IN THE FLORIDA SUPREME COURT
CASE NO. SC06-1577

Bond Validation Appeal From A Final Judgment
Of The Twentieth Judicial Circuit,
Collier County, Florida

CITIZENS ADVOCATING RESPONSIBLE ENVIRONMENTAL SOLUTIONS, INC., DOUGLAS H. ENMAN and FRANCES ENMAN,

Appellants,

v.

THE CITY OF MARCO ISLAND,

Appellee.

INITIAL BRIEF OF THE APPELLANTS

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PREFACE

This is an appeal from the Circuit Court's entry of a final judgment on a complaint brought by the City of Marco Island for the validation of bonds.

Rather than employ the full party names, Defendants below and Appellants here are referred to as the "Citizens." Rather than employee the full party name, Plaintiff below and Appellee here, "The City of Marco Island" is referred to as the "City."

The Appendix will be referred to by the symbol "AP" followed by the tab letter, followed by a page number. Exhibits to items in the Appendix will be further identified by the prefix "Exh."

STATEMENT OF JURISDICTION

Under Florida Statutes Section 75.01, a circuit court has "jurisdiction to determine the validation of bonds and all matters connected therewith." Pursuant to Rule 9.030(a)(1)(B)(i) of the Florida Rules of Appellate Procedure, this Court has jurisdiction over final orders entered in proceedings for the validation of bonds where provided by general law. This Court has mandatory jurisdiction to hear appeals from final judgments entered in a proceeding for the validation of bonds. Article V, Section 3(b)(2), Florida Constitution. Florida Statutes Section 75.08 provides that either party may appeal the trial court's decision on the complaint for validation.

STATEMENT OF THE ISSUE

I. Whether the special assessments underlying the subject bonds are fairly and reasonably apportioned among the properties that receive the benefit.

STATEMENT OF THE CASE

This appeal arises from a final judgment granting the City's prayer to validate the revenue bond issue intended to fund, in part, the construction and upgrade of the sewer and wastewater treatment facilities. The Citizens file this appeal requesting reversal of the final judgment.

On May 15, 2006, the Circuit Court for the Twentieth Judicial Circuit in and for Collier County, Florida, heard oral argument on Plaintiff's Amended Complaint for validation of the subject revenue bonds. (AP, A.) On May 31, 2006, the Circuit Court entered a final order concerning the bonds the City of Marco Island proposed to issue related to its sewer system. (AP, D.) On June 9, 2006, Appellants' filed their Motion for Rehearing. (AP, E.) On June 19, 2006, the same Court denied Appellants' Motion for Rehearing. (AP, G.) Appellants timely filed their Notice of Appeal on July 18, 2006. (AP, H.)

STATEMENT OF FACTS

The events leading to the instant dispute began several years ago. In 2003, the City of Marco Island purchased the Marco Island utility system. (AP, I, 35.) The wastewater treatment facility was included within the purchase. (AP, I, 35) At the time, only a portion of the dwellings on Marco Island were connected to the sewer system and wastewater treatment facility. (AP, I, 40)

After the purchase, the City commissioned a utility master plan. (AP, I, 39.) The master plan called for the addition of the remaining dwellings to the sewer system. Under the master plan, there will be approximately six-thousand (6,000) new users of the sewer system. (AP, I, 64.) Currently, there are approximately fifteen-thousand (15,000) existing users of the sewer system. (AP, I, 10.) The plan calls for connections to be added to the sewer system in phases, or a few "districts" at a time. There are fifteen (15) new districts. (AP, I, 12.) The bonds at issue in this case are for the first two districts ("Tigertail" and "South Barfield"). (AP, I, 13.)

