IN THE SUPREME COURT OF FLORIDA

QUINTON DRYDEN, et al.,

Petitioners,

v. CASE NO. 87,594

MADISON COUNTY, FLORIDA, a political subdivision of the State of Florida; and WES KELLY, in his official capacity as Tax Collector of Madison County, Florida,

Respondents.
_____/

SUBSTITUTED AMICI CURIAE BRIEF OF FLORIDA ASSOCIATION OF COUNTIES AND FLORIDA ASSOCIATION OF COUNTY ATTORNEYS

On Appeal From The First District Court of Appeal
Case Nos. 95-00466 and 95-00978

ROBERT L. NABORS
Florida Bar No. 097421
VIRGINIA SAUNDERS DELEGAL
Florida Bar No. 989932
Nabors, Giblin & Nickerson, P.A.
315 South Calhoun Street
Barnett Bank Building, Suite 800
Post Office Box 11008
Tallahassee, Florida 32302
(904) 224-4070

SPECIAL COUNSEL FOR AMICUS CURIAE, FLORIDA ASSOCIATION OF COUNTIES

HERBERT W.A. THIELE
Florida Bar No. 261327
President, Florida Association of County Attorneys, Inc.
Leon County Courthouse
301 South Monroe Street
Tallahassee, Florida 32301
(904) 487-1008

ATTORNEY FOR AMICUS CURIAE FLORIDA ASSOCIATION OF COUNTY ATTORNEYS

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PRELIMINARY STATEMENT

This brief is submitted by Amici Curiae Florida Association of Counties and the Florida Association of County Attorneys in support of Madison County, Florida (the "County").

STATEMENT OF THE FACTS AND CASE

Amici Curiae adopt the Statement of the Facts and Case of the Appellee, Madison County.

SUMMARY OF THE ARGUMENT

The issue in this case -- whether the County's special assessments, imposed for solid waste and fire and rescue services, which were judicially invalidated for procedural defects, must be completely and fully refunded -- is an issue of first impression in this state. However, Florida has a clear policy against refunding invalidated revenue sources without examining certain equitable considerations and without permitting other retroactive, curative remedies. The cases of McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990), and Kuhnlein v. Department of Revenue, 646 So. 2d 717 (Fla. 1995), while ordering refunds of the revenue sources at issue there, do not alter the historical Florida case law allowing an examination of equitable considerations in refund requests. Furthermore, and most significantly, this case is not controlled by McKesson Corp. v. Division of Alcoholic Beverages & Tobacco nor Kuhnlein v. Department of Revenue, because the instant case does not involve a discriminatory, unconstitutional tax in violation of the United States Constitution. Rather, this case involves a special assessment invalidated for procedural errors. Such errors may be cured, in accordance with these cases and the equitable considerations cases, by reassessments, not refunds.

ARGUMENT

I. INTRODUCTION

This case involves the invalidation of several Madison County ordinances which imposed special assessments for solid waste and fire and rescue services and the determination of an appropriate remedy to cure their invalidity. This issue is one of first impression as no case in Florida has ever held that special assessments which are invalid because of procedural deficiencies must be fully and completely refunded.[1] However, the Appellants in this case assert that a full refund of all assessments paid is mandated by recent decisions in the cases of McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) and Kuhnlein v. Department of Revenue, 646 So. 2d 717 (Fla. 1995), cert. den'd 115 S.Ct. 2608 (1995),[2] which required refunds of the taxes found to be discriminary in violation of the United States Constitution. Furthermore, the Appellants assert that these two cases overrule this state's precedent in denying refunds when

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[1] In an effort to make distinctions among the various flaws which could exist in a special assessment program and to assist this Court, a portion of Point III(B) herein addresses the appropriateness of refunds when special assessments are invalid for either special benefit or fair apportionment problems. Although, these problems are not present in this case.

