IN THE SUPREME COURT OF THE STATE OF FLORIDA

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No. SC00-1555

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CITY OF NORTH LAUDERDALE,

Appellant,

v.

SMM PROPERTIES, INC., *et al.*,

Appellees.

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On Appeal from the Fourth District Court of Appeal
Case No. 98-03525

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# BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES SMM PROPERTIES

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## INTRODUCTION

Pursuant to Florida Rule of Appellate Procedure Rule 9.370, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Appellees SMM Properties, Inc.; M.H. Group II,; Sunbank,; as Trustee d/b/a The Presidential Plaza and The Presidential Plaza West; Kendi Inc.; Eagle Insurance Company, and MRG Realty Corp.

## INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has offices in Sacramento, California; Bellevue, Washington; Honolulu, Hawaii; and Miami, Florida. PLF's Florida office, known as the Atlantic Center, is staffed by a full-time attorney who is a member of the Florida Bar.

For 25 years, PLF's attorneys have been litigating in support of the right of individuals to be free from unreasonable burdens on their private property, including participation in cases before this Court. *See, e.g., Martin County v. Yusem*, 690 So. 2d 1288 (Fla. 1997) (standard of review of comprehensive land use plan amendments), and *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126 (Fla. 2000) (legality of a school impact fees). In addition, PLF is currently participating before this Court in another case which, like the case at bar, raises the

question of the legality of a special assessment. *Pomerance v. The Homosassa Special Water District*, Case No. SC00-912. Moreover, PLF's attorneys have been before the United States Supreme Court on two occasions representing individuals whose rights to use their property were unlawfully denied by government agencies. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). And PLF attorneys are currently representing landowners before that Court in another such case: *Palazzolo v. State of Rhode Island*, 746 A.2d 707 (R.I.), *petition for writ of cert. granted*, No. 99-2047, 2000 U.S. LEXIS 6596 (Oct. 10, 2000). PLF has a significant history of participation in issues of the type presented by this case.

## STATEMENT OF THE CASE

This case brings to this Court a topic with which it has wrestled on numerous occasions in recent years: To what extent may local government utilize nonad valorem revenue raising devices to augment legislatively authorized taxes. *See, e.g.*, *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (considering the validity of a school impact fee); *Collier County v. State*, 733 So. 2d 1012 (Fla. 1999) (considering the validity of a charge variously characterized as a special assessment, impact fee, and user fee); *Lake County v. Water Oak Management Corp.*, 695 So. 2d 667 (Fla. 1997) (considering the validity of a special assessment for fire rescue

services); *Sarasota County v. Sarasota Church of Christ, Inc.,* 667 So. 2d 180 (Fla. 1995) (considering the validity of a special assessment for a stormwater runoff utility); *State v. City of Port Orange,* 650 So. 2d 1 (Fla. 1994) (considering the validity of a road usage fee); and *City of Boca Raton v. State,* 595 So. 2d 25 (Fla. 1992) (considering the validity of a special assessment for downtown infrastructure).

The underlying friction between the citizens of this state and their local governments that generate these disputes seems to be as constant as the friction that exists between the earth's continental shelves. Counties and municipalities are continually seeking to expand their revenue bases. *See Fisher v. Board of County Commissioners*, 84 So. 2d 572, 580 (Fla. 1956) ("From experience gained over the years as a City and County Attorney, the writer is thoroughly cognizant of the difficulties attendant upon financing public improvements . . . ."); *State v. City of Port Orange,* 650 So. 2d at 4 ("[W]e recognize the revenue pressures upon the municipalities and all levels of government in Florida."). On the other hand, the people of Florida have written into their constitution deliberate, express limits on the powers of their governments to levy taxes upon them. For example, Article VII, Section 1(a), of the Florida Constitution has long provided that "No tax shall be levied

except in pursuance of law." Art. VII, § 1(a), Fla. Const.[1] And, while the state legislature has granted to local governments in Florida the power to levy ad valorem taxes,[2] the amount of an ad valorem tax which can be levied by a county or municipality is limited to 10 mills on the assessed value of the property.[3] Art. VII, § 9(b), Fla. Const.

It cannot be said that these restrictions placed by the people on their government are a creature of political whim or ill will. The requirement that local government ad valorem taxation must be legislatively authorized goes back to 1868. *See* Footnote 1, below. The limitations on ad valorem taxation in Florida, commonly known as "millage caps," were adopted in 1976. Art. VII, § 9(b), Fla. Const. (1976). These constraints are recognized as a significant factor in the growth and prosperity experienced by this state. As far back as 1956, this Court stated:

> We take judicial notice of the fact that Florida is one of the fastest growing states in the nation. It is consistent with the knowledge that we have that a major factor in this growth is contributed by the attractive ad

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[1] This language first appears in Art. VII, Sec. 3, Fla. Const. (1868).

