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IN THE SUPREME COURT
OF THE STATE 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.	1st DCA No.: 93-3445 Fourth Judicial Circuit Case No.: 92-2585-CA Case No.: 93-0409-CA

APPELLANTS'
INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

This is an appeal of the grant of summary judgment to Clay County on a challenge to its special assessment for solid waste disposal. Throughout, Plaintiffs-Appellants will be referred to as the homeowners, and Defendants-Appellees will be referred to as Clay County, or the County.

A. FACTUAL SUMMARY

In 1992 Clay County enacted an ordinance imposing a partial year special assessment for the maintenance of the county solid waste facilities (R-119-146, App. tab 3). The assessment was applied only to residential properties in the unincorporated area of the county.

Residents of the unincorporated area formerly paid a tipping fee based on the weight of the waste they brought to the landfill. As a result of the assessment they are now entitled to deposit their solid waste without paying any tipping fee. The assessment does not fund collection service. Residents are required to transport their own waste to the landfill or to pay separately for the service.[1] Commercial and unimproved property are not subject to the assessment, so the tipping fee method of payment is still applicable to those properties.

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[1] The County has entered into franchise agreements with commercial haulers, but residents who use these haulers must pay the entire cost of the collection service as well as the disposal assessment.

The Appellants are elderly, low-income homeowners subject to the assessment. Because the assessed value of their properties is less than $25,000, they pay no ad valorem taxes, but they are required to pay the special assessment. (R-5 para. 10, App. tab 1; R-50, para. 11, App. tab 2)

The instant case is a challenge to the partial year special assessment. Since this action was filed, the County has enacted a full year assessment, to be collected as provided by §197.3632, Fla. Stat. The homeowners have challenged that ordinance as well, but those cases are pending, by agreement of counsel, until there is a resolution of this case.

B. PROCEDURAL HISTORY

The homeowners brought two separate actions challenging the assessment, Ms. Harris on December 28, 1992, and the Townsends on March 2, 1993. The cases were later consolidated without objection. (R-467-468, App. tab 9). Both raised the issue of the validity of the assessment, but the Townsends' case raised the additional issue of arbitrariness in determining which structures are "dwelling units" subject to separate assessments. (R-48-49 para. 8, App. tab 2).

The County moved for summary judgment on June 15, 1993. (R-92-184, App. tab 3). Certain County documents, obtained in discovery, were presented to the Court at the summary judgment hearings. (R-439-464, App. tab 7). The homeowners contend that these documents show that the assessment was not calculated by determining the cost of the service, as the County claimed, but

that it was instead an arbitrary predetermined rate, which was justified by adjusting the budget figures for that purpose. The trial Court refused to admit these documents, though their authenticity was undisputed,[2] and granted summary judgment in favor of the county. (App. tab 9). The homeowners appealed from that final order.

The First District Court of Appeal affirmed, with a dissent.

SUMMARY OF ARGUMENT

This case presents nothing less than the question of whether the Florida Constitution will mean what it says, with regard to property taxation and homestead protection. Local government officials, sworn to uphold the Constitution, have, because of fiscal and political pressures, attempted to pervert the plain meaning of constitutional limitations on property taxes. The use of special assessments to fund ongoing municipal services makes the constitutional provisions meaningless in practice, nullifying the will of the citizens who inserted those provisions in the constitution.

Existing case law does not permit the special assessment exception to swallow the rules of homestead exemption and millage

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[2] Transcript, p. 28. The transcript of the Summary Judgment Hearing is found in Appellants' Appendix, tab 8. The trial court's alternative holding (R-474, App. tab 9) was that the documents did not raise an issue of material fact. Likewise, the Court of Appeal approved the exclusion of the documents, but obviously considered them, stating "[t]hese documents, standing by themselves, are insufficient to raise a material dispute concerning the legislative determination of the county." Certified Record, page 18. App. tab 11.

rate limitations. However, this Court must clarify the law, and place in context cases that have recently been re-interpreted to widen the scope of special assessments. Local governments are rapidly expanding the scope and rationale of special assessments, making urgent the need for a clear definition of a valid special assessment.

In the instant case, the trial court and the District Court of Appeal approved an assessment for landfill maintenance, but not for waste collection, where the assessment proceeds were commingled into the County's solid waste budget, and where non-payment can result in the forced sale of a homestead. However, commercial and unimproved property receives the same disposal services but is not subject to the assessment, and therefore not subject to liens and tax sales to enforce payment.

The County did not demonstrate benefit to any particular property, and the County's listing of benefits, both in its legislative findings and its answers to interrogatories, reveals that most of the benefits are general. As to the only specific benefit--the disposal of waste from a particular property--the amount of the assessment bears no relation to the benefit, that is, to the actual use of the landfill. Affirmance by this Court would mean that an exception to constitutional protection could be supported by nothing more than self-serving declarations of County officials.

The benefit asserted rested upon a flow-control ordinance, such as that which the United States Supreme Court has recently

held to violate the dormant Commerce Clause.

The assessment imposes a flat charge for unlimited residential use of the landfill. This is contrary to state and federal policy of reducing landfill use by conservation and recovery of energy and materials from solid waste.

A clear ruling about valid assessments would benefit the citizens of Florida, local governments and the administration of justice. That ruling should be that only traditional assessments, which increase the market value of property by providing an improvement serving that property, may legally burden the homestead.

ARGUMENT

I. THE CONSTITUTIONAL LIMITATIONS ON PROPERTY TAXATION DO NOT CONTEMPLATE ASSESSMENTS FOR ONGOING MUNICIPAL SERVICES

A. THE CONSTITUTION PROVIDES A COHERENT SCHEME FOR LIMITING LOCAL TAXATION

Article VII of the Florida Constitution has one overriding message: the people of Florida want their taxes to be strictly and specifically limited, and they have exercised the political process to achieve that result. The citizens have, moreover, placed these limitations in the state's Constitution, so that they will not be subject to transient political changes, and so that all branches of government will be bound by them.

The wisdom of these provisions may be debatable, but there is no question that the will of the people has been clearly expressed.

While these provisions give rise to technical issues about how certain terms shall be defined, and how certain quantities shall be

calculated, there is no ambiguity in the intention strictly to limit taxation.

This case, if affirmed, will render that entire scheme meaningless with respect to local government. If a county or city may turn any ongoing service into an open-ended assessment, if that assessment may be supported only by the vague and self-serving statements of its own officials, not subject to independent scrutiny by any court, and if the amount of the assessment, and the method of calculating that amount, can likewise be justified by self-serving statements alone, regardless of evidence to the contrary, then local governments can assess any property any amount for any purpose. Property owners will be subject to unlimited taxation, at the will of local government officials, and court review will be so perfunctory that it will soon be abandoned altogether. The clear intentions of the citizens of this state will have been frustrated.

It has been argued that it is precisely because of the stringent tax limitations that courts must affirm assessments for ongoing services. However, that is not demonstrated in the cases that have recently come before this Court. While local governments have allowed the courts to assume that they had no other funding options available, that has not always been factual.

Clay County has a millage somewhat close to the 10 mills permitted by Article VII, Section 9(b), but it could raise the same amount as the assessment proceeds through ad valorem taxes and

remain under 10 mills.[3] It also has not used any of the 10 mills provided by section 9(b) for municipal services, though the maintenance of a landfill is clearly a municipal service.