To fund the sewer system project, the City is demanding approximately $18,000 from each new user in the form of special assessments. (AP, C, Exh. C at 4.) The proposed bonds are to be funded by these special assessments. (AP, A.) Connection to the sewer system for new users is mandatory. The assessment is made up of two parts (AP, I, 38):

I. A "Capacity Cost" of $6,280 (AP, C, Exh. C at 4); and

II. A "Construction Cost" ranging from $11,840 to $13,810. (AP, C, Exh. C at 4.)

The "Capacity Cost" is attributed to the cost of "planning, engineering, and construction of other wastewater facilities that may not be within your district." (AP, C, Exh. C at 4.) The "Construction Cost" is attributed to the cost of the physical construction of connections for the new users. (AP, C, Exh. C at 4.)

On or about February 15, 2005, Plaintiff published a budget for the sewer project. (AP, C, Exh. A.) According to the published budget, the total project is budgeted at approximately $136 million. (AP, C, Exh. A.) Included within this budget are upgrades to the system, and a new wastewater treatment facility. There is approximately $38 million budgeted for upgrades and a new wastewater treatment facility. (AP, I, 13.)

On or about August 1, 2005, the City passed the final assessment resolutions. (AP, A, 4.) Existing users are not being specially assessed. According to City Manager, A. William Moss, existing users initially were going to be specially assessed for upgrades to the system, and the new wastewater treatment facility. In Mr. Moss' words:

> "Existing customers were not going to be paying for the expansion portion. **They were going to be paying for the upgrades that would have been required whether or not there was any expansion** . . . most of [existing

> users] were installed through a special assessment process that was administered by Collier County in the 1980s . . . So, the city council was hearing from these members of the public that said I have my sewer on special assessment program, and I and my neighbors don't think it's fair that we should have to pay additional costs . . ." (AP, I, 45. Emphasis added.)

As stated above, there is approximately $38 million budgeted for upgrades and a new wastewater treatment facility. (AP, I, 13.)[1] The entirety of this expenditure will be borne by new users (approximated by 6,000 new users multiplied by the $6,298 capacity cost). Existing users are not being specially assessed. (AP, I, 44.) In other words, existing users will not pay "additional costs" for the new wastewater facility. (AP, I, 45.)

The wastewater treatment facility needs to be replaced, regardless of the addition of new users. Existing users have worn out the wastewater facility. In the words of the City's Public Works Director, A. Rony Joel:

> "Well, the plant is approximately 30 years old. The . . . master plan that was developed identified significant shortfalls in most of the unit processes, which are at the end of their useful life." (AP, I, 93).

[1] The $38 million expenditure includes the following line-item expenditures, "50% Utility Master Plan, South Collier Sewer Main Oversizing, North Collier Sewer Main Oversizing, Heathwood/San Marco Sewer Main Oversizing, Master Plan Sewer System, **Wastewater Treatment Plant Design/Build MBNR ($11 million)**, Centrifuge Screw Press, Existing Sewer Upgrades, Wastewater Treatment Plant Headworks, Design/Build Equalization Tanks, Deep Well Injection, Upgrade Expand Disinfection System, Maintenance Lab, Miscellaneous Capital Expansion." (AP, C, Exh. B.)

> "We are having pieces of equipment that are falling down right now." (AP, I, 97).
>
> "The plant that's coming to the end of its useful life is the existing 3.5-million-gallon-a-day plant that has nothing to do with the expansion." (AP, I, 98.)
>
> "[New users] have not contributed any flow to the plant; therefore, they would not have contributed to the degradation." (AP, I, 99.)

While the new plant will need to be bigger than the existing plant to accommodate new users,[2] it does not change the fact that the existing plant is at the end of its life, and that new users had nothing to do with wearing it down. To repeat, the existing plant will need to be replaced in any event. To repeat, existing users are not being specially assessed for the replacement of the existing plant.

