IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1998

Lower Tribunal No. 5D98-3178

MARY BARLEY, as Personal Representative of the Estate of GEORGE M. BARLEY, JR.; SHEILA MULLINS; BENJAMIN WERMEIL; and NATHANIEL PRYOR REED, both individually and on behalf of other similarly situated,

Petitioners,

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Respondent.

ANSWER BRIEF OF RESPONDENT, SOUTH FLORIDA WATER MANAGEMENT DISTRICT

On Discretionary Review from a Decision of the District Court of Appeal Fifth District of Florida

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INTRODUCTION

This Court is asked to review the Fifth District Court of Appeal's affirmance of a judgment on the pleadings for Respondent, Defendant below, South Florida Water Management District ("SFWMD"). That judgment was entered in a declaratory judgment action brought by Petitioners, Plaintiffs below, Mary Barley, as personal representative of the Estate of George M. Barley, Jr., Sheila Mullins, Benjamin Wermeil and Nathaniel Pryor Reed (collectively "Plaintiffs"). The gravamen of Plaintiffs' action was that the funding provisions of the Everglades Forever Act, § 373.4592, Fla. Stat. (Supp. 1994), and the District's 1997 taxing and spending activity relating thereto were unconstitutional under "Amendment 5" - article II, section 7(b) of the Florida Constitution. (R.1-22, 185-218, 440-47) Based on the constitutional doctrine of separation of powers, the trial court refused Plaintiffs' invitation to encroach on the powers of the Legislature with regard to these issues and entered judgment for SFWMD.

Prior to the filing of Plaintiffs' action, this Court had already determined that Amendment 5 is not self-executing and requires implementing legislation not only to make it operative and effective but also to define any rights to be determined, enjoyed or protected under it. This Court also determined that there is no inconsistency between the Everglades Forever Act and Amendment 5. Advisory Opinion to the Governor--1996 Amendment 5 (Everglades), 706 So. 2d 278 (Fla. 1997). Based upon well-established Florida law concerning the effect of constitutional amendments on preexisting statutes as well as this Court's recent analyses of the

effect of Amendment 5 vis-à-vis the Everglades Forever Act, and given the fact that the Florida Legislature had not yet enacted enabling legislation under Amendment 5, the trial court entered judgment on the pleadings for SFWMD. (R. 434-39) On appeal to the Fifth District Court of Appeal, that court affirmed the trial court's judgment.

As discussed in detail below, this Court should approve the lower courts' dispositions because Plaintiffs are unable to state a judicially cognizable cause of action, because Plaintiffs lack standing, and because the trial court lacked subject matter jurisdiction. Because Amendment 5 is not self-executing, absent enabling legislation, Amendment 5 is not operative or effective, and it neither grants nor protects any defined rights. Because there is no inconsistency between Amendment 5 and the EFA, the funding allocations mandated by the EFA remain in effect until amended or repealed by subsequent legislation. It necessarily follows that the judicial relief requested by Plaintiffs below is not available as a matter of law. For similar reasons, Plaintiffs have no standing to pursue their proposed action. Any other rulings by this Court or the lower courts would violate the fundamental constitutional precept of separation of powers: "No person belonging to one branch shall exercise any powers appertaining to either of the other branches . . ." Fla. Const. art. II, §3. Moreover, because Plaintiffs failed to timely comply with the requirements of section 194.171, Florida Statutes, the trial court never acquired subject matter jurisdiction over

Plaintiffs' proposed action. For any and all of these reasons, this Court should approve the Fifth District Court of Appeal's disposition.

STATEMENT OF THE CASE AND FACTS

Factual Background

The Everglades is the largest subtropical wetland in the United States and is a unique and irreplaceable natural resource. The Everglades ecological system contributes to South Florida's water supply and serves as the habitat for a diversity of plants and wildlife not found anywhere else in the United States. Many decades ago, approximately 700,000 acres of the original Everglades immediately south of Lake Okeechobee were drained for agricultural use and for flood control purposes to allow development of South Florida. This area is generally referred to as the Everglades Agricultural Area ("EAA"). (R. 194-95)

Remnants of the original Everglades include the Loxahatchee National Wildlife Refuge (also known as Water Conservation Area 1), the Water Conservation Areas, and Everglades National Park. These areas are generally referred to collectively as the Everglades Protection Area ("EPA"). (R. 195)

In 1994, the Florida Legislature enacted the Everglades Forever Act ("EFA"), the bulk of which is contained in section 373.4592, Florida Statutes (Supp. 1994). The purposes and intent of the Legislature in enacting the EFA are set forth at length in the statute itself, section 373.4592(1), and include the goal of reducing pollution flowing into the EPA from the EAA and other

sources. Included among the many projects and programs required by the EFA is the construction of more than 40,000 acres of Stormwater Treatment Areas ("STAs") and related works.

The STAs are the heart of the Everglades Construction Project ("ECP") and are required to be constructed pursuant to a schedule set forth in the EFA. See § 373.4592(4)(a), Fla. Stat. (R. 198). In addition to providing pollution abatement benefits in reducing phosphorus flowing to the EPA, the ECP is also designed to implement the hydropattern restoration goals of the EFA by "improving water quantity reaching the Everglades, correcting longstanding hydroperiod problems, increasing the total quantity of water flowing through the system, providing water supply for Everglades National Park, urban and agricultural areas, and Florida Bay, and replacing water previously available from the coastal ridge in areas of southern Dade County." § 373.4592(1)(f), (4)(b).

The Everglades Construction Project is defined in the EFA as the project described in the February 15, 1994, conceptual design document together with construction and operation schedules on file with the SFWMD. § 373.4592(2)(f), Fla. Stat. To provide funding to carry out the pollution-abatement, hydropattern restoration, and other restoration mandates of the EFA, among other things, the Legislature specifically authorized the SFWMD to use 0.1 mill of ad valorem taxes assessed within the Okeechobee basin for the purposes of the design, construction, and acquisition of the ECP. § 373.4592(4)(a). In addition, the EFA authorized imposition of an agricultural privilege tax on agricultural lands within the EAA for

these and other purposes. § 373.4592(6). (R. 186-88) The construction schedule mandated by the EFA was derived directly from the ECP Conceptual Design document which, in turn, was premised primarily on certain funding assumptions, principal among them being that SFWMD would use the full 0.1 mill ad valorem tax (as authorized in the EFA) beginning in 1994 and continuing throughout the life of the project. (A. 1 at p. VIII-1 et seq., and Attachment D).

[1]

The Conceptual Design document incorporated into the EFA states with regard to the implementation schedule mandated by the EFA that the "single most significant assumption made is that implementation activities and construction will be constrained to available funding." (App. A at VIII-1) With regard to this funding constraint, the Conceptual Design document goes on to state that the SFWMD "will annually commit ad valorem tax income to the account [for funding implementation]. The amount of that commitment will be $21,800,000 in Fiscal Year 1994, and will be increased by 5 percent per year thereafter." (Id. at VIII-3) The required commitment figure of $21,800,000 for 1994 is derived from the assumption that the SFWMD will assess and use the full EFA-authorized 0.1 mill ad valorem tax in 1994, and that increases in property values will increase the commitment figure by

[1] Included in SFWMD's Appendix as A.1 are excerpts of the conceptual design document expressly incorporated as part of the EFA. The entire document was marked as Defendant's Exhibit "A" during the September 30, 1998 hearing on SFWMD's motion for judgment on the pleadings (A.2 at 7-8, 18) but only relevant excerpts are included in the Appendix because of the voluminous nature of the document. Although never objected to by Plaintiffs, the trial court declined to consider the ECP conceptual design document because it believed it was something outside the pleadings. (R. 436) Although not necessary to support the trial court's judgment, SFWMD submits it is appropriate to consider the design document because it is a part of the EFA, section 373.4592 (2)(f), and because the EFA is made part of the pleadings by reference and incorporation throughout Plaintiffs' amended complaint. See, e.g., Striton Properties, Inc. v. City of Jacksonville Beach, 533 So. 2d 1174, 1179 (Fla. 1st DCA 1988) (document critical to asserted claim properly filed and considered in ruling on motion to dismiss), rev. denied, 544 So. 2d 201 (Fla. 1989); Woolzy v. Government Employees Ins. Co., 360 So. 2d 1153, 1154 (Fla. 3d DCA 1978) (proper to consider document incorporated into complaint in ruling on motion to dismiss).