The County also has the option of continuing the tipping fee, for residential users, and not increasing millage at all. This would mean that payment would be in proportion to use of the service, and that there would be no liens placed on homesteads.[4]

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[3] Clay County's millage was 8.4585 for 1995. Recapitulation of Taxes as Extended on the 1995 Tax Rolls, form DR 403 CC provided by Clay County to the Bureau of Analysis and Evaluations. Its millage in 1991 was 8.239. Florida Advisory Council on Intergovernmental Relation [ACIR] Ad Valorem Taxes: Public Reaction and Policy Response, January 17, 1992, Table 2, page 10. However, the County answered Interrogatory 3 stating that $1,676,023.30 had, so far, been collected as a result of the assessment, and answered Interrogatory 17 that one mill would generate $2,237,726.97 in ad valorem taxes. Thus, one mill, which would not put the County over the 10 mill limit, would generate more than was collected through the assessment. (R-396, 400, App. tab 5.)

[4] While one would think sound public policy would discourage liens on homesteads, the County's consultant, Public Financial Management, Inc., has a different view, as expressed at R-460-462, App. tab 7, a letter recommending the adoption of the assessment. Among other advantages discussed is the following:

> As discussed above, the collection of assessments, unlike tipping fees, is not dependent upon the number of tons which are actually delivered to the System. Rather, the collection of assessments is solely dependent upon the County's ability to enforce the assessment. The County's ability to place a lien against the property for failure to pay the assessment is considered by credit analysts to be the strongest method of enforcing the collection of solid waste user fees. Generally, the greater the percentage of users which are subject to the assessment, the stronger the credit. R-461.

In fact, the County stopped short of imposing the assessment on commercial and unimproved property, focussing the powerful enforcement tool only on residential property.

Likewise, in its Reply Brief before this Court in Sarasota County v. Sarasota Church of Christ, Inc., 20 Fla. L. Weekly S600 (Fla. December 21, 1995), Sarasota County has admitted that revenue pressures did not lead to its stormwater assessment.[5] Finally in State v. City of Port Orange, 650 So. 2d 1 (Fla. 1994) the State pointed out in its brief that there has been neither allegation nor proof that the City had reached its millage limitations, and that in fact an ad valorem tax reduction for certain businesses was planned as a result of the revenue from the "traffic utility fee." Case No. 83,103, Appellant's Initial Brief, p. 4 n.1., p. 9.

Thus, assessments can permit local governments to obtain more revenue than allowed by the millage limitations. They can also shift the tax burden from an ad valorem tax to a flat tax on homeowners, as was the case in Sarasota County, from use-sensitive user fees to a flat tax on homeowners as in Clay County, or from ad valorem taxation to an arbitrary classification of residences based on street type, such as was used in Port Orange.

It is certainly conceded that local governments have budget constraints, as well as political constraints, and have needs for revenue. However, allowing them unlimited access to the pockets of Florida's homeowners is not a solution permitted by the State Constitution.

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[5] Indeed, that assertion was one of the six major points of the Reply Brief, and was stated in the outline of the argument. Reply Brief, case number 84,414, pp. i and 10. Sarasota County stated "[T]here are no such revenue pressures evident from the record in this case or which exist in SARASOTA." id. at 10.

B. THE HOMESTEAD TAX EXEMPTION IS PART OF A COHERENT SCHEME FOR PROTECTING THE HOMESTEAD UNDER FLORIDA LAW

The constitutional recognition of the homestead appears in Article VII, Section 6,[6] which provides the homestead tax exemption, and also in Article X, Section 4[7], which prohibits

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[6] **Art. VII § 6. Homestead exemptions**

(a) Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon, except assessments for special benefits, up to the assessed valuation of five thousand dollars, upon establishment of right thereto in the manner prescribed by law. The real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of ninety-eight years.

This provision was originally inserted in the Constitution in 1934. Subsequent revision of the wording of the exception for assessments is discussed infra at page 17.

[7] **Art. X § 4. Homestead; exemptions**

(a) 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, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, 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 improvement thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family;

(2) personal property to the value of one thousand dollars.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be devised if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, jointed by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the

forced sale of a homestead, alienation of a homestead by one spouse, and even devise of the homestead when there is a surviving spouse or child. These, as well as the tax limitations, are distinctive features of Florida law. "No policy of this State is more strongly expressed in the constitution, laws and decisions of this State than the policy of our exemption laws." Sherbill v. Miller Manufacturing Company, 89 So. 2d 28 (Fla. 1956).

The exemption from forced sale had been part of the 1868 constitution, and of each subsequent revision, however the tax exemption was first placed in the Constitution in 1934. Its purpose was to preserve homes from forced sale because of delinquent taxes, during the Depression years when many families lacked the income to pay taxes. "The natural aversion to foreclosures and the subsequent economic losses inherent in such measures inspired the legislature to protect Florida homeowners." David W. Wilcox, The False Promise of Homeowner Tax Relief, 6 Fla. St. U. L. Rev. 1055 (1978) at 1055. Thus, the tax exemption can be seen as a completion of the protection provided in Article X. Homeowners were already protected from forced sale for other debts, but Article X had an exception for taxes and assessments. A tax

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entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

This provision existed in the 1868 Constitution, though the scope of it has undergone revision. These revisions are traced in Donna Littman Seiden, There's no place like home(stead) in Florida--should it stay that way? 18 Nova L. Rev. 801, 823 et seq. (1994).

exemption provided the needed protection for homeowners without the funds to pay taxes.

Each of these constitutional homestead sections have been interpreted in a number of statutes (Chapter 196 provides procedures for the tax exemption, sections 222.01-222.05 and 222.08-222.10 provide procedures for the exemption for forced sale, and sections 732.401-732.4015 interpret the restrictions on alienation and devise.) Through the years these provisions have been interpreted by many court decisions. The recurring theme of these cases is that the protection of the homestead, and the continued ability of the family to reside in the homestead, is of the highest social and political value.[8]

Thus, both the tax exemption and the Article X protection from loss form a coherent scheme for the protection of a homestead.

Clay County's assessment implicates both constitutional homestead provisions because assessments form an exception to both. The assessment at issue, if affirmed, will require homestead owners to pay even if they are exempt from ad valorem taxes, as are the homeowners here, and will result in sale of tax certificates on the homesteads of those who are unable to pay, (Motion to

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[8] This Court, in Overstreet v. Tubin, 53 So. 2d 913 (Fla. 913) surveyed the homestead exemptions of the other states, and found only one other as extensive as Florida's. Seiden, supra, provides an updated and more detailed comparison with other states. Only fifteen states place the homestead exemption in the constitution, while only seven other states exempt from forced sale a homestead of unlimited value, but a limited value of personalty. "The framers of the original constitution considered a debtor's right to have a place to live and work so important as to protect it by constitution with no dollar limitation, whereas the right to exempt personalty was limited to $1,000." id. at 841-842.

Supplement the Record, Certified Record pp. 1-4, App. tab 10) leading ultimately to forced sale of those homes. Indeed, the ordinance provides for foreclosure in the event of non-payment.[9] (R-139-140; App. 3), although the County has apparently chosen thus far to proceed by sale of tax certificates instead.

