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

APPELLANT'S INITIAL BRIEF

C. Allen Watts, of
COBB COLE & BELL
Post Office Box 2491
150 Magnolia Avenue
Daytona Beach, FL 32115-2491
(904) 255-8171
ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

CITATION OF AUTHORITIES

Cases: Page

Statutes:

Other Authorities:

STATEMENT OF THE CASE AND FACTS

This is an appeal from a final judgment of the Circuit Court for Collier County (COLLIER), refusing validation of certain revenue anticipation notes proposed by Ordinance 98-25 of the County, upon the answer and objections of the State Attorney (STATE) and Guy B. Carlton, Tax Collector of Collier County (TAX COLLECTOR). The Court has jurisdiction pursuant to Art. V, §3(b)(2), FLA. CONST., § 75.08, FLA. STAT. (1997) and Fla.R.App.P. 9.030(a)(1)(B)(i).

Overview

Article VII, §2 of the Constitution requires that nonexempt properties be subject to ad valorem taxation at a uniform rate within a governmental unit. By statute, property is valued on January 1 for taxes which become payable on the following November 1. § 192.042, FLA. STAT. (1997). By statute, cities and counties are required to utilize a fiscal year commencing October 1. § 129.04, FLA. STAT. (1997).

The Board of County Commissioners (the "Board") discerned that the interrelationship of these statutes creates a windfall to certain taxpayers, not contemplated or required by the Constitution. (A-50). Property improvements substantially completed after October 1 and before January 1 of a fiscal year incur no ad valorem taxes for the balance of that fiscal year. Property improvements substantially completed after January 1 of a fiscal year incur no ad valorem taxes for the balance of that fiscal year, and for the entirety of the following fiscal year. As a result of that windfall, the burden of taxation upon the nonexempt properties of the

County is inordinantly increased, particularly during periods of rapid growth when the ratio of newly-completed property to taxed property is high.

The Board also determined that improved properties require an increase in government services, and that a portion of the cost of certain county services is dependent upon and responsive to the increase of improved property in the County. (A-50). Accordingly, the Board commissioned a study of the fixed costs and the growth-sensitive costs of these services. (A-70-108). Based on that study, the Board adopted Ordinance 98-25 (the "Ordinance"). (A-49-69).

Briefly, the Ordinance determines that improved properties (not otherwise tax-exempt by reason of homestead, use, or classification) receive a special benefit. (A-50). The benefit is conferred in each fiscal year in which such properties cause measurable increases in the variable costs of certain services, without incurring taxes. The benefit is measured by the pro rata share of the growth-sensitive portion of the cost. Only that portion of the cost which would otherwise be funded by ad valorem taxes is considered. A credit is granted for such taxes as are payable. After the required notices and hearings, a roll is adopted annually and a non-ad valorem assessment equal to the benefit is levied and collected under the uniform method prescribed in § 197.3134 *et seq.*, FLA. STAT. (1997). If the uniform method cannot be used, the saving clause provides for the same amount to be collected upon completion of the improvement and issuance of a certificate of occupancy.

There are separate assessments imposed for each eligible (*i.e.* growth-sensitive) service. (A-53-64). In cases where differing levels of service are provided in the unincorporated area, or a service is provided only in the unincorporated area

(identified as the Municipal Services Tax District), a separate assessment is imposed on properties in that area for that differential service. The Ordinance further requires that the collections be sequestered and spent only for the payment or reimbursement of the identified government services, whether countywide or limited to the unincorporated area, and for the year the service is provided. (A-67). In order to ensure that the revenues and expenditures are properly balanced in the fiscal year when service is provided, the Ordinance authorizes Revenue Anticipation Notes to be issued in the year in which the cost is incurred, repayable upon actual collection of the assessments. (A-67). It is these Notes which the County seeks to validate in this proceeding.

The STATE and the TAX COLLECTOR did not challenge COLLIER's findings or its methodology for allocating the special benefits, or any procedural aspects of the ordinance adoption or the validation proceedings, but only the authority of COLLIER to impose the non-ad valorem assessment without legislative approval. The Circuit Court likewise recognized that without the assessment, existing taxpayers are inordinantly burdened and others receive a windfall. (A-220). Nevertheless the Circuit Court held that the Legislature's failure to address the disparity was beyond COLLIER's authority to remediate through local ordinance. (A-226-227). From the final judgment denying validation, COLLIER has timely appealed directly to this Court.

The Tischler Report

COLLIER commissioned Tischler and Associates, Inc. to study the service structure of the County and its financing for purposes of calculating interim service

fees to newly completed properties. (A-52). Section 5.1 of the Ordinance incorporates that report by reference. (A-70-108). The report was admitted into evidence (A-196), and Paul Tischler testified at length, at the validation hearing. (A-144-177).

The first step was the ascertainment of those activities whose operating expenses are (1) paid through the General Fund (A-72-77), and (2) likely to increase due to growth.[1] (A-78-93). Non-ad valorem revenues are subtracted from the expenses to determine the net operating cost. (A-71).

The second step was the determination of the most appropriate measurement of demand generation, which may be population growth or, in the case of commercial properties, employment base. (A-100-108).

The third step involved correlation of the demand generator to the various property uses. (A-71). This task was accomplished by converting per capita costs to per-home costs (in the case of residential properties) or per-employee or per-square foot costs (in the case of nonresidential uses). (A-72-73). Special demand generators were utilized for services of the Sheriff (incident frequency) (A-80-82) and Public Works (lane-miles of road). (A-89-90).

Assessments under the Ordinance

[1] The report determined that numerous government costs were fixed, and are *not* impacted by growth: Board of County Commissioners, County Attorney, Property Appraiser, Tax Collector, Clerk of Circuit Court, Clerk of County Court, Clerk of the Board, Community Development (Administration), Housing/Urban Development, Natural Resources, County Manager, Franchise Management, Management & Budget, Public Services (Administration), Agriculture, Social Services,Veterans' Services, Lawrence Center (mental health), Stormwater Management, Support Services (Administration), Human Resources, Property Management, 800 MHz (Communications), and Forestry. (A-78).

Section 5.2 describes the process for determining the actual assessments for Sheriff's services. (A-53). Incident calls requiring a deputy's response increase with growth. First, the cost of each incident call (net of fixed administrative expense) is determined. Then the proportion of calls generated by each improved property type (residential, hotel, retail, office, industry) is determined, so that a cost per property type can be calculated.[2] (A-54).

This cost is then multiplied by the fraction of the Sheriff's budget funded from the General Fund, and multiplied again by the fraction of the General Fund consisting of ad valorem tax revenues. (A-54). The result is the assessment for Sheriff's services, which in the case of a single-family home is $213.99. (A-53). For those additional services of the Sheriff provided exclusively in the unincorporated area, the assessment on a single-family home is $36.41. (A-53).

