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 REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

The State has not disputed any of the facts set forth in Collier County's initial brief. Indeed, neither the State nor the Tax Collector presented any evidence in this case. The Tax Collector has claimed an absence of evidence from the County to support the findings of the Board of County Commissioners that the properties being charged under the Ordinance in question are receiving a benefit. He suggests that the occupants of the property, rather than the property, are the beneficiaries of the government services in dispute.

Nevertheless, at A-157, Mr. Tischler testified for the County that he was able in his supporting study to make a distribution of the costs of services among *improved properties*. At A-164-65, the following exchange occurred between Mr. Tischler and counsel for the Tax Collector:

> "Q. Okay. In carrying out your responsibilities to do this study, you did not consider or determine or provide to the County specific benefits to parcels of property, did you?
>
> A. Well, the report addressed the benefits accruing to a single family house versus other types of land use."

At A-169, Mr. Tischler testified "it goes with the property, not so much the person."

On redirect examination, Mr. Tischler testified:

> "Q. All right, sir. In your determination of the benefit that each property receives under this ordinance, did you essentially equate benefit with the cost of the service that is not otherwise paid for?
>
> A. Yes."

Mr. Tischler otherwise explained at length, and his study also articulates, the methodology by which he ascertained the marginal or population-sensitive costs of the affected government services, and allocated these costs to properties of various types. His calculations have not been challenged, either by evidence or arguments.

No controverting evidence was submitted by the State or by the Tax Collector. Their legal critique of the findings of the Board of County Commissioners is more appropriately addressed in argument.

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

SUMMARY OF ARGUMENT

The State has incorrectly characterized the finding of the trial court. The court did not find that there was no benefit to the assessed properties. Quite the contrary, the court found that such properties enjoyed a "windfall" at the expense of ad valorem taxpayers. (A-231) The ad valorem tax falls only *in rem*; the owner of such property incurs no personal obligation and suffers no personal liability for failure to pay it, other than loss of the *res*. Thus, an escape from ad valorem taxation is a benefit to the *res*, not to its owner.

Neither the State nor the Tax Collector have directly disputed the inherent home-rule authority of Collier County to adopt ordinances, nor do they cite any express legislative interdiction of the Ordinance in question. They argue, and the circuit court agreed, that the charge is not authorized by general law. They say that the charge an unconstitutional tax under Article VII, §1(a). This begs the question, for if the charge is a special assessment or user fee, it is not a tax.

The judgment under appeal is internally inconsistent. Having found that the benefitted properties do indeed receive a benefit or windfall from Collier County which the Ordinance attempts to recoup, the court was bound to look at the allocation of that benefit among the properties charged. There being no evidence or argument to refute the findings or methodology of the Board of County Commissioners, those findings should have been approved. Instead, the trial court second-guessed the legislative body, contrary to the precedents of this Court.

The Ordinance under review emphatically does *not* attempt an end-run around constitutional homestead exemption or millage caps. The assessment can be imposed

only upon property, or a portion thereof, which is paying *zero* mills in property taxes. There is an offset or credit required in the Ordinance, equivalent to the value of a homestead exemption for properties so entitled. Thus, the concerns raised by some members of the Court in recent decisions have been expressly honored, anticipated and avoided in the Ordinance.

ARGUMENT

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

Neither the State nor the Tax Collector have directly disputed the County's exposition of the derivation and extent of its home-rule powers. The sole dispute between the parties seems to be whether the charge in question is a tax, or not. If it is a tax, then home-rule power is insufficient to authorize it, because Art. VII, § 1(a), FLA. CONST. requires general-law authorization of any tax.

The Tax Collector says that the charge is an attempt to levy a partial-year assessment of ad valorem taxes in the absence of legislative authorization. Clearly, this is not so. An ad valorem tax is, by definition, levied in proportion to the value of property. The assessment under review bears no relationship to the value of property, but rather to the cost of government services provided specifically to the property.[1] Unlike taxes, the collections from these assessments cannot be spent for the general welfare, but *only* for the reimbursement of the specifically enumerated services received in respect of the benefitted properties.

II. PROPERTIES EXCUSED BY LAW FROM TAXATION ARE SPECIALLY BENEFITTED

The circuit court agreed with the County (Final Judgment, at A-231) that the properties which are subject to assessment under the Ordinance would otherwise receive a windfall, at the expense of those who pay property taxes not only to support

[1]Benefits recoverable by special assessment may, in a proper case, be measured by the increase in the tax valuation of property. *City of Boca Raton v. State*, 595 So.2d 25 (Fla. 1991).

their own governmental services but also to support governmental services to newly improved and non-taxpaying properties. Neither the State nor the Tax Collector challenges that finding.

