

IN THE SUPREME COURT OF FLORIDA

Case Number: SC14-350

SCOTT MORRIS, JOHN SULLIVAN, LARRY BARTON,
RICHARD KUDLA, and WILLIAM DEILE,
Appellants,

v.

CITY OF CAPE CORAL,
Appellee.

Bond Validation Appeal from a Final Judgment rendered by
the Twentieth Judicial Circuit, in and for Lee County, Florida

Lower Court Case No. 13-CA-002406

**BRIEF OF
FLORIDA LEAGUE OF CITIES AND CITY OF COCOA, FLORIDA,
AS *AMICI CURIAE* ON BEHALF OF
RESPONDENT, CITY OF CAPE CORAL**

ANTHONY GARGANESE
City Attorney for City of Cocoa
Florida Bar No. 988294

ERIN J. O'LEARY
Florida Bar No. 0001510

**BROWN, GARGANESE, WEISS
& D'AGRESTA, P.A.**

111 North Orange Ave., Suite 2000
P.O. Box 2873
Orlando, Florida 32802-2873
Ph. 407-425-9566
Fax 407-425-9566

**Counsel for Florida League of
Cities and City of Cocoa, Florida**

TABLE OF CONTENTS

TABLE OF CITATIONS ii

STATEMENT OF THE IDENTITY OF *AMICI CURIAE* AND THEIR INTEREST IN THE CASE1

 A. The Florida League of Cities.....1

 B. City of Cocoa.....2

SUMMARY OF THE ARGUMENT4

STANDARD OF REVIEW4

ARGUMENT5

 I. Municipalities may use their home rule authority to impose special assessments.....5

 II. A legally imposed special assessment is not a tax.7

 III. Under their home rule authority, municipalities may choose which methodology they wish to use to apportion a special assessment.8

 IV. Cape Coral’s special assessment methodology comports with Florida law.9

CONCLUSION.....15

CERTIFICATE OF SERVICE15

CERTIFICATE OF COMPLIANCE.....16

TABLE OF CITATIONS

Cases

<i>Certain Lots, Etc. v. Town of Monticello</i> , 159 Fla. 134, 31 So. 2d 905 (1947).....	7
<i>City of Boca Raton v. State</i> , 595 So. 2d 25 (Fla. 1992).....	6, 7, 8, 9, 13
<i>City of Miami v. Kayfetz</i> , 92 So. 2d 798 (Fla. 1957).....	6
<i>City of Naples v. Moon</i> , 269 So. 2d 355 (Fla. 1972).....	9, 10, 13
<i>City of Tampa v. Birdsong Motors</i> , 261 So. 2d 1 (Fla. 1972).....	7
<i>City of West Palm Beach v. Williams</i> , 291 So. 2d 572 (Fla. 1974).....	9
<i>City of Winter Springs v. State</i> , 776 So. 2d 255 (Fla. 2001).....	4, 5, 9, 10
<i>Klemm v. Davenport</i> , 129 So. 904 (Fla. 1930).....	8
<i>Richardson v. Hardee</i> , 85 Fla. 510, 96 So. 290 (1923).....	9, 13
<i>Sarasota County v. Sarasota Church of Christ</i> , 667 So. 2d 180 (Fla. 1995).....	5, 8, 9, 10, 11
<i>South Trail Fire Control Dist., Sarasota County v. State</i> , 273 So. 2d 380 (Fla. 1973).....	8, 9
<i>State v. Miami Beach Redevelopment Agency</i> , 392 So. 2d 875 (Fla. 1980).....	14

<i>Strand v. Escambia County</i> , 992 So. 2d 150 (Fla. 2008).....	5
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Florida Constitution and Florida Statutes

Art. VIII, § 2(b), Fla. Const.	5
Ch. 166, Fla. Stat.....	5
Ch. 170, Fla. Stat.....	6
§ 125.01, Fla. Stat.	6
§ 166.021, Fla. Stat.	6, 7
§ 166.041(1), Fla. Stat.....	7
§ 170.19, Fla. Stat.	6
§ 170.21, Fla. Stat.	6
§ 197.3631, Fla. Stat.	6
§ 197.3632, Fla. Stat.	6

