IN THE SUPREME COURT OF FLORIDA

Pinellas County, Florida, **CASE NO. 96,332**

Appellant,

v.

The State of Florida,
The City of Madeira Beach, Florida,
The City of Indian Rocks Beach,
Florida, James Palamara, Robert Johnson,
Marsha Loper and John Demont,

Appellees.
_____/

AMICUS CURIAE BRIEF OF THE FLORIDA ASSOCIATION OF COUNTY ATTORNEYS

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I. The trial court erred by focusing on the mandatory nature of the fee and overlooking the fact that it is a utility fee authorized by state law. Pinellas County has ample authority under general law, its charter, and special laws to recover its costs when providing water service to its unincorporated area and municipalities alike. The trial court also erred in determining that the County was required to follow chapter 153, Florida Statutes, when by its own terms, chapter 153 is a *supplemental* method for counties to provide water and sewer

systems.

II. The reclaimed water availability charge is in substance the same as a special assessment which counties are legally authorized to impose. In its Bond Resolution, the Board of County Commissioners declared that the improvements to the distribution system for reclaimed water will specially benefit the affected properties, and that the costs of improvements are fairly apportioned among the affected properties. As such, the legal requirements for imposing a valid special assessment have been met. It serves no purpose to invalidate the charge at issue and with it the County's means of funding its water reclamation project solely because the County labelled it a "fee."

I. THE MANDATORY UTILITY FEE AT ISSUE IN THIS CASE IS LEGAL BECAUSE IT IS AUTHORIZED BY STATE LAW

The trial court relied incorrectly on State v. City of Port Orange, 650 So. 2d 1, 3(Fla. 1994), in ruling that a mandatory availability charge is an impermissible tax. The trial court misconstrued the holding in Port Orange by focusing only on whether the fee was mandatory, and not on whether the fee

was authorized by state law.

Port Orange distinguishes between legal mandatory fees which are authorized by state law and those fees not authorized by state law which must be voluntary. In Port Orange, this court determined that a mandatory transportation utility fee, levied on all properties fronting local roads in the municipalities, was an illegal tax because it was not authorized by state law. The trial court likened the fee to storm-water utility fees. This court observed, however, that:

> storm-water utility fees are expressly authorized by section 403.031, Florida Statutes (1993). Similarly, various municipal public works and charges for their use are authorized by chapter 180, Florida Statutes (1993). However, the City's transportation utility fee is not authorized by chapter 180, Florida Statutes.

650 So. 2d at 4.

Section 403.031(17), Florida Statutes, provides that storm water management programs are to be operated "as a typical utility which bills services regularly, similar to water and wastewater services." Utilities providing water and sewer are therefore presumed by the Florida Legislature to be "typical utilities " for billing purposes.

Service availability charges of the sort at issue here are recognized in

Florida as valid utility fees. See,e.g., § 367.101, Fla. Stat. (1997) (providing that for utilities regulated by the Public Service Commission "the Commission shall set just and reasonable charges and conditions for service availability"). That the Pinellas County service availability charge at issue here involves reclaimed water does not change its nature as a valid utility charge, authorized by state law.

Florida has long provided statutory authority for local ordinances mandating connection to sewer or to reclaimed water service when service is available in an area. Section 153.12, Florida Statutes (1997), for example, provides that counties may, upon construction of a sewage disposal system and the financing of such a system by the issuance of sewer revenue bonds, require that each lot or parcel of land within the county which abuts upon a street or other public way containing sanitary sewer to connect to such sewer. Section 381.0065, Florida Statutes (1997), provides that connections to on-site sewage and disposal systems are only allowed when service is not available from a publicly owned or private sewage system. Section 381.00655, Florida Statutes (1997), further provides that property owners must connect to available sewer systems within a specified time. Section 373.309, Florida

Statutes (1997), provides for requirements for mandatory connection to available potable water systems in areas of known contamination. Section 180.02(3), Florida Statutes (1997), provides that municipalities have the power to create a zone or area by ordinance and to require all persons or corporations living in or doing business within the area to connect, when available within any sewerage system or alternative water supply system, including, but not limited to, reclaimed water. Finally, chapter 403 encourages local governments to implement programs for the reuse of reclaimed water and provides further that governments implementing such programs "shall be allowed to allocate the costs in a reasonable manner." §§403.064(8) & (9), Fla. Stat. (1997). There exists, in other words, ample authority under Florida law for local governments to recoup its costs when providing water service in general and when providing reclaimed water service in particular.

