IN THE FLORIDA SUPREME COURT
Case No. 96,332

Bond Validation Appeal from A Final Judgment
Of the Sixth Judicial Circuit,
Pinellas County, Florida

PINELLAS COUNTY, FLORIDA , ETC.

Appellant

v.

STATE OF FLORIDA, ET AL.

Appellees.

INITIAL BRIEF OF APPELLEES

STATE OF FLORIDA

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INTRODUCTION

The State of Florida (the "State"), who appears on behalf of all of the property owners of Pinellas County who might be impacted by the Bond Validation and its funding mechanism, and the intervening Appellees, the municipalities of Madeira Beach and Indian Rocks Beach and James Palamara, Robert Johnson, Fred Vowinkel, Marsha Loper and John DeMont have consulted together and agreed to file one Brief on Appeal which will respond to the arguments of both Pinellas County and the Amicus Curiae Brief of The Florida Association of County Attorneys ("FICA"). References to the parties shall be the same as those in Pinellas County's Brief and the same Appendix reference system to the record will be used.

STATEMENT OF FACTS[1]

The underlying impetus for the reclaimed water system which was to be paid for by the bonds to be validated in this case was a need for an alternative to disposing of waste water through deep-well injection or some other system of disposal (AP-S-20-21, 31-32, 44-47). While one could argue reclaimed water is a valuable resource, it is not

[1]Appellees generally accept the Statement of Facts set out by Pinellas County in its Initial Brief but believe the Supreme Court needs to be advised of the additional facts set forth in this Statement of Facts to supplement that information provided by the County.

potable water and is not useable in the homes of the interveners (AP-S-44; AP-J; AP-K; AP-H-5-6). This reclaimed water will not be of value or use to many citizens of the Beach Communities (AP-H-4-6).

The Counties' decision to force reclaimed water upon the Beach Communities was predetermined (AP-S-25-26) without any regard to the percentage of potable water use which the reclaimed water would replace or what actual use of potable water is currently made by the Beach Communities for the things reclaimed water could be used for such as car-washing or irrigation. (AP-S-33-36). The County's consultants only studied a discreet part of the County for this extension of the reclaimed water system and included income as a primary factor in determining who should bear the cost of the disposal system (AP-S-37-39). At the same time, the County's own witness acknowledged that all other costs of expanding a reclaimed water system, including the upgraded waste water treatment plant and the building of the remainder of the distribution system will be borne by all waste water customers of the system in the County on an equal basis (AP-S-43-24, 44-47).

The County's only witness could not describe, and did not know, how the availability of reclaimed water would benefit any of the five properties owned by the individual citizen Interveners (AP-S-39-40). The County offered no evidence to support

the proposition the availability of reclaimed water conferred any benefit upon real property in the County.

It is important to note that in its Final Judgment, the Court specifically ruled that the Counterclaim filed by Interveners in this case did not seek the resolution of any collateral issues (AP-R-3). The Court specifically held that the County was proceeding to extend the reclaimed water system and fund it pursuant to Chapter 153 and that the County may not extend its reclaimed water facility into the incorporated municipalities without their consent as a result (AP-S-3-5).

More importantly, the Court specifically held the availability charge at issue as the funding mechanism for the proposed bonds was not a connection charge or a user fee and was an impermissible tax the County sought to place upon some residents of Pinellas County (AP-R-6).

SUMMARY OF ARGUMENT

The issue of Beach Community consent to the building, maintenance, operation and ownership of the reclaimed water system at issue was not a collateral issue in the proceeding because of the County's reliance upon Chapter 153, Fla.Stat. in the ordinances concerning the reclaimed water system and because earlier grants of authority to the County to generally conduct business preceded Chapter 153 and the recent mandate for reclaimed water given the County by the legislature. The non-consent of the

municipalities then becomes relevant to the very issue of whether or not the project bonds are authorized by law because it speaks to the issue of authority to issue the subject bonds and the legal purpose of the obligation.

The availability charge or funding mechanism for repayment of the bond obligation was invalid. It could not be authorized or imposed as a tax because it was not imposed upon all the citizens of the County, nor was it created by a public referendum. The charge fails as a user fee because it was mandatory, involuntary and non-users will have to pay it.