It may be thought that the amounts in question are negligible, and for many people they are. The assessment at issue is only $63.00 for 9 months, and the current assessment is only $84.00 per year. However, it is precisely cash-poor owners of modest homes that the homestead tax exemption is meant to protect.[10]

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[9] The County has created a hardship fund to pay the assessments of certain low-income people in its discretion. However, this fund can operate only so long as the funds are appropriated from general revenues, a process subject to multiple political and fiscal contingencies. The existence of the hardship fund does not obviate the threat to the homestead which the tax exemption was designed to protect.

The County in its answers to Interrogatories estimates that it will help approximately 200 people with the hardship fund (Interrogatory 12, R-399, App. tab 5), yet it states that 3,192 parcels are totally exempt because of the homestead exemption, (Interrogatory 15, R-400, App. tab 5).

[10] That principle is so strong that it results in occasional abuses, such as highly publicized debtors being permitted to retain lavish (but presumably sparsely furnished) homes, and such as a convicted criminal defeating a RICO forfeiture on homestead. Butterworth v. Caggiano, 605 So. 2d 56 (Fla. 1992). However, its overall effect is the salutary one intended by the framers. Seiden, supra at 837, provides information that in bankruptcy courts in Florida the average homestead exempted had a value of $40,000 in the Northern and Middle Districts, and $72,000 in the Southern District, while the highest exemption in a single case was $115,000 in the Northern and Middle Districts, and $300,000 in the Southern District.

In addition, the level of scrutiny applied to this case would permit not only an $63.00 assessment, but also a $630 or an $6,300 assessment. Nothing in the procedure for imposing the assessment, nor in the justification demanded of the County, distinguishes between an amount which is burdensome to a few of the citizens, and one which would be burdensome to many.

Assessments for ongoing services impose a flat tax on homeowners with drastically different ability to pay, and thus they undermine the basic values of an elaborate constitutional scheme for protecting the homestead.

This Court recognized the coherence of the constitutional tax limitation and exemption system in Port Orange, 650 So. 2d at 4.

> Finally, we recognize the revenue pressures upon the municipalities and all levels of government in Florida. We understand that this is a creative effort in response to the need for revenue. However, in Florida's Constitution, the voters have placed a limit on ad valorem millage available to municipalities, Art. VII, § 9, Fla. Const.: made homesteads exempt from taxation up to the minimum limits, Art. VII, §6, Fla. Const.: and exempted from levy those homesteads specifically delineated in Article X, section 4 of the Florida Constitution. These constitutional provisions cannot be circumvented by such creativity.

C. EXISTING CASE LAW DOES NOT SUPPORT ASSESSMENTS FOR ONGOING SERVICES AS AN EXCEPTION TO THIS SCHEME

This Court has several times considered the exception "for assessments for special benefit" to the homestead tax exemption. Since 1938, when that language was inserted in the Constitution,

this Court has invalidated each assessment for services that came before it, when the homestead was an issue.

In Crowder v. Phillips, 1 So. 2d 629 (Fla. 1941), a special assessment was levied by special act of the legislature, throughout Leon County, to fund the operation of a hospital. This Court found that such a charge was not a valid special assessment notwithstanding the legislative declaration, stating:

> That a hospital is a distinct advantase to the entire community because of its availability to anv 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. The purpose is, of course, to provide a place where those who are so unfortunate as to be injured or to become diseased may receive the benefits of medical skill and modern apparatuses whether they be the owners of property **or** not, and such advantases cannot fall in the cateaorv of special benefits to real property for which assessments would be authorized.

Crowder, 1 So. 2d at 631 (emphasis added).

Similarly, a county health unit was to be funded by a tax on property, and this Court was presented with the question whether the homestead tax exemption applied. The Court determined that

> a county health unit is the source of benefits to all the people of the county. It is, in fact, as much a "current governmental need" and "as essential to the public welfare as police protection, education or any other function of local government." (citation omitted.] But there would appear to be no "special or peculiar benefit" to the real property located in the county by reason of its establishment. . . Whisnant v. Strinsfellow, 50 So. 2d 885, 885-886 (Fla. 1951).

Accordingly, it could not be a special assessment, and could not be applied to homestead property.

This Court considered a waste collection ordinance in City of Fort Lauderdale v. Carter, 71 So. 2d 260 (Fla. 1954). It found that "no special or peculiar benefit results to any specified portion of the community or the property situated therein." The assessment was really a tax[11], and "therefore, is without constitutional authority insofar as it applies to homestead property." Id. at 261. Carter is the controlling authority in the instant case.

Fisher v. Dade County, 84 So. 2d 572 (Fla. 1956), involved an assessment for street paving and street lighting, the type of projects for which special assessments are routinely approved. In that case, however, the assessment was challenged under the constitutional homestead provision, and it was invalidated, because the projects to be funded by it did not provide the requisite "peculiar special benefits" (id. at 579) to the homestead property being assessed. The Court considered the case law, the

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[11] The assessments in the Carter, Fisher and St. Lucie cases were levied on an ad valorem basis. However, it was the absence of special benefit to particular property which led the Court to invalidate the assessment, not the ad valorem basis. A proper special assessment, which actually provides special benefits to each assessed property, may be assessed on an ad valorem basis. See, e.g. City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992) Conversely, an improper charge, even if denominated a fee and apportioned on a completely different basis than ad valorem , can be found to be actually a tax, and invalidated as an attempt to avoid the homestead exemption. Port Orange, 650 So. 2d 1 (Fla. 1994)

constitutional limitations on taxation, and the practical effects on local government. It concluded "the approval of the principle of financing here suggested could, and likely would, open a floodgate of financing schemes and devices that would eventually eliminate for all practical purposes the prohibition against taxing homesteads up to a valuation of $5,000." (Id. at 580) That warning should be heeded by this Court, in light of the recent proliferation of special assessments documented infra at pages 27-29.

In St. Lucie County-Fort Pierce Fire P & C Dist. v. Higgs, 141 so. 2d 744 (Fla. 1962) a special assessment to create a fire protection district purported to extend to all property including homesteads, and it included the legislative finding that all property received peculiar benefits in that it was protected from destruction by fire. The Court, nevertheless, found that "no parcel of land was *specially* or peculiarly benefitted in proportion to its value, but that the tax was a general one on all property in the district for the benefit of all." Id. at 746 [emphasis in the original]. (The two subsequent cases involving assessments for fire protection Fire District No. 1 of Polk County v. Jenkins, 221 So. 2d 740 (Fla. 1969) and South Trail Fire Control District v. State, 273 So. 2d 380 (Fla. 1973) are more frequently cited, but they did not involve homestead issues, because the plaintiffs in those cases were owners of commercial property.)

Until1938, the exception to the constitutional tax exemption read "special assessments for benefits" whereas since then it has

read "assessments for special benefits." The only case which construed this difference held that the new language is "much more restrictive." State v. Halifax Hospital District, 159 So. 2d 231, 234 (Fla. 1963). That case invalidated an assessment to build an addition to a hospital, the very same hospital which originally had been built with special assessment funds. The earlier assessment had been approved by this Court in State ex rel. Ginsburg v. Dreka, 135 Fla. 463, 185 So. 616 (1938), while the "special assessment for benefits" language was still controlling. This Court considered that precedent in **Halifax Hospital**, but determined that the "assessment for special benefits" language was "much more restrictive" and thus mandated the opposite result. 159 So. 2d at 234.[12]

Since the constitutional language has required an "assessment for special benefit," this Court has never approved an assessment for services when the homestead issue was raised.

