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IN THE SUPREME COURT OF THE STATE OF FLORIDA

LAKE COUNTY, FLORIDA, ETC., ET AL.,

Appellants,

v.

WATER OAK MANAGEMENT CORPORATION, ET AL.,

Appellees.

_____/

CASE NO. 88,218

COPY

APPELLEES' ANSWER BRIEF

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PRELIMINARY STATEMENT

The Appellees, Water Oak Management Corporation, Sun QRS, Inc., and John Richard Sellars, are referred to in this brief as "Appellees" or as "the property owners." The Appellants are referred to as "the county." Amicus Curiae, Florida Association of Counties, is referred to as "Florida Association." Amicus Curiae, Escambia County, is referred to as "Escambia." References to the record are designated by page number (e.g., "R.1."). References to the Appendix are designated by page number (e.g., "A0001").

STATEMENT OF TEE CASE AND THE FACTS

The county fails to accurately state some facts, and omits critical facts. The property owners therefore provide the following statement of facts.

Incorrect or Irrelevant Facts

The county begins by referring to its "broad home rule powers." Initial Brief, p. 2. Escambia and Florida Association base nearly their entire argument on the premise that broad home rule authority pretermits judicial inquiry into whether the assessments at issue are truly "assessments for special benefits." Escambia brief, *passim;* Florida Association brief, *passim.*

The county's home rule power has no bearing on the case. The case is not about whether the county may provide fire and rescue service or solid waste management. Rather, in view of the homestead exemption clause and the millage caps of the Florida Constitution, the issue is whether the county may exact funds to pay for such functions by levying special assessments on improved

property (through the use of the "non-ad valorem assessment" under § 197.3632, Florida Statutes), and thereby impose forced liens against property. With respect to that issue, the county may not rely on home rule power to impose a special assessment which contravenes constitutional limits. E.g., *City of Boca Raton v. State,* 595 So.2d 25, 28 (Fla. 1992). The Constitution itself prevents such exercises of home rule authority.

The county also notes that the fire assessment ordinance was approved by voter referendum. This is likewise irrelevant to the constitutional validity of the special assessment. The Constitution does not permit special assessments on homestead property, even if approved by a voter referendum, unless the assessment is for a function which provides a truly special benefit in the sense intended by the homestead exemption clauses. The immunity from special assessment liens is personal to each homestead owner. It cannot be abrogated by a majority referendum vote. *See Fisher v. Board of County Commissioners of Dade County, 84* So.2d 572, 578-579 (Fla. 1956). The statute authorizing non-ad valorem assessments provides that only assessments "which can become a lien against a homestead as permitted in s. 4, Art X of the State Constitution" may be levied under it. § 197.3632(1)(d), *Fla.* Stat. (emphasis added). Thus, no assessment lien may be imposed under § 197.3632 on any property, if the assessment lien may not constitutionally be levied against homestead property.

The county adverts to its substantive power under § 403.706, Florida Statutes, to provide solid waste management. This is

likewise irrelevant. The property owners challenge the constitutionality of imposing special assessments to pay for the function, not the power of the county to provide the function.

Property Owners' Statement of the Case and the Facts

At issue is the constitutionality of certain "non-ad valorem" special assessments imposed by the county for fire and rescue service and solid waste management. (R. 1036-1065; A0001-A0030). We assert that the special assessments are unconstitutional because the services they fund do not provide a unique benefit to the property assessed, in the intended constitutional sense, but instead merely provide a general benefit to the community. The property owners seek declaratory relief and refunds.

The trial court granted the county's motion for summary judgment, upholding both assessments. The Fifth District Court of Appeal affirmed the trial court's judgment as to the solid waste management assessment, but reversed as to the fire assessment, and certified questions to this Court.

Appellee Sellars owns homestead property in unincorporated Lake County, in both the fire service and solid waste service "municipal service benefit units" ["MSBUs"]. The other Appellees own commercial property lying in the Lake County MSBU for fire protection. (R. 1194-1195; A0031-A0032) (R. 1254; A0033) (R. 591; A0034).

The county relies on sections 125.01(q),(r), and 197.3632, Florida Statutes, as authority for the fire and solid waste special assessments. The county passed ordinances authorizing special

assessments for fire and solid waste management activities and purporting to use the non-ad valorem tax roll collection system to assess and collect such "special assessments." See § 197.3632, *Fla. Stat.* The county has imposed the fire assessment on the property owners' lands in past years and intends to continue doing so.

Mr. Sellars is also subject to the county ordinance which (a) requires that all solid waste generated in the county be disposed of at county facilities, and (b) provides that he must contract with a county-franchised private hauler to collect trash or, if he does not contract with the county-approved waste hauler, or allows his contract to lapse, his property is immediately liened for the assessment. (R. 1456-1483; A0035-A0110).[1]

In addition to the special assessments for fire protection and solid waste management, Lake County has adopted ordinances purporting to allow it to levy special assessments for other general community services, such as police protection, animal control, transportation, library services and recreation. Lake County Ordinances 79-8, 80-3, 80-4, 80-5, 80-12, 80-14, 84-9, 89-5 and 90-25. (R. 628-637; 638-649; 650-664; 665-675; 676-682; 683-688; 689-700; 701-715; 835-843; A0111-A0120; A0121-A0132; A0133-A0147; A0145-A0158; A0159-A0165; A0166-A0171; A0172-A0183; A0184-A0198; A199-A216; A0217-A0225).

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[1]Thus, Mr. Sellars has standing to challenge the solid waste assessment, though the county contends he does not. *See Department of Revenue v. Kuhnlein, 646* So.2d 717, 720 (Fla. 1994).

The Fire Assessment

The fire assessment is based on the overall operational costs of the county's fire department. (R. 2837-2843; 2855; A0226-A0232; A0240). It defrays salaries for fire fighters, equipment replacement, equipment maintenance, and other general operating expenses. (R. 3041-3042; 3026; A0257-0258; A0253), (R. 2855; 2856; A0240-A0241). It reduces the drain on the county's general funds from the operation of the fire department.

The county fire department provides fire and medical first response services to all persons and all real and personal property located within unincorporated Lake County. The fire department routinely responds to accident scenes, crime scenes and incidents, and provides civil defense responses in the case of natural disaster. (R. 3031-3033; A0254-0256) (R. 3043-3047; A0259-0263) (R. 2842-2848; A0233-0239) (R. 2765-2769; A0264; A0265).[2] (R. 2873-2875; A0248-A0250).

The Solid Waste Management Assessment

The county's solid waste management assessment is also based on the overall operational expenses of the program. (R. 2451-2454; A0269-A0272). (R. 3166-3169; A0282-A0285). Most of the expense

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[2]The county asserts that the benefit of fire service is not uniform. The county claims that some variance in degree of benefit occurs depending upon a property's proximity to a fire hydrant, since property owners closer to a hydrant pay a lesser property insurance rate than property owners more distant from hydrant locations. (R. 3100-3102; A0266-A0268) (R. 2861-2864; A0242-A0247). The county, however, neither provides the fire hydrants, where they are available, nor maintains them; and the assessment is not used to install, maintain or repair these hydrants. (R. 2879-2880; A0251-A0252).

arises from the county's duty to prevent damage to the subterranean aquifer and to ground water from county landfill discharges. That duty is imposed by state and federal law and by order of the Florida Department of Environmental Protection. (R. 3166-3169; A0282-0285). § *403.702, Fla. Stat.*;[3] § 403.031(12), *Fla. Stat.*; § 403.021, *Fla. Stat.*

In various resolutions, the County Commission set forth the reasons for the solid waste assessment:

- The need to insure that all solid waste generated within unincorporated Lake County is collected and disposed in a safe and healthy manner and in a fair and equitable manner for all residents of Lake County.
- The need to collect solid waste in an efficient and economical manner by reducing travel time, reducing the use of fuel and reducing traffic on the roadways in Lake County.
- The need to collect sufficient quantities of solid waste for the Lake County Resource Recovery Facility to meet Lake County tonnage and financial obligations.
- The need to implement recycling programs countywide to assist in meeting state-mandated recycling goals.
- The need to meet the requirements of Chapter 163, Florida Statutes, part II, The Local Government Comprehensive Planing and Land Development Regula-

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[3] ". . . the Legislature finds that:

"(a) Inefficient and improper methods of managing solid waste create hazards to public health, cause pollution of air and water resources, constitute a waste of natural resources, have an adverse effect on land values, and create public nuisances.