The Ordinance requires a credit to be given against the total assessment, equal to the taxes payable. (A-65). Those taxes may be the taxes due on vacant land, or taxes due on already-improved property prior to construction of an addition. A further credit is available, equal in value to a homestead exemption from County taxes, for properties otherwise eligible for homestead exemption if they were taxable.

A similar process is utilized under Section 5.3 of the Ordinance, calculating the population-variable costs of the Supervisor of Elections (*e.g.* poll workers, absentee ballots) on a per capita basis, converting that number to a per-home basis, and

[2]Incident calls in respect of vacant or agricultural property continue to be allocated entirely to the General Fund.

determining what proportion would otherwise be funded through ad valorem taxes. The assessment is $117.49 per single family home. (A-54).

Section 5.4 imposes an assessment for Code Enforcement services, provided only in the unincorporated area. The cost is $8.63 per single family home. (A-55).

Section 5.5 imposes an assessment for that part of the County-funded cost of the judicial system which is population-sensitive and funded by ad valorem taxes. (A-56-57). The cost is $27.65 per single family home. (A-56).

Section 5.6 imposes an assessment for animal control and disposal services. The cost per single-family home is $3.09. (A-57).

Section 5.7 imposes an assessment for countywide library services. (A-57-58). The cost per single-family home is $23.14. (A-58).

Section 5.8 imposes an assessment for parks and recreational services. (A-58-59). The cost countywide is $38.66 per single family home. (A-58). An additional assessment of $14.74 per home is imposed for services rendered exclusively in the unincorporated area. (A-58).

Section 5.9 imposes an assessment for public health services, including environmental health and engineering. (A-59-61). The cost is $4.58 per single family home. (A-59).

Section 5.10 imposes an assessment for the population-sensitive costs of the Medical Examiner's Office. The cost is $4.20 per single family home. (A-61).

Section 5.11 imposes an assessment for that portion of countywide road maintenance otherwise funded by ad valorem revenues. (A-61-63). It is based on the maintenance cost per lane-mile of road, allocated on the basis of the lane-mile

demand (average number of daily trips multiplied by trip length, divided by the total daily capacity of a lane-mile) of each property type. (A-62-63). The cost is $2.93 per single family home. (A-61).

Section 5.12 imposes an assessment for various support service costs which are growth-sensitive, including building maintenance, emergency medical services and security. (A-63-64). The cost is $56.26 per single family home. (A-63).

Section 6 acknowledges that properties eligible for tax exemption under Chapter 196, FLA. STAT., receive no special benefit by escaping taxation (A-64-65). Accordingly, owners may apply for total exemption.

Section 7 provides for credits against the total of all assessments. (A-65). Each assessed property is entitled to a credit against the total assessment, for taxes actually due. In addition, for any person eligible for a homestead exemption, the amount of $25,000 times the applicable ad valorem tax rate is subtracted as a credit. Because of the additional millage in the Municipal Services Tax District, the credit is slightly larger in that unincorporated area.

Section 8 provides for annual review of assessments. (A-65).

Section 9 provides for preparation of an assessment roll by the County Administrator (A-66), and Section 10 provides for adoption of the roll by the Board, concurrent with the required budget hearings under § 200.065(2)(c), FLA. STAT. (1997). (A-66). Section 11 provides for collection by the uniform method set forth in § 197.3632, FLA. STAT. (1997). (A-66).

Section 12 requires the proceeds of the assessments to be deposited in a special fund, and utilized only for transfers to reimburse the General Fund for provision of

County services to the properties which are subject to the assessment. (A-66). This section also authorizes issuance of Revenue Anticipation Notes to fund the cost of services for a fiscal year for which assessments are imposed but are not yet payable. When the assessments are collected, they may be expended to retire the Notes. (A-67).

Section 14 provides for appeals and adjustments, including:

1. A claim that the amount of the assessment exceeds the special benefit received by virtue of the escape of such property from taxation. (A-67).

2. A claim that the amount of the assessment, in combination with ad valorem taxes actually paid, imposes a nonuniform share of the costs of government services upon the property. (A-67).

3. A claim that the amount of the assessment, in combination with ad valorem taxes actually paid, is an aggregate sum that, if the assessment were an ad valorem tax, would exceed the constitutional limit. (A-67).

Section 17 provides for severability. (A-68). It specifically provides that if the method specified for collection as a non-ad valorem assessment is held invalid, the amounts shall remain due and shall be deemed regulatory fees necessitated by, proportional to, and segregated for, the cost of government services provided to new construction without compensation. (A-68-69). Such fees are payable by the owner upon issuance of a Certificate of Occupancy. (A-69).

The Complaint for validation alleged the findings of the Board and the adoption of the Ordinance, and COLLIER's intent to issue not more than $700,000 in Revenue Anticipation Notes for the fiscal year. The State Attorney answered the

Complaint and alleged that the Ordinance imposed a tax not authorized by general law. (A-114-115). The Tax Collector also answered and expressed his concern that, because the assessment would become a lien on homestead property (or rather, property which may be eligible for homestead exemption after occupancy), its legality should be assured. (A-116-117). He denied a number of allegations (A-117-122) in the complaint, and affirmatively alleged a lack of constitutional or statutory authority. (A-122-123).

Upon final hearing, there was no procedural objection to the adoption of the ordinance or the validation proceedings themselves. The STATE and the TAX COLLECTOR offered no evidence to challenge the legislative findings or the computation and allocation of benefits in the Ordinance. The circuit court acknowledged the current statutory loophole and the windfall to certain citizens, and the commendable efforts of the County to recoup its lost revenue. (A-220). The court nevertheless concluded that the assessments undergirding the Revenue Anticipation Notes were taxes not authorized by general law, and thus denied validation (A-227), leaving only "the inescapable, obvious and burning question to the trial court: Where is the Florida Legislature." (A-223).

Standing both on its constitutional duty to restore equity and its own constitutional right to legislate, COLLIER has timely appealed.

ISSUES ON APPEAL

I.

THE COUNTY HAS INHERENT AUTHORITY TO DETERMINE AND IMPOSE SPECIAL ASSESSMENTS IN THE ABSENCE OF CONSTITUTIONAL OR STATUTORY PROHIBITION

II.

PROPERTIES EXCUSED BY LAW FROM TAXATION ARE SPECIALLY BENEFITTED

III.

THE ASSESSMENTS DO NOT VIOLATE ANY CONSTITUTIONAL OR STATUTORY PROVISION

IV.

THE COUNTY'S LEGISLATIVE DETERMINATION AND ALLOCATION OF BENEFITS IS ENTITLED TO JUDICIAL DEFERENCE

STANDARD OF REVIEW

Appellate review of a bond validation proceeding is limited to "whether the issuing body had the authority to act under the constitution and laws of the state and to ensure that it exercised that authority in accordance with the spirit and intent of the law." *McCoy Restaurants, Inc. v. City of Orlando*, 392 So.2d 252, 253 (Fla.1980); *Murphy v. City of Port St. Lucie*, 666 So.2d 879, 880 (Fla. 1996). Its objective is to put in repose any question of law or fact affecting the validity of the bonds. *State v. Manatee County Port Authority*, 171 So.2d 169 (Fla. 1965); *North Shore Bank v. Surfside*, 72 So.2d 659 (Fla. 1954). These questions may include the validity of underlying agreements or ordinances. *State v. City of Daytona Beach*, 431 So.2d 981

(Fla. 1983); *State v. Brevard County*, 539 So.2d 461 (Fla. 1989). In the review of the policy judgment and necessity for the underlying ordinance, the Court's review is of legislative facts, and the standard for judicial review, both as to the existence of a special benefit and its proper apportionment, is whether the matter is fairly debatable. *Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So.2d 180 (Fla. 1995).

SUMMARY OF ARGUMENT

This Court has long acknowledged that it is permissible for local governments to impose user fees and special assessments under home rule authority. Such fees and assessments are not considered taxes, so long as two prongs are satisfied. First, their imposition rationally remediates a legitimate governmental need. Second, the amount imposed is roughly proportional to the burden imposed upon or benefit received from the community. The judiciary will not disturb legislative judgments on these matters unless they are arbitrary.

The trial court correctly acknowledged that the properties subject to the County's special assessment receive a windfall or benefit. That issue was not seriously contested and is not cross-appealed.

The trial court erred in concluding that the County requires legislative authority to impose such assessments. Where the determination and allocation of benefits was unchallenged, the trial court was bound to approve the assessments and the notes dependent upon them, unless there is some constitutional prohibition or contrary general law.

The assessments are rationally related to an increased demand for governmental services, and are proportional to that demand. They meet the tests established by this Court to distinguish between permissible regulatory fees, exactions or assessments and impermissible taxes. Accordingly, they are not "taxes" requiring legislative authorization under the Constitution. The fact that a governmental exaction is involuntarily imposed does not render it a tax. The ordinance also appropriately protects homesteads, and ensures that constitutional millage caps cannot be indirectly violated.

There being no legal impediment, the trial court was bound to defer to the legislative determinations of COLLIER with respect to the existence of special benefits and the allocation of assessments. No contrary evidence was presented, no judicial findings adverse to COLLIER were made on this point, and there is no cross-appeal.

ARGUMENT

The 1968 Constitution and the confirming statutes which shortly followed it (*e.g.* Chapters 71-14 and 73-129, Laws of Florida) destroyed the "local bill evil" and freed local populations from the shackles of Dillon's Rule.[3] The Court has since consistently acknowledged that local populations are free to govern themselves in local matters.

In fiscal matters, the promise of home rule has been only partly fulfilled. Under the Constitution, a true "tax" must be the subject of a statewide law. *Alachua County v. Adams*, 702 So.2d 1253 (Fla. 1997)(special act was unconstitutional where it allowed uses of local option sales tax not permitted by general law). Not every locality in the state will simultaneously require or support an additional tax. Hence, locally-elected legislators have been slow to approve for their own constituents any statewide tax authorization which might be necessary for the relief of a colleague's community.

Florida's counties are diverse. In counties where tax-favored woodlands are plentiful and homesteads are modest in value, a mill of property taxes will generate comparatively little revenue, and ironically will fall with disproportionate force on scarce industry. On the other end of the spectrum, even in apparently prosperous and fast-growing counties, a subsidy of new development may be political intolerable, especially when aggravated by a dependence on the property tax and the disjunction of the tax and budget calendar observed here.

---

[3]"Dillon's Rule" holds that local governments have only those powers specifically delegated by the Legislature. John F. Dillon, The Law of Municipal Corporations § 55 (1st ed. 1872)

The chafing of a "one-size-fits all" local fiscal structure has been exacerbated by unfunded Legislative mandates. In 1968, fully two-thirds of annual state and local governmental expenditures were made at the state level. By 1990, these proportions were reversed.[4]

Through these thirty years, the Court has allowed local democratically-elected bodies to address the issues of how to finance their government, at their own political peril. These local governments are simultaneously required to protect private property rights,[5] provide expanded public infrastructure and services which are undergraded by the impact of growth,[6] and do it all with a plan that is approved by the State as financially feasible.[7]

To meet their increasing responsibilities, local governments have been forced to resort to an array of local service fees, impact fees and special assessments. This Court has developed a two-prong "dual rational nexus" test for distinguishing between such authorized regulatory impositions, and unauthorized taxes. Its decisions have presaged more recent decisions of the United States Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) (measure must rationally advance a legitimate governmental purpose) and *Dolan v. City of Tigard*, 512 U.S.374, 114 S.Ct. 2309, 129 L.Ed. 2d 304 (1994)

---

[4]The people braked this process slightly through adoption of Article VII, §18, Fla. Const. (1990).

[5]*See* Chapter 70, FLA. STAT. (1995), the "Bert J. Harris, Jr. Private Property Rights Protection Act," which requires statutory compensation for government regulation well below the threshold of a constitutional taking.

[6]§ 163.3180, FLA. STAT. (1997)

[7]§163,3177(3), Fla. Stat. (1997).

(measure must be roughly proportional in its impact). This Court also requires that such funds be earmarked for an identifiable (or specific) purpose. *Contractors and Builders Association v. City of Dunedin*, 329 So.2d 314 (Fla. 1976).

The Court has recently shown signs of deep division as to whether it will continue or recede from this course. In *State v. City of Port Orange*, 650 So.2d 1 (Fla. 1994), the Court invalidated, as a "tax," a transportation utility fee that was nothing more than the "operational expense" counterpart of the "capital expense" transportation user fee which the courts had approved decades ago.[8]

In *Port Orange*, Justice Wells wrote for a unanimous Court that constitutional millage caps and homestead exemptions could not be circumvented by creative measures. *Cf.* § 163.3202(3), FLA. STAT. (1997) ("This section shall be construed to encourage the use of innovative land development regulations which include provisions such as ... impact fees.")

In *Sarasota County v. Sarasota Church of Christ*, 667 So.2d 180 (Fla. 1996), the Court by a 4-3 margin approved a stormwater utility fee. Justice Wells, joined by Justice Harding, expressed in dissent his concern that such measures were taxes, but none of the opinions mentioned *Port Orange*.

In *Harris v. Wilson*, 693 So.2d 945 (Fla. 1997), the Court by a 5-2 margin approved a countywide, partial-year special assessment for solid waste collection.

---

[8]*See Homebuilders & Contractors Assn of Palm Beach County v. Board of County Commissioners*, 446 So.2d 140 (Fla. 4th DCA 1983, *review denied* 451 So.2d 848 (Fla. 1984), *appeal dismissed* 469 U.S. 976 (1984). The Legislature afterward became a convert; *see* § 163.3180(11)(d) and (e).