The Tax Collector instead makes a circular argument. He says that there is no benefit to the properties assessed, because the benefit is recouped by the assessment. That argument can indeed be made in any special assessment case, because it is the very purpose of a special assessment to prevent the enrichment of a segment of the community at the expense of the larger community. Any property owner who has ever been assessed for street or sewer improvements might truthfully have said that after the assessment, the property received no net benefit. The problem with that argument is that the benefit is to be measured *before*, and as justification for, the assessment.

The State and the Tax Collector join in arguing that the benefit here is not to the property assessed, but to the property's owner. That same argument could have been made in *Harris v. Wilson*, 693 So.2d 945 (Fla. 1997). In that case, the Court approved a partial-year special assessment for solid waste collection. Property, in and of itself, cannot emit solid waste which requires collection and disposal; it requires some use, occupancy and human activity to produce such waste. In such a case, is it the property or the owner of the property who is benefitted by the collection and disposal of the waste?

An ad valorem tax is imposed in respect of property, not its owner, and constitutes a lien on the property. § 192.053, FLA. STAT. (1997). There is no debt or personal liability of a property owner for the nonpayment of ad valorem taxes. *In re*

Ratliff's Estate, 188 So. 128, 133 (Fla. 1939). Hence, the escape from such taxation is a benefit primarily to the value of such property, and only indirectly to its owner.

The State argues that this Court has prejudged the Ordinance, by its dictum in *Lake County v. Water Oak Management*, 695 So.2d 667 (Fla. 1997) that other governmental services such as law enforcement and judicial services could not be made the subject of a special assessment. But the State fails to answer the authorities of the County, pointing out that the courts have *already* approved such locally or specially-imposed fees in the case of law enforcement (*Rushfeldt v. Metropolitan Dade County*, 630 So.2d 643 (Fla. 3d DCA 1994), *review denied* 639 So.2d 980 (1994)) and court-related facilities (*Farabee v. Board of Trustees, Lee County*, 254 So.2d 1 (Fla. 1971)).

In its initial brief, the County has observed a gradual confluence of analysis in this Court's decisions dealing with both user fees and special assessments and their common points of distinction from taxes. Neither of the Appellees has disputed that observation. Nevertheless the terms have not always been used with precision by litigants or governments. McQuillan's treatise, Municipal Corporations (3d Ed.) explains that some of the fees heretofore approved by this Court under the name "special assessment" might more properly be characterized as "special fees". The distinction is explained at §38.02.20:

> Although there are similarities between the special services process and that of special assessments for local improvements, the special services process is distinct from special assessments.

* * *

> A special fee is a charge imposed on persons or property and reasonably designed to meet the overall cost of the service for which the fee is imposed. The *amount of a special fee must be reasonably related to the overall cost of the service.*
>
> * * *
>
> A special fee might be subject to invalidation as a tax when the principle (sic) purpose of the fees is to raise revenue for general municipal purposes, *rather than to defray the expense of the particular service for which the fee is imposed.*[citing *Bloom v. City of Fort Collins,* 784 P.2d 304 (Colo. 1989); emphasis supplied].

Florida caselaw is not as confining as McQuillan's text; *see, e.g. Harris v. Wilson, supra* (solid waste collection); *Lake County v. Water Oak Management, supra* (fire protection); *State v. Sarasota County*, 693 So.2d 546 (Fla. 1997), all of which have been characterized as valid special assessments under Florida law.

Nevertheless, Collier's ordinance takes pains to provide, in its saving clause, that if the charge fails for any reason to qualify as a special assessment collectible under the uniform method for special assessments in § 197.3632, FLA. STAT. (1997), it nevertheless is subject to collection as a user fee at the time of issuance of a certificate of occupancy by the County. Neither the State nor the Tax Collector has directly challenged the alternate characterization of the charge as a valid user fee, nor the validity of any Revenue Anticipation Notes which might be issued thereon.

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

The trial court was keenly aware of the Legislature's failure to redress an inequity in the present ad valorem tax structure of Florida:

> The inescapable, obvious and burning question to the trial court is: Where is the Florida Legislature? . . . this is one loophole that deserves continued scrutiny.