"(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."

tions Act, in preparing the Lake County Comprehensive Plan.

(R. 1438-1446; A0288-A0296), (R. 1447-1455; A0297-A0305), (R. 1507-1513; A0320-A0326)(R. 1485-1498; A0306-A0319). Each enunciated purpose reflects the generality of the health, environment, safety, or economic benefits which the solid waste system delivers.

Other Pertinent Facts

The county has levied only 5.13 mils of the permissible 10 mils of ad valorem tax which it may levy for county purposes. (R. 2968; A0364). *See* Art. VII, § 9(b), *Fla. Const.* Since fire protection and solid waste management are deemed municipal purposes by section 125.01(q), Florida Statutes, the county also has an additional 10 mils of permissible and un-levied ad valorem tax which may be used to fund the cost of fire protection and solid waste management. (R. 2968-2969; A0364-A0365). See, Art. VII, § 9(b), *Fla. Const*; *Gallant* v. *Stephens,* 358 So.2d 563 (Fla. 1978).

SUMMARY OF ARGUMENT

Upholding these special assessments would obliterate any meaningful distinction between taxes and special assessments and will eviscerate the homestead exemption and millage cap provisions of the 1968 Florida Constitution.

The county places its "special assessments" on the county tax roll as "non-ad valorem assessments." If the property owners fail to timely pay the charges, a lien is imposed on their property, and a tax sale certificate is sold. If they do not redeem the certificates, their property ownership is transferred to the certificate buyer, or another bidder, by means of a tax deed. The

ordinances impose the levy for garbage disposal only on those property owners who do not elect to participate in the garbage collection program by contracting directly with the franchised garbage hauler, and this constitutes an improper delegation of authority and a due process violation.

To be valid special assessments, the charges must meet a two-pronged test. They must first be charges for a unique benefit bestowed on the assessed property (the first prong). The benefit may not be merely like in kind to the general benefit enjoyed by property or persons from a government function; it must be distinguished in kind from those general benefits, and must be provided uniquely to the assessed property. *E.g., Boca Raton v. State of Florida,* 595 So.2d 25, 29 (Fla. 1992). If the charge meets the first prong, it must then pass the second prong of the constitutional test: The method of apportionment must not be arbitrary or capricious in relation to the special benefit conferred. *Id.* The property owners here raise first prong challenges.

The 1968 Florida Constitution contains a carefully crafted set of protections for property owners. Counties are constitutionally limited in their power to impose ad valorem taxes, the only form of taxation devoted to local government. Counties may levy 10 mils for county purposes and 10 mils for municipal purposes (when providing municipal-type services in the unincorporated county areas). Art. VII, § 9(b), *Fla. Const;* see also § 125.01(q),(r), *Fla. Stat.* Homestead owners are given an exemption from ad valorem tax up to

$25,000 of assessed value. Article VII, § 6, *Fla. Const.*; § 196.031(3) *(e), Fla. Stat.* Accordingly, the Constitution intends that homesteads will bear a comparatively lesser burden to support local government than non-homestead property. Nor may a lien for debt attach to homestead property without the property owner's consent. Art. X, § 4, *Fla. Const.* Similarly, all taxpayers - homestead owners and non-homestead owners alike - enjoy the constitutional assurance that, without voter approval, local governments may not tax their properties beyond set limits.

The exceptiontothis protection blueprint is "assessments for special benefits." Art. VII, § 6, *Fla. Const.* Homestead property, though significantly exempted from ad valorem taxes, and though completely exempt from liens for other fees and charges, is not exempt from liens for "assessments for special benefits." Similarly, though the millage caps of Article VII, section 9(b) apply to ad valorem taxes, there is no cap on assessments for special benefits. *Howell* Water & *Reclamation Dist. v. State, 268* So.2d 897, 899 (Fla. 1972).

Hence, unless local governments' use of "special assessments" is closely scrutinized and kept uncompromisingly within the intended constitutional channel, the proliferation of spurious "special assessments" will erode the protection of homestead property and the constitutional limits on local government taxing power. The judiciary has the duty to protect the individual rights of a class of property owners when such rights are secured in the Constitution.

Neither fire protection nor solid waste management provides the unique benefit to the assessed property which the Florida Constitution requires in order to impose special assessments on homestead property. All property and persons are benefitted similarly by fire service' and solid waste management. A general community benefit is constitutionally insufficient to support a special assessment.

If the county may expediently label these charges as "assessments for special benefits," then the counties may freely circumvent the constitutional limits on the burdens they may extract from property owners to support local government, and may freely circumvent the homestead protection intended by the Constitution's framers. If fire fighting and solid waste management are held to confer the sort of special benefit which will support a special assessment, then equally so would many other county functions.

The threat is real. Lake County has passed ordinances to fund not only fire protection and solid waste management, but police protection, libraries, transportation, animal control and recreation by means of "special assessments," declaring that each provides a *@special benefit" to property. (R. 835-843; A0217-A0225).

Sarasota *County v. Sarasota Church of Christ, Inc., 667* So.2d 180, (Fla. 1995) represents the high water mark of permissible special assessments. It does not condone this fire assessment. In that case, the properties which caused the storm water runoff

problem were disbursed throughout the county. However, each assessed property received a benefit not generally extended to other property or to the community - the control and treatment of storm water runoff from man-made impervious surfaces installed on each property, a function which is the duty of such landowners to others, in the first instance.

Here, in contrast, every property, vacant or improved, and every person enjoys the benefit of fire and rescue service. All property in the county, improved or unimproved, presents the threat of fire. Fire response protects the community generally from conflagration.

Nor does *Sarasota County* condone the solid waste assessment. This assessment does not merely defray the cost of removing debris from a particular property. The lion's share pays for landfill operations and other general operating costs of the solid waste system. The benefits of that system - protection of health and the environment - are extended to all citizens of the county and of the state, and all property contributes to the need. Moreover, the thrust of the ordinance is to impose a lien for charges which are *ex contractu*, and cannot be the basis for imposing a forced lien on homesteads.

The county's claim of a "logical relationship" between improved property and the demand for fire service does not satisfy the Constitution's requirement of a special benefit. If a special assessment for fire fighting is justified by a notion that improved property calls for more fire service, then by that logic, special

assessments are also permitted for a myriad of other functions for which development increases demand. If that were the constitutional test, then the millage caps on local government and the homestead exemption would be virtually meaningless.

Instead, the courts must look to the policies underlying the homestead exemption and the millage caps. When that is done, neither assessment can be valid.

The county wrongly claims that *Sarasota County* puts the determination of special benefit beyond the power of the courts, and in the domain of local legislative fiat. *Sarasota County* cites earlier cases holding that the proof of no special benefit must be clear and cogent, and earlier cases which are second arong, fair apportionment cases. Judicial inquiry concerning the existence of a special benefit must start with recognition of the purposes of homestead exemption and millage caps, and the evidence pro or con must be independently evaluated by the courts in light of those purposes. otherwise, the judiciary abdicates its responsibility to enforce and protect the Constitution. *See Dade County Classroom Teachers Ass'n, Inc.* v. *Legislature,* 269 So.2d 684 (Fla. 1972); *Sparkman* v. State, 58 So.2d 431 (Fla. 1952). Surely, in Sarasota *County* the Court did not intend such abdication.

The evidence here is clear and cogent: neither program provides the constitutionally intended unique benefit to properties assessed. These assessments are merely devices to fund general county health-safety-welfare operations improperly.

Finally, the county and its amici rely on cases which are second prong, fair apportionment cases, not first prong, special benefit decisions. Those cases did not decide the issues presented here. However, other cases decided by this Court hold that fire and solid waste functions may not be funded by special assessments.