On the heels of *Harris v. Wilson* came the 4-3 decisions in *State v. Sarasota County*, 693 So.2d 546 (Fla. 1997), approving broadened special assessments for stormwater protection, and *Lake County v. Water Oak Management*, 695 So.2d 667 (Fla. 1997), approving countywide special assessments for fire protection.

Between the closely-divided decisions in 1997 and the completion of the briefing of this case, three Justices will have retired from this Court. It is accordingly appropriate that the governing principles of local home rule, user fees and special assessments be surveyed and restated.

I. THE COUNTY HAS INHERENT AUTHORITY TO DETERMINE AND IMPOSE SPECIAL ASSESSMENTS IN THE ABSENCE OF CONSTITUTIONAL OR STATUTORY PROHIBITION

Article VIII, s. 1(f) of the 1968 Constitution provides that noncharter counties shall have such power of local self-government as is provided by general or special law.

In *Speer v. Olsen*, 367 So.2d 207 (Fla. 1978), this Court acknowledged that the Legislature has provided broad authority to local governments to conduct their own affairs:

> Chapter 125, FLA. STAT., implements the provisions of Art. VIII, Section 1(f), Florida Constitution (1968), which gives counties not operating under county charters, such as Pasco County, such powers of self-government as are provided by general or special law. This provision of the Florida Constitution also authorizes the board of county commissioners of such a county to enact ordinances in the manner prescribed by Chapter 125, FLA. STAT., which are not inconsistent with general law.

> The intent of the Legislature in enacting the recent amendments to Chapter 125, FLA. STAT., was to enlarge the powers of counties through home rule to govern themselves.
>
> The first sentence of Section 125.01(1), FLA. STAT., (1975), grants to the governing body of a county the full power to carry on county government. Unless the Legislature has pre-empted a particular subject relating to county government by either general or special law, the county governing body, by reason of this sentence, has full authority to act through the exercise of home rule power.

To similar effect is *State v. Orange County*, 281 So.2d 310 (Fla. 1973). There, Orange County proposed to issue revenue bonds secured by its share of racetrack and jai alai funds, without any specific legislative authority. In affirming the validation of those bonds, the Court noted:

> There is little need for Section 125.01(1)(r) if a county still has to go to the Legislature to get special enabling legislation each time it wishes to issue bonds. The ordinance carefully tracks the enabling authority of the cited statutes. Under these circumstances there was no reason for the county to go to the Legislature for a special act.
>
> The unquestioned object of Section 1(f), Article VIII, is to authorize a 'board of county commissioners of a county not operating under a charter (to) enact, in a manner prescribed by general law, county ordinances Not inconsistent with general or special law . . .' (Emphasis supplied.) For a definition of the meaning of the word, 'inconsistent,' in this context, see State ex rel. Dade County v. Brautigam, Fla., 224 So.2d 688.
>
> Instead of going to the Legislature to get a special bill passed authorizing such building fund revenue bonds, the Orange County Commissioners under the authority of the 1968 Constitution and enabling statutes now may pass an ordinance for such purpose, as they did in this case, because there is nothing inconsistent thereto in general or special law. On the contrary, there is ample Delegated authority for such purpose. The object of Article VIII of the 1968 Constitution was to do away with the local bill evil to this extent.

Id. at 312.

Noncharter counties, authorized by general law such as § 125.01, are not dissimilar to charter counties or to cities in the breadth of their home rule authority. In *City of Boca Raton v. State*, 595 So.2d 25 (Fla. 1992), this Court acknowledged and described the breadth of home rule authority to impose special assessments. The State and several property owners objected on the ground that the City had admittedly not complied with Chapter 170, FLA. STAT. The Court held that the 1968 Constitution and the statutes which acknowledged the home rule it had wrought, marked the demise of Dillon's Rule. Chapter 170 was now merely an additional authorization. The Court held that so long as the assessment met the basic two-prong test of benefit to the property and fair apportionment, it was within the home-rule power of the City.

The Court in *Boca Raton* pointed to its recent decision in *Taylor v. Lee County*, 498 So.2d 424 (Fla. 1986), which held that *noncharter counties* acting under the home rule authority of Chapter 125 need not comply with Chapter 159, FLA. STAT., in the adoption of a bond issue to finance a new bridge.

In *Santa Rosa County v. Gulf Power Company*, 635 So.2d 96 (Fla. 1st DCA 1994), *review denied* 645 So.2d 452 (Fla. 1994), the court held that notwithstanding the lack of any specific legislative authority for noncharter counties to impose franchise fees, Escambia and Santa Rosa Counties had such inherent authority as a result of the general powers conferred in § 125.01(1). Similarly, in *St. Johns County v. Northeast Florida Builders Association*, 583 So.2d 635, 641 (Fla. 1991), this Court found that the noncharter County had home rule authority under Chapter 125 to impose a school impact fee, and that its action was not expressly pre-empted by other

statutes authorizing the funding of school construction. The Court then found that the ordinance (with impermissible provisions excised) complied with the necessary criteria for an impact fee.

Under the provisions of § 125.01(1)(r), FLA. STAT. (1997), COLLIER has express authority to levy and collect taxes *and special assessments*, both for county purposes and for the provision of municipal services within any municipal services taxing unit.

In *Boca Raton*, this Court observed that there are similarities between taxes and special assessments, in that both of them are involuntary. 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.

595 So.2d at 29.

The decision as to whether such a benefit is conferred is, in the first instance, a legislative decision which is reviewable only if it is arbitrary. *Sarasota Church of Christ, supra*, 667 So.2d at 184.

The trial court did not hold that COLLIER's determination of benefit was "arbitrary." Indeed, he held quite the opposite. He agreed with the County that those who are subject to this assessment are receiving a windfall at the expense of those who pay taxes.

It is evident that COLLIER has home-rule authority to impose special assessments, so long as the legal tests for assessments are satisfied. This brings us

to the next point: the Ordinance properly determined and imposed a special assessment.

II. PROPERTIES EXCUSED BY LAW FROM TAXATION ARE SPECIALLY BENEFITTED

Under this Court's decision in *Sarasota County v. Sarasota Church of Christ*, *supra*, 667 So.2d at 184, determination of a special benefit is one of fact for the legislative body; likewise the apportionment of the assessments is a legislative function which should be sustained if reasonable persons can differ.

A. UNDER THE EXISTING TAX LAWS, NEWLY IMPROVED PROPERTY RECEIVES THE BENEFIT OF BEING EXCUSED FROM TAXATION FOR NINE TO TWENTY-ONE MONTHS

In *TEDC/Shell City Inc. v. Robbins*, 690 So.2d 1323 (3d DCA 1997), the court was called upon to define "benefit":

> A tax credit is a "benefit" as the word is used in "its plain and ordinary sense." Citizens of State v. Public Serv. Comm'n, 425 So.2d 534 (Fla.1982); Carson v. Miller, 370 So.2d 10 (Fla.1979). Benefit is defined as "anything contributing to an improvement in condition; advantage." Webster's New World Dictionary 138 (1959). Indisputably, a tax credit is an advantage and a benefit in a tangible financial sense. See generally Housing Pioneers, Inc. v. C.I.R., 58 F.3d 401 (9th Cir.1995) (income tax credit is a benefit that inures to those who receive it).

To similar effect are the decisions in *State v. Inter-American Center Authority* 84 So.2d 9 (Fla. 1955) (tax exemptions are special privileges) and *State ex rel. Miller v. Doss*, 2 So.2d 303, 304 (Fla. 1941) ("Exemptions from taxation are special favors frowned upon by the courts. They invariably cast a greater burden on other taxpayers.") *See also Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 236 (Scalia, J., dissenting):

> Our opinions have long recognized--in First Amendment contexts as elsewhere--the reality that tax exemptions, credits, and deductions are a form of subsidy that is administered through the tax system.

In *Miami Battlecreek v. Lummus*, 192 So.211, 215-16 (Fla. 1939), the Court expressed Florida's tax philosophy:

> It is the general rule, that all privately owned property is subject to taxation for the support, maintenance and efficiency of the government from which the property receives protection. *See Lummus v. Florida Adirondack School,* 123 Fla. 810, 168 So. 232. This rule is, however, subject to some few exceptions.
>
> By statute in this State, all real and personal property, not expressly exempted therefrom, is subject to taxation. Section 1, Chapter 5596, Acts of 1907 (C.G.L.1927, Section 893). All exemptions being in the nature of special privileges or immunities, must be strictly construed in favor of the Sovereign in order to confine such exemptions to the limitations prescribed by said Sovereign.

Article VII, §2 of the Constitution requires that all property within a taxing unit be taxed at a uniform rate. Unless expressly exempted from taxation, all real and personal property in the state, and all personal property belonging to persons residing in the state, is subject to taxation as provided by law. § 196.001, FLA. STAT. (1997). A lien for such taxes applies to the property on the date of assessment. § 192.053, FLA. STAT. (1997). Because the lien attaches to the res and is enforceable *in rem*, *Dade County v. Certain Lands*, 247 So.2d 787 (Fla. 3d DCA 1971), it is *property* which is excused from taxation, and hence specially benefitted, under the circumstances which follow.

By statute, the Legislature has fixed January 1 of each year as the date for assessment of the just value of real and tangible personal property. § 192.042, FLA.

STAT. (1997). The tax thereon becomes a lien on that date, but does not become delinquent until fifteen months later. § 197.122, FLA. STAT. (1997).

The Legislature has further specified that improvements to real property which are not substantially completed on January 1 shall have no value placed thereon. § 192.042(1), FLA. STAT. (1997). Construction work in progress with respect to tangible personal property is similarly not valued until substantial completion. § 192.001(11)(d), FLA. STAT. (1997).

The Legislature has also fixed the fiscal year for cities and counties, from October 1 to September 30. § 218.33(1), FLA. STAT. (1997).[9] Taxes are levied as of the first day of the fiscal year. § 192.001(9), FLA. STAT. (1997); *Moye v. State ex rel. McCollum*, 151 So. 501 (Fla. 1933).

As a result of this lack of congruence between the prescribed tax calendar and the prescribed budgetary calendar, there is always a nine-to-twelve month delay in the taxation of personal property acquired, or improvements to real property completed, during a fiscal year. Property completed between October 1 and January 1 of a fiscal year is not subject to taxes for the entirety of that fiscal year.

Property completed between January 2 and September 30 of a fiscal year escapes taxation not only for the remainder of that fiscal year, but also the entirety of the following fiscal year. Moreover, because taxes are not delinquent until April 1 of the year following assessment, it is possible that a local government may receive

[9]Prior to legislation requiring balanced annual budgeting and an October 1 fiscal year, local governments under the Constitution of 1885 were apparently able to spend funds as they were received. *See, Consolidated Naval Stores v. Hendry*, 30 So.2d 617 (Fla. 1947); Op.Atty.Gen.Fla. 73-415 (1973).

a nondelinquent initial tax payment as long as *twenty-seven months* after the acquisition or completion of property. But expanded government services are required upon occupancy.

There is no inherent impediment to altering the taxable status of property after January 1. For example, newly annexed property is subject to the taxes of a municipality upon the effective date of annexation, even after January 1, so long as the annexation occurs prior to the October 1 date on which taxes are levied. § 171.061(1), FLA. STAT. (1997).

In *Culbertson v. Seacoast Towers, Inc.*, 212 So.2d 646 (Fla. 1968), this Court was confronted with a claim that former § 193.11(4), FLA. STAT. (1967) was unconstitutional. The statute then provided:

> All taxable lands upon which active construction of improvements is in progress and upon which such improvements are not substantially completed on January 1, of any year shall be assessed for such year as unimproved lands. Provided, however, the provisions hereof shall not apply in cases of alteration or improvement of existing structures.

In *Culbertson*, improvements consisting of a hotel were assessed, and the taxpayer disputed the assessment, claiming that the hotel was not substantially completed on January 1, 1967. The property appraiser answered that the statute was unconstitutional, because it granted an exemption not authorized by the Constitution of 1885. But this Court held:

> The statute constitutes only a temporary postponement of valuation and assessment of incomplete improvements on real property provided the prescribed conditions are met on the annual assessment date. The requirement is simply that the *separate classification* of such property shall bear some reasonable relationship to the legislative power to prescribe regulations to secure a just evaluation of property...

Id. at 647 (emphasis supplied).

Under the Constitution of 1885, the Legislature had broad power to classify property for purposes of its valuation. *Lanier v. Overstreet*, 175 So.2d 521 (Fla. 1965). However, in *Interlachen Lakes Estates, Inc. v. Snyder*, 304 So.2d 433 (Fla. 1974), this Court was confronted with a challenge to § 195.062(1), FLA. STAT. (1971). That statute allowed land which was platted as a subdivision to be taxed as acreage until sixty per cent of the lots had been sold. The statute was thus the rough equivalent of a "substantial completion" law for assessment of subdivisions.

The Court noted the changes wrought by the 1968 Constitution in the Legislature's authority to classify lands for valuation:

> Under the 1885 Constitution, we had held that the legislature could tax different classes of property on different bases, as long as the classification was reasonable. *Lanier v. Overstreet*, 175 So.2d 521 (Fla.1965). The people of this State, however, by enumerating in their new Constitution which classifications they want, have removed from the legislature the power to make others.
>
> It is true that the constitutional provision allows the Legislature to prescribe regulations for the purpose of securing a just valuation of All property, but such regulations must apply to All property and not to any one particular class. The regulations contemplated by the Constitution are those which establish the criteria for valuing property; and All property --save those four classes specifically enumerated in the Constitution-- must be measured under the same criteria.

