IN THE SUPREME COURT OF FLORIDA
CASE NO. 88,872

THE STATE OF FLORIDA, and the taxpayers, Property Owners and Citizens of Sarasota County, Florida, including non-residents owning property or subject to taxation therein, and all others having or claiming any right, title or interest in property to be affected by the issuance of the Bonds, herein described, or to be affected thereby,

Appellants,

v.

SARASOTA COUNTY, FLORIDA a political subdivision of the State of Florida,

Appellee.
_____/

ANSWER BRIEF OF APPELLEE, SARASOTA COUNTY, -FLORIDA

On Appeal From The Twelfth Judicial Circuit,
In And For Sarasota County, Florida
Case No. 96-2055-CA-01

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JURISDICTIONAL STATEMENT

This case involves an appeal under Rule 9.030(a)(1)(B)(i), Florida Rules of Appellate Procedure, from a final order issued pursuant to Chapter 75, Florida Statutes, validating the County's proposed issuance of not exceeding $45,000,000 Sarasota County, Florida Stormwater Utility Revenue Bonds, Series 1996 (the "Bonds").

STATEMENT OF THE CASE AND FACTS

Appellee Sarasota County accepts the Statement of the Case and the Statement of the Facts as set forth by Appellant in its Initial Brief, but adds the following to those statements.

Sarasota County, Florida (the "County") is a charter county organized under the authority of Article VIII, section 1(g), Florida Constitution, and the County's duly adopted charter. County App. 5.[1] Under the broad home rule powers granted by this provision of the Florida Constitution, charter counties have all powers provided to them under their charter so long as the exercise of those powers is not inconsistent with general law or a special act approved by the county voters. In furtherance of these powers and the Florida Legislature's mandate in section 403.0891, Florida Statutes, that local governments develop "mutually compatible stormwater management programs" with the State and water management districts, the County embarked on developing a stormwater management program in the late 1980's and has been continually refining and tailoring the implementation of the program since that time. County App. 2; County App. 1, testimony of J.P. Marchand, at pp. 12-17.

As a part of the County's overall stormwater management plan, the County enacted Ordinance No. 94-066, as amended and supplemented by Ordinance Nos. 95-063 and 96-010, (collectively,

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[1] In this brief, citations to Appellant's Appendix will be stated as "State App. ___," and references to Appellee's Appendix will be stated as "County App. ."

the "Assessment Ordinance"). State App. A. The Assessment Ordinance created the Stormwater Environmental Utility, imposed special assessments to fund certain costs of the stormwater improvements and services, and established a Stormwater Environmental Utility Enterprise Fund. See State App. A, Assessment Ordinance, sections 2.01, 2.02 and Articles II and III, generally. On July 11, 1995, the County adopted Resolution No. 95-154 (the "Initial Stormwater Improvement Assessment Resolution"), further identifying the property which the stormwater improvements will specially benefit,[2] allocating the estimated cost of the improvements among the improvement areas, and articulating how the Stormwater Improvement Assessments will be calculated. See State App. B, Initial Stormwater Improvement Assessment Resolution, Articles II and III.

On September 7, 1995, after a properly noticed public hearing, the County adopted Resolution No. 95-212 (the "Final Stormwater Improvement Assessment Resolution"), approving the plans, specifications, and cost estimates for the Stormwater Improvements, and providing a mechanism to compute Stormwater Improvement

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[2] The County disagrees with Appellant's statement that the "bonds differ substantially from prior issuances in that they apply to undeveloped as well as developed properties." Initial Brief at 3. As its stormwater management program has evolved, the County has determined that "developed" property includes not only property with impervious area but also certain types of pervious areas that generate stormwater runoff. Property in its natural state is considered "undeveloped" and is not subject to the assessment. County App. 2; County App. 1, testimony of J.P. Marchand, at pp. 23-29.

Assessments if prepayments are made. See State App. C, Final Stormwater Improvement Assessment Resolution, section 4.

On February 13, 1996, the County then adopted Resolution No. 96-033 (the "Bond Resolution") , State App. D. The Bond Resolution declared that the County would issue the Bonds and use their proceeds to fund the cost of acquiring and constructing the various stormwater improvements, to capitalize interest on the Bonds, to fund a debt service reserve account for the Bonds, and to pay costs and expenses associated with the issuance of the Bonds. See State App. D, Bond Resolution, Articles II-V.

The County then filed its Complaint for Validation under Chapter 75, Florida Statutes, asking the circuit court to validate the County's authority to issue the Bonds and determine the legality of the Stormwater Improvement Assessments. State App. E. Appellant responded to the Complaint, answering that it was without knowledge of the allegations and demanding proof. State App. F. The circuit court entered an Order to Show Cause, but because the order was not duly published pursuant to section 75.06, Florida Statutes, the court entered a Renewed Order to Show Cause. It was properly published and the court held a hearing to determine the validity of the assessments and the County's authority to issue the Bonds, County Apps. 1, 4. After taking testimony, accepting evidence and considering the arguments of counsel, the circuit court approved the assessments and validated and confirmed the issuance of the Bonds in a Final Judgment entered on July 18, 1996.

