizzie Harris, Wanda M. Townsend, and Ellis Townsend will be referred to collectively herein as the "homeowners." Respondents, Dale Wilson, James Jett, Larry Lancaster, Patrick McGovern, George Bush, and Clay County, Florida, will be referred to collectively herein as the "county." Amicus curiae, Quinton Dryden, will be referred to herein as the "amicus."

STATEMENT OF THE CASE

The amicus adopts the statement of the case as set forth in the initial brief of the homeowners.

STATEMENT OF THE FACTS

The amicus adopts the statement of the facts of the homeowners and adds the following. The charge levied pursuant to ordinance 92-26, described as a "Partial Year Solid Waste Disposal Assessment," is imposed only on some of the residential property in the unincorporated area of the county. It is not imposed on commercial property which generates solid waste and is not imposed on residential improved property "provided with commercial container service by a County franchised solid waste hauler at the time the Final Assessment Resolution is adopted." See Article II, Section 2.01(A), Article II, Section 1.01, which contains the definition of "residential property," and Article I,

Section 1.03(D). The factual scenario surrounding the adoption of ordinance 92-26 is:

1. Prior to adoption, all persons and entities disposing of solid waste at the county landfill paid a tipping fee based on the weight of that disposed of, for the use of the landfill.

2. After adoption, only residential property as defined in the ordinance pay the tipping fee, now labeled a solid waste disposal assessment, through the charge levied in the ordinance. These residential property owners no longer are required to pay a tipping fee at the dump site.

3. All other residential property owners and all commercial property owners are not subject to the assessment made by the ordinance but continue to pay the tipping fee at the dump site, either directly or indirectly, through the charge made pursuant to agreement with the county franchised hauler. See Section 4.03(A), which states:

> With the exception of Residential Property subjected to assessment under this Ordinance, a disposal fee shall be paid for all Solid Waste generated in both incorporated and unincorporated areas of the County and delivered to a Solid Waste Disposal Facility. Solid Waste generated on Residential Property against which a Partial Year Solid Waste Disposal Assessment has been imposed shall be delivered by a County franchised solid waste hauler to a Solid Waste Disposal Facility without payment of or charge for any additional disposal fee.

(Emphasis added.)

4. The lien created by the ordinance attaches only to the residential property made subject to the levy of the assessment.

5. No assessment is levied against either the residential property excepted by the ordinance's definition, or commercial property.

6. The ordinance contains provisions designed to prevent or discourage commercial property owners from hauling residential garbage. See Section 4.03(B), (C), and (D), which provide:

> (B) It shall be a violation of this Ordinance to avoid payment of a disposal fee to the County for Solid Waste generated on Commercial Property by depositing such Solid Waste into a receptacle serving Residential Property.
>
> (C) It shall be a violation of this Ordinance to deliver Solid Waste to a Solid Waste Disposal Facility which includes both Solid Waste generated on Residential Property and Solid Waste generated on Commercial Property unless (1) the Person delivering the Solid Waste identifies the relative amount of each component to the County's sole satisfaction and (2) pays the appropriate disposal fee for all Solid Waste which was generated on Commercial Property. Failure to conclusively and expeditiously identify at the entrance to the Solid Waste Disposal Facility the relative amount of Solid Waste contained in any truckload shall result in the determination that the entire truckload consists of Solid Waste generated on Commercial Property.
>
> (D) It shall be a violation of this Ordinance for a Person to offer Solid Waste generated on Commercial Property for disposal at an Environmental Convenience Center or a Solid Waste Disposal Facility by representing

such Solid Waste as having been generated on Residential Property.

SUMMARY OF ARGUMENT

At issue is the validity of Clay County ordinance 92-26, and the charge levied pursuant thereto. The ordinance imposes a charge against homestead residential property labeled a "solid waste disposal assessment" to pay for the operation of a county landfill. The charge is imposed only on residential property as defined in the ordinance, and no similar charge is imposed against commercial property. The ordinance creates a lien on all residential property which is subject to the levy for nonpayment. No assessment is imposed and no lien attaches to residential improved property "provided with commercial container service by a County franchised solid waste hauler at the time the Final Assessment Resolution is adopted," because such residential property is excluded from the definition of "Residential Property" found in Section 1.01 of the Ordinance. Thus, the ordinance singles out one class of residential property, and imposes the assessment only on it. This is patent discrimination of the rankest kind.

The ordinance also imposes no assessment on residential property within municipalities stating in the findings in Section 1.03(D):

> (D) It presently does not appear necessary to impose a solid waste disposal assessment in incorporated areas of the County due to (1) the compactness or intensity of development in incorporated

> areas being conducive to more efficient commercial service to improved properties within incorporated areas and (2) the current recovery of disposal costs allocable to improved properties within incorporated areas via tipping fees charged for disposal at a Solid Waste Disposal Facility.

(Emphasis added.) This gives two reasons why city residential property is not assessed, one of which acknowledges that such property receives "more efficient commercial service" within cities, and the other of which acknowledges that the "current recovery of disposal costs . . . via tipping fees charged . . . at a Solid Waste Disposal Facility," is sufficient.

In plain language, this means that city residences are served by franchised haulers, and enough tipping fees are collected to pay the disposal costs. These two reasons why city residential property is not assessed, conversely explain the county's true motivation in adoption of its ordinance and assessment levy. That is, it guarantees that the county will receive the necessary funds because it holds homesteads hostage for nonpayment, is not subject to the $25,000 homestead tax exemption, and franchised service may not be available in some areas of the county. This also explains the definition of "residential property" subject to the levy, which excludes residential property which has commercial container service from a county franchised hauler.

It is undisputed that the landfill serves all property in the county whether residential or commercial and that commercial property owners generate solid waste just like

residential owners who own homes. Commercial owners are permitted to contract with garbage haulers. Similarly, residential improved property which is serviced by contracted for commercial container service, is not assessed. Only the other residential property is assessed and it is only the owners of same that must pay the assessment, which supposedly took the place of the tipping fee formerly charged. They must also either pay for garbage collection or haul their own garbage to the landfill.

The amicus submits that the sole purpose of this form of financing the landfill operation, is to circumvent the homestead exemption and protections and that that is the sole reason for only levying the charge against designated residential property. Because commercial property owners and other residential owners generate garbage just the same as the assessed residential property owners, there is no legitimate basis for the different treatment.

The operation of a landfill is a proprietary function as opposed to a governmental or sovereign function. The tipping fee charged for landfill use is a proprietary charge. It is a charge which emanates from ownership of property and is in the same category as a toll for use of a road or bridge, a utility charge for electricity or water, or a fee to a garbage collection company. Nonpayment of a proprietary charge gives rise to the existence of a debt, which if not paid can result in a suit and judgment lien against property. However, in Florida such lien

could not attach to homestead property because of Article X, Section 4, Florida Constitution. That is precisely why the county has created its levy and labeled it a "special assessment." It allows it to circumvent the homestead protection from forced sale and the homestead tax exemption. By labeling the charge a "special assessment," the county can lien the homestead and coerce payment. Also, the ordinance is drawn to allow for collection pursuant to the non-ad valorem assessment method the following year, which allows for collection through sale of certificates like ad valorem taxes. See Section 1.03(G), which states:

> A Partial Year Solid Waste Disposal Assessment imposed pursuant to this Ordinance provides an interim mechanism to generate revenue from parcels of Residential Property for the last nine months of the 92/93 Fiscal Year and will provide a practical opportunity to thereafter transition to an annual non-ad valorem assessment within the meaning and intent of the Uniform Assessment Collection Act.

Franchised commercial haulers continue to pay the tipping fee and their customers contract for their services. The contracts are for performing the proprietary activity of picking up, transporting, and disposing of waste, and presumably is structured to include the county's tipping fee. In-city residential property owners do likewise.

