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,

Appellant,

v.

THE STATE OF FLORIDA,
THE CITY OF MADEIRA BEACH, FLORIDA,
THE CITY OF INDIAN ROCKS BEACH, FLORIDA
JAMES PALAMARA, ROBERT JOHNSON, FRED VOWINKEL
MARSHA LOPER AND JOHN DEMONT,

Appellees.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Appellant, Pinellas County, Florida (the "County") presented its basic argument in its Initial Brief. In this Reply Brief, the County responds to the Appellees' counter-argument.

REPLY TO THE APPELLEES' COUNTER-ARGUMENT

1. Reply to Appellees' Statement of the Facts, citations to the Record and attachments.

The Appellees' supplemental "Statement of the Facts" section contains several statements and citations that, if left uncorrected, could lead the Court to conclusions not supported by the Record. On several occasions, Appellees make reference to the unverified Counterclaim (App-H) to assert that individual residents will not be able to use reclaimed water and that reclaimed water is of no value to "many citizens of the Beach Communities." (Answer Brief, p.2) In fact, there is no Record evidence to such effect. None of the individuals whose names were affixed to the Answer and Counterclaim (AP-H) testified at the Validation hearing or filed affidavits objecting to the Bonds, to the Availability Charge or to reclaimed water.

The Appellees' assertion that the County offered no evidence regarding the benefit to real property (Answer Brief pp. 2-3) is also contradicted by the Record. *See* AP-5-23, 39-40 (testimony of County Director of Utilities); AP-SUP-5-1 (reports of Parsons Engineering (the "Consultants") regarding water needs and alternative water sources for

southern portions of the County); AP-X-2 (findings of the County's Board of County Commissioners regarding the benefits of reclaimed water).

Appellees seek to introduce evidence for the first time on Appeal that was not in the Record below by attaching a superceded 1995 rate resolution to the Answer Brief described as an "Ordinance" that controls the instant dispute. The Ordinance and Resolutions properly before this Court in the Record (AP-X, AP-Y, AP-Z) replaced the 1995 rate resolution attached to Appellees' Answer Brief, and were drafted in anticipation of the Beach Cities and other beach communities receiving reclaimed water service. The 1995 rate resolution applied to the County's established reclaimed water system in northern portions of the County in place since 1976 (AP-S-22). The operative rate resolution applicable to the instant dispute is Resolution No. 98-01 (AP-Y). Resolution No. 98-01 does not seek to invoke the authority of Ch. 153. Appellees should not now be allowed to potentially confuse the issue by submitting the repealed and superceded rate resolution not found in the Record.

Even more problematic is the Appellees' assertion that Ordinance No. 97-103 (AP-X) refers to ". . . Chapter 153 as the source of the authority to construct, operate and fund this particular reclaimed water system." (Answer Brief, pp.5-6) This is a complete mischaracterization of Ordinance No. 97-103. The page cited by the Appellees (AP-X-12) contains a savings clause referencing Ch. 153 (and special assessments) as the

alternative authority in the event that the Availability Charge is deemed invalid. The citation in a savings clause evidences the County's intention not to rely on Ch. 153 as the authority for imposing the Availability Charge in the Ordinance because it is included as alternative authority, not in the main body of the Ordinance. The Appellees' citation of this clause and inclusion of a superceded 1995 rate resolution should be disregarded by the Court or, in the alternative, struck from Appellees' Answer Brief pursuant to Rule 9.180(h)(3), Fla.R.App.P.

The Appellees overstate the trial court's ruling below by representing at page 3 of the Answer Brief that the trial court held that the County was funding the reclaimed water project pursuant to Ch. 153. The trial court made no reference to the County's use of Ch. 153 or any citations by the County to the Ch. 153. Rather, the trial court appears to reason that Ch. 153 is generally applicable to the County, is not optional, and that Section 153.03(1) requires that the County gain the consent of the municipalities. There is no finding by the trial court that the County actually invoked[1] the authority of Ch. 153 (AP-R-4-5).

