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

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

Appellants,

vs.

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

Appellees.
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CLAY COUNTY, FLORIDA'S RESPONSE TO THE JURISDICTIONAL BRIEF OF PETITIONERS

On Petition for Discretionary Review Of The Decision From The First District Court of Appeal
Case No. 93-3445

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STATEMENT OF THE CASE AND FACTS

This matter is before this Court on a petition brought by Petitioners, Harris and Townsend ("the Petitioners"), for discretionary review of the First District Court of Appeal's decision (attached as "App. A") affirming the Summary Final Judgment entered by the Circuit Court for the Fourth Judicial Circuit in and for Clay County, Florida.

Clay County, Florida ("the County"), the Respondent here, is a charter county organized under Article VIII, section 1(g), Florida Constitution. Under its broad home rule powers, the County adopted an ordinance in 1992 authorizing a partial year solid waste disposal special assessment on all residential property located within the unincorporated area of the County. The special assessment funds the cost of providing solid waste disposal services and facilities for the properties subject to the assessment. The Petitioners challenged the solid waste disposal special assessment as invalid, claiming that the assessment conferred no special benefits on their property and that the assessment was not fairly apportioned. Judge William Wilkes, Circuit Judge of the Fourth Judicial Circuit granted Summary Final Judgment on behalf of the County. The First District Court of Appeal affirmed and the Petitioners are requesting this Court to exercise its discretionary jurisdiction and review the First District Court of Appeal's decision.

SUMMARY OF ARGUMENT

The First District Court of Appeal's decision affirming the Summary Final Judgment of the Fourth Judicial Circuit does not expressly or directly conflict with any other decision of a district court of appeal or this Court on the same question of law. Each decision, cited by the Petitioners as expressly and directly conflicting with this case, is distinguishable on its facts or law. Moreover, under either distinction, the "same question of law" does not exist among the cases; thus, neither can a jurisdictionally sufficient conflict so exist.

STANDARD OF REVIEW

The Petitioners ask this Court to exercise its discretionary jurisdiction under Article V, section 3(b)(3), Florida Constitution, which states, "The supreme court: may review any decision of a district court of appeal that . . . expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."[1] This Court has traditionally explained this standard to mean that:

> A conflict of decisions . . . must be on a question of law involved and determined, and such that one decision would overrule the other if both were rendered by the same court; in other words, the decisions must be based practically on the same state of facts and announce antagonistic conclusions.

Ansin v. Thurston, 101 So.2d 808, 811 (Fla. 1958)(quoting 21 C.J.S. Courts § 462)(emphasis added). In addition, decisions are not in

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[1] This constitutional provision is procedurally implemented through Florida Rule of Appellate Procedure 9.030(2)(A)(iv).

express and direct conflict with one another if distinctions exist between them. See Department of Revenue v. Johnston, 442 So.2d 950, 950 (Fla. 1983)("Because we find this cause distinguishable on its facts from those cited in conflict, we discharge jurisdiction.").

The Petitioners have failed to exhibit an express and direct conflict on the same question of law between the First District Court of Appeal's decision here and any other district court of appeal or with any decision of this Court.

ARGUMENT

I. NO EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN THE INSTANT CASE AND DECISIONS FROM OTHER DISTRICT COURTS OF APPEAL.

The Petitioners' purported conflict between Hanna v. City of Palm Bay, 579 So.2d 320 (Fla. 5th DCA 1991), and this case does not exist because the decisions do not consider the same question of law.[2] Not only did the First District Court of Appeal recognize the differences between the instant case and the Hanna v. City of

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[2] In fact, the First District Court of Appeal correctly noted the differences between this case and the decision in Hanna v. City of Palm Bay. The First District Court of Appeal stated:

> In Hanna v. City of Palm Bay, . . . , the fifth district held that a special assessment for road maintenance was not valid because the benefitted properties did not "receive a benefit which is different in type or degree from the community as a whole." We find Hanna inapplicable in the instant situation for several reasons. [Court enumerated those reasons.]

(App. A, p. 8).

Palm Bay decision of the Fifth District Court of Appeal, so did the Petitioners. Their Jurisdictional Brief acknowledges the following fundamental factual differences: (1) the special assessments in the two cases involved different services and improvements and (2) the City of Palm Bay imposed the special assessments pursuant to Chapter 170, Florida Statutes, not its home rule powers. (Jurisdictional Brief, pp. 4-5).

The Petitioners argue that the definition of special benefit in Chapter 170, Florida Statutes, under which the City of Palm Bay imposed its street improvement special assessments, should have controlled the First District Court of Appeal here. The court in Hanna v. City of Palm Bay determined that the City could not impose its special assessment under any alternative authority (e.g., home rule powers) other than Chapter 170 and because the City's assessment failed to meet Chapter 170's statutory definition of special benefit, the special assessment was invalid. In contrast, the special assessment at issue here was not imposed under Chapter 170 but under the County's home rule powers.