State App. G. Appellant timely filed its notice of appeal. county App. 6.

SUMMARY OF THE ARGUMENT

Appellant correctly asserts that referendum approval is required before bonds payable from ad valorem taxes may be issued. However, the bonds for which validation is sought in this action are payable from the proceeds of special assessments; thus no referendum is required.

In order for special assessments to be deemed valid, Florida case law requires that (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.

The County's stormwater assessment strategy addresses both of these issues by assigning the debt service attributable to each stormwater improvement to the specific Stormwater Improvement Area to be served and then allocating the debt service among the parcels of property based upon their relative generation of stormwater runoff. Although the program approved in Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180 (Fla. 1995), imposed assessments only against developed property that included impervious area, the County's current program imposes assessments against all developed property, whether the property includes impervious area or not, reflecting the fact that developed pervious area does generate stormwater runoff. The various types of pervious area were factored to ensure that the cost was properly apportioned, Undeveloped property in its natural state is not assessed,

While the stormwater assessment strategy in the instant case differs in some respects from the method already upheld by the Supreme Court, these differences are designed to more accurately match the assessment to the property's contribution of stormwater runoff. This Court did not limit its approval to the specific apportionment methodology in question in Sarasota Church of Christ, The County believes that the revisions embodied in its current stormwater assessment strategy render the apportionment more equitable than the methodology previously approved by this Court and should be affirmed.

The County's treatment of delinquent assessments merely augments the debt service reserve traditionally used in assessment programs to insulate bonds from the losses attributable to uncollected assessments and does not invalidate the County's program. Augmenting the debt service reserve by increasing the subsequent year's assessment to replace amounts withdrawn maintains the debt service reserve at its original level, provides additional security for the Bonds, and further lowers the interest rate. Since lower interest rates benefit the assessed property through lower Stormwater Improvement Assessments, the County's treatment of delinquencies is reasonable and within its legislative discretion.

ARGUMENT

I. THE COUNTY HAS SUFFICIENT AUTHORITY TO ISSUE THE BONDS AND IMPOSE THE STORMWATER IMPROVEMENT ASSESSMENTS WITHOUT REFERENDUM APPROVAL.

Sarasota County is a charter county. County App. 5. Under the Florida Constitution, charter counties have "all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors." Article VIII, section l(g), Florida Constitution.[3] No general law, special act, or charter provision is inconsistent with the County's issuance of the Bonds in this case. The Bonds will be issued pursuant to the County's home rule powers under Article VIII; section 1(g), Florida Constitution, Chapter 125, Florida Statutes, and the Stormwater Assessment Ordinance. See State App. D, Bond Resolution, section 1.02. These authorities provide the County with ample authority for issuance of the Bonds. See Taylor v. Lee County, 498 So. 2d 424, 425-426 (Fla. 1986) (where the Florida Supreme Court held that the county had sufficient authority, through its home rule powers under the Constitution and Chapter 125, Florida Statutes, to issue revenue bonds for transportation facilities).

Under the Florida Constitution, a county cannot levy any taxes, other than ad valorem taxes, without general law authorization. Article VII, section 9(a), Florida Constitution.

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[3] Non-charter counties have a similar grant of powers through the Florida Constitution and the provisions of general law. See Article VIII, section l(f), Florida Constitution; section 125.01, Florida Statutes. See also State v. Orange County, 281 So, 2d 310, 312 (Fla. 1973).

Moreover, as Appellant asserts, a county may not issue bonds payable from ad valorem taxes, absent approval by referendum vote of the electors. Article VII, section 12(a), Florida Constitution. However, the Constitution requires no specific general authorization for counties and cities to impose special assessments. When special assessments meet the case law criteria for their validity, a county or city may impose such assessments under their home rule power and issue bonds secured thereby without referendum approval, City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992).

The primary distinction between taxes and special assessments is that taxes are levied for the general benefit of the community and need not provide a special benefit to property. Case law establishes two requirements 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, at 29. A special assessment may provide funding for either capital expenditures or the operational costs of services, so long as the property which is subject to the assessment derives a special benefit from the improvement or service. Madison County v. Foxx, 636 So. 2d 39 (Fla. 1st DCA 1994). In fact, many assessed services and improvements have been upheld as providing the requisite special benefit including, for example: solid waste disposal, Harris v. Wilson, 656 So. 2d 512

(Fla. 1st DCA 1995), rev. granted, 666 So. 2d 143 (Fla. 1995) and Charlotte County v. Fiske, 350 So. 2d 578 (Fla. 2d DCA 1977); sewer improvements, Meyer v. City of Oakland Park, 219 So. 2d 417 (Fla. 1969); and stormwater management services, Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180 (Fla. 1995).