The county's charge is a substitution for the tipping fee. The residential properties subject to the assessment pay a tipping fee but must still either pay the franchised hauler to pick up garbage and transport it or transport it themselves. If

the tipping fee was a proprietary service charge, then the substitute must be also. Garbage collection and disposal has traditionally been recognized as a proprietary and not a governmental activity. See Turner v. State ex rel. Gruver, 168 So.2d 192 (Fla. 3d DCA 1964); Chardkoff Junk Co. v. City of Tampa, 135 So. 457 (Fla. 1931). A charge to go onto another's property is clearly a proprietary charge which anyone can make. A charge to go onto another's property and hunt, plant crops, drink water, or dump garbage is still a charge for the use of property and is a proprietary charge.

The determination of what is a "special assessment," or an "assessment for special benefits," or an "assessment," as such terms are used in Article VII, Section 6, and Article X, Section 4, Florida Constitution, is a purely judicial function. Similarly, the determination of whether certain activities are proprietary or sovereign/governmental is a judicial function.

ARGUMENT

The charge levied by Clay County Ordinance 92-26, as a substitution for a tipping fee, is not a special assessment, or assessment for special benefit, as such terms are used in the Florida Constitution and the district court's decision is contrary to law.

The amicus submits that the district court decision is incorrect in its holding that a charge substituted for a tipping fee is a valid special assessment which can become a lien against the homestead. The amicus further submits that the district

court was incorrect in bottoming its holding on the premise that since the county commission had declared the charges to be special assessments benefitting the property assessed, that this precludes judicial inquiry into the true nature of the charges. In a case such as that at bar, which requires a determination of the true meaning of certain terms used in the constitution, the district court's holding permits the legislature, and here the county commissions, to define the meaning of terms used in the Florida Constitution. The amicus submits that the determination of the meaning of terms in the constitution is a purely judicial function and not within the province of the legislature whether at the state or county level.

The amicus submits that tipping fees are proprietary charges which emanate from the ownership of property and are not sovereign charges. Amicus further submits that distinguishing proprietary from sovereign-governmental functions is a judicial function. The nature of such functions cannot be changed by a self-serving county declaration or finding in an ordinance. Taxes and special assessments are sovereign charges; that is charges which emanate from sovereignty as opposed to proprietorship. No private entity or person can exercise any aspect of the sovereign power. However, anyone can exercise a proprietary function and charge for the use of property or for a service rendered. Amicus submits that both the trial court and the majority in the district court totally overlooked this distinction in concluding that the assessments levied by the

involved ordinance, as a substitution for tipping fees, are sovereign charges.

The amicus further submits that any ordinance which levies its charge only on a selected class of residential property, is invalid on its face. At bar, the involved ordinance makes no assessment against commercial property or against certain residential property which receives contracted for container garbage disposal services, from the authorized franchise hauler in the county. Thus, those residential homeowners who contract with the county franchised hauler and commercial property owners are not subject to the assessment by the terms of the ordinance. Neither are city residential property owners for the same reasons. This is discrimination of the most flagrant kind.

The involved assessment is imposed by the following provisions in ordinance 92-26. Article II, Section 2.01(A) of the ordinance provides:

> The Board is hereby authorized to impose a Partial Year Solid Waste Disposal Assessment against all Residential Property within the County at a rate of assessment based on the special benefit accruing to such property from the County's provision of Solid Waste management and disposal services. The Partial Year Solid Waste Disposal Assessments shall be imposed in conformity with the procedures set forth in this Article II.

(Emphasis added.) "Residential Property" is defined in Article I, Section 1.01 as follows:

> "Residential Property" means all Improved Property used as single-family Dwelling Units, Apartments or Condominiums except for

> Improved Property provided with commercial container service by a County franchised solid waste hauler at the time the Final Assessment Resolution is adopted.

(Emphasis added.) Findings are contained in section 1.03 of Article I. Section 1.03(D) provides:

> (D) It presently does not appear necessary to impose a solid waste disposal assessment in incorporated areas of the County due to (1) the compactness or intensity of development in incorporated areas being conducive to more efficient commercial service to improved properties within incorporated areas and (2) the current recovery of disposal costs allocable to improved properties within incorporated areas via tipping fees charged for disposal at a Solid Waste Disposal Facility.

(Emphasis added.) These provisions make it clear that no assessment is imposed against that residential property excepted in the definition of "residential property," that residential property in cities is not assessed, and that no assessment is imposed against commercial property. Thus, the only property which is subject to the lien for nonpayment of the assessment is the residential property not within the exception. This means that that residential property, the owner of which has separately contracted to provide for commercial container service by a county franchised solid waste hauler, is not subject to the assessment. Thus, no lien attaches on this property. The ordinance is quite clear in this respect.

It should be further pointed out that the exception applies to those properties which are receiving such service with the county franchised solid waste hauler at the time the final

assessment resolution was adopted. Thus, while the ordinance was being debated, those residential properties who signed agreements to obtain the service from the franchised hauler, would not have their property subject to the assessment. This means that, by their own actions, they could avoid having the property assessed. The arbitrariness inherent in any such scheme is apparent.

In fact, in Cassady v. Consolidated Naval Stores Co., 119 So.2d 35 (Fla. 1960), this Court invalidated a similar arrangement involving ad valorem taxes where the statute provided for separate assessment of subsurface interests in real property only when a return was filed. The statute permitted the owner of property to determine if it was to be taxed or not taxed. Here the owner can avoid the assessment by having a contract for garbage services.

The ordinance is specifically designed to force certain residential owners to pay. Commercial property generates solid waste as does all residential property. However, it is only the residential property classified by the definition which is subject to the assessment as a substitution for the tipping fee.

Each of the various contentions of the amicus will be addressed in order.

1. A tipping fee is a proprietary charge and not a sovereign charge, and hence the county's assessment as a substitution for said charge is also a proprietary charge for the use of property.

The only way the district court's decision can be correct is if there no longer exists a legal distinction between a proprietary charge and a sovereign governmental charge. This Court, as recently as 1994, recognized that such distinction still exists and flows from the very nature of the activity and function being performed by the government. In Sebring Airport Auth. v. McIntyre, 642 So.2d 1072 (Fla. 1994), this Court stated:

> Proprietary functions promote the comfort, convenience, safety and happiness of citizens, whereas government functions concern the administration of some phase of government. *Black's Law Dictionary*, 1219 (6th ed. 1990).

McIntyre, 642 So.2d at 1074 n.1.

The operation of a landfill is a proprietary activity. Anyone can operate a landfill except as restricted by law. Thus, any charge made by a person for the operation of his landfill and use of his property would be a proprietary fee or charge which emanated from his ownership of the involved property. Thus, when Clay County was operating the landfill and charging a tipping fee for all persons bringing solid waste to the landfill, based on the weight of the solid waste being disposed of, it was performing a proprietary activity and the fee charged was a proprietary fee. For the district court's decision to be correct, the operation of a landfill would have to be a sovereign function and the fee charged would have to be a sovereign charge. This obviously was not the case.

In Chardkoff Junk, this Court addressed the question of whether or not the operation of an incinerator was a governmental

or a proprietary function. It held that the operation of an incinerator was a proprietary function and not a governmental function. In Chardkoff Junk, the court discussed the difference between proprietary and governmental functions as follows:

> In 43 C. J. 182, the editor said: "In its public character, a municipal corporation is the agent of the state, acting as an arm of the sovereignty of the state created for the convenient administration of the government, exercising to the extent that they have been granted, the governmental functions and powers of the state. It executes the functions and possesses the attributes of sovereignty which have been delegated by the legislative department of government; municipal corporations are primarily created to perform the functions of local self-government; they chiefly administer the local affairs of the territory incorporated. Governmental functions are those conferred or imposed upon the municipality as the local agency of limited and prescribed jurisdiction, to be employed in administering the affairs of the state, and promoting the public welfare generally. While in a certain sense any municipal function might be regarded as governmental, when properly applied the term 'governmental functions' should be limited to legal duties imposed by the state upon its creature, which it may not omit with impunity but must perform at its peril."