Furthermore, the Petitioners fail to recognize that the value of Hanna v. City of Palm Bay is limited to the facts of that case alone as this Court has since overruled the fundamental premise of the Hanna v. City of Palm Bay decision. The court in Hanna v. City of Palm Bay had stated this premise as, "The special assessment method of funding local improvements is a creature of statute. There exists no inherent police power for levying special assessments to fund local improvements." Hanna, 579 So.2d at 322

(emphasis added). However, the next year, this Court held that a city did not need specific statutory authority to impose special assessments and that under the 1968 Florida Constitution, a city "had the authority to impose a special assessment under this home rule power." City of Boca Raton v. State, 595 So.2d 25, 30 (Fla. 1992). Thus, the First District Court of Appeal in this case stated:

> The assessments in Hanna were enacted pursuant to chapter 170, Florida Statutes. The assessment in the instant case is one enacted pursuant to the home rule authority of the county. Such an assessment is only subject to the limitations enumerated in City of Boca Raton v. State, supra.

(App. A, pp. 8-9) (emphasis added). The two requirements enumerated in City of Boca Raton v. State are that the assessed property must derive a special benefit from the service provided and that the assessment is fairly and reasonably apportioned among the benefited properties. City of Boca Raton v. State, 595 So.2d at 29. These two requirements were the ones applied by the First District Court of Appeal in this case. Consequently, the fact that the First District Court of Appeal did not apply the statutory definition of special benefit from Chapter 170, Florida Statutes, does not create an express and direct conflict with Hanna v. City of Palm Bay, 579 So.2d 320 (Fla. 5th DCA 1991), on the same question of law.

Furthermore, the Petitioners assert that the First District Court of Appeal's decision expressly and directly conflicts with "a crucial provision" in Charlotte County v. Fiske, 350 So.2d 578

(Fla. 2d DCA 1977). The Petitioners state, "[T]he decision ignored one crucial limitation in Fiske, that there be no 'improper "tax" aspect inuring to the benefit of the county at large.'" (Jurisdictional Brief, p. 9 (quoting Charlotte County v. Fiske, 350 So.2d at 581)).[3] This language does not and cannot create a third "crucial" requirement for valid special assessments.[4] The provision of a governmental service, whether by county employees, as in this case, or through contracts with a private entity, as in the Charlotte County v. Fiske case, does not distinguish valid from invalid special assessments.

II. NO EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN THE INSTANT DECISION AND OTHER DECISIONS OF THIS COURT.

The Petitioners' asserted express and direct conflict between the First District Court of Appeal's decision here and this Court's jurisprudence on homestead protection is misleading. No case exists in Florida law and no case cited by the Petitioners stands

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[3] The entire sentence from which the Petitioners extract this language is the following, "Secondly, the total of the charges collected for the total services is paid out to the franchised disposal company and no profit is made by the county (thus, incidentally, there is no improper "tax" aspect inuring to the benefit of the county at large)." 350 So.2d at 581.

[4] The Petitioners also assert a conflict with respect to Charlotte County v. Fiske by referencing facts in this case which cannot create a jurisdictional conflict. The Petitioners' citations to the Record on page 8 of their Jurisdictional Brief are beyond the scope of what may constitute a sufficient conflict for this Court's review. See Reaves v. State, 485 So.2d 829, 830 n.3 (Fla. 1986) ("[W]e are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions.").

for the proposition that special assessments for services cannot be imposed against homestead property or that they are subject to a higher level of scrutiny than those imposed against commercial or non-residential property. The Florida Constitution states that the owner of homestead property "shall be exempt from taxation thereon, except assessments for special benefits[.]" Art. VII, § 6(a), Fla. Const. While this constitutional language clearly limits assessments against homestead property to those providing "special benefits," the language does not further limit the assessments to particular types of programs which provide special benefits. The Florida Constitution does not limit valid special assessments imposed against homestead property to those which fund only capital improvements and no court has interpreted this constitutional language in such a manner. Thus, special assessments for services may constitutionally be imposed against homestead property so long as they provide "special benefits."

In fact, the cases which the Petitioners cite for the proposition that special assessments for services cannot be imposed against homestead property did not invalidate the special assessments at issue because homestead property was involved. The Court invalidated the special assessments on other grounds. For example, in City of Fort Lauderdale v. Carter, 71 So.2d 260 (Fla. 1954)(solid waste management services), St. Lucie Co.-Ft. Pierce Fire Protection & Control Dist. v. Higgs, 141 So.2d 744 (Fla. 1962) (fire protection and control services), and Fisher v. Board of County Commissioners of Dade County, 84 So.2d 572 (Fla. 1956)

(street improvements), the purported special assessments at issue were invalidated on the basis of their apportionment methodology. In each case, the assessment was apportioned on the basis of the value of the property for which the Court held that no relationship existed between the special benefit derived and the property's fair market value. These cases did not, in declaring that the special assessment failed to meet the constitutional tests for special assessments, declare that homestead property could never be specially assessed for services and improvements. In addition, the Court in State v. Halifax Hospital District, 159 So.2d 231 (Fla. 1963) and Whisnant v. Stringfellow, 50 So.2d 885 (Fla. 1951), invalidated the assessments because the Court determined that hospital services and improvements provided only general benefits because no logical relationship existed between the hospitals and the use and enjoyment of the assessed properties. The Court did not address the applicability of the homestead exemption to special assessments.