The Appellant notes the following list of citations in the Answer Brief which are not supported by the Record:

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[1] This interpretation of the Court's ruling is further supported by the fact that the Appellees did not include one of the purported references to Ch. 153 — the 1995 Rate Resolution — in any filing to the Court below.

At page 2, the Appellees incorrectly cite income as a primary factor in determining where the County would locate the South County reclaimed water program. In fact, the primary factors used by the Consultants were (1) potable water use per dwelling unit and (2) groundwater quality for purposes of sinking shallow irrigation wells (AP-SUP-5-1)[2].

At page 6, the Appellees' reference to the County's proposal to have municipalities in the Water Service Area adopt resolutions accepting the reclaimed water system and its funding mechanisms is without a citation to the Record.

At page 10, the Appellees assert that the County made no effort to determine (1) what percentage of water consumption could be replaced by the use of reclaimed water and (2) to what extent potable water use would be decreased upon the availability of reclaimed water to the beaches. This statement is without any citation to the Record. In fact, the County's consultant's report did consider these factors. *See* AP-SUP-1-1, 5-1, and AP-SUP-Appendix A to the January 1997 supplement.

2. The Appellees fail to recognize the optional and supplemental nature of Ch. 153 of the Florida Statutes.

The Appellees' assert that the County relied upon Ch. 153 as authority for imposing the Availability Charge and then failed to obtain the consent of municipalities

[2] Median family income and proximity to the transmission main were secondary factors (AP-SUP-5-1). Further, the inclusion of the secondary factors "did not generally reduce the priority ranking" that ranked the Beach Cities amongst the top candidates for reclaimed water (AP-SUP-5-2).

under § 153.03(1), Fla. Stat. (1997) regarding the Availability Charge. As demonstrated in Section 1 above, the County was not relying on Ch. 153 as its authority when implementing the Availability Charge. Section 153.20, Fla. Stat. (1997) requires that this law be considered supplemental authority for water and sewer projects to be invoked at the option of a county. It is not exclusive authority.

The County has independent authority under Home Rule, the Special Acts (Ch. 29442, Laws of Fla. (1953), Ch. 20066, Laws of Fla. (1939) and Ch. 17644, Laws of Fla. (1935)) and §§180.02, 403.064 and 373.250 of the Florida Statutes to assess the Availability Charge. *See* Initial Brief of the Appellant (pp. 18-26). The Appellees' contention (and the lower Court's ruling) that Ch. 153 applies to the Availability Charge completely ignores the supplementary nature of Ch. 153 and should not persuade this Court, where, as here, the County is operating under alternative sources of authority. This Court has held that virtually identical statutory language gives local government the option to rely on other available authority. *City of Boca Raton v. State*, 595 So.2d 25 (Fla. 1992) (§170.21 explicitly states that Ch. 170 provides supplemental, additional and alternative procedure for imposing special assessments; special assessment was properly imposed under home rule, not Ch. 170); *Taylor v. Lee County*, 498 So.2d 424 (Fla. 1986) (county's home rule authority to issue bonds under Ch. 125 supplemental to Ch. 159's bond financing provisions); *Speer v. Olson*, 367 So.2d 207 (Fla. 1978) (county

could issue water and sewer bonds under home rule power, bypassing Ch. 153 entirely). Even before the advent of home rule powers, the County's Special Acts made Ch. 153 supplemental. *Mountain v. Pinellas County*, 152 So.2d 745 (Fla. 2d DCA 1963) (county may elect to proceed under Special Act to install water system, not Ch. 153). This Court should reverse the holding below and declare that Ch. 153 does not apply to the Availability Charge.

3. The Availability Charge is a Proper Utility Fee, Not a Tax.

Appellant urges this Court to apply the law set forth in its Initial Brief regarding the County's independent and distinct support for the Availability Charge under Home Rule, the Special Acts and §§ 180.02, 403.064 and 373.250, Florida Statutes. The Appellees' Answer Brief completely ignores Home Rule, the Special Acts and the legislative authority of the County to set water rates for its customers. These laws regarding the Availability Charge are authorities that the Appellees cannot overcome, and thus ignore in their Answer Brief.