Chardkoff Junk, 135 So. at 459 (emphasis added). Further it stated:

> On the other hand, a municipal corporation in its private or quasi-private capacity enjoys the powers and privileges conferred for its own benefit. In respect of its purely business relations as distinguished from those that are governmental, a municipal corporation is held to the same standard of just dealing that the law prescribes for private individuals or corporations. Then the municipality acts for the private advantage of the inhabitants of the city and

> to a certain extent for the city itself. In such case it is not acting in its governmental capacity as sovereign, or in a legislative capacity, but is acting in a proprietary capacity, acting only in a quasi-public capacity. It is performing a function not governmental, but often committed to private corporations or persons, with whom it may come into competition. The function may be municipal, but the method may not be. It leads to profit, which is the object of the private corporation.

Chardkoff Junk, 135 So. at 459 (emphasis added). Thereafter it held that the operation of an incinerator was not an exclusive governmental function but was instead a proprietary function stating:

> It appears that the operation of an incinerator, is not an exclusive sovernmental function, if it may be considered such in any event. The operation of the incinerator is for the specific benefit and advantage of the urban community embraced within the corporate boundaries. It is especially maintained to peculiarly promote the comfort, convenience, and welfare of the citizens of the municipality, and such benefits are not enjoyed by, nor do the results accomplished affect, the general public beyond the corporate limits.

Chardkoff Junk, 135 So. at 459-460 (emphasis added). Continuing the Court stated:

> In City of Denver v. Porter, the Circuit Court of Appeals of the Eighth Circuit, reported 126 F. 288, it was said:
>
> "The gathering of refuse and waste by a city, and the establishment, maintenance, and operation of dumping grounds for its ultimate disposal, under the direction of the officers of the city health department, is a duty of local or municipal concern, not performed in the exercise of any sovernmental function; and hence the city is liable for the

> negligence of its officers and agents engaged in the performance of such work."

Chardkoff Junk, 135 So. at 460 (emphasis added). This recognizes that the operation of a dumping ground which is simply a landfill was not a government function.

Thereafter, the Court cited with authority from a Mississippi case stating:

> In the case of City of Pass Christian v. Fernandez, 100 Miss. 76, 56 So. 329, 29 L. R. A. (N. S.) 649, the Supreme Court of Mississippi held:
>
> "The public or governmental duties of a city are those given by the state to the city as a part of the state's sovereignty, to be exercised by the city for the benefit of the whole public, living both in and out of the corporate limits. All else is private or corporate duty, and for any neslisence on the part of the asents or employees of the municipality in the discharge of any of the private duties of the city the city is liable for all damage just as an individual would be. The use of the cart in hauling dirt or trash for the city is for no governmental purpose, as connected in any way with the sovereisn duty of the state. The state does owe the duty to all its citizens of protecting the person from assault and the property from destruction, and all done by the city in furtherance of this duty of the state is done in a governmental capacity. But the hauling of dirt and trash is for the use and advantage of the city in its corporate capacity, is a corporate duty, and the city is liable for all damage done by any officer or agent so employed."

Chardkoff Junk, 135 So. at 460 (emphasis added). It then cited a New York case stating:

> In Missano et al. v. Mayor, etc., of City of New York, 160 N. Y. 123, 54 N. E. 744, the Court of Appeals of New York said:

> "The fact that the discharge of the duty of repairing and cleaning the streets of a city might incidentally benefit the public health does not make the acts of the commissioner of street cleaning a public function, so as to exempt the city from liability for personal injuries caused by employees engaged therein."

Chardkoff Junk, 135 So. at 460 (emphasis added). Continuing the Court cited with favor an Illinois case which addressed the function of cleaning of city streets stating:

> In Roumbos, Administrator, v. City of Chicago, 332 Ill. 70, 163 N. E. 361, 60 A. L. R. 87, it was held that the cleaning of the city streets is a corporate function under a statute conferring power on a common council to provide for the cleansing of the streets, and the municipality is liable for the negligence of its sweeper who leaves unwatched a fire set to trash swept to the curb, with the result that the flame is blown by the wind to a child whose death results from the burns inflicted. The only difference between that case and the one now under consideration is that here the city was using a more modern means and instrumentality to consummate the function involved.

Chardkoff Junk, 135 So. at 460 (emphasis added).

All these cited cases generally arise when the question involved is the negligent or careless operation in the particular function under consideration. If in performing the gathering of refuse and waste and the maintenance and operation of a dump site for the disposal of same, negligence exist, then the courts have held that the city may be held liable for its negligent acts because the operation of solid waste collection and disposal and a dumping ground is a proprietary function. This appears such an obvious result because any company or person properly franchised

could perform the function of garbage collection and disposal, and any entity, if franchised properly, could operate a private landfill. Inasmuch as these functions can be just as readily performed by a private entity as by the sovereign, it follows as night follows day that the activity is a proprietary activity emanating from the ownership and use of property as opposed to a sovereign governmental activity derived from an attribute of sovereignty.

In Chardkoff Junk, this Court also cited numerous Florida Supreme Court cases which had reached the same result as that in Chardkoff Junk. Among the cases cited is Kaufman v. City of Tallahassee, 84 Fla. 634, 94 So. 697, 30 A. L. R. 471 (1923).

In City of Miami v. Oates, 10 So.2d 721 (Fla. 1942), this Court held that the operation of a hospital was a proprietary function as opposed to a governmental function, and accordingly the city could be held liable for the negligence of its employee. The Court stated:

> The first question for our determination is whether or not a municipality, in operating a hospital, acts in its governmental or its municipal corporate capacity. On this question authorities are not in harmony. We think, however, that we must follow the line of reasoning which we have heretofore adopted with reference to such matters beginning with the case of Kaufman v. City of Tallahassee, 84 Fla. 634, 94 So. 697, 30 A.L.R. 471, and in Smoak v. City of Tampa, 123 Fla. 716, 167 So. 528, 529, wherein we said:
>
> "Generally the governmental or public duties of a municipality for which it can claim exemption from damages for tort have reference to some part or element of the

> state's sovereignty granted it to be exercised for the benefit of the public whether residing within or without the corporate limits of the city. All other duties are proprietary or corporate, and in the performance of them the city is liable for the negligence of its employees. City of Pass Christian v. Fernandez, 100 Miss. 76, 56 so. 329, 39 L.R.A., N.S., 649.

Oates, 10 So.2d at 722-723 (emphasis added). Thereafter, this Court discussed the difference between governmental and corporate duties stating:

> The difference between governmental and corporate duties is sometimes nebulous and difficult to classify, but there is certainly nothing connected with garbage disposal that partakes of a public or governmental function. It was, consequently, one of the proprietary or corporate duties for the negligent performance of which the city may be held liable. City of Tallahassee v. Kaufman, 87 Fla. 119, 100 So. 150; Chardkoff Junk Co. v. City of Tampa, 102 Fla. 501, 135 so. 457; City of Pass Christian v. Fernandez, supra."