On May 15, 2006, the Circuit Court for the Twentieth Judicial Circuit in and for Collier County, Florida, heard oral argument on Plaintiff's Amended Complaint for validation of the subject bonds. (AP, I.) On May 31, 2006, the Circuit Court entered a final order concerning the bonds the City of Marco Island proposed to issue related to its sewer system. (AP, I, D.) The final order is twenty-three (23) pages long (AP, I, D). The Court's verbal ruling, in contrast, is

[2] The existing plant is rated for 3.5 million gallons per day. (AP, I, 91.) The new plant is projected to be rated for 5 millions gallons per day. (AP, I, 92.) To oversimplify, new users, then, account for roughly only 1.5 million gallons of the new plant capacity, but will pay all of the assessments.

on three (3) pages of transcript. (AP, I, 164-166.) Generally, the Court expressed deference to the City as a legislative body and to that of their experts. (AP, I, 166.)

STANDARD OF REVIEW

This Court, in reviewing the bond validation, may rule as to : (1) whether the public body has the authority to issue bonds; (2) whether the purpose of the obligation is legal; and (3) whether the bond issuance complies with the requirements of the law. *See* State v Osceola County,752 So. 2d 530 (Fla. 1999); State v. Inland Protection Fin. Corp., 699 So. 2d 1352 (Fla. 1997). Appellants have the burden of demonstrating that the record and evidence fails to support the trial court's conclusions. Wohl v. State, 480 So. 2d 639, 641 (Fla. 1985).

SUMMARY OF ARGUMENT

The Court's deference to the methodology used by the City is not absolute, and the apportionment must still be equitable, fair, and reasonable. Existing users have worn out the existing wastewater treatment facilities. Existing users are not being assessed to replace existing wastewater treatment facilities. Existing users and the community at large are reaping a windfall at the expense of new users. The findings of the assessing authority are arbitrary. The special assessment impermissibly conveys most of the benefit on the community at large. The counterarguments advanced are unpersuasive.

INTRODUCTION

The Landscape of Florida Special Assessment Jurisprudence[3]

In 1968, everything changed in Florida. The Florida Constitution was amended to allow municipalities and counties the exclusive right to levy ad valorem taxes. Fla. Const. art. VII, § 4. This new financing mechanism would presumably bring about an avalanche of revenue for local improvements. However, over time, exemptions and exceptions eroded away a significant portion of the new ad valorem tax base, bringing about a renewed financial pinch was felt by local governments. See, e.g., Fla. Const. art. VII, § 9(b).

In response, local governments found new and innovative ways to generate revenue. Local governments collected regulatory fees, user and impact fees, and special assessments.[4] Florida courts generally have been quick to prevent local governments from levying taxes disguised as fees. See, e.g. Collier County v. State, 733 So. 2d 1012 (Fla. 1999). However, in recent years, the courts have relaxed the rules traditionally applied to distinguish taxes from special assessments, as illustrated below.

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[3] Analysis of the case law progeny hereunder is derived in large part from Pamela M. Dubov, *Circumventing the Florida Constitution: Property Taxes and Special Assessments, Today's Illusory Distinction*, 30 Stetson L. Rev. 1469, 1474 (2001).
[4] See generally Fla. Legis. Comm. Intergovtl. Rel. & Fla. Dept. Revenue, Local Government Financial Information Handbook 1, 52 (1999).

Special assessments and taxes have a few simple distinctions. Essentially, special assessments and taxes are both involuntary payments; they differ in that taxes are levied for the general benefit of the community, while special assessments provide a special benefit to the assessed property.[5] In 1930, the Florida Supreme Court required that the party paying the special assessment receive a "special or peculiar benefit in the enhancement of value of the property against which it is imposed." Klemm v. Davenport, 100 Fla. 627 (Fla. 1930). Later, in Boca Raton v. State, the Court explained the two-prong test still used to analyze the validity of special assessments. Boca Raton v. State, 595 So. 2d 25 (Fla. 1992). "First, the property assessed must derive a special benefit from the service provided." Id. at 29. Second, the amount of "the assessment must be fairly and reasonably apportioned among the properties that receive the special benefit." Id. If a special assessment meets these two requirements, it is not an illegal tax and does not violate the constitutional provision preempting general taxation to the state. Id.