Unable to counter the County's argument regarding these laws, Appellees confusingly cite a series of impact fee cases[3] and appear to be urging this Court to apply

[3] *City of Tarpon Springs v. Tarpon Springs Arcade Limited*, 585 So.2d 324 (Fla. 2d DCA), *rev. denied* 593 So.2d 1051 (1991), *Contractors and Builders Association of Pinellas County v. City of Dunedin*, 329 So.2d 314 (Fla. 1976), *Punta Gorda v. Burnt Shore Hotel*, 639 So.2d 679 (Fla. 2d DCA 1999) and *St. John (sic) County v. Northeast Florida Builders*, 583 So.2d 635 (Fla. 1991).

the "dual rational nexus test" applicable to impact fees to this matter. *See* Answer Brief at p. 11. The County, however, has never attempted to characterize the Availability Charge to existing customers as an "Impact Fee." Thus, the first prong of the dual rational nexus test (a nexus between the need for additional capital facilities and the growth generated by the construction or expansion) would not apply here.[4]

The Appellees also contend that *State v. City of Port Orange*, 650 So.2d 1 (Fla. 1994) should govern this case. Appellees encourage this Court to enlarge the holding of *Port Orange* regarding a novel "transportation utility fee" to undo decades of governmental water and sewer charges in the State of Florida. The well-settled law in Florida (and in other jurisdictions) is that local governments may require their citizens to connect to, and pay mandatory charges arising from, public water and public sewer systems. *See* Initial Brief, pp.32-38. Such public water and sewer systems are amongst a range of activities that are considered proprietary functions of government, activities that both government and private enterprise can engage in. *See Loeb v. City of Jacksonville*, 134 So. 205 (Fla. 1931).

In *Port Orange*, a city was attempting in this Court's view to convert its road

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[4] The second prong of the test — a nexus between the expenditures of the funds collected and the benefits accruing to the construction or expansion — would be easily met in this case, where the entire amount of the Availability Charge is collected to pay off only the costs of distribution lines in the service area.

network into a toll road system (payable only by landowners) without any legislative authority. *Port Orange*, 650 So.2d at 4. This case is distinguishable because the fee in *Port Orange* implicated sovereign functions of the government. Sovereign or governmental functions are those duties owed by the government to the general public at large as part of the compact between the government and the people, acting as the sovereign. *Hamler v. City of Jacksonville*, 122 So.220, 221 (Fla. 1929). The City of Port Orange's transportation fee impinged upon the right of the citizens of Florida to free travel on the public highways, including city streets, subject only to the police powers and the power of taxation for the construction and upkeep of the roads. *See Day v. City of St. Augustine*, 139 So. 880, 885 (Fla. 1932) ("a city would have no right to erect toll gates along its streets as a means of raising revenue from citizens, taxpayers and others who travel thereon"); *City of Miami v. South Miami Coach Lines, Inc.*, 59 So.2d 52, 55 (Fla. 1952) (use of municipal streets is inherent right of a citizen). Thus, in *Port Orange*, this Court concluded that the proposed transportation fee was in essence a tax gathering revenue for the exercise of a sovereign function for the support of the government, and the exercise of various functions the sovereign is called on to perform. *Port Orange*, 650 So.2d at 3, citing *City of Boca Raton v. State*, 595 So.2d 25 (Fla. 1992) and *Klemm v. Davenport*, 129 So. 904 (Fla. 1930).