The Fifth District Court of Appeal addressed the question of homestead protection and special assessments in Hanna v. City of Palm Bay, 579 So. 2d 320 (Fla. 5th DCA 1991). That case concerned a street improvement assessment on abutting property owners. However, the project was part of a plan to resurface all of the

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[12] Vernon W. Clark, surveying the law on the homestead tax exemption in 1959, before the Halifax decision, drew the same conclusion from this Court's post-1938 cases. He noted that the Attorney General had also changed his position with respect to special assessments, and stated that the test for a special assessment is "the improvement of the land commensurate with the burden of the tax." Vernon W. Clark, Homestead Tax Exemption in Florida, 8 U. Miami L. Rev. 261 (1959) at 277-279.

paved streets in the city, in several phases. The Court noted that the use of special assessments denied the homeowners the homestead exemption, and also avoided voter approval of the levy, and therefore that the criteria for a special assessment should be carefully examined. It ruled that

> even if a benefit is conferred upon particular parcels of property, if the benefit is the same or similar to that which is conferred upon the community at large, the individual homeowner may not be assessed for a pro rata cost of the improvement... Id. at 322.

No Court of Appeal, except the First District in this case, has found assessments for services valid when the homestead issue was properly raised.[13] Other than Fiske, which is discussed below, the numerous cases cited to justify assessments such as this either

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[13] In Nordbeck v. Wilkinson, 529 So. 2d 360, (Fla. 2d DCA 1988) the Appellant was pro se. While he claimed the homestead exemption, he did not brief any of the cases involving assessments and homestead, nor did he contest the validity or benefit of the assessment, only its applicability to him. In that case the assessments were for special districts which had been created with voter approval.

In Madison County v. Foxx and Dryden, 636 So. 2d 39 (Fla. 1st DCA 1994) the assessment was invalidated because of numerous procedural irregularities, and the Court did not reach the validity of the assessment as against the homestead.

> In view of our holding that the ordinances imposing the special assessments are null and void, we decline to reach the further constitutional issue raised by appellee Foxx--that it is unconstitutional to take away a homestead from an indigent homesteader based upon foreclosure of a special assessment lien--because this issue is not ripe for our consideration. id. at 50.

involve traditional capital improvements[14] or involve challenges by owners of commercial property[15] or both. Where the homestead issue was considered, no Florida appellate court has validated a special assessment for ongoing services, except in this case.

D. GENERAL BENEFITS DO NOT JUSTIFY A SPECIAL ASSESSMENT

The projects to be funded by the assessments in the above-described cases by and large fulfill very worthwhile public purposes. However, the issue is not whether the funds are used for a beneficial purpose, but whether the assessment provides special benefit to the homestead sufficient to allow the costs to burden the homestead.

Assessments are based on the theory that the property owner receives added value in the form of the improvement benefitting his

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[14] These include City of Hallendale v. Meekins, 237 So. 2d 318 (Fla. 4th DCA 1970), aff'd 245 So. 2d 253 (Fla. 1971) (sewer improvements); Meyer v. City of Oakland Park, 219 So. 2d 417 (Fla. 1969) (sewer improvements); Atlantic Coast Line R. Co v. City of Gainesville, 83 Fla. 275, 91 So. 118 (Fla. 1922) (street paving); Bodner v. City of Coral Gables, 245 So. 2d 250 (Fla. 1971) (street improvements); Citv of Nasles v. Moon, 269 So. 2d 355 (Fla. 1972) (parking facilities); City of Treasure Island v. Strong, 215 So. 2d 473 (Fla. 1968) (erosion control structures); and City of Boca Raton v. State, 595 so. 2d 25 (Fla. 1992) (downtown development improvements).

[15] Fire District no. 1 221 So. 2d 740, (challenge by owners of mobile home rental spa&es) and South Trail, 273 So. 2d 380, (challenge by owners of commercial property, consolidated with a bond validation case), as well as all the cases listed in n. 14 supra, except Bodner, perhaps the property owners in Treasure Island, and perhaps some of the property owners in Meyer.

property, and that the added value compensates for the cost- of the assessment. An assessment would otherwise be a confiscation.[16] However, assessments for ongoing services do not meet that test, because at the end of each assessment year, the property owner has accumulated nothing to show for his payment, and the service will need to be paid for again each subsequent year. Therefore open-ended assessments for services cannot fit within the exception to the homestead exemption.

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> "The theory underlying the doctrine of local assessments of the first type, which is held by the great majority of the courts, is that the value of certain property is enhanced by an improvement of a public character, the property thus receiving an especial and peculiar benefit: and that upon such property a part or the whole of the cost of such public improvement is assessed to an amount not exceeding the amount of such benefits. The owner of the property is therefore under this theory no poorer by reason of the entire transaction, as the assessment only takes from him the equivalent of part or all of the special benefit which the public improvement has conferred upon him: or to state it in another way, the special benefits conferred on him by the public improvement compensate him or more than compensate him for the amount of the assessment which he is obliged to pay.". . .
> "Taking under guise of taxation or of that branch of that power of taxation known as local assessment, in defiance of the essential elements of such power, is a taking of property without due process of law." Page and Jones, Taxation by Assessment §§11, 549, quoted in Atlantic Coast Line R. Co v. City of Gainesville, 83 Fla. 275, 91 so. 118 at 121. (1922) ; Treasure Island 215 So. 2d at 479.

Even a staunch advocate for the expansion of special assessments insists on the requirement of an ascertainable special benefit to property.

> When a local government levies a valid special assessment, it must determine that the property upon which the assessment is levied receives an ascertainable "special and peculiar benefit." . . . Failing to ascertain the special benefit peculiar to each parcel of property renders the levy unenforceable because without a special benefit the ordinance would be an attempt at a general tax.

Henry van Assenderp & Andrew Solis, Dispelling the Myths: Florida's Non-Ad Valorem Special Assessments Law 20 Fla. St. U. I,. Rev. 823 (1993). at 853, 854.

The County has listed the benefits it has legislatively determined to flow from the provision of solid waste disposal, as follows:

> the processing and disposal of the solid waste generated by their properties...the availability of solid waste disposal facilities to properly and safely dispose of solid waste generated on improved residential lands, closure and the long term monitoring of the facilities, a potential increase in value to improved residential lands, better service to owners and tenants, and the enhancement of environmentally responsible use and enjoyment of residential land.
> (R-117; App. tab 3)

Most of these are general benefits, which flow to commercial and unimproved property as well as residential property. Only the disposal of waste from a specific property and the potential increase in value are benefits to that property. The potential for increase in the value of property, as a result of the assessment,

is speculative at best. The County has not offered any evidence of an increase in value, actual or potential.[17] In fact the County has admitted that any such increase would result from the general benefits, which are shared with commercial and unimproved property, which is not assessed.'*

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[17] The "potential increase in value" recited in the Ordinance had been rephrased as "increase in the value of such properties;" when the County answered the homeowners' interrogatories. (Interrogatory 1, R. 396, App. Tab 5).

To sustain an assessment the benefits must be "substantial, certain and capable of being realized within a reasonable time." Fire District No. 1 of Polk County v. Jenkins, 221 So. 2d 740 (Fla. 1969). The notion that the value of residential property will increase as a result of being burdened with an assessment and therefore having the right to use a county landfill without a tipping fee does not meet this standard. The payment of the tipping fee is the only thing that changed as a result of the assessment-- the service received has not changed at all.