Charter counties have the power to provide municipal services of this sort in unincorporated areas pursuant to the powers granted to charter counties in the Florida Constitution. Orange County v. McLeod, 645 So. 2d 411 (Fla. 1994). Counties also have the power pursuant to section 125.01(k)1, Florida

Statutes (1997), to provide waste and sewage collection and disposal, water and alternative water supplies, including reclaimed water. In addition, Pinellas County may require mandatory reclaimed water service in both the unincorporated and incorporated areas alike pursuant to the powers in its Charter and its Special Acts. See,e.g., §126-1, Pinellas County Code, et seq. As such, Pinellas County's charge for reclaimed water, even under a Port Orange analysis, is a legal mandatory fee, authorized by state law. The trial court erred by focusing on the mandatory nature of the fee and overlooking the fact that it is simply a utility fee. Mandatory utility connection fees are not taxes and the mandatory availability charge of Pinellas County is not an illegal tax.

The trial court also erred in ruling that Pinellas was required to follow the dictates of chapter 153, Florida Statutes. Section 153.20 states that chapter 153 is a supplemental method for counties to provide water and sewer systems. The trial court inexplicably found that, pursuant to chapter 153, Pinellas County needed the consent of the municipalities in which the system was to be constructed notwithstanding Pinellas County's power to construct water and sewer utilities in municipalities pursuant to Special Act as codified

in the Pinellas County Code. In Mountain v. Pinellas County, 152 So. 2d 745, 747 (Fla. 2d DCA 1963), chapter 153 was described in a case involving Pinellas County as "supplemental and not to be regarded as in derogation of existing powers or repealing any such special acts." Section 153.20 has not been amended since Mountain was decided in 1963. There exists no support, therefore, for the argument that Pinellas County no longer retains all authority regarding water and sewer provided in its Special Acts, including the authority set forth in section 126-36, Pinellas County Code as follows:

> The board of county commissioners is hereby authorized and empowered to construct, own, operate or maintain any water system, sewage disposal system, water system improvements and sewer improvements or additions thereto, as defined in F.S. §153.02, on property located within the corporate limits of any municipality within the county without the consent of the council, commission or body having general legislative authority in the government of such municipality...

The trial court chose to ignore the precedent in Mountain and rely instead upon Hodges v. Jacksonville Transportation Authority, 353 So. 2d 1211 (Fla 2d DCA 1977), which is inapplicable to this case. Hodges involved condemnation of right of way for a limited access highway where the condemning authority failed to gain required consent from a municipality as

required in section 338.01, Florida Statutes. Unlike chapter 153, however, section 338.01 is in no way supplemental in nature. The trial court, in declaring the availability charge an illegal tax, overlooked this critical difference in the character of these two statutes, the precedent of the Second District Court of Appeal in Mountain, the Pinellas County Charter, and applicable general and special law. This court should reverse.

II. EVEN IF THE CHARGE AT ISSUE IS IMPERMISSIBLE AS A MANDATORY FEE, IT IS IN SUBSTANCE A VALID SPECIAL ASSESSMENT WHICH BENEFITS THE AFFECTED PROPERTIES AND WHICH IS REASONABLY APPORTIONED AMONG THE PROPERTIES RECEIVING THE BENEFIT

The reclaimed water availability charge at issue here is in substance no different than a special assessment which counties are authorized to impose under Florida law. Chapter 125, Florida Statutes, authorizes counties to provide for and regulate water collection and disposal, including reclaimed

water, and to create municipal service taxing or benefit units to fund such services. See §§ 125.01(1)(k)1. & (q), Fla. Stat. (1997). More importantly, the list of governmental powers in section 125.01(1) is by no means exclusive. Courts broadly construe a county's home rule authority, allowing a county to perform all acts necessary to carry out its governmental powers to the extent not inconsistent with general or special law. See Santa Rosa County v. Gulf Power, 635 So. 2d 96, 99(Fla. 1st DCA 1994), and cases cited therein.

The Fourth District Court of Appeal accordingly rejected the notion that a county had to establish a municipal service taxing unit or benefit unit (MSTU or MSBU) pursuant to section 125.01(1)(q), Florida Statutes, before it could impose a special assessment. In Sockol v. Kimmins Recycling Corp., 729 So. 2d 998 (Fla. 4th DCA 1999), the court relied upon the expansive language in section 125 to determine that the county need not create an MSTU or MSBU pursuant to section 125.01(1)(q) in order to impose a special assessment. According to the court:

> Section 125.01(3)(b) provides for a liberal construction of section 125.01 'in order to effectively carry out the purpose of this section and to secure for the counties of broad exercise of home rule powers authorized by the State Constitution.' These provisions empower St. Lucie County to act as it did in imposing a special

> assessment without first establishing an MSBU or MSTU. Further, section 125.01(1)(r) permits a county to 'levy and collect ... special assessments' as distinct from the county's power to '[l]evy and collect taxes, both for county purposes and the providing of municipal services within any municipal service taxing unit...' §125.01(1)(r), Fla. Stat. (1997). The plain meaning of this subsection when given the mandated liberal construction in favor of the County, provides the authority for St. Lucie County's action of imposing a special assessment on a portion of the unincorporated area of the County without first creating an MSBU of MSTU.