In this case, the County has shown that it will fund its stormwater improvement program, not through taxes, but with special assessments that meet the case law requirements. Thus, neither is general law authorization necessary to impose the assessments nor is a referendum vote required to approve the issuance of the Bonds.

A. The Stormwater Improvement Assessment Provides A Special Benefit To The Assessed Properties.

Less than one year ago, this Court concluded that stormwater management services and improvements can provide special benefits to assessed properties. Sarasota County v. Sarasota Church of Christ, 667 So. 2d 180 (Fla. 1995). In so holding, this Court specifically recognized that

> both the legislature and the County have determined that the creation, maintenance, and operation of stormwater facilities benefit the individual properties that contribute to the stormwater problem caused by developed properties, particularly those with impervious surfaces, by assisting in the control, collection, and disposition and treatment of the stormwater within the areas for which the facilities provide service.

Id. at 185 (emphasis added). This Court then upheld these determinations, concluding, "We do not find that the declarations

of the legislature and County regarding the benefits of stormwater facilities are arbitrary or unreasonable in any respect." Id.

The County's stormwater assessment strategy is designed to require property owners to contribute to the cost of the stormwater improvements based upon their relative contribution of stormwater runoff. The first phase of this strategy addresses the special benefit issue by assigning the debt service for each stormwater improvement to the specific Stormwater Improvement Area to be served. See County App. 2; County App. 1, testimony of J.P. Marchand, at pp. 18-21. This phase of the assessment process asks the following question: which geographic area generates the stormwater burden, that, in turn, creates the need for each stormwater improvement? The special benefit phase of the assessment strategy is consistent with section 403.0893(3), Florida Statutes, which states that "[a]ny benefit area containing different land uses which receive substantially different levels of stormwater benefits shall include stormwater management system benefit subareas which shall be assessed different . . . fees from subarea to subarea based upon a reasonable relationship to benefits received."

Determining the geographic area which derives special benefits from a stormwater improvement is largely an exercise of "maps and crayons." The County has organized its stormwater improvement special assessment program to apportion the cost of stormwater improvements only among those parcels which receive the benefit of the improvements. See County App. 2; County App. 1, testimony of

J.P. Marchand, at pp. 18-22. The County's Initial Stormwater Improvement Assessment Resolution approved the plans for at least six different stormwater improvement projects. State App. B. The cost of each stormwater improvement is apportioned only among property located within the appropriate Stormwater Improvement Area. For example, Article II, section 2.03 of the Initial Stormwater Improvement Assessment Resolution provides for stormwater improvements within the Matheny Creek Stormwater Improvement Area as follows:

> **SECTION 2.03. MATHENY CREEK STORMWATER IMPROVEMENTS.**
>
> (A) This Resolution will initiate the process for imposition of Stormwater Improvement Assessments to finance acquisition and construction of the Matheny Creek Improvements. The Board hereby finds and determines that:
>
> (1) The Matheny Creek Improvements will correct existing deficiencies and achieve a consistent Stormwater Improvement Performance Standard within the Matheny Creek Stormwater Improvement Area, as more specifically set forth in the Supplemental Matheny Creek Basin Plan.
>
> (2) The Matheny Creek Stormwater Improvement Area is hereby designated as the Stormwater Improvement **Area** for the Matheny Creek Improvements.
>
> (3) The Matheny Creek Improvements will provide a special benefit to the property located within the Matheny Creek Stormwater Improvement Area.

> (B) The estimated Capital Cost for the Matheny Creek Improvements is $2,082,000. The Capital Cost and related expenses shall be funded through the imposition of Stormwater Improvement Assessments against property located in the Matheny Creek Stormwater Improvement Area in the manner set forth in Section 2.08 hereof.

Id. Similar provisions identify Stormwater Improvement Areas and make specific special benefit findings for the remaining stormwater improvements to be funded from proceeds of the Bonds.[4]

The County's special benefit findings enjoy the presumption of correctness unless proven to be arbitrary. Sarasota Church of Christ, 667 So. 2d, at 184 (the question of special benefit is a question "of fact for a legislative body rather than the judiciary . . . and the existence of special benefits . . . should be upheld unless the determination is arbitrary.").

As previously noted, the County's stormwater assessment strategy is designed to require property owners to contribute to the cost of the stormwater improvements based upon their relative contribution of stormwater runoff. Accordingly, even though property may be located within the identified Stormwater Improvement Area, if it does not contribute to the stormwater burden, no assessment is imposed

The assessment program at issue in Sarasota Church of Christ imposed stormwater assessments only against developed property that

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[4] See Appendices C-H to State App. B, the Initial Stormwater Improvement Assessment Resolution, No. 95-154. These appendices contain the various improvement plans for the Phillippi Creek Stormwater Basin, the Matheny Creek Stormwater Basin, The Alligator Creek Stormwater Basin, the Elligraw Bayou Stormwater Basin, the Clower Creek Stormwater Basin, and the Oyster Bay Stormwater area.

included horizontal impervious area. In this case, however, the assessment program imposes stormwater assessments against all developed property, whether the property includes impervious area or not. Undeveloped property in its natural state is not assessed. Various types of pervious area were factored to ensure that the cost was properly apportioned.

J.P. Marchand, Deputy Director of Transportation and formerly Stormwater Environmental Utility Manager for Sarasota County, testified at trial about the inclusion of pervious area and the factors used to ensure a fair assessment.

> [i]t was the intention that from the beginning when we established the utility, we would collect additional data, we would learn more about the system and how it works and, if appropriate, we would come back and modify or refine the current -- the assessment system; and we did that in 1994 with adoption of the fourth ordinance . . ., we revised the methodology. And one of the primary points that we revised when we started looking, not just at the hardened or impervious surface, . . . but recognized that there is runoff, although relatively less, off of the soft or pervious surfaces -- lawns, orchards, improved pasture, that sort of thing -- and we included those areas in our new assessment methodology.
>
> They were, however, related to impervious surfaces recognizing that the improved pasture, while it is runoff, it's significantly less than runoff off of a road.

County App. 1, testimony of J.P. Marchand, at p. 15, 11. 19-25; p. 16, 1. 5-12.

Upon further questioning by the State and upon redirect, Mr. Marchand explained how the current stormwater assessment program evolved from the previous program at issue in Sarasota Church of

Christ and why certain types of pervious area are considered to be developed property:

> Q. (By MR. LEE) Now, in that case the County was only assessing developed properties; is that right?
>
> A. The County was only assessing properties that had impervious surfaces. As I said before, the basis of the initial assessment was how much parking lot, buildings, pervious surface did you have. If a property did not have any parking lots or buildings, there was no assessment.
>
> Q. So undeveloped property was not assessed?
>
> A. Well, properties without -- it depends on how you define "undeveloped property." Currently, native state properties that have not been developed whatsoever, are not assessed. But if you develop them as pasture or orchards or something like that, they are currently assessed; but in the original methodology, they weren't.
>
> Q. That's what I'm getting at, originally you did not assess undeveloped properties. In the Church of Christ case you did not assess undeveloped properties?
>
> A. Well, again, it depends on how you define "undeveloped," but we did not assess any properties that did not have pavement or buildings on it. If it was developed into an orchard, we didn't assess it. Now, if that's undeveloped property --
>
> * * *
>
> Q. And, in fact, the testimony at trial in the Church of Christ case indicated undeveloped properties were not assessed because undeveloped properties actually provide a benefit to the Stormwater Management System by assisting in the absorption of runoff creating by developed properties; is that right?
>
> * * *

THE WITNESS: I don't know if that's exactly what I said or not. I know that's what's written in the opinion.

THE COURT: Do you agree or disagree with it?

THE WITNESS: Well, I disagree in terms of -- depending on how you define "undeveloped property," As I said before, there is runoff of orchards, pasture land, lawns that prior to the changes in '94 there was no assessment or no recognition of that because, again, the impervious surface represents the bulk of the runoff. But there is runoff off of lawns, there is runoff off of golf courses, there is runoff off of orchards and those areas, and so we've gotten more sophisticated we refined the methodology to include that; whereas, prior to that we did not. We still have no assessment on what's obviously undeveloped and still native-state type property. Nobody's done anything to that.

* * *

Q. (BY MR. CHILES) With regard to the definition of developed and how that's evolved in the latest assessment program, are there standards which you have used to come up with these determinations of what is developed and what's not?

A. We really don't use the word developed or undeveloped in that, but we have standards that we use to determine the relationship between, you know, runoff off of a pasture land or an orchard or a lawn versus runoff off of a parking lot or a building.

We used the U.S. Department of Agriculture's Conservation Service runoff factors for those different types of land use and we calculated on an annual basis the runoff of an acre of parking lot, an acre of pasture land, an acre of orchard, an acre of all these different types of land uses and related them all to the runoff of an acre of parking lot,

So the factor for an acre of parking lot is one, for example, the factor for an acre of pasture land, I think, is .002, which means that you take an acre of pasture land and you multiply that by .002 and you get the equivalent acreage of parking lot that the runoff of that acre of pasture land would represent. So, for example, it's going to take about 2,000 acres of pasture to equal the runoff off of an acre of parking lot.

Q. But I guess the point is, you just didn't come up with these things out of the air, you had some standards upon what you based your determinations?