[18] Interrogatory 6 and the County's response are set forth in full as follows:

> Do you contend that the fair market value of the property of LILLIE [sic] MAE HARRIS and the property of WANDA M. TOWNSEND and ELLIS TOWNSEND was or will be affected by the solid waste disposal services provided by funds from the special non-ad valorem assessment? If so, state the dollar amount of this effect, and all facts relied upon to make this determination?
>
> Yes. The value of the property is enhanced through the availability of solid waste disposal facilities and services to that property. The reduction in littering which results from the availability of disposal services also enhances the value of property. The amount of enhancement may vary between particular residential units, however, such increase in value is in excess of the amount of the Partial Year Solid Waste Disposal Assessment." R-397, App. tab 5.

However, a decrease in littering was also one of the general benefits listed by the County in response to interrogatory 19, R-401, App. tab 5.

Judge Booth, in her dissent, observed

> Although these county-wide benefits are generally shared by both assessed and non-assessed property owners, the up-front costs of maintaining the landfill in question are not shared. Owners of residential property in the unincorporated area of the county are required to pay the fixed assessment to maintain the landfill; however, the landfill so maintained continues to be available to all other county residents and commercial users, who can use the landfill at will by payment of a "tipping fee", . . . Harris v. Wilson, 656 So. 2d 512 (Fla. 1st DCA) at 518-519, App. tab 11, pp. 18-19.

Clay County has funded a facility providing general benefits to the community, not special benefits to the assessed homestead property.

E. FISKE DOES NOT REQUIRE **AFFIRMANCE** IN THIS CASE

The current trend of using special assessments to subvert the limitations on ad valorem taxation rests on Charlotte County v. Fiske, 350 so. 2d 578 (Fla. 2d DCA 1977), a case which ignored a half-century of Florida jurisprudence maintaining a careful distinction between fees, assessments, and taxes.

> 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 collectable to finance usual and recognized

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It is obvious that both the availability of disposal facilities and the reduction of littering are general benefits shared by the entire community, including commercial and undeveloped property. However, only residential property is burdened with the assessment and its accompanying lien to provide those benefits.

> 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. [emphasis in the original] 350 so. 2d at 580.

No authority is cited for the Court's view, except Gleason v. Dade County, 174 So. 2d 466 (Fla. 3d DCA 1965), which is cited for the proposition that a fee can take the form of a special assessment for lien purposes. However, the Gleason court considered only the relative priority of a lien in a foreclosure, not whether it was a valid special assessment."

The Fiske court's "anything goes" view of assessments relieved it of examining the particulars of Charlotte County's assessment. In fact, the county was using its assessment powers as a collection agent for a private hauler. The residential properties in the area were forced by the assessment to pay the hauler, while the owners of commercial properties could choose whether to use the same hauler, or whether to apply for a permit to haul the waste themselves. In either case, commercial property owners would not have payment enforced by a lien. 350 So. 2d at 579.

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[19] Also, Gleason cited Turner v. State ex rel. Gruver, 168 So. 2d 192 (Fla. 3d DCA 1964) which determined that a garbage collection fee was a debt, not a tax, and therefore non-payment could not constitutionally be punished by imprisonment. Accordingly, Gleason made clear that the fee was not a tax, 174 So. 2d at 467, and then determined the lien priority question based upon the intention expressed in the municipal ordinance regarding the specific issue of lien priority of debts to the municipality. Thus, Gleason is not authority for the Fiske court's having blurred the lines between a fee and an assessment, because the Gleason opinion was very clear about that distinction.

The expansive view of special assessments expressed 'in the Fiske opinion is contrary to **the long** line of previous Florida cases, which hold that assessments **are** clearly distinguishable from taxes, and that they must be strictly limited to their proper purpose. City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992) at 29, citing Klemm v. Davenport, 100 Fla. 627, 631-634, 129 So. 904, 907-908 **(1930).**

From 1978 to 1994, Fiske **was** cited only three times in published cases, none **of** which involved **a** special **assessment.**[20] The case **was** cited for the broad latitude granted to administrative boards and local governments. Only recently has Fiske been widely cited as a way of bolstering many local governments' attempts to meet fiscal crises with new funding sources.

The above-quoted language was cited to this Court repeatedly in Port Oranse, 650 So. 2d 1, and, if followed, would have required approval of the "traffic utility **fee"** at issue in that case. This Court, however, invalidated that fee and ignored the supposed authority of Fiske.

Also, the Fiske case involved the provision of **a** new service for garbage collection. 350 So. 2d at 579. In the instant case,

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[20] In two of the cases, the citations were for the general language about the discretion of administrative bodies. Furnams v. Santa Rosa Island Authority, 377 So. **2d 983, 988** (Fla. 1st DCA 1980, concerning the leasing of public property, and Cohen v. School Board of Dade County, Fla., 450 s. 2d 1238, 1241 (Fla. 3d DCA 1984) reviewing **a** travel allowance in a special education case. The last case involves the monthly rates charged to different classes of property for **garbage** collection service, but does not involve a special assessment. City of New Smyrna Beach v. Fish, 384 So. 2d 1272, 1275 (Fla. 1980) reversing Fish v. City of New Smyrna Beach, 382 So. 2d 307 (Fla. 1st DCA 1979).

the County does not provide collection; it only provides disposal at the landfill. Thus the service has even less connection to the property than in Fiske or any other collection fee case.[21]

The service that is provided cannot be used at all by those who cannot transport their solid waste to a disposal facility. Low-income residents are less able to hire the franchise hauler, and less able to buy and maintain a vehicle to haul the waste themselves. Elderly and disabled persons may lack the physical ability to load and haul the waste. The homeowners in this case, and people like them, thus get less benefit from the disposal services than healthier and more prosperous residents.

Further, in Fiske the Court relied on the fact that all the proceeds of the assessment were paid directly to the contract hauler, and thus there was no "improper 'tax' aspect inuring to the benefit of the county at large," 350 So. 2d at 581, in sharp contrast to the commingling of assessment proceeds detailed at pages 33-34 infra.

Finally, the homestead issue, and the special benefit necessary to support an assessment on homestead, were never considered in Fiske. This Court cited Fiske and Gleason in its recent ruling in Sarasota, analogizing the special benefit of stormwater drainage to "the special benefit received from the

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[21] Van Assenderp and Solis, supra, at 855-856, make the argument that mobile emergency medical and rescue services would provide a special benefit, even though it is clear that a stationary county or municipal health unit or hospital would not provide such a benefit. By analogy, landfill maintenance remote from the property would not provide a special benefit even if collection of waste at the property would do so.

collection and disposal of solid waste." 20 Fla. L. Weekly at 602. Neither of those cases determined whether waste collection was a special benefit, Gleason because the home was in foreclosure and the only issue was lien priority, and Fiske because that decision ignored special benefit as well as all other established criteria for a valid assessment.

The controlling authority for this case is not Fiske, but Carter, 71 So. 2d 260, discussed supra at page 15.

II. LOCAL GOVERNMENTS ARE ATTEMPTING TO EXPAND ASSESSMENTS TO ANY LEGITIMATE GOVERNMENTAL FUNCTION

"The use of non-ad valorem special assessments to fund systems, facilities, services, works and improvements to real property is increasing in Florida counties, unlike in the rest of the country." Van Assenderp and Solis, supra at 835. The Comptroller compiles information on special assessments imposed by local governments. That information shows the number of counties, municipalities and special districts levying special assessments all increased during the 1985-1990 time period, and increased still further in 1990-1991. Florida Advisory Council on Intergovernmental Relations [ACIR] Special Assessments: Current Status in Law and Application 12 (January 21, 1992).