ARGUMENT

I. SARASOTA *COUNTY V. SARASOTA CHURCH OF CHRIST, INC.* DOEB NOT REACH THE ISSUES PRESENTED HERE; AND OTHER DECISIONS OF THIS COURT ARE DISPOSITIVE AGAINST THE COUNTY'S ARGUMENTS

This case presents facts which the Court did not address in Sarasota *County v.* Sarasota *Church of Christ, Inc.* The property owners here do not complain simply that the special assessments are levied throughout the unincorporated area. Geographic reach is not the *sine qua non* of the first prong test. Rather, the core of the first prong test is whether assessed properties are conferred some uniaue benefit for which the assessment may be levied, a benefit different in kind from that generally enjoyed by the community.

In Sarasota *County,* though disbursed throughout the county, each assessed property received a direct and unique benefit not extended to other properties or to the community generally. Each assessed property owner had the duty to prevent runoff to other properties caused by the alteration of the assessed properties from their natural states. The stormwater system relieved the property owners of that burden. Unimproved properties, having no man-made impervious surfaces, had no such duty, and thus received no such direct and unique benefit.

Here, in contrast, no unique benefit flows to the assessed properties, distinguished from the benefits flowing to all property and all persons in the county from fire and rescue service. Vacant land, equally with improved land, presents the risk of fire. Timberland, cropland, hayfields and public rights of way all experience fires. As recent Western States fires aptly show, many fires begin as brush fires and spread to improved land.

Fire response protects not merely a specific property, but all properties and persons, from conflagration. Fire service extends to vacant and improved real property, to movable personal property (equipment, automobiles, boats, planes, etc.), and to persons. The fire department responds to accident and crime scenes, providing extrication and medical service, as well as fire fighting. It responds to civil emergencies, such as windstorms, removing debris, and subduing flames erupting in public and private venues. County witnesses testified that all county property benefits by fire protection.[4]

Likewise, the solid waste management system provides no unique benefit to assessed properties which is not enjoyed by the community generally. The vast majority of the waste system expense

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[4]The county claims some variance in degree of benefit depending upon a property's proximity to a fire hydrant (since property owners closer to a hydrant pay a lesser insurance rate owners whose property is more distant from hydrant locations). (R. 3100-3102; A0266-A0268) (R. 2861-2864; A0242-A0247). However, the county neither provides fire hydrants, nor maintains them. The assessment is not used to install, maintain or repair these hydrants. Instead, where hydrants are available, they are installed by private or city-operated water systems. (R. 2879-2880; A0251-A0252).

($15,000,000 over the next 15-25 years) is for of the county's duty under state and federal law to protect the state's ground water and subterranean aquifer from landfill discharge. (R. 3266-3169; A0282-A02825), (R. 2947-2952; A0358-A0363). The solid waste assessment defrays that cost, along with other general operating expenses of the solid waste program. (R. 2452-2460; A0273-A0281), (R. 1527; A0035-A0110), (R. 1460-1461; A0327-A0357). Lake County Ordinance 1992-7 defines the "Solid Waste Management System Costs" thusly:

> Solid Waste Management System Costs mean any costs, including capital outlay, for the disposal or management of solid waste, including the costs for (1) the resource recovery program, which includes the net service fee due to the operator of the county's resource recovery facility[5] and the county's direct resource recovery/ash monofill program costs; (2) the recycling program, including drop off centers, processing facilities, mulching or compost facilities or any other associated recycling activity; (3) the landfill management program, including closure and long term maintenance costs;[6] (4) transfer station costs; (5) the hazardous waste program; and (6) administrative, implementation, or financing costs, including debt service, associated with the county's solid waste management and disposal program.

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[5] This phrase refers to the "Ogden facility," which burns certain trash to generate electricity. Under a contract between the county and Ogden, the county is obligated to deliver a certain minimum tonnage of burnable refuse or "biomass." If the county fails to do so, it is contractually obligated to pay the facility operator a fee. (R. 3148-3153; A0366-A0371).

[6] This phrase has reference to the county's obligation, under a consent decree entered into with the State of Florida, Department of Environmental Protection, to properly close and then manage the closed landfill known as "Astitula I," to keep leakage from that landfill from reaching the surface or ground waters of the state. § 403.706, *Fla. Stat.;* (R. 3186-3187; A0286-A0287).

(R. 1461-1462; A0327-A0328). The "Solid Waste Management System Assessment" is levied "to pay all or a portion of the Solid Waste System Cost attributable to Improved Property" (R. 1461; A0327).[7]

The accumulation of substances deposited at landfills, resulting in the leachate which must be prevented, does not originate only from assessed property. Oil products are used in personal property - primarily vehicles. The need for their management arises from use by all persons in the county. Discarded machinery and equipment is personalty, used on unimproved and public land as well as on improved property. Noxious chemicals - insecticides, herbicides and the like - are used on unimproved land, as well as improved. Their remnants must be managed regardless of where used. General trash and biological wastes accumulate on unimproved land and public by-ways, as well. The need for disposal and control of all these substances arises from human activity occurring generally throughout the county.

In sum, the facts of this case are far different from the facts presented in *Sarasota County.*

Sarasota *County* must be considered the high water mark of constitutionally permitted special assessments, if the integrity of the homestead exemption and millage caps is not to be violated. Other decisions of this Court have considered the validity of fire

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[7] The implementing resolutions setting the manner of computation of the assessment show, as well, that total system costs are recouped by the assessment. (R. 1447-1449; 1493-1494; 1527; A0297-A0299; A0306-A0307; A0320).

and waste management assessments. Those decisions hold that such functions cannot support special assessments.

A. DECISIONS DEALING DIRECTLY WITH IMPROPER SPECIAL ASSESSMENTS FOR FIRE PROTECTION AND SOLID *WASTE* COLLECTION DISPOSE OF THE COUNTY'S ARGUMENTS

This Court has previously invalidated attempts to impose fire and solid waste special assessments, and thus avoid the Florida Constitution's taxpayer protections.

St. Lucie County -Fort Pierce Fire Prevention & Control Dist. v. Higgs, 141 So.2d 744, 745-46 (Fla. 1962) addressed a fire special assessment. The court invalidated the assessment, reasoning as follows:

> We agree with the learned circuit judge that the levy is a tax and not a special assessment for the reason he gave, namely, that no parcel of land was sweciallv or geculiarlv benefitted in wrowortion to its value, but that the tax was a ueneral one on all wrowertv in the district for the benefit of all. Our view harmonizing with that of the circuit judge, it follows that we also accept his conclusion that the first $5000 of each homestead is exempt because only in the *case* of special assessments could it be reached.

Id. (emphasis added).

The infringement of the homestead exemption by means of a solid waste special assessment was confronted in City *of Ft. Lauderdale v. Carter,* 71 So.2d 260 (Fla. 1954):

> The City of Fort Lauderdale has levied an ad valorem tax upon all property, real and personal, in the city, for the fiscal year 1953-54, the revenues produced thereby to be used to defray the expenses of garbage, waste and trash collection.
>
> Mrs. Carter brought suit against the city to enjoin the imposition and collection of the tax against her property, on the ground that homestead property is exempt from such taxation. The city defended the suit on the theory that the tax imwosed amounted to an "assessment

> for special benefits" as to which homestead wrowertv is not exemat.
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> * * * *
>
> . . . [N]o special or peculiar benefit results to any specified portion of the community or the wrowertv situated therein. It seems clear, therefore, that the charge levied asainst all real and personal wrowertv in the city is a general tax imposed for the suwwort of the government and not an assessment against particular prowerties for swecialbenefits. The lew. therefore, is withoutconstitutionalauthoritv insofar as it awwlies to homestead wrowertv.

Id. at 261 (citations omitted; emphasis added).

Thus, when squarely presented with the issue of whether a charge for fire protection or solid waste collection may constitutionally be a classified as an "assessment for special benefits" avoiding homestead protection, the Court's answer has been "no."

The framers of the 1968 Florida Constitution are presumed to have known of those decisions when they framed Article VII, section 6 and Article X, section 4 of the Constitution pertaining to assessments for special benefits. *See Jenkins v. State, 385* So.2d 1356, 1357 (Fla. 1980). Those decisions marking the constitutional limits of "assessments for special benefits" are subsumed in the Constitution adopted in 1968. The county may not disregard those established, integrated principles to treat its charges as "assessments for special benefits." Under established law, charges for fire protection and solid waste management do not provide the unique benefit required by the Florida Constitution to justify imposing a special assessment against homestead property.