[2] Art. VII, § 9(a), Fla. Const., states that "[c]ounties, school districts, and municipalities shall . . . be authorized by law to levy ad valorem taxes." The Florida Legislature has implemented that mandate through Chapter 192, Florida Statutes, for counties and § 166.021(1), Fla. Stat., as it pertains to municipalities. An ad valorem tax is a tax based upon the assessed value of real property. § 192.001(1), Fla. Stat.

[3] One "mill" is one-tenth of one cent. Black's Law Dictionary 993 (6th ed. 1990).

> valorem tax climate engendered by provisions written into our Constitution by the people themselves relating to controls on the funding of long range public debts, the pledging of the ad valorem taxing power and the protection of homesteads against burdensome taxation.

*Fisher v. Board of County Commissioners*, 84 So. 2d at 580.

Nevertheless, when local governments in Florida have lacked the legal authority or political will to levy an ad valorem tax, they frequently seek to recast the levy as an impact fee, special assessment, or user fee. *See, e.g.*, *Collier County v. State*, 733 So. 2d at 1016-20. This case involves the legality of a municipality's conversion of an ad valorem tax for emergency medical services to a special assessment. Unlike ordinary taxes, which are levied for the common benefit of a community, "special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property that property should pay for the improvement." *Illinois Central Railroad Co. v. City of Decatur*, 147 U.S. 190, 198 (1893); *accord* Richard R. Powell, *Law of Real Property*, ch. 5 § 39.03[1] (rev'd 1997); *Collier County v. State*, 733 So. 2d at 1017 ("[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 . . . ."). It is tempting to disregard the organic law to satisfy the financial demand of an attractive project or

where a majority of a particular population are willing to bear the cost. However, that is not the function of the Courts. When a special assessment cannot be justified, its exaction becomes an act of confiscation and abuse of power by the legislative body, and it becomes the duty of the courts to protect the person or corporation assessed. *Atlantic Coast Line Railroad Co. v. City of Winter Haven*, 112 Fla. 807, 814, 151 So. 321, 324 (1933).

PLF will argue that this Court must be careful to avoid temptations to ignore the principles of the organic law of this state which have been in existence for over 150 years, and strictly adhere to and construe the tests for determining whether a special assessment confers a special benefit on the property called upon to bear the burden. PLF will further argue that the courts should and must examine the particular components of any proposed special assessment to assure that all components meet the requirements of law. Finally, PLF will argue that when challenged, local governments should be required to offer some factual proof of the benefits conferred on property in support of the assessment.

## SUMMARY OF THE ARGUMENT

The Florida Constitution has long provided that local governments may not tax their citizens absent authorization by the constitution of the state or legislative authorization. However, counties and municipalities do possess authority to impose

impact fees, special assessments, and user fees as provided by general law. It has also long been the law of this state that a special assessment will be held invalid as an unauthorized tax unless: (1) the services at issue provide some special benefit in the enhancement of the value of the property against which it is imposed; and (2) the assessment is properly apportioned in accordance with the benefit received. The assessment for emergency medical services in this case provides no special benefit to the property burdened by the assessment. The service is available to all persons within the Appellant City of North Lauderdale's jurisdiction as may be necessary in the event of a medical emergency.

The courts of this state have a fundamental role and duty to assure that local governments do not abuse their taxing powers. This Court should not make it too onerous for taxpayers to challenge local government abuse of their authority. The ultimate burden of proving the validity of a tax or levy should be born by the local government proponent of the tax or levy. The courts should also be willing to examine each component of a service proposed to be included in a special assessment to be certain that it meets the requirements of a valid special assessment.

## I

## THE "LOGICAL RELATIONSHIP" TEST RECENTLY ARTICULATED BY THIS COURT TO EVALUATE WHETHER THE SPECIAL BENEFIT PRONG OF A SPECIAL ASSESSMENT IS SATISFIED MUST BE CAREFULLY AND STRICTLY CONSTRUED IN ORDER TO AVOID RUNNING AFOUL OF THE STATE'S ORGANIC LAW

In its recent opinion in *Lake County v. Water Oak Management Corp.*, 695 So. 2d 667, this Court appears to have either relaxed or implicitly rejected long-standing tests for determining whether a special benefit is actually conferred upon property by the services for which a special assessment is imposed. The Court stated:

> In evaluating whether a special benefit is conferred to property by the services for which the assessment is imposed, the test is not whether the services confer a "unique" benefit or are different in type or degree from the benefit provided to the community as a whole; rather, the test is whether there is a "logical relationship" between the services provided and the benefit to real property.