Sockol, 729 So. 2d at 1001.

Sockol is equally instructive insofar as it notes that the charge at issue would run afoul of the law were it characterized as a *mandatory* user fee. Id. at 1000-01 (citing State v. City of Port Orange, 650 So. 2d 1,3 (Fla. 1994)). According to the court, both parties in Sockol conceded as much, but failed to look more closely at the question of what separates a "fee" from an "assessment." A fee is charged in exchange for a governmental service which benefits the party paying the fee, and the amount of the fee must bear some relationship to the cost incurred by the government in providing the service. See generally Port Orange, 650 So. 2d at 3; Contractors and Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 319 (Fla. 1976). A special assessment must

similarly benefit the affected property and the amount of the assessment must be fairly apportioned. City of Boca Raton v. State, 595 So. 2d 25, 29 (Fla. 1992). Both, in other words, represent a rationally calculated charge imposed by a government to defray the cost of a government-provided service. Thus, the only practical difference between the two is that in the case of a fee, the cost of the service is charged to the user, and in the case of a special assessment, it is charged against the affected property.[1]

Pinellas County is authorized pursuant to its Charter and Special Acts to impose a special assessment or a fee in the unincorporated areas and municipalities alike. See,e.g., Home Rule Charter for Pinellas County, Florida, §2.04(n). As set forth in Section 1.04, paragraphs (E)[2] and (F) of the Bond Resolution the Board of County Commissioners found that the improvements to the distribution system for reclaimed water will specially benefit the affected properties and that the costs of the improvements are fairly

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[1]If anything, the former method is more just in that the charge as a "fee" is always levied against the end user rather than the person who happens to own the property.

[2]Section 1.04 has two paragraph (F)'s, an apparent typographical error. This sentence refers to the two paragraphs marked "(F)" in the Resolution.

apportioned among the affected properties. Thus the Board of County Commissioners determined as a matter of fact, and it has not been disputed, that the legal requirements for imposing a valid special assessment have been met. Moreover, the charges at issue are not like typical user fees that are based on the rate of use of a government service. According to the Affidavit of Pick Talley, which is in the record as Exhibit B to Pinellas County's Memorandum of Law in Support of Validation, the seven dollar monthly availability fee is based on recovering a portion of the system's *capital cost*. That the County termed this charge a "fee" rather than a "special assessment" should not be fatal to the proposed reclaimed water system. If the trial court's decision is allowed to stand, Pinellas County will undoubtedly repeat the entire process, at great cost to the public, only to accomplish the precise result it seeks here.

In cases such as this where the charge at issue is in essence a valid legal special assessment, it serves no purpose to invalidate the charge, and with it, the County's means of funding its water reclamation project solely because the County terms this charge a "fee." As the Fourth District reasoned in Sockol, a government should not be bound to employ a specified statutory procedure

when that government enjoys alternate means of accomplishing the same end. 729 So. 2d at 1001.

CONCLUSION

Amicus Curiae, for the reasons set forth above, urges this court to reverse the trial court's Final Judgment refusing to validate the bonds with instructions to dismiss with prejudice the claims of Madiera Beach and Indian Rocks Beach, and to enter an Order validating the bonds.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was served by U.S. Mail, postage pre-paid, this ____ day of September, 1999, to Lee Wm. Atkinson, Esquire, Tew, Zinober, Barnes, Zimmet & Unice, 2655 McCormick Drive, Prestige Professional Park, Clearwater, Florida 33759, C. Marie King, State Attorney's Office, P.O. Box 5028, Clearwater, Florida 34618-5028, Joseph A. Morrissey, Esquire, Assistant County Attorney, Pinellas County, 315 Court Street, 6th Floor, Clearwater, Florida 33756, Grace E. Dunlap, Esquire, Bryant, Miller and Olive, P.A., 101 East Kennedy Blvd., Suite 2100, Tampa, Florida 33602, and Kenneth A. Guckenberger, Bryant, Miller and Olive, P.A., 101 East Kennedy Blvd., Suite 2100, Tampa, Florida 33602.

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