B. ANALOGOUS CASES DEALING WITH CONSTITUTIONAL TAXPAYER PROTECTIONS AGAINST MISUSE OF SPECIAL ASSESSMENT POWER

The reasoning and results of the cases discussed above are consistent with decisions which turned away claims that health service could be funded by special assessments, *Whisnant v. Stringfellow, 50* So.2d 885, 886 (Fla. 1951)[8], and that hospital operations could be funded by special assessments. *Crowder v. Phillips,* 1 So.2d 629, 631 (Fla. 1941).[9]

The Fifth DCA concluded, in a squarely analogous context, that local government may not evade the Constitution's taxpayer protections by labeling a charge as a "special assessment" when the funded "public improvement imposes a benefit upon individual homeowners no different than that which is imposed upon the community at large." *Hanna v. City of Palm Bay, 579* So.2d 320, *322* (Fla. 5th DCA 1991). It is noteworthy that the function which the

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[8] "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.' *State v. Florida State Improvement Commission, Fla., 48* So.2d 165, 166. But there would awwear to be no 'special or peculiar benefit' to the real wrowertv located in the county by reason of its establishment--no 'logical relationship' between its establishment and the improvement of the real estate situated in the county. It benefits evervone in the county, regardless of their status as prowertv owners. It is a 'governmental need' for which the taxing power of the county may be obligated." (Emphasis added).

[9] The court there noted that the purpose of a hospital is to provide hospital care to all:

> "[W]hether they be the owners of the wrowertv or not. and such advantaaes cannot fall in the categorv of special benefits to real wrosertv for which assessments would be authorized."

(Emphasis added).

city attempted to fund in Hanna by special assessment was street paving, normally understood to uniquely benefit a particular class of property. *Hanna,* at 321. Nevertheless the court invalidated special assessments in that case, reasoning as follows:

> At bar, the challenged special assessments were indisputably part of a long range program under which all of the City-maintained streets were to be reconditioned to a point where annual maintenance costs would be greatly diminished, thereby relieving the tax burden imposed upon the general fund of the City of Palm Bay. The instant assessments, therefore, *were* part of a program intended to benefit the taxpayers and community at large by upgrading all City-maintained streets and by diminishing the burden placed upon other sources of revenue comprising the general fund of the City of Palm Bay. 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 from the benefits conferred to the community as a whole."

Hanna, at 323. The reasons underlying *Hanna* are keenly important and pertinent:

> [B]ecause the Florida Constitution sets forth an exception to the homestead exemption for improvements that specifically benefit the homestead, the requirement of a special benefit conferred must be rigorously adhered to in order to avoid the circumvention of the constitutional exemption from forced sale of the homestead. *Fisher v. Board of County Commissioners, 84* So.2d 572 (Fla. 1956). . . . .

Hanna, at 322.

Though it dealt with a city's attempt to mis-label charges as special assessments, *Hanna* is precisely analogous here. Just as

Palm Bay had statutory authority to levy special assessments, the county here relies on sections 125.01(q), (r), 197.3632, Florida Statutes. However, as *Hanna* reconfirmed, the power to levy special assessments is limited by the Florida Constitution. Accord, *City of Boca Raton* v. State, 595 So 2d 25, 28 (Fla. 1992). Just as Palm Bay was limited by those constitutional clauses in *Hanna,* the county is equally limited.

Palm Bay attempted to fund services "intended to benefit the taxpayers and community at large," *Hanna* at 323, by levying a counterfeit "special assessment." The city did so to reduce the burden on the city's general revenues. Likewise, the county here funds services merely benefitting the community at large, and for the same impermissible objective. This case presents the Court with another attempt by local government to pay for programs of general community benefit through the improper use of the special assessment power. If there were any doubt of that, it is erased by the arguments appearing at pp. 12-15 of the Florida Association brief and p. 2 of the Escambia brief. They are pleas to "broadly construe" special benefits, in contravention of established precedent - to thereby free local governments to widely resort to such assessments, because of their plea that 1968 Constitution restricts their taxing power.

II. A8 A MATTER OF CONSTITUTIONAL POLICY, CHARGES FOR FIRE PROTECTION AND SOLID WASTE COLLECTION CANNOT BE SUSTAINED AS SPECIAL ASSESSMENTS

The courts have long recognized that, without careful judicial scrutiny, local governments' attempts to mis-use special

assessments will inevitably demolish the taxpayer shields in the Florida Constitution. In *Fisher v. Board of County Commissioners of Dade County,* 84 So.2d 572 (Fla. 1956), this Court warned:

> A further reason for disapproving the plan of financing presented by this appeal is that if the annual ad valorem levies proposed to be made are valid "assessments for special benefits" in the constitutional sense, then such levies could actually be made without the necessity of an approving vote of the freeholders.[] While we realize that a referendum was required and was held in the case before us, nevertheless, if the assessments proposed to be made are valid "assessments for special benefits," such referendum added nothing at all to their constitutionality because a referendum is not a necessary condition precedent to a valid "assessment for special benefits" unless specifically required by statute. Therefore, if the so-called assessments before us are granted the benefit of judicial approval, such assessments generally could be made without the necessity of a referendum and this in turn would open the door to limited programs for financing public improvements by indirectly employing the ad valorem taxing power under the guise of "assessments for special benefits" . . . . . It would mean that by using the ad valorem valuation type of assessment here employed and the simple expedient of declaring all property in a municipality or other taxing unit to be "benefitted" by a proposed improvement, every type of real estate, business, commercial, residential or vacant, could be subjected to the exercise of the ad valorem taxing power for the liquidation of a bonded debt without compliance with the requirements of Article IX, Section 6 . . . .

Id. at 578-79 (emphasis added, citations omitted). The warning was recently reiterated in *State of Florida v. City of Port Orange, 650* So.2d 1, 4 (Fla. 1994), when the Court struck down a similar attempt to mischaracterize a charge as a user fee or impact fee:

> 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(b), Fla. Const.; made homesteads exempt from taxation up to minimum limits, art. VII, § 9, 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.

Those consistent admonishments cannot be ignored now. Lake County has followed a policy of seeking to fund not only fire and solid waste operations, but recreation, police protection, transportation, animal control and other general county services by "assessments for special benefits."[10] The counties exhort the Court to condone such wholesale use of "special assessments." If not checked, the counties will fulfill their plans to fund large portions of general operations by spurious "special assessments."

III. THE COUNTY'S "LOGICAL RELATIONSHIP" ARGUMENT IS FLAWED, AND IS NOT SUPPORTED BY THE CASES THE COUNTY CITES.

The county overreaches in suggesting that its claimed @@logical relationship" between improved property and fire fighting and waste management satisfies the constitutional requirement of a special benefit. The argument is but a thinly disguised device to decimate the Constitution's taxpayer protections.

If fire fighting provides a "special benefit" because it is "logically connected" to improved properties' increased demands, then that is equally so for many other county functions. Certainly, the denser population accompanying improved property

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[10]Lake County Ordinance 1990-25, section 5, purports to authorize the county to collect special assessments within the unincorporated area of Lake County "in order to fund the provision of law enforcement services, recreational services and facilities, ... transportation, libraries and library services, animal control patrol services, and other essential services pursuant to Chapter 125, Florida Statutes, Section 125.01(q) and (r)." (R. 835-843; A0217-A0225)

means increased police calls and greater demand for recreation, animal control, and transportation. Denser populations likewise mean greater demand for building and health code enforcement, for zoning enforcement, and even for county hospital and health care services. If the "logical relationship" between improved property and use of fire service establishes a special benefit from fire protection, then every other listed function also confers a "special benefit" which will support a "special assessment.** Under that theory, counties may fund police protection, transportation systems, building code and health code enforcement, zoning and land use code enforcement, libraries, county health units, and hospitals by special assessment. The homestead exemption clause and the millage cap clause will be rendered hollow.

For this very reason the Florida Constitution demands "rigorous" compliance, *Hanna, supra,* at 322, with the principle that special assessments must offer benefits truly unique to the property assessed, and not merely benefits of a character indistinguishable in kind from those bestowed on the community at large.

