SUPREME COURT OF FLORIDA

CASE NO. SC-10-1220

NORTH PORT ROAD AND DRAINAGE DISTRICT, a dependent special district of the State of Florida,

Petitioner,

v.

WEST VILLAGES IMPROVEMENT DISTRICT, an independent special district of the State of Florida,

Respondent.

Lower Tribunal No. 09-2221

PETITIONER'S INITIAL BRIEF

On Review from the District Court of Appeal,
Second District, State of Florida
Case No. 09-2221

TERRY E. LEWIS, ESQ.
Florida Bar No. 276685
MAGGIE D. MOONEY-PORTALE, ESQ.
Florida Bar No. 0555924
Lewis, Longman & Walker, P.A.
1001 3rd Avenue West, Suite 670
Bradenton, Florida 34205
Telephone (941) 708-4040
Facsimile (941) 708-4024
Co-Counsel for Petitioner,
North Port Road and Drainage District

ROBERT K. ROBINSON, ESQ.
Florida Bar No. 815081
JACKSON C. KRACHT, ESQ.
Florida Bar No. 548561
Nelson Hesse, L.L.P.
2070 Ringling Blvd.
Sarasota, Florida 34237-7002
Telephone (941) 366-7550
Facsimile (941) 955-3710
Co-Counsel for Petitioner,
North Port Road and Drainage District

TABLE OF CONTENTS

Page

APPENDIX (Separately Tabbed)

PAGES

CITATIONS OF AUTHORITIES

CASE LAW Page

RULES

STATUTES

CONSTITUTION

MISCELLANEOUS

PREFACE

The Petitioner North Port Road and Drainage District will be referred to as the "Drainage District". The City of North Port will be referred to as the "City". The Respondent West Villages Improvement District will be referred to as "WVID". The Record on Appeal from Florida's Second District Court of Appeal will be referenced as "(R)" and any references to the records from that proceeding shall include volume and tab references corresponding to the documents filed by the Respondent, WVