ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,802

COLLIER COUNTY, a political subdivision of the State of Florida,

Appellant,

v.

THE STATE OF FLORIDA and **GUY L. CARLTON**, as Tax Collector of Collier County, Florida,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA

ANSWER BRIEF

of

Guy L. Carlton, Tax Collector

APPELLEE

Douglas L. Stowell of
STOWELL, ANTON & KRAEMER
Post Office Box 11059
211 East Call Street
Tallahassee, Florida 32302
(850) 222-1055
ATTORNEYS FOR APPELLEES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA CONSTITUTION

FLORIDA STATUTES

CASES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Throughout this Answer Brief, the Appellant, Collier County, will be referred to as "the County". The Interim Service Fees Study will be referred to as "the Study". The Collier County Ordinance 98-25, which adopted the Interim Governmental Services Fee, shall be referred to as "the Ordinance". The Interim Governmental Services Fee shall be referred to as "the Fee".

Citations to the Record on Appeal shall be to the appendix prepared by the Appellant and designated by "A" followed by the appropriate page numbers.

STATEMENT OF THE CASE

Collier County seeks to have certain revenue certificates and the revenue source for the repayment of the certificates validated. This proposed source of revenue has been created by Ordinance 98-25, adopted by the County on March 31, 1998. (A-49) This proposed revenue source is named the Interim Governmental Services Fee. The apparent purpose for the Fee is to provide the equivalent of a partial year assessment of ad valorem taxes on property that has been improved or put in service after January 1 of a given year and is therefore not eligible for ad valorem taxation at its new full value.(A-49-50) The intent of the Fee is to replace ad valorem tax revenue that is not collected prior to the improved property being placed on the tax rolls. (A-71, A-161)

The Ordinance provides that the Fee will be "collected by the uniform method for collection of non-ad valorem assessments pursuant to section 197.3632, Florida Statutes." (A-66) This method of collection has nearly a 100 percent collection rate. (A-188)

The title of the Ordinance provides in part that the County is establishing the Fee and providing a method of calculation of benefits and assessments. (A-49) Section 5 of the Ordinance confirms the general government-support purpose of this Fee and at paragraph 5.1 provides:

> That the initial costs of service and determination of benefits have been made in an "Interim Service Fees Study" performed by Tischler and Associates, Inc., for the Board of County Commissioners dated October 23, 1996. (A-52)

According to Mr. Tischler, author of the study, the study does not address the issue of special benefits but rather focuses on the costs of government services for which the Fee is being assessed. (A-166)

Section 5 of the Ordinance also sets forth the services for which the Fee is being imposed. They include the sheriff's services, the supervisor of elections' services, code enforcement services, the services of the courts and related agencies, animal control services, library services, parks and recreation services, public health services, medical examiner services, road maintenance, and general support services. (A-52-64)

The only statement or provision in the Ordinance or in the Study that attempts to identify the special benefit of the Fee to the affected properties is found in paragraph 2.9 of the Ordinance which provides:

> "The provision of government services in respect to any taxable property, without the imposition of taxes thereon for the fiscal year within which such services are rendered, constitutes a special benefit to such properties for each fiscal year or portion thereof during which no taxes are paid." (A-50)

According to Mr. Yonkosky, the Director of the Department of Revenue for the County, the County considered four methods of

collecting the Fee (A-179) which are set forth in a document presented to the Board identified as Exhibit A to the Study. (A-108) Mr. Yonkosky indicated that the normal and preferred collection method for an "operating special assessment" such as the Fee is a one time fee at the time the certificate of occupancy is issued on new construction. (A-180; A-188) The County chose, however, to collect the Fee as a special assessment on the ad valorem tax bill as one time assessment. (A-66, A-180-181) The reason this option was selected was that the building industry opposed collection of the Fee by methods that would impact it. (A-180; A-189)

ISSUE ON APPEAL

Whether the Interim Services Fee proposed by the county to pay for the costs of certain general government services is a valid non-ad valorem special assessment?

SUMMARY OF ARGUMENT

The court below correctly concluded that the Fee to be imposed by the County by the passage of the Ordinance was not a valid non-ad valorem special assessment.

Taxes are a means to pay for the benefits of government that are general, community wide and support the functions of the sovereign generally. Non-ad valorem special assessments provide funding for particular services, systems and facilities that confer particular special benefits to the property burdened by the assessment.

The County derives its power to tax from the constitution and general laws enacted by the legislature. The legislature has enacted section 192.042, Florida Statutes, implementing the constitutional authority of counties to levy ad valorem taxes. In implementing this authority, the legislature has provided for ad valorem taxes imposed on newly improved property as of January 1 of any given year. If the property is not improved as of January 1, it is taxed as if the improvements did not exist, even if the improvement is completed during the tax year. Thus, the legislature has prohibited partial year assessments of ad valorem taxes.

The County has created the Fee which is intended to be a non-ad valorem special assessment and which is intended to substitute for the prohibited partial year ad valorem assessment.

By so doing the County is amending general law by the passage of the Ordinance that creates the Fee.

The Fee does not provide a special benefit to the property burdened by the Fee, therefor the Fee can not be a valid special assessment. To allow the Fee to be imposed as a non-ad valorem special assessment would effectively negate the provisions of the constitution that limit the extent to which ad valorem taxes may be imposed.

ARGUMENT

Taxes are a means whereby government distributes the burdens of its costs among those who enjoy its benefits. The benefits of taxes are general, community-wide, and serve at least one of these functions: (1) government support, (2) administration of the law, or (3) execution of the functions of the sovereign. Special assessments are burdens imposed upon property by local governments for funding particular services, systems and facilities. They confer a special benefit peculiar to the burdened property and are reasonably and fairly apportioned. They are neither general nor uniform revenue-generating mechanisms. See, van Assenderp and Solis, Dispelling the Myths: Florida's Non-Ad Valorem Special Assessments Law, 20 Fla. St. U. L. Rev. 823-869 (1993) at 830-831.

This court clarified the distinction between a tax and a special assessment when it wrote in City of Boca Raton v. State, 595 So.2d 25, 29 (Fla. 1992):

> "However, a legally imposed special assessment is not a tax. Taxes and special assessments are distinguishable in that, while both are mandatory, there is no requirement that taxes provide any specific benefit to the property; instead, they may be levied throughout the particular taxing unit for the general benefit of residents and property. On the other hand, special assessments must confer a specific benefit upon the land burdened by the assessment. City of Naples v.

Moon, 269 So.2d 355 (Fla. 1972). As explained in Klemm v. Davenport, 100 Fla. 626, 631-34, 129 So. 904, 907-08 (1930):

> A tax is an enforced burden of contribution imposed by sovereign right for the support of the government, the administration of the law, and to execute the various functions the sovereign is called on to perform. A special assessment is like a tax in that it is an enforced contribution from the property owner, it may possess other points of similarity to a tax but it is inherently different and governed by entirely different principles. It is imposed upon the theory that portion of the community which is required to bear it receives some special or peculiar benefit in the enhancement of value of the property against which it is imposed as a result of the improvement made with the proceeds of the special assessment. It is limited to the property benefited, is not governed by uniformity and may be determined legislatively or judicially."

I. The creation of the Fee by the County is an unauthorized imposition of a partial year assessment contrary to law.

The County has no inherent power to tax but rather obtains that right from the state and the limitations set forth in the Florida Constitution. Whitney v. Hillsborough County, 99 Fla. 628, 127 So. 486 (1930). The constitution requires that the legislature authorize counties by law to levy ad valorem taxes and allows the legislature to authorize counties to levy other taxes. Art. VII, § 9(a), Fla. Const. All other forms of taxation are preempted to the state unless otherwise provided by general law. Art. VII, § 1(a), Fla. Const.

In carrying out this responsibility, the legislature has enacted section 192.042, Florida Statutes, which establishes that all property shall be assessed according to its just value as of January 1 of each year. Improvements not substantially completed on January 1 shall have no value placed on them. On November 18, 1998, the Third District Court of Appeal filed its opinion in Fuchs v. Robbins, Case Nos. 98-275 and 98-274 (Fla. 3d DCA, November 18, 1998) in which it considered the constitutionality of section 192.042, Florida Statutes. See Appendix A. The court, in that decision, wrote:

> "Accordingly, we find that section 192.042 does not create an additional exemption in violation of Article VII, section 4. Rather, it merely relates to the timing of the valuation and assessment of incomplete improvements to real property. Culbertson, 212 so. 2d at 647. We note that it is the Legislature, acting through statutes that it passes, that has the recognized authority to determine the date upon which valuation and assessment of property shall take place, to-wit: January 1st of each calendar year. See Fla. Stat. § 192.042 (1997)."

Thus it is clear that the legislature has the authority to prohibit and has prohibited partial year assessments for purposes of ad valorem tax.