A. That's correct.

Q. Also, the idea of the testimony that was read, that undeveloped provided a benefit, the latest assessment program deals not only with trying to improve the -- to take care of quantity of runoff and the rate of runoff, but also the quality of the water that's runoff; does not?

A. That's right.

Q. And, in fact, agriculture lands or rather somewhat less developed properties would create a lesser quality of water, would they not?

A. One of the -- our basic charge is not just to address flood control, but also to try to improve water quality, and the Federal Government does recognize that water quality is being impacted adversely by stormwater, the Clean Water Act requires us to do and other counties and cities to do -- to take a lot of measures to reduce the pollutant loading from stormwater runoff.

And during the first several years of the utility, we had our impervious area only based assessment methodology. One of the comments that the Board was frequently hearing at the public testimony was, what about the agricultural folks, don't they contribute a lot of -- particularly pesticides and erosion and fertilizers to the stormwater system and you need to take care of those, and that was

> part of the reasons that we looked at a newer refined assessment methodology.
>
> But, again, as I said, it was the intent all along from the beginning to start off with something simple, collect some of the data that we needed. We didn't know all the different types of land use and how much was represented out there and have that data to initially set it up that way, so it took us a few years to collect that.

County App. 1, testimony of J.P. Marchand, at p. 23, l. 14 - p. 24, l. 13; p. 25, ll. 8-14, 21-25; p. 26, ll. 1-16, 22-25; p. 27, l. 1-p. 29, l. 13. See also County App. 2; State App. B, Initial Stormwater Improvement Assessment Resolution, Appendix A, "Sarasota County Stormwater Utility Mitigation Credit Policy."

Mr. Marchand's testimony clearly indicates that the County's current stormwater assessment strategy more accurately identifies the property that contributes stormwater runoff and thus receives a special benefit from the stormwater improvements. While Appellant seems to believe that the inclusion of property without impervious area is prohibited by Sarasota Church of Christ, that is clearly not the case. This Court articulated the standard for review as follows: "the legislative determination as to the existence of special benefits and as to the apportionment of costs of those benefits should be upheld unless the determination is arbitrary." Id. at 184. This standard was then applied to the methodology under review and was determined not to be arbitrary, The Court's finding does not preclude other methodologies, however, particularly where a more accurate determination of the properties contributing to an area's stormwater runoff problem has been made.

The evidence presented to the circuit court reflects that the assessments to be imposed under the County's current stormwater assessment strategy also meet the "special benefit" test and are fully consonant with the teachings of Sarasota Church of Christ.

B. The Stormwater Improvement Assessment is Fairly and Reasonably Apportioned Among the Benefited Properties.

After the area specially benefiting from the improvement or service has been identified, the cost must be "fairly and reasonably apportioned" among the property located within the benefit area. City of Boca Raton v. State, 595 so. 2d 25 (Fla. 1992); Parrish v. Hillsborough County, 123 So. 830 (Fla. 1929). For example, in South Trail Fire Control District, Sarasota County v. State, 273 So. 2d 380 (Fla. 1973), the Supreme Court upheld an apportionment scheme which assessed business and commercial property on an **area** basis while other property was **assessed on a** flat rate basis. The Supreme Court held that the manner of the assessment's apportionment is immaterial and may vary, so long **as** the amount of the assessment for each property does not exceed the proportional benefits it receives as compared to other properties.

The second phase of the County's stormwater assessment strategy reflects an allocation of the debt service attributable to **each** Stormwater Improvement among the individual parcels of property within the Stormwater Improvement Area served by the stormwater improvement. See County App. 1, testimony of J.P. Marchand, at pp. 21-22; County App. 2.

As noted above, the Supreme Court of Florida has already approved one method of apportioning special assessments in Sarasota County for stormwater purposes. Sarasota County v. Sarasota Church of Christ, 667 So. 2d 180 (Fla. 1995). While the stormwater assessment strategy in the instant case differs in some respects from the method already upheld by the Supreme Court, these differences are designed to more accurately match the assessment to the property's contribution of stormwater runoff.

Under the County's current assessment program, the debt service attributable to each Stormwater Improvement is allocated among the individual parcels of property within the appropriate Stormwater Improvement Area based upon the number of equivalent stormwater units or "ESUs" attributable to each parcel[5]. ESUs relate to the physical characteristics of the property and are determined by the "Effective Impervious Area" of each parcel, which represents both the impervious area and the "factored" pervious area. Pervious area factors are numbers between 0.0 and 1.0, computed by the County's consulting engineers from runoff curve numbers published by the United States Department of Agriculture in "Technical Report 55," and the frequency distribution of rainfall events across the State of Florida published in Hydrology and Water Quantity Control (Martin P. Wanielista, University of Central

[5] The number of ESUs within each Stormwater Improvement Area will be determined annually. Accordingly, the debt service attributable to each Stormwater Improvement will be reallocated annually among parcels of property located within the appropriate Stormwater Improvement Area. This annual reallocation of debt service will require new development to contribute its fair share.