Id. at 434-35.

The continued viability of *Culbertson* under the 1968 Constitution is thus unclear,[10] and a closer analysis might question its description of the process as a mere

[10]In *Markham v. Yankee Clipper Hotel*, 427 So.2d 383 (Fla. 4th DCA 1983), the court upheld the present statute on the basis of *Culbertson*, and perceived no major underlying changes in the 1968 Constitution, but failed to address the new limitations on classification power recognized by this Court in *Interlachen*.

"postponement" of assessment. For at least one and perhaps two full budget years, the tax is not merely postponed; it is excused. But what *is* clear is that the statutory scheme creates windfalls in favor of those improved properties which require and receive services without paying taxes. Moreover, the tax burden of the remaining properties is increased because they must carry the subsidy for the excused properties.

The trial court put it this way in the Final Judgment: (A-231)

> As pointed out by the County, this situation created a windfall to certain citizens which was unfair to those taxpayers who did not receive the same advantage.
>
> It is axiomatic that the Government must provide all citizens of the County such general public services as police, courts, libraries and fire protection... Those who are not assessed at full value obviously pay less than their proportionate share. Thus, those owners whose property is improved or occupied after January 1 may enjoy a windfall of up to 24 months of paying taxes at less than full value. It was the County's desire to recapture this lost revenue which created the impetus for the Fee.

These findings of the trial court were not disputed and have not been cross-appealed here by the STATE or the TAX COLLECTOR. Thus the first prong of the test for a valid special assessment was satisfied.

B. THE ASSESSMENT IS FAIRLY APPORTIONED.

The second prong is whether the assessment has been fairly apportioned. The short answer to this question is that the STATE and the TAX COLLECTOR did not argue below, nor did the trial court conclude, that COLLIER's methodology was arbitrary.

Early cases dealing with special assessments typically dealt with nonrecurring capital improvements such as paving or the installation of sewers. The assessment

was imposed to the extent that abutting properties were disproportionately increased in value by the improvements, and recapture of that value by the community at large was necessary to avoid unjustly enriching a few.

Nevertheless it has long been held that assessments may also be imposed for recurring services which offer a continuing enhancement of the value and utility of property. *Charlotte County v. Fiske*, 350 So.2d 578 (Fla. 2d DCA 1977).

Thus in *Sarasota Church of Christ, supra,* 667 So.2d at 186, this Court approved a methodology which held that the value of church property was enhanced by the availability of stormwater treatment and disposal services, and the value was properly measured by the allocable cost of services. Similarly, in *Harris v. Wilson*, the value of the solid waste disposal service to benefitted properties was measured by its recurring cost.

There has been a merger in the legal analyses of user or impact fees and special assessments. This is not surprising, since the usual avenue of legal challenge to either a user fee or a special assessment is that it is an unauthorized tax. The common point of distinction from taxes is that the obligation to pay a tax is not dependent upon a measurable burden or benefit (*see* Point III, *infra*). The Court's requirements for special assessments (determination of a special benefit, rational allocation of that benefit) are strikingly similar to its "dual rational nexus" test which distinguishes user fees from taxes. *St. Johns, supra,* 583 So.2d at 637. The second prong of the "dual rational nexus" test is that the user fee may not exceed a pro rata share of the cost of providing the service. Florida's tests presage Justice Scalia's test of "rough proportionality" in *Dolan*, in determining whether a governmental exaction on

property is a "taking." Ultimately, a special assessment which exceeds the allocable benefit to property is such a taking. *City of Treasure Island v. Strong*, 215 So.2d 473, 476 (Fla. 1968).

In *Sarasota Church of Christ*, the Court approved stormwater special assessments established under § 403.0893(3), FLA. STAT. (1995). But § 403.9893(1) also authorizes stormwater "utility fees." Typically, municipalities, which already have utility billing systems established, will use the "utility fee." Counties, which less frequently have a monthly billing database established, will more frequently resort to the special assessment, which can be collected by the Tax Collector under the uniform method in Chapter 197. But the test for legality is no different.

Because of the congruence of the Court's tests for user fees and for special assessments, the Ordinance provides that in the event it cannot be collected as a special assessment under the uniform statutory method, the charge should be considered a "user charge" and collected upon issuance of a certificate of occupancy for the improvement. (A-68-9).

But there is no challenge here to the apportionment made in the Ordinance. The property tax falls *in rem*, and an escape from its effect is likewise a benefit to the res. The benefit is not directly measured by the amount of tax thus avoided, because there is no requirement of proportionality between taxes owed and government services provided. Rather, the benefit is measured by the pro rata share of what it costs the assessed owners to "purchase" those services from their provider. The purchase price equals the allocable cost of the service. Any tax payments are

credited, and any "special coupons" for homestead or eleemosynary exemption are honored.

The only judicial inquiry is whether the method of allocation thus used is one on which reasonable persons might differ. *Sarasota Church of Christ*, *supra*, 667 So.2d at 184. No contrary evidence or argument having been offered below, this issue is foreclosed.

III. THE ASSESSMENTS DO NOT VIOLATE ANY CONSTITUTIONAL OR STATUTORY PROVISION

Article VII, §1(a) pre-empts all forms of taxation other than the property tax to the state, except as provided by general law. Thus, special acts or local ordinances which impose taxes are unconstitutional. *Alachua County v. Adams*, *supra.*

The trial court agreed that COLLIER's Ordinance imposed a tax rather than a special assessment, and was unconstitutional because of "the failure of the Legislature to lead and adequately legislate in this area." (A-233). That conclusion is inconsistent with its conclusion that the properties assessed will otherwise receive a windfall.

Although there are similarities between taxes and special assessments, those similarities ought not to make the courts fearful of their ability to distinguish between the two. The test is a simple one: is there a direct benefit, fairly allocated? If so, it is a special assessment. If not, it fails as a special assessment, and can survive only as a tax. The distinction has nothing to do with any particular service which is categorically eligible or ineligible. It has only to do with whether there is a direct relationship between payment and benefit.

In *Dressel v. Dade County*, 219 So.2d 716 (Fla. 3d DCA 1969), taxpayers sued to prevent collection of a countywide fire tax within cities which also provided fire protection, on the ground that they would receive no benefit from the tax. Rejecting that claim, the appellate court adopted the conclusion of the trial court as its own:

> In the Court's view this situation is akin to that in which ad valorem taxes are imposed and collected for the public school system. Persons owning substantial properties and paying heavy ad valorem taxes but having no children entered in the public school system may contend they are taxed without benefit or, alternatively, that the tax they pay is disproportionate to the benefit they receive; however, they have for many years been adjudged to have no cause of action.
>
> * * *
>
> In 1937 the United States Supreme Court strongly endorsed these legal principles in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 57 Sup.Ct. 868, 81 L.Ed. 1245, 109 A.L.R. 1327. The Court's opinion held:
>
> 'Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditures, and who are not responsible for the condition to be remedied. A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. *See Cincinnati Soap Co. v. United States*, (301) U.S. (308), 81 L.Ed. (Adv. 707), 57 S.Ct. 764, supra. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government that it exists primarily to provide for the common good. A corporation cannot object to the use of the taxes which it pays for the maintenance of schools because it has no children. *Thomas v. Gay*, 169 U.S. 264, 280, 42 L.Ed. 740, 746, 18 S.Ct. 340. This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him. (301 U.S. at 521--523, 57 S.Ct. 868.)

