IN THE SUPREME COURT OF FLORIDA

DAVID M. POMERANCE and
RICHARD C. POMERANCE,

Petitioners,

vs.

CASE NUMBER: SC00-912
Lower Tribunal No. 5D98-2504

HOMOSASSA SPECIAL WATER
DISTRICT, a political subdivision
of the State of Florida,

Respondent.
_____/

After an Opinion by the District Court of Appeal,
Fifth District (Case No. 98-02504)

On Appeal from the Circuit Court, Fifth Judicial Circuit
In and For Citrus County, Florida, Case No. 94-2070-CA

PETITIONERS' INITIAL BRIEF

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PRELIMINARY STATEMENT

The Plaintiffs/Appellants, DAVID M. POMERANCE and RICHARD C. POMERANCE , will hereinafter be referred to as "PETITIONERS" or "POMERANCE". The Defendant/Appellee, HOMOSASSA SPECIAL WATER DISTRICT, will hereinafter be referred to as "RESPONDENT", "THE DISTRICT", and/or "WATER DISTRICT". Citations to the record herein will be referred to as "R - ___". Citations to the transcript of the trial before the lower Court will be referred to as "Transcript at page ___" or (T-____)". Citations to the opinion of the Fifth District Court of Appeal dated March 24, 2000 will be referred to as "Opinion at Page _____ or (0 - ___)."

PETITIONERS' STATEMENT OF THE CASE AND FACTS

The Petitioners, DAVID M. POMERANCE and RICHARD C. POMERANCE, are the owners of approximately nine acres of real property located in Citrus County, Florida and abutting U.S. 19 in the Homosassa area. (See, R-540 and T-14). Mr. Pomerance and his mother, Mildred F. Pomerance, acquired the property in 1984 at a purchase price of $151,000.00. (T-14).

Thereafter, in 1993 following the death of Mrs. Pomerance, her interest in the property was conveyed by the Personal Representative of the Estate to the Petitioners here. (T-16) During the probate process, the property was appraised for probate purposes by James W. Morton of J. W. Morton Century 21 Real Estate, Inc. in Citrus County, Florida. (T-16) Mr. James Morton testified that if developable, the property had an appraised value of $58,893.00 and that if not developable, the property had no value at all. (T-16)

The Petitioners real property is located within the Homosassa Special Water District, a special taxing district authorized and established by State Legislative enactment in 1959 to allow citizens within the District to tax themselves to construct and maintain a public water system. (R-541 and T-17). In 1988, the residents of the District voted to extend the service to a nearby subdivision known as "Halls River Estates." (R-541). In order to effectuate the new service, the District had to run a waterline travelling along U.S. 19 to the

new subdivision. (R-447). In so doing, the line ran across the front of Petitioners' property. Petitioners' property is almost entirely vacant wetlands and Petitioners' had no desire or need for water service. (R-555).

In order to fund the cost of construction of the service, the Respondent imposed a special assessment on all landowners abutting the extension on a front foot basis. (R-447, T-16 and T-19). The Pomerances were assessed approximately $20,000.00(T-19). In reaching this assessment, the Respondent allowed a reduction only for the irregular shape of the Pomerance property (triangular). The assessment did not consider either the fact that the property contained extensive wetlands or the fact that the only upland portion of the site suitable for development was located in the extreme rear of the property and separated from the waterline and US 19 by wetlands. (R-447).

At trial, both the Petitioners and the Respondent presented expert testimony, all of whom testified as to the extensive wetlands located on the property. In fact, both Petitioners' and Respondent's expert witnesses testified that the small portion of the upland area that does exist and which is the only part of Petitioners' land which could be developed and thus potentially benefit from the waterline is located at the rear of the property. (See, T-80, 120-121, 173-174, 495, 486 and 428). Despite such, the Respondent made no adjustment to its assessment as a result of the severely diminished capacity of the property

to support development but rather claims that such assessment represents the proportionate benefit derived by the Pomerance Property from the Respondent's waterline. (T-19).

The Pomerances sought relief from the Special Assessment levied against the Pomerance's property by the District pursuant to Florida law and the Charter provisions under which the District is organized and authorized. (T-17) (A copy of the District's Charter is attached hereto as Appendix 1 to this brief.) The Respondent's Charter, together with relevant Amendments, copies of which were submitted into evidence, specifically require that any Special Assessments be levied in proportion to the special benefit to each parcel of property the improvement bears. (R-541 and T-17). (As stated above, a copy of Respondent's Charter and relevant amendment is attached hereto and incorporated herein as Appendix 1. A copy of the Resolution authorizing the assessments is attached hereto and incorporated herein as Appendix 2.) The Pomerances' real property consists of a triangular piece of parcel nearly entirely composed of wetlands protected pursuant to Florida and Federal law. (T-35) A copy of the United States Army Corp of Engineers' preliminary wetlands jurisdictional line was submitted into evidence. (R-555). (See also, trial transcript at pages 82-83).

Pursuant to such Environmental Survey of the property described above,

it is apparent that the property consists of approximately 8.95 acres of which only a maximum of .75 acres is uplands. (See, T-68, 83), Subsequent to a recent site review report prepared by the United States Army Corp of Engineers, it is now apparent that the site contains a mere .50 acres of uplands. (See, R-555 and T-133). The upland acreage is separate from the nearest public roadway and for development and use purposes would require access over and across a wetlands area. (See, transcript at page 83). The wetlands jurisdictional line reflects that absent the filling of wetland areas no access to the nearest public roads could be obtained for the benefit of the .50 acres of upland property. (See, transcript at page 83, R-555).

