IN THE SUPREME COURT OF FLORIDA

NORTH PORT ROAD AND
DRAINAGE DISTRICT,

Appellant, CASE NO.: SC10-1220

vs.

WEST VILLAGES IMPROVEMENT
DISTRICT,

Appellee,
_____/

AMICUS CURIAE BRIEF OF FLORIDA LEAGUE OF CITIES, INC.

On Appeal From the Second District Court of Appeal
Case No. 2D09-2221

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TABLE OF CONTENTS

Page No.

Table of Contents Cont. **Page No.**

TABLE OF AUTHORITIES

Page No.(s)

Cases

Table of Authorities Cont. **Page No.(s)**

Florida Constitution

Florida Statutes

Table of Authorities Cont. **Page No.(s)**

Laws of Florida

Other Authorities

PRELIMINARY STATEMENT OF INTEREST

The central issue in this case is whether the implemented constitutional home rule design embodied in the 1968 constitutional revision is somehow diminished by the survival of a pre-1968 judicial decision requiring a special act by the Florida Legislature for a municipality to impose a special assessment on public property. The analysis of the lower court in this case resurrects an out-dated decision construing municipal power under the 1885 Florida Constitution and is repugnant to the constitutional stream of judicial decisions interpreting Article VIII of the 1968 Florida Constitution and inconsistent with the tenor and constitutional logic of the decision of this Court in City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992).

The Florida League of Cities, Inc. (the "League") has a special interest in this case due to its potential impact on the ability of Florida municipalities to impose special assessments by ordinance to raise revenue to fund essential governmental services and programs pursuant to their constitutional and statutory home rule powers. The lower court's decision in this case that special authorization from the Florida Legislature is necessary for the imposition of special assessments on public property undermines the well established home rule authority of Florida municipalities and other local governments and is inconsistent with long-standing precedent of this Court.

Under Florida's constitutional home rule principles, as implemented by section 166.021, Florida Statutes, for municipalities, the legislative vehicle for imposition of special assessments is a local ordinance. Under the 1968 constitutional framework, a general law or special act of the Florida Legislature remains a potential vehicle for a limitation or preemption of municipal home rule. However, a general law or special act is simply unnecessary for any grant of municipal power to impose special assessments as a consequence of the expansive implementation of constitutional municipal home rule in the Municipal Home Rule Powers Act.

STATEMENT OF THE CASE AND FACTS

The League accepts the Appellant's Statement of the Case and Facts.

Both the City of North Port and the North Port Road and Drainage District shall be referred to in the Amicus Brief as the "City."

SUMMARY OF ARGUMENT

When determining whether a Florida municipality possesses the power to perform a function or render a service the inquiry is not whether a specific grant of power exists, but whether there is any express prohibition against the exercise of the power. This is the effect of Florida having adopted home rule, which fundamentally altered the relationship between the Florida Legislature and local governments. Where local government power under the Florida Constitution of

1885 was severely limited to that granted by the Legislature, the 1968 Florida Constitution began a revolution when the people approved the home rule provisions in Article VIII of the 1968 constitutional revision.

As to municipal governments, the Municipal Home Rule Powers Act, Chapter 166, Florida Statutes, completed the constitutional design. In that Act, Article VIII, section 2, Florida Constitution, was implemented by legislatively granting municipalities the necessary governmental, corporate and proprietary power to:

> conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.

Id. It is self evident from the constitutional grant and crystal clear from implementing legislation and established judicial precedent that the legislative vehicle to implement home rule is now a local municipal ordinance.

ARGUMENT

I. A MUNICIPALITY, DIRECTLY OR THROUGH A MUNICIPAL DEPENDENT DISTRICT, HAS THE CONSTITUTIONAL AND STATUTORY HOME RULE POWER TO IMPOSE SPECIAL ASSESSMENTS BY ORDINANCE.

Under the 1885 Florida Constitution, all municipal powers were dependent on a specific delegation of authority by the Legislature in a general law or special act:

> The Legislature shall have power to establish, and to abolish, municipalities to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time.

Art. VIII, § 8, Fla. Const. (1885).

This requirement of an express legislative grant was a reflection of the prevailing nineteenth century local government theory known as "Dillon's Rule."[1] Under this approach to municipal power, "[t]he authority of local governments in all matters, including those purely local, was limited to that expressly granted by the legislature, or that which could be necessarily implied from an express grant." Sparkman, The History and Status of Local Government Powers in Florida, 25 U. of Fla., L.R, 271, 282 (1973). To find a municipal power to legislate, the search was for an express delegation of authority from the Legislature in a general law or special act.