5% per year with the same 0.1 mill ad valorem tax being used each year thereafter:

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(Id. at Attachment D)

As the foregoing.makes.clear, the only.means.of implementing.the.Everglades . . . . .

> restoration project mandated by the EFA is through assessment, collection, and use each year of the full 0.1 mill ad valorem tax as authorized by the EFA. Absent such assessment and use, there is no way to fund the implementation of the Everglades restoration efforts expressly mandated by the EFA.[2]

On November 5, 1996, the voters approved a constitutional amendment to article II, section 7, of the Constitution of the State of Florida. Commonly referred to as "Amendment 5", the amendment added subsection 7(b) to article II of the constitution. This provision states:

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[2] Thus, a central premise of much of Plaintiffs' argument - that the EFA does not require assessment and use of the full 0.1 mill authorized - is simply wrong and is based on a misreading of the statute and the expressed intent of the Legislature. Simply put, elimination or reduction in the ad valorem tax revenue authorized for use by the EFA for the ECP, as sought by Plaintiffs in this action, would completely shut down the Everglades restoration project - "the largest environmental cleanup and restoration of this type ever undertaken," § 373.4592(1)(h), Fla. Stat. - and set Everglades restoration back by years.

> Those in the Everglades Agricultural Area who cause water pollution within the Everglades Protection Area or the Everglades Agricultural Area shall be primarily responsible for paying the costs of the abatement of that pollution. For purposes of this subsection, the terms "Everglades Protection Area" and "Everglades Agricultural Area" shall have the meanings as defined in statutes in effect on January 1, 1996.

Fla. Const. art. II, § 7(b). (R. 185-86)

In 1997, this Court provided the Governor with an advisory opinion concerning the proper interpretation and effect of Amendment 5 vis-à-vis the EFA. Among other things, this Court expressly determined that the amendment was not self-executing and required implementing legislation to make it operative and effective. In this regard, the Court specifically found that the intent of the voters in adopting Amendment 5 was to have the Legislature "enact supplementary legislation to make the amendment effective, to carry out its intended purposes, and to define any rights intended to be determined, enjoyed, or protected." The Court also found that there was no inconsistency between the EFA and Amendment 5. Advisory Opinion to the Governor -- 1996 Amendment 5 (Everglades)-373.4592(4)(a). The individual Plaintiffs allegedly paid this tax in 1997. Plaintiffs' instant action was filed to contest the SFWMD's authority to levy these ad valorem taxes in 1997 against their real property and use same for funding in part the design, construction and acquisition of the ECP. (R. 185-90, 203-05)

Plaintiffs' Action

On December 3, 1997, Plaintiffs commenced this action against SFWMD. (R. 1-22) In their amended complaint, Plaintiffs alleged they each separately owned certain real property in Orange, Monroe, Broward and Martin Counties, respectively, and that they were required to pay ad valorem taxes assessed by SFWMD in 1997. More specifically, Plaintiffs alleged they were "required to pay the 0.1 mill ad valorem tax on their properties [as authorized by § 373.4592(4)(a)], as well as additional ad valorem taxes levied under the SFWMD's general ad valorem taxing authority for . . . pollution abatement costs attributable to EAA polluters, or else risk facing penalties for their failure to pay said taxes." (R. 189-90)

Plaintiffs purported to bring the action individually and on behalf of a putative class of all "ad valorem taxpayers from Orlando to Key West who did not pollute the Everglades Protection Area ("EPA") or the [EAA], but are nevertheless taxed by the [SFWMD] for the major portion of the EAA's pollution abatement costs under § 373.4592(4)(a)(1994) of the [EFA] and under the SFWMD's general ad valorem taxing authority, in direct contradiction to Article II, Section 7(b) of the Florida Constitution (commonly referred to as . . . 'Amendment 5')." (R. 185-86, 188-91) The gravamen of Plaintiffs' amended complaint was that Amendment 5 renders unconstitutional some unidentified portion of ad valorem taxes levied against them and the class they purported to represent and requires invalidation of portions of the EFA. (R. 185-87, 191, 202-05)

Plaintiffs sought various forms of affirmative relief against SFWMD. Principally, Plaintiffs sought to have the trial court declare that the SFWMD's ad valorem tax assessments and the authorizing statutes therefor, as well as specific provisions of the EFA, § 373.4592, Fla. Stat., were unconstitutional under Amendment 5. Specifically, by their action, Plaintiffs sought:

> a declaration that the 0.1 mill ad valorem tax levied by the SFWMD pursuant to §373.4592(4)(a)(1994) of the EFA to abate EAA pollution and the additional ad valorem taxes levied under the SFWMD's general ad valorem taxing authority for other pollution abatement costs attributable to EAA polluters, violates . . . Amendment [5] . . . because the polluters within the EAA as a group are presently not paying for 100% of the cost to abate the pollution they cause . . . .; [and]
>
> a declaration that . . . section 373.4592 (8)(a)(1994) of the EFA violates . . . Amendment [5] because it prohibits the SFWMD from raising additional revenues from EAA polluters . . . .

(R. 186-87, 203-05) In addition, in the event the Legislature did not act in the next session to reallocate the relative contributions of funding for Everglades restoration projects between EAA and non-EAA taxpayers as Plaintiffs alleged the Legislature should reallocate them under Amendment 5, Plaintiffs also sought "an order requiring the [SFWMD] to provide an accounting of and refund of all monies collected pursuant to section 373.4592(4)(a)(1994) of the EFA and the [SFWMD's] general ad valorem taxing authority for that portion of the pollution abatement costs attributable to EAA polluters." (R. 204-05)

Dismissal for Lack of Jurisdiction

SFWMD moved to dismiss the original complaint and the action, raising three principal grounds for dismissal. First, SFWMD asserted that the jurisdictional limitations of section 194.171 applied to the action and the trial court did not have subject matter jurisdiction pursuant to the plain meaning of the language of that statute. Second, SFWMD asserted that, because Amendment 5 is not self-executing (which Plaintiffs have never disputed), Plaintiffs had no judicially cognizable cause of action for any alleged "violation" of Amendment 5. Third, SFWMD asserted that Plaintiffs lacked standing, primarily because Amendment 5 does not give them standing and the Legislature has not yet enacted enabling legislation defining who has any rights or standing to bring a claim for an alleged violation of the amendment. (R. 23-25, 59-96)

By order dated June 12, 1998, the trial court granted SFWMD's motion to dismiss on the first ground - lack of subject matter jurisdiction. The court found the allegations of the complaint to "fall squarely within the scope of § 194.171." Contrary to SFWMD's position, however, the trial court held that the deficiency in its subject matter jurisdiction could be cured through amendment of the complaint showing "compliance" with section 194.171, and allowed Plaintiffs to amend. The court denied the motion on the second and third grounds because it found those grounds went to the merits of the declaratory judgment action and not to whether the complaint stated the elements of a cause of action for declaratory relief. (R. 160-70)