Expert witnesses on behalf of Plaintiff, Clifford Manuel, P. E., Dale Cronwell, P. E., and Donald Lacey, AICP, testified that overriding environmental considerations consisting of State and Federal law prohibit the development of the property by virtue of State and Federal environmental laws requiring the replacement or mitigation of wetlands at a two to one ratio per acre of land disturbed. (See, transcript at pages 80,120-121,173-174). Because the Pomerances' real property has insufficient uplands available to it to mitigate the impact that the filling of wetlands in order to provide access to the small portion of uplands would require, the property is undevelopable and cannot be built upon. (See, transcript of Dale E. Cronwell, P. E., Clifford Manuel, P. E. and

Dale Lacey, AICP, at pages 69,76-77,115,171-174). Such has been confirmed by the Regulatory Agency with jurisdiction herein, the United States Army Corp of Engineers. (See, R-555).

Accordingly, the improvements for which the Respondent seeks to assess the Pomerance property provide no special benefit to the Pomerances' property whatsoever insomuch as the Pomerances' property cannot be utilized for the construction of any structure. (T-18,19,51-52,85,126,141,174-175) Additionally, the Respondent's Special Assessment of the Pomerances' property was in the amount of $21,334.71. (See, transcript at page 18). This was later reduced to $19,044.39. (See, R-544 and transcript at page 19). Because the Pomerances cannot develop the real property, the waterline improvements constructed by the Respondent along Highway 19 into Halls River Estates and for which this assessment is imposed, would not specially benefit the Pomerances' real property at all. (T-76-77,85-86,119-120,126,127,172-175).

Even if Respondent's assessment provided a benefit to the Pomerances' property, the uncontroverted trial testimony of James Morton establishes that the maximum benefit to Pomerances' property is the cost of a potable well or $2,000.00 - $5,000.00. (See, testimony of James Morton at "T-214" and R-545). Mr. Morton testified that if the property could not be developed, the property would have no value whatsoever and the waterline improvements

would be of no benefit to the site (T-213). On the other hand, Mr. Morton testified that even if it could be developed, the property would be worth only $58,000.00 (T-213) and the Respondent's waterline improvement would be of benefit only to the extent of the value of a well (T-214). Mr. Barry Runyon, licensed real estate appraiser confirmed this testimony (T-227-239).

In addition to the trial testimony of Petitioner's expert witnesses and appraisers, the Citrus County Director of Development Services, Gary Maidhof testified before the Court. (T-240) Mr. Maidhof testified as to his current responsibilities and extensive background in the permitting and development of property in Citrus County, Florida. (T-242). Mr. Maidhof further testified as an expert witness to the following facts:

1. That the site is predominantly wetlands. (T-246)

2. That there is less than one (1) acre of usable uplands. (T-246)

3. That the development of the site is at best extremely limited. (T-247)

4. That the site has no upland property abutting U.S. 19. (T-248)

5. That the site has no usable property fronting the Appellee's waterline. (T-248)

6. That due to the high presence of wetlands and the limited development potential, his recommendation was to allow the State to acquire the site for conservation. (T-249-250)

7. That the wetlands located on the Pomerance site are

considered one of the more important types of wetlands. (T-251)

8. Typically mitigation of the site to allow any fill of wetlands would be required of anywhere up to two and a half (2½) acres to each one (1) area impacted. (T-251-252)

9. That there is currently no public sewer available. (T- 253)

10. That sewer service by any off-site package plants within the area would be unlikely. (T-253)

11. That an on-site septic system would be required and that 3.5 acres of uplands would be required for such. (T-255)

12. That this site does not contain 3.5 acres of uplands. (T-255)

13. That the property cannot be used for residential purposes. (T-256)

14. That commercial development would be extremely difficult. (T-256)

15. That the existence of public water to the site does not provide "much benefit" to the site. (T-257)

16. That sufficient upland acreage does not remain after mitigation to develop the site without owning off-site property. (T 240-258) and (See, R-560).

It is clear from the expert testimony of Mr. Maidhof and other witnesses that the Pomerance property cannot be developed without the acquisition of off-site property, that the Respondent's waterline improvement provides no benefit to Pomerances' property and that even if the property could be developed, it is not benefited by Respondent’s improvement in proportion to the amount assessed. Because the property will not receive a proportionate benefit from the water

system improvements made by the Respondent, the assessment is improper under Florida law and the Respondent's Charter provisions.

The Pomerances objected to the assessment on these grounds and ultimately sued the Respondent in the Circuit Court in and for the Fifth Judicial Circuit arguing that they should not be obligated to pay the assessment alleging that because of the onsite jurisdictional wetlands, the assessment was not properly imposed in proportion to the benefit the waterline presented to the Pomerance property. The Trial Court upheld the Respondent's assessment and the Pomerances appealed. The Fifth District Court of Appeal then affirmed the Lower Court's decision and issued its opinion, Judge Harris dissenting. A conformed copy of the opinion is attached hereto as Appendix 3.

Thereafter, the Pomerances filed their Notice to Invoke Discretionary Jurisdiction of the Supreme Court on April 24, 2000. This Court granted certiorari and issued its Order Accepting Jurisdiction and Setting Oral Argument on September 19, 2000.

SUMMARY OF ARGUMENT

The special assessment imposed upon the Petitioners' property is invalid as a result of the failure of the Respondent to comply with the law of this state and the Respondents own Charter provisions, as amended. More particularly, the Respondents assessment fails to comply with the basic principles established by this Court that the property derive a special benefit and that the assessment be fairly and reasonably apportioned according to the benefits received. Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180 (Fla. 1995).