A. In the Municipal Home Rule Powers Act, the Legislature Granted Broad Powers of Local Self-Government to Municipalities.

The 1968 revision to the Florida Constitution abolished and buried Dillon's Rule and unleashed a Florida revolution in municipal home rule power:

[1]The term "Dillon's Rule" is named after a treatise on municipal corporations by J. Dillon. See Malone v. City of Quincy, 62 So. 922 (Fla. 1913) (providing for a typical application of Dillon's Rule by the Florida Supreme Court).

> POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. . . .

Art. VIII, § 2(b), Fla. Const. (emphasis supplied). The constitutional revision signaled a potential dramatic reversal of the source of municipal legislative power from Tallahassee to city halls throughout Florida. Section 166.021, Florida Statutes, the Municipal Home Rule Powers Act, completed the constitutional design of the novel municipal home rule concept.

This liberal construction of municipal home rule has been consistently followed by the Court:

> Article VIII, Section 2, Florida Constitution, expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services. The only limitation on that power is that it must be exercised for a valid "municipal purpose." It would follow that municipalities are not dependent upon the Legislature for further authorization. Legislative statutes are relevant only to determine limitations of authority.

State v. City of Sunrise, 354 So. 2d 1206, 1209 (Fla. 1978) (emphasis supplied).

A comparison of municipal power under the 1885 and 1968 Florida Constitutions was made by the Court in Lake Worth Utilities Authority v. City of Lake Worth, 468 So. 2d 215 (Fla. 1985), as follows:

> Thus, [under the 1885 Constitution] the municipalities were inherently powerless, absent a specific grant of power from the legislature. The noblest municipal ordinance, enacted to serve the most compelling municipal purpose, was void, absent authorization found in some general or special law.
>
> The clear purpose of the 1968 revision embodied in article VIII, section 2 was to give the municipalities inherent power to meet municipal needs.

Id. at 217.

To determine the home rule power of a municipality to legislate by ordinance the search today is not for specific legislative authorization. The search is for a general or special law that is inconsistent with the subject matter of the proposed ordinance. Absent an inconsistent law, a municipality has the complete power to legislate by ordinance for any municipal purpose.[2] The expansive scope of municipal home rule is underscored by the definition of municipal purpose in section 166.021(2), Florida Statutes, as "any activity or power which may be exercised by the state or its political subdivisions."

[2]Similar broad powers of self government have been granted to counties, both charter and non-charter. See Art. VIII, §§ 1(f) and (g), Fla. Const. (as implemented by section 125.01, Florida Statutes). See also State v. Orange County, 281 So. 2d 310 (Fla. 1973); and Speer v. Olson, 367 So. 2d 207 (Fla. 1979).

B. The Precedential Value of Judicial Decisions Rendered Prior to the 1968 Constitutional Revision Requires Interpretation in Light of the Subsequent Implementation of Constitutional Home Rule.

The home rule concepts unleashed by the 1968 constitutional revision jarred traditional thinking on municipal power and rendered fundamentally inapplicable the precedential value of pre-1968 judicial decisions.

Decisions prior to the 1968 constitutional revision are required to be read within the statutory and constitutional context in which they were decided. Otherwise, the legal analysis misses the mark demanded by the new municipal home rule concepts implemented in section 166.021, Florida Statutes. Thus, all pre-1968 judicial decisions on municipal home rule are fundamentally suspect and of minimal precedential value under the provisions of the 1968 Florida Constitution.

An example of misplaced reliance upon pre-1968 decisions on municipal powers is the quote from the lower court's decision in this case from Edwards v. City of Ocala, 50 So. 421, 422 (Fla. 1909), that "legislative intent to sanction special assessments on state property must 'clearly appear [] from the statute.'"[3] West Villages Improvement Dist. v. North Port Road and Drainage Dist., 36 So. 3d

[3]The quote from Edwards was lifted by the Court from the decision in City of Gainesville v. State, Department of Transportation, 778 So. 2d 519 (Fla. 1st DCA 2001), which case is analyzed subsequently in this argument under Point II of this Amicus Curiae Brief.

837, 840 (Fla. 2d DCA 2010). This outdated pre-1968 restatement is erroneously offered by the lower court as support for the decision in this case on appeal.

The fundamental thrust of municipal home rule was stressed by the Legislature in its enactment of section 166.021(4), Florida Statutes:

> The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature . . . to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.

Id. (emphasis supplied). It is difficult to imagine any stronger statement by the Legislature of its intent to move the source of municipal legislative power from the Legislature to local city councils.