*Lake County*, 695 So. 2d at 669 (citations omitted, footnote omitted). In so doing, this Court relied upon two earlier decisions of this Court in which the phrase "logical relationship" was used. In the first, *Crowder v. Philips*, 1 So. 2d 629 (Fla. 1941), this Court invalidated a special assessment for the construction and operation of a hospital in Leon County because there was "no logical relationship between the construction and maintenance of a hospital, as important as it is, and the improvement of real estate

situated in the district." *Crowder,* 1 So. 2d at 631. In the second, *Whisnant v. Stringfellow,* 50 So. 2d 885, 855 (Fla. 1951), this Court remarked that *Crowder* "*indicated* that an improvement for which an '[assessment] for special benefits' is made must bear some logical relationship to the enhancement of the value of the real estate located in the taxing district." *Whisnant*, 50 So. 2d at 885 (emphasis added). In *Lake County*, this Court converted that "indication" into a test. *Lake County*, 695 So. 2d at 669. On that basis, the Court approved a special assessment which included fire protection services containing first response medical aid and educational programs and inspections. *Id.* at 667.

The Appellants here seek to employ the *Lake County* "logical relationship' test to justify the levy of a special assessment for yet another service, emergency medical services. Initial Brief of Appellant City of North Lauderdale at 11-12. Emergency medical services are statutorily defined as the systematic provision of services for assessment, treatment, and transportation of injured persons in medical emergencies. *See* § 401.211, Fla. Stat. *SMM Properties, Inc. v. City of North Lauderdale*, 760 So. 2d 998, 1000 n.2 (Fla. 4th DCA 2000). Emergency medical services benefit people, not property. *Id.* at 1004. They do not confer any particular benefit on the property being assessed. It has long been the law of this state that a special assessment must

confer a specific benefit upon land burdened by the assessment. In *Klemm v. Davenport,* 129 So. 904 (Fla. 1930), this Court stated:

> [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. It is limited to the property benefited, is not governed by uniformity and may be determined legislatively or judicially.

*Klemm v. Davenport*, 129 So. at 907-08. Except for the majority decision in *Lake County*, this court has repeatedly and consistently relied upon this passage from *Klemm* since 1930. *See Whisnant v. Stringfellow,* 50 So. 2d at 885 (quoting *Klemm*); *Fisher v. Board of County Commissioners*, 84 So. 2d at 578 (quoting *Klemm*); *City of Boca Raton v. State*, 595 So. 2d at 29 (quoting *Klemm*); and *Collier County v. State*, 733 So. 2d at 1017 (quoting *Klemm*). Because the assessment in question here confers no special benefit on property, it cannot stand.

PLF submits that this Court ignores the wisdom of this well- and long-settled precedent at the peril of sanctioning unauthorized taxes in contravention of the express will of the people of this state. Should this Court determine to utilize the "logical relationship" test urged by the City in this case, the test should be carefully and strictly construed so that it does not depart from that standing precedent in this Court.

**II**

## THIS COURT SHOULD NOT HESITATE TO EXAMINE THE INDIVIDUAL COMPONENTS OF A SPECIAL ASSESSMENT

The Appellant here also seeks to capitalize upon an admitted misreading of *Lake County* by the lower court of appeal in another case to defend the special assessment in this case. In *City of Pembroke Pines v. McConaghey*, 728 So. 2d 347 (Fla. 4th DCA 1999), the court of appeal had occasion to consider the validity of a special assessment levied on property owners for consolidated fire rescue services and emergency medical services. Unlike the case before this Court, however, "[t]he same personnel [of the City of Pembroke Pines] who provided fire fighting service [were] also either paramedics or emergency medical technicians." *City of Pembroke Pines v. McConaghey*, 728 So. 2d at 349. Relying on *Lake County*, the *McConaghey* court concluded that it therefore could not "analyz[e] each particular item funded within the fire protection services budget separately to determine if each individual item survives the special benefit test." *City of Pembroke Pines v. McConaghey*, 728 So. 2d at 351, and upheld the assessment.[4] In its *en banc* decision, the *SMM Properties* court receded

[4] The *McConaghey* court thus did not reach the question of whether the emergency medical service component of the City of Pembroke Pines special assessment conferred a special benefit on real property. *SMM Properties, Inc*., 760 So. 2d at 1003.

from this reading of *Lake County. SMM Properties, Inc. v. City of North Lauderdale,* 760 So. 2d at 1003.