The availability charge also fails as a special assessment because the County could offer no evidence that the service to be provided will confer a particular special benefit on a particular piece of real property that will be required to pay the fee. The fees are, in fact, not to be used to benefit the specific real properties whose owners will have to pay the fee but to provide for the general public good and insure a long-term potable drinking water source for all citizens of the County in the future. Because all users of the waste water system contribute to the creation of the effluent which must be disposed of, and because the reclaimed water system is a way of disposing of that effluent by retreating it and providing it for use in lieu of potable water, the cost of the disposal of waste water should be fully shared in its entirety by all of the users of the system. While the County can properly charge a connection fee for those who wish to use reclaimed water and

charge each user for the reclaimed water used, it cannot charge those who do not intend to use reclaimed water for the cost of building the system used to dispose of waste water created by all users of the County waste water system.

ARGUMENT

I. THE CHAPTER 153, FLA. STAT. (1997) CONSENT ISSUE.

The County's lengthy arguments on the variety of sources for its power to operate a potable water system within Pinellas County, or its power to provide and operate a waste water disposal system in Pinellas County, beg the question and miss the point of the Beach Cities' arguments concerning non-consent under Chapter 153. From a historical standpoint, much of the County's earlier powers, whether through special acts or otherwise, preceded the concept of a reclaimed water system. However, Chapter 153, Fla.Stat. specifically provides for the County owning, building, maintaining, operating and funding a reclaimed water system within its jurisdiction.

Unfortunately for the County, its own reclaimed water ordinances (95-176, a copy of which is attached to this Brief, and 97-103, AP-X-12) both refer to Chapter 153 as the source of the authority to construct, operate and fund this particular reclaimed water system.

In recognition of this legal authority for the system, the County went to each of the Beach Communities which would be affected by the system and proposed each adopt a

resolution accepting the system and its funding mechanism. The Appellee Beach Communities in this case declined the invitation and on more than one occasion reiterated their non-consent.

To the extent the County looked to Chapter 153, Fla.Stat. in its own ordinances as a legal authorization for its reclaimed water system, that statute reads in pertinent part as follows:

> Provided, however, that none of the facilities provided by this Chapter may be constructed, owned, operated or maintained by the County on property located within the corporate limits of any municipality **without the consent... of such municipalities... (emphasis added).**

In the case of Hodges v. Jacksonville Transportation Authority, 353 So.2d 1211 (Fla. 1st DCA 1977), the First District Court of Appeal reviewed similar language contained in §338.01(1), Fla.Stat., which required municipal consent for certain limited access highway construction within the corporate boundaries of the municipalities. The Trial Court relied upon this specific language from the Court's opinion in that case:

> We first address Petitioner's contention that Respondent's failed to comply with F.S. 388.01(1) (sic) in that no consent to the construction of the limited access highway on the subject property has been obtained from the City of Jacksonville, an incorporated municipality within such properties admittedly located. The statute is clear and no good reason has been shown for non-compliance. **Indeed, it is questionable whether or not compliance may be excused.**

Id. at 1213 (emphasis added).

The Trial Court's finding that this issue of consent was a proper consideration in

the Bond Validation proceeding because it was not collateral to the issues the Court must consider in a Bond Validation proceeding was a correct one. Compare, Murphy v.City of Port St. Lucy, 666 So.2d 879, 880 (Fla. 1995). The Trial Court's factual finding that the County was relying, in part, upon Chapter 153, Fla.Stat. as authorization for the reclaimed water system is supported by the evidence and should bind the County upon this Appeal.

The County should not be authorized to issue bonds to spend money for something it cannot legally do.

II. THE AVAILABILITY FEE TO FUND THE RETIREMENT OF THE BONDS IN QUESTION WAS AN INVALID TAX AND THE TRIAL COURT DID NOT ERROR IN REFUSING TO VALIDATE THE BONDS AS A RESULT.

This Court has repeatedly spelled out the judicial inquiry which must be undertaken in Bond Validation proceedings. State v. City of Port Orange, 650 So.2d 1 (Fla. 1994). The Court has stated such an inquiry includes: (1) determination of whether a public body has the authority to issue the subject bonds; (2) determination of whether the purpose of the obligation is legal; and (3) whether the authorization of the obligation complies with requirements of law. Id. at 2. (Citing Taylor v. Lee County, 498 So.2d 424, 425 (Fla. 1986)). This Court was careful to point out, however, that "subsumed within the inquiry as to whether the public body has the authority to issue the subject

bond is the legality of the financing agreement upon which the bond is secured." Id. at 3 (citing GRW Corporation v. Department of Corrections, 642 So.2d 782 (Fla. 1984)). Any fees, assessments, or other funding devices included as part of the Finance Agreement must be reviewed by the Court to determine whether the public agency has the "authority to impose such a fee." Id. The Court must review the structure of the funding device, regardless of how it is labeled, to determine whether it meets the requirements for any of the fees permitted by law or has been authorized in accordance with the law applicable to that particular fee. Id. See also, Contractors and Builders Association. v. City of Dunedin, 329 So.2d 314 (Fla. 1976). Alachua County v. State, _____ So.2d_____, 24 Fla.L.Weekly, S212 (Fla. May 13, 1999); Collier County v. State, _____ So.2d _____, 24 Fla.L.Weekly, S206 (Fla. May 6, 1999).