Florida Rules of Appellate Procedure

Fla. R. App. P. 9.210(a)(2).....	16
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STATEMENT OF THE IDENTITY OF THE *AMICI CURIAE*
AND THEIR INTEREST IN THE CASE

A. The Florida League of Cities

The Florida League of Cities, Inc. (“League”), is a voluntary organization whose membership consists of municipalities and other units of local government rendering municipal services in the State of Florida. Its membership presently includes approximately 400 municipalities. Under its charter, the League’s purpose is to work for the general improvement and efficient administration of municipal government, and to represent its members before the various legislative, executive, and judicial branches of government on issues pertaining to the welfare of its members.

The questions raised in this case are of great interest and concern to the membership of the League because the issues directly call into question the authority of municipalities to exercise their home rule powers to legally impose special assessments in order to address funding needs for critical services and improvements in the manner that they deem most appropriate.

This case, therefore, has a direct impact on the effective and efficient administration of municipal government in Florida. Furthermore, the manner in which the Court addresses the issues presented by this case is of fundamental importance to the membership of the League because the decision rendered herein

could affect fire assessments and critical fire department funding in numerous municipalities statewide.

One of the municipalities that will be affected by this Court's decision in this case is the City of Cocoa, which has adopted a fire assessment methodology that is virtually identical to the methodology utilized by the City of Cape Coral (hereinafter referred to as "Cape Coral" or "City"). Cocoa, therefore, joins the League in this Amici Curiae brief.

B. City of Cocoa

The City of Cocoa, Florida ("Cocoa"), is a municipal corporation located in the central part of Brevard County, Florida. Cocoa's City Charter mandates that Cocoa operate and maintain a fire department. Cocoa's fire department responds to approximately 4,500 incidents per year, which vary from emergency medical, to motor vehicle accidents, to structure and wildland fires.

Pursuant to its home rule authority, in 2006 the City Council of the City of Cocoa enacted Ordinance 20-2006 to impose a special assessment to partially fund fire protection services within its municipal boundaries. The assessment was apportioned using the "calls for service methodology."

In 2013, in furtherance of the requirement that it maintain its fire department, Cocoa adopted a new 5-year capital improvement plan (2015-2019), which includes \$8.8 million of projects critical to operating the fire department and

providing fire and emergency medical services to the citizens of Cocoa. Cocoa plans to borrow the funds to cover the costs of its 5-year capital improvement plan, and will pledge its fire protection special assessment as security for the financing of the capital improvement plan.

In anticipation of obtaining that financing, Cocoa consulted with Burton and Associates for a reevaluation of its fire protection special assessment and the methodology utilized to calculate it. Based upon Burton and Associates' study and recommendation, Cocoa decided to change the methodology it uses for calculating the rate structure for its fire assessment from the "calls for service methodology" to a two-tier methodology that is substantially similar to the two-tier methodology adopted by the City of Cape Coral.

Cocoa thereafter adopted Resolution No. 2013-085, which includes the two-tier assessment methodology, to partially fund Cocoa's cost of providing fire protection services. Cocoa was in the process of preparing its complaint for the validation of the bonds, which again will be funded in part by its new fire protection assessment, when it learned of this case.

This Court's decision in this case will directly impact Cocoa because the decision could affect not only Cocoa's current financing for its fire department, but also Cocoa's planned future financing.

SUMMARY OF THE ARGUMENT

Under both the Florida Constitution and Florida Statutes, municipalities in Florida have broad home rule powers, including the power to adopt special assessments to fund municipal services such as fire protection. There is no one method that all municipalities must use to apportion special assessments. Instead, municipalities must be able to exercise their sound discretion to determine which apportionment methodology best suits their tax base and funding needs. The methodology chosen by a municipality must be upheld so long as the methodology fairly and reasonably apportions the assessment and is not arbitrary.