Special assessments are being used to evade the homestead exemption and the millage caps. This fact is clear from the Van Assenderp article, supra, at 837-838.

> This trend is the product of several factors that have caused local governments--especially counties--to look for alternative revenue sources, preferably those that are lienable.

> First, the constitutional homestead exemption limits the amount of local ad valorem revenues, especially in rural counties. . . .
>
> Second, the ad valorem millage caps [citations omitted] also induce local governments to use special assessments. . . .

Special assessments have recently been imposed for projects that benefit the entire community, but do not benefit any parcel of land differently from any other. Now, in addition, local governments are attempting to impose assessments on property which clearly does not benefit from the project, on the theory that the property contributes to the need for the project, though the benefit actually accrues to different property. Sarasota, 20 Fla. L. Weekly S602, (Grimes, C.J. dissenting), Case No. 84,414, Initial Brief of Appellant, pp. 18-19. It is, in fact, difficult to imagine any legitimate function of local government which does not benefit the general community, or meet needs generated by some part of the community.

Allowing these types of assessments to burden the homestead makes the term "special benefit" mere surplusage. This is a drastic reinterpretation of constitutional language.

If "special benefit" means general benefit, or means no benefit at all, but rather contribution to need for some project, then any legitimate governmental function can be funded by a special assessment. The permitted tax millage could then be used, presumably, to pay for activities which do not benefit the community, or which do not meet needs created by the property in the community. Alternatively, the millage could continue to be

lowered, as more and more local government functions are funded by assessments, thus replacing ad valorem taxation with a multitude of flat taxes. The constitutional provisions intended to limit taxes would be meaningless, as would those protecting the homestead.

In Port Orange, 650 So. 2d 1, the device for evading the constitutional provisions was called a fee rather than an assessment, but the evasive purpose was the same. This Court subjected the city's methods and justif ications to realistic scrutiny, and found the fee to be an invalid tax. The same should be done in this case.

III. TEE ASSESSMENT IN THIS CASE WAS ARBITRARY

A. THE ASSESSMENT WAS IMPOSED WITHOUT ADEQUATELY DETERMINING THE COSTS OR BENEFITS

In Sarasota, 20 Fla. L. Weekly 5600, the churches' assessments were calculated on an individualized basis, using the square footage of impervious surface on the property. In contrast, the assessment in this case is the same far each dwelling, and the County made no attempt to tailor the assessment to actual use, or even to determine the amount of variation of actual use. Clay County's method of calculating the assessment was arbitrary, and should not be sustained by the Court.

1. THERE WAS EVIDENCE THAT THE FEE WAS PREDETERMINED

The trial Court was presented with County documents= in which

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[22] There was considerable discussion in the briefs about the admissibility of those documents. However, the trial Court's Summary Final Judgment contained an alternative ruling that the documents "even if considered, do not raise an issue of material

the County Comptroller referred to the assessment& as a "predetermined $7/mo fee" (R-449, App. tab 7) and with a pair of budget calculation worksheets (R-447-448, App. tab 7) in which the last line was "Unincorporated Residential Waste % Necessary for $63.00 Assessment" ($63 representing $7 per month for the nine months of the assessment.) These two calculations start with different amounts in the top line, "Total System Disposal Fee Requirement", work through the calculations, and each arrive at an assessment slightly less than what was actually imposed. These documents demonstrate that the total budgetary needs of the solid waste system, and the percentage of funds needed to service the unincorporated residential units (the only properties subject to the assessment) were very flexible numbers[23], so that the budget could be adjusted backward from the amount that the County had determined to charge as a monthly assessment.

Similarly, when it turned out that there were more dwelling units than anticipated, instead of lowering the assessment, the

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fact which would preclude the entry of a judgment in this matter." R-474, App. tab 9. Likewise, the Court of Appeal, at p. 13-14, App. tab 11, 656 So. 2d at 517, stated "These documents, standing by themselves, are insufficient to raise a material dispute concerning the legislative determination of the county." Rather than reviewing the propriety of excluding the documents, this Court can review, as a matter of law, these alternative holdings that the documents have no bearing on the summary judgement. Such review would promote judicial economy.

[23] In fact, the percentage of waste generated by the residences in the unincorporated area was 39.93% in the budget submitted with the County's Motion for Summary Judgment, R-155, App.tab 3, line 14, and was 44% in R-447-448, lines 6 and 16, App. tab 7.

additional $125,370 was merely added to the budget, primarily in the contingency line. (R-450-452, App. tab 7).

If these figures could be manipulated to justify a predetermined fee, this implies that the County has not determined the actual cost of serving the properties assessed[24]. Further, the affidavits of county officials, on which both lower courts relied, are false, with regard to the cost of providing service. Since the County has no knowledge about the actual cost of the service, and has undertaken no study of the benefit, the affiants have no knowledge on which to base their statements that the benefit equals or exceeds the cost.

This Court considered an analogous record in Fisher, 84 So. 2d at 576 (Fla. 1956).

> In fact, except for the bald conclusion submitted there is nothing in this record to show any actual attempt to evaluate the benefits to be received by the various properties abutting the streets to be improved. The unsupported conclusion of the County Engineer under the circumstances revealed in this record regardless of his ability and integrity cannot be accepted as determinative of the constitutional question involved.

Likewise, Clay County's affidavits should not be given deference by this Court, because they do not establish a benefit in any logical or legitimate way.

2. THE COUNTY MEASURES ACTUAL USE AT THE DISPOSAL SITE

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[24] The County's response to interrogatories on this subject are singularly unenlightening. See Interrogatory 8, R-398 and interrogatory 20, R-401.

The County has admitted in its answers to interrogatories that the solid waste brought into the landfill is weighed "as is required by Florida law." R-402, interrogatory 22, App. tab 5. Thus, the county has actual knowledge of how much waste is brought by each resident. The County could continue to charge each resident according to his or her actual use of the landfill, by means of a tipping fee. It could also have tabulated the weights of the waste brought by residents and determined the variability in landfill usage among households, and then have imposed a less arbitrary assessment.[25] Instead the County determined to charge a flat fee, which residents cannot change by reducing their use of the landfill.

3. REQUIRING LIGHT USERS TO SUBSIDIZE HEAVY USERS CANNOT BE A BENEFIT

The landfill was available for use by the residents before the assessment. All the general benefits from operating the landfill were likewise available. The only possible benefit provided by the

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[25] The County stated, in its answer to Interrogatory 5, R-397, App. tab 5, that

> [c]ommercial and other non-residential properties are not subject to the Partial Year Solid Waste Disposal Assessment because of the widely varying degrees of production of solid waste generated from such properties. In addition, an adequate method for the recovery of disposal costs allocable to such properties exists through tipping fees.

However, the County has declined to find out what variability there is in waste disposal between residences, so it cannot know whether the variability in commercial waste disposal is greater. Similarly, the tipping fee mechanism is no more or less adequate for residential property than for other types. The targeting of the assessment on residences is more plausibly explained as an attempt to evade the homestead exemption.

assessment to residential property owners is the ability to bring waste to the landfill without paying a tipping fee. That is, the cash savings from not paying the tipping fee is the only possible specific benefit to those paying the assessment.