As we demonstrate below, the cases the county cites as support for its touted "logical relationship" test are fair apportionment, second prong cases. Those cases did not deal with the core question presented here: Is the benefit one which the Florida Constitution recognizes as "special," *i.e.,* unique to the assessed property?

IV. THE COUNTY RELIES ON SECOND PRONG DECISIONS, WHICH DID NOT REACH TEE ISSUES PRESENTED HERE.

The county ignores *Higgs, supra,* and *Carter, supra,* holding that fire protection and solid waste disposal may not be funded by special assessments. The county likewise ignores *City of Port Orange, supra.* Instead, it relies on extraneous discussion in cases in which did not present the issue here.

A. FIRE PROTECTION CASES

The county repeatedly relies on three cases to argue that the fire assessment is valid. Those cases are second prong cases, not first prong cases.

The first case on which the county relies is *Fire District* Number 3 *of Polk* County *v. Jenkins,* 221 So.2d 740 (Fla. 1969) ("*Jenkins*"). The issue presented in *Jenkins,* as stated by the Court, was whether "the special assessment . . . . violated Article IX, Section 13 of the Florida Constitution, F.S.A., relating to assessment of mobile home spaces and that the Act in its application to mobile home parks was arbitrary, confiscatory, discriminatory and disproportionate." Id. at 741. Despite this clear enunciation of the issue presented in *Jenkins,* the county asserts that the issue in *Jenkins* was not fair apportionment, but was rather the first prong issue - the existence of a unique benefit. On the contrary, first prong issue could not have been addressed in *Jenkins,* and was not, as the Court's exposition of the issue clearly shows.

The issue of whether funding fire service by special assessment circumvents constitutional millage caps could not have

been raised in *Jenkins.* When *Jenkins* was decided there was no constitutional limitation on millase for seneral county or municipal purposes. *Jenkins* arose before the adoption of the 1968 Florida Constitution, which imposed a broad cap on millage for general county and city operations. Art. VII, § 9(b), *Fla. Const.* (1968). Unlike the 1968 Constitution, the 1885 Florida Constitution contained no such limitation on ad valorem tax millage levied for general local government purposes. Instead, the only millage limitation in the 1885 constitution was on county school taxes. 26A *Fla. Stat. Ann.* p. 143-144 (Comment).

Nor did *Jenkins* deal with the question of whether a fire assessment contravenes homestead protection, since the plaintiff was a commercial property owner, not a homestead owner. *Jenkins, supra,* at 741. Thus, all of the discussion in *Jenkins* from page 742 onward, on which the county relies, concerned the second prong of the test for a valid special assessment: Was the method of apportionment arbitrary or capricious? It did not consider whether the benefit, in the first place, was so unique to the assessed property that it would support an assessment against homestead property. It is this first prong upon which the case at bar hinges.[11]

The second case on which the county relies, *South Trail Fire Control* Dist. v. *State,* 273 So.2d 380 (Fla. 1973) ["*South Trail*"],

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[11] This first prong of the test takes on even broader importance with the advent of general millage limitations, in addition to homestead exemption, in the 1968 Florida Constitution. *See State of Florida v.* City *of Port Orange, supra; Hanna v.* City *of Palm Bay, supra.*

was also a second prong case, although the county incorrectly claims otherwise. The plaintiffs there did not raise the issues in the case at bar, and the Court, therefore, did not decide them. The plaintiffs in *South Trail* owned commercial property. *Id.* at *382.* They could not raise the issue of infringement of homestead exemption by the special assessment. They could have raised the issue that a fire protection special assessment circumvents the millage cap provisions of Article VII, section 9(b), Florida Constitution, see State *of* Florida *v. City of Port Orange, supra; Hanna v. City of Palm Bay, supra,* but they did not. Instead, the taxpayers presented only the issue of arbitrary apportionment:

> The Owners submit the following question in their brief: Whether a determination of benefits accruing to business and commercial property by the Legislature is constitutional when the property is assessed on an area basis and all other property in the tax district is assessed at a flat rate basis and the evidence shows that the special assessments paid by business and commercial property as a result are discriminatory when compared with other property." The Owners say the primary question is one of discrimination in that business and commercial property owners were paying 17.2% of the total assessments, while the value of their property was only 10.8% of all of the property in the district and they receive only 6% of the actual services of the district.

Id. at 382. Thus *South Trail* centers on the second prong of the constitutional test: the fairness of the apportionment. The case is irrelevant to the first prong issue of critical significance here, and in *Hanna, Higgs, Carter,* and *City of Port orange.*

Finally, the county relies on *Sarasota County v. Sarasota Church of Christ,* 641 So.2d 900 (Fla. 2d DCA 1994) ["*Church of Christ"].* In *Church of Christ,* the Second District relied expressly on *Fire District Number 1 of Polk County v. Jenkins,*

supra and *South Trail Fire Control Dist. v. State, supra,* without appreciating that those cases did not address first prong issues. *Id.* at 902 n.2. The Second District commented that *Jenkins* and *South* Trail "seemed to strain the definition and historical meaning of a special assessment" set forth in cases such as Higgs, *supra. Id.* The Second District incorrectly perceived such a strain because, like the county, it failed to appreciate that Higgs, (as well as Carter, Hanna and *City of Port* Orange) dealt with first prong issues, while *Jenkins* and *South Trail* dealt with second prong issues.

Tension between the two lines of cases does not in fact exist, since the cases address different issues. If, indeed, the two lines of cases concerned the same issue, this Court would have been compelled to recede from *Higgs* in order to decide *Jenkins* and *South Trail* as it did. Yet the Court neither questioned, qualified, nor receded from *Higgs* in *Jenkins* or in *South Trail*.

B. SOLID WASTE CASES

The county relies on *Charlotte County v. Fiske, 350* So.2d 578 (Fla. 2d DCA 1977), to support the solid waste management assessment. Like the fire protection cases the county cites, *Fiske* is a second prong decision, not a first prong decision. In *Fiske,* the court framed the issues as follows:

> [O]wners of the residences assessed, brought this action to void the ordinance. They prevailed, the trial court having found: (1) that there is no rational basis for distinguishing the properties subject to the assessment and those not; (2) that some of the properties especially benefitted by the assessment are not subject to the assessment; (3) that the ordinance imposes special assessments without construction of any public

> improvement from the levy; and (4) that the ordinance does not require that the amount of the assessment equal or approximate the benefit.

Id., at **580.** The issues raised by the *Fiske* taxpayers were not the first prong issue in this case. If *Fiske* were indeed a first prong case, then, the Supreme Court's decision in *City of Ft. Lauderdale v. Carter, supra,* would have controlled and required an result opposite to that reached in *Fiske.* But, as with the fire protection cases discussed above, *Fiske* addressed an issue different from *Carter. Carter* was a first prong case; *Fiske* was a second prong case.

Fiske's comment that garbage fees "may take the form (at least for lien purposes) of 'special assessment,"' is obiter dictum. That is apparent from the passage where the comment appears, and from the cases which the *Fiske* court cites in that passage. *Fiske, supra* at 580. After stating the second prong issues actually to be decided, the court prefaced its decisive reasoning by emphasizing that the precise character of the garbage charge was unimportant to its decision:

> To begin with, while the ordinance before us speaks of the assessment involved as a "special assessment," we are of the view that such a term is a broad one and may embrace various methods and terms of charges collectible to finance usual and recognized municipal improvements and services. Among such charges are what are sometimes called "fees" or "service charges," when assessed for special services. Moreover, these may take the form (at least for lien purposes) of "special assessment." (FN1) In point, indeed, such charges for garbage disposal were denominated "waste fees" in a Dade County ordinance interpreted by our sister court in the Third District in *Turner v. State ex rel. Gruver,* (FN2) wherein they were defined not as a form of taxes but as "special charges" imposed for a "special service" performed by the county.

Id. Thus the *Fiske* court announced at the very outset that whether garbage charges were properly characterized as "special assessments," "special charges," "fees," or otherwise, was irrelevant to the court's disposition. In that context that the court commented that "these [garbage fees] may take the form (at least for lien purposes) of 'special assessment.'"