Plaintiffs filed an amended complaint on July 13, 1998. (R. 185-218) The amended complaint asserted essentially the same allegations as the original complaint on the merits, but

included additional allegations directed to purported "compliance" with the jurisdictional requirements of section 194.171. Specifically, Plaintiffs included allegations that they filed suit within 60 days from the time the tax rolls were certified, paid the tax collector the amount of the tax which in good faith was owed, and attached as exhibits purported "receipts" reflecting those payments. (R. 188-89)

Judgment on the Pleadings

After answering the amended complaint, SFWMD moved for judgment on the pleadings. (R. 266-78, 279-97, 304-17) SFWMD argued, inter alia, that, because Amendment 5 is not self-executing and is not inconsistent with the EFA, and because the Legislature had not yet enacted implementing legislation, the constitutional amendment on which Plaintiffs' action was premised provided Plaintiffs no rights to be declared or protected and could not be construed to have impliedly repealed SFWMD's constitutional and statutory authority to impose and use the ad valorem taxes in question. Because the trial court is not empowered to legislate under the doctrine of separation of power, the judicial relief requested by Plaintiffs was not available. Accordingly, because the merits of the case could be determined as a matter of law from the pleadings without regard to the factual issues Plaintiffs sought to raise, judgment on the pleadings in favor of SFWMD was appropriate. (R. 279-97)

Following Plaintiffs' filing of a written response to the motion, a hearing was held before the trial court on September 30, 1998. (R. 389-417; A. 2) After presentation of argument by the parties, the trial court took the motion under advisement. (A. 2) On October 22, 1998, the trial court issued its Order Granting Defendant's Motion for Judgment on the Pleadings, and dismissed the action. (R. 434-39)

In its final order, the trial court noted that, consideration of the pleadings in conjunction with Florida law -- and especially the doctrine of separation of powers -- required SFWMD's motion for judgment on the pleadings be granted. After reviewing the relief sought by Plaintiffs, including Plaintiffs' request that the court give the Legislature only until the next session to reallocate funding

for Everglades pollution abatement as Plaintiffs alleged it should be reallocated under Amendment 5, the court held that it "cannot direct the Legislature to implement Amendment 5." Citing this Court's determination that Amendment 5 is not self-executing and there is no inconsistency between the EFA and Amendment 5, and relying on well-established Florida law concerning the effect of constitutional amendments on pre-existing statutes, the court also held that a cause of action for the relief sought would not be established even if Plaintiffs could prove their allegations. Accordingly, the court granted the SFWMD's motion, entering judgment on the pleadings for SFWMD. (R. 434-39)

On appeal, the Fifth District Court of Appeal affirmed. The appellate court agreed with the trial court that there was no constitutional impediment to levying a tax upon Plaintiffs to clean the Everglades. Consistent with this Court's advisory opinion, the appellate court found Amendment 5 was not self executing and that there was no inconsistency between the EFA and Amendment 5. Accordingly, based on well-established Florida law, the court held that the EFA, including its funding provisions concerning the taxes in question, remains in effect until repealed or amended by the Legislature. In response to the dissent, Chief Judge Thompson's majority opinion pointed out that "a court cannot override the will of the people, as expressed in the constitution, which was to adopt an amendment that requires legislative execution." Barley v. South Florida Water Management District, 766 So. 2d 433,434 (Fla. 5th DCA 2000).

[3]

[3] It is particularly noteworthy that the dissent is based entirely on a misreading of Amendment 5. Judge Harris states in his dissent that the "amendment herein contained two provisions: non-polluters should pay nothing and polluters should pay all to clean up *their* pollution." He goes on to suggest that the "first provision" is self executing, whereas only the latter is not. Id. at 435 (Harris, J., dissenting). But a simple review of Amendment 5 reveals that the first provision does not exist in the constitutional provision. Judge Harris was apparently led astray in this regard by the argument of Plaintiffs as to the "meaning" of Amendment 5.

SUMMARY OF THE ARGUMENT

Amendment 5 is not self-executing. It left numerous policy issues for determination by the Legislature. In adopting Amendment 5, the voters expected the Legislature to enact supplementary legislation to make it effective, to carry out its intended purposes, and to define any rights intended to be determined, enjoyed, or protected. Thus, Amendment 5 is not operative or effective until the Legislature enacts enabling legislation. Accordingly, Amendment 5 neither grants nor protects any defined rights of Plaintiffs. Absent appropriate enabling legislation, Plaintiffs have no rights or interests that can be declared, defined, protected or enforced by the courts through any form of judicial action. Accordingly, under the constitutional doctrine of separation of powers, the trial court had no choice but to enter judgment for SFWMD. For this reason alone, the Fifth District's affirmance of the trial court's judgment should be approved by this Court.

Moreover, there is no inconsistency between the EFA and Amendment 5. Among other things, the EFA was enacted to determine how and at whose expense Everglades pollution should be abated, and it imposed substantial tax liability (in addition to ad valorem taxes imposed throughout the Okeechobee basin) on agricultural lands within the EAA to fund the pollution-abatement projects it mandated. Amendment 5 was adopted for a similar purpose — to require polluters in the EAA to pay for abatement of their pollution. Accordingly, under well-established Florida law, the EFA, including its funding provisions, remains in effect until amended or repealed by the Legislature. This Court should approve the Fifth District's affirmance of the judgment on this ground as well because Plaintiffs' entire action was premised on the erroneous legal assertion that the funding allocations established by the EFA, as implemented by SFWMD in accordance with the mandate of the EFA, "violate" or are "inconsistent" with Amendment 5.

The judgment below should also be affirmed because Plaintiffs had no standing to pursue their proposed action. Amendment 5 does not define any rights intended to be enjoyed or protected — let alone any rights belonging to Plaintiffs. It left to the Legislature the determination of "by whom" a claim for violation might be asserted. Until the Legislature defines the rights to be protected, there can be no present and existing controversy giving rise to standing in anyone to assert

claims under Amendment 5. Unless and until the Legislature defines Amendment 5 to protect the rights of a class of persons which includes Plaintiffs and provides for judicial enforcement of those rights, Plaintiffs have no standing to bring any claim for any relief in the courts of this state. In addition, Plaintiffs lack standing under the traditional standard for "taxpayers" suits because they have no special injury and their "constitutional" challenge is not based on a specific constitutional limitation on the Legislature's taxing and spending authority.

This Court should also approve the disposition below because the trial court was without subject matter jurisdiction. Because Plaintiffs' action expressly contested the legality of ad valorem tax assessments, section 194.171 applied to limit the circuit court's subject matter jurisdiction. Plaintiffs' failure to allege in their initial complaint that they paid at least the amount of tax they agreed was due within 60 days of certification of the tax rolls and their failure to file the receipts showing such payments deprived the trial court of jurisdiction. See § 194.171(2)-(3), (6), Fla. Stat. (1997). Because of the jurisdictional nature of the requirements of section 194.171, no relation back rule can be applied and Plaintiffs' amended complaint filed more than eight months after certification of the tax rolls did not "cure" the lower court's lack of jurisdiction in the case. Indeed, under a plain-meaning application of the statute, the trial court was without jurisdiction to even allow amendment to the complaint.

For any and all of these reasons, this Court should approve the decision of the Fifth District Court of Appeal which affirmed the trial court's entry of judgment on the pleadings for SFWMD.