Because Petitioner's property is subject to overriding environmental regulatory constraints, it receives no benefit from the waterline improvement for which it was assessed. Accordingly, Respondents property receives no special benefit nor was it fairly and reasonably assessed in proportion to the benefits received. The assessment is therefore invalid. The Opinion of the Fifth District Court of Appeal and the judgment of the Circuit Court upholding Respondent's assessment should be reversed.

ARGUMENT
ISSUE

WHETHER A SPECIAL ASSESSMENT LEVIED BY A SPECIAL WATER DISTRICT IS INVALID WHERE THE WATER DISTRICT FAILED TO COMPLY WITH FLORIDA LAW AND THE WATER DISTRICT'S LEGISLATIVE CHARTER, AS AMENDED, BY FAILING TO FAIRLY AND REASONABLY ASSESS PROPERTY WHICH IS THE SUBJECT OF EXTENSIVE GOVERNMENTAL ENVIRONMENTAL REGULATIONS IN PROPORTION TO THE BENEFIT RECEIVED BY SUCH PROPERTY FROM THE WATER DISTRICT'S WATERLINE IMPROVEMENT.

As Judge Harris stated in his dissent in the Fifth District Court of Appeals Opinion in this case, "This case adds insult to injury." (Opinion at Page 6). The Homosassa Water District is a Special District created by Special Act of the Florida Legislature. See, Chapter 59-Laws of Florida. A copy of such Special Act is attached to this Brief as Appendix 1). The Water District has no inherent authority to levy special assessments. See, City of Miami v. Brinker, 342 So.2d 115, 116 (Fla. 3d DCA 1977). Such levies are invalid unless made "pursuant to the method prescribed by the legislature." Id.

The power of state and local governments to levy taxes is governed by the Constitution of the State of Florida. Article VII, Section 1(a), Florida Constitution provides as follows:

> No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms

> of taxation shall be preempted to the state except as provided by general law. Id.

Article VII, Section 9(a) of the Florida Constitution further provides that:

> (a) Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution.

Therefore, the Constitution mandates that Special Districts created by the legislature have no authority to levy taxes or other assessments except as provided by legislative law. See, Collier County, Florida v. State of Florida, 773 So. 2d 1012 (Fla. 1999). All other forms of taxation are preempted to the State unless authorized by general law. Id. at 1013.

Florida has adopted a two-prong test for determining the validity of special assessments

In reviewing the validity of special assessments, the Florida Supreme Court has adopted a two-prong test to determine whether an assessment is lawful. See Lake County Florida v. Water Oak Management Corporation, 695 So. 2d 667, 668 (Fla. 1997). See also, Sarasota County v. Sarasota Church of Christ, 667 So.2d 180, 183 (Fla. 1995); City of Boca Raton v. State, 595 So.2d 25, 29 (Fla. 1992). First, it must be determined "whether the services at issue provide a special benefit to the assessed property" and second, it must be

determined "whether the assessment for the services is properly apportioned". Lake County, 695 So. 2d 667 (Fla. 1997). This Brief will address first whether the services provided by the Respondent's water-line provide a "special benefit" to the Pomerance property and second whether the Respondent's assessment is fairly and properly apportioned.

There must be a special and peculiar benefit

In Harris v. Wilson, 693 So. 2d 945 (Fla. 1997), a county's partial year special assessment applicable to residential properties in unincorporated areas for the purpose of financing solid waste disposal was found not to be arbitrary. Id. In discussing the county's determination of benefits, the court noted that the county had stated in both the ordinances and the resolution adopting the assessment that the properties to be assessed would be specially benefited by such an assessment. See Id. Specifically, the county's Resolution directly stated that:

> "Benefits provided to affected lands include by way of example and not limitation, the availability of facilities to properly and safely dispose of solid waste generated on improved residential lands, closure and the long term monitoring of the facilities, a potential increase and value to improve residential lands, better service to owners and tenants, and the enhancement of environmentally responsible use and enjoyment of residential land." Harris, 693 So. 2d 945 (Fla. 1997).

In contrast to Harris, however, the resolution as adopted by the

Homosassa Special Water District failed to provide any specific findings of special benefit to the property to be assessed. (See Resolution, dated January 13, 1992 at R-542 and Appendix 2 at Page 1). Rather, the Resolution merely stated in general terms that the water system improvements were being provided based on a petition by a majority of the residents of a portion of the area to be assessed and that the District "desired" to provide the water service provided that the special assessment was paid by the lands to be benefited. See, Id. No mention was made of what that benefit might be. See, Id.

No special benefits existed here or were found by the Respondent

Although it can generally be said that the benefits from water service may potentially improve residential lands, no such benefit was expressed by the Water District. See, Id. Additionally, no determination of any benefit to commercial properties or those environmentally impacted such as the Pomerances' property was made by the District. See, Id. The Respondent, at trial, stipulated that the official minutes of the meetings of the Commissioners of the District accurately reflect all evidence considered by the District in confirming the Special Assessment roll and the specific assessment which is the subject of this action. (See, Joint Stipulation of the parties at T-277).

In fact, a review of the Official Minutes of the District reflects that no evidence as to benefit was considered by the District. In fact, the District

considered only the improvement plans and the assessment roll describing property and amounts for each assessment. (See, R-548). No evidence in support of special benefit to any property including the Pomerances' property was considered. In fact, the only evidence on the issue and benefit considered was provided by the Pomerances and established a lack of benefit to the Pomerance property. (See, R-554).