There are two jurisprudential trends relevant here. Firstly, there has been repeated judicial deference to legislative findings as to the nature of benefits

[5] Henry Kenza van Assenderp & Andrew Ignatius Solis, *Dispelling the Myths: Florida's NonAd Valorem Special Assessments Law*, 20 Fla. St. U. L. Rev. 823, 826-831 (1993).

conferred. Secondly, there has been a divergence in the definition of special benefit.

A. Judicial Deference is Afforded to Judicial Findings Unless Arbitrary

As to judicial deference, in the late 1960s and 1970s, Florida courts began to show deference to local government assessments for services, which traditionally had been funded through property taxes. See, e.g., Fire Dist. No. 1 v. Jenkins, 221 So. 2d 740 (Fla. 1969). In South Trail Fire Control District v. State, the Florida Supreme Court upheld a special assessment based upon a legislative declaration that such services benefited "all property within the territorial bounds of the district." South Trail Fire Control Dist. v. State, 273 So. 2d 380 (Fla. 1973). A few years later, in Charlotte County v. Fiske, the Second District Court of Appeal upheld a special assessment for services, relying in part on South Trail. Charlotte County v. Fiske, 350 So. 2d 578 (Fla. Dist. Ct. App. 1977). In both cases, the courts relied on the long-recognized principle that courts should not substitute their opinions for those of a legislature unless the legislature acts in a clearly arbitrary way.

The degree of deference paid to legislative findings is a key issue in the special assessments debate, because the assessing authorities making the legislative findings relative to special benefits are the same authorities struggling to deal with funding shortfalls. The deference showed to the legislative body by the courts in

the two cases above foreshadowed the concern expressed by Justice Wells in his dissent in Church of Christ, in which he questioned the majority's discussion of the proper standard of review for special assessment cases. Sarasota County v. Sarasota Church of Christ, 667 So. 2d 180, 187 (Fla. 1995). Justice Wells believed that the majority's deference to legislative findings would be read as an abdication of the court's responsibility to make "the fundamental legal determination of whether the taxing authority's levy is a special assessment or a tax." Id.

In 1995, Church of Christ was concluded with the majority reaffirming the level of deference to legislative findings. Id. Therein, the Court's four-member majority remanded the case to the district court for an opinion consistent with the Court's findings that legislative determinations declaring the existence of special benefits were to be upheld unless they were arbitrary. Id.

B. The Definition of Special Benefits Has Diverged

The definition of special benefit is somewhat in a state of divergence. It is generally true that, "Special assessments must confer a specific benefit upon the land burdened by the assessment." Boca Raton v. State, 595 So. 2d 25, 29 (Fla. 1992). However, the analytical process used to determine whether special or

"peculiar" benefits are enjoyed by assessed properties is controversial.[6] Citing cases from the 1920s, 1930s, and 1970s, the Florida Supreme Court, in City of Boca Raton, reiterated the well-established precedent defining special benefits as peculiar benefits that differ in type or degree from those enjoyed by the community at large. Boca Raton v. State, 595 So. 2d 25, 29 (Fla. 1992). Thus, as late as 1992, the Court affirmed its acceptance of the traditional special benefits test that represented the first prong of the two-prong test used to validate special assessments. Id.

However, in 1997, in Lake County, the Court used an altered definition of special benefit in the context of **services**. Lake County v. Water Oak Mgmt. Corp., 695 So. 2d 667 (Fla. 1997). The Court held that the test for special benefit was not its uniqueness when compared to the benefits enjoyed by the community as a whole, but instead was "whether there is a 'logical relationship' between the **services** provided and the benefit to real property." Lake County v. Water Oak Mgmt. Corp., 695 So. 2d 667 (Fla. 1997). (Emphasis added.)