Oates, 10 So.2d at 723 (emphasis added). Further this Court quoted extensively from Chardkoff Junk stating:

> "All functions of a municipal corporation, not governmental, are strictly municipal. Municipal functions are those granted for the specific benefit and advantage of the urban community embraced within the corporated boundaries. Logically all those are strictly municipal functions which specially and peculiarly promote the comfort, convenience, safety, and happiness of the citizens of the municipality, rather than the welfare of the general public. Under this class of functions are included, in most jurisdictions, the proper care of streets and alleys, parks and other public places, and the erection and maintenance of public utilities and improvements generally. In this character the corporation stands for the community in the administration of local

> affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred. * * *

Oates, 10 So.2d at 723 (emphasis added).

A similar conclusion was reached in Daly v. Stokell, 63 So.2d 644 (Fla. 1953), which involved the question of whether a contract with a 24-hour wrecker service to remove certain derelict vehicles from the public streets, was proprietary or sovereign. In discussing the distinction this Court stated:

> We understand the test of a proprietorv Esicl power to be determined by whether or not the agents of the city act and contract for the benefit and welfare of its people; any contract, in other words, that redounds to the public or individual advantage and welfare of the city or its people is proprietorv [sic], while a governmental function, as the term implies, has to do with the administration of some phase of government, that is to say, dispensing or exercising some element of sovereignty.

Daly, 63 So.2d at 645 (emphasis added). Saunders v. City of Jacksonville, 25 So.2d 648 (Fla. 1946), held that the operation of a electric utility in the furnishing of electric service to customers, was a proprietary activity, and nonpayment of the electric bill would create a debt which could be reduced to a judgment lien. However, this lien could not attach to the homestead.

Applying these prior decisions of this Court to the function of the operation of a landfill for refuse disposal, the authorities are clear that such function is a proprietary function as opposed to a governmental function. Accordingly, any charge made for the use of the facility, regardless of the manner

in which the charge is imposed, must also be a proprietary fee or service charge. This means that the charge could not be a sovereign charge and assessments for special benefits are sovereign charges. The facts in this case are undisputed that prior to the adoption of the involved ordinance and the levy of the solid waste assessment provided for therein, the county collected a tipping fee based on weight of the solid waste deposited in the landfill. Such fee was a charge for the use of the property, which anyone owning property and permitting it to be used as a landfill could make. It partakes of no element of sovereignty. This being so, the assessment levied against selected residential property, in lieu of and in substitution for the tipping fee formerly charged, must also be a proprietary charge for landfill use, regardless of the name or label applied to it.

If the charge is a proprietary charge as the homeowners and amicus contend, and as has been demonstrated herein, then the nonpayment of such charge could not result in a lien attaching to homestead property by virtue of the protections found in Article X, Section 4. It provides in part:

> There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon . . . the following property owned by a naturai'person:
> (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, . . . ,

If a private person was operating a landfill and had contracts with property owners for the use of that landfill, and such property owners failed to pay the contracted price as agreed, then the private landfill owner could sue the property owner and obtain a judgment which could become a lien on all that person's property except the homestead. The county, in the instant case, is attempting to do precisely what the constitution prevents, and that is make nonpayment of the solid waste assessment a lien against the homestead. It is doing this by labeling the charge an assessment or special assessment, because a homestead can be liened for sovereign charges which includes only taxes and special assessments, and it does not include proprietary charges.

The purpose of the protection found in the constitution and the language which permits taxes and special assessments to become a lien against the homestead, is clear. That is, the homestead is subject to sovereign powers and levies. The language in the constitution is specific and does not include any proprietary fee or charge imposed by a city or county for the simple reason that such are not sovereign charges.

Thus, the only way that the district court's decision can be correct is if there is no distinction between a proprietary and a sovereign charges, or if the court now decides to reverse many years of jurisprudence which have held that the operation of a landfill and the collection and disposal of solid waste are proprietary functions and not sovereign governmental functions.

In any proprietary relationship where a charge is being made for the use of property or a service rendered, nonpayment of the charge gives rise to the existence of a debt. However, in Florida nonpayment of a debt cannot result in a lien attaching to the homestead, because of the protections of Article X, Section 4. In the case at bar, commercial property is serviced through contract with the county's franchised hauler and if a commercial property owner fails to pay pursuant to his agreement, the franchised hauler could sue him on the debt, and obtain a judgment lien. The nonpayment would give rise to the existence of a debt. Since the franchised hauler cannot exercise any sovereign function and the levying of taxes and special assessments is a sovereign function restricted to use solely by the sovereign, his charge could not be a special assessment. Similarly, municipal residential property owners, serviced by a franchised hauler, could be sued for nonpayment of the contracted for amount because such would constitute a debt. However, although the franchised hauler could obtain a judgment against the residential property owner, such judgment could not attach to the homestead. Similarly, presumably franchised haulers have an agreement with the county pursuant to which they are to make certain payments for the franchise and if they fail to make such payments the county could sue the franchised hauler and obtain a judgment for nonpayment of the debt. This judgment could attach to property of the franchised hauler, but if the franchised hauler was an individual owning a home in the county, such

judgment could not attach to the homestead. But the charge levied by the ordinance does lien the homestead, although used for the same purpose, i.e., to fund the landfill operation.

The assessment levied by the ordinance is a substitution for the tipping fee and is levied only against the selected classified residential property in the unincorporated areas of the county. As pointed out, through the definition of "residential property" some residential properties in the unincorporated areas of the county are subject to the assessment and some are not. That which is not subject to the assessment, contracts with the franchised hauler and if he fails to pay the franchised hauler, nonpayment results in a debt which could not attach to the homestead. The charge against the other residential property owners is a pure substitution for the tipping fee and accordingly must fall in the same category as the tipping fee did originally, and as the fee paid by residential owners to the franchised hauler. That is, it must be a proprietary charge for a service rendered in the use of property.

Thus, in Tallahassee, if persons did not pay their electric bills, the city could pursue such persons through civil action and obtain a judgment lien for nonpayment of the debt. However, this lien could not attach to the homestead because the homestead is protected from debt. Clay County, through its ordinance, attempts to transform a proprietary tipping fee into a sovereign special assessment by its self-serving findings and declarations contained in its ordinance. If the charge is a

proprietary charge when paid to a private entity operating a landfill, then the same charge must also be a proprietary charge if such landfill is operated by the governmental entity such as the county or city.

Accordingly, amicus submits that the charge selectively levied by the ordinance is a substitution for the tipping fee, which has as its purpose the enforcement method of threatening sale of a homestead for nonpayment, is a purely proprietary charge and hence, cannot be a valid special assessment. No private entity, franchised hauler, landfill operator, or electric company can exercise any aspect of the sovereign power and the levy of taxes and special assessments are sovereign charges.

2. The charge levied referred to as a "solid waste disposal assessment," in Clay County Ordinance 92-26, is not a special assessment.

Approximately 6 times, this Court has considered cases where the contention was made that various charges levied by local governmental bodies were special assessments, where the validity of same was cast in doubt because of the existence of the homestead protections found in the constitution. In every case, until now, this Court has consistently invalidated such charges on the grounds that such were not valid special assessments. See Bair v. Central and Southern Fla. Flood Con. Dist., 144 So.2d 818 (Fla. 1962); St. Lucie County-Fort Pierce Fire Prevention and Con. Dist. v. Higgs, 141 So.2d 744 (Fla. 1962); Fisher v. Board of County Commissioners of Dade County, 84

So.2d 572 (Fla. 1956); City of Fort Lauderdale v. Carter, 71 So.2d 250 (Fla. 1954); Whisnant v. Strinsfellow, 50 So.2d 885 (Fla. 1951); Crowder v. Phillips, 1 So.2d 629 (Fla. 1941). This Court recently, in Citv of Boca Raton v. State, 595 So.2d 25 (Fla. 1992), recognized the distinction between a special assessment and a tax citing the landmark case of Klemm v. Davenport, 129 So. 904 (Fla. 1930). This Court stated:

> However, a legally imposed special assessment is not a tax. Taxes and special assessments *are* distinguishable in that, while both are mandatory, there is no requirement that taxes provide any specific benefit to the property; instead, they may be levied throughout the particular taxing unit for the general benefit of residents and property. On the other hand, special assessments must confer a specific benefit upon the land burdened by the assessment. *City of* Naples v. *Moon, 269* So.2d 355 (Fla.1972).