Thus, black-letter statements in prior judicial opinions that "municipalities have no inherent power to levy assessments" are simply old law to be ignored by virtue of the 1968 constitutional revision mandate.

II. UNDER THE DESIGN OF THE 1968 CONSTITUTIONAL REVISION, A MUNICIPAL ORDINANCE IS THE LEGISLATIVE ACT IMPLEMENTING CONSTITUTIONAL AND STATUTORY HOME RULE POWER.

That Article VIII of the 1968 constitutional revision contemplated a local ordinance as the legislative vehicle for the implementation of local government home rule powers is clear and apparent in the language of Article VIII and the contemporaneous implementing legislation.

As to counties, Article VIII, section 6(d), Florida Constitution, provides that local laws relating only to the unincorporated areas on the effective date of the Article may be amended or repealed by county ordinance. Similarly, section 166.021(5), Florida Statutes, provided that all existing special acts pertaining exclusively to the power or jurisdiction of a municipality, with certain exceptions, became ordinances of the municipality on the effective date of the act subject to modification or repeal by the municipality as other ordinances.

Additionally, the Legislature, in its enactment of Chapter 71-59, Laws of Florida, repealed 20 pages of enumerated population acts and converted them into local ordinances of the particular county or municipality affected subject to modification or repeal as other ordinances. Such constitutional and legislative labor point to a singular objective -- the substitution of a local municipal ordinance for the specific authorization by the Legislature of municipal powers.

This elevation of the local ordinance as a legislative vehicle for the implementation of local government home rule powers in replacement of a special act has also been judicially acknowledged. In State v. Orange County, 281 So. 2d 310 (Fla. 1973), in upholding legislative implementation of the contemplated home rule power of a non-charter county, the Court stated:

> Instead of going to the Legislature to get a special bill passed authorizing such building fund revenue bonds, the Orange County Commissioners under the authority of the 1968 Constitution and enabling statutes now may pass an ordinance for such purpose, as they did in this case, because there is nothing inconsistent thereto in general or special law. On the contrary, there is ample delegated authority for such purpose. The object of Article VIII of the 1968 Constitution was to do away with the local bill evil to this extent.[[4]]

281 So. 2d at 312 (emphasis supplied).

Such judicial characterization of special acts and the objective of the 1968 constitutional revision to minimize their use by the Legislature was also explained in the landmark municipal home rule decision of City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764 (Fla. 1974):

[4]An example of the time demand on the Legislature to focus on issues of local authority: (1) the number of local bills introduced in the 1965 Legislative Session was 2,107; and (2) the number of population acts enacted had grown to 2,100 by 1970 with over 1,300 having been enacted since the effective date of the 1960 census. Sparkman, supra, p. 286; p. 286, n. 110.

> the provision of new F.S. § 166.021(1) which expressly empowers municipalities to "exercise any power for municipal purposes, except when expressly prohibited by law." . . . [T]he intent of this chapter was largely to eliminate the "local bill evil" by implementing the provisions of Art. VIII, § 2, Fla. Const.

305 So. 2d at 766 (Dekle, J., concurring specially) (emphasis supplied).

Notwithstanding the existence of municipal home rule power to impose special assessments affirmed in City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992),[5] and the stream of other cases articulating the broad scope of municipal home rule, the lower court in this case held that the municipal authority to impose special assessments against public property required legislation in the form of a special act. Such misapprehension of municipal home rule is the central issue in this appeal. The instruction in Blake v. City of Tampa, 156 So. 97 (Fla. 1934), that specific authority from the Legislature is required for the assessment of public property has been supplanted by municipal home rule. The lower court makes an unwarranted detour from established precedent by its misplaced construction of the viability of this legislative instruction in Blake.

Prior to its decision in Blake, the Court, during the time in which Dillon's Rule held sway in Florida, held that the Legislature had the power to grant a

[5]The City of Boca Raton decision also clarified that a home rule special assessment is not a tax. Article VII, section 1(a), Florida Constitution, requires authorization by general law for all forms of taxation other than the ad valorem tax.

municipality the authority to assess county property used for governmental purposes for street improvements in City of Gainesville v. Alachua County, 68 So. 759 (Fla. 1915).

The issue in Blake was whether legislative authority existed for a municipality to assess local school district property because of the unique constitutional limitations on school funding. The Court in Blake held:

> We hold therefore as follows: that notwithstanding the provision of the several sections of Article XII of the Constitution of Florida relating to schools and the public school funds, that property acquired and used for public school purposes, owned within the jurisdiction of a municipality by a special tax school district under the constitution and laws of Florida, may, by a duly enacted statute expressly so providing, be lawfully encumbered with a lien for a special or local assessment authorized to be imposed by the municipality . . . .