These "hospital" cases, just like the others cited by the Petitioners, did not hold, opine or imply that homestead property could not be specially assessed for services. Clearly, however, special assessments for services, like the solid waste disposal special assessments in this case, are subject to constitutional scrutiny. This scrutiny is the same scrutiny declared to be appropriate by this Court in City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992), and this scrutiny remains the same regardless of

the nature of the property assessed and regardless of the service or improvement provided with the special assessment proceeds.

The Petitioners also assert that the First District Court of Appeal's decision in this case expressly and directly conflicts with the "reasoning"[5] of this Court's decision in State v. City of Port Orange, 650 So.2d 1 (Fla. 1994). The Petitioners state, "The Court of Appeal relied on the distinction that State v. Port Orange involved fees rather than assessments." (Jurisdictional Brief, p. 8). Although the Petitioners disagree, the distinction between the requirements for valid special assessments and fees is significant and controlling because the validity of all non-tax revenue sources depends upon compliance with the applicable legal requirements for their home rule imposition.

This Court in State v. City of Port Orange, 650 So.2d 1 (Fla. 1994), was charged with the task of determining the validity of a transportation utility fee, not a special assessment. Because the revenue source at issue in State v. City of Port Orange was a fee, the unique special benefit and fair apportionment requirements for the imposition of a valid special assessment were not before the Court. Even this Court noted in State v. City of Port Orange:

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[5] Jurisdictional Brief, p. 8. The assertion that the First District Court of Appeal's decision to uphold the special assessments for solid waste disposal conflicts with the "reasoning" of State v. City of Port Orange is not sufficient for conflict jurisdiction. "It is conflict of decisions not conflict of opinions or reasons that supplies jurisdiction for review[.]" Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980)(quoting Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1970) (emphasis in original)).

> The ordinance states that the fees collected from any property need not be in close proximity to such property or provide a special benefit to such property that is different in type or degree from benefits provided to the community as a whole.

650 So.2d 1, 2-3 (Fla. 1994). Consequently, this Court's holding and cautionary statements in State v. City of Port Orange create no conflict with the First District Court of Appeal's decision here.

CONCLUSION

The Petitioners have failed to exhibit an express and direct conflict between the decision here and any other district court of appeal or Supreme Court decision on the same question of law. Thus, this Court should deny the Petitioner's request for discretionary jurisdiction under Article V, section 3(b)(3), Florida Constitution.

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., 550 Kingsley Avenue, Orange Park, Florida 32073; ALICE M. VICKERS, ESQUIRE, Florida Legal Services, Inc., 2121 Delta Boulevard, Tallahassee, Florida 32303; and MARK ALIFF, ESQUIRE, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 29th day of August, 1995.

ROBERT L. NABORS

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Appendix

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 93-3445

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

Appellants,

v.

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.

_____/

Opinion filed May 25, 1995.

An appeal from the Circuit Court for Clay County.
William A. Wilkes, Judge.

Gloria A. Einstein, Jacksonville Area Legal Aid, Inc., Orange Park, for appellants.

Robert L. Nabors, Gregory Stewart, and Virginia Saunders Delegal of Nabors, Giblin & Nickerson, P.A., Tallahassee; Mark H. Scruby, Clay County Attorney, Green Cove Springs, for appellees.

Alice M. Vickers for amicus curiae, Florida Legal Services, Inc.

WOLF, J.

Appellants challenge a final summary judgment determining that a special assessment imposed by appellee, Clay ~~County~~

(county) for financing solid waste disposal was valid. Appellants raise a number of issues which may be consolidated and restated as whether the trial court correctly determined that no material factual disputes existed concerning the validity of the assessment. Appellants asserted that as a general proposition a special assessment for providing for solid waste disposal services throughout an entire geographical area (which service was previously funded through tipping fees) on a particular class of property was an invalid tax. We find that the trial court properly rejected this general assertion. In addition, no disputed issues of material facts remain concerning whether the properties subject to this assessment received a special benefit, and whether this assessment is fairly and reasonably apportioned among the properties that receive the special benefit. We therefore affirm.

In 1992, Clay County enacted an ordinance imposing a partial year special assessment (ordinance 93-26) applicable only to residential properties in the unincorporated areas of the county for the maintenance of county solid waste facilities. The assessment was for $63 per residential dwelling unit. Commercial properties and undeveloped properties were not subject to the assessment. Appellants are homeowners subject to the assessment.