While a specific finding of benefit to every parcel is not required for each parcel, some finding of benefit must be made by the taxing authority

The Fifth District Court within its opinion herein concluded that a factual finding that the specific parcel in question receives a special benefit is not required based upon, City of Treasure Island v. Strong, 215 So 2d 473 (Fla. 1968). (See, Opinion at Appendix 3, Page 2.) In doing so, the court completely failed to consider the fact that herein, the District made no finding or determination of any benefit to any of the assessed properties. In City of Treasure Island v. Strong, supra, this Court stated as follows:

> ...when, as in the instant case, there is an inherent and obvious legislative determination in the enabling provision that the benefits flowing from a particular improvement are of the kind as would usually accrue to particular properties, it is not absolutely incumbent on the taxing authority to make a determination that each property ownership will be specially benefited by the improvement. Id. at 482. (emphasis added).

Respondent's Resolution dated January 13, 1992, which Resolution was admitted into evidence and is attached hereto as Appendix 2 reflects on its face the following:

> Whereas, an overwhelming majority of the residents and or landowners of the "Halls River Estates" Subdivision have petitioned the Homosassa Special Water District (hereafter called the District), to have water service extended to the subdivision and made available to the individual lot owners therein;ÿ
>
> Whereas, the District is desirous of providing said water service, provided that those landowners to be benefited thereby, (that is, the landowners in the subdivision itself and those landowners along the route of the extension) pay for the cost of the expansion through the levy by the District of a special assessment on the lands to be benefitedÿ. Id.

Unlike the taxing authority in City of Treasure Island v. Strong, 215 So. 2d, 473, the taxing authority in this case made no determination of benefit to any parcel within its "enabling provision" or otherwise. Rather, this taxing authority relied solely upon the "desire" of a portion of the residents of a portion of the area assessed living farther out than Petitioner's property and the taxing authority's own "desire". (See Resolution dated January 13, 1992 at R-542 and attached hereto as Appendix 2 to this Brief).

In City of Treasure Island v. Strong, supra, this Court, in 1968, addressed the issue of a special assessment issued by the City of Treasure Island for the

purpose of preventing beach erosion. In that case, the City of Treasure Island, enacted its Ordinance, had it ratified by the Circuit Court and thereafter by its Board of Commissioners, adopted a resolution specifically finding that the assessments were on a basis of "justice and right." Id. at 476-477. During all of those proceedings, the affected land owners did not object. Id. at 478. After a foreclosure action was filed by the City, the affected landowner argued that the assessment was invalid. Id.

In reviewing the issue, this Court in City of Treasure Island v. Strong, ultimately concluded that, because the landowner made no timely objection and the City had completed its improvements, the landowner was estopped to contest that assessment, having failed to avail himself of the remedies available such as objecting at the previous hearings. Id. City of Treasure Island v. Strong was later distinguished on that very basis by the Second District Court of Appeal in Lee County v. Zemel, 544 So. 2d 344, 345 (Fla. 2nd DCA 1989). Herein, the Petitioners' timely objected and more importantly, the Respondent failed to find any benefit, special or otherwise, to affected assessed properties.

The Court cannot defer to a legislative finding of special benefit where no such finding is made or expressed

While the law may require a court to defer to a legislative finding of special benefit, see e.g. Sarasota County v. Sarasota Church of Christ, 667 So.

2d 180-183, no such deferral can be made absent such a finding. The rule clearly states that it **must be determined** "whether the services at issue provide a special benefit to the assessed property." Lake County, 695 So. 2d 667 (Fla. 1997). Thus, this determination is required to be made prior to the levying of a special assessment, not after such assessment has been levied. Id.

Herein, the Water District failed to establish any benefit, as evidenced in its Resolution, dated January 13, 1992. The Water District's effort to establish a benefit through the testimony of experts after the institution of this litigation has no bearing on the finding the Water District was required to make prior to levying the assessment. Further, because it is a legislative function and not a judicial function to determine benefit, See Sarasota County, 667 So.2d at 180, the Lower Court could not infer or provide a special benefit where the Water District failed to establish its existence via Resolution.

The failure to find a special benefit to assessed properties violates the Respondent's Charter

More importantly, the evidence at trial clearly established that the Respondent is a Special District subject to the provisions and requirements of its legislatively created Charter, as Amended. (See, R-541 and Appendix 1). Chapter 63-1222 of the Laws of Florida, an Amendment to the Respondent's Charter provides as follows:

> The district may provide for the construction or reconstruction of improvements to the system of a local nature and of special benefit to the properties served thereby. Such project may be initiated by the board by a resolution ordering the construction of the improvements and shall assess against the property to be specially benefited by such improvements that portion of the cost which the board has designated, such remaining cost to be paid from other funds designated by the board. Such special assessments shall be levied upon the property specially benefited by such improvements in proportion to the benefits to be derived therefrom. Such special benefits shall be determined and prorated according to the front footage of the properties specially benefited by such improvements, or by any other method as the board may prescribe....
>
> The amount of the assessment against each lot or parcel of land shall in no event exceed the special benefits accruing thereto.
>
> (R-541 and Appendix 1at Page 6). (Emphasis added).

Nowhere within this specific governing language does the Respondent's Charter provide that special benefit may be assumed or that a bare assertion of special benefit may be made. The law governing the Respondent's special assessments clearly requires that such must be in proportion to the benefits derived from the improvement. Id. And see, Collier County v. State, 733 So.2d 1012 (Fla. 1999); City of Treasure Island v. Strong, 215 So.2d. 473 (Fla. 1968); Sarasota County v. Sarasota Church of Christ, Inc., 667 So.2d 180 (Fla. 1995); City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992).