In this case, it is important to note that the reclaimed water system at issue, and to be expanded, is relatively new. It was not part of the original water system the County began providing to these municipalities a long time ago. Nor was it part of the initial waste water recovery system which the County contracted with the municipalities to provide. Reclaimed water is a by-product of the waste-water collection and treatment system. The public purpose behind the reclaimed water system is primarily to dispose of the waste water which all customers of the waste water system have produced. The County can no longer dispose of this water by deep-well injection and it has been

required by environmental regulators to find another way to dispose of it.

It is as a result of this mandate that the County is spending about $200,000,000.00 to upgrade and expand its waste water treatment plant so that effluent may be brought to the quality of being useable as "reclaimed water". All other costs of this collection, treatment and disposal system are being equally shared by all waste water customers of the system. By this availability charge, the County seeks to tax all citizens of the Beach Communities so that some citizens of the Beach Communities would have this resource of reclaimed water available to them and all customers of the system will have their waste water disposed of.

Just as the County's focus on other sources for its authority to create, maintain and operate a reclaimed water system misperceives the Appellees Chapter 153 argument, the County's and amicus' characterization of reclaimed water as a precious resource being provided to the general public to serve a broad general public purpose misdefines the funding issue before the Court. Reclaimed water may be a resource and, to the extent that it is used in lieu of potable drinking water and leaves potable water available for human use in greater quantities in the future, reclaimed water may benefit the public. However, it is deceiving to characterize reclaimed water as a precious resource. It may not be used for drinking, the risk from harm from it is so great it cannot be connected to a pipe that will bring it into a residence or building where it could be misused by a human being. It

is generally useful only for such activities as irrigation and menial tasks, such as car and patio washing, etc. The County made no effort to determine what percentage of water use in the Beach Communities was attributable to such practices, nor to what extent potable water use would be decreased by making reclaimed water available to the beaches. Many Beach Community residents, like several of the Interveners, simply have no use for reclaimed water and no desire to have it available. It is in this context then, that the County seeks to impose upon the citizens of the Beach Communities fees to fund the bonds which would pay for a portion of the waste water treatment and disposal system.

The funding mechanism for this particular bond validation is made up of several components: an actual fee for use of reclaimed water to be paid as the water is used; a connection or hook-up fee; and a readiness to serve charge or availability charge which would be paid by each landowner whether he uses the system, or chooses to connect to it, or not. It is this latter fee which the Trial Court properly found invalid in this case.

This Court has viewed the defining characteristics of a tax and a special assessment and to a lesser degree, a user fee. Revenue devices that do not fit into one of the established categories, or which appear to be a hybrid of the three categories, are generally deemed to be unconstitutional. "If a fee is charged that has no nexus or logical bearing on an impact, then it would amount to a tax without regard to the name that was

assigned to it." City of Tarpon Springs v. Tarpon Springs Arcade Limited, 585 So.2d 324, 326 (Fla. 2nd DCA 1991) review denied 593 So.2d 1051 (Fla. 1991). More importantly, if a revenue device includes any attributes of a tax and the device has not been approved by referendum, it would be deemed unconstitutional. State v. City of Port Orange, 650 So.2d 1 (Fla. 1994).

This Court has repeatedly stated that taxes are "levied for the general benefit of residents and property and are imposed under the theory that contributions must be made by the community-at-large to support the various functions of government." Sarasota County v. Sarasota Church of Christ, 667 So.2d 180, 183 (Fla. 1995), or for "sovereign functions". For this reason, the revenues collected from taxes may be used for purposes other than for the subject of the fee. Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So.2d 314, 317 (Fla. 1976). Article VII, Section 9, Fla.Const. restrains and limits as a matter of state constitutional law a local government's ability to levy a tax and requires voter approval prior to implementation of the tax.

User fees, on the other hand, are paid by those who voluntarily choose to accept a governmental service. This may include a connection fee which is reasonably proportional to the cost of providing the service as well as an actual fee for use of a governmental service or instrumentality. This Court has recently stated that user fees are

"charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society", State v. City of Port Orange, Id. at 3. A "party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge." Id.