[2] Because of frequent reference to these two cases, Amici will refer to them as "McKesson" and "Kuhnlein" respectively.

certain equitable considerations weigh against such a drastic remedy.

The Appellants' arguments are fundamentally flawed. Neither McKesson nor Kuhnlein mandate that refunds be awarded for invalid special assessments or in circumstances other than those fitting the facts and issues presented therein. The Appellants' erroneous argument arises from their fundamental misunderstanding of the nature of special assessments and particularly the special assessments in this case. Quite simply, the special assessments here are not unconstitutional, discriminary taxes. In fact, they are not taxes at all.

Taxes are levied to provide only general governmental services. No legal requirement exists which mandates the taxpayer bearing the burden of the tax receive any specific benefit from the taxes paid. However, special assessments are imposed only when a logical relationship exists between the special assessment program and the use and enjoyment of property (i.e., a special benefit) and the cost of the program is fairly and reasonably apportioned among the benefitted properties. Furthermore, as a result of this case, the law is now clarified that a special assessment program must also fulfill any procedural requirements mandated by the invocation of particular statutory authority. The determinations of a special benefit, of fair and reasonable apportionment, and procedural compliance are, in the first instance, factual in nature. If they are shown to be arbitrary or improper, they may generally be cured through a retroactive reassessment process. Thus, the cases of

McKesson and Kuhnlein do not alter the nature of special assessments and do not require a court to ignore equitable concerns in fashioning a remedy to cure the factual determinations relating to a special assessment.

II. THIS CASE IS NOT CONTROLLED BY THE CASES OF McKESSON CORP. v. DIVISION OF ALCOHOLIC BEVERAGES & TOBACCO, 496 U.S. 18 (1990), AND KUHNLEIN v. DEPARTMENT OF REVENUE, 646 So. 2d 717 (Fla. 1995).

A. Invalid Special Assessments Are Not Equivalent To An Unconstitutional Tax.

This case concerns invalidated special assessments not unconstitutional, discriminatory taxes as were involved in both McKesson and Kuhnlein. The difference between the two funding mechanisms is significant and controlling.

The courts in Florida, and elsewhere, have long recognized the differences between taxes and special assessments. In Florida, the differences arise out of the Florida Constitution. Article VII, section 1(a), Florida Constitution, provides that "[n]o tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law." The Florida Constitution further provides that "[c]ounties, . . . shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes. . . ." Art. VII, § 9(a), Fla. Const. Article VII of the Florida Constitution is not a source of taxing power. Other than the

mandatory authorization to levy ad valorem taxes within the stated millage limits, Article VII grants no taxing power to local governments. Rather, Article VII is a limitation on the power to tax, whether imposed by ordinance or special act because all taxes other than ad valorem taxes are preempted to the state unless authorized by general law.

However, not all local government revenue sources are taxes requiring general law authorization under Article VII, section 1, Florida Constitution. The judicial inquiry, when a county or municipality creates a funding source by ordinance, is whether the charge meets the legal sufficiency test for a valid fee or special assessment. If so, the imposition of the fee or assessment by ordinance is within the constitutional and statutory home rule power of cities and counties. If not, the charge is a tax and general law authorization is required under the tax preemption provisions of Article VII, section 1.

Special assessments and taxes are distinguishable because no requirement exists that taxes provide a specific benefit to property; rather, taxes are levied for the general benefit of residents and property. Special assessments are "charges assessed against the property of some particular locality because that property derives some special benefit from the expenditure of the money. . . ." Atlantic Coast Line R. Co. v. City of Gainesville, 91 So. 118, 121 (Fla. 1922). As established by case law, two requirements exist for the imposition of a valid special assessment: (1) the property assessed must derive a special

benefit from the improvement or service provided and (2) the assessment must be fairly and reasonably apportioned among the properties which receive the special benefit. City of Boca Raton v. State, 595 So. 2d 25, 29 (Fla. 1992). Assessments meeting these requirements may provide funding for either capital expenditures or the operational costs of services. For example, the courts in Florida have upheld special assessments for garbage disposal, sewer improvements, fire and rescue services, street improvements, parking facilities, downtown redevelopment, and stormwater management services.

The revenue sources involved in both McKesson and Kuhnlein were not special assessments nor were they even purported or invalidated special assessments. Rather, both cases involved taxes which the courts invalidated because the taxes violated provisions of the United States Constitution. Specifically, in McKesson, this Court, and then the United States Supreme Court, struck a liquor excise tax imposed on manufacturers, distributors, and vendors of alcoholic beverages as violating the Commerce Clause of the United States Constitution. The tax scheme unconstitutionally discriminated against interstate commerce because it provided preferences for certain local products. Furthermore, in Kuhnlein, the Supreme Court of Florida struck a tax imposed only on vehicles which were purchased or titled in other states and then registered in Florida by persons having or establishing permanent residency in Florida. This tax also facially violated the Commerce Clause of the United States Constitution.

The invalidated special assessments involved in this case are different from the unconstitutional, discriminatory taxing schemes in McKesson and Kuhnlein. For example, here, the property owners received the benefit of the services funded by the special assessment programs. Throughout the contested period, the County continued to provide the solid waste and fire and rescue services for which the special assessments were imposed. The payment, however, of a discriminatory tax provides the taxpayer with no special services or improvements. Such a tax merely adds revenue for the general support, albeit on an unconstitutional basis, of government. The expenditure of tax revenue, absent statutory direction otherwise, carries with it no obligation to expend the taxes collected for a special purpose. Special assessments, like the ones imposed in this case, must be expended for the very purpose they were collected.

In addition, the County's special assessments have not been deemed to be invalid because they are discriminatory or because they violate any other protections of the United States Constitution. Furthermore, the County's Special Assessments are not even invalid because they fail to provide a special benefit or are not fairly and reasonably apportioned. In fact, the purposes for which the County imposed the assessments have been upheld on several occasions by the courts in Florida. See, e.g., Charlotte County v. Fiske, 350 So. 2d 578 (Fla. 2d DCA 1977) and Harris v. Wilson, 656 So. 2d 512 (Fla. 1st DCA 1995), rev. granted 666 So. 2d 143 (Fla. 1995)(courts upheld special assessments for solid waste

disposal); South Trail Fire Control Dist., Sarasota County v. State, 273 So. 2d 380(Fla. 1973)(court upheld a special assessment for fire and rescue services); and Fire Dist. No. 1 of Polk County v Jenkins, 221 So. 2d 740 (Fla. 1969)(court upheld special assessments for fire protection and control services). Clearly, the County had the benefit of judicial precedent concerning each service for which it created a special assessment program. The problem, however, for the County came when it seemingly failed to follow the statutory procedures referenced in its implementing ordinances. This flaw simply is not the same infirmity as a tax which is discriminatory on its face and in effect in violation of the United States Constitution. Thus, the County's special assessments are not controlled by the cases of McKesson and Kuhnlein.

B. Refunds, Under The Reasoning of McKesson And Kuhnlein, Are Not The Appropriate Remedy For Procedurally Deficient Special Assessments.

A procedural flaw in a special assessment program is not the type of legislative infirmity which requires complete and full refunds of all paid special assessments. The cases of McKesson and Kuhnlein, which the First District Court of Appeal believed may be involved here and the Appellants assert must control here, do not dictate the appropriate remedy for this case.

For example, in McKesson, this Court struck the liquor excise tax at issue as violating the Commerce Clause of the United States Constitution but ruled that prospective relief alone remedied the

infirmity. The United States Supreme Court agreed that the tax was discriminatory but declared that retroactive relief was necessary. The Supreme Court stated the following:

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: If a state places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 31 (1990)(emphasis added). In analyzing this issue, the Supreme Court examined several equitable considerations which the State of Florida argued prohibited refunds of the tax proceeds. For example, the Supreme Court recognized that this Court had cited two equitable considerations "as grounds for providing petitioner only prospective relief," but the Supreme Court rejected these bases because "neither [wa]s sufficient to override the constitutional requirement that Florida provide retrospective relief as part of its post-deprivation procedure." Id. at 44. In rejecting the "equitable considerations," the Supreme Court commented that they do not justify the "State's attempt to avoid bestowing this [refund] . . . when redressing a tax that is unconstitutional because discriminatory." Id. at 47. The Supreme Court recognized, however, that a refund of the entire amount of taxes paid may not be the only remedy which would satisfy its due

process concern on a retroactive basis. The Supreme Court concluded its opinion with the following:

> In this case, Florida may satisfy its obligation for any form of relief, ranging from a refund of the excess taxes paid by petitioner to an offsetting charge to previously favored distributors, that will cure any unconstitutional discrimination against interstate commerce during the contested tax period. The State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.

Id. at 51-52 (emphasis added).

Likewise, in Department of Revenue v. Kuhnlein, 644 So. 2d 717 (Fla. 1994), this Court followed the reasoning of McKesson in fashioning a remedy for another discriminatory tax scheme. In fact, the State of Florida argued that under McKesson it was entitled to develop a remedy providing retroactive relief to the aggrieved taxpayers without resorting to a refund of all the paid taxes. This Court disagreed, noting that the trial court had given

> due consideration to this possibility [of an alternative retroactive remedy] and was within its discretion in rejecting the State's proposal. While the trial court gave several reasons, we find one sufficient in itself: there would be grave difficulty in assessing a retroactive tax. The record below indicates that the Florida Department of Highway Safety & Motor Vehicle would be unable to collect the tax from a very substantial percentage of title holders, whose addresses cannot be kept current. The Department further has averred that it lacks the resources necessary to track down these title holders.

Id. at 726. Furthermore, this Court held that "[t]he only clear and certain remedy is a full refund to all who have paid this

illegal tax. The result reached by the trial court and its refund order therefore are approved." Id.

However, the Florida Legislature moved for a clarification of this Court's opinion with regard to the fiscal prerogative of the legislative branch. This Court granted the motion, readopted and clarified its opinion as follows:

> We agree with the Legislature that it has authority to fashion a retroactive remedy under McKesson with respect to taxes declared illegal under the Commerce Clause. As McKesson notes, that remedy need not be perfect. In the present case, however, any conceivable retroactive remedy the Legislature might fashion necessarily would be so highly imperfect and involve such delays as to result in fundamental injustice.

644 So. 2d at 726. The Court went on to "strongly emphasize" that

> the court should show great deference to the legislative prerogative. If there is any reasonable way that prerogative may be honored without substantial injustice to the taxpayers of this state, then a court reviewing a tax case of this type should give the Legislature the opportunity to fashion a retroactive remedy within a reasonable period of time.

Id. at 727. This reasoning, from both McKesson and Kuhnlein, clearly indicates that unless a revenue source is flawed for the same or similar reasons as both taxing schemes, then, while a retroactive remedy may be required, that remedy need not be a full and complete refund.

Furthermore, jurisdictions beyond Florida have recognized that McKesson and its progeny are limited in their mandate of refunds -- limited to cases which are factually and legally similar. For example, in Kennecott Corp. v. State Tax Commission of Utah, 862

P.2d 1348 (Ut. 1993), a taxpayer challenged a local tax assessment as violating the unequal taxation provisions of the state constitution, seeking a full refund of taxes paid. The Utah Supreme Court concluded the assessment was invalid under that provision but stated, "[W]hen we concluded that there has been justifiable reliance on the prior state of the law or that the retroactive application of the new law may otherwise create an undue burden, the court may order that a decision apply only prospectively." Id. at 1352. Recognizing the McKesson case, the Utah Supreme Court commented that "[i]n McKesson, the Court repeatedly stated that its decision was based on Florida's violation of the Commerce Clause, but [that in this case,] the tax scheme was stricken as a violation of the Utah Constitution's prohibition against unequal taxation." The court concluded simply, "No federal law was involved." Id. Thus, "federal law does not govern the question of whether a state court decision involving state law should be applied retroactively or prospectively." Id.

Consequently, these two cases, McKesson and Kuhnlein, do not obligate the County to provide refunds in this case. The procedurally inferior special assessments created no discriminatory classifications, did not run afoul of any constitutional protections, and actually provided benefits despite their procedural flaws. These distinctions take the County's special assessment programs out of the realm of automatic, full and complete refunds, making the results of McKesson and Kuhnlein inapplicable.

III. THE FLORIDA CASES RECOGNIZING EQUITABLE CONSIDERATIONS IN FASHIONING RETROACTIVE REMEDIES ARE IN HARMONY, NOT IN CONFLICT, WITH McKESSON AND KUHNLEIN.

A. Florida Law Disfavors Refunds For Special Assessments Imposed In Good Faith.

While the particular issue presented by this case -- whether a refund of special assessments is required when the implementing ordinance is void for failure to follow statutory procedures -- is one of first impression, Florida law has an over 20 year history of disfavoring refunds for revenue sources which are imposed in good faith. See Gulesian v. Dade County School Board, 281 So. 2d 325 (Fla. 1973), and Coe v. Broward County, 358 So. 2d 214 (Fla. 4th DCA 1978). Furthermore, twice in this case, the First District Court of Appeal correctly recognized the Florida precedent which allows courts to examine equitable considerations in determining whether a refund is the only applicable and available remedy for an invalid revenue source.

In this case's first appearance in the First District Court of Appeal, the court ruled that the ordinances imposing the special assessments for fire and rescue and solid waste purposes were invalid because of procedural problems, the court noted that based on its reading of Gulesian v. Dade County School Board, 281 So. 2d 325 (Fla. 1973) and Coe v. Broward County, 358 So. 2d 214 (Fla. 4th DCA 1978), the issues of the County's good faith, fiscal condition, and cost prohibitions were central to the determination of a refund. Madison County v. Foxx, 636 So. 2d 39, 50 (Fla. 1st DCA

1994). In this case's second appearance in the First District Court of Appeal, the court again concluded that under the holding of Gulesian, supra, "substantial competent evidence [existed] to support the trial court's conclusion that the county acted in good faith . . . and decline[d] to disturb the decision of the trial court as to the refund" of the 1989 and 1990 special assessments. Dryden v. Madison County, 21 Fla. L. Weekly D587, D587-88 (Fla. 1st DCA March 5, 1996).

The case of Gulesian v. Dade County School Board, 281 So. 2d 325 (Fla. 1973), began when Jacob Gulesian filed suit against the Dade County School Board for a refund to all Dade County taxpayers of .82 mills over the limit of 10 mills of tax collections, amounting to $7,300,000 levied for Dade County school purposes. The trial court denied this relief and held that section 236.25, Florida Statutes, authorizing school districts to levy ad valorem taxes in excess of 10 mills without a vote of the electors conflicted with Article VII, section 9(b), Florida Constitution. The trial court also concluded that notwithstanding the holding that section 236.25 was unconstitutional, the holding would not operate retroactively to invalidate the excess mills nor require the refunds sought because of equitable considerations. Specifically, the court noted first that a retroactive application of refunds would "work great hardship on the School Board out of proportion to the interests of the individual taxpayers, as compared to the needs of the school children of the county." Id. at 326. In addition, the trial court found that "the School Board

in adopting the mill excess levy acted in good faith reliance on a presumptively valid statute . . ., and has since faced increasingly critical budgeting problems and a refund would greatly compound these problems." Id. Based on these factors, this Court agreed with the reasoning of the trial court and its resort to equitable considerations in deciding to deny refunds.

Furthermore, in Alsdorf v. Broward County, 373 So. 2d 695 (Fla. 4th DCA 1979), the court faced the issue of "the validity of certain county taxes as levied against incorporated and unincorporated areas of the county." Id. at 696. The plaintiffs, many municipal mayors in their official capacities and as individual taxpayers, challenged county property taxes levied on real estate within municipal boundaries under Article VIII, section 1(h), Florida Constitution. The plaintiffs contended that many county expenditures for various services, especially libraries, parks and recreation, sheriff patrol, and emergency medical services, were of no "real and substantial benefit" to the residents of the municipalities and that taxing land within the municipalities was, therefore, improper under Article VIII, section 1(h). The court ultimately found that the only taxes which were improperly collected were in the area of emergency medical services and neighborhood parks.

As to these taxes, the plaintiffs sought refunds of the improperly collected amounts. At trial, the court denied the request for refunds. On appeal, the court addressed this question first by recognizing that "the trial court properly exercised its

inherent equitable powers. One of the major considerations in such a determination is whether the taxing authority acted in good faith." 373 So. 2d at 701. The court further cited to both Gulesian and Coe and noted that "the evidence is clear that the County exercised good faith and there is no assertion to the contrary." Consequently, the court upheld the conclusion that refunds were not necessary. Id.

The Appellants assert that this line of Florida cases does not apply here for two reasons. First, they assert that these cases are overruled by McKesson and Kuhnlein. This Court had the direct opportunity in Kuhnlein to determine whether McKesson and its progeny overruled the equitable considerations which a court may evaluate in granting refunds. This Court did not do so. In fact, while this Court rejected the State of Florida's arguments on these considerations, this Court expressly evaluated and applied them to the facts presented. The Kuhnlein case involved a similar tax to that in McKesson because the taxing scheme at issue violated the same provision of the United States Constitution as did the scheme in McKesson. In fact, instead of overruling the cases on equitable considerations, this Court clearly indicated their general applicability in fashioning a remedy. Dept. of Revenue v. Kuhnlein, 646 So. 2d 717, 727 (Fla. 1994)("We do not imply, however, that the courts of this state can order refunds in any or even most cases of this type.")

Second, the Appellants assert that if these equitable considerations cases apply, the County did not rely on a state

statute in good faith; in fact, according to the Appellants, the County violated the statute. Thus, the Appellants argue that no good faith is present which could weigh against a consideration of refunds. However, the Appellants fail to recognize that the special assessments were imposed in good faith reliance on Florida law permitting special assessments for solid waste and fire and rescue services. Furthermore, the County's failure to follow precisely the statutory procedure of Chapter 125, Florida Statutes, does not negate nor alter that good faith reliance on valid law. This conclusion is bolstered by the fact that under the Florida Constitution's grant of home rule powers to counties, a county ordinance has the dignity, force, and effect of local legislation. Clearly then the County imposed its special assessments in good faith reliance on the state of the law with respect to such assessments and with the presumption that its ordinances were valid. See, e.g., City of Pompano Beach v. Capalbo, 455 So. 2d 468 (Fla. 4th DCA 1984), rev. den'd 461 So. 2d 113 (Fla. 1985), cert. den'd 474 U.S. 824 (1985), and Hardage v. City of Jacksonville Beach, 399 So. 2d 1077 (Fla. 1st DCA 1981), rev. den'd 411 So. 2d 382 (Fla. 1981).[3]

[3] Furthermore, this Court recently clarified that in the special assessment context, legislative findings of special benefit and fair and reasonable apportionment are presumed to be valid unless they are proven to be arbitrary. Sarasota County v. Sarasota Church of Christ, 667 So. 2d 180 (Fla. 1995).