Id. at 719-20. This Court adopted the opinion as its own; *Dressel v. Dade County*, 226 So.2d 402 (Fla. 1969).

The Court also noted in *Boca Raton* the distinction between the special assessment it approved there, and a tax:

> [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. 627, 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 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.

The distinction between special assessments and taxes would be relatively unimportant here if the only question were the home rule authority of the County. But superimposed on the County's action are three constitutional issues. First, a tax of any sort must be authorized by general law. Second, ad valorem taxes do not apply to the exempt value of a homestead. Third, ad valorem taxes are capped at ten mills.

Only the first of these constitutional issues is relevant, because the Ordinance does not pretend to impose any charge measured by property value which might be

an "ad valorem" tax. *Cf. Boca Raton* (assessment measured by increase in value of benefitted property.)

In *Harris v. Wilson*, Justice Wells wrote in dissent:

> My overarching concern is that the majority's decision fosters government that is not straightforward or honest about revenue raising. The citizens of this state have voted for millage caps on ad valorem taxes and for homestead exemption from levy of ad valorem taxes. However, the majority's decision now allows governments to give these voter mandates a wink and a nod and then circumvents them by semantics in labeling as a special assessment what actually is a tax. Voters are the victims of such deception, and I believe this Court should protect them from it.

693 So.2d 945, at 950.

COLLIER respectfully suggests that it begs the question to say that a valid special assessment is an assault on constitutional homesteads and millage caps. Mere legislative approbation neither adds to nor detracts from those limitations. If the measure meets the legal test of a special assessment, there is no particular sanctity in the fact that the legislators who adopted it sat in Naples rather than in Tallahassee. *See* Point IV, *infra.* If the Legislature, by general law, expressly required all counties to adopt an ordinance like COLLIER's, the question of whether it was "authorized" would become moot; but the mere fact that other revenues may supplement or supplant the ad valorem tax, postponing an encounter with millage caps, does not transform those other revenues into ad valorem taxes. The Legislature might likewise authorize local option sales taxes, county gasoline taxes, occupational license taxes, or a utility tax. None of these are limited by ad valorem millage caps, and any or all of them may be more regressive for the owner of a modest homestead than this special assessment. At least in the case of a special assessment, the payor is

constitutionally guaranteed that there is a required direct correlation between the payment and the value of a service.

Nor, on this particular assessment, is there any reason to be concerned about the evasion of millage caps. The entire thrust and reason of the Ordinance is to impose a charge on improvements which are paying at a millage rate of *zero*. Moreover, the proceeds of the assessments must be segregated. They do not provide a pot of money for Commissioners to expend on a whim. The Ordinance thus compels a net *reduction* in the ad valorem taxpayers' burden.

Nor is the protection of the homestead exemption threatened by this Ordinance. It specifically requires that a credit be given against the assessment for the value of a homestead exemption.

In *Lake County*, the majority observed in dictum that "clearly, services such as general law enforcement activities, the provision of courts, and indigent health care ... provide no direct, special benefit to real property." *Id.* at 670.

However, in *Rushfeldt v. Metropolitan Dade County*, 630 So.2d 643 (Fla. 3d DCA 1994), *review denied* 639 So.2d 980 (1994), the court upheld creation of a "security guard special taxing district" under home rule authority of the County, noting that the ostensible "tax district" in reality was imposing special assessments for police services.

In *Farabee v. Board of Trustees, Lee County*, 254 So.2d 1 (Fla. 1971), this Court upheld the constitutionality of a special act[11] imposing a supplemental filing

[11]The special act predated the 1968 Constitution's requirement that taxes be imposed by general law, but the decision followed the Constitution by three years.

fee on court cases to support law libraries. The Clerk had refused to collect it, believing that it was a tax on access to the courts in violation of the Constitution; *see Flood v. State ex rel. Homeland Co.*, 117 So. 385 (1928). The Court distinguished *Flood*, on the ground that the surplus fees there were to be deposited into the General Fund without restriction, and hence were taxes. In *Farabee*, the act provided for the fees to be segregated for use solely for the purposes for which it was imposed, and for the benefit of litigants on whom it was imposed. *Cf.* Section 12 of the Ordinance, requiring segregation of the funds and similarly limiting their expenditure.

The requirement of segregation of funds is also found in *Contractors and Builders Association v. City of Dunedin*, 329 So.2d 314 (1976), upholding impact fees on the condition that an ordinance be amended retroactively to require an escrow fund.

In *Port Orange*, one of the points made by the Court in declaring the transportation utility fee to be a "tax" was the fact that it was involuntary. But both user fees and special assessments may be involuntarily imposed, and do not thereby become "taxes." *See Boca Raton, supra,* (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); *Dunedin, supra* (user fee does not become tax even though it is required upon connection to utility and such connection is mandatory); *City of New Smyrna Beach v. Fish*, 384 So.2d 272 (Fla. 1980) (solid waste collection fee is valid even though involuntarily imposed year-round on condominiums which are seasonally vacant).

If citizens are truly concerned because special assessments apply to homesteads with full force and taxes do not, they have a political remedy. That remedy is to amend the constitution to excuse homesteads from special assessments. In the absence of such an initiative, and indeed in the absence of any protest whatsoever from any non-elected citizen of Collier County in this case, the courts have no reason to fear the democratic process. In adopting its Ordinance, COLLIER has been sensitive to concerns expressed by the judiciary about the protection of homesteads and millage caps. Nevertheless the incidence of assessments under the Ordinance falls *only on newly-completed properties paying zero millage.* The Court may profit from the observation in *Wald v. Metropolitan Dade County*, 338 So.2d 863, 868 (Fla. 3d DCA 197):

> The subdivider is a manufacturer, processor, and marketer of a product; land is but one of his raw materials. In subdivision control disputes, the developer is not defending hearth and home against the king's intrusion, but simply attempting to maximize his profits from the sale of a finished product. As applied to him, subdivision control exactions are actually business regulations. John D. Johnston, Jr., Constitutionality of Subdivision Control Exactions: The Quest for a Rationale, 52 Cornell L.Q. 871, 923 (1967)

IV. THE COUNTY'S LEGISLATIVE DETERMINATION AND ALLOCATION OF BENEFITS IS ENTITLED TO JUDICIAL DEFERENCE

The STATE and TAX COLLECTOR[12] offered no challenge to the finding of a benefit, and no evidence that the finding was arbitrary. What, then, is the proper function of a reviewing court?