At trial, the Respondent presented no testimony as to the alleged benefit to Petitioners property except the testimony of the engineer who drafted the

plans for the improvement. (T-495). Mr. George McDonald testified that "the cost of bringing water to that person is equal of the cost that it takes to run pipe across the front of the lot" (T-495).[1] Such is directly contrary to the law as established by this Court and the language and requirements of Respondent's Charter, as Amended. (Appendix 1 at Page 6) As set forth above, Respondent's Charter requires that an assessment be based upon proportionate benefit, not proportionate cost. (R-541). More importantly, a nexus between benefit and assessment as opposed to cost and assessment has been required by this Court. See, Collier County v. State, 733 So.2d 1012 (Fla. 1999); City of Treasure Island v. Strong, 215 So.2d. 473 (Fla. 1968); Sarasota County v. Sarasota Church of Christ, Inc., 667 So.2d 180 (Fla. 1995); City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992).

While Respondent's Charter authorizes the front footage assessment method, it clearly states that the District must:

> assess against the property to be specially benefited by such improvements that portion of the cost which the Board has designated, such remaining cost to be paid from other funds by the Board. (R-541 and Appendix 1at Page 6) (Emphasis added).

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[1] Mr. McDonald testified as an expert in the area of engineering. He was not accepted as an expert in the area of value or benefit analysis. (T-492-523).

The District's Charter allows for a front footage assessment based upon benefit, not cost, and requires that the additional funds be paid from other sources. (R-541). The Respondent, in imposing the assessment without any foundation or determination of benefit of any kind, created an arbitrary assessment.

Herein, the Pomerances' property is not specially benefited by the Respondent's waterline improvement in any way. The testimony at trial clearly established that the Pomerances' property cannot be developed or used for any commercial purpose. (T-77). The testimony at trial further established that the Respondent's waterline improvement provides no benefit to the property if, in fact, the property cannot be developed (T-85,127,257). Petitioners' expert witnesses established that the Petitioners' property cannot be used or developed as a result of the predominant wetlands. (T-77,120,126).

While Respondent's expert witnesses testified that the property can be developed if off-site property is purchased for mitigation of wetlands impacted by fill, such is patently absurd. (T-486). The maximum value of the Pomerance property is $58,000.00. No reasonable developer would purchase off-site property, fill to achieve access and then develop .5 acres of commercial property. Further, Respondent's Charter does not provide for special benefit if additional property is purchased but rather requires that the Pomerances' property be assessed in proportion to benefit derived by the Pomerance property

without more. (R-541).

It is clear from the testimony at trial of all witnesses that no upland access to the upland area in the rear of the property exists. Therefore, feasible development would require off-site mitigation in order to fill and create upland access. (T-482,485). In fact, Respondent's own expert witness, Dr. Martin A. Roessler, testified that the soil sample removed from the community he identified as upland, community 4 was, in fact, "muck" and evidence of wetland status. (T-428) and See, R-556). The Respondent's expert further testified and opined that access to the property subject to development could come from another direction.

As Judge Harris said in his dissent to the Fifth District Court of Appeal Decision, "Does this not concede that the property subject to development does not front on the waterline?" (See Appendix 3, Opinion at Page 2 of the Dissent). Of course it does. Given the predominant wetlands located on the site and the inability to develop the site, the Respondent's waterline improvement provides no benefit to the Pomerances' property. (T-85,126). Even if the property could be developed, the uncontroverted evidence at trial established that the maximum value of the special benefit to the property is the sum of $2,000.00 - $5,000.00, the cost of a well. (T-214). Respondent's assessment of $19,044.39 is clearly far in excess of the special benefit, if any, derived by Petitioners' property and

should be declared by this Court to be arbitrary and void. See, South Trail Fire Control District v. State, 273 So.2d 380 (Fla. 1973); Collier County v. State, 733 So. 2d 1012 (Fla. 1999).

If, however, this Court finds that a determination of benefits was made by the Water District absent any language so providing, the Water District failed to strictly comply with the language of its charter with regard to the assessment of benefits and the law established by this Court. Pursuant to the Water District's charter, 59-1177, Laws of Florida, as amended by 63-1222, Laws of Florida, the Water District may levy assessments "against properties **specially benefited** by the water system improvements." 63-1222(16)(b), Laws of Florida. (See, Appendix 1at Page 3) (Emphasis added). The Water District, however, contends that it only needs to "reasonably determine" benefits to justify an assessment.

The Court in Snell Isle Homes, Inc. v. City of St. Petersburg, 199 So.2d 525, 527 (Fla. 2d DCA 1967), citing this Court's decision in Fort Myers v. State, 117 So. 97 (Fla. 1928), held that a "requirement as set forth in the charter must be strictly complied with and any deviation from the requirement is jurisdictional and therefore fatal to the validity of the special assessments." Id. (Emphasis added). In Snell Isle, the city failed to have cost estimates on file as required by its charter. See Id. at 526. Although it later filed such cost estimates, the court

found that this was insufficient, as the city had "failed to follow the clear language contained in the charter," and as such the assessments were invalid. Id. at 526, 529.

Similarly, the Water District's assessment of Petitioners' property was invalid. While the Water District's charter specifically states that it must find that the property is "specially benefited," 63-1222(16)(b), Laws of Florida, the Water District has failed to find **any** benefit much less a "reasonable" benefit. See, Resolution, dated January 13, 1992 at Appendix 2, Page 1. Further, any attempt to discern a specific benefit to Petitioners' property would be to no avail. Petitioners' property as stated above is primarily wetlands, with only a very, very small upland portion right in the extreme southern area of approximately .50 acres. (T-133).