In 1976, this Court in Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976), noted that a charge for hookup to a sewer system was for use of the water and sewer facilities and that the property owners who did not wish to use those facilities did not have to pay the fee. Id. at 319, Fn. 8. In this respect, this Court held that the City of Dunedin's connection fees were voluntary. The County stresses that the Beach Cities are already hooked up to the County's water and sewer, but this does not support the forced connection to the County's expansion of its system to provide the nonessential reclaimed water. See Punta Gorda v. Burnt Shore Hotel, 639 So.2d 679 (Fla. 2nd DCA 1999); St. John County v. Northeast Florida Builders, 583 So.2d 635, 639 (Fla. 1991).

In striking down the mandatory charges imposed on those whose only choice was owning property, this Court distinguished the type of user fee it approved in Contractors and Builders Association of Pinellas County v. City of Dunedin on the basis of "a voluntary choice to connect them to an existing instrumentality of a municipality." City of Port Orange, Id. at 4.

The revenue collected by the user fee must be used for the sole purpose for which the fee is charged and no other. Contractors and Builders Association of Pinellas County v. City of Dunedin, Id., City of Daytona Beach Shores v. State, 483 So.2d 405 (Fla. 1985).

The proposed monthly fee schedule adopted by the County to support the funding of the bonds at issue here requires that all homes, businesses and vacant lots pay the fee regardless of whether they use claimed water from the county system. This feature of the proposed fee schedule is contrary to the nature of a user fee and this funding scheme cannot be validated as a proper user fee.

Nor can this fee stand scrutiny as a special assessment. This Court has held special assessments are distinct from taxes and that the theory behind a special assessment is that "portion of the community which is required to bear it receives some special or peculiar benefit in the enhancement of the value of the property against which... [a special assessment] is imposed as a result of the improvement made with the proceeds of the special assessment." City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992) emphasis added; Accord, Sarasota County v. Sarasota Church of Christ, 667 So.2d 180, 183 (Fla. 1995). To be valid, a special assessment must meet two (2) requirements: 1) the assessed property "must derive a special benefit from the service provided, and; 2) the assessment must be fairly and reasonably apportioned according to the benefits received",

Sarasota County v. Sarasota Church of Christ, Id. at 183.

The fundamental test for determining the validity of a "special benefit" is whether or not there is a logical relationship between the services provided and the actual benefit to the real property to which the services are provided. Lake County v. Water Oak Management Corp., 695 So.2d 667, 669 (Fla. 1997). In that case, this Court observed at 670:

> Clearly, services such as general law enforcement activities, the provision of courts, and indigent health care are, like fire protection services, functions required for organized society. However, unlike fire protection services, those services provide no direct, special benefit to real property. Whisnant. 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.

Where, as here, the government agency seeking to impose the special assessment has no evidence as to the specific manner in which the benefit to be paid for by the assessment will enhance the value of real property (AP-SS 39-40), and has made no effort to determine that such an enhancement of value will occur, the assessment cannot stand. (It is important to note that in its Brief on Appeal, the County has made no effort to demonstrate the special benefit to real property. On the contrary, in its argument that the proposed availability charge should be affirmed as a special assessment, it says instead: "First, the service provides a "direct special benefit" **to the customers in the Readiness to Serve Zone."** (Appellant's Brief, p. 40) And, "the availability charge lowers water costs **to customers**, offers irrigation and other non-potable water service not

impacted by watering restrictions... "(p. 41). And, "Because those with reclaimed water availability in the Readiness to Serve Zone will be getting an additional benefit not available to all in the County, the County deemed it appropriate to allocate a portion of the distribution line costs to those property **owners** who will receive a special benefit therefrom" (p. 41, emphasis added.)[2] The County has no evidence from which it can substantially support the proposition that the availability of reclaimed water will enhance the value of a Beach Community real property which has no irrigation needs or no other use for the reclaimed water. Without that evidentiary showing, the availability charge cannot stand as a special assessment.