The cases to which the *Fiske* court referred in footnotes 1 and 2 of that passage confirm that the court was not deciding whether a special assessment for garbage service was consistent with constitutional taxpayer protections (the first prong issue). The court cited *Turner v. State ex rel. Gruver*, 168 So.2d 192 (Fla. 3d DCA 1964). *Turner* held that the obligation to pay for waste collection "constitutes a debt within the suarantee of Sec. 16 of: the Declaration of Rights aaainst imprisonment for debt." Id. at 193 (emphasis added). Thus, *Turner* stands as no authority that garbage collection service may support a constitutionally legitimate special assessment against homesteads. It supports exactly the opposite conclusion: such a charge is in the nature of a debt "arising ex contractu." *Turner* at 194. Since the charge was a debt, *Turner* held that one cannot constitutionally be imprisoned for failure to pay it. Likewise, as a debt, it may not be imposed against homesteads. Art. X, § *4, Fla. Const.*

In the passage in question, *Fiske* also cited *Gleason v. Dade County,* 174 So.2d 466 (Fla.3d DCA 1965). *Fiske* at 580 n.1. *Gleason* merely decided that the a recorded county lien for garbage fees was superior to a mortgage lien, by virtue of statute. The *Gleason*

court specifically remarked that it was deciding no constitutional issue. *Gleason* at 194.[12]

Nor was it decided in Fiske. Properly understood, the *Fiske* passage on which the county relies merely observes that charges for garbage collection have been variously characterized in assorted contexts, but that those various characterizations were unimportant to the issues the Fiske court was called upon to decide.

Furthermore, it is apparent from the *Fiske* facts that the county was acting as collection agent of the garbage hauler. The garbage hauler contracted directly with some property owners and was paid directly by them, while the county collected the garbage fee from residential owners and paid it over to the hauler. Since no private entity can exercise sovereign powers, and since special assessments, like taxes, are sovereign levies, the fee paid directly to the garbage hauler had *to* be an *ex contractu* proprietary fee, and thus the fee collected on behalf of the garbage hauler also had to be an *ex contractu* proprietary fee or service charge.

Any charge which emanates from ownership and use of property (*e.g.*, the hauler's equipment) is a proprietary charge, not a sovereign levy. For example, a toll for bridge or road use is a

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[12] "The only issue before the trial court was whether the liens or the mortgage should be entitled to priority. The trial court ruled that the special assessment liens were valid and superior to the mortgage. . . . . The record does not reflect that the question of constitutionality . . . was at issue before the trial court; or that this matter was properly presented to, or ruled upon, by the trial court. We therefore cannot consider this matter for the first time upon appeal." *Id.* at 467.

proprietary charge. *See Day v.* City *of St. Augustine, 139 So. 880* (Fla. 1932); [illegible] v. *Duval County, 154 So.* 172 (Fla. 1934). Like a toll, a garbage fee paid for the service of garbage collection is a charge emanating from the ownership of property, and is proprietary, not sovereign. Accordingly, contrary to the county's contention, *Fiske* does not involve a sovereign levy, but like *Turner* and *Clein* v. Lee, 200 So. 693 (Fla. 1941), cited in Fiske, involved a proprietary fee.

v. THE COUNTY'S HOME RULE POWERS ARGUMENT IS INCORRECT.

Repeatedly, the county and its amici refer to counties' "broad home rule power" to justify these assessments. They fail to recognize that neither the legislature nor the county may exercise power in a way which circumvents the constitutional limitations. *E.g., State of Florida v. City of Port Orange, supra.*

The question of whether these assessments are truly for "special benefits" must be resolved by the principles contained in those constitutional clauses. The legislative grant of home rule power has no bearing on the matter, for the legislature could not delegate to the county the power to contravene those constitutional limits, any more than the legislature could contravene them itself.

Moreover, the county's reading of the home rule powers act, section 125.01, Florida Statutes, is wrong. The county asserts that section 125.01(q),(r), Florida Statutes, authorizes both assessments. Where pertinent, the statute provides:

> (1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes [illegible] the power to:

* * * *

> (q) Establish . . . municipal service taxing or benefit units for any part or all of the unincorporated area of the county, within which may be provided fire protection, law enforcement, beach erosion control, recreation service and facilities, water, streets, sidewalks, street lighting, garbage and trash collection and disposal, waste and sewage collection and disposal, drainage, transportation, indigent health care services, mental health care services, and other essential facilities andmunicipal services from funds derived from service charges, special assessments, or taxes within such unit only . . . .
>
> (r) Levy and collect taxes, both for county purposes and for the providing of municipal services within any municipal service taxing unit, and special assessments . . . . (Emphasis added.)

The county argues that, because it may provide all of the listed services, including fire and solid waste collection, "from funds derived from service charges, special assessments, or taxes within such unit only," it may pay for all of the listed functions by any of the listed means, including special assessments.

That is a misinterpretation of the statute. The phrase "from funds derived from service charges, special assessments, or taxes within such unit only," prohibits the county from levying any form of charge outside of the unit's boundaries to pay for services in the unit. That phrase may not be read as permitting the county to pay for all of the permitted services by means of special assessments. To suggest, as does the county, that by this language the legislature intended to, or could constitutionally obliterate the distinctions between taxes, special assessments, tolls and other similar service charges founded on proprietorship, is

specious. *As* stated in *New Symrna Inlet Dist. v. Esch*, 138 So. 49, 50 (Fla. 1931):

> There is a recognized legal distinction between a tax in its true sense and a special benefit assessment . . . .

See also Day, supra; Masters, supra.

If the statute were read as the county contends, it would directly conflict with the Florida Constitution. Section 125.01(q) authorizes the county to provide law enforcement, recreation service, indigent health care services, mental health care services, and other essential facilities and municipal services, within "municipal service taxing or benefit units." If the county's reading were correct, then the county would be free to fund law enforcement, recreation service, indigent health care services, mental health care services, and other such services through separate "special assessments" for each activity. On the contrary, special assessments may not be used to fund county health units, *Whisnant v. Stringfellow, supra;* county hospitals, *Crowder v. Phillips, supra;* garbage collection, *Carter, supra;* or fire service, *Higgs, supra.* Such a broad construction would allow local governments to freely circumvent both homestead exemption and the Article VII millage caps of the Florida Constitution. That reading is plainly contrary to the Florida Constitution. *See State of Florida v. City of Port Orange, supra.*

Section 125.01(q),(r) must be read to conform to constitutional limitations, not to violate them. *See Florida Dept. of Education v. Elasser, 622* So.2d 944 (Fla. 1993); *Capital* City *Country Club v. Tucker,* 613 So.2d 448 (Fla. 1993). It must be read

to mean that all the listed services may be provided, and that the county may pay for each service by selecting constitutionally permissible means for each from among the fundina choices listed. The county may impose user fees, but only if user fees are constitutionally permissible for the particular expense or function.[13] *City of Port Orange, supra.* (But user fees may not become a lien on homesteads.) It may impose ad valorem taxes up to 10 mils, in addition to its 10 mile for county purposes, because the legislature has determined that the listed services qualify as "municipal purposes" under Article VII, section 9(b) of the Florida Constitution. (But homesteads are exempt up to $25,000 of assessed value from such municipal purpose taxes.) It may impose a special assessment for a facility or service which provides a benefit truly unique to the properties assessed. But the statute does not, and may not, authorize special assessments for fire, solid waste collection, or other services which provide merely a general community benefit, contrary to the Florida Constitution.

The supremacy of the Constitution's taxpayer protections in this regard is expressly recognized in section 197.3632, Florida Statutes, the source of authority for the county's non-ad valorem assessment process. Section 197.3632 limits itself to "only those assessments which are not based upon millage and which can become

[13] For instance, the county might impose an impact or user fee on new development to fund the capital costs of expanding the fire protection system; but it cannot impose an impact or user fee to defray the costs of maintaining and supporting the fire protection system, since that, itself, would be an impermissible circumvention of Article VII, sections (6) and (9)(b), and Article X, section 4 of the Florida Constitution. *See City of Port Orange, supra.*

a lien against a homestead as permitted in s. 4. Art. X of the State Constitution." § 197.3632(1)(d), *Fla. Stat.* (emphasis added). Under the authorities discussed above, assessments for fire protection and garbage collection and disposal cannot legitimately become a lien against homestead property. The county therefore may not legitimately impose forced liens against property for such functions by mis-labeling these charges as special assessments.