As explained in the Interm Services Fees Study, which was prepared for the County in anticipation of creating the Fee, the intent of the Fee is "...to replace Ad Valorem tax revenue that

was not collected prior to the improved property being on the tax rolls." (A-71) This purpose was confirmed by the author of the Study, Mr. Tischler. (A-161) By passing the Ordinance to create the Fee, the County is, in effect, amending the general law adopted by the legislature in furtherance of its constitutional responsibility to authorize ad valorem taxes. The County is effectively imposing a partial year assessment of an ad valorem tax.

In a similar situation this court rejected an attempt to alter the affect of a general law by the passage of a special act that allowed a county to alter the purposes for which a discretionary sales surtax could be levied. Alachua County v. Adams, 702 So.2d 1253 (Fla. 1997) The court in this case should also reject the effort of the County by ordinance to alter the effect of general law which prohibits partial year assessments as being contrary to Article VII, Section 1(a) and Article VII, Section 9(a) of the Florida Constitution.

II. The Fee does not meet the requirements of a non-ad valorem special assessment because it does not provide a special benefit to the properties upon which it is imposed.

We turn our attention to the requirements of special assessments to determine if the County can squeeze the Fee into the non-ad valorem special assessment box. This court has provided guidance for this query in City of Boca Raton v. State,

595 So.2d 25 (Fla. 1992). In that case the court sets forth the two requirements for the imposition of a valid special assessment:

> "First, the property assessed must derive a special benefit from the service provided. Atlantic Coast Line R.R. v. City of Gainesville, 83 Fla. 275, 91 So. 118 (1922). Second, the assessment must be fairly and reasonably apportioned among the properties that receive the special benefit. South Trail Fire Control Dist. v. State, 273 So.2d 380 (Fla. 1973). Thus, a special assessment is distinguished from a tax because of its special benefit and fair apportionment." at 29.

It is clear from section 5 of the Ordinance that the services being funded by the proposed Fee are those which are for the support of the government generally and do not provide a special benefit to the properties so assessed.(A-52-64) These government services include road maintenance. (A-61) In State v. City of Port Orange, 650 So.2d 1 (Fla. 1994) the court rejected a transportation utility fee which was imposed upon the owners and occupants of developed properties within the City of Port Orange. The "funding for the maintenance of an existing municipal road system even when limited to capital projects . . . is revenue for exercise of a sovereign function contemplated within this definition of a tax." State v. City of Port Orange, at 3.

In Lake County v. Water Oak Management Corp., 695 So.2d 667, 670 (Fla. 1997) the court wrote:

> "Clearly services such as general law enforcement activities, the provision of courts, indigent health care are, like fire protection services, functions

> required for an organized society. However, unlike fire protection services, those services provide no direct, special benefit to real property. (citation omitted). Thus such services cannot be the subject of a special assessment because there is no logical relationship between the services provided and the benefit to real property."

Here, the Fee is to provide funding for the general functions of government such as the services of the sheriff and the supervisor of elections, code enforcement services, the services of the courts and related agencies, animal control services, library services, parks and recreation services, public health services, medical examiner services, road maintenance, and general support services that are all currently being funded as general government responsibilities.(A-52-64) These are the purposes for which taxes are to be levied and for which taxes are currently being used by the County. Just as the court concluded in Lake County v. Water Oak Management Corp., this court must conclude that the services for which the Fee is being imposed provide no special benefit peculiar to property being burdened by the Fee.

The County relies in part on language in the Final Judgement below that certain citizens obtain a special benefit because they receive government services funded by ad valorem taxes yet pay taxes on less than full value of their property. The County, as the court below, refers to a "windfall."(A-231) Windfall is defined as an unexpected legacy or any unexpected piece of good fortune. Webster's New Universal Unabridged Dictionary, Second

Edition. It can hardly be said that a person who receives the benefit of the statutory provisions for the administration of the ad valorem tax (specifically section 192.042, Florida Statutes) with respect to recently improved property, as others have in the past, is receiving an unexpected benefit.

The County has further addressed the issue of special benefit of the Fee in two ways. First in paragraph 5.1 of the Ordinance states that the determination of benefits of the Fee has been made in the Study.(A-52) The author of the Study, Mr. Tischler testified that the Study does not address the issue of special benefits but rather focuses on the costs of the general government services for which the Fee is being assessed.(A-166) Thus the Study does not support a finding of any special benefit to the land burdened by the Fee.

Secondly, the Ordinance in paragraph 2.9 addresses the special benefit in a rather circuitous manner. (A-50) The County reasons that those recently improved properties that are not yet on the tax rolls at the full value are receiving a benefit in that they are receiving government services which they are not paying for, the so called "windfall." The Ordinance then provides that the Fee will be imposed in an amount equal to the cost of the "windfall." If the Fee is paid then there is no benefit since the benefit is defined as the receipt of services with out paying for them.