STANDARD OF REVIEW

In reviewing a judgment on the pleadings, this Court must accept as true all well-pleaded factual allegations of the non-moving party. Crocker v. Pleasant, 26 Fla. L. Weekly S61, S65 n.4 (Fla. Feb. 1, 2000). Conclusory allegations or conclusions of law alleged in a complaint, however, are not accepted as true. See Yunkers v. Yunkers, 515 So. 2d 419, 420 (Fla. 3d DCA 1983); Whitaker v. Powers, 424 So. 2d 154, 155 (Fla. 5th DCA 1982); Mills v. Mills, 339 So. 2d 681, 684 (Fla. 1st DCA 1976). In a declaratory judgment action, such as this case, a trial court may enter a judgment on the pleadings if the merits of the case can be determined as a matter of law from the pleadings. Camino Gardens Ass'n v. McKim, 612 So. 2d 636, 639 (Fla. 4th DCA 1993); State Farm Mut. Auto. Ins. Co. v. Chapman, 415 So. 2d 47, 49 (Fla. 5th DCA 1982).

[4]

[4] The standard of review for judgments on the pleadings in declaratory judgment actions such as this one is, thus, different than in other types of cases where such a motion is treated as a motion to dismiss for failure to state a cause of action. Accordingly, Plaintiffs' reliance in this case on cases equating a motion for judgment on the pleading to a motion to dismiss (which traditionally looks only to the elements of the cause of action and does not reach the merits of the dispute) is misplaced. Here, the trial court properly resolved the merits of this declaratory judgment action on SFWMD's motion for judgment on the pleadings because, accepting the well-pled facts alleged in the complaint as true, SFWMD was clearly entitled to judgment as a matter of law. See Crocker, 26 Fla. L. Weekly at S65 n. 4. See also Camino Gardens, 612 So. 2d at 639; Chapman, 415 So. 2d at 49.

ARGUMENT

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I. THE APPELLATE COURT PROPERLY AFFIRMED THE ENTRY OF JUDGMENT ON THE PLEADINGS FOR SFWMD BECAUSE AMENDMENT 5 IS NOT SELF-EXECUTING AND BECAUSE THERE IS NO INCONSISTENCY BETWEEN THE EFA AND AMENDMENT 5.

A. Judgment For SFWMD Was Proper Because Amendment 5 Is Not Self Executing.

By their amended complaint, Plaintiffs sought various forms of affirmative relief against SFWMD. Plaintiffs' entire action, however, was based on their allegations that ad valorem tax assessments levied and used by SFWMD pursuant to SFWMD's general taxing authority and as expressly authorized in the EFA were unconstitutional under Amendment 5.

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SFWMD responds to the arguments presented by Plaintiffs in Point "I" below. The arguments presented in Points "II" and "III" below provide additional grounds for approval of the Fifth District's affirmance of the trial court's judgment on the pleadings, which grounds were asserted by SFWMD below (in both the trial and appellate courts) but not expressly relied upon by the trial or appellate courts in their decisions. See Vandergrift v. Vandergrift, 456 So. 2d 464, 466 (Fla. 1984) (trial court decisions are presumptively valid and, if correct, should be affirmed even on grounds not relied upon by the trial court); Home Depot U.S.A. Co. v. Taylor, 676 So. 2d 479, 480 (Fla. 5th DCA 1996) (same).

Plaintiffs sought a declaration that provisions of the EFA concerning taxing and revenue for funding of the ECP and other Everglades restoration projects are unconstitutional under Amendment 5. Thus, Plaintiffs' entire action, and the legal viability thereof, was necessarily premised on their legal

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[5] Although Plaintiffs' brief is divided into four "points," these serve more as subheadings for organization purposes of their argument as to a single point: whether the lower court erred in affirming the judgment on the pleadings for SFWMD. Accordingly,

interpretation of Amendment 5 that they asserted gives them immediate (albeit admittedly undefined) rights that can be enforced (presumably after being defined) by the trial court through their action.

As discussed below, Plaintiffs' interpretation is not legally viable and is contrary to well-established Florida law. Amendment 5 is not self-executing — as even Plaintiffs concede. What Plaintiffs ignore, however, is the legal effect of that necessary legal concession. That is, absent enabling legislation, Amendment 5 gives no rights to Plaintiffs that can be judicially defined, declared, or enforced by the courts. Accordingly, the relief requested by Plaintiffs is unavailable as a matter of law and the appellate court properly affirmed the entry of judgment on the pleadings for SFWMD.

1. Amendment 5 is Not Self-Executing.

In Advisory Opinion to the Governor -- 1996 Amendment 5 (Everglades), 706 So. 2d 278, 281-82 (Fla. 1997)----, "[u]ntil enabling statutes are duly enacted, the organic section [of the constitution that has been amended] is effective only as it was before the amendment." Id. This means a constitutional amendment that is not self-executing — like Amendment 5 — does not alter or change existing law or create any new rights enforceable by the courts — until enabling legislation is enacted defining those rights, who has them, how they can be enforced, and the remedies available.

In Klemm, the Court's comments were directed to article III, section 24, of the Florida Constitution as amended in 1934, which amendment required establishment of a uniform system of county and municipal governments. Id. Twelve years later, this Court addressed a claim premised on the same constitutional provision where the Legislature had yet to enact any enabling legislation. In State ex

rel. Wilder v. City of Jacksonville, 157 Fla. 276, 25 So. 2d 569, 571 (1946), the plaintiff claimed that a special or local law concerning liquor licensing in Jacksonville was invalid and unconstitutional under article III, section 24, , which specifically provided that "no special or local laws . . . providing for . . . government, jurisdiction, powers, duties and privileges [of cities] shall be passed by the Legislature." This Court rejected the claim as a matter of law because the constitutional provision was not self-executing and, therefore, the Court held that, until the Legislature enacted enabling legislation, the Legislature remained free to enact special and local laws such as the one at issue:

> Section 24 of Article III is a mandate from the people to the legislature to establish a uniform system of county and municipal government throughout the state, but this section of the Constitution is not self-executing. It requires legislative action before it can accomplish its purpose. Until such time as the legislature sees fit to establish, by general law, the uniform system of government contemplated by this section of the constitution, the power of the legislature to enact special or local laws in cases not expressly enumerated in section 20, Article III [a self-executing provision precluding special or local laws on specifically enumerated subjects] for the government, jurisdiction, powers, duties and privileges of the municipalities is in nowise impaired or altered.

Id. (citations omitted).

A case even more factually analogous to the present case is Draughon v. Heitman, 124 Fla. 24, 168 So. 838 (1936). At issue there was a constitutional amendment to article IX, section 1, ratified in 1924, that required taxation of intangible property at a rate not to exceed 5 mills. The gist of the plaintiffs' complaint was that the county tax assessor had failed to put intangibles on

the tax roll in 1931 as required by the 1924 constitutional amendment, resulting in plaintiffs being required to pay more than their fair share of the taxes and others (with untaxed intangible property) paying less than they owed.