Consequently, as a review of the United States Army Corp of Engineers jurisdictional wetlands delineation confirms, no upland properties exist sufficient to provide access to U.S. Highway 19 without the necessity of filling jurisdictional wetlands. (T-79-83-84,139). It is, however, unlikely that the Pomerances could receive a permit to fill, even a portion of the site, without extensive on-site or off-site mitigation. (T-80,120-122,139). As a result, Petitioners' property is undevelopable. Therefore, extension of the Water District's service to the Pomerances provides no benefit, special or otherwise

and the assessment made for such by the Respondent is arbitrary.

In order to be valid, a special assessment must also be fairly proportioned and the property assessed must receive a benefit that is substantial, certain and capable of being realized

This second prong of the two part test as established by this Court and the Appellate Courts of the state, has not been met. Notwithstanding the above arguments challenging the Water District's assessment of benefits, there are guidelines that must be followed in determining whether a special benefit is conferred on the property by the services for which the assessment is imposed. The test established by this Court is "whether there is a logical relationship between the services provided and the benefit to real property." Lake County v. Water Oak Management Corp., 695 So. 2d 667 (Fla. 1997).

In Lake County, this court considered a special assessment for fire protection services and solid waste disposal. See Id. Among the benefits the court found were a decrease in insurance premiums, the protection of public safety and the enhanced value of business property by creation of the fire district. See Id. In noting these benefits, however, the court stated that, while "[i]t [wa]s not necessary that the benefits be direct or immediate . . . they must be substantial, certain and capable of being realized within a reasonable time." Id. (Emphasis added).

Herein, the Water District, however, argues that it merely had to reasonably determine the existence of a benefit to justify its assessment of Petitioners' property. Under this Court's decision in Lake County, the Water District must show that the benefit is certain. As to the Pomerance property, the Water District cannot establish that a benefit is substantial, certain and capable of being realized within a reasonable time. Petitioners' property is predominantly wetlands, with no upland area from which to access the only traffic corridor abutting their land. (T-139) Even a minuscule amount of development on the property would not be possible, as the Pomerances would be required to provide on-site or off-site mitigation for any permitted filling of jurisdictional wetlands. (T-139). Petitioners' own no off-site lands for mitigation. (T-35).

Because the wetland jurisdictional line as established by the United States Army Corps of Engineers reflects that no upland access to the nearest road exists, clearly the filling of jurisdictional wetlands would be required in order to utilize any portion of the upland property. (See, R-555). The property contains insufficient upland property such that mitigation for the disturbance of wetland areas could not be made and no development could occur. Consequently, the Pomerances property cannot substantially benefit, nor is any possible benefit certain or likely to occur within a reasonable time period. See, Lake County v.

Water Oak Management Corp., 695 So.2d 667.

The Respondent, in issuing its special assessment for the waterline improvements which are the subject of this action, elected to impose its assessment on a front footage basis taking into account only reductions for irregularly shaped lots such as the Pomerance property. The Respondent failed to take into account any land use regulations which rendered the developability of the property either nonexistent or substantially impaired. In reviewing the Lower Court's decision upholding the Respondent's special assessment as applied to the Pomerance property, the Fifth District Court of Appeal misapplied the standards set and established by this Court in numerous cases.

In affirming the decision of the Trial Court, the majority opinion of the Fifth District Court of Appeal correctly recognized the basic principle that, "The manner of assessment is immaterial and may vary within the District as long as the amount of the assessment for each tract is not in excess of the proportional benefits as compared to other assessments on other tracts." City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992), modified on other grounds, Sarasota v. Sarasota Church of Christ, Inc., 667 So. 2d 180 (Fla. 1995) (citing, South Trail Fire Control District v. State, 273 So.2d 380,384 (Fla. 1973), modified on other grounds, Sarasota v. Sarasota Church of Christ, Inc., 667 So.22d 180 (Fla. 1995). However, the court below misapprehended and misapplied that principle

in this case by declining to consider the impact of substantial land use restrictions placed on the property by local government. This case presents the opportunity for this court to affirm that under the principles which it has announced which are as set forth above, substantial land use restrictions should and must by the law of this State be considered in the determination of the amount of a special assessment.

Extensive land use restrictions resulting in substantial diminution of benefit are no different than irregularities of parcel shapes. In recent years, local governments in Florida have sought to circumvent constitutional and statutory limitations upon local governmental taxation by the increasingly aggressive use of impact fees and special assessments to supplement their revenue needs. All revenue-producing mechanisms operate in the same mandatory manner and place the same burdens upon the ownership of private property. However, unlike ad valorem taxes which arguably consider regulatory burdens in assessed valuation, regulatory burdens were not considered by Respondent in establishing its special assessment.

Accordingly, in addition to being certain and specific, the benefit must be fairly apportioned. In City of Boca Raton, Florida v. State, 595 So.2d 25 (Fla. 1992), this Court considered the requirements for the imposition of a valid special assessment. There, the City determined to construct a wide range of

improvements in its effort to revitalize its downtown area and determined to obtain a portion of the money to pay for such improvements via a special assessment against downtown properties to be benefited by the improvements. Id. at 26. This Court, citing City of Naples v. Moon, 269 So.2d 355 (Fla.1972) held that a special assessment must confer a specific benefit upon the land burdened by the assessment.

This Court further stated that a special assessment is imposed "upon the theory that a portion of the community which is required to bear it receive 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." Id. at 28. Citing Klemm v. Davenport, 129 So.904 (Fla. 1930). This Court concluded that there are two requirements for the imposition of a valid special assessment and opined that "the manner of assessment is immaterial and may vary within the District as long as the amount of the assessment for each tract is not in excess of the proportional benefit as compared to other assessments on other tracts. Id. at 31(emphasis added). The Court determined that the assessment was valid insomuch as the City properly determined its assessment not in excess of the proportional benefits derived by each parcel assessed. Id.