Cape Coral's fire assessment is valid because it was legally imposed under Cape Coral's home rule authority, is supported in the record by competent substantial evidence, and the methodology used to apportion the assessment is fair and reasonable, and is not arbitrary. This Court should, therefore, affirm the judgment of the circuit court.

STANDARD OF REVIEW

This Court's scope of review in a bond validation case is limited to the following three issues: (1) whether the public body has the authority to issue the bonds; (2) whether the purpose of the issuance of the bonds is legal; and (3) whether the bond issuance complies with the requirements of the law. *City of Winter Springs v. State*, 776 So. 2d 255, 257 (Fla. 2001) (citations omitted).

Where the bond issuance is funded in part by a special assessment, in order to satisfy the third issue, the special assessment must satisfy the following test: (1) the property burdened by the assessment must derive a special benefit from the service provided by the assessment; and (2) the assessment for the services must be properly apportioned among the properties receiving the benefit. *Id.* at 257 (citations omitted). For both of these prongs, “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.” *Id.* at 257 (quoting *Sarasota County v. Sarasota Church of Christ*, 667 So. 2d 180, 184 (Fla. 1995)).

In determining whether these tests have been met, this Court applies the competent, substantial evidence standard of review to the trial court’s findings of fact and the *de novo* standard of review to the trial court’s conclusions of law. *Strand v. Escambia County*, 992 So. 2d 150, 154 (Fla. 2008).

ARGUMENT

I. Municipalities may use their home rule authority to impose special assessments.

Under Article VIII, section 2(b) of the Florida Constitution and Chapter 166, Florida Statutes, municipalities possess governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform municipal functions, render municipal services, and exercise any power for municipal

purposes except as otherwise provided by law. These broad home rule powers include the power to impose special assessments. *City of Boca Raton v. State*, 595 So. 2d 25, 29-30 (Fla. 1992).

Municipalities' home rule powers to impose special assessments exist, notwithstanding the fact that the Florida Legislature has also provided supplemental statutory procedures by which to adopt special assessments.¹

The determination of whether to impose a special assessment pursuant to the city's home rule powers or pursuant to other statutory authority is a legislative function left to the municipality's sound discretion. *See generally City of Miami v. Kayfetz*, 92 So. 2d 798, 801 (Fla. 1957) (city, through its proper officials, should be permitted to determine what rules are necessary for the city's own local governance). Local authorities have knowledge of their local conditions, and their assessment of the needs of their communities should be respected. *Id.*

¹ *See* § 197.3631, Fla. Stat. ("Section 197.3632 is additional authority for local governments to impose and collect non-ad valorem assessments supplemental to the home rule powers pursuant to ss. 125.01 and 166.021 and chapter 170, or any other law."); § 170.19, Fla. Stat. ("This chapter . . . shall be construed as an additional and alternative method for the financing of the improvements referred to herein."); § 170.21, Fla. Stat. ("This chapter . . . shall be deemed to provide a supplemental, additional, and alternative method of procedure for the benefit of all cities, towns, and municipal corporations of the state . . ."). *See also City of Boca Raton*, 595 So. 2d at 29-30 (holding that city had authority to impose a special assessment under its home rule authority and was not required to impose the special assessment under chapter 170, Florida Statutes).

Municipalities may, therefore, opt to use either their home rule authority or the authority provided elsewhere in Florida Statutes to adopt special assessments.

II. A legally imposed special assessment is not a tax.

When analyzing the validity of the special assessment in this case, it is essential for this Court to conduct its analysis under the rules governing fees, rather than taxes, because municipalities in Florida may levy only those taxes authorized by the Florida Legislature, *City of Tampa v. Birdsong Motors*, 261 So. 2d 1 (Fla. 1972), and any doubts as to whether a municipality may levy a tax will be resolved against the municipality, *Certain Lots, Etc. v. Town of Monticello*, 159 Fla. 134, 31 So. 2d 905 (1947). On the other hand, municipalities have broad home rule authority to charge user fees, including special assessments. *City of Boca Raton*, 595 So. 2d at 29. Additionally, under their home rule authority, they may conduct municipal government, perform municipal functions, and render municipal services, and may “exercise those powers at their own discretion, subject only to the terms and conditions they choose to prescribe.” § 166.041(1), Fla. Stat.; *see also* § 166.021, Fla. Stat. (municipalities may raise “by user charges or fees authorized by ordinance, amounts of money which are necessary for the conduct of municipal government . . .”).