Although the standard of review in the determination of special benefit, required of assessments, has changed somewhat in recent years, the current standard is set forth in Sarasota County v. Sarasota Church of Christ, Inc., 667 So.2d 180, 184 (Fla. 1996) The standard to be applied is whether the determination of special benefit by the legislative body is arbitrary. Here the determination of special benefit was to have been part of the Study leading up to the enactment of the Ordinance. The Study, however, is devoid of any attempt to establish a special benefit of the Fee. The second attempt to determine special benefit is the declaration in paragraph 2.9 of the Ordinance that the receipt government services without the imposition of taxes in a given fiscal year is a special benefit which the Ordinance takes away by imposing the Fee. Certainly, such determinations are arbitrary and without any foundation in fact or logic.

III. The County's need for additional revenue to be collected in a politically convenient manner is not an adequate basis for approval of an unauthorized non-ad valorem special assessment which will violate long standing constitutional limitations on ad valorem taxation.

The County was presented with four alternatives to impose and collect the Fee. (A-108) The Director of the Department of Revenue, Mr. Yonkosky testified that the normal and preferred

method of collecting an operating special assessment such as the Fee would as a one time fee at the time the certificate of occupancy is issued on new construction. The County, however chose to collect the Fee as a non-ad valorem special assessment on the ad valorem tax bill because the building industry was opposed to the use of any method that would impact it. (A-180-181; A-189) The County has anticipated the possibility that the method of collection that it has selected might be rejected and has provided in the Ordinance at paragraph 17.4 an alternative method of collection linked to the issuance of the certificate of occupancy.(A-68) It is clear that the county is prepared to collect the Fee by an appropriate method and one which was the normal and preferred method.

Valid non-ad valorem special assessments have unique characteristics in relation to the constitution. Such assessments are not subject to homestead exemption or millage caps, nor are they subject to the exemption from forced sale. Art. VII, § 6, § 9 and Art. X, § 4, Fla. Const. The dissent in Lake County v. Water Oak Management Corp. 695 So.2d 667, 670 (Fla. 1997) forewarned of the "...conversion of this state's local-government tax base to a general-assessment tax base, thereby demolishing constitutional provisions for ad valorem tax caps, homestead exemptions, and bonding referendums." The Fee clearly is an assault on these constitutional protections.

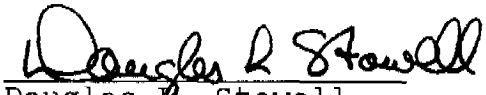
Although the majority in Lake County did not believe that the court's decision would result "in a never-ending flood of assessments," the County in this case is pushing the envelope of non-ad valorem special assessments. This court has acknowledged creative efforts on the part of local governments in response to the need for revenue but has rejected those efforts when they are being used to circumvent the constitution. State v. City of Port Orange, 650 So.d. at 4, (Fla. 1994). This court should likewise reject this creative effort to circumvent the constitution.

CONCLUSION

The court should affirm the court below and not validate the proposed revenue certificates or the revenue source.

Respectfully submitted,

STOWELL, ANTON & KRAEMER

By: 

Douglas L. Stowell
Florida Bar No. 116277
Post Office Box 10059
Tallahassee, Florida 32302
(850)222-1055

Attorneys for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail this 30th day of November, 1998, to **C. Allen Watts, Esquire** and **John P. Ferguson, Esquire**, Cobb, Cole & Bell, 150 Magnolia Avenue, Post Office Box 2491, Daytona Beach, Florida 32115-2491, **Michael J. Provost, Esquire**, State Attorney's Office, Twentieth Judicial Circuit of Florida, Collier County Courthouse Complex, 6th Floor, P. O. Drawer 2007, Naples, Florida 34112, **David C. Weigle, Esquire** and **Heidi Ashton, Esquire**, Collier County Attorney's Office, 3301 Tamiami Trail East, Naples, Florida 34112, **Daniel D. Eckert, Esquire**, Volusia County Attorney, President Florida Association of County Attorneys, 123 West Indiana Avenue, DeLand, Florida 32720-4615, and **Joseph A. Morrissey, Esquire** and **Mark A. Watts, Esquire**, Pinellas County Attorney's Office, 315 Court Street, Clearwater, Florida 33756.

Douglas L. Stowell

Douglas L. Stowell

h:\clients\carlton\appeal\brief.dra