What constitutes a special benefit is a matter of judgment that courts should not overturn in the absence of a clear and full showing of arbitrary action or plain abuse. *South Trail Fire Control District v. State*, 273 So.2d 380 (Fla. 1973).

When the people of Florida adopted the 1968 Constitution, they placed at the head of that Charter these words: "All political power is inherent in the people." Although this Court is still ultimately responsive to the electors, members of local governing bodies are subject to contested elections. Accordingly, the Court has from time to time announced its tradition of deference to the policy choices made by directly-elected representatives. Such is the case in the field of special assessments. In *Sarasota Church of Christ*, the Court said that in order to disspel any confusion,

> we know that a valid special assessment must meet two requirements: (1) the property assessed must derive a special benefit from the service provided; and (2) the assessment must be fairly and reasonably apportioned according to the benefits received. *City of Boca Raton*, 595 So.2d at 30. These two prongs both constitute questions of fact for a legislative body rather than the judiciary. *Id.* at 30 (apportionment of benefits is a legislative function); *South Trail*, 273 So.2d at 383 (determination of special benefit is one of fact for legislative body; apportionment of the assessments is a legislative function). *See also Meyer v. City of Oakland Park*, 219 So.2d 417 (Fla. 1969).

* * *

[12]The propriety of the Tax Collector's appearance here, at least in his official capacity and at public expense, is open to debate. *See Escambia County v. Bell*, 717 So.2d 85 (Fla. 1st DCA 1998) (where County complies with requirements of § 197.3632, Tax Collector's duty to collect non-ad valorem assessment is ministerial); *Department of Revenue v. Markham*, 396 So.2d 1120 (Fla. 1981) (property appraiser is without standing to challenge, in his official capacity, a statutory duty as unconstitutional).

> 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.

David Osborne refers to local governments as the "laboratories of democracy."[13] In this field, as in others where the demands upon democratically elected officials are great and their resources are few, the Court has thus been appropriately tolerant of the policy choices made by these officials. After all, the voters who created millage caps and homestead protections can throw out those officials whom they feel are violating their rights, more easily than they can overcome a decision of this Court.

There are reasons grounded more in jurisprudential theory why the Court should exhibit deference where it is possible to do so. Professor John Hart Ely offered these observations on the struggle to identify the judiciary's role in Federal constitutional interpretation:[14]

> Contemporary constitutional debate is dominated by a false dichotomy. Either, it runs, we must stick close to the thoughts of those who wrote our Constitution's critical phrases and outlaw only those practices they thought they were outlawing, or there is simply no way for courts to review legislation other than by second-guessing the legislature's value choices. Each side has an interest in maintaining the idea that these are the only choices. One racks up rhetorical points by exposing the unacceptability of the only alternative to one's view; if the debate is defined thus, that is quite an easy task -- for both sides, and for much the same reason. For neither of the proffered theories -- neither that which would grant our appointed judiciary ultimate sovereignty over society's substantive value choices nor that which would refer such choices to the

[13]Osborne, *Laboratories of Democracy,* Harvard Business School Press 1990.

[14]Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980)

> beliefs of people who have been dead for over a century -- is ultimately reconcilable with the underlying democratic assumptions of our system.

Id. at vii.

In developing his own theory of interpretation, Ely notes the opinion of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316 (1819), at 436. After invalidating a state tax on banks, including the Bank of the United States, Marshall nevertheless noted: "This opinion does not extend to a tax paid by the real property of the bank, in common with the other real property within the state." Ely comments:

> The unity of interest with all Maryland property owners assured by this insistence on equal treatment would protect the Bank from serious disablement from taxes of this sort. The power to tax real or personal property is potentially the power to destroy. But people aren't lemmings, and while they may agree to disadvantage themselves somewhat in the service of some overriding social good, they aren't in the habit of destroying themselves en masse.

Id. at 85. Ely also cites Madison, *The Federalist* No. 57 at 385 (B. Wright Ed.):

> I will add, as a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of society.

Id. at 87. Ely then concludes:

> The approach to constitutional adjudication recommended here is akin to what might be called an "antitrust" as opposed to a "regulatory" orientation to economic affairs -- rather than dictate substantive results it intervenes only when the "market," in our case the political market,is systematically malfunctioning. (A referee analogy is also not far off: The referee is to intervene only when one team is gaining unfair advantage, not because the "wrong" team has scored.) Our government cannot fairly be said to be "malfunctioning" simply because it sometimes generates outcomes with which we disagree, however strongly (and claims that it is reaching results with which the "people" disagree -- or would "if they understood" -- are likely to be little more than self-deluding projections.) In a representative democracy, value determinations are to be made by our elected representatives, and if in

> fact most of us disapprove we can vote them out of office. Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.

Id. at 103.

So the question becomes, under this particular theory of the judiciary's function, whether the elected representatives are in fact not representing the interests of those whom the system presupposes they are. Does this Ordinance betray a democratic process that has malfunctioned so dreadfully that a more detached judiciary must step in and restore fairness to the game? Or do we have sufficient faith in the people not to act like lemmings and destroy themselves en masse?

CONCLUSION

The Final Judgment should be reversed with instructions to enter a judgment of validation.

Respectfully submitted,

COBB COLE & BELL

By:_____
JOHN P. FERGUSON
FLA. BAR NO. 0983977

By:_____
C. ALLEN WATTS
FLA. BAR NO. 139759
150 Magnolia Avenue
Post Office Box 2491
Daytona Beach, FL 32115-2491

(904) 255-8171
ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by First Class U.S. Mail this **2nd** day of **November**, A.D. **1998** to: **Douglas L. Stowell, Esquire**, Stowell, Anton & Kraemer, P. O. Box 11059, Tallahassee, FL 32302; **Michael J. Provost, Esquire**, State Attorney's Office, Twentieth Judicial Circuit of Florida, Collier County Courthouse Complex, 6th floor, P. O. Drawer 2007, Naples, FL 34112; **David C. Weigel, Esquire** and **Heidi Ashton, Esquire,** Collier County Attorney's Office, 3301 Tamiami Trail East, FL 34112; and **Daniel D. Eckert, Esquire**, Volusia County Attorney, President Florida Association of County Attorneys, 123 West Indiana Avenue, DeLand, FL 32720-4615 **Joseph A. Morrissey, Esquire** and **Mark A. Watts, Esquire**, Pinellas County Attorney's Office, 315 Court Street, Clearwater, FL 33756 and that this document has been prepared in a 14 point proportional font in accordance with direction of the Clerk of the Court for the State of Florida.

C. Allen Watts