156 So. at 100.

The error of the lower court in this case was to rely on the following quote from Blake as its explanation of "how special assessments could be validly applied to public property":

> [I]t is recognized by the weight of authority in the United States that with the exception of property of the general government, such as may be used for a custom house, post office, or other public building, all other public property is assessable if so provided by legislation, for it is unquestionably competent for the lawmaking power to authorize lands of the state, or public property belonging either to municipal corporations or to other public quasi

> corporations, or to political subdivisions, to be subjected to special assessments. But public property will not be deemed to be so included unless by special enactment or necessary implication.

36 So. 3d at 839-40 (citing Blake v. City of Tampa, 156 So. 97, 99 (Fla. 1934) (emphasis in original). Relying on the language from this quote from Blake, the lower court in this case then concluded:

> This discussion in Blake leads this court to conclude that legislative authorization--whether express or necessarily implied--is required before a special assessment can be imposed upon public property.

36 So. 3d at 840.

The lower court's misapprehension in this case is its requirement of specific legislation emanating from the Florida Legislature in face of the constitutional and statutory home rule powers embodied in the 1968 constitutional revision. Under the ensuing constitutional design, the legislative vehicle to authorize and implement a municipal power is a local ordinance not a special act of the Legislature. Since 1968, legislative statutes are relied upon only to determine the limitations on municipal authority. See State v. City of Sunrise, 354 So. 2d 1206 (Fla. 1978). The object of Article VIII in the 1968 constitutional revision was to do away with the evil of the local bill enactment requirement. See State v. Orange County, 281 So. 2d 310 (Fla. 1973).

This dramatic change in the source of municipal power was recognized in City of Boca Raton v. State as follows:

> Thus, a municipality may now exercise any governmental, corporate, or proprietary power for a municipal purpose except when expressly prohibited by law, and a municipality may legislate on any subject matter on which the legislature may act, except those subjects described in paragraphs (a), (b), (c), and (d) of section 166.021(3). The provisions of section 166.021(3)(a) and (d) are irrelevant to the instant case. Therefore, it would appear that the City of Boca Raton can levy its special assessment unless it is expressly prohibited by law--section 166.021(1), expressly prohibited by the constitution--section 166.021(3)(b), or expressly preempted to the state or county government by the constitution or by general law--section 166.021(3)(c).

595 So. 2d at 28. The following concern of the lower court in this case that Blake had not been overruled by the City of Boca Raton decision evidences a fundamental misunderstanding:

> We find it significant that the City of Boca Raton case did not even mention the Blake decision, much less explicitly overrule it. And it is well settled that the supreme court does not overrule itself by implication. See Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002). We also note that the City of Boca Raton case did not separately address whether public property would be subject to special assessments in the absence of specific legislative authority.

Id. at 840. There was no need for the Court in City of Boca Raton to overturn Blake or to "separately address" the assessment of public property. Such issues

were not in controversy in City of Boca Raton. The Blake decision established two municipal power provisions under the 1885 Florida Constitution. First, school district property can be assessed only by express legislation. Second, because public property cannot be sold for execution of a lien, mandamus will ordinarily be available to compel payment.

The Court in City of Boca Raton was simply not faced with the issue of whether the breadth of municipal home rule power encompassed the power to impose a special assessment against public property.

The lower court in this case on appeal also relied on the decision in the two City of Gainesville cases construing municipal power to charge state agencies stormwater utility fees.

It was acknowledged in the decision on appeal that the First District Court in City of Gainesville v. State, Department of Transportation, 778 So. 2d 519 (Fla. 1st DCA 2001), did not directly address the validity of a special assessment imposed on public property because of the position taken by the city in that appeal:

> We recognize that City of Gainesville is limited in application because there the city of Gainesville did not argue that state property was subject to special assessment.

36 So. 3d at 840.

The First District Court in City of Gainesville had noted the following:

> But the City does not contend that state property can be taxed, or that state property can be specially assessed, absent a statute authorizing special assessments specifically on state property, either explicitly or by "necessary implication." Blake v. City of Tampa, 115 Fla. 348, 156 So. 97, 99 (Fla. 1934). The City does not question the rule that legislative intent to sanction special assessments on state property must "clearly appear[] from the statute." Edwards v. City of Ocala, 58 Fla. 217, 50 So. 421, 422 (Fla. 1909). At issue is whether the utility fee is a user fee, as the City contends, rather than either a tax or a special assessment, as DOT contends.