B. Florida Law Recognizes Alternative Retroactive Remedies For Invalid Special Assessments.

In this case, the appropriate retroactive remedy, if one is required, is not a complete and full refund of all special assessments paid. The remedy which fulfills both the concerns of the courts in McKesson and Kuhnlein and recognizes the equitable considerations of Gulesian, Coe and Alsdorf is reassessment. Such a remedy has been recognized by the Florida Legislature and the judiciary as well.

For example, provisions of Chapter 170, Florida Statutes specifically allow local governments to reassess an invalid special assessment until the assessment is correctly imposed. Section 170.14, Florida Statutes, states as follows:

> If any special assessment made under the provisions of this chapter . . . shall be either in whole or in part annulled, vacated or set aside by the judgment of any court, . . . the governing authority of the municipality shall take all necessary steps to cause a new assessment to be made for the whole or any part of any improvement or against any property benefited . . . and in case such second assessment shall be annulled, said governing authority of any municipality may obtain and make other assessments until a valid assessment shall be made.

Id. While the County in this case did not impose its special assessments under the authority of Chapter 170, Florida Statutes, its existence indicates a clear public policy that special assessments, even when judicially annulled, should be treated differently than discriminatory, unconstitutional tax schemes.

This public policy also finds support in the case law of Florida. For example, in New Smyrna Inlet District v. Esch, 137 So. 1 (Fla. 1931), this Court recognized a local government's ability to cure invalid special assessments. In that case, the inlet district imposed special assessments for several capital improvement projects and while the assessments were void, this Court noted the following rule:

> Where a tax levy is made . . . under defective legislative enactments, or without complying with prescribed statutory requirements, such administrative levy may be ratified by a proper statutory validation if the administrative levy could have been authorized by a proper statute when the defective statutory authority was given, and the validating statute when enacted may make the levy itself as a statutory levy without violating the constitution.

Id. at 4.[4] The ability to cure local government revenue sources has been recognized in non-special assessment contexts as well. For example, in Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), this Court invalidated an impact fee, imposed to fund the expansion of its water and sewer utility system. The City's implementing ordinance failed to sufficiently "earmark" the expenditure of the impact fee

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[4] Although the charge in New Smyrna Inlet District is characterized as a "tax", the Court applied the special benefit concept incorporated under current Florida law requirements for a valid special assessment. It was common in early Florida cases applying traditional special assessment concepts to use various terms "special tax" or "assessment tax" because no Florida constitutional imperative existed to distinguish between a tax and a special assessment. The "tax" referred to in this quote was, in current terms, a special assessment.

proceeds to meet the costs of the required improvements. This Court, however, specifically recognized the County's ability to cure its invalid fee program. This Court stated, "Nothing we decide, . . ., prevents Dunedin from adopting another sewer connection charge ordinance, incorporating appropriate restrictions on use of the revenues it produces." Id. at 322. This Court further advised that "Dunedin is at liberty, moreover, to adopt an ordinance restricting the use of moneys already collected." Id.

Likewise, in this case, the County had the authority under its home rule powers or several specific statutory provisions to impose the special assessments at issue. City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992). With this initial authority, the County has the lawful ability to reassess and reimpose the void special assessments to cure the procedural defects.

If, however, the courts in this case had invalidated the County's special assessments, not for procedural errors, but because the assessments were not fairly and reasonably apportioned among the benefitted properties, the appropriate remedy would have again been reassessment under a revised apportionment method.[5] Refunds, in that situation, would only be necessary to the extent that the prior assessment exceeded the special benefits conferred by the assessment program.

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[5] The question of fair and reasonable apportionment has traditionally been reviewed as a factual determination to be made by legislative decision. See Rosche v. City of Hollywood, 55 So. 2d 909 (Fla. 1952).

If, however, the courts here invalidated the County's special assessments, not for procedural errors, but because the assessments funded a service or improvement that provided no special benefit to the assessed property, the appropriate remedy is not as clear. In such a case, a good faith determination by the court would be necessary in crafting an equitable remedy which balances the public and private interests. For example, if a special assessment for solid waste or fire and rescue services were declared invalid because of a failure to provide a special benefit, such a ruling would overrule entire lines of cases in Florida. Thus, the assessing entity should be entitled to rely in good faith on the state of the law at the time of imposition and avoid refunding the assessments paid. The appropriate relief would be prospective only.