* * *

> No citizen will benefit from allowing this legal quagmire to continue. We clearly have able and competent legislatures who are obligated to do the right thing. However, the failure of the Legislature to lead and adequately legislate in this area cannot be subsumed by the courts. (A-233)

It is clear from that plaint that there has been no enactment of the Legislature either authorizing or forbidding the Ordinance under review; nor do the Appellees suggest otherwise.

The Tax Collector has cited and relied upon a recent decision of the Third District in *Fuchs v. Robbins*, Nol 98-275 (Fla. 3d DCA November 18, 1998) for the proposition (answer brief, p. 9): "Thus it is clear that the Legislature has the authority to prohibit and has prohibited partial year assessments for purposes of ad valorem tax."

The *Fuchs* decision deals with the constitutionality of § 192.042, FLA. STAT. (1997) in light of the 1968 Constitution. The decision may well be destined for review here, since it expressly declares valid a state statute, but it has nothing to do with Collier's ordinance. Collier County did not impose a partial year assessment, which would have created "general revenue" funds. Instead, it imposed an assessment on particular properties and restricted the use of the funds to the recoupment of the costs on which the assessment was predicated.

Collier has stepped into the Legislative vacuum with a revenue device that is peculiarly within the authority of a local government. The fiscal difference between the funds collected under this Ordinance and a partial year assessment is that this Ordinance guarantees ad valorem tax relief to the taxpayers of Collier County. The

funds, unlike taxes, cannot be diverted or spent for general governmental purposes. They are imposed in strict proportion to the governmental costs otherwise already being funded by ad valorem taxes of others. Because of the legal restrictions on their use, these assessments can only replace, not supplement, the ad valorem taxes of others.

A substantial minority of the Court expressed its concern in *Lake County v. Water Oak Management*, *supra*, that creative local ordinances could produce an undermining of constitutional protection of homesteads and constitutional limitations on property tax millages. That danger exists where an ordinance is not carefully attuned to those issues. But the Ordinance here under review is careful to protect those constitutional safeguards. First, there is a specific credit, equal to the value of a homestead exemption. Second, a homestead cannot be sold for delinquent taxes *or special assessments* in a hardship case; *see* § 197.252, FLA. STAT. (1997), allowing a deferral of both ad valorem taxes and non-ad valorem assessments. Finally, because of the limitation on the funds discussed above, the assessments are imposed only on property which is otherwise subject to *zero* mills in property taxes, and may be utilized only in a way which guarantees property tax *reduction* for all ad valorem taxpayers.

In the absence of legislation, a home-rule local government may adopt by Ordinance any measure which the legislature itself might adopt. *Cf.* § 166.021(3), FLA. STAT. (1997); *Speer v. Olsen*, 367 So.2d 207 (Fla. 1978). Nor does any provision of the Constitution forbid the County to do so unless the measure is a tax. For the reasons set forth in Points II and III, the measure under review meets the tests of this Court for both special assessments and for user fees, and hence is not a tax requiring general-law authorization.

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

The trial court erred in holding (A-233) that "the failure of the Legislature to lead and adequately legislate in this area cannot be subsumed by the courts."

No one has asked the courts to legislate in this case. The legislative body of Collier County has done so. The courts are being asked only to validate bonds which depend upon that legislation for their repayment. Neither of the Appellees has offered any reason why the judiciary should find Collier's legislative judgments of benefit and proportionality to be arbitrary or not fairly debatable. Neither of the Appellees has contested the trial court's finding that there is indeed a windfall to the benefitted properties in this case, an unintended fluke arising from the peculiar interaction of unrelated statutes but well within the power of a local government to remediate. If this Ordinance is upheld, no one need complain again that the Legislature has failed to lead in this area, and no one need argue whether the existing

disparity in tax classification is a denial of equal protection to those who pay their taxes.

CONCLUSION

The judgment below should be reversed, and this cause should be remanded with instructions to enter a judgment validating the notes at issue.

Respectfully submitted,

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By:_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by 1st Class U.S. Mail this **17th** day of **December**, A.D. **1998** to: **Douglas L. Stowell, Esquire**, Stowell, Anton & Kraemer, P. O. Box 11059, Tallahassee, FL 32302-3059; **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 F. Ashton, Esquire,** Collier County Attorney's Office, 3301 Tamiami Trail East, Naples FL 34112; and **Daniel D. Eckert, Esquire**, Volusia County Attorney, President Florida Association of County Attorneys, 123 West Indiana Avenue, DeLand, FL 32720-4613; **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 Supreme Court for the State of Florida.

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Attorney