Appellants brought two separate actions (which were later consolidated), challenging the assessment. The county filed a motion for summary judgment. In support of the motion, the

county filed an affidavit from the interim county manager (formerly solid waste director), and an affidavit of a consultant who assisted in the preparation of the partial solid waste disposal assessment for the county. The affidavits outlined the assessment adoption process and in addition, alleged that the amount of the assessment was apportioned to the properties subject to the assessment in an amount equal to or less than the benefit received by such properties. The affidavits further provided (1) that the cost of providing for the processing and disposal of solid waste from properties located within the municipalities and for commercial and other nonresidential properties within the unincorporated area are collected through tipping fees at the disposal site, (2) that the tipping fees imposed are equal to the cost of the processing and disposal of the solid waste generated from such properties, and (3) that the determination not to impose the partial year solid waste disposal assessment upon commercial properties in the unincorporated area is based upon the varying production of solid waste generated from commercial properties.

The trial court also had before it the ordinances adopting the assessment, which made specific findings as to (1) the rationale for not imposing the partial year solid waste disposal assessment within the municipal boundaries, and (2) how the residential properties subject to the partial year solid waste disposal assessment were benefitted by the processing and

disposal of the solid waste generated from their properties. Further, the board expressly made various findings of benefit in the Final Assessment Resolution. These included the availability of solid waste disposal facilities to properly and safely dispose of solid waste generated on improved residential lands, closure and long-term monitoring of the facilities, a potential increase in value to improved residential lands, service to owners and tenants, and the enhancement of environmentally responsible use and enjoyment of residential land.

On August 31, 1993, the date of the summary judgment hearing,[1] plaintiffs filed a supplemental response to defendant's motion for summary judgment with attached copies of documents concerning the alleged process of calculating the assessment. While the documents had been provided by the county in response to a request to produce, no affidavit was filed authenticating the documents, nor was any backup provided concerning the context in which the documents had been produced. The trial court refused to admit the documents, and granted final summary judgment in favor of the county.

In City of Boca Raton v. State, 595 So. 2d 25, 29 (Fla. 1992), the supreme court recognized that a special assessment is not a tax and is, thus, not subject to the preemption of

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[1]The summary judgment hearing was scheduled for August 23, 1993, but was continued for eight days on plaintiff's motion because of storm damage to the offices of plaintiff's counsel.

taxation to the state pursuant to article VII, section 1(a) of the Florida Constitution.[2]

> 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).[3]

In City of Boca Raton, the supreme court said that there are only two factors in determining whether a special assessment is valid.

> There are two requirements for the imposition of a valid special assessment. First, the property assessed must derive a special benefit from the service provided. Atlantic Coast Line R.R. v. City of Gainesville, 83 Fla. 275, 91 So. 118 (1922). Second, the assessment must be fairly and reasonably apportioned among the properties that receive the special benefit. South Trail Fire Control Dist. v. State, 273 So. 2d 380 (Fla. 1973). Thus, a special assessment is distinguished from a tax because of its special benefit and fair apportionment.

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[2]It would also follow that such assessment, if valid, would not constitute a tax and, thus, would not be subject to the millage cap contained in art. VII, § 9 of the Florida Constitution.

[3]Thus, special assessments, unlike user fees, do not have to be voluntary. It would appear that the requirements for a valid special assessments vary from the requirements for a valid user fee identified in State of Florida v. City of Port Orange, 19 Fla. L. Weekly S563 (Fla. Nov. 3, 1994).

Id. at 29.

Appellant essentially argues that the levy is not valid because (1) a special assessment may not be levied throughout an entire taxing unit, (2) that special assessments are not appropriate for the provision of certain services such as stormwater or solid waste, see Sarasota County v. Sarasota Church of Christ, 641 So. 2d 900 (Fla. 2d DCA 1994), and (3) that questions of fact were presented concerning the apportionment of benefits in light of the documents which were improperly rejected by the trial court. We disagree with these contentions.

The first two issues concern whether the properties in question were specially benefitted. In Madison County v. Foxx, 636 So. 2d 39 (Fla. 1st DCA 1994), this court was asked to determine the validity of a special assessment for solid waste disposal, and found that properties may receive a special benefit from services such as solid waste disposal.

> Regarding appellee Foxx's contention that special assessments may not be used to fund services, but only capital improvements, we note that a similar argument was considered and rejected by the court in Charlotte County v. Fiske, 350 So. 2d 578, 580 (Fla. 2d DCA 1977). Moreover, we cannot overlook the considerable Florida case law that has permitted the imposition of special assessments, even when no capital improvements were involved. See, e.g., South Trial Fire Central Dist., Sarasota County v. State, 273 So. 2d 380 (Fla. 1973); First Dist. No. 1 of Polk County v. Jenkins, 221 So. 2d 740 (Fla. 1969).