VI. THE COUNTY READS *SARASOTA COUNTY* *V. SARASOTA CHURCH OF CHRIST,* INC. TOO BROADLY.

The county and its amici assert that the county's mere declaration of a special benefit virtually binds the courts. This position manifestly eviscerates the protection extended by the homestead clauses. On the contrary, judicial review of such claims must be de novo and rigorous, *Hanna, supra; Fisher, supra,* in order to safeguard the Constitution's taxpayer protections.

In *Fisher v. Board of County Commissioners of Dade County, 84 so.* 2d 572 (Fla. 1956), this Court held that the existence of a special benefit is a fact to be ascertained as any other, that the matter is not reposed in the judgment of local officials, and that the courts must independently scrutinize claims of special benefit:

> "Special benefits" must be made to appear and there must be adequate factual data in the record to support the conclusionthatthe homesteads involved have received the peculiar special benefits charged against them as required by the constitution.

Id. at 576-77, 579. Without such review, constitutional limitations could be avoided by "the simple expedient of declaring

all property in a municipality or other taxing unit to be 'benefitted' by a proposed improvement.@@ *Id.* at 579-580.[14]

The county implies that this Court's decision in Sarasota *County v. Sarasota Church of Christ, Inc., supra* shields the county's *ipse dixit* of "special benefit" from independent factual scrutiny. Initial Brief, at 24. Escambia asserts that proposition more directly. Escambia Brief, at 2. That assertion is founded on the Court's statement that the standard of review is the same for the existence of a special benefit and for fair apportionment of the assessment.[15]

Were county-declared findings controlling, the separation of powers doctrine would be violated. *See Hancock v. Board of Pub. Instruction,* 158 So.2d 519 (Fla. 1963); *Times Pub. Co. v. Ake*, 660 So.2d 255 (Fla. *1995);Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992); *Chiles v. Children,* 589 So.2d 260 (Fla. 1991). The power to determine if a statute or ordinance conflicts with the constitution is exclusively a judicial function. Furthermore, any enactment which affects homesteads should be strictly construed to protect this class of persons protected by the constitutional homestead

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[14]*See also City of Tampa* v. State, 19 So. 2d 697, 697 (Fla. 1944) ("[L]egislative findings of fact are not conclusive and may be contested in the court").

[15]"To eliminate any confusion regarding what standard is to be applied, we hold that the standard is the same for both prongs; that is, the legislative determination as to the existence of special benefits and as to the apportionment of the costs of those benefits should be upheld unless the determination is arbitrary." Sarasota *County, supra,* at 183.

exemption and protection. As stated in *Sparkman v. State, 58* So.2d 431, 432 (Fla. 1952), which invalidated legislation which operated to limit homestead protection:

> When the constitutional validity of the statute is measured by this rule the following situation is apparent: Section 7, Article X of the Constitution creates a right or privilege of exemption in a clearly defined class or group of persons, namely, "Every person who has legal title or beneficial title in equity to real property in this State and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person".
>
> * * * *
>
> [W]hen the provisions of the challenged statute are applied the class or group of persons to whom is accorded the right or privilege of exemption becomes materially limited, restricted and altered . . .(emphasis added).

The posture of the judiciary when constitutionally guaranteed or protected rights are involved was best stated in *Dade County Classroom Teachers Ass'n, Inc. v. Legislature,* 269 So.2d 684 (Fla. 1972), as follows:

> We think it is appropriate to observe here that one of the exceptions to the separation-of-powers doctrine is in the area of constitutionality guaranteed or protected rights. The judiciary is in a lofty sense the guardian of the law of the land and the Constitution is the highest law. A constitution would be a meaningless instrument without some responsible agency of government having authority to enforce it. As Chief Justice Charles Evans Hushes once stated:
>
> > "We are under a constitution, but the constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the constitution."
>
> When the people have spoken through their organic law concerning their basic rights, it is primarily the duty of the legislative body to provide the ways and means of enforcing such rights: however, in the absence of

> appropriate leaislative action, it is the reswonsibilitv of the courts to do so.
>
> Where people in a constitution or charter vote themselves a governmental benefit or wrivilese, they the people in whom the power of government is finally reposed, have the right'to have their constitutional rights enforced.

Id., at 686 (emphasis added) (citing *McCulloch v. State of Maryland,* 4 Wheat. (17 U.S.) 316, 4 L.Ed. 579).

We do not perceive that the Court intended in *Sarasota County* to abdicate the courts' responsibility to independently evaluate the evidence on the core question of special benefit. The courts' duty under Article V is to preserve and protect the homestead exemption, and to enforce the constitutional policies embodied in the millage caps of Article VII. Discharge of that duty requires independent judicial evaluation of the facts showing or negating the existence of a "special benefit," an evaluation which must be instructed by the constitutional meaning of that term in the homestead clauses. That can only be done by scrupulous, independent evaluation of local government declarations of "special benefit."

Sarasota County cites *Meyer v. City of Oakland Park, 219* So.2d 417 (Fla. 1969) in support of an arbitrariness test for special benefit. *Meyer* states:

> Both the City Council and the trial judge found that the property involved was specially benefitted by the improvements. There is a presumption that such findings as to benefits are correct and this presumption can be overcome only by strong, direct, clear and positive proof.

Id. at 420 (emphasis added). *Meyer* and similar cases hold that the burden of proof is on the property owner to show facts negating the

existence of a special benefit. If the proven facts are reasonably susceptible of the conclusion that assessed properties do enjoy a unique benefit, then a special assessment is a proper means to fund the service. However, though the property owner bears the burden of proof, the courts must nevertheless scrupulously examine the proofs. They must independently ascertain from the facts of record whether the county service actually provides a uniuue benefit to the property assessed. In evaluating the evidence, the courts must bear in mind the purpose of the homestead exemption and millage cap clauses: to limit government power to impose forced liens on property for the support of local government.

If, as we perceive its meaning, this particular passage of the *Sarasota County* opinion intends a Meyer-type standard for determination of special benefits, then the facts here clearly show none exists. Even if the Court intended a slightly more relaxed standard, the facts here nevertheless carry the property owners' burden.

The facts indisputably show that whatever benefit flows from fire service, it does not flow uniauelv to improved properties. Unlike the stormwater function in *Sarasota County,* fire protection does not provide a benefit to the assessed property which is different in kind from the benefit which fire protection extends to all properties and persons. Unlike the stormwater function, fire service does not remove or assist the property owner in discharging a duty unique to improved lands: the duty not to discharge water onto other lands due to man-made alterations of the property *(i.e.,*

nuisance[16]). All property, including land in its natural state, as well as personalty, carries the inherent risk of combustion, and with it, the risk of general conflagration. All property calls for fire protection service. The primary purpose of public fire service is to protect the community generally from destruction due to a fire starting at any location, and that is why city fire departments are funded by ad valorem taxes and other general revenue sources.

Nor does the solid waste program provide a unique benefit to improved property. The principal expense of the system, which the assessment defrays, is the cost to prevent contamination of state waters by landfill leakage. That activity benefits all persons and properties in the same way, and all property - vacant and improved, real and personal - contributes to that need.

The solid waste assessment also underwrites the county's contractual obligation to pay penalties to a private concern, if the county fails to deliver minimum amounts of combustible matter to the company's facility (the Ogden facility). That contractual undertaking may ultimately serve the general welfare of the county, by providing means to reduce the amount of waste deposited at the county's landfills. But, it does not uniquely benefit improved property. Moreover, "biomass," which the facility burns, comes from vegetation, vegetation products, and animal carcasses, which are

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[16]*See, e.g., Westland Skating v. Gus Machado Buick, 542* So.2d 959 (Fla. 1989); *Koger Properties, Inc. v. Allen,* 314 So.2d 792 (Fla. 1st DCA 1975).

retrieved from all types of property, and from public rights of way.

