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IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: SC00-912

Lower Tribunal No. 5D98-2504

DAVID M. POMERANCE and
RICHARD C. POMERANCE,

Petitioners,

vs.

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

Respondent.
_____/

Petitioner's
~~RESPONDENTS~~' **AMENDED JURISDICTIONAL BRIEF**

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RESPONDENTS' STATEMENT OF FACTS

The Respondents, DAVID M. POMERANCE and RICHARD C. POMERANCE, are the owners of approximately nine acres of real property in Citrus County, Florida and fronting on U.S. 19. (See, R-540 and T-14). The Respondents' 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. (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. 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.

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.

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 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 Appellee made no adjustment as a result of the severely diminished capacity of the property to support development.

The Pomerances objected to the assessment on this ground 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 1.

SUMMARY OF THE ARGUMENT

The Court should accept jurisdiction of this action because the Opinion of the Court below expressly and directly conflicts with other decisions of this Court. The Opinion of the Lower Court fails to properly apply the basic principles established by this Court that the properly derives a special benefit and that the assessment be fairly and reasonably apportioned according to the benefits received. Sarasota County v. Sarasota Church of Christ, 667 So.2d 180 (Fla. 1995).

ARGUMENT:

Petitioners invoke the jurisdiction of this Court under Article V, Section 3(b)(3) of the Florida Constitution. The Opinion of the Court below expressly and directly conflicts with other decisions of this Court. City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992); Lake County v. Water Oak Management Corp., 695 So.2d 667 (Fla. 1997); South Trail Fire Control District v. State, 273 So.2d 380 (Fla. 1973); Sarasota County v. Sarasota County Church of Christ, 667 So. 2d 180 (Fla. 1995) and Collier County v. State, 773 So.2d 1012 (Fla. 1999).

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. such, therefore, directly conflicts with this Court's prior decisions.

More particularly, 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." (See page 4). 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 principle which it has announced 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.

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 Klein 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. 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.

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 Opinion in this case issued by the Fifth District Court of Appeal further conflicts with 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 Court's decision conflicts 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.

The Court concluded that the Sarasota County special assessment was valid and satisfied both prongs of the test for validity of special assessments insomuch 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 a special benefit 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 Appellee'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. Accordingly, based upon the testimony below it is clear that no developable property on the Pomerance site directly abuts the waterline.

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 expressly and directly conflicts with 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 be 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).

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). 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).

CONCLUSION

Regulatory burdens, such as the undisputed existence of substantial wetlands on the Pomerance property, were not considered by either the Respondent 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 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 shows that the Fifth District Court of Appeal affirmation of this assessment expressly and directly conflicts with the caselaw of this Court as set forth herein.

I hereby certify that the size and style of type used in this Brief is 12 point Courier New, a font that is not proportionally spaced.

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the above and foregoing Petitioners' Jurisdictional 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, Saint Augustine, Florida 32085 on this 24 day of May, 2000.

_____
Karen O. Gaffney

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2000

DAVID M. POMERANCE and
RICHARD C. POMERANCE,

Appellants,

v. CASE NO. 5D98-2504

HOMOSASSA SPECIAL WATER DISTRICT, etc.,

Appellees.

Opinion filed March 24, 2000.

Appeal from the Circuit Court
for Citrus County,
Patricia Thomas, Judge.

Karen 0. Gaffney of Haag, Gaffney & Wilcox. P.A., Inverness, for Appellants.

Jack A. Moring of Myers & Moring, P.A., Crystal River, and Sidney F. Ansbacher of Upchurch. Bailey & Upchurch. P.A.. St. Augustine, for Appellees.

THOMPSON, J.

David M. Pomerance and Richard C. Pomerance appeal a final judgment in favor of the Homosassa Special Water District. In contention is whether the district properly assessed property owned by the Pomerances. We affirm.

In 1988, the district annexed Halls River Estates, lying north of the Pomerance property. The nine-acre Pomerance property was already within the district. After annexing

Appendix 1

Halls River Estates, the district ran water lines to serve Halls River Estates and to serve land, including the Pomerance property, previously lying within district boundaries. The district specially assessed the Pomerance property and the other properties abutting the water lines. After unsuccessfully protesting the assessment before the district, the Pomerances sued for relief in the circuit court. Their main contention, below and on appeal, is that their property will not be benefitted by the water line because the property consists primarily of wetlands and cannot be developed.

The Pomerances first argue that chapter 88-533, which authorized the annexation, is void because by its terms the effectiveness of the authorization is conditioned on a vote of the electors to be held by 2 December 1988. The election was held on 6 December 1988, four days late. We conclude that we need not rule on the validity of the act because the Pomerance property was within the territorial boundaries of the district before the enactment of chapter 88-533. Since the Pomerance property was already within the district, the district was authorized to extend water service to it, and to assess the property therefor, regardless of the validity of chapter 88-533.

The Pomerances next argue that there was no special benefit to their property because the district did not make a factual finding that the property was specially benefitted. Such a factual finding was not required. See City of Treasure Island v. Strong, 215 So. 2d 473 (Fla. 1968) ("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 benefitted by the improvement"); see also, City of Hallandale v. Meekin, 237 So. 2d 318 (Fla. 4th DCA 1970), adopted, cert. discharged, 245 So. 2d 253 (Fla. 1971) (sanitary sewer system is by its nature designed to afford special or peculiar benefits to abutting or other property within the protective proximity of the improvement, and, because of presumption of special benefit to abutting property, city was relieved of necessity of making specific finding of benefit as to each parcel).