Madison County v. Foxx, 636 So. 2d 39, 49 (Fla. 1st DCA 1994). In Charlotte County v. Fiske, 350 So. 2d 578 (Fla. 2d DCA 1977), the second district upheld the validity of a special assessment for garbage disposal. In Sarasota County v. Sarasota Church of Christ, 641 So. 2d 900 (Fla. 2d DCA 1994), the second district recognized that special assessments were appropriate for funding fire and rescue services.[4] In the instant case, the trial judge found that solid waste disposal specially benefitted the improved residential property:

> Providing for the proper disposal of solid waste generated on properties subject to the assessment clearly provides a special benefit within the meaning of Article VII, Section 6 of the Florida Constitution. As the County has made its legislative findings as to the existence of special benefits from disposal services, the courts should not substitute their judgment for those determinations.[5]

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[4]The second district, however, ruled that stormwater management services could not be appropriately funded by special assessments because they provided community-wide benefit and had been previously funded through taxes. We do not see any basis for determining that stormwater management services can never be funded through special assessments, or that services which have been previously funded through taxes can never be funded by special assessment. In fact, the court never adequately explains what the difference is between stormwater assessments and the fire and rescue services assessment which was upheld. Nor do they distinguish the assessment for garbage disposal approved in Fiske. We can only assume that the decision was based on the court's observation that no evidence was presented of any direct or special benefit to the properties involved.

[5]The legislative findings referred to by the trial judge were contained in the assessment resolution as follows: (A) The parcels of Residential Property described in the Solid Waste Disposal Assessment Roll, which is hereby approved, are hereby found to be specially benefited by the provision of the solid

We find no error in the analysis.

We are also unaware of any constitutional prohibition which would preclude a special assessment based on a county or municipality's home rule power from being assessed throughout an entire taxing unit. In Hanna v. City of Palm Bay, 579 So. 2d 320 (Fla. 5th DCA 1991), the fifth district held that a special assessment for road maintenance was not valid because the benefitted properties did not "receive a benefit which is different in type or degree from the community as a whole." We find Hanna inapplicable in the instant situation for several reasons.

The first reason is that the limitation placed by the court on special assessments was based upon statutory language contained in chapter 170. The assessments in Hanna were enacted pursuant to chapter 170, Florida Statutes. The assessment in the instant case is one enacted pursuant to the home rule authority of the county. Such an assessment is only subject to the

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waste disposal and recycling facilities and services described in the Partial Year Rate Resolution, in the amount of the Partial Year Solid Waste Disposal Assessment set forth in the Solid Waste Disposal Assessment Roll, a copy of which is present at this meeting and is incorporated herein by reference. The benefits provided to affected lands include by way of example and not limitation, the availability of facilities to properly and safely disposes 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.

limitations enumerated in City of Boca Raton v. State, supra. In addition, the residential property in the instant case which was subject to the assessment, received benefits which were different in degree and type from those received by other properties within the taxing unit. For instance, vacant land generates far less solid waste than improved property. Commercial properties are more easily serviced by commercial haulers who may be subjected to a tipping fee at the dump based on the volume produced.[6] Improved residential property may clearly be differentiated from other types of properties in reference to solid waste generated. These benefits to the properties were identified in the adoption ordinances as well as the trial court's order. In Hanna, supra, the fifth district could not identify such a benefit. We, therefore, find Hanna inapplicable to the instant case, and find no error in the trial court's determination that the assessed property derived a special benefit.

In relation to the fair apportionment of benefits, the trial court stated as follows:

> b. Fair Apportionment
> The apportionment of the partial year solid waste disposal assessment was based upon the budgetary requirements for providing of solid waste disposal services and facilities from January 1, to September 30, 1993, to residential properties in the unincorporated area subject to the assessment. The amount

[6]Subjecting individual property owners to tipping fees may result in illegal dumping; therefore, assessment may be the only practical way to collect from residential property.

> of the assessment is based on the actual cost to provide disposal services and facilities to the properties subject to the assessment and is equally distributed among these units. No profit was included into [sic] the assessment.

The trial court, citing to Charlotte v. Fiske, 350 So. 2d 578 (Fla. 2d DCA 1977), and Fire Dist. No. 1 of Polk County v. Jenkins, 221 So. 2d 740 (Fla. 1969), found that such a method for determining apportionment was valid. We concur with the trial court's statement of the law.

We also recognize that apportionment of benefits is a legislative function that should not be second guessed.

In City of Boca Raton v. State, 595 So. 2d 25, 30 (Fla. 1992), the Supreme Court, in discussing the role of the court in analyzing the apportionment of a special assessment, stated as follows:

> At the outset, we note that the City made specific findings that the improvements would constitute a special benefit to the subject property, that the benefits would exceed the amount of the assessments, and that the benefits would be in proportion to the assessments. The apportionment of benefits is a legislative function, and if reasonable persons may differ as to whether the land assessed was benefitted by the local improvement, the findings of the city officials must be sustained. Rosne v. City of Hollywood, 55 So. 2d 909 (Fla.1952).