This Court in Draughon held that plaintiffs' complaint should have been dismissed because, *inter alia*, the constitutional amendment was not self-executing and no enabling legislation had been enacted as of 1931. 168 So. at 840-41, 843. As explained by the court:

> Prior to enactment of chapter 15789, Acts 1931, Ex. Sess., which did not become effective until January 1, 1932, the State Legislature had provided no means for executing the purpose and intent of the 1924 constitutional amendment on the subject of intangible personal property. . . . [B]etween the date of ratification of the constitutional amendment of 1924, and the convening of the 1931 Legislature, no legislative attempt to carry out the provisions of the amended Constitution was successful. Therefore the status of the intangible property of all kinds, insofar as the taxes of 1931 are concerned, was at all times, to say the least of it, doubtful. In view of this fact, how can it be truthfully alleged as a matter of law [as alleged by plaintiffs] that the tax assessor of any particular county . . . committed a legal fraud upon other taxpayers by deliberately, illegally, willfully, intentionally, arbitrarily, and systematically omitting from the tax rolls of his county intangible property, since it was only subject to a special and limited kind of taxation, the provision for imposing which the Legislature had never carried into effect insofar as that year was concerned?

Id. at 840.

The same analysis applies here. Just like the county tax assessor in Draughon, SFWMD is legally and factually unable to allocate assessments to generate revenues for funding the EFA-mandated pollution-abatement projects as Plaintiffs would like —- unless and until the Legislature defines and authorizes such

taxation or revenue generation under the auspices of Amendment 5 or otherwise.

[6] Indeed, the Florida Legislature in section 373.4592(4)(a) provided that the funding allocations it created in the EFA were to remain in place "unless the Legislature by specific amendment to this section increases the 0.1 mill ad valorem tax contribution, increases the agricultural privilege taxes, or otherwise reallocates the relative contribution by ad valorem taxpayers and taxpayers paying the agricultural privilege taxes . . . ." In Draughon, the this Court noted that, prior to enabling legislation, the county tax collector was faced with such imponderables as what rate should be assessed on intangible property and what property would constitute intangibles. In this case, this Court has already acknowledged the existence of similar and more difficult imponderables facing the SFWMD (or any other yet-to-be-identified state entity to be charged with carrying out Amendment 5) such as:

> how should the cost of pollution abatement be assessed? (i.e., by what method and over what period of time?) and
>
> who should the cost be assessed against? (i.e., what constitutes "pollution" and how will one be adjudged a polluter?)

Advisory Opinion--Amendment 5--, 766 So. 2d at 434.

The intent of the voters controls the proper interpretation of Amendment 5. Advisory Opinion -- Amendment 5--, 766 So. 2d at 434.

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[6] Absent enabling legislation under Amendment 5 establishing or authorizing appropriate classifications of property subject to differing rates of ad valorem tax, any attempt by SFWMD to tax property at different rates throughout the Ockeechobee basin based on alleged relative contributions to pollution entering the EPA would be unconstitutional. See art. VII, § 2, Fla. Const. (all ad valorem taxation shall be at a uniform rate within each taxing unit). In addition, SFWMD could not uniformly reduce the .1 mill ad valorem tax in question to ensure EAA polluters pay [what Plaintiffs allege is] 100% of the abatement cost for their pollution without enabling legislation under Amendment 5 because, absent legislation defining "pollution," "polluter," and otherwise effectively defining how much and over what period of time EAA "polluters" must pay to "abate" their "pollution," there is no way to determine how much the .1 mill should be reduced, if at all. Finally, to the extent Plaintiffs are suggesting the entire .1 mill ad valorem tax in question must be eliminated until the Legislature implements Amendment 5, i.e., the .1 mill is unconstitutional under Amendment 5 (which Plaintiffs maintain they are not arguing), such would be contrary to the finding of this Court that there is no inconsistency between the EFA and Amendment 5. See Advisory Opinion--Amendment 5, 706 So. 2d at 282.

By their action, Plaintiffs would have the trial court usurp the power of the Legislature and, by judicial fiat, legislate on all the complex policy issues committed to the Legislature by the mandate of the people. By their action, Plaintiffs would have the trial court — by judicial decree — make Amendment 5 effective, define and enforce its intended purpose, and define the rights intended to be determined, enjoyed, and protected. All this, contrary to the will of the voters who "expected the Legislature to enact supplementary legislation" to carry out these tasks. Id.

In effect, Plaintiffs ask this Court, like they asked the lower courts, to ignore the fundamental constitutional doctrine of separation of powers embodied in article II, section 3, of the Florida Constitution. This, the Court should not and cannot do. See Sullivan v. Askew, 348 So. 2d 312, 314-16 (Fla.), cert. denied, 434 U.S. 878 (1977). As this Court recently reiterated: "[t]he preservation of the inherent powers of the three branches of government, free of encroachment or infringement by one upon the other, is essential to the effective operation of our constitutional system of government." Florida Senate v. Florida Public Employees Council 79, 2001 WL 388863, *3 (Fla. April 18, 2001) (quoting In re: Advisory Opinion to the Governor, 276 So. 2d 25, 30 (Fla. 1975)). See also Chiles v. Children A, B, C, D, E & F, 589 So. 2d 260 (Fla. 1991). Accordingly, like the lower courts, this Court should give effect to the expectations of the voters who approved Amendment 5 and allow the Legislature to define the rights intended to be determined enjoyed and protected by the amendment.

, 766 So. 2d at 435 and n. 5 (Harris, J., dissenting). In addressing a similar suggestion with regard to the Sunshine Amendment, Fla. Const. art. II, § 8, this Court in Williams held:

> The legislators are sworn to uphold the Florida Constitution and are presumed to act in a lawful manner. The mandate of the people to act in this area is clear and forceful. Any suggestion that the people are in fear that the legislators will attempt to frustrate their will is inappropriate on its face.

360 So. 2d at 421 n. 9 (emphasis added).

> There have been at least three bills proposed in the Legislature to implement Amendment 5, although none have been enacted to date.

[7] Nevertheless, until the Legislature defines the rights to be determined, enjoyed and protected by Amendment 5, and unless and until the Legislature defines a class of persons who can bring an action for judicial relief for violation of Amendment 5 that includes Plaintiffs, Plaintiffs have no cause of action that can be premised on Amendment 5. Amendment 5 is not self-executing. It gives Plaintiffs no rights that they can have declared, defined, or enforced through a judicial action. See Advisory Opinion--Amendment 5-, 25 So. 2d at 571; Klemm, 181 So. at 159. Accordingly, this Court should approve the Fifth District's affirmance of the trial court's judgment for SFWMD.

B. Plaintiffs' Argument Of Inconsistency With Amendment 5 Does Not Give Rise To Any Legally Cognizable Rights To Be Declared Or Enforced By The Courts.

Plaintiffs alleged in their amended complaint that SFWMD's assessment of ad valorem taxes on their properties pursuant to admitted existing statutory authority, including the EFA, is "in direct contradiction to . . . Amendment 5." (R. 185-86) Plaintiffs appear to believe that this allegation of "inconsistency" gives rise to a cause of action by which the trial court could invalidate the existing statutory provisions Plaintiffs claim are inconsistent with the yet-to-be-defined meaning and intent of Amendment 5 as well as the District's levies and use of ad valorem taxes in accordance with its general taxing authority and the EFA. Plaintiffs are wrong.

As the parties agreed below (R. 438), but markedly absent from discussion in Plaintiffs' brief to this Court, the well-established applicable law is as follows:

> In considering the effect of constitutional amendments upon existing statutes, the rule is that the statute will

[7] See SB 2290, 1998 Sess. (Fla.); SB 2142, 1998 Sess. (Fla.); SB 2070, 1998 Sess. (Fla.).

> continue in effect unless it is completely inconsistent with the plain terms of the Constitution. However, when a constitutional provision is not self-executing, as is the case here, all existing statutes which are consistent with the amended Constitution will remain in effect until repealed by the Legislature. Implied repeals of statutes by later constitutional provisions is not favored and the courts require that in order to produce a repeal by implication the repugnancy between the statute and the Constitution must be obvious or necessary. Pursuant to this rule, if by any fair course of reasoning the statute can be harmonized or reconciled with the new constitutional provision, then it is the duty of the courts to do so.