778 So. 2d at 521-22. The issue of whether a special assessment imposed by municipal ordinance against State property was a legislative act consistent with the instruction in Blake was simply not an issue. The city had apparently conceded such an argument to advance the validity of its stormwater management fee.

Thus, both the decision by the First District in City of Gainesville and the subsequent decision of the Court in the separate bond validation proceedings in City of Gainesville v. State, 863 So. 2d 138 (Fla. 2003), approved the validity of the stormwater management fee as a valid user fee and the type of legislation required for the imposition of a special assessment against public property under the Blake instruction was not a determinative issue.[6] Neither decision construed

[6]The conclusions in Florida Attorney General Opinions 90-85 (1990) and 97-70 (1997) as to the imposition of special assessments imposed by municipal ordinance on State property is a parroting of pre-1968 judicial decisions in reliance on the dictum in the City of Gainesville decisions on the validity of stormwater utility fees.

the novel constitutional and statutory home rule power embodied in the 1968 constitutional revision and its impact on the reasoning in Blake.[7]

The Appellee, West Villages Improvement District is a limited purpose independent special district with local budgetary authority. The limited governmental nature of such independent special districts was acknowledged in State v. Frontier Acres Community Development Dist. Pasco County, 472 So. 2d 455, 457 (Fla. 1985), where the Court expressly recognized that, "A community development district created under chapter 190 does not exercise general governmental functions." A community development district is in function and scope the equivalent of the independent taxing district form of government utilized by the Appellee. Property owned by such local governments receives the same benefit from a special assessment program as similarly situated private property. No constitutional or public policy rationale relieves specially benefitted public property from a shared burden resulting from a fair apportionment of the cost of the assessed improvement or service. Thus, if an exception exists as to the legislative authority of a municipality under its constitutional and statutory home

[7]Alternatively, the Blake decision should be limited in its application to only property owned by the state and its agencies and not extended to local governmental entities. The basis for such a limitation would be the limited budgetary and spending authority of the state, which is subject ultimately to annual appropriation by the Florida Legislature, as well as the unique constitutional status of the State under the Florida Constitution.

rule power to assess public property, it should be limited to the State and not to other local governments with local budgetary discretion.

III. THE LEGISLATURE RETAINS THE POWER TO PREEMPT MUNICIPAL HOME RULE POWER TO IMPOSE SPECIAL ASSESSMENTS BY EITHER GENERAL LAW OR A SPECIAL ACT.

A seminal element of the 1968 constitutional design in Article VIII is the retention by the Legislature of the power to preempt county and municipal home rule by the enactment of an inconsistent general or special act.[8] The Blake instruction for express legislation for the assessment of public property has been flipped under the current constitutional analysis. The search is for a legislative act of preemption rather than authorization.

The constitutional logic of a legislative preemption for local school districts was recognized by the Fifth District Court in Remington Community Development Dist. v. Education Foundation of Osceola, 941 So. 2d 15, 16 (Fla. 5th DCA 2006), which held:

> Historically, public schools in Florida were not exempt from special assessments. Blake v. City of Tampa, 115 Fla. 348, 156 So. 97 (Fla. 1934). In 1953, the legislature enacted the precursor to section 1013.51, Florida Statutes (2005), [fn. omitted] which, as construed by the courts, authorized, but did not require, education boards to expend funds for special assessments.

[8]As to charter counties, Article VIII, section 1(g), Florida Constitution, requires elector approval of any special act limiting constitutionally granted powers of local self-government.

Thus, as to school districts, the municipal home rule power to assess school property has been limited by section 1013.51, Florida Statutes. An additional example is section 258.14, Florida Statutes, which exempts land described in sections 258.11 and 258.12, Florida Statutes, as exempt from the payment of "any special assessment or any assessment of taxes." Id.

Thus, when the municipal home rule power to impose special assessments by ordinance is preempted, the Florida Legislature does so expressly consistent with the 1968 constitutional design.

CONCLUSION

Amicus, Florida League of Cities, urges the Court to reverse the decision of the Second District Court of Appeal in this case and restate the decision of the trial court upholding the non-ad valorem assessments imposed by the Appellant. The imposition by ordinance of the challenged special assessments against public property owned by the Appellee was within the constitutional home rule power of the City and was not preempted by general or special act of the Legislature.

Respectfully submitted,

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I HEREBY CERTIFY that this brief is presented in Times New Roman font, 14 point type, a font that is proportionately spaced as required by the Florida Rules of Appellate Procedure.

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