Citv of Boca Raton, 595 So.2d at 29 (emphasis added). Continuing it stated:

> 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.

Citv of Boca Raton, 595 So.2d at 29 (emphasis added). Applying these principles to the ordinance and the assessment at bar, one thing is immediately glaringly noted. The ordinance singles out a select classification of residential property to be made subject to the assessment even though it acknowledges that the

landfill is used by all property owners within the county, both within the cities and without, including commercial property owners. The ordinance classifies residential property into three categories which are (1) residential property within cities; (2) residential property in the unincorporated areas whose garbage collection and disposal needs are serviced by a franchised hauler, and (3) residential property which is in the unincorporated area of the county and not serviced by a franchised hauler. It is only the last classification of residential property which is subject to the assessment. Presumably the county's reasoning for this is that it is assuming that the other two classes of residential property owners which are serviced by franchised haulers will be paying the tipping fee indirectly through its contract with the franchise hauler which no doubt also has a contract with the county for the use of the landfill. Since those residential property owners contracting with a franchise owner are not subject to the assessment, their property is not liened. Furthermore, if they fail to pay the contracted for amount to the contract hauler, and the contract hauler sues them and obtains a judgment, the judgment lien for nonpayment to the franchised hauler cannot attach to the homestead. However, the residential owners which are subject to the assessment are also subject to the ordinances provisions that nonpayment of same results in a lien against their homestead. This is patent discrimination and different treatment for residential owners in the county. Thus, the second prong of the

requirement set forth in Citv of Boca Raton is not complied with. That is, the assessment is not fairly proportioned and is not fairly administered.

Without conceding that any property is specially benefitted by a landfill, a conclusion which the district court reached with which the amicus expressly disagrees, it is obvious that fair apportionment has not been accomplished because all residential property whose garbage disposal needs are serviced through the use of the landfill, are not subject to the assessment. Furthermore, there is no special benefit to property by the use of the landfill. Garbage collection and disposal are services which are, no doubt, of benefit to property owners but they also benefit non-property owners and a landfill benefits anyone whether residing in the county or not if they have solid waste to be disposed of. See Whisnant v. Stringfellow; Crowder v. Phillips, 1 So.2d 629 (Fla. 1941). These cases emphasize that that which is benefitted is people, not property by the existence of a county health facility and a hospital.

Turner v. State, ex rel. Gruver, also recognized that garbage collection and disposal was a proprietary function and the charge for same was a proprietary charge, the nonpayment of which gave rise to a debt. In Turner, the court held that nonpayment of a waste fee gave rise to the existence of a debt, and because Florida's Declaration of Rights prevented imprisonment for debt, a person could not be imprisoned for nonpayment of same. It stated:

> The rule generally recognized is that taxes and excises including license fees are not debts within the meaning of a constitutional prohibition against imprisonment for debt. The obligation placed by the Metro code on landowners to pay a charse for sarbaqe and waste collection and disposal is not a tax but is a charge imposed for a special service performed to the owner by the county, and as such it constitutes a debt within the guarantee of § 16 of the Declaration of Rights against imprisonment for debt.

Turner, 168 So.2d at 193 (emphasis added). Thereafter it stated:

> Two Florida cases cited by the appellant are not considered controlling here. Clein v. Lee, 146 Fla. 306, 200 So. 693, where the City of Miami had imposed a flat annual fee of $4 on each family for garbage removal, did not involve the question of whether nonpayment of a fee could be a basis for imprisonment. It was held there that one who had not paid the garbage fee could not mandamus the city to render the service to him free. In State ex rel. Lanz v. Dowling, 92 Fla. 848, 110 So. 522, 525, the Supreme Court said that debts intended to be covered by § 16 of the Declaration of Rights were those arisins ex contractu and not fines or penalties imposed as punishment for crimes. The debt involved in this case is considered to be more nearly in the ex contractu class than in the other categories referred to there. It is a charse for a special service such as ordinarily would be the basis of contract.

Turner, 168 So.2d at 194 (emphasis added). In Turner, Metropolitan Dade County had imposed a waste fee and attempted to coerce payment by imprisonment for nonpayment of the waste fee. Turner supports all of that which was stated under the previous point distinguishing between proprietary and sovereign levies. Proprietary levies arise ex contractu; that is, they generally are the subject of agreement between the parties involving the

use of property or services performed through the use of property. Taxes, special assessments and excises on the other hand, as Turner points out, do not arise from contract but are sovereign levies. See Klemm; City of Boca Raton. Nonpayment of sovereign charges--taxes and special assessments--does not give rise to the existence of a debt. This Court made that very clear in St. Lucie Estates v. Ashley, 105 Fla. 535, 141 So. 738 (1932), stating:

> In its pragmatic application, a tax is not a debt in the ordinary sense of that term, it is not predicated on contract, and can, under no circumstances, be discharged by setoff, counterclaim, or barter, and when legally assessed taxing officers are totally without power to compromise or release it except as specifically authorized by statute, and, when such power is given, it must be rigidly pursued.

St. Lucie Estates, 141 So. at 739.

In only two places in the constitution is debt referenced. It is found in the Declaration of Rights, which prohibits imprisonment for debt, and it is found in Article X, Section 4, which protects the homestead from forced sale for debt. If a garbage fee or waste fee is an ex contractu charge, nonpayment of which gives rise to a debt within the purview of the Declaration of Rights, then it also gives rise to a debt within the purview of Article X, Section 4.

At bar, the charge is a tipping fee which instead of being collected directly at the dump site, is attempted to be collected through a lien against selected homestead residential property. But its proprietary nature and character is unchanged.

Turner was cited in Charlotte County v. Fiske, 350 So.2d 578 (Fla. 2d DCA 19771, which such case was cited by the district court below. The amicus suggests that the district court has misunderstood the Fiske decision. In Fiske no question was raised concerning whether or not nonpayment of the charge levied by the involved ordinance could result in a lien against a homestead, and no issue was raised as to whether the charge was a special assessment as opposed to a service fee. The issues presented are set forth as follows:

> They prevailed, the trial court having found: (1) that there is no rational basis for distinguishing the properties subject to the assessment and those not; (2) that some of the properties especially benefitted by the assessment are not subject to the assessment; (3) that the ordinance imposes special assessments without construction of any public improvements from the levy; and (4) that the ordinance does not require that the amount of the assessment equal or approximate the benefit.

Fiske, *350* So.2d at 580. Thereafter the court cited Turner stating:

> To begin with, while the ordinance before us speaks of the assessment involved as a "special assessment," we are of the view that such a term is a broad one and may embrace various methods and terms of charges collectible to finance usual and recognized municipal improvements and services. Among such charges are what are sometimes called "fees" or "service charges," when assessed for special services. Moreover, these may take the *form* (at least for lien purposes) of "special assessment." In point, indeed, such charges for garbage disposal were denominated "waste fees" in a Dade County ordinance interpreted by our sister court in the Third District in *Turner v. State ex rel. Gruver*, wherein they were defined not as a

> form of taxes but as "special charges" imposed for a "special service performed by the county. In fact, "service charges" for garbage disposal are expressly authorized by statute.