In re Advisory Opinion to Governor, 132 So. 2d 163, 169 (Fla. 1961) (citations omitted; emphasis added). See also In re Rincon's Estate, 327 So. 2d 224, 226 (1976).

In Advisory Opinion--Amendment 5-[8]

Moreover, contrary to assertions made by Plaintiffs, this Court was clearly not addressing only the "facial consistency of the EFA with the overall purpose of Amendment 5" or the "overall consistency," as opposed to the consistency of the funding provisions of the EFA, when it found no inconsistency between the EFA and Amendment 5. In fact, the Court specifically mentioned the funding aspects of the law in finding the EFA and Amendment 5 consistent:

> [T]he Everglades Forever Act was enacted . . . to determine how and at whose expense pollution of the Everglades should be abated. Amendment 5 was adopted for a similar purpose — to require polluters to pay for the abatement of their pollution.

Advisory Opinion--Amendment 5-(1)(h), Fla. Stat. This is also

[8] This Court need not and should not accept Plaintiffs' allegation or argument of "inconsistency" as true in addressing the issues presented. Although this case involves a judgment on the pleadings, such legal conclusions alleged in a complaint are not presumed true for purposes of ruling on a motion for judgment on the pleadings. See Whitaker v. Powers, 424 So. 2d 154, 155 (Fla. 5th DCA 1982)

reflected in the Legislature's express attempt to balance the funding responsibilities and the economic impact of the projects, and its express provision that only it (not SFWMD) can reallocate the relative contribution between ad valorem taxpayers and EAA taxpayers also paying the agricultural privilege tax. See § 373.4592(1)(e), (4)(a) Fla. Stat.

Although this Court did not construe the EFA to be the enabling legislation for Amendment 5, it found the EFA, including its funding provisions, to be consistent with Amendment 5. Under well-established law, this means the EFA and its funding provisions remain in effect until amended or repealed by the Legislature. This necessarily includes the primary funding assumption underlying the EFA's mandated ECP construction schedule -- that SFWMD will levy and use the full 0.1 mill ad valorem tax as authorized by subsection (4)(a) beginning in 1994 and continuing throughout the project. (A. 1) See id. at 281-82. See also In re Advisory Opinion, 132 So. 2d at 169.
[9]

As the foregoing demonstrates, Plaintiffs' legal conclusory allegation of inconsistency does not give rise to any legal right to the relief requested by Plaintiffs below. As a matter of law, the EFA and its funding provisions for pollution-abatement projects mandated thereunder are not inconsistent with Amendment 5 and remain in effect until amended or repealed by the Legislature. Advisory Opinion--Amendment 5--, 360 So. 2d at 420 n.5. Moreover, that is precisely what the entire constitutional provision, as amended by Amendment 5, requires when read *in pari materia*.

[9] Of course, Amendment 5, looked at in isolation, is arguably concerned only with funding for Everglades restoration. (R. 186) Thus, any suggestion that this Court's finding of consistency did not include or take into account the funding aspects of the respective provisions is spurious at best.

Advisory Opinion--Amendment 5-[10]

Moreover, although the Court need not reach the issue in light of the lack of implementing legislation required to provide Plaintiffs standing, Plaintiffs' proposed claim did not assert the type of "constitutional" challenge that gives rise to standing in a "taxpayer" suit in any event. The traditional rule is that a plaintiff-taxpayer must have some special and peculiar injury to pursue a "taxpayer" suit. See Rickman v. Whitehurst, 73 Fla. 152, 74 So. 205, 207 (1917) and its progeny. The single narrow and limited exception to the traditional rule requires a claim premised on a constitutional violation involving a constitutional provision that imposes a specific limit on taxing and spending legislation. See Department of Admin. v. Horne, 269 So. 2d 659, 662-63 (Fla. 1972) (creating "narrow" and "limited" exception to special injury requirement for standing in taxpayer suit where action is premised on violations of constitutional provisions which "specifically limit taxing and spending legislation"). See also North Broward Hosp. Dist. v. Fornes, 476 So. 2d 154, 155-56 (Fla. 1985); School Bd. of Volusia County v. Clayton, 691 So. 2d 1066 (Fla. 1997).

Clearly, Plaintiffs have not suggested they suffered any special injury, but rather assert their injury is the same as all other taxpayers in the Okeechobee basin (excluding "EAA polluters"). Although Plaintiffs have suggested Amendment 5 is a "restriction on the discretion" of the District's taxing authority, the plain language of the amendment clearly does not "specifically limit [any] taxing and spending legislation." See Horne, 269 So. 2d at 662-63. Certainly, there is no logical basis to conclude that the voters who approved Amendment 5 intended it to be a specific limitation on any taxing or spending legislation since no such language appears in the amendment itself.[11] If anything, it is a donation of authority to the government to enact laws imposing payment obligations (i.e., taxes, special assessments, penalties, etc.) polluters of the EAA and EPA to pay for abatement

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[10] Although the Court did find standing in Kuhnlein

[11] SFWMD's constitutional authority to levy ad valorem taxes comes from article VII, section 9, of the Florida Constitution, which authorizes SFWMD to levy ad valorem taxes up to 1.0 mill, subject to authorization by general law. By statute, SFWMD is given authority to levy ad valorem taxes up to .8 mill. § 373.503 (3)(a)5, Fla. Stat. Nothing in Amendment 5 reflects any intent to restrict SFWMD's taxing authority under these constitutional and statutory provisions.

of their pollution.

Accordingly, Plaintiffs have no standing to bring their proposed claim under Amendment 5. It necessarily follows that their complaint and action was properly dismissed by the trial court. This Court, therefore, should approve the disposition of the appellate court.

III. PLAINTIFFS' COMPLAINT AND ACTION WAS PROPERLY DISMISSED BECAUSE THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION.

One of the grounds asserted in SFWMD's motion to dismiss was the trial court's lack of subject matter jurisdiction due to Plaintiffs' failure to comply with the jurisdictional requirements of section 194.171, Florida Statutes (1997). Although the trial court correctly held that section 194.171 applied and dismissed Plaintiffs' complaint, the court - without jurisdiction - allowed Plaintiffs to amend their complaint to "cure" the court's lack of jurisdiction through some form of relation back rule inapplicable to the jurisdictional issue implicated. (R. 160-70) Although the trial court's error was rendered harmless by its ultimate disposition of the case, the disposition below can also be approved by this Court based on the trial court's lack of subject matter jurisdiction.

A. Section 194.171 Applies to Plaintiffs' Action.

Section 194.171, Florida Statutes (1997), governs judicial review of "all matters relating to property taxation." § 194.171(1), Fla. Stat. Its provisions not only govern the prerequisites to any action brought to contest a tax assessment, but also limit the subject matter jurisdiction of the circuit court to entertain any such action. § 194.171(2)-(6), Fla. Stat.

Plaintiffs' action was expressly brought to contest SFWMD's tax assessments under the EFA and its general taxing authority.

[12] Accordingly, section 194.171 is applicable by its plain language.