Once again, Justice Wells dissented and took issue with the majority's redefinition of the special benefits test. Id. at 671. He concluded that there needed to be both "a 'logical relationship' between the services provided and the benefit"

[6] Henry Kenza van Assenderp & Andrew Ignatius Solis, *Dispelling the Myths: Florida's NonAd Valorem Special Assessments Law*, 20 Fla. St. U. L. Rev. 823, 826-831 (1993).

and a special or peculiar benefit to the assessed property. Id. The phrases "peculiar benefit" and “logical relationship between the services provided and the benefit" are significantly different, the latter broader in scope than the former. Thus, in the context of services, the test for a special benefit is somewhat different today than it was seventy years ago when the court defined special benefits as a "special or peculiar benefit in the enhancement of value of the property against which it is imposed as a result of the improvement made with the proceeds of the special assessment." Klemm v. Davenport, 100 Fla. 627 (Fla. 1930).

It is unclear how and if this altered test could be applied to physical improvements, as are at issue here. It is clear that the “peculiar benefit” cases have never been expressly overruled. Id. There is a divergence in the authority that has not been reconciled.[7]

Whatever the case, the intrinsic fairness underlying the need for those specially assessed to be specially benefited by the assessment have strong roots in the common law. According to U.S. Supreme Court, the takings protections forbidding inequitable taxation are rooted "in those elementary principles of equity and justice which lie at the root of the social compact." Norwood v. Baker, 172

[7] The divergence might be explained by the fact that special assessments for services is a relatively new phenomenon. Fire Dist. No. 1 v. Jenkins, 221 So. 2d 740 (Fla. 1969). Perhaps the “peculiar” special benefit standard used for physical improvements is not as apt for measuring the intangible and diffuse benefits derived from as services.

U.S. 269 (U.S. 1898). To the extent that the cost of governmental action exceeds the benefits to particular property owners, "the burden should be borne by the community for whose benefit the improvement is made." French v. Barber Asphalt Paving Co., 181 U.S. 324, 368 (U.S. 1901). When the government relies on general taxation, "all citizens are equally affected," providing everyone with protection against "unjust taxation." Id. at 369. Special assessments that are laid on a few landowners, however, invite abuse. "The majority are never backward in consenting to, or even demanding, improvements which they may enjoy without expense to themselves." Id. What is more, state courts, have continued to invalidate special assessments when the burden is disproportionate to the benefit. See, e.g., Furey v. City of Sacramento, 598 P.2d 844 (Cal. 1979); Dixon Road Group v. City of Novi, 395 N.W.2d 211 (Mich. 1986); Haynes v. City of Abilene, 659 S.W.2d 638 (Tex. 1983).

To summarize the current landscape of special assessment law in Florida, the courts are continuing to exercise deference to the findings of assessing authorities unless they are arbitrary. Further, in the context of services, the Court has somewhat refined "special benefit" from its historic construction which required peculiar benefits to the assessed property, but has refrained from overruling prior "peculiar benefit" holdings. All the same, national trends in the common law continue to require those specially assessed to be specially benefited.

C. There Is an Apt Definition of Arbitrary

As noted above, the Court has firmly set the bar for overturning findings of the assessing authority. The findings must be "arbitrary." Sarasota County v. Sarasota Church of Christ, 667 So. 2d 180, 187 (Fla. 1995). The current state of the judicial deference doctrine is reminiscent of the state of the Federal commerce clause circa 1995, when the United States Supreme Court tested the outer limits of that expansive doctrine in United States v. Lopez, 514 U.S. 549 (1995). In other words, what are the limits of the doctrine? How far should the deference to the findings of the assessing authority extend? What is facially "arbitrary" when it comes to findings of the assessing authority, such that this Court must draw a line in the sand?

To a large extent, that which is arbitrary has been defined in the negative; it has been defined by what the Court has found is *not* arbitrary, as in the cases cited above. However, a handful of definitions of that which is arbitrary continue to linger in the case law.