To carry *Port Orange* to the extent urged by Appellees would convert mandatory

water charges into unauthorized taxes. This is contrary to the long-established water and sewer system fees for such proprietary governmental services in Florida and throughout the United States. Unlike *Port Orange*, in which this Court found "no statutory or constitutional authority" for the transportation utility charges by that City, the Constitution and the Legislature authorize Pinellas County to collect fees for water facilities, water service and reclaimed water in a variety of sources. *See* Article VIII, 1(g), Fla. Const. (charter counties have all powers of local government not inconsistent with general law); 1953 Special Act, § 126-129 (board shall prescribe and collect reasonable rates, fees or other charges for the <u>services and facilities</u> of such water system . . .") (AP-V); §180.02(3), Fla. Stat. (1997) (authorizing mandatory connection to reclaimed water systems); §403.064, Fla. Stat. (1997) (local government implementing reclaimed water program allowed to allocate costs in a reasonable manner). Thus, an authorized water utility is distinguishable from the sovereign function of keeping the roads open for free travel in *Port Orange*. When operating a proprietary function such as water service, the County can assess the Availability Charge for reclaimed water to its water customers without it becoming a tax. Appellees and the trial court ignore this distinction, and try to use *Port Orange*'s restrictive language regarding mandatory fees associated with governmental functions to eliminate decades of water and sewer fees by categorizing the Availability Charge for reclaimed water as an unauthorized tax. This Court must not

permit such an expansion of *Port Orange*.

The Appellees also cite *Port Orange* by noting that certain persons might not currently have use for reclaimed water, and thus the mandatory Availability Charge is not a proper user fee. The Appellees' assertions that certain properties in the Beach Cities have "no irrigation needs or no other use for the reclaimed water" (Answer Brief, p. 16) are flawed in two fundamental ways. First, judging whether a particular property actually makes use of an available utility has never been the method pursuant to which water and sewer availability charges are evaluated. *See State v. City of Miami Springs*, 245 So. 2d 80 (Fla. 1971) (flat rate for sewer charges to all single family residences, unrelated to actual use was not unreasonable, arbitrary or in conflict with State or Federal constitutions or law); *Town of Redington Shores v. Redington Towers, Inc.*, 354 So.2d 942 (Fla. 2d DCA 1978) (mandatory sewer charges against unoccupied property applied from date the sewer main was available to be used were permitted; sewage charges were reasonably related to the value of service rendered either as actually consumed or as readily available). The focus is whether the service is made available to every property, regardless of whether the owner uses the service. If such a property has the potential to use reclaimed water, whether or not an individual property owner decides to use it, the Availability Charge is proper. *Redington Shores, supra; Hallandale v. Meekins*, 237 So.2d 318 (Fla. 4th DCA 1970) (although property not currently using residential sewer

service, potential use of such service warranted mandatory sewer fee).

The second flaw in the Appellees' argument that certain property owners are "non-users" is that they are users of potable water, and the Record shows that reclaimed water is an integral part of the overall water supply system to the Beach Cities (AP-S-22-24; AP-X, AP-Y). The County is under a legislative directive to exhaust its reclaimed water supplies before importing other forms of potable water from outside the County to meet the potable water needs of its customers. *See* §373.016(4)(a), Fla. Stat. (1999), AP-S-22. Potable water and reclaimed water are thus inextricably linked as related components of the water supply. No Appellee has ever indicated that they do not have use for potable water. To the contrary, the failure of the County to supply potable water to the Beach Cities would be a catastrophic event for those communities, who have virtually no ability to supply themselves with either potable or irrigation water (AP-V, AP-S-26). To continue to ensure an adequate water supply to its customers in the Beach Cities, the County Commission determined that the reclaimed water supplies of the County must be utilized. Because each property in the Beach Cities has the potential for using water (including reclaimed water), the Appellees argument that certain properties are "non-users" fails.

4. The Answer Brief mistakenly characterizes the Availability Charge for reclaimed water as an improper special assessment.

In its Initial Brief, the County argued in the alternative that the Court could also uphold the Availability Charge by construing it as a special assessment. Appellees contend that the County's Availability Charge does not confer a special benefit on the property and is not fairly apportioned amongst the properties (Answer Brief, pp.15-16).

The proposition that a reclaimed water line connection confers a special benefit to the property owners is well within what this Court has construed to be appropriate for purposes of defining "benefit" for a special assessment. *See City of Treasure Island v. Strong*, 215 So.2d 473, 478-79 (Fla. 1968) (presuming benefit to non-beachfront properties for beach erosion control systems) citing *Atlantic Coast Line Rail Company v. City of Gainesville*, 91 So. 118 (Fla. 1922) (presuming peculiar benefit where assessments levied upon property bordering an improved street). Beyond such a presumption, the County made specific findings in Resolution No. 98-251 (AP-Z-2-3) regarding the benefit to the properties and the apportionment of the costs. Courts should not substitute their judgment for such determinations of special benefit. *Harris v. Wilson*, 656 So.2d 512, 515 (Fla. 1st DCA 1995) *aff'd* 693 So.2d 945 (1997).