Without citing any authority, Plaintiffs baldly asserted below that section 194.171 was inapplicable merely because "Plaintiffs are challenging the authority and power of the SFWMD to levy ad valorem taxes in direct contradiction to the Florida Constitution." (R. 40) Plaintiffs cited no authority for their argument because there is none. As this Court has held, the mere fact that a plaintiff raises constitutional challenges to the assessments and to the authorizing statutes does not avoid application of section 194.171. See Markham v. Neptune Hollywood Beach Club, 527 So. 2d 814, 814-16 (Fla. 1988)(approving dismissal for lack of jurisdiction, finding the section 194.171 jurisdictional requirements applied notwithstanding claim that taxes were void and unconstitutional). See also State, Dept. of Revenue v. Stafford, 646 So. 2d 803, 806 (Fla. 4th DCA 1994) ("jurisdictional limitations on challenges by a taxpayer to an assessment found in section 194.171 have been held to be constitutional and not to unreasonably restrict a taxpayer's access to courts") (citing Bystrom v. Diaz, 514 So. 2d 1072 (Fla. 1987), and Rudisill v. City of Tampa, 151 Fla. 284, 9 So. 2d 380 (1942)).[13]

Moreover, the mere fact that Plaintiffs sought declaratory relief under chapter 86, Florida

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[12] Plaintiffs' original complaint expressly sought to invoke the trial court's subject matter jurisdiction under "Fla. Const. Art. V § 20(c)(3), in that this case involves the legality of a tax assessment." (R. 3-4) See Fla. Const. Art. V, § 20(c)(3) ("Circuit courts shall have jurisdiction . . . in all cases involving legality of any tax assessment"). Plaintiffs also sought to invoke the trial court's jurisdiction under section 26.012(2)(e), which similarly provides that circuit courts "shall have exclusive jurisdiction . . . [i]n all cases involving legality of any tax assessment." See § 26.012(2)(e), Fla. Stat. (1997). (R. 3-4) Indeed, the primary relief sought by Plaintiffs was a judgment "[d]eclaring that the 0.1 mill ad valorem tax levied by the SFWMD pursuant to § 373.4592(4)(a)(1994) of the EFA . . . and the additional ad valorem taxes levied under the SFWMD's general ad valorem taxing authority . . . violate the Polluter Pays Amendment." (R. 203)

[13] Plaintiffs' reliance on Kuhnlein below was wholly misplaced. Kuhnlein did not address or concern the subject matter jurisdiction of the circuit court, much less the application of section 194.171 to a constitutional challenge to ad valorem taxes. However, in discussing standing, the Court did note that Florida circuit courts have plenary subject matter jurisdiction over any matter "not expressly denied them by the constitution or applicable statutes." 646 So. 2d at 720. Section 215.26, discussed in that case, does not establish limits on the court's jurisdiction. Section 194.171, however, did expressly limit the circuit court's subject matter jurisdiction in this case.

Statutes, does not alter the fact that Plaintiffs' proposed action contested tax assessments made by the SFWMD and was a matter "relating to property taxation." § 194.171(1), Fla. Stat. Indeed, a challenge to the constitutionality of a tax assessment or an authorizing statute, such as in Markham and in the present case, is almost always pursued by a declaratory action. Nevertheless, where the true substance of the action is a challenge to a tax assessment, section 194.171 is applicable regardless of how plaintiff dresses up the claim. See Hall v. Leesburg Regional Medical Center, 651 So. 2d 231, 232-33 (Fla. 5th DCA 1995) (rejecting plaintiff's attempt to avoid section 194.171 by asserting its action concerning exemptions was not an action contesting tax assessments); Stafford, 646 So. 2d at 805-07 (rejecting plaintiff's attempts to circumvent the jurisdictional limitations of section 194.171 by couching its complaint as an action for a refund, holding section 194.171 applied where the relief sought was based on plaintiff's assertion that tax assessments were "unjust, capricious, arbitrary and illegal"). See also Dept. of Revenue v. Ray Construction, etc., 667 So. 2d 859, 863 (Fla. 1st DCA 1996) (similar analysis with regard to section 72.011 in declaratory judgment action).

Whether couched in terms of a declaratory judgment action, an action for refund, or any other form of action, Plaintiffs clearly sought to contest the legality of the SFWMD's ad valorem tax assessments by their claim. There is nothing in chapter 194 that limits application of the jurisdictional requirements of section 194.171 to a particular form of action by which a taxpayer seeks to contest the legality of ad valorem taxes. Rather, the plain language of the statute applies broadly to cover any form of action, including Plaintiffs' declaratory judgment action that contests the constitutional validity of SFWMD's tax assessments. See Markham; Hall; Stafford; Ray Construction.

B. Plaintiffs Did Not State And, At The Time SFWMD's Motion to Dismiss Was Ruled Upon, Were Unable to Amend to State a Cause of Action Within The Limits of The Circuit Court's Subject Matter Jurisdiction.

The subject matter jurisdiction of the circuit court to entertain Plaintiffs' challenge to the "legality of a tax

assessment" (R. 3-4) was expressly constrained by section 194.171. This statute provides in pertinent part:

> (2) No action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under s. 193.122 (2). . . .
>
> (3) Before an action to contest a tax assessment may be brought, the taxpayer shall pay to the collector not less than the amount of the tax which the taxpayer admits in good faith to be owing. The collector shall issue a receipt for the payment, and the receipt shall be filed with the complaint.
>
> * * * *
>
> (6) The requirements of subsections (2), (3), and (5) are jurisdictional. No court shall have jurisdiction in such cases until after the requirements of both subsections (2) and (3) have been met.

§ 194.171(2), (3), (6), Fla. Stat. (emphasis added).

This Court has held that subsection (6) of section 194.171 means what it plainly says and must be enforced as a limitation on the circuit court's subject matter jurisdiction. See Markham, 527 So. 2d at 815 (circuit court was without jurisdiction to consider a constitutional challenge to a tax assessment and authorizing statute where the action was not alleged to have been commenced or actually commenced within the 60-day period required by section 194.171(2)). See also Bystrom v. Diaz, 514 So. 2d 1072 (Fla. 1987) (failure to comply with subsection (5) (requiring timely payment of taxes in years after an action is brought) during the pendency of a case divests a court of jurisdiction, requiring dismissal).

In Wilkinson v. Reese, 540 So. 2d 141 (Fla. 2d DCA 1989), the court similarly applied the plain meaning of subsection (6) and held that "the payment of the taxes and attachment of the receipt [is] a jurisdictional prerequisite," referring to the requirements

of section 194.171(3). As explained by the court:

> Our supreme court has held that dismissal of complaints that have not complied with subsections (2) and (5) were proper given the "plain meaning" of subsection (6). . . .
>
> We can ascertain no meaningful distinction between the failure to comply with subsections (2) and (5) and subsection (3), and hold, consistent with Markham, Bystrom, and Clark[v. Cook, 481 So. 2d 929 (Fla. 4th DCA 1985)], that failure to comply with subsection (3) requires dismissal of the . . . complaint.

Id. at 143.

It is well established that a pleading must contain allegations of fact sufficient to show the subject matter jurisdiction of the court. Fla. R. Civ. P. 1.110(b)(1); Gannett v. King, 108 So. 2d 299, 301 (Fla. 2d DCA 1959) ("A pleading which sets forth a claim for relief must contain allegations of fact sufficient to show the jurisdiction of the court."); Jozu Enters., Inc. v. Muller, 400 So. 2d 831 (Fla. 3d DCA 1981) (granting relief from judgment where allegations of complaint were insufficient to confer jurisdiction on circuit court to enter a judgment). In this case, in order for the circuit court to have subject matter jurisdiction, Plaintiffs were required to: (1) allege facts in their complaint showing the action was commenced within 60 days from the date the assessments being contested were certified; (2) allege facts in their complaint showing Plaintiffs paid the tax collector not less than the amount of the tax each admitted in good faith to be owing; and (3) attach to or file with the complaint the receipts for such payments. § 194.171(2)-(3), (6), Fla. Stat.