Fiske, 250 So.2d at 580 (emphasis added, italics in original, footnotes omitted). The Amicus suggests that the use of the term "special assessment" and "service fee" intermingled, indicates clearly that the Court is not having to distinguish between the two type charges, one of which is a sovereign charge and the other of which is a proprietary charge. Furthermore, by citing Turner, the amicus believes that Fiske is recognizing that the charge under consideration in Fiske was in fact a charge for a special service of the same nature as that involved in Turner. Of course, Turner held that the charge involved there, the garbage collection waste fee, was a proprietary ex contractu charge.

The ordinance in Fiske is explained as follows:

> The ordinance established a mandatorv garbage disposal system financed by an annual $51.00 "special assessment" on each *residential* unit in the district. While commercial properties within the district were not assessed, they were nonetheless required by ordinance either to contract for the service with the franchised disnosal company for the district (appellee Englewood Disposal Company) or to obtain a permit to haul their own sarbase.
>
> It is to be further noted at this point that the ordinance was enacted upon a legislative finding that there was an inordinate amount of littering on the public rights of way in the area affected; that the entire $51.00 assessment was payable to the contract franchisee Englewood Disposal

> Company and no profit inured to the county, . . .

Fiske, 350 So.2d at 579 (emphasis added, italics in original). Thus, in Fiske, the county is acting as a collection agent for the franchise hauler in the collection of the $51.00 for residential owners. This is clear because the $51.00 collected by the county is paid over in its entirety to the franchise hauler. However, commercial property owners are free to contact with the franchise hauler for garbage collection and disposal and the county does not collect these charges. Thus, it cannot be disputed but that the arrangement between the commercial property owners and the franchise hauler is contractual and proprietary in nature. Accordingly, the charge due from the commercial owners to the franchise hauler is a proprietary charge, nonpayment of which would give rise to the existence of debt. If the charge paid by the commercial hauler is a proprietary charge, then that paid to the county as agent for the franchise hauler by residential property owners must also be a proprietary charge. That explains why Fiske cites Turner for the statement which it makes that the charges are not a form of taxes but are a special charge for a special service. That is precisely what Turner held. Special assessments are part of the sovereign taxing power and this is well known. See Cooley on Taxation which states:

> The difference between a special assessment and a tax are that (1) a special assessment can be levied only on land; (2) a special assessment cannot (at least in most states) be made a personal liability of the person assessed; (3) a special assessment is based wholly on benefits; and (4) a special

> assessment is exceptional both as to time and locality. The imposition of a charge on all property, real and personal, in a prescribed area, is a tax and not an assessment, although the purpose is to make a local improvement on a street or highway. A charge imposed only on property owners benefitted is a special assessment rather than a tax notwithstanding the statute calls it a tax.
>
> The power to levy such assessments is undoubtedly an exercise of the taxing power, ...

Ch. 1, sect. 31 at page 106.

If nonpayment of the contracted for charge by the commercial property owner gives rise to a debt, then nonpayment of the same type charge by a residential owner for garbage collection service rendered, must also give rise to the existence of debt, regardless of the nature of the collection mechanism. Thus, even though the county is collecting the money from the residential owner and paying it over to the franchise hauler, the inherent characteristics of the relationship is ex contractu and proprietary as recognized in Turner. The amicus submits that the district court either misread the case or misunderstood it, because Fiske does not support the conclusion that a garbage collection fee is a sovereign charge. In fact, all the law in Florida which has considered this type question has held that such charges are proprietary charges for a proprietary service and not sovereign governmental.

The pivotal question in Fiske as far as applying it to the situation in the case at bar, is whether the garbage collection service offered by the franchised hauler to both

commercial and residential property owners, was a proprietary function or a sovereign function. Since the franchised hauler is performing it and contracting with the commercial property owners for the furnishing of same, it follows that the service being offered was proprietary and that the function also is proprietary. In the case at bar, the operation of a landfill and the charging of a tipping fee for such operation also is proprietary because it emanates from the ownership and use of property. Anyone can engage in such activity. Since the franchised hauler in Fiske could not exercise any of the sovereign power, the charge paid pursuant to the contract could not have been a sovereign charge which includes special assessments.

Since Fiske used both the terms "special assessments" and "service charges," but cited Turner which held that the waste fees involved were not part of the taxing power but were proprietary ex contractu charges, and since no homestead issue was raised in Fiske which would require a clear resolution of the distinction, and since the factual scenario demonstrates clearly that the franchised hauler is contracting with commercial property owners who are not subject to the Charlotte County levy, and the county is collecting the money from the residential owners to pay over to the franchised hauler, the amicus submits that the charge in Fiske is undisputedly a proprietary charge and not a sovereign special assessment as the district court apparently held.

The Fifth District Court of Appeal recently reached a similar conclusion with regard to certain road paving in Hanna v. City of Palm Bay, 579 So.2d 320 (Fla. 5th DCA 1991), and in so doing stated:

> We agree with the succinct exposition of the applicable law as set forth in the appellants' Initial Brief:
>
> > When a public improvement imposes a benefit upon individual homeowners no different than that which is imposed upon the community at large, the individual homeowners cannot be made to bear the burden of the cost of the improvement. *City of Fort Myers v. State,* [95 Fla. 7041 117 so. 97 (Fla.1928). This legal premise is based upon two important policy considerations. First, because the Florida Constitution sets forth an exception to the homestead exemption for improvements that specifically benefit the homestead, the requirement of a special benefit conferred must be risorouslv adhered to in order to avoid the circumvention of the constitutional exemption from forced sale of the homestead. *Fisher v. Board of County Commissioners, 84* So.2d 572 (Fla.1956). A second important policy consideration is that there exists no need for voter approval when a public improvement project is funded by virtue of special assessments, and the cost of the improvement is not spread among all of those who use the services of the City by use of ad valorem tax revenues, fees, and other revenue sources and; rather, the individual, affected homeowners, who have no vote in the levy of the assessment, are held responsible for the full cost of the improvement. It is imperative,

> therefore, that only improvements that provide a special and peculiar benefit to affected property owners are funded through such a revenue vehicle.

Hanna, 579 So.2d at 322 (emphasis added). Thus, Hanna, State of Florida v. Citv of Port Orange, 650 So.2d 1 (Fla. 1994), Whisnant, Crowder, Bair, Higgs, Fisher, City of Fort Lauderdale, all recognize that labeling certain charges "special assessments" does not make them so.

Prior to 1934 no homestead exemption from ad valorem tax existed. In 1934, the constitution was amended to provide same except for "special assessments for benefits." The provision was again amended in 1938, and language was changed to except "assessments for special benefits." These changes were addressed in State ex rel. Clark v. Henderson, 188 So. 351 (Fla. 1939), where this Court held that the ad valorem taxes levied by the Hillsborough County School District were not special assessments stating:

> Under original section 7 the homestead exemption is "from all taxation, other than special assessments for benefits." Under amended section 7 the homestead exemption is "from all taxation, except for assessments for special benefits." It is not necessary in this case to determine whether there is any material difference in the ultimate effect of the two last quoted organic provisions. The tax under section 10, Article XII, is imposed in aid of a general public free school system, which the constitution makes uniform throughout the State, and the tax is not imposed for special benefits to accrue to the lands in the particular area, therefore, the burden is a tax and not a special assessment.

Henderson, 188 so. at 353. Subsequently, in State v. Halifax Hospital Dist., 159 So.2d 231 (Fla. 1963), this Court addressed the difference in the two amendments to the homestead provision in 1934 and 1938, and held that the 1938 language was much more restrictive stating:

> It should be noted that the original language permitted "special assessments for benefits", the latter amendment was much more restrictive, and permitted only "assessments for special benefits."
>
> Thus, it was that when the problem recurred in 1941, in Crowder v. Phillips, supra, a Leon County Hospital District case, the Court held:
>
> > "It is clear that the tax to be imposed under the provisions of the law under attack is ad valorem on all real and personal property as distinguished from assessments for special benefits to the real property located in the district. That a hospital is a distinct advantage to the entire community because of its availability to any person who may be injured or stricken with disease cannot be gainsaid, but there is no logical relationship between the construction and maintenance of a hospital, important as it is, and the improvement of real estate situated in the district.