In this case, the trial court correctly analyzed the apportionment issue when it stated,

> Whether there are other methods of apportioning benefits which were available to the County is-not the issue. No system of apprising benefits or assessing costs has yet been devised that is not open to some criticism and none have attained the ideal of exact equality. Meyer v. City of Oakland Park, 219 So. 2d 417 (Fla. 1969). The issue is whether the County has made a legislative determination as to the method of apportioning benefit and whether such apportionment is reasonable. Clearly it is.

The documents submitted by appellant on the date of the hearing also do not provide a basis for finding disputed issues of material fact because these documents were neither timely nor properly presented. The procedures which govern a court's consideration of a motion for summary judgment are contained within rule 1.510, Florida Rules of Civil Procedure, as well as the specific information which may be reviewed by the court in determining whether a disputed material fact exists and the proper form of that information:

> The motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall be served at least twenty days before the time fixed for the hearing. The adverse party may serve opposing affidavits by mailing the affidavits at least five days prior to the day of the hearing or by delivering the affidavits to the movant's attorney no later than 5:00 p.m. two business days prior to the day of the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 1.510(c), Fla. R. Civ. P. (emphasis added). The language of rule 1.510, Florida Rules of Civil Procedure: reflects a clear intent to allow courts to consider only that information which has been either admitted by the parties (i.e., admissions, interrogatories, or answers) or which establishes the existence or nonexistence of material facts in dispute through affidavits and information which has been timely presented. The documents submitted by the appellants do not comport with this intent of the rule as they were not timely filed nor were they accompanied by an affidavit.

Appellants attempted to file, as an exhibit to their supplemental response to defendants' motion for summary judgment, various documents purportedly obtained through discovery. No accompanying affidavit was provided with those documents, and the only discussion concerning what they allegedly represented was by the attorney in her own memorandum. As such, submission of the documents was not in compliance with rule 1.510, Florida Rules of Civil Procedure.

This court has previously addressed the timing and form requirements of rule 1.510. In DeMesme v. Stephenson, 498 So. 2d 673 (Fla. 1st DCA 19861, this court upheld the trial court's exclusion of two documents that failed to comply with the requirements of rule 1.510 in that they were not timely filed. The rule requires that any opposing affidavits to a motion for summary judgment be mailed at least five days prior to the

scheduled hearing or be hand delivered to opposing counsel at least. two days prior to-the hearing. Consequently, the documents sought to be submitted by appellants at the hearing were not timely submitted. Rule 1.510, Fla. R. Civ. P.

Furthermore, the proposed documents in this case were not in a proper admissible form. This court in DeMesme excluded documents sought to be admitted upon a motion for summary judgment because they were not in the form of an affidavit as required by Florida Rule of Civil Procedure 1.510(e). Id. at 675. Florida Rule of Civil Procedure 1.510 (e) states as follows:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits.

Id. (emphasis added). The last requirement, by its language, excludes any document from the record on a motion' for summary judgment that is not one of the enumerated documents or is not a certified attachment to a proper affidavit. Nothing was presented which provides us with any context as to when they were prepared. These documents, standing by themselves, are insufficient to raise a material dispute concerning the

legislative determination of the county.

We, thus, affirm the summary final judgment.

MICKLE, J., concurs; BOOTH, J., dissenting with written opinion.

BOOTH, J., dissenting.

I must dissent because it appears that summary judgment was premature, leaving unresolved issues of fact. Discovery documents from the county were received by appellant on August 17, 1993.[14] A devastating storm struck the area the next day (August 18, 1993) and damaged appellant's law office. Due to the storm damage, the trial court granted appellant's motion for continuance Of the summary judgment hearing (originally scheduled for August 23, 1993) and rescheduled same for August 31, 1993.

At the August 31, 1993 summary judgment hearing, the trial court acknowledged that "I continued the hearing to give them an opportunity to prepare what they needed to prepare." Nonetheless, when appellant sought at the August 31 hearing to introduce the documents, the county objected, although it did not dispute that the documents were either from its discovery response or from public records. In offering the documents, Appellee explained:

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[14] The documents at issue are (1) draft of Clay County's assessment calculation, as well as a letter and memoranda regarding same; (2) clay County's 1992-93 revenue, expense, and disposal fee projections, along with related documents; (3) Clay County's 1992-93 estimated expenses and revenue; (4) 1992-93 assessment; (5) letter from the Managing Consultant of Public Financial Management to the Board of County Commissioners summarizing the principle advantages and disadvantages of the assessment; (6) newspaper affidavit that a notice of public hearing regarding the assessment was published on November 19, 1992, and a list of the County's 1992 holiday schedule (R. 447-64).