In the instant case, the Court will be taken to task, and held up to its own articulation of "arbitrary." See Contractors and Builders Ass'n of Pinellas County v. City of Dunedin**,** 329 So.2d 314, 320-321 (Fla. 1976). In invalidating a user fee as an impermissible tax, this Court found the fee structure "arbitrary and irrational." Id. at 321. Contractors involved a user fee for new users of a sewer

system. This Court held that the ordinance was an impermissible tax under the guise of setting charges for sewer connections. Id. at 317. In so holding, this Court stated:

> [I]t is not 'just and equitable' for a municipally owned utility to impose the entire burden of capital expenditures, including replacement of existing plant, on persons connecting to a water and sewer system after an arbitrarily chosen time certain. The cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent. When new facilities must be built in any event, looking only to new users for necessary capital gives old users a windfall at the expense of new users . . . New users thus share with old users the cost of original facilities . . . For purposes of allocating the cost of replacing original facilities, it is **arbitrary and irrational** to distinguish between old and new users, all of whom bear the expense of the old plant and all of whom will use the new plant." Id. at 320-321. (Emphasis added.)

Here, the Court need only apply its apt definition of "arbitrary and irrational" under Contractors.

ARGUMENT

THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN FAILING TO INVALIDATE THE PROPOSED BONDS AS THE SPECIAL ASSESSMENTS UNDERLYING THE BONDS ARE NOT EQUITABLY APPORTIONED

The Court's deference to the methodology used by the City is not absolute, and the apportionment must still be equitable, fair, and reasonable. Existing users have worn out the existing wastewater treatment facilities. Existing users are not being assessed to replace existing wastewater treatment facilities. Existing users and the community at large are reaping a windfall at the expense of new users. The findings of the assessing authority are arbitrary. The special assessment impermissibly conveys most of the benefit on the community at large. The counterarguments advanced are unpersuasive.

A. Deference to the Assessing Authority is Not Absolute and Apportionment Must Still Be Equitable

It is generally true that, the apportionment of assessments is primarily a function of the legislative or assessing authority. Meyer v. City of Oakland Park, 219 So. 2d 417, 420 (Fla. 1969). However, proper, fair, and reasonable apportionment of the cost of a public improvement is essential to the validity of the assessment therefor. See, e.g., Lake County v. Water Oak Management Corp., 695

So. 2d 667 (Fla. 1997). Unless the determination was arbitrary, the finding of the local officials must stand. City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992).

"[I]t is also equally well recognized that a local assessment may so transcend the limits of equality and reason that its exacting would cease to be a tax or contribution, and become extortion and confiscation, in which case it then becomes the duty of the courts to protect the person or corporation assessed, from robbery under color of a better name." Atlantic Coast Line R. Co. v. City of Winter Haven, 151 So. 321, 324 (Fla. 1933). The polestar for deciding such matters is a determination of whether or not the assessments for the entire cost of the improvement have been proportionally and equally laid and spread against all of the property that may be required to pay a part of the cost. Id.; Charlotte County v. Fiske, 350 So. 2d 578 (Fla. 2d DCA 1977); 48 Fla. Jur. Special Assessments § 28 (2006).

B. Existing Users Have Worn Out the Existing Wastewater Treatment Plant

The wastewater treatment facility needs to be replaced, regardless of the addition of new users. Existing users have worn out the wastewater facility. In the words of the City's Public Works Director, A. Rony Joel:

> "Well, the plant is approximately 30 years old. The . . . master plan that was developed identified significant shortfalls in most of the unit processes, which are at the end of their useful life." (AP, I, 93).

> "We are having pieces of equipment that are falling down right now." (AP, I, 97).
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> "The plant that's coming to the end of its useful life is the existing 3.5-million-gallon-a-day plant that has nothing to do with the expansion." (AP, I, 98.)
>
> "[New users] have not contributed any flow to the plant; therefore, they would not have contributed to the degradation." (AP, I, 99.)