In this case, the emergency medical services are provided pursuant to a separate contract with Broward County. *SMM Properties, Inc. v. City of North Lauderdale,* 760 So. 2d at 1000. The services provided pursuant to the contract are separate and identifiable from any services provided by the city. *Id.* They are also paid for separately by the City of North Lauderdale at $318,000 per year. *Id*. Although the services are together characterized as an "integrated fire rescue program," *Id.* at 999, the program is an integrated program only in the sense that all of the services are administratively situated in the same municipal department. Final Judgment at 2.

PLF submits that this Court should not hesitate to examine particular components of a special assessment to determine whether or not they can be charged as part of a special assessment on real property in a county or municipality. Neither the administrative placement of the service being examined nor its association with a service that is chargeable should influence the legal analysis or result. Moreover, while not directly presented in this case, the fact that services are combined--as apparently is the case in the City of Pembroke Pines--should not immunize them from legal scrutiny. To do so, would allow local governments to design and package services to circumvent the limits of the taxing power placed upon them. As this Court

stated in *State v. City of Port Orange*, 650 So. 2d at 4: "[T]he voters have placed a limit on ad valorem millage available to municipalities, Art. VII, Sec. 9, Fla. Const. . . . . These constitutional provisions cannot be circumvented by such creativity."

## III

## THE STANDARD OF REVIEW OF LEGISLATIVE DETERMINATIONS SUPPORTING SPECIAL ASSESSMENTS SHOULD NOT BE MADE TOO ONEROUS FOR TAXPAYER CHALLENGES

Given the revenue pressures, real or perceived, on municipalities and all levels of government in Florida, it is not surprising that local governments are constantly probing for additional revenue sources. At the same time, the organic law of this state clearly places substantial limitations on the authority of state and local government to exact revenue from their constituents. All branches of state government are bound to respect these limits. *Gray v. Moss,* 156 So. 262, 266 (Fla. 1934) ("All statutes . . . are subject to controlling provisions of both the State and Federal Constitution[,] . . . which all *officers* and all *electors* [are] required to take an oath to support). *See also Montgomery v. State,* 45 So. 879, 883 (Fla. 1908) ("The duty rests upon all courts, state and national, to guard, protect and enforce every right granted or secured by the constitution of the United States."). It is obvious, however, that a court may effectively vitiate the ability of a taxpayer to challenge a levy

imposed by placing the bar so high that the ability to challenge is illusory. PLF submits that this Court should exercise care to avoid that result.

Although the standard of review of taxpayer challenges is variously articulated in the opinions of this Court, the most frequently stated view is that "a legislative determination as to the existence of a special benefit should be upheld unless the determination is 'palpably arbitrary or grossly unequal and confiscatory.'" *Sarasota County*, 667 So. 2d at 184 (quoting *South Trail Fire Control District v. State,* 273 So. 2d 380, 388 (Fla. 1973)). *See also Fire District No. 1 of Polk County v. Jenkins,* 221 So. 2d 740, 742 (Fla. 1969) ("[S]uch determinations will not be disturbed by the courts, unless an abuse of power or purely arbitrary and oppressive action is clearly shown."). This Court has not provided any clear definition of "palpably arbitrary" or "purely arbitrary and oppressive." A reasonable reading of these authorities would suggest, however, that the degree of proof necessary to successfully challenge a levy must be at or very near the criminal "beyond a reasonable doubt" standard. And whatever is meant by "palpably arbitrary," or "purely arbitrary and oppressive," the phraseology suggests a standard of review that is more stringent than an ordinary arbitrary and capricious standard. PLF submits that a standard of such magnitude is unnecessary and provides unwarranted comfort to local governments that may be of a mind to stretch the constitutional limits of their taxing power.

In addition, it is not clear in the law of this state who has the burden of proof in a court of law to meet the standard: Does a challenger have the burden at trial to prove that the legislative determinations exceeded the standard? Or must the municipality offer proof of some level supporting the levy against a challenge? The decisional law of this Court appears in conflict on this point. In *City of Hallandale v. Meekins,* 237 So. 2d 318, 320 (Fla. 4th DCA 1970), that court articulated the more traditional view that "the burden is on those contesting the assessments to establish to establish their invalidity." In *Fisher v. Board of County Commissioners,* 84 So. 2d 572, this Court looked to the local government entity to demonstrate the validity of the assessment. That court stated:

> "The question of whether property abutting upon a street is in fact specially benefited by the paving of the street does not rest exclusively in the judgment or upon the 'ipse dixit' of the municipal officer or officers, if there are more than one, who asserts authority over municipal affairs, but it is a question of fact to be ascertained and established as any other fact, and the *proportion of the cost* to be assessed against a particular lot must bear a reasonable and fair relation to the *special* benefits which actually accrued."
>
> . . . A "special benefit assessment" must be levied according to the particular benefits received by the real property in question and in order

> to sustain the assessment, there must be some proof of the benefits other than the dictum of the governing agency.