Florida, 1990), to relate the contribution of stormwater runoff expected to be generated by pervious areas to the contribution of stormwater runoff expected to be generated by an impervious surface. See State App. B, Initial Stormwater Improvement Assessment Resolution, section 1.01. The following table of pervious area factors appears in the Initial Stormwater Improvement Assessment Resolution and illustrates the relationship between stormwater generated by impervious area (factored at 1.0) and various categories of pervious area[6]:

Pervious Area Category	Pervious Area Factor
Natural State	0.000
Pasture/Meadow	0.002
Groves and Orchards	0.017
Tilled Agriculture	0.030
Urban Pervious	0.148

See State App. B, Initial Stormwater Improvement Assessment Resolution, section 1.01, and County App. 1, testimony of J.P. Marchand, at pp. 26-29.

In addition to the foregoing factors, which relate to the generation of stormwater runoff, the County has also implemented a mitigation credit program. See County App. 2; State App. B, Initial Stormwater Improvement Assessment Resolution, Appendix A, "Sarasota County Stormwater Utility Mitigation Credit Policy." Application of the mitigation credit program reduces the number of

[6] Again, property in its natural state is considered undeveloped. Accordingly, such property has a pervious area factor of 0.0, resulting in no stormwater assessment.

ESUs otherwise attributable to property served by privately owned and maintained Stormwater management facilities.

The County has declared that "[t]he Stormwater Assessments . . . provide an equitable method of funding the Capital Cost of Stormwater Improvements, . . . by fairly and reasonably allocating such costs to specially benefitted property classified on the basis of the stormwater burden expected to be generated by the physical characteristics and use of such property." See State App. A, Assessment Ordinance, section 1.03(E). No contrary evidence was presented to the circuit court. As noted above, the Court did not limit its approval to the specific apportionment methodology in question in Sarasota Church of Christ, but held that "the legislative determination as to the . . . apportionment of the costs of th[e] benefits should be upheld unless the determination is arbitrary." Id. at 184. The County believes that the revisions embodied in its current stormwater assessment strategy render the apportionment more equitable than the methodology approved by this Court in Sarasota Church of Christ and that this revised methodology, too, should be affirmed.

II. THE COUNTY'S TREATMENT OF UNCOLLECTED SPECIAL ASSESSMENTS IS FAIR AND REASONABLE AND WITHIN THE LEGISLATIVE: DISCRETION OF THE COUNTY.

The County's stormwater assessment program does include one feature that has not been addressed directly in a reported Florida appellate decision -- the treatment of uncollected special assessments (i.e., delinquencies). See County App. 1, testimony of

Bonny Wise, at pp. 33-34. If, for any year, the assessments collected are insufficient as a consequence of delinquencies for the payment of the actual debt service and the County is required to withdraw funds from its debt service reserve, the amount withdrawn will be added to the amount assessed for the following year against all property within the Stormwater Improvement Area. Any increase will be offset by the reduction of Stormwater Improvement Assessments in a future year, since the proceeds of delinquent assessments that are subsequently paid will be used to redeem bonds, See State App. A, Assessment Ordinance, section 2.02.

Appellant contends that this feature is unreasonable and violative of the fair apportionment standard articulated in Citv of Boca Raton v. State. The County believes that this approach actually lowers the assessed costs for all parcels by providing additional security for the Bonds, which, in turn, results in lower interest rates.

The County's treatment of delinquencies merely augments the traditional method utilized in assessment programs to insulate bonds from the losses attributable to uncollected assessments. Typically, the principal amount of local government revenue bonds is increased at the outset to create a debt service reserve account which is used to pay debt service if the assessment revenue is insufficient. The debt service reserve account (generally one year's debt service or ten percent of the principal, whichever is less) lowers the bondholders' risk, resulting in a lower interest

rate. The debt service reserve is generally included as part of the project cost for purposes of computing the assessments. Funds remaining on deposit in the debt service reserve are applied to the final year's debt service on the bonds. Augmenting the debt service reserve by increasing the subsequent year's assessment to replace amounts withdrawn maintains the debt service reserve at its original level, provides additional security for the Bonds, and further lowers the interest rate. See County App. 1, testimony of Bonny Wise, at pp. 33-34, 39, 40-41; State App. D, Bond Resolution, section 4.05(B)(iv).