Nor did the County make any effort to apportion the assessment based upon the special benefit provided to the particular real property. To the contrary, it simply spread the cost and proportionate share of the bonds equally to each property owner in the Beach Cities (but not to all the County's sewer customers), regardless of the size of the parcel or other factors and circumstances unique to the property, such as actual water use. (AP-5-42). This is not good enough. The means of apportioning a special assessment must be based upon the special benefit provided to the particular real property. Lake County

[2] The brief of amicus FICA similarly glosses over the critical factor necessary to distinguish and validate a special assessment and the lack of evidence to support the claim the service to be paid for - reclaimed water availability- benefits each parcel of real property assessed by enhancing its value.

v. Water Oak Management Corporation., Id. at 670. The validity of a special assessment "turns on the benefits received by the recipients of the services and the appropriate apportionment of the cost thereof" Sarasota County v. Sarasota Church of Christ, Id. at 183.

"To constitute a special benefit, the improvement must add something to the usual market value of the assessed property", Hanna v. City of Palm Bay, 579 So.2d 320, 322 (Fla. 5th DCA 1991) (Citing Fisher v. Board of County Commissioners, 84 So.2d 572 (Fla. 1956)).

In Collier County v. State, ____ So.2d ____, 24 Fla.L.Weekly, S206, (Fla. May 6, 1999), this Court determined that the fee in that case could not be a valid special assessment because there was no specific benefit to the land assessed, and that the proposed fee was not a valid user fee because there was no special benefit to the person paying the fee, and it was not a valid impact fee because there was no benefit to the property assessed.

To support a special assessment, the legislative body must have made specific findings of fact concerning the questions of special benefit to real property and fair apportionment. Those determinations will be overturned as arbitrary if they are not supported by substantial competent evidence in the record.

See, Harris v. Wilson, 693 So.2d 945, 947 (Fla. 1997); State v. Sarasota County, 693 So.2d 546, 548 (Fla. 1997). No such evidence was proffered here.

III. AN AVAILABILITY CHARGE IS NOT AUTHORIZED BY OR CONSISTENT WITH §403.064, §373.250, or §180.02 FLA. STAT.

The County has tried to find authorization for a tax upon a distinct segment of the public, and without a plebecite, in the legislature's general statements favoring reuse of reclaimed water (§403.064(8), Fla.Stat. and §373.250, Fla.Stat.), and this language from Section 403.064(9): "A local government that implements a reuse program under this section shall be allowed to allocate costs in a reasonable manner." Allocation of costs does not necessarily equal taxation of costs. Appellees suggest strict adherence to the proper legal methods of "taxing" costs is the only reasonable manner in which such costs may be allocated.

Nor does Section 180.02(3), Fla.Stat. imply a methodology for taxation of the costs of "requiring all persons or corporations... to connect, when available, with any sewage system or alternative water supply system." In light of the previous decisions of this Court, it is unlikely a mandatory connection fee could be imposed upon persons or corporations in such a zone or area.

To the contrary, appellees suggest funds collected from any fees imposed must be shown to benefit those who have paid the fees and where fees have been collected for

public works or services which benefit the entire community, the entire population of that community must be subject to the fee. St. John County v. Northeast Florida Builders, 583 So.2d 635, 639 (Fla. 1991).

CONCLUSION

The Trial Court properly found that the County is proceeding under the authority of Chapter 153, Fla.Stat. for the purpose of expanding its reclaimed water system. The Trial Court properly found that because the County seeks to construct, own, maintain and operate a portion of this newly proposed reclaimed water system within the corporate limits of Madeira Beach and Indian Rocks Beach, it must have the consent of these municipalities to do so under that Chapter. These Beach Communities have not consented and the Trial Court was correct to rule that the County cannot proceed with the reclaimed water system within the corporate limits of those municipalities.

The availability charge proposed as a part of the funding mechanism for the bonds is not a proper and legal user fee and cannot meet the test for a special assessment. Nor did the County properly support the necessary determinations it had to make of special benefit and fair apportionment that would qualify the charge as a special assessment by substantial competent evidence. It is, therefore, an invalid tax which has not been properly approved by public referendum. For

all of these reasons, the Trial Court's Final Judgment denying the bond validation should be sustained by this Court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellees has been furnished by U.S. Mail to Joseph A. Morrissey, Assistant County Attorney, 315 Court Street, 6th Floor, Clearwater, Florida 33756 and to Grace E. Dunlap, Bryant, Miller and Olive, P.A., 101 East Kennedy Blvd., Suite 2100, Tampa, Florida 33602 this _____ day of September, 1999.

_____

LEE WM. ATKINSON

CERTIFICATION

The undersigned has certified that this Brief used 14 point Times New Roman type and does hereby comply with Rule 9.210(a)(2), Florida Rules of Appellate Procedure and the Administrative Order of this Court dated July 13, 1998.

_____

LEE WM. ATKINSON