If, as the County contends, the assessment generates an amount which equals the cost of the landfill use by all the households assessed, then the assessment amount for each dwelling unit is an average of the use of all the residents. Some residents clearly generate more solid waste than others, although the County made no effort to determine the extent of this variation. Thus, the assessment is forcing the lighter users, those who are actually complying with the state and federal policy of reducing waste to the landfill, to subsidize the users who are making no such efforts.

For the heavy users, the assessment results in a savings, and thus a benefit, but for the lighter-than-average users, (approximately half of the residents), the assessment costs more than they would spend on tipping fees, and thus is a detriment.

4. THE ASSESSMENT PROCEEDS ARE COMMINGLED IN A COUNTY ENTERPRISE FUND

The assessment proceeds are not kept in a separate account, such as would be the case in a special district. Instead, they are placed in a Solid Waste Enterprise Fund. The funds are commingled there with other County funds from other sources, and they are used to pay for many items besides the maintenance of the landfill. For example, the Solid Waste Enterprise Fund apparently pays a portion

of the salaries of County-wide officials such as the Chairman of the Board of Commissioners (20%), the Clerk/Comptroller (10%), and the county Attorney (10%). While these officials may spend time on solid waste issues, they certainly do not spend time providing solid waste services to the residents. Likewise the Fund also pays substantial professional fees ($295,000) and a large payment ($150,000) on a fine for previous non-compliance with solid waste regulations. R-457-458, App. tab 7.

The commingling of the assessment proceeds in the Enterprise Fund, together with the flexibility in the budgeting process, together with the County's failure to document actual use when the figures are available at the landfill, show that the County has made no attempt to determine the actual benefit to the assessed properties. The affidavits provided, and the legislative declarations of benefit, are self-serving, and without substance. They do not cure the arbitrariness of this assessment, and they should not be given deference by this Court.

B. JUDICIAL SCRUTINY IS NEEDED TO PROTECT CITIZENS FROM ARBITRARY ASSESSMENTS

The District Court of Appeal accepted all of Clay County's declarations and affidavits, without subjecting them to judicial scrutiny. It thus turned a legal question into a factual question, and deferred to the County Commission to determine the facts. Foreclosing judicial inquiry because of the findings and declarations found in the ordinance is wholly inconsistent with

this Court's reasoning, analysis and holding in Port Orange, 650 So. 2d 1.

The irregularities in the assessment process did not prevent the majority of the Court of Appeal panel from affirming the Summary Judgment for the County. If it is affirmed by this Court, local governments will be aware that assessments are available as an unlimited source of revenue, based on mere assertions about cost and benefit.

C. THE ISSUE OF THE NUMBER OF DWELLING UNITS WAS NOT RESOLVED

There has been no resolution of the issue raised by the Townsends' complaint, that of arbitrariness in determining the number of dwelling units on their property[26], and consequently the amount of the assessment. The County originally billed Mr. and Ms. Townsend for four dwelling units. (R-48, App. tab 2). At their request it inspected the property, ♋■♎ issued a memo correcting the number of dwelling units to two (R-55; App. tab 2.[27]). It sent a final bill for three dwelling units (R-57; App. tab 2). This

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[26] It is not unusual for a rural homestead to contain more than one structure, or vehicles such as mobile homes or campers, which are arguably habitable, and which may have been used as dwellings at various times, but not at other times. This was the case at the Townsends' homestead.

[27] The Townsends' property is indicated on the fourth line from the bottom on that memo, R-56; App. tab 2. This can be verified by comparing the address, 4502 Spring Bank Rd, with the Townsend's address on R-57; App. tab 2, which is the assessment notice directed to them. However, R-S6 indicates there are two dwelling units, and R-S7 is a bill for $189.00, which is three times the assessment per dwelling unit of $63.00.

sequence of events clearly demonstrates arbitrariness, which was not addressed by the Court of Appeal, though it was briefed.

IV. BENEFITS BASED ON FLOW CONTROL RUN AFOUL OF TEE COMMERCE CLAUSE

The record shows that the County failed to show a benefit to support the assessment. That argument is strengthened by the subsequent United States Supreme Court case of C & A Carbone, Inc. v. Town of Clarkstown, New York, ___ U.S. ___, 114 S. Ct. 1677, 128 L. Ed. 2d. 399 (1994). That case requires a finding that there cannot be a special assessment for solid waste services, because the local government can never demonstrate a benefit to property. In Carbone the Supreme Court decided that a local government's flow control ordinance for solid waste discriminated against interstate commerce, and therefore violated the dormant commerce clause of the United States Constitution. Flow control means using the regulatory power of local government to force persons and companies to use a specific solid waste facility. The Court held that such flow control discriminates against out of state businesses which could have provided that service.

Clay County's argument that residential property receives a benefit from the assessment is based on flow control. This is seen in the findings portion of the Ordinance, R-128, App. tab 3, in the ordinance's mandate that solid waste be taken to a County facility, R-144-145, App. tab 3, in the notice of the assessment sent to property owners, R-165, App. tab 3, and in the transcript of the summary judgment hearing, App. tab 8, pp. 9 and 27. The connection

between flow control and benefit is very explicit in the-letter from Public Financial Management to the County Commissioners, R-460-461, App. tab 7.

The assessment is based on a simple argument: all residential properties generate solid waste, all solid waste must be brought to county facilities, and therefore all properties are benefitted by the maintenance of those facilities. If you remove the requirement that residents must use county facilities, the benefit argument fails.

Since the Supreme Court has decided that the Commerce Clause allows other facilities to compete, the County landfill may be less economical, and the residents may wish to use competing facilities. Commercial property owners have the option to choose the most advantageous facility, but residential property owners cannot make that choice freely because the assessment requires them to pay for the county facilities, whether they use them or not. This cannot be viewed as a benefit; it is clearly a detriment.

V. SOLID WASTE DISPOSAL IS A PROPRIETARY, NOT A SOVEREIGN FUNCTION

The Carbone case also makes clear that solid waste disposal is a business, in which a necessary service is provided for a fee. As Justice Kennedy stated "[W]hat makes garbage a profitable business is not its own worth, but that its possessor must pay to get rid of it." 114 S. Ct. at 1682. In the case of Clay County, all that is provided is the use of the County's facility on the County's property. Another. entity could set up a competing landfill, and could provide the same service that Clay County provides. This is

clearly a proprietary, and not **a** sovereign function, of the local government.*'

The competing landfill could charge a tipping fee, charge by the month, or make any other fee arrangement, but it could not impose an assessment, and it could not obtain payment by the forced sale of a homestead. Likewise the County, while providing the **same** service, cannot **legally** use those means of collection.

Nonpayment for **a** service **like waste** disposal would create a debt. Florida's Constitution protects debtors from imprisonment in Article I, Declaration of Rights, Section 11. Turner v. State, ex rel. Gruver, 168 So. 2d 192 (Fla. 3d DCA 1964) determined that a person could not be imprisoned for nonpayment of a county waste collection fee, because it was **a** debt, not a tax. A county code which made violation a crime did not deprive the debtor of his constitutional protection.

If nonpayment of a garbage fee creates debt, preventing imprisonment, as Turner squarely decided, then it also is a debt within the meaning of Article X, Section 4, which protects homesteads from forced **sale** for **"debt."**

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[28] This Court recently recognized the distinction between proprietary and sovereign governmental functions in its unanimous decision authored by Justice Shaw in Sebrins Airport Auth. v. McIntyre, 642 So.2d 1072 (Fla. 1994).