A special assessment is an enforced contribution from a property owner, but if legally imposed, is not a tax. *City of Boca Raton*, 595 So. 2d at 29. A special

assessment 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.” *Klemm v. Davenport*, 129 So. 904, 907 (Fla. 1930). Taxes, on the other hand, are “levied throughout the particular taxing unit for the general benefit of residents and property,” and do not carry a requirement that they provide any specific benefit to the property. *City of Boca Raton*, 595 So. 2d at 29. Thus, a special assessment differs from a tax because of its special benefit and fair apportionment. *Id.*; *accord Sarasota County*, 667 So. 2d at 183 (distinguishing taxes from special assessments and reiterating that “special assessments must confer a specific benefit on the land burdened by the assessment and are imposed under the theory that the portion of the community that bears the cost of the assessment will receive a special benefit from the improvement or service for which the assessment is levied”).

III. Under their home rule authority, municipalities may choose which methodology they wish to use to apportion a special assessment.

This Court has previously held that “[t]he apportionment of [special] assessments is a legislative function.” *South Trail Fire Control Dist., Sarasota County v. State*, 273 So. 2d 380, 384 (Fla. 1973) (citation omitted). Local government officials have knowledge of the unique challenges they face in funding the municipal services they provide. They must have flexibility in exploring stable

and reliable revenue sources, and must have the ability to change their funding plan if circumstances warrant. To that end, the precise methodology used to apportion a special assessment is “immaterial and may vary within the district, as long as the amount of the assessment for each tract is not in excess of the proportional benefits as compared to other assessments on other tracts.” *Id.* at 384. Courts should interfere with the will of the legislative body of a city only when the legislative body’s actions are arbitrary or unreasonable. *Sarasota County*, 667 So. 2d at 184; *City of West Palm Beach v. Williams*, 291 So. 2d 572, 575 (Fla. 1974) (citation omitted); *see also City of Winter Springs*, 776 So. 2d at 259 (“[S]o long as the legislative determination by the City is not arbitrary, a court should not substitute its judgment for that of the local legislative body.”).

IV. Cape Coral’s special assessment apportionment methodology comports with Florida law.

As indicated above, “[t]he manner of the assessment is immaterial and may vary” *South Trail Fire Control Dist.*, 273 So. 2d at 384. This Court has previously upheld special assessments based in part upon assessed values. *See City of Boca Raton*, 595 So. 2d at 31 (rejecting the contention that a special assessment cannot be sustained because it will be applied on an ad valorem basis); *Richardson v. Hardee*, 85 Fla. 510, 96 So. 290 (1923) (upholding a special assessment for local improvements which was based upon an ad valorem basis); *City of Naples v. Moon*, 269 So. 2d 355, 358-59 (Fla. 1972) (holding that while ad valorem

assessments were factors in the calculus for determining the amount of a special assessment to be imposed, the assessments merely formed “a logical valuation base against which the special assessment benefits may be multiplied”). Thus, the simple fact that the Cape Coral special assessment is apportioned, in part, based upon property value data obtained from the property appraiser does not automatically render the special assessment an invalid tax. Instead, this Court must examine whether the apportionment fairly and reasonably apportions the assessment and whether the apportionment is arbitrary.

When conducting this examination, this Court must start with the premise that the circuit court’s decision validating the bonds and special assessment is presumed correct. *See City of Winter Springs*, 776 So. 2d 255. Appellants, therefore, have the burden of demonstrating that the apportionment is arbitrary. Appellants complain about Cape Coral’s methodology and assert that the assessment is a tax, but they fail to demonstrate *how* the methodology is arbitrary and *why* the use of a structure value for determining Tier 2 results in an assessment that is not fairly and reasonably apportioned. *See* Initial Brief, p. 35-41. Cape Coral’s “choice of apportioning assessments by one or another methodology is not for this Court-or even Validation Opponents. Rather, it is a City responsibility in the first instance which must be upheld if not arbitrary.” *City of Winter Springs*, at 260-61; *see also Sarasota County*, 667 So. 2d at 184 (“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”). Appellants have failed to establish how Cape Coral’s apportionment methodology is arbitrary, and therefore, Appellants’ argument should be rejected by this Court.