> This is the soonest we were able to analyze any of it [due to the storm damage and subsequent disruption]. I believe there's more that the Court should consider. we're not in a position to bring it to the Court's attention at this point, but these documents are ready to be brought to the Court's attention. The documents speak for themselves.

Appellant also offered an affidavit regarding the source of the documents. The trial court ultimately disallowed the evidence in its order entered several weeks after the hearing.

Affidavits filed by the county stated that there was no profit to the county from the proposed assessment. The excluded documents cast doubt on that statement, however, and tended to show that the assessment was not calculated to cover only the landfill service provided. In view of the confusion generated by the trial court's statements regarding its continuance of the summary judgment hearing, the nature of the discovery documents sought to be introduced, and the material bearing these documents have on this case, I believe the trial court abused its discretion by excluding the documents.

Even without the excluded documents, however, the record on summary judgment is sufficient to create genuine issues of material fact regarding (1) whether there is a special benefit to the assessed property owners; (2) whether the funds collected are limited to maintenance of the landfill for which the assessment is made; and (3) whether profit or excess collected from the assessment will go into the county general fund, or will be

required to be reinvested in the landfill in question and/or returned to the assessed property owners.

The record before us contains appellees' response to an interrogatory question regarding benefit to the assessed property:

> Among the benefits derived by properties subject to the Partial Year Solid Waste Disposal Assessment are the providing of the disposal of solid waste generated from such property, availability of facilities to properly and safely dispose of solid waste generated from such properties: providing for the closure and long-term monitoring of facilities which are necessary for and which provide for the disposal of solid waste generated from such properties: increase in the value of such properties; better service to the owners and occupants of such properties for the disposal of solid waste generated by such properties; and the enhancement of environmentally responsible use of such properties.

In a subsequent interrogatory answer, appellees further asserted:

> The value of the [assessed] 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.

However, the above-stated benefits to the assessed property owners are shared county-wide. Another of appellees' answers to interrogatories states that "[i]n addition to the special benefit derived by property owners subject to the Partial Year Solid Waste Disposal Assessment, less littering occurs from the availability of solid waste disposal facilities as well as a cleaner environment generally."

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", as stated in appellees' answers to interrogatories:

> Following said effective date [for the assessment], a tipping fee is no longer charged for residents of the unincorporated areas of the County [subject to the assessment]. Pursuant to Solid Waste Division policy, if the vehicle in which the solid waste is carried to the Landfill bears a Clay County tag an inquiry concerning the source (by street name) of the solid waste is made (if the source is within the unincorporated area of the County, no tipping fee is charged, as explained hereinabove). If the vehicle does not bear a Clay County tag, or if the Solid Waste Division employee in his or her judgment deems it otherwise appropriate, the individual can be required to establish proof of residency by way of a drivers license, a voters registration card, or an electric bill or other document showing a Clay County address.

Furthermore, the record does not establish that the assessed property owners receive any new or enhanced service as a result of the assessment (such as garbage collection, for example); to the contrary, the assessed property owners must still take their garbage to the landfill, just as they always have, only now they must pay the mandatory set assessment rather than the variable "tipping fee." All other county residents and businesses are

free to use the landfill or not, and need only pay a tipping fee if and when they fse it. Thus, the majority's reliance on Madison County v. Foxx, 636 So. 2d 39 (Fla. 1st DCA 1994), and Charlotte County v. Fiske, 350 So. 2d 578 (Fla. 2d DCA 1977), is misplaced, in that those cases involved garbage *collection,* a service that directly inured to the assessed property. Foxx and Fiske stand for the general proposition that special assessments may be used to fund services as well as capital improvements: however, this court in Foxx held that summary judgment was not appropriate *for* resolution of the benefit issue, and Fiske is totally distinguishable as involving a sanitation district and a franchised garbage collection company that received all of the assessment funds with no profit to the county. The court in Fiske held that, although the garbage fee was denominated a "special assessment", the fee was, in reality, a service charge. 350 So. 2d at 580 (citing Turner v. State ex rel. Gruver, 168 So. 2d 192 (Fla.3d DCA 1964)).