Halifax Hospital Dist., 159 So.2d at 234. In Halifax Hospital Dist, this Court held that Crowder and Fisher were decided after the 1938 change and reached a different result than that reached in State ex rel. Ginsbers v. Dreka, 185 So. 616 (Fla. 1938), decided under the 1934 amendment. Thus, all cases decided prior

to 1938 involving charges termed special assessments could no longer be relied on.

3. The duty to construe and interpret the constitution and words and terms used in the constitution, and the duty to determine what constitutes a proprietary function as opposed to a sovereign function, is a judicial duty which may not be circumvented by legislative fiat or declaration.

The district court upheld the assessments levied pursuant to ordinance 92-26 and in doing so stated that the county commission had made legislative findings and that these should not be disturbed by the judiciary. The effect of this holding is that the district court abdicated to the county commission the authority to determine what is and what is not an assessment for special benefit within the purview of Article X, Section 4, and Article VII, Section 6, and relegated to the county commission the authority to determine what is a proprietary charge as opposed to a sovereign charge. The amicus submits that such is a total abdication of judicial authority and is in conflict with numerous prior decisions of this Court.

In Department of Revenue v. Florida Boaters Ass'n, Inc., 409 So.2d 17 (Fla.1982), this Court invalidated a legislative act which had the effect of expanding the definition of the word "boat" as used in the constitution. The statute defined a "live aboard vessel" and subjected it to ad valorem taxation and the question before the court was whether or not the legislative enactment was valid. In other words, did the

legislature have the power to define what constitutes a "boat" which was the term used in the constitution. Both this Court and the district court held that the legislature did not have that power and that its attempt was unconstitutional. This Court stated:

> While the constitution gives the Legislature the authority to define "boats" and the other species of property excluded by article VII, section l(b) from ad valorem taxation, the authority is not unlimited and must be exercised in a reasonable manner. The flexibility thus granted to the Legislature does not empower it to depart from the normal and ordinary meaning of the words chosen by the framers and adopters of the constitution. *See, e.g., State v. Florida State Improvement Commission, 47* So.2d 627 (Fla.1950); *City of Jacksonville v. Glidden Co., 124* Fla. 690, 169 So. 216 (1936). The definitional flexibility was provided because it is conceivable that floating structures might be endowed with characteristics which completely differentiate them from the historic and popularly understood concept of a "boat." The Legislature's definitional attempt, however, has failed to make such a reasonable differentiation. It has simply decreed that when the transportational *or* navigational use of a boat is secondary to other uses, the boat will be subject to ad valorem taxation instead of a license tax.

Florida Boaters, 409 So.2d at 19. In Florida Boaters, the constitution itself expressly authorized the legislature definitional flexibility as to what constitutes a boat, but this Court invalidated the attempt finding that the legislature's action was arbitrary and unreasonable. At bar, the county is attempting to transform a proprietary tipping fee into a constitutional assessment for special benefits. Homestead

protection exists in two places, except for assessments for special benefits. Although the terms used are slightly different in Article VII, Section 6, and Article X, Section 4, the meaning and purpose is clear. That is, it is only those special assessments which emanate from sovereignty which are contemplated. Clay County's ordinance attempts to expand the term as used in the constitution, to include that which traditionally is a proprietary charge for a proprietary function emanating from the use of property. If a county ordinance can do that by including self-serving declarations and findings to that effect therein, then a county can declare any proprietary charge it makes to be a valid assessment for special benefit and make so called "findings of benefit" and circumvent the constitution. The county will argue here, as it did below, that the judiciary is bound by these self-serving determinations and declarations. If the judiciary were bound by such findings and declarations, then Florida Boaters was incorrectly decided. Both the district court and this Court in Florida Boaters recognized that terms and words used in the constitution must be considered in their normally and popularly understood meanings. Neither the legislature nor a county commission is granted the authority in the constitution to define what is and what is not a special assessment. Even had the constitution permitted the legislature to do so, Florida Boaters makes it clear that the legislative action in this regard must be reasonable. The county's attempt in the case at bar is flagrantly unreasonable because it attempts

to convert a proprietary tipping fee to an assessment which can result in a lien against the homestead. The tipping fee could not result in a lien against the homestead for nonpayment and the substituted charge should not be permitted to either.

Most recently in State of Florida v. City of Port Orange, this Court held that a charge labeled a transportation utility fee imposed against all developed property within the county to provide funding for the maintenance and improvement of an existing municipal road system was a tax, notwithstanding the municipal legislative declarations found in the ordinance. There, as here, the purpose of the labeling was to circumvent the protections of Article X, Section 4, and Article VII, Section 6. If self-serving legislative, county or municipal declarations are sufficient to oust the judiciary of authority to make these determinations, then City of Port Orange and Florida Boaters were incorrect. This Court performed the same function in Crowder, Whisnant, Carter, Fisher, Higgs, and Bair, because in each of these instances this Court would not accept the legislative determinations found in the various ordinances or statutes involved.

By giving an inordinate amount of deference to the legislature, this Court failed to heed its own admonition in Bancroft Inv. Corp. v. City of Jacksonville, 27 So.2d 162 (Fla. 1946), in which it stated:

> The real question here is the application of the quoted exemption statute to the facts recited. We never decide such questions in isolation, but we lay the statute beside the

> facts and deduce what appears to be the rational result. If a court is not to look through the letter of the statute and apply it to facts as they exist, the lesislative declaration of a falsehood may, in manv cases, amount to the judicial declaration of a truth. In this case it amounts to selecting one taxpayer in one of the most desirable business areas in Jacksonville and placing him in a privileged class. To so interpret the exemption statute does not square with reason

Bancroft Inv. Corp., 27 So.2d at 171 (emphasis added). The district court failed to consider that the determination of what is a proprietary verses a sovereign function is a judicial function which must be made based on the inherent characteristics of the function being performed and the charge being made therefor. The determination of what is a special assessment or assessment for special benefits as such terms are used in the constitution, like all other terms used in the constitution, is purely a judicial function and not the subject of legislative fiat. As Justice Shaw opined in Northern Palm Beach Co. Water ... Dist. v. State, 604 So.2d 440 (Fla. 1992):

> Simply designating a project "public" by legislative fiat does not necessarily make it so, especially where uncontroverted facts attest otherwise. A quote from Lewis Carroll makes the point:
>
> > "I don't know what you mean by 'glory,"' Alice said.
> > Humpty Dumpty smiled contemptuously. "Of course you don't --till I tell you. I meant 'there's a nice knock-down argument for you!'"
> > "But 'glory' doesn't mean 'a nice knock-down argument,"' Alice objected.

> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean--neither more nor less."
> "The question is," said Alice, "whether you can make words mean so many different things."
> "The question is," said Humpty Dumpty, "which is to be master--that's all."
>
> Lewis Carroll, *Through the Looking Glass* 113 (Dial Books for Young Readers, NAL Penguin, Inc. 1988) (1872). Under our constitutional system of government in Florida, courts, not legislators or water control districts, are the ultimate "masters" of the constitutional meanincr of such terms as "public purpose" in judicial proceedings.

Northern Palm Beach Co., 604 So.2d at 446-447 (emphasis added). The district court's holding also is inconsistent with the holding of this Court authored by Justice Overton, in the unanimous decision in Citv of Daytona Beach Shores v. State, 483 So.2d 405 (Fla. 1985).