Appellants’ argument should be rejected for the additional reason that the record contains ample, competent substantial evidence to establish that Cape Coral’s decision in adopting the two-tier method of apportionment was not arbitrary. As part of a larger plan to keep Cape Coral solvent, Cape Coral retained Burton and Associates to recommend a non-ad valorem fire assessment program that would allow Cape Coral to recover a portion of its fire protection costs, and therefore alleviate some of the burden on the City’s general fund. (App. 45, 47-48, 790, 909, 1059, 1062).

Burton concluded that a two-tier assessment approach would best address Cape Coral’s tax base and financial predicament. (App. 915). Under the first tier, all parcels in Cape Coral are assessed at one rate based upon fire and rescue service merely being available (“readiness-to-serve”) to all parcels (improved and unimproved) without discrimination because each parcel benefits in a substantially similar degree from the costs incurred by the City to make fire protection services available on a 24 hour per day, 7 days per week basis to all parcels, regardless of whether or not calls for service are ever received by any parcel. (App. 919). As

such, Burton concluded that it is fair and reasonable to apportion readiness-to-serve costs equally among benefitted parcels. (App. 915-919).

Under the second tier, improved parcels in the City are assessed for the protection from the loss of structures on parcels, based upon the value of the improvements on the parcels. (App. 916-917). Burton concluded that “structure value inherently addresses the higher and proportionate benefit accruing to properties facing potentially greater financial loss in the event of fire incident and is a direct and logical means to allocate the costs and benefits of fire protection services and facilities.” (App. 920). In addition, parcels with similar structural value are assessed with “proportionate fairness.” (App. 920). According to Burton, the protection from loss is conferred by the availability of fire protection services provided by the City either through the ability to obtain fire insurance or by the ability of the City to provide actual fire suppression services, whether or not a request for service is ever received. (App. 917-918).

Burton determined that neither the actual investment cost nor replacement cost of the improvements, which is needed for the second-tier of the assessment, is readily available to the City, and that it would be extremely expensive for the City to determine, on an annual basis, the investment or replacement cost of the structures on every improved parcel. (App. 917). He also determined, however, that structure values *are* readily available from the property appraiser’s database,

and that the property appraiser must regularly maintain those values. (App. 917). Burton concluded that using the property appraiser values would be an appropriate surrogate to represent the relative investment or replacement cost of structures on improved parcels. (App. 917-918).

In essence, Burton's Tier 2 methodology of apportionment uses a readily available public data source compiled by another governmental entity to isolate the value of structures constructed on parcels within the City. Burton concluded that this data is relevant to apportionment because "the protection from the loss of structure(s) due to fire is best represented by the protection from the loss of the investment in the structure(s) or the avoidance of the cost of replacing the structure(s) on the property." (App. 917). Appellants argue that the special assessment has all the "indicia of a tax" and is invalid because the structure value data used to calculate the special assessment comes from the property appraiser. Appellants' argument fails to consider that the structure value data the City uses in calculating the special assessment is but one component of data that the property appraiser uses to determine overall assessed value of a parcel for ad valorem tax purposes. Again, the use of property value has been accepted by this Court as a proper basis of apportioning a special assessment. *See City of Boca Raton*, 595 So. 2d 25; *Richardson*, 96 So. 290; and *City of Naples*, 269 So. 2d 355. Furthermore, and very importantly, the mere use of ad valorem tax data as a measure to

apportion a special assessment does not mean the assessment is a tax in the constitutional sense of the term. *See State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875 (Fla. 1980) (holding that county and city use of ad valorem taxes as merely a measure for determining an annual funding contribution did not mean the contribution constituted an ad valorem tax in the constitutional sense for bond referendum purposes).