In substance, the County will treat amounts withdrawn from the debt service reserve as a cost of the project, pending the payment of delinquent assessments. Although the previously decided cases have not involved funding amounts withdrawn from a debt service reserve, Florida courts have upheld apportionment methodologies based upon the budgetary requirements for a service funded with special assessments. For example, in Fire District No. 1 of Polk County v. Jenkins, 221 So. 2d 740 (Fla. 1969), the Supreme Court noted the following:

> It is also contended that the special assessment was illegal in that the amount determined was based upon the budgetary requirement of the Fire District and no effort was made to determine the relative fire hazard involved in mobile home parks as opposed to other uses. The budgetary requirement would be the measure of the value or benefit which is to be apportioned among the properties benefited. This involves the exercise of judgment which was determined by the legislative authority.

Id. at 742 (emphasis added). See also Charlotte Co. v. Fiske, 350 So. 2d 578, 581 (Fla. 2d DCA 1977) (where the court upheld an apportionment methodology which equally distributed "the entire cost of the services to the residential units.") (emphasis added).

While no reported Florida appellate decision has specifically upheld such a treatment of uncollected assessments, at least one court outside Florida has directly decided a case involving a similar methodology and concluded that it does not affect the validity of an otherwise lawful special assessment. In Clark v. Citv of Royal Oak, 38 N.W.2d 413 (Mich. 1949), a special district planned to construct an underground drainage system which was financed through the sale of bonds secured only by special assessments imposed against property in the drainage district, Id. at 414. Several parties challenged any additional assessment for deficiencies, arguing

> additional assessments in the case of a deficiency is unconstitutional as it does not provide that the new assessment must be based on and may not exceed the benefits to the land bv the drain when added to the assessment already levied, and further that as there is no hearing as to the apportionment of the added assessments, it violates the due process of law provisions of the State and Federal Constitutions.

Id. at 418 (emphasis added). The court rejected these arguments, responding to the first issue by noting, "[t] he additional assessments are based on the same percentages as the original assessments and thus are based on the benefits to the land as originally determined." Id. Because public hearings were held on the original assessment methodology, the court noted in response to

the due process issue that because "the added assessments were based on the same percentages as the original apportionment, there was no new determination of benefits to the land, [and] the parties . . . had full opportunity of hearing on such apportionment." Id. at 418. Thus, the court concluded, "There is nothing capricious, arbitrary or fraudulent in so basing the added assessments for the deficiency on the prior determination of benefits to the land . . . ." Id.

In the instant case, any amount withdrawn from the debt service reserve as a result of uncollected special assessments will also be reapportioned to the assessed properties according to the benefits received, based upon the number of ESUs attributable to each parcel of property. Moreover, the County held several noticed public hearings on the apportionment methodology for the Stormwater Improvement Assessments, providing all owners of assessed property with an opportunity to be heard. In fact, the annual Stormwater Improvement Assessment for each parcel of property is limited to the amount specified in these notices unless each property owner is provided with a new notice and an additional opportunity to be heard. In this regard, the Assessment Ordinance provides as follows:

> If the proposed Stormwater Improvement Assessment for any parcel of property exceeds the maximum amount established in the Final Stormwater Improvement Assessment Resolution or if a Stormwater Improvement Assessment is imposed against property not previously subject thereto, the Board shall provide notice to the owner of such property in accordance with Section 4.05 [notice by mail] and 4.06 [notice by publication] hereof and

> conduct a public hearing prior to adoption of the Annual Stormwater Improvement Assessment Resolution.

See State App, A, Assessment Ordinance, section 4.08, Thus, the County has gone beyond those requirements found acceptable in Clark, supra.

To support its contention that the approach is "patently unfair," Appellant makes an emotionally charged argument that the assessment of amounts withdrawn from the debt service reserve could result in 10 percent of the assessed property paying 100 percent of the cost. See Initial Brief, at 10. This assertion is inconsistent with the facts presented to the circuit court.

The County intends to collect the assessments under the provisions of sections 197.3632 and 197.3635, Florida Statutes, the Uniform Assessment Collection Act. See State App. A, Assessment Ordinance, section 5.01; County App. 1, testimony of Bonny Wise, at p. 36. This statute allows counties to place special assessments on annual ad valorem tax bills and collect the special assessments along with ad valorem taxes. Thus, the same strict collection and enforcement mechanisms which are available for the collection of ad valorem taxes will be available to the County in its collection efforts relating to the special assessments. See section 197.3632 (8), Florida Statutes.

Contrary to Appellant's hypothetical scenario of non-payment, the enforcement mechanisms of this collection method have historically resulted in an exceedingly high rate of collection of ad valorem taxes in Sarasota County, ranging from a low of 95.4

percent to a high of 99.8 percent over the past ten years. See County App. 3. Property owners cannot elect to pay only the ad valorem taxes and not the special assessments. The Tax Collector is not authorized to accept partial payments in this fashion. See sections 197.332, 197.3632(8) (a), Florida Statutes.