The Pomerances also argue that their property was not in fact benefitted by the improvement. The burden is on the property owner to overcome the dual presumptions that a sewer system improvement is of special benefit to those in proximity to it, and that the legislative determination of special benefit is correct. Association of Community Organizations for Reform Now/ACORN v. City of Florida City, 444 So. 2d 37, 38-39 (Fla. 3d DCA 1983), rev. denied, 451 So. 2d 847 (Fla. 1984)(citing Meekin; Mever v. City of Oakland Park, 219 So. 2d 417 (Fla. 1969); Atlantic Coast Line Rv. v. City of Winter Haven, 112 Fla. 807,151 So. 321 (1933); Atlantic Coast Line Rv. v. City of Gainesville, 83 Fla. 275, 91 So. 118, 121 (1922)). A water system is similar to a sewer system in the manner in which it benefits abutting property. See Murphy v. City of Port St. Lucie, 666 So. 2d 879 (Fla. 1995) (abutting properties specially benefitted by extension of existing water and sewer system into areas of the city not served by any system). The factual conclusions of the lower court should not be disturbed when the judgment is supported by sufficient evidence in the record, and when both parties had the opportunity to present evidence and expert testimony to the trial court. Id. at 38.

In the instant case, it was the Pomerances' burden to overcome the presumptions that

their property was benefitted from the improvement, and the presumption that the district correctly determined that the property received a special benefit. At trial, the parties presented conflicting expert testimony regarding the amount of the property that was wetlands, and the amount of the property that could be developed. 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 it on appeal.

Finally, the Pomerances argue that the board was arbitrary in using the front-foot method of assessment, and that it improperly equated the benefit obtained with the pro rata cost of bringing water to the properties.[1] The front foot method of assessment is a valid exercise of the legislative power to make and spread such special assessments. Atlantic Coast Line R. Co., 151 So. at 812. The front foot method is the more traditional, although other methods are permissible. City of Boca Raton v. State, 595 So. 2d 25, 31 (Fla. 1992), modified on other grounds, Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180 (Fla. 1995). The manner of the assessment is immaterial and may vary within the district, as long as the amount of the assessment for each tract is not in excess of the proportional benefits as compared to other assessments on other tracts. Id. (citing South Trail Fire Control District v. State, 273 So. 2d 380, 384 (Fla. 19733, modified on other grounds, Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180 (Fla. 1995)).

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[1] Contrary to the implication created by the dissent, the Pomerances do not argue that their assessment should be reduced; rather, their argument is that it should be eliminated entirely.

Further, the district was not required to specifically itemize a dollar amount of benefit to be received by each parcel. Id. (citing Cane Dev. Co. v. City of Cocoa Beach, 192 So. 2d 766 (Fla. 1966)). As noted earlier, the legislative determination as to the apportionment of the costs of those benefits should be upheld unless the determination is arbitrary. Sarasota County Church of Christ, 667 So. 2d at 184. The Pomerances have not shown that the selection of the front-foot method, which was allowed by the enabling legislation, was arbitrary.

In view of this result it is not necessary to discuss the points on appeal regarding the Pomerances' contention that the recordation of the assessment constituted a cloud on the title that the lower court should have removed, and that the assessment was a slander of title for which they were entitled to damages.

AFFIRMED.

ANTOON. C.J., concurs.
HARRIS J.. dissents, with opinion.

HARRIS, J., dissenting. **Case No. 5D98-2504**

This case adds insult to injury.

Homosassa Special Water District extended its waterline past the 8.95 acre parcel owned by appellants in Citrus County. The waterline was extended in order to accommodate a housing development farther out. Appellants were assessed almost $20,000 to support this accommodation. The problem, legally speaking, is that because their property has extensive wetlands, they receive little or no benefit from the waterline but they are being assessed on the same basis as those parcels which have no wetland restrictions.

The trial court's conclusion that since appellants had not applied for a building permit, the evidence "reflects that development may be possible" is too simplistic, All of the experts testified about the extensive wetlands on this property. Worse, the sliver of upland that does exist, and which is the only part of appellants' land which could be developed and thus benefit from the waterline, is at the rear of the property.

Recognizing the problems inherent in running a road across wetlands, the District's expert opined access to the property subject to development could come from another direction. Does this not concede that the property subject to development does not front on the waterline?

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 exists 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.

Further, it is apparent from this record that in order to use the waterline provided by the District, appellants would have to further extend the waterline some eight acres across the wetlands before construction could commence. Proper&y which could be developed adjacent to the waterline would of necessity benefit much more than property which had to have the lines extended several hundred feet before any benefit could accrue. The same logic which requires an adjustment to the standard per front foot assessment when the shape of the property affects its ability to benefit from the improvement, also requires an adjustment when such factors as wetlands and the distance from the lines to the development detract from the benefits.

The failure to consider these additional factors shows that the assessment on appellants' property was not assessed "in proportion to the benefits to be derived therefrom" as required by Chapter 63-1222, section 17(a) which authorized the assessment. For example, assume there are two ten-acre parcels of equal dimensions side by side. One parcel will support the construction of twenty homes; the other, only two homes, The parcel that will accommodate twenty homes will benefit much more by the extension of this waterline. Clearly an assessment on a standard front foot basis, when wetlands are involved only on some of the parcels, will not assess the properties in proportion to the benefits derived and, therefore, the District has exceeded its authority in assessing appellants' property herein.

In this case, we have a governmental agency which tells properly owners that although they have an unequal right to develop their 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.