*Fisher v. Board of County Commissioners*, 84 So. 2d at 576 (citation omitted).

Although this Court must be cognizant of the need of government entities to be free to perform the services under their jurisdiction without undue interference, this Court should be equally cognizant that the people of Florida have established the structure within which they must operate. Taxation by local government in this state must be expressly authorized. *City of Port Orange,* 650 So. 2d at 3, and "[d]oubt as to the powers sought to be exercised must be resolved against the municipality and in favor of the general public," *City of Tampa v. Birdsong Motors, Inc.*, 261 So. 2d 1, 3 (Fla. 1972).

In the case presently under consideration, the lower court recognized the high standard of review articulated in *Sarasota County. SMM Properties, Inc. v. City of North Lauderdale,* 760 So. 2d at 1001. But, in invalidating the assessment, the Court also looked to the record provided by the City of North Lauderdale to see what proof it had offered to support the assessment. *Id.* at 1004. ("Additionally, there was no evidence in this record that the availability of emergency medical services decreased insurance premiums or enhanced the value of real property.") Appellants argue that

the lower court cannot look to the record in the case, but must accept the legislative determinations of the City. Initial Brief of Appellants at 32. ("[T]he Fourth District improperly substituted its judgment on the issue of special benefit for that of the City Council.")

To give effect to this Court's ruling in *Fisher*, however, the local agency must be required to prove the existence of a special benefit. A reasonable procedure to reconcile these decisions is to require the taxpayer to carry the burden of going forward with evidence that the property assessment does not provide a special benefit to the property assessed. Once such evidence was produced, the burden of persuasion would be on the local government entity to demonstrate by a preponderance of the evidence that the proposed assessment provides a special benefit. A standard such as this would tend to discourage unwarranted taxpayer actions because there would remain an initial cost and burden on the taxpayer, while at the same time shifting the burden upon appropriate proof to the local government to demonstrate the validity of its action. Under a standard such as this, a court could readily protect both the organic rights of the citizens of the state and at the same time enable local government to effectively exercise its legislative will.

## CONCLUSION

The difference between a special assessment and a tax must be scrupulously maintained. To relax or disregard the distinction would be to disregard the long-standing, organic will of the people of the state of Florida. The Florida Constitution forbids the imposition of an assessment which will not benefit property. The courts of this state have a fundamental role and obligation in determining whether a local government levy is a special assessment or a tax. This Court must not make it so onerous for taxpayers to challenge a levy that this responsibility is effectively abdicated and taxpayer challenges essentially vitiated.

DATED: November 30, 2000.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the foregoing has been formatted using 14-point proportionately spaced Times New Roman font.

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## CERTIFICATE OF SERVICE

I certify that the foregoing Brief Amicus Curiae of Pacific Legal Foundation in Support of Appellees SMM Properties has been furnished by United States mail, postage prepaid, this 30th day of November, 2000, to the following: Robert L. Nabors, Gregory T. Steward, and Virginia Saunders Delegal, Nabors, Giblin & Nickerson, P.A., P.O. Box 11008, Tallahassee, Florida 32302; Samuel S. Goren and Michael D. Cirullo, Jr., Josias, Goren, Cherof, Doody & Ezrol, P.A., 3099 East Commercial Boulevard, Suite 200, Fort Lauderdale, Florida 33308; Neisen O. Kasdin and R. Hugh Lumpkin, Keith Mack, LLP, First Union Financial Center, 200 South Biscayne Boulevard, 12th Floor, Miami, Florida 33131-2310; Edna L. Caruso, Caruso, Burlington, Bohn & Compiani, P.A., Barristers Building, 1615 Forum Place, Suite 3A, West Palm Beach, Florida 33401; Alan P. Dagen, Schantz, Schatzman & Aaronson, P.A., First Union Finance Center, 200 South Biscayne Boulevard, Suite 1050, Miami, Florida 33131-2394; Jamie A. Cole, Weiss, Serota, Helfman, Pastoriza & Guedes, P.A., 3111 Stirling Road, Suite B, Fort Lauderdale, Florida 33312; Randall N. Thornton, P.O. Box 58, Lake Panasoffkee, Florida 33538-0058, and William Phil

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