However, if an assessing entity created a special assessment for police protection, on which no case or statutory law exists, and the assessment was invalidated on special benefit grounds, the issue of good faith reliance would be more unclear and refunds of some or all assessments paid may be appropriate. The lack of clarity in such a situation results from the fact that generally no logical relationship exists between the need for police protection and the use and enjoyment of real property, although a unique fact pattern could possibly exist in which property received a special benefit from police services. Finally, if a special assessment were imposed for hospital or public health unit construction and the assessment was invalidated, the assessing entity would have

difficulty claiming good faith reliance on valid law. The courts in Florida have held, since 1941, that these improvements do not provide special benefits sufficient for a valid special assessment. See Crowder v. Phillips, 1 So. 2d 629 (Fla. 1941) and Whisnant v. Stringfellow, 50 So. 2d 885 (Fla. 1951). In such a clear situation, a refund of all assessments paid would be the most appropriate remedy.

This case, however, presents none of these combinations of problems. The County's special assessment programs were not invalidated because of an apportionment flaw and they were not invalidated because of a special benefit problem. The assessments were invalidated because of a failure to fully comply with statutory procedures under Chapter 125, Florida Statutes. The County had the authority to initially impose the special assessments for solid waste and fire and rescue purposes and the assessments were supported by Florida case law. In this situation, a complete and full refund without an opportunity to reassess or retroactively cure the legislative deficiencies, is not required when the assessment is not a discriminatory tax, when the property owners actually received the benefit of the assessments, and when the County relied in good faith on presumptively valid ordinances, statutes, and cases.

CONCLUSION

The special assessments in this case should not be subject to a complete and full refund because of procedural deficiencies. The law in Florida disfavors such a drastic remedy and the cases of McKesson and Kuhnlein do not alter that policy.

Respectfully submitted,

ROBERT L. NABORS
Florida Bar No. 097421
VIRGINIA SAUNDERS DELEGAL
Florida Bar No. 989932
Nabors, Giblin & Nickerson, P.A.
315 South Calhoun Street
Barnett Bank Building, Suite 800
Post Office Box 11008
Tallahassee, Florida 32302
(904) 224-4070

SPECIAL COUNSEL FOR AMICUS CURIAE,
FLORIDA ASSOCIATION OF COUNTIES

HERBERT W.A. THIELE
Florida Bar No. 261327
President, Florida Association
of County Attorneys, Inc.
Leon County Courthouse
301 South Monroe Street
Tallahassee, Florida 32301
(904) 487-1008

ATTORNEY FOR AMICUS CURIAE
FLORIDA ASSOCIATION OF COUNTY ATTORNEYS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Larry E. Levy, Esq., Law Offices of Larry E. Levy, Post Office Box 10583, Tallahassee, Florida 32302, Edwin B. Browning, Jr., Esq., Davis, Browning & Schnitker, Post Office Drawer 652, Madison, Florida 32341, Kenza van Assenderp, Esq., Young, van Assenderp & Varnadoe, Post Office Box 1833, Tallahassee, Florida 32302, Joseph C. Mellichamp, III, Esq., and Eric J. Taylor, Esq., Department of Legal Affairs, Tax Section, The Capitol, Tallahassee, Florida 32399, Keith C. Hetrick, Esq., Florida Home Builders Association, 201 East Park Avenue, Tallahassee, Florida 32301, Robert M. Rhodes, Esq., and Victoria L. Weber, Esq., Steel, Hector & Davis, LLP, 251 South Monroe Street, Suite 601, Tallahassee, Florida 32301, this 11th day of June, 1996.

ROBERT L. NABORS