In addition, Appellants have not cited to any cases holding that the use of publicly available data generated by a property appraiser for ad valorem tax purposes invalidates a special assessment. Thus, the City can lawfully rely on this data as one component for determining that the apportionment of a special assessment is not arbitrary. The assessment is valid so long as the use of that data results in the assessment being fairly and reasonably apportioned among the properties that receive the special benefit. That is precisely the case here.

Burton presented his two-tier apportionment approach to Cape Coral; they ultimately approved it via the adoption of the requisite City resolutions. Cape Coral's decision to use the two-tier methodology was not arbitrary, but rather was a carefully considered solution to Cape Coral's dire budgetary instability and shortfalls. This Court should not substitute its judgment for that of the Cape Coral City Council, and should uphold its decision.

Furthermore, this Court should conclude that municipalities have the right to assess their situations, as Cape Coral did in this case, and to utilize creative or even novel assessment apportionment methods based upon readily available public data sources, so long as the apportionment methods are not arbitrary. No one apportionment methodology is going to work in every city. Cities must, therefore, have the flexibility to explore available revenue sources, explore possible apportionment methods, and determine, in light of their tax bases and budgetary needs, what will best suit their unique needs.

CONCLUSION

Amici curiae, the Florida League of Cities and the City of Cocoa, respectfully request that this Court affirm the circuit court's final judgment in its entirety.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via email on this 24th day of April, 2014, to: **Scott Morris, Esquire**, scott@morrislawfirm.org, Morris Law Firm, P.A., Counsel for Appellants, 514 Southwest 3rd Street, Cape Coral, FL 33991; **Christopher B. Roe, Esquire**, croe@bmola.com, **Elizabeth W. Nieberger, Esquire**, enieberger@bمولaw.com, **Ryan J. Hobbs, Esquire**, bhobbs@bمولaw.com, and **Susan Churuti, Esquire**, schuruti@bمولaw.com, Bryant Miller Olive, P.A., Counsel for Appellee, City of Cape Coral, 101 North Monroe Street, Suite 900, Tallahassee, FL 32301; **Dolores Menendez, Esquire**, dmenendez@capecoral.net, City Attorney, City of Cape Coral, 1015 Cultural Park Boulevard, Cape Coral, FL 33915; **Anthony W. Kunasek, Assistant State Attorney**, akunasek@sao.cjis20.org, State Attorney's Office, 2000 Main Street, 6th Floor, Fort Myers, FL 33901; **Robert K. Robinson, Esquire**, rrobinson@nelsonhesse.com, Nelson Hesse LLP, Attorneys for Amicus Curiae City of North Port, Florida, 2070 Ringling Boulevard, Sarasota, FL 34237;

James C. Dinkins, Esquire, jdinkins@markglawson.com, and **Mark G. Lawson, Esquire**, mlawson@markglawson.com, Mark G. Lawson, P.A., Attorneys for Amici Curiae, City of Haines City, Florida and City of Springfield, Florida, P.O. Box 14143, Tallahassee, FL 32317; and **Major B. Harding, Esquire**, mharding@ausley.com and **Steven M. Hogan, Esquire**, shogan@ausley.com, Ausley & McMullen, P.A., Attorneys for Amicus Curiae, Government Services Group, 123 South Calhoun Street, Tallahassee, FL 32301.

/s/ Erin J. O’Leary
ANTHONY GARGANESE
City Attorney for City of Cocoa
Florida Bar No. 988294
ERIN J. O’LEARY
Florida Bar No. 0001510
**BROWN, GARGANESE, WEISS
& D’AGRESTA, P.A.**
111 North Orange Ave., Suite 2000
P.O. Box 2873
Orlando, Florida 32802-2873
Ph. 407-425-9566
Fax 407-425-9566

**Counsel for Florida League of
Cities and City of Cocoa, Florida**

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14-point font and that this brief complies with all requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Erin J. O’Leary
ERIN J. O’LEARY
Florida Bar No. 001510