Finally, the solid waste assessment is also invalid because it is a debt ex contractu. The county's levy for solid waste is not a sovereign governmental imposition, but is a charge in place of the fee collected by the franchise hauler and hence could not be a special assessment. Special assessments are sovereign/governmental charges. The franchise hauler, having no attributes of sovereignty could not levy a sovereign charge. The franchise hauler's charge is a proprietary charge emanating from its ownership and use of property. The county's charge is imposed only if the franchise hauler notifies it that a property owner has not contracted with the hauler. The county's charge takes the place of the contracted hauler's charge, and hence must also be a proprietary charge.

The county's ordinance clearly only levies the solid waste fee against parcels of real property whose owners fail to contract with a franchised waste hauler. Those who do pay the waste hauler directly, and do not pay the "assessment."

The effect of this is twofold: (1) An individual can avoid the levy and his property will not be assessed and, thus, not liened by participating in the program. Thus, although the county contends that its levies are special assessments which are sovereign levies emanating from sovereignty not proprietorship, it has delegated the decision on whether the special assessment is levied to the property owners and franchise hauler. It is axiomatic that sovereign/governmental power cannot be delegated to

private persons and that no statute or ordinance can be made to depend on the acts of individuals for executive and operative effect. (2) If the charge is lesally a special assessment as the county contends, then it has improperly delegated the determination of when, and against what property it is to be levied, to private persons or entities and this constitutes an improper delegation of its taxing authority. *Cassady v. Consolidated Navel Stores Co.,* 119 So.2d 35 (Fla. 1960); *State ex rel. Taylor v. City of Tallahassee,* 177 So. 719 (Fla. 1937).

In finding the statute unconstitutional the *Cassady* court stated:

> This it had the right to do--subject to controlling constitutional limitations--in the exercise of its sovereign sower to determine the subjects of taxation and the exemptions therefrom. Long v. St. John, 1936, 126 Fla. 1, 170 so. 317, 109 A.L.R. 809. And under § 5 of Article 9, Fla.Const., the Lesislature mav lawfullv delectate to counties, acting through their constitutionally authorized and duly elected taxing officials, the authority to assess and impose taxes for county purposes. Whitney v. Hillsborough County, 1930, 99 Fla. 628, 127 So. 486, 493. Or it can exercise its taxing power through "statutory" boards or officers acting within definitely prescribed statutory limitations. Ibid., 127 So. at page 492. But, as in the case of any other statute, the execution of a tax statute or the exercise of taxina powers thereby qranted cannot be made to depend upon the unbridled discretion or whim of a "statutory" board or individual or qroup of individuals. See Richey v. Wells, 1936, 123 Fla. 284, 166 so. 817; Whitney v. Hillsborough County, supra, 127 So. at 493; Tarpey v. McClure, 1923, 190 Cal. 593, 213 P. 283. Cf. State ex rel Taylor v. City of Tallahassee, 1937, 130 Fla. 418, 177 So. 719.

Id. ,at 37 (emphasis added). Continuing the court stated:

> We are conscious of our duty to interpret a legislative Act so as to effect a constitutional result if it is possible to do so. We are, however, bound by the unambisuous terms of a statute; and we cannot help but

> conclude that the italicized provision of § 193.221, quoted above, has the effect of vesting in the owner of some record interest in the surface of the land an unbridled discretion as to when the authority granted by the Act to assess severed subsurface rights for ad valorem tax purposes shall be exercised as to that particular tract of land. This is clearly an unauthorized delegation of the legislative power under the decisions cited above, and one that is particularly obnoxious in the case of the taxing power when we recall that "Taxation without representation" was the battle cry that precipitated the Revolution.

Id., at 37 (emphasis added).

Here, the determination of which property is subject to the levy is determined by each individual owner's election to participate or not participate in the pick-up program. *See also Richey* v. *Wells,* 166 So. 817 (Fla. 1936), in which this Court held unconstitutional a statute conferring on a county delinquent tax adjustment board the authority to compromise taxes "upon principles of fairness to the county and the owners and lienors of such lands," as constituting an illegal delegation of authority. *Richey,* at 820.

Thus, the county has a dilemma, which is:

(a) If it admits that its levies are not special assessments, but are charges for solid waste collection service, *i.e.* in place of those of the franchise hauler, then the charges cannot become a lien the homestead because non-payment of an ex contractu proprietary fee creates a debt and article X, section 4, protects a homestead from debt. *See Turner v. State ex rel. Gruver*, 168 So.2d 192 (Fla. 3d DCA 1964).

(b) If it asserts that the levies is a sovereign levy which can lien a homestead, then it must confront the fact that its

ordinance permits private persons to determine by their own action if their property is to be assessed. In *Cassady v. Consolidated Naval Stores Co.,* 119 So.2d 35 (Fla. 1960), this Court squarely held that any law which permits persons to determine if an assessment is to be imposed is unconstitutional because the sovereign power of taxation cannot be delegated.

The thrust of the ordinance speaks the truth, disclosing exactly what is intended, i.e., that is the county's solid waste charge is intended to force property owners to contract with the franchise hauler. If the franchise hauler is paid pursuant to contract, then no county charge is made; but if the property owner does not pay him, the county assesses. Forced liens for debt may not be imposed against homesteads. It may be that the County may force use of a franchised waste hauler in the exercise of it police power. But the county could not authorize liens of homestead property for charges by the private waste hauler. It may not do so by inserting itself as collection agent for the waste hauler and imposing a lien against homestead properties in that manner.[17]

Thus, under any reasonable test which gives due weight to the homestead exemption and millage caps, neither of these assessments can be held consistent with the Constitution.

If, however, *Sarasota County* intends to say that a legislative declaration of special benefit forecloses judicial scrutiny if any

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[17]Again, we note that the issue here is not whether county residents may be required to pay, by permissible means, for solid waste management. The issue is whether the constitution and section 196.3632 permit the imposition of forced liens against homesteads to enforce payment.

conceivable facts could support such a conclusion, even though not shown by the evidence, we respectfully urge that such is error. Such a wholly deferential standard would sound the death knell for homestead exemption and pave the way for wholesale circumvention of the millage caps of Article VII. It would fling wide the gates for all manner of local revenue exactions based on flimsy declarations of "special benefit." Moreover, if that is the meaning which the passage intends, it is *obiter dictum.* The Court found that, in fact, the assessed properties in that case received a unique benefit not extended to all classes of property from the stormwater program. Given that conclusion, the passage in question was not necessary to the Court's conclusion. It should not be followed here.

CONCLUSION

For the reasons stated herein, the Court should affirm the decision of the Fifth District Court of Appeal insofar as it invalidates the county's fire assessment and reverses the trial court's judgment in favor of the county concerning the constitutional validity of the fire assessment. The Court should reverse the decision of the Fifth District Court of Appeal insofar as it upholds the county's solid waste assessment and affirms the trial court's judgment in favor of the county concerning the constitutional validity of the solid waste assessment. The case should be remanded for further proceedings with instructions to enter judgment declaring these assessments to be invalid.

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 United States Mail to SANFORD A. MINKOFF, Minkoff & McDaniel, P.A., 226 West Alfred Street, Tavares, Florida 32778; GREGORY T. STEWART and ROBERT L. NABORS, Nabors, Giblin & Nickerson, Barnett Bank Building, Suite 800, 315 South Calhoun Street, Tallahassee, Florida 32301; GAYLORD WOOD, Wood & Stuart, 304 S.W. 12th Street, Ft. Lauderdale, Florida 33315; WILLIAM J. ROBERTS, Florida Association of Counties, Post Office Box 549, Tallahassee, Florida 32302; HARRY "CHIP" MORRISON and KRAIG COHN, Florida League of Cities, Inc., 201 West Park Avenue, Tallahassee, Florida 32301; JORGE L. FERNANDEZ, Florida Association of County Attorneys, Office of the County Attorney, Sarasota County, 1660 Ringling Boulevard, 2nd Floor, Sarasota, Florida 34236, and DAVID G. TUCKER and NANCY STUPARICH, Escambia County, Florida, 14 West Government Street, Room 411, Pensacola, Florida 32501, this 26th day of August, 1996.

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