Plaintiffs' original complaint patently failed to comply with any of these jurisdictional requirements. Accordingly, the trial court properly dismissed Plaintiffs' complaint due to lack of subject matter jurisdiction. The trial court erred, however, in allowing Plaintiffs to amend their complaint to "cure" this jurisdictional deficiency and in not dismissing the action. See Markham; Wilkinson; § 194.171(2)-(3), (6), Fla. Stat.

Plaintiffs' amended complaint, filed on July 13, 1998, more than eight months after certification of the respective tax rolls (R. 41), could not cure the jurisdictional deficiencies in Plaintiffs' action.

[14] This is because the amendments do not relate back to the commencement date of the action. As held in Wilkinson, given the jurisdictional nature of the subsection 194.171(2)-(3) requirements as established by subsection (6), the relation back doctrine cannot be used to allow amendments to complaints that are not technically in compliance with the statute. 540 So. 2d at 143. Thus, in that case, notwithstanding the trial court's factual findings that plaintiffs had made good faith payment and had filed the receipt with the court before the taxes became delinquent, the appellate court held that the trial court erred in applying the relation back doctrine and the action had to be dismissed for lack of jurisdiction "because the complaint failed initially to comply with subsection (3)." Id.

Although Mikos v. Parker, 571 So. 2d 8 (Fla. 2d DCA 1990), would seem to allow Plaintiffs to amend in order to attach the requisite receipts for payments to their complaint with the

[14] Because Plaintiffs' amended complaint was not filed within 60 days from the date the taxes being contested were certified, this Court need not determine whether an amendment within such time should ever be allowed as opposed to a new action being filed within the 60-day jurisdictional period.

amendment relating back to the initial filing,[15] Mikos was wrongly decided and conflicts with the express language of the applicable statute as well as this Court's interpretation and application of the statute.[16] Section 194.171(3) clearly requires that the receipt for payment "shall be filed with the complaint." Just as clearly, section 194.171(6) states that the circuit court has no jurisdiction "until after the requirements of both subsections (2) and (3) have been met." It necessarily follows that, since the requirements of subsection (3) were not met, the circuit court had no jurisdiction in this case and, thus, there was no jurisdiction even to allow an amendment of the pleadings to cure the jurisdictional deficiency in failing to file the requisite receipts.

In addition, this Court has held that the language of subsection (6) is clear and must be given its plain meaning — that is, the requirements of subsections (2), (3) and (5) are jurisdictional. Failure to comply with those technical requirements requires dismissal for lack of jurisdiction. See Markham; Bystrom. There is nothing ambiguous about the mandate of section 194.171(3) that "the receipt shall be filed with the complaint" or subsection (6) which makes this requirement jurisdictional just like the other requirements of subsections (2), (3) and (5). See Wilkinson, 540 So. 2d at 142-43. Where the plain meaning of a statute is clear, courts are without power to engage "rules of construction" to establish a legislative intent contrary to that plain meaning. See State v. Barnes, 595 So. 2d 22, 24 (Fla. 1992) ("this Court has no authority to change the plain meaning of a statute where the legislature has unambiguously expressed its intent"); Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (same); St. Petersburg Bank & Trust Co. v. Hamm, 414 So. 2d 1071, 1073 (Fla.

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[15] Mikos has no bearing on the jurisdictional deficiencies in Plaintiffs' original complaint arising from failure to allege good faith payment of taxes admittedly owed and filing within the 60-day jurisdictional period. Thus, those jurisdictional deficiencies required dismissal of the action without regard to Mikos' holding concerning the requirement of attaching the receipt.

[16] The holding of the Second District in Mikos is also in conflict with the holding of the same court in Wilkinson, discussion or citation of which is markedly absent in Mikos. Thus, Mikos is of questionable precedential import even in the Second District. Wood v. Fraser, 677 So. 2d 15, 18 (Fla. 2d DCA 1996) ("absent an en banc opinion expressly receding from a point of law announced in previous opinions of this Court, a trial court should not rely on the expressions of a three-judge panel as a basis to conclude that a previous opinion of another three-judge panel no longer carries the force of law").

1982) ("[e]ven where a court is convinced that the legislature intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity") (quoting Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (1918)); Henriquez v. Adoption Ctr., Inc., 641 So. 2d 84, 90 (Fla. 5th DCA 1993) (on rehearing) ("It is not the function of appellate courts to correct what they perceive to be inequitable results produced by clear and unambiguous legislative mandates"), rev. denied, 649 So. 2d 233 (Fla. 1994).[17]

Accordingly, pursuant to section 194.171, Plaintiffs' action was required to be dismissed due to the circuit court's lack of subject matter jurisdiction. The circuit court was without jurisdiction to grant leave to Plaintiffs to amend their complaint to "cure" the jurisdictional deficiencies and Plaintiffs' amended complaint did not relate back to breathe life into the action or infuse subject matter jurisdiction into the circuit court that did not exist. Although the trial court's error in this regard was rendered harmless by virtue of the ultimate disposition of the action, the trial court's lack of subject matter jurisdiction over the action provides an additional ground for this Court to approve the disposition below.

CONCLUSION

Plaintiffs, not content to wait for the Legislature to act, filed this action seeking to have the trial court usurp the power of the Legislature and resolve judicially the myriad policy issues the voters committed to the Legislature under Amendment 5. The trial and appellate courts below, consistent with constitutional concepts of separation of powers, declined to do so. This Court should do likewise and defer to the Legislature those policy issues that must be resolved to give effect to Amendment 5 and thereby fulfill the expectation of the voters who approved the amendment. Under any fair reading of well-established Florida law, the trial court properly entered judgment on the

[17] Thus, the Mikos court erred in engaging in such an exercise, especially where it purported to rely on a legislatively unstated "obvious objective" that the court merely found would not be "hindered" by an interpretation at odds with the plain meaning of the language of the statute.

pleadings for SFWMD and the appellate court properly affirmed that judgment. Accordingly, this Court should approve the decision of the Fifth District Court of Appeal in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via U. S. Mail on April ____ 2001, to E. Thom Rumberger, Esq., Christopher T. Hill, Esq., and Suzanne Barto Hill, Esq., Rumberger, Kirk & Caldwell, Counsel for Appellants, Signature Plaza, Suite 300, 201 South Orange Avenue, P. O. Box 1873, Orlando, FL 32802; Jon Mills, Esq. and Timothy McLendon, Esq., Counsel for Appellants, P.O. Box 2099, Gainesville, FL 32602; William L. Hyde, Esq. and Rebecca A. O'Hara, Counsel for Amicus, Gunster Yoakley et al., 215 S. Monroe St., Tallahassee, FL 32301; Daniel S. Pearson, Esq., Holland & Knight, Counsel for Amicus, U.S. Sugar Corporation, 701 Brickell Avenue, Suite 3000, Miami, Florida 33131; William Green, Esq., Counsel for Amicus, Florida Chamber of Commerce, Inc., Hopping Green Sams & Smith, 123 S. Calhoun St., P.O. Box 6526, Tallahassee, FL 32314; and Ruth P. Clements, Esq., Office of Counsel, South Florida Water Management District, P.O. Box 24680, West Palm Beach, FL 33416-4680.

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CERTIFICATE OF TYPE STYLE

The type style utilized in this brief is 12 point Courier proportionately spaced.

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