C. Existing Users Are Not Being Assessed to Replace the Existing Wastewater Treatment Plant

Existing users are not being specially assessed. According to City Manager, A. William Moss, existing users **originally were** going to be specially assessed for upgrades to the system, and to the new wastewater treatment facility. Due solely to their complaints, existing users were absolved of paying. In Mr. Moss' words:

> "Existing customers were not going to be paying for the expansion portion. **They were going to be paying for the upgrades that would have been required whether or not there was any expansion** . . . most of [existing users] were installed through a special assessment process that was administered by Collier County in the 1980s . . . So, the city council was hearing from these members of the public that said I have my sewer on special assessment program, and I and my neighbors don't think it's fair that we should have to pay additional costs . . ." (AP, I, 45. Emphasis added.)

The City may attempt to highlight line-item expenditures that are ostensibly related to replacement of the wastewater treatment plant, outside of the aforementioned $38 million attributable to assessments to new users. However, the City will not be able to produce line-items remotely comparable in amount to those attributable to new users. Also, the City will not be able to establish from the

record that existing users are bearing the burden of any such line-items on their own. In other words, the inequity derived from the failure to specially assess existing users is irrefutable.

D. The Legislative Determination at Issue Is Arbitrary

This apportionment scheme has been treated by the Florida Supreme Court. See Contractors and Builders Ass'n of Pinellas County v. City of Dunedin**,** 329 So.2d 314, 320-321 (Fla. 1976). This Court found that distinguishing between old and new users in this context is "arbitrary and irrational." Id. at 321. Contractor's involved user fees for new users of a sewer system. This Court held that the fee was an impermissible tax, unauthorized by general law, under the guise of setting charges for new sewer connections. Id. at 317. On strikingly similar facts, this Court stated:

> [I]t is not 'just and equitable' for a municipally owned utility to impose the entire burden of capital expenditures, including replacement of existing plant, on persons connecting to a water and sewer system after an arbitrarily chosen time certain. The cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent. **When new facilities must be built in any event, looking only to new users for necessary capital gives old users a windfall at the expense of new users** . . . New users thus share with old users the cost of original facilities . . . For purposes of allocating the cost of replacing original facilities, it is **arbitrary and irrational** to distinguish between old and new users, all of whom bear the expense of the old plant and all of whom will use the new plant." Id. at 320-321. (Emphasis added.)

It is true that Contractors specifically involved a user fee and not a special assessment, as here. However, the question of whether the apportionment is "just and equitable" is the same in Contractors as it is here. The question of whether the legislative determination is "arbitrary and irrational" is the same as it is here.

To iterate, "It is arbitrary and irrational to distinguish between old and new users." Id. at 321. As noted above, deference is afforded to the assessing authority unless the determination was arbitrary. City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992). Here, the City has distinguished between old and new users, which is "arbitrary and irrational" under Contractors. The City's apportionment scheme is therefore, not afforded deference, and is invalid.

Indeed, the only statement advanced to explain why existing users are not paying for their new wastewater treatment plant is that they do not want to pay for the new plant. In the words of City Manager, A. William Moss, "the city council was hearing from these members of the public that said I have my sewer on special assessment program, and I and my neighbors don't think it's fair that we should have to pay additional costs." (AP, I, 45.) Thus, existing users have been excluded from payment simply because they say so. There are few decisions that could be said to be more arbitrary.

E. The Community as a Whole Benefits Such That the Benefits Are Not Special

Assuming *arguendo* that the Court does not choose to apply its precedent as to arbitrariness, the special assessment is still flawed in that the Citizens have not received benefits that differ in type or degree from those enjoyed by the community at large. The special assessment is still flawed in that the community at large is receiving most of the benefit.