Unlike the City of Boca Raton's assessment, in City of Boca Raton v.

State, 595 So.2d 25(Fla. 1992), the Respondent's assessment made no attempt to fairly and reasonably apportion the assessment among properties receiving the special benefit nor did the assessment address the reduction in benefits received by properties subject to significant land use regulations. Accordingly, the Fifth District Court of Appeal in its opinion failed to apply this Court's standard regarding special assessments by failing to consider the proportional benefits of the improvement to properties in relation to the significant developability impacts of other land use regulations.

The Respondent's assessment in this case further is directly contrary to the requirements of this Court's opinion in South Trail Fire Control District v. State, 273 So.2d 380 (Fla. 1973), modified on other grounds, Sarasota County v. Sarasota Church of Christ, 667 So.2d 180 (Fla. 1995), insomuch as the Respondent fails to comply with the requirement that the assessment must not be in excess of the proportional benefits as compared to other assessments on other lots and tracts affected by the improvement. South Trail Fire Control District v. State, 273 So.2d 380 at 382. In Sarasota County v. Sarasota Church of Christ, 667 So.2d 180 (Fla. 1995), this Court accepted jurisdiction based upon express and direct conflict with South Trail Fire Control District v. State and other cases.

In the Sarasota County case, Sarasota County adopted a County

Ordinance which created a stormwater environmental utility and imposed special assessments to fund stormwater improvements and services. Id. at 182. This Court reiterated that a valid special assessment must meet two requirements: (1) the property assessed must derive a special benefit from the service provided; and (2) the assessment must be fairly and reasonably apportioned according to the benefits received. Id. at 183.

In Sarasota County, this Court concluded that the Sarasota County special assessment was valid and satisfied both prongs of the test for validity of special assessments insomuch as the County carefully assessed benefit and allocated the same to developed properties and not undeveloped properties, finding that storm water contributions of undeveloped properties were far less significant. The Court determined that this method of appropriating the cost of stormwater services was not arbitrary and bears a reasonable relationship to the benefits received by the individual developed properties in the treatment and control of polluted storm water runoff. Id. at 185.

Unlike Sarasota County, the Respondent herein made no attempt to actually determine the special benefits to properties located along the waterline and merely applied a front footage assessment with reductions only for irregularly shaped lots. The record is clear that the District made no effort to determine whether or not special benefits in proportion to the assessment were

received by properties such as the Pomerances which are subject to extraordinary land use regulations. Although the testimony at trial from expert witnesses and appraisers differed as to what specific acreage could be developed on the Pomerance property, experts for both parties opined that the wetlands located upon the Pomerance parcel were significant. The Respondent's expert further acknowledged that the only upland area for available for development was in the extreme rear of the property and would result in a requirement of access to be created from U.S. 19 (the location of the waterline) to the rear of the property in order for any development to occur. (See, T-80, 120-121, 173-174,495,486 and 428). Accordingly, based upon the testimony below it is clear that no developable property on the Pomerance site directly abuts the waterline.

The District cannot by its "fiat"
declare a special benefit when there is NONE

The Legislature "cannot by its fiat" make a local improvement of that which is in its essence is not such an improvement and cannot by its fiat make a special benefit to sustain a special assessment where there is no such special benefit". South Trail Fire Control District v. State, 273 So.2d 380. (Fla. 1973). See also, the dissent in Sarasota County v. Sarasota Church of Christ, 667 So.2d 180, 186 (Fla. 1995). While the front foot method of assessment as been held to be a valid exercise of Legislative power to make and spread such special

assessments (See, Atlantic Coastline Railroad Co. v. City of Winter Haven, 151 So. 321 (Fla. 1933), the fundamental requirement for the validity of a special assessment is that it not be in excess of the proportional benefits to the property assessed.

Herein, in sustaining the Lower Court's findings in this case, the Fifth District Court of Appeal concluded as follows:

> The Trial Court found that the Pomerances did not prove by a preponderance of the evidence that there was no benefit to the property from the extension of water service to it. Because that finding is supported by the evidence, we cannot disturb on it appeal. See, page 4 of the Opinion.

This decision is directly contrary to and fails to comply with the case law established by this Court's cases as previously cited insomuch as the standard for the validity of a special assessment is not that the objector prove by a preponderance of evidence that there was no benefit to the property but rather that the assessment was not properly apportioned as to the special benefit received by the assessed property. Lake County v. Water Oak Management Corporation, 695 So.2d 667 (Fla. 1997).

This Court has recently had the opportunity to consider the issues presented by governmental taxation under the guise of special assessments in Collier County Florida v. State of Florida, 773 So. 2d 1012 (Fla. 1999). In

Collier County, the County sought to validate revenue certificates based upon an "Interim Governmental Services Fee Ordinance." Id. at 1013. The County's ordinance sought to impose a special assessment against properties upon which improvements were not substantially complete by January 1 of each year and thus not assessable for ad valorem taxation for such a year. Id.

This Court held that such an attempt to specially assess properties did not create a valid special assessment but rather constituted an impermissible tax. Id. at 1016. In reviewing the issue of whether Collier County's assessment, was in fact, a special assessment this Court citing City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992) stated:

> [A] legally imposed special assessment is not a tax. Taxes and special assessments are distinguishable in that, while both are mandatory, there is no requirement that taxes provide any specific benefit to the property; instead, they may be levied throughout the particular taxing unit for the general benefit of residents and property. On the other hand, special assessments must confer a specific benefit upon the land burdened by the assessment. . .
>
> A tax is an enforced burden of contribution imposed by sovereign right for the support of the government, the administration of the law, and to execute the various functions the sovereign is called on to perform. A special assessment is like a tax in that it is an enforced contribution from the property owner, it may possess other points of similarity to a tax but it

> is inherently different and governed by entirely different principles. It 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. Id. at 1016 (emphasis added).