Even with the efficiencies inherent in the tax bill collection method, there will probably be delinquencies. However, the County's stormwater assessment program includes security features to induce investor participation and to reduce the possibility that delinquencies will increase the amount payable by other property owners. For example, the "Adjusted Actual Debt Service" used to compute the Stormwater Improvement Assessments assumes that the Bonds bear interest at a rate one full percentage point in excess of their actual rate, In addition, since general law provides that the County can only appropriate 95 percent of its anticipated revenue and cannot expend more than the amount appropriated, the debt service attributable to each parcel of property has been increased to permit appropriation of the total Adjusted Annual Debt Service. See sections 129.01(2) (b), 129.07, Florida Statutes; see also County App. 1, testimony of Bonny Wise, at pp. 34-35, 39. These additional security features will result in Stormwater Improvement Assessments that exceed the actual amount of debt service becoming due in any year. In fact, the five percent

appropriations discount alone exceeds the greatest shortfall in ad valorem tax collection over any of the past ten years[7].

Although these additional security features may result in Stormwater Improvement Assessment revenue for any fiscal year that is greater than the actual debt service becoming due on the Bonds, the County will not be enriched unjustly. All proceeds of the Stormwater Improvement Assessments must be used to pay debt service on the Bonds, either as scheduled payments or by prepayment of the Bonds. Any prepayment of the Bonds will reduce future Stormwater Improvement Assessments. See State App. A, Assessment Ordinance, sections 2.02(C) and State App. B, Initial Stormwater Improvement Assessment Resolution, section 2.08(B) (2).

As previously noted, the debt service attributable to each parcel of property will be determined annually, based upon the number of ESUs. Accordingly, as new development adds additional ESUs, the share of debt service attributable each ESU will decrease. This provides an additional hedge against any increase of the Stormwater Improvement Assessment above the amount initially contemplated resulting from amounts withdrawn from the debt service reserve.

Finally, the documents underlying the Stormwater Improvement Assessments contemplate optional prepayments by the owners of assessed property. See State App. C, Final Stormwater Assessment Resolution, section 4; County App. 1, testimony of J.P. Marchand,

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[7] The lowest percentage of ad valorem tax collection over the past ten years (95.4 percent) occurred in 1991. This resulted in a shortfall of only 4.6 percent. See County App. 3.

at p. 22. Although an optional prepayment would deprive a property owner of any benefit from additional ESUs caused by new development, it would permit a property owner to avoid participating in the financing program which, of necessity, includes features designed to secure payment of the Bonds and lower the interest rate paid by property owners through the Stormwater Improvement Assessments[8].

In sum, the County believes the minimal risk that a future annual assessment will be increased as a result of amounts withdrawn from the debt service reserve is outweighed by the interest rate advantages resulting from the additional security provided to Bondholders. The interest rate advantage inures to the benefit of assessed property through lower Stormwater Improvement Assessments. This Court has held that "the legislative determination as to the existence of special benefits and as to the apportionment of costs of those benefits should be upheld unless the determination is arbitrary." Sarasota Church of Christ, 667 So. 2d, at 184. The County's treatment of delinquencies is reasonable, is clearly within its legislative discretion, and cannot be deemed arbitrary.

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[8] As previously noted, augmenting the debt service reserve by assessing amounts withdrawn from the debt service reserve will provide additional security for the bonds and further lower the interest rate. See County App. 1, testimony of Bonny Wise, at pp. 33-34, 39, 40-41; State App. D, Bond Resolution, section 4.05 (B) (iv).

CONCLUSION

The stormwater improvements to be made in **Sarasota** County under this program have been shown to provide a special benefit to the assessed properties, and the cost of the assessments has been demonstrated to be fairly and reasonably apportioned among the benefited properties. The refinements in the program have made the assessment methodology both more accurate and more equitable, and these refinements, supported by improved data and the relevant legislative findings, have not been shown to be arbitrary.

The County's treatment of amounts withdrawn from the debt service reserve does not alter that reasonableness and fairness. In fact, the inclusion of such amounts in the assessment for future years is supported by case law in other jurisdictions, satisfies all notice and hearing requirements under due process standards, and fulfills the special benefit and fair apportionment tests. Clearly, this program will be paid for through assessments and not taxes; as such, no referendum approval for the issuance of Bonds is required. In sum, the County has shown that it is authorized to issue the subject Bonds; that its purpose in issuing the obligations is legal; and that the authorization of the obligations meets the requirements of law. Taylor v. Lee County, 498 So. 2d, at 425, The County respectfully urges that the Final Judgment entered below be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via Federal Express to Henry E. Lee, Esquire, Chief Assistant State Attorney, Fourth Floor, Criminal Justice Building, 2071 Ringling Boulevard, Sarasota, Florida 34237-7000, this 27th day of September, 1996.

Harry F. Chiles

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