Further, there is uncontradicted evidence in the Record that reclaimed water programs: (1) are used by a substantial majority of residents in neighboring beach communities like St. Pete Beach and Tierra Verde similar to the Beach Cities in geography and geology (AP-N-Exh.B, p.2); 2) increase property values as an additional

benefit to the property (AP-S-39-40); and 3) allow a wider range of irrigation options unimpeded by water restrictions imposed on potable water (AP-N-Exh.B, p.2). Reclaimed water is also less costly than potable water for the same units of production (AP-S-23). Thus, properties with reclaimed water service available receive special benefits that other unserved properties do not receive.

Appellees also argue that the costs of the project are not fairly apportioned. The apportionment of costs is a legislative function that should not be second guessed by courts. *Harris v. Wilson*, 656 So.2d at 516. Findings of the legislative body must be sustained as long as reasonable people may differ as to whether the land assessed was benefitted by the local improvement. *City of Boca Raton v. State,* 595 So.2d at 30. The County's Availability Charge consists of a portion of the cost of the specific distribution lines bringing reclaimed water to the properties in question from the main transmission lines (AP-S-24). In the calculations, the County credited $6 million in grant moneys (reducing the approximate cost from $22 million to $16 million) and averaged the balance of the costs of the distribution lines and the hose bib connection at each property (AP-S-29-30). This apportionment was reasonable.

5. Section 180.02(3) authorizes mandatory connections and therefore charges like the Availability Charge.

The County is authorized by §180.02(3) to require connection to the reclaimed

water system. The Appellees only retort to this argument is a citation of an impact fee case (*St. Johns County, supra*) for the proposition that a showing of a special benefit to those who have paid the fees is required. Appellant does not dispute that is a proper recitation of the rule for impact fees. But where, as here, a charter county can cite direct statutory authority for requiring connections to reclaimed water, it does not believe that the rationale applicable to impact fees (which are not created pursuant to statutory authority) would control. The Legislature has authorized required connections for reclaimed water. The County has imposed a fee[5] pursuant to such applicable statutory and home rule authorization. Therefore, neither *St. Johns County* nor *Port Orange* controls.

CONCLUSION

The Appellees urge this Court to (1) apply Ch. 153 to a County even where it opts not to invoke it and (2) expand its ruling in *Port Orange* to invalidate the County's reclaimed water Availability Charge. The Ch. 153 argument fails because it does not recognize the optional nature of Ch. 153 under §153.20, Fla. Stat. (1997). *Port Orange* should not apply because required hook-ups to water and sewer systems and their associated fees are well-established. The Availability Charge for reclaimed water is

[5] The County's Availability Charge is actually more accommodating to property owners than § 180.02(3) Fla. Stat., contemplates. First, the County permitted all those with functioning wells for irrigation to opt out of the Availability Charge. Second, it permits customers who do not wish to use the Reclaimed Water to forgo connection to the reclaimed bib at the property site, thereby saving (for residential customers) $2.00 per month.

within the framework of such traditional utility charges, reasonably related to the costs of the service. The trial court erred in concluding that *Port Orange* required all utility fees to be voluntary and that Ch. 153 applied to this matter.

For all of the forgoing reasons, the Final Judgment denying validation of the Bonds should be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant has been furnished by U.S. Mail to Lee Wm. Atkinson, Esquire, Tew, Zinober, Barnes, Zimmet & Unice, 2655 McCormick Drive, Prestige Professional Park, Clearwater, Florida 33759, and Marie C. King, State Attorney's Office, P.O. Box 5028, Clearwater, Florida 34618-5028, this the ___ day of October, 1999.

____
Grace E. Dunlap

CERTIFICATION

The undersigned does hereby certify that this Reply 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.

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Grace E. Dunlap