Florida law is replete with statements that the special assessment must especially benefit those assessed rather than the community at large. "When the public improvement imposes a benefit upon individual homeowners no different than that which is imposed upon the community at large, individual homeowners cannot be made to bear the burden of the cost of the improvement by means of a special assessment." Hanna v. City of Palm Bay, 579 So.2d 320, 323 (Fla. 5th DCA 1991). If primary benefit results to the public from special improvement, and secondary benefit to abutting property, such property cannot be assessed for the entire expense. City of Fort Myers v. State, 95 Fla. 704, 717 (Fla. 1928).

Here, the community at large benefits. Existing users, numbering nearly 15,000, are benefiting directly and palpably from the expenditure of 6,000 new users. The new users, almost entirely alone, are purchasing a new wastewater treatment plant for the community at large.

This Court requires that the "portion of the community which is required to bear [the special assessment] 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." Boca Raton v. State, 595 So. 2d 25, 29 (Fla. 1992). [8] Here, the benefit to the community is no different in quality than that received by those specially assessed. Here, the benefit to the community is greater than that received by those being specially assessed.

F. The Counterarguments Are Unpersuasive

The circuit court and opposing counsel raised two points in validating the subject bonds. Firstly, the circuit court thought it important that only bonds for two districts were subject to validation at this time. (AP, I, 24.) Secondly, the circuit court thought it important that existing users had been assessed for use of the wastewater treatment facility in the 1980s. (AP, I, 145-146.)

As to the point that only bonds for two districts are at issue, the point is remarkably obtuse and willfully ignorant. This point could be raised repeatedly at subsequent bond validations for subsequent districts, such that the entire arbitrary

[8] It unclear how or why the "logical relationship" test espoused in Lake County v. Water Oak Mgmt. Corp., 695 So. 2d 667 (Fla. 1997) would apply as the test is apparently limited to services. Of course, there is no "logical relationship" between the amounts assessed to new users and the 3.5 million gallons of capacity of the new wastewater treatment plant attributable to existing users. It is apparent that the benefit inuring to new users is only 1.5 million gallons of the 5 million gallon total capacity for the new facility, and yet they are the only party assessed. What is more, Lake County involved services, which are presumably subject to a more fluid test to account for the intangible and diffuse nature of service benefits.

and unjust scheme is ratified, simply due to willful failure to view the overall apportionment. This point ignores the fact that the unjust burden is proportionately the same in each assessment as it is in the larger arbitrary and unjust scheme.

As to the point that existing users were assessed in the 1980s for initial use of the wastewater treatment plant, this point is equally obtuse. This point ignores the fact that existing users have worn out the existing wastewater treatment plant entirely on their own. If one purchases an automobile and wears it out himself, he cannot be justified in putting the entire cost of replacing the automobile on a few of his new passengers.

CONCLUSION

Peter is being robbed to pay Paul. Millions of dollars are at stake, as are the personal finances of thousands of individual citizens. The Court has defined arbitrary and irrational. Appellants only ask the Court to apply its own definition. The apportionment scheme of the assessing authority is arbitrary and irrational. The community as a whole, the self-interested majority, is reaping a tangible benefit by reaching into the pockets of a few citizens. If the City is to come knocking at the doors of the Citizens and demand tens of thousands of dollars, the costs must be equitably apportioned.

Accordingly, Appellants request that the ruling of the circuit court be reversed, and that the bonds are invalidated.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to CHRISTOPHER ROE, ESQ., Bryant, Miller & Olive, P.A., 101 North Monroe Steret, Suite 900, Tallahassee, Florida 32301-1549; and MICHAEL JOHN PROVOST, ESQ., 6th Fl Administration Building, 3301 Tamiami Trail E., Naples, Florida 34112-4961, by facsimile and mail this _____ day of August, 2006.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P.9.100(1), I certify that this computer generated initial brief is submitted in Times New Roman 14-point font, in black and distinct type, double-spaced, and with margins of no less than one inch. As such, this brief is in compliance with Fla. R. App. P. 9.100(1).

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