Genuine issues of material fact exist in the present case regarding whether the special assessment at issue provides any special benefit to the assessed property owners beyond the general benefit provided to all Clay County residents. under the

limited facts Of record, there is no *presumption* of benefit to the assessed property owners; special benefit must be shown.[15]

The court in Sarasota County V. Sarasota Church of Christ, Inc., 641 So. 2d 900 (Fla. 2d DCA 1994), rev. granted, _____ so. 2d _____ (Fla. Feb. 23, 1995), held that a special assessment for stormwater management was invalid. The assessment was sought to be imposed against various tax-exempt landowners, to wit, churches. The court upheld the assessment for fire and emergency services on the grounds that the churches' past practice of voluntarily paying estopped them from objecting to the fire and emergency service assessment. However, as to the stormwater assessment, the court held:

> Stormwater management services are, without question, both necessary and essential. However, such services [as planned and funded pursuant to Sarasota County Ordinance No. 89-1171 benefit the community as a whole and provide no direct benefit, special benefit, increase in market value or proportionate benefit regarding the amount paid by any particular land owner. No evidence was presented of any direct or special benefit to any of the church properties involved in this lawsuit. Accordingly, these stormwater management

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[15] Cf. 48 Fla. Jur. 2d Special Assessments § 20 (1984), which provides that "[w]hen a particular improvement by its nature is designed essentially to afford special or peculiar benefits *to abutting or other property within* the *protective proximity of the improvement, it is presumed that* special or *peculiar benefits may or will* accrue *to the property so situated,* and the special assessments are permitted without an express, specific finding of benefits as to each parcel sought to be assessed." (Emphasis added.)

> services do not meet the definition of a special--assessment. It is interesting to view Defendant's Exhibit B which confirms stormwater management revenues for fiscal 1991 exceeded expenditures by 50% (e.g., $2,000,000.00).
>
> If services are allowed to routinely become special assessments then potentially the exemption of Churches from taxation will be largely illusory. For example, a review of Plaintiff's . . . [evidence] reveal[s] that the significant majority of items presently comprising the ad valorem tax base are services by nature. A domino effect could ensue if special assessments axe continually expanded to include generic services. . . .

Id. at 902-03.

The solid waste landfill service here is akin to the stonnwater management system in the Sarasota Church case, a service held to be of general benefit but not sufficient special benefit to support an assessment. Further, this court has held that the issue of benefit supporting a special assessment is a mixed question of law and fact and should not be resolved by summary judgment. In Foxx, supra, 636 So. 2d at 49, this court held:

> It is our view that the issue in this case -- whether these alleged special assessments confer special benefits upon the property assessed -- presents mixed questions of law and fact. See, e.g., South Trail Fire Control Dist., Sarasota County v. State, 273 So. 2d 380, 383 (Fla. 1973). Because this issue was, in part, a question of fact, and the pleadings, depositions on file, and the affidavits, do not demonstrate an absence of material issues of fact, the trial court's determination that these charges were not special assessments was premature.

In Hanna v. City of Palm Bay, 579 So. 2d 320, 323 (Fla. 5th DCA 1991), the court struck down a special assessment for street improvements against abutting property owners, holding:

> Under the guise of special assessments, therefore, the City of Palm Bay merely shifted its responsibility for the maintenance of streets onto individual property owners rather than spreading the cost of maintenance over the community at large by use of ad valorem tax revenues, utility tax revenues, fees from occupational licenses, franchise fees, and other available sources of revenue that contributed to the general fund of the City. By doing so, the City completely ignored the express limitation on special assessments that the benefit conferred upon the homeowners be "different in type or degree form the benefits conferred to the community as a whole."

Several other issues of material fact appear *in the* **record** which preclude summary judgment in this case. Appellees responded to an interrogatory that all funds from the assessment are deposited as revenue into what appears to be a general county solid waste fund, for expenditure in accordance with the budget thereof. This fund is not expressly limited to maintenance of the landfill for which the assessment is made.

Appellees' answers to interrogatories provide for shortfalls in revenue collected but conspicuously lack any provision addressing what will be done with excess revenue from the assessment, should any exist. In Fiske, supra, 350 So. 2d at 581, the court was able to uphold a special assessment for

garbage disposal because the entire amount of the fee was paid to the garbage company and no profit was made by the county; this was the critical point, as the court held:

> Finally, the trial court's fourth reason for voiding the ordinance, i.e., because it does not require that the amount of the assessment equal or approximate the benefit, is also fatally defective. . . . [T]he total of the charges collected for the total services is paid out to the franchised disposal company and no profit is made by the county (thus, incidentally there is no improper "tax" aspect inuring to the benefit of the county at large). [Emphasis added.]

A special assessment imposed by a legislative body must be limited to the amount necessary to efficiently accomplish that purpose; the proceeds of a special assessment cannot be used for any purpose other than payment for the particular improvement, and in no case may the assessment be in excess of the benefit conferred on the land, nor may it exceed the cost of the improvement and necessary incidental expenses. 48 Fla. Jur. 2d Special Assessments § 22 (1984).

The instant case goes further than any to date in crossing the boundary between assessment and tax. I would diligently uphold the requirements for a valid special assessment and require proof that all revenues collected are for services to the assessed property and not general revenue to the county, and that the benefits are particular to the property assessed and not county-wide. Otherwise, selected groups and areas can be singled out and subjected to "assessment" without regard to the

exemptions and millage caps, and a tax masquerading as an assessment will become a proverbial monster, escaping all bonds and undermining the legal limitations on taxation.