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

id., at 1072 n.1.

VI. THE ASSESSMENT VIOLATES STATE AND LOCAL POLICY ON SOLID WASTE

In the Sarasota case it appeared that the assessment furthered federal and state policies regarding stormwater. 20 Fla. L. Weekly at S601-602. In this case, the assessment contravenes federal and state policies by encouraging unlimited use of the landfill.

Federal waste management policies are set forth at 42 USC § 6901 et seq. The Congressional findings at 42 USC 6941a include:

> §6941a Energy and materials conservation and recovery;
>
> Congressional findings
>
> 1. significant savings could be realized by conserving materials in order to reduce the volume or quality of material which ultimately becomes waste; . . .
>
> 3. the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste;

Florida's legislative findings regarding solid waste include similar findings.

> Fla. Stat. § 403.702
>
> b. Problems of solid waste management have become a matter statewide in scope and necessitate state action to assist local government in improving methods and processes to promote more efficient methods of solid waste collection and disposal. . . .
>
> e. The failure or inability to economically recover material and energy resources from solid waste results in the unnecessary waste and depletion of our natural resources, and, therefore, maximum resource recovery from solid waste and maximum recycling and reuse of such resources must be considered goals of the state....
>
> (2) It is declared to be the purpose of this act to: . . .
>
> (g) Promote the reduction, recycling, reuse, or treatment of solid waste,

specifically including hazardous waste, in lieu of disposal of such wastes. . . .

(j) Promote the education of the general public and the training of solid waste professionals to reduce the production of solid waste, to insure proper disposal of solid waste, and to encourage recycling.

(k) Encourage the development of waste reduction and recycling as a means of managing solid waste, conserving resources, and supplying energy through planning, grants, technical assistance, and other incentives...

(n) Require counties to develop and implement recycling programs within their jurisdictions to return valuable materials to productive use, to conserve energy and natural resources, and to protect capacity at solid waste management facilities.

Further, the State Comprehensive plan includes goals and specific policies regarding the reduction of landfill use, to wit:

Fla. Stat. § 187.201

(a) Goal.--All solid waste, including hazardous waste, wastewater, and all hazardous materials, shall be properly managed, and the use of landfills shall be eventually eliminated.

(b) Policies.--

1. By 1994, reduce all volume of solid waste requiring disposal by 30 percent.

Thus, federal and state policies require local governments to maintain landfills, but they also require that the use of landfills be minimized. Clay County's assessment has actually removed an incentive to reu-se and recycle solid waste. Residents who formerly paid for landfill services according to how much waste they brought to the landfill now have a "blank check" to deposit all the waste they can bring, without any additional cost. Further, taxpayers who resent the mandatory nature of the assessment can vent their frustration by refusing to take the extra effort to recycle or to reuse materials.

The connection between the cost of solid waste services and the behavior of users of those services is recognized in Florida Statutes §403.7049(4), which states in full

> Each county and each municipality which provides solid waste collection services through its own operations or by contract, is encouraged to charge fees to each resident and nonresidential user of the solid waste collection service which vary based upon the weight of solid waste that is collected from each user.

If these fees are to vary when collection is provided, a situation in which it is difficult to weigh the waste, then a fortiori, fees should vary when the waste is brought directly to the landfill, where it is routinely weighed, Interrogatory 22, R-402, App. tab 5.

Clay County has imposed a flat tax which discourages residents from complying with important federal and state policies. It is not entitled to deference from this Court.

VII. A CLEAR RULING ABOUT THE LIMIT8 OF SPECIAL ASSESSMENTS IS CRUCIAL

This Court should enunciate statewide standards regarding what types of assessments may burden a homestead.

A. A CLEAR RULING BENEFITS LOCAL GOVERNMENTS, WHO CAN THEN PLAN FOR LEGAL MEANS OF RAISING THE REQUIRED FUNDS

Supporters and opponents of special assessments for services agree that the requirements for such assessments should be made clear. Local governments, as well as property owners who might oppose assessments, benefit from definite criteria which can be consulted to avoid litigation.

> Confusion, myths and uncertainty exist in Florida among practitioners, courts, citizens, property owners, taxpayers and government officials about special assessments or "non-ad valorem special assessments." It has been the authors' experience that this confusion and uncertainty reaches all aspects of the nature, use, levy, collection, and enforcement of special assessments. This confusion also causes many local governments to gamble on the reaction of property owners and courts to the imposition of special assessments. Van Assenderp, supra, at 825.

Local governments as well as citizens are harmed by gambling on the acceptability and the legality of special assessments.

B. A CLEAR RULING BENEFITS LOW-INCOME HOMEOWNERS WHO ARE IN DANGER OF LOSING THEIR HOMESTEADS

Retaining one's home is important to most people, but is most important to those whose financial circumstances are such that they cannot afford replacement housing. Florida's homestead provisions were designed to provide families with the security of being able to retain their homes in spite of economic adversity.

That security is impaired when the property is vulnerable to unpredictable assessments, unlimited in type, number and amount. Florida's homestead owners need to know what types of assessments will be permitted to burden their property, and to be free from the effects of local governments gambling on assessments of questionable legality.

C. A CLEAR RULING UPHOLDS THE CONSTITUTION AND TEE POLITICAL PROCESS FOR AMENDING THE CONSTITUTION

If the current system of revenue limitations for local governments is untenable, it should be addressed through

appropriate legislative and constitutional revision procedures. Indeed, there has been substantial study and some progress in that direction". Deficiencies in funding local government should continue to be dealt with in a systematic and democratic way, with full disclosure to, and input from, the citizens.

The use of assessments to subvert the constitution undermines the lawful processes for constitutional change, and undermines the respect for law which is an important aspect of a civil society. If officials of local government make affidavits about matters on which they have no knowledge, and if courts decline to scrutinize those affidavits because the local governments need the money, then the citizens can only conclude that needing the money is a justification to manipulate the facts in a legal proceeding. If citizens know that the constitution provides a homestead tax exemption, and nevertheless are paying assessments for a variety of ongoing services which they know are traditionally funded by taxes, they will lose respect for the constitution and the political process.

The harm to the rule of law may not be as dramatic as the harm caused to those people who lose their homesteads, but it will be more widespread, and it may be prove to be more destructive.

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[29] Mary Kay Falconer, Lynda K. Barrow and Steven O'Cain, Local Government Revenues Post 1993 Lesislative Session: A combination of New and Improved, 21 Fla. St. U. L. Rev 585 (1993).

CONCLUSION

The assessment in this case was imposed only on residential property. Other types of property pay on a fee for service basis, which cannot be enforced by lien.

Thus, this case squarely presents the issue of what types of assessments will be permitted to lien the homestead. It poses the question whether this Court will follow its own jurisprudence about assessments, developed over decades, or will instead follow an ill-considered Court of Appeal decision which received no deference until it became part of a campaign to promote the use of special assessments. It gives this Court the opportunity to rule that special assessments must be limited to their traditional scope, and may not be a tool to nullify the tax and homestead provisions of the Constitution.

This Court should rule, as a matter of law, that the assessment presented in this case cannot be imposed on homestead property, and should provide clear guidelines for the use of special assessments.

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CERTIFICATE! OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served on

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