This Court further concluded that the Collier County special assessment failed to meet the two prong test established in Lake County v. Water Oak Management Corp., 695 So. 2d 667 (Fla. 1997) in that it failed to establish that the property burdened by the special assessment was specially and peculiarly benefited by the services supported by the assessment. Collier County v. State of Florida, 773 So. 2d 1012 (Fla. 1999). In fact, this Court concluded:

> The assessment in this case fails because it does not satisfy the first prong of the test. Contrary to the County's contention, the first prong of the test is not satisfied by establishing that the assessment is rationally related to an increased demand for county services. If that were the test, the distinction between taxes and special assessments would be forever obliterated. Id. at 1017.

The services funded by the Special Assessment must provide a direct, special benefit to the real property being burdened. 695 So.2d at 670. See also,

Collier County v. State of Florida, 733 So.2d 1012 (Fla. 1999). In this case, as Judge Harris of the Fifth District Court of Appeal noted in his dissent,

> This case adds insult to injury... It is undisputed that because the property has extensive wetlands, the Pomerance property receives little or no benefit from the waterline but is assessed on the same basis as those parcels which have no wetland restrictions....Even though the District made an adjustment to the front foot assessment because of the configuration (triangular) of Appellants' property, it made no adjustment because of the severely diminished capacity of the property to support development which all the experts agreed exist because of the wetlands. In other words except for the shape of the property, Appellants were assessed as though their entire parcel was subject to the same development capability as were other parcels assessed on the same front foot basis.... The failure to consider these additional factors shows that the assessment on Appellant's property was not addressed in proportion to the benefit to be derived therefrom as required by Chapter 63-122, Section 17(A), which authorized the assessment. (See, Opinion at Dissent, Pages 1-2).

Like the County in Collier County, herein the District has attempted by its "fiat" to declare a special benefit where NONE exists. Given that both the lower court and the Fifth District Court of appeal failed to apply the principles established by this Court in Collier County v. State of Florida, 733 So. 2d 1012, Lake County v. Water Oak Management Corporation, 695 So. 2d 667, and Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180, the opinion

of the Fifth District Court of Appeal in this case should be reversed. As state and local governmental agencies seek to impose greater restrictions upon the development of sensitive wetland areas, they cannot be allowed to require such developmentally impaired properties to simultaneously bear the burden of providing services to properties not similarly restricted. As Judge Harris stated in his dissent to the Fifth District Court of Appeal's Decision in this case, "we have a governmental agency which tells property owners that although they may have an unequal right to develop this property, they must nevertheless pay an equal amount in bringing waterlines to their property. The District's enabling statute says the properties must be assessed only in accordance with the benefits received and so should we." See, Appendix 3, Opinion at Dissent Page 2.

CONCLUSION

Regulatory burdens, such as the undisputed existence of substantial wetlands on the Pomerance property, were not considered by either the Respondent, the lower court or the Fifth District Court of Appeal. Herein, the Respondent should have considered regulatory burdens in establishing the amount of the assessments against the property. By failing to do so, the Respondent unreasonably affects the right of the property owner to own, use and dispose of his private property. The Fifth District Appeal in its opinion failed to properly apply the requirements of the case law of this Court that in order to be a valid special assessment, the same must meet the two prong test set forth in City of Boca Raton v. State and its progeny. The failure to consider these factors further establishes that the assessment against the Pomerance property is improper and directly contrary to the Appellee's governing Charter. More particularly, the assessment of $19,044.39 is arbitrary, based upon no findings by the District of benefit and is far in excess of the proportionate benefit to be derived by the Pomerance properties.

Accordingly, Respondents request that this Court enter its Order reversing the opinion of the Fifth District Court of Appeal and the Final Judgment of the Lower Court herein and remanding this cause for the entry of a Final Judgment declaring that the Respondents Special Assessment levied

against the Pomerances' property based thereon is void and invalid and fails to be made in proportion to the benefit received by the property.

CERTIFICATE OF COMPLIANCE

I hereby certify that the size and style of type used in this Petitioners' Initial Brief is 14 point Times New Roman, a font that is proportionally spaced in accordance with this Court's Administrative Order dated July 13, 1998. I further certify that this Brief is further transmitted upon a three and one-half inch computer diskette formatted for DOS, saved in WordPerfect 5.1 format and scanned for viruses prior to submission.

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the above and foregoing Petitioners' Initial Brief has been furnished by regular United States Mail to: JACK A. MORING, ESQUIRE, Moring & Moring, P. A., 7655 West Gulf to Lake Highway, Crystal River, Florida 34429 and SIDNEY ANSBACHER, ESQUIRE, Upchurch, Bailey & Upchurch, P. A., Post Office Drawer 3007, St. Augustine, Florida 32085, on this _____ day of October, 2000.

_____
Karen O. Gaffney

APPENDICES TO PETITIONERS' INITIAL BRIEF

APPENDIX 1:	Homosassa Special Water District's Charter Chapter 59-1177 and Chapter 63-1222
APPENDIX 2:	Homosassa Special Water District's Resolution dated January 13, 1992
APPENDIX 3:	The Fifth District Court of Appeal Opinion Judge Harris dissenting