The district court held that the assessment against selected residential owners was a valid special assessment, even though it is a charge made as a substitute for tipping fees for the use of the county landfill. In City of Daytona Beach Shores, this Court held that charges made for persons to drive vehicles on the beach were user *fees* which are proprietary charges for access to and use of publicly owned property. Both are charges for the use of property, properly characterized as user fees.

The amicus submits that the district court was incorrect in holding that the findings made by Clay County in its

ordinance that the charge levied was a valid special assessment are binding on the court and prevents judicial inquiry.

> 4. The finding by the district court that the assessments levied against the selectively classified residential properties, is a valid special assessment, is inconsistent with and in conflict with the provisions of Article VII, Section 6, and Article X, Section 4, both of which address such assessments.

The homestead exemption from ad valorem taxation was added to the constitution in 1934, as subsequently amended in 1938. Florida's protection of its homesteads from forced sale has existed since 1868 when it was made a part of the 1868 constitution. It continued as a part of the 1885 constitution and exists today in Article X, Section 4. It provides:

> There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon . . . . ., the following property owned by a natural person:
> (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, ...

Thus, the thrust of these two provisions was to protect homesteads of Florida residents. Florida law is well settled that the homestead exemption should be liberally construed in favor of the person claiming the exemption and in furtherance of the exemption's purpose. See Butterworth v. Caggiano, 605 So.2d 56 (Fla. 1992); Public Health Trust of Dade County v. Lopez, 531 So.2d 946 (Fla. 1988); Miami County Dav School v. Bakst, 641

So.2d 467 (Fla. 3d DCA 1994). Prior to the adoption of the 1934 homestead tax exemption, cases coming before this Court were not required to distinguish between special assessments and ad valorem taxes for special purposes and accordingly cases arising before that time frequently will use terminology which will be inconsistent with terminology used after that time. Homesteads were protected from sale for debt, and were protected from imposition of taxes, now up to the amount of $25,000. However, exceptions were made for the levy of sovereign assessments for special benefits. Since both taxes and special assessments are sovereign impositions, the thrust and purpose of this language was to allow homesteads to be made subject to certain specific sovereign charges which were true assessments for special benefits. These were assessments which provided a specific benefit to the property. Cases consistently have held that this is of a limited type and that the benefit must be different in kind and degree from that generated to property throughout the county. Stated differently, there must be a specific benefit as opposed to a general benefit. Thus, if any purported benefit is the same, the charge cannot be a special assessment. Similarly, if the charge benefits people and not property it cannot be a special assessment.

As to the homestead protection from forced sale for debt, this too was subject to exceptions where sovereignty is involved. The sovereign charges of taxes and assessments are permitted to lien a homestead. No other government charges are

permitted to become a lien against the homestead. Only the sovereign charges. It is significant that both places in the constitution where homesteads are protected, excepted are only the sovereign imposition of taxes and assessments. In Article VII, Section 6, it is recognized that special assessments are part of the taxing power but are excepted from the homestead protection for ad valorem taxes. Article X, Section 4, permits the sovereign charges to become a lien against the homestead. This allows the latitude needed for the state and its political subdivisions where sovereignty is involved. These merely recognized that all privately held property in the state is subject to the state's sovereisn sowers. Nowhere in either of these two provisions is any mention of proprietary charges. The reason is simple. Proprietary charges are not sovereign charges but are exercised pursuant to proprietary authority conferred by law. At the present time, since the 1968 constitution, this Court has recognized that counties may be performing what were traditionally considered municipal proprietary activities in the unincorporated areas of the county. See State ex rel. Dade County v. Dickinson, 230 So.2d 130 (Fla. 1970); Gallant v. Stephens, 358 So.2d 536 (Fla. 1978); Tucker v. Underdown, 356 So.2d 251 (Fla. 1978). Thus, although the constitution only specifically recognizes municipalities as performing proprietary functions, by statute and judicial fiat, counties are now performing municipal type functions in the unincorporated areas of the county and levying municipal type charges therein. In

fact, in Gallant and Tucker, this Court upheld the levy of municipal millage by counties in the unincorporated areas of the county.

Thus, both counties and cities are now performing proprietary functions and activities and making charges therefor. However, the true nature of such activities has not changed one jot or one tittle because it is being performed by a county as opposed to a city. That is what section 125.01(1)(q), Florida Statutes (1995), expressly addresses.

With this in mind, it is necessary to ascertain the intent of the framers of the constitution in the two provisions which provide homestead protection.

In State ex rel. West v. Gray, 74 So.2d 114 (Fla. 1954), this Court considered a provision of the constitution dealing with the holding of public office. It stated:

> It is a firmly settled principle of law that in "construing and applying provisions of a Constitution, the leading purpose should be to ascertain and effectuate the intent and the object designed to be accomplished." Mugge v. Warnell Lumber & Veneer Co., 58 Fla. 318, 50 So. 645, 646; State ex Rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298. An the intention to be ascertained must be that of the framers and the people adopting it, for that intention is the "spirit" of the Constitution, Amos v. Matthews, 99 Fla. 1, 126 So. 308; Sullivan v. City of Tampa, 101 Fla. 298, 134 So. 211; City of Jacksonville v. Continental Can Co., 113 Fla. 168, 151 So. 488; State v. City of Miami, 113 Fla. 280, 152 So. 6; City of Tampa v. Tampa Shipbuilding & Engineering Co., 136 Fla. 216, 186 So. 411; State ex rel. McKay v. Keller, 140 Fla. 346, 191 So. 542; Sylvester v. Tindall, 154 Fla. 663, 18 So.2d

892; Story on the Constitution, 5th Ed., Section 400.

Gray, 74 So.2d at 115. The amicus submits that there can be no doubt but that the purpose of both provisions in the constitution was to protect homesteads. The one exempted from ad valorem taxation, but permitted other sovereign charges or special assessments to be applied against the homestead. The other protected the homestead from debt but permitted the homestead to be reached for sovereisn impositions only.

5. The charge levied pursuant to Clay County's Ordinance 92-26, is flagrantly arbitrary.

It previously has been demonstrated that the assessment imposed by the Clay County ordinance 92-26, is imposed only on residential properties in the unincorporated area which are not serviced by the county franchised hauler. The reasons for this are expressed in the ordinance itself wherein it is pointed out that residential properties within cities are not subject to the assessment for the reasons that (1) houses are closer together in the city and thus are conducive "to more efficient commercial service . . .," and (2) because the current recovery of disposable costs through the imposition of the tipping fee was sufficient. In other words, the ordinance recognizes if houses are closer together they can let a franchised hauler pick up the garbage just as well and they don't need to make the assessment on them. It is further recognizing that the tipping fees being generated are enough at that time to meet the county's needs.

Thus, it is only those residential properties scattered in the unincorporated area of the county which have not contracted with the franchise hauler for service, on which the assessment is made. If all the property is benefitted by the landfill, then all must either be subject to it or not subject to it and these lines of distinction should not be drawn based on whether or not the residential property owner has contracted with a franchised hauler or because his property is adjacent to other property.

The design and purpose of the ordinance, pure and simple and recognizing substance over the form, is to put in place a collection method for poor people living in the unincorporated area of the county and to force them to pay a tipping fee to fund the operation of the landfill. This is purely arbitrary and has as its purpose that of forcing payment through threat of loss of homestead.

CONCLUSION

For the reasons stated herein, the amicus submits that the district court's decision should be quashed.

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 32073-4908; ROBERT NABORS, ESQUIRE, Nabors, Giblin & Nickerson, Post Office Box 11008, Tallahassee, Florida 32302; and MARE H. SCRUBY, ESQUIRE, Clay County Attorney, Post Office Box 1366, Green Cove Springs, Florida 32043 on this the 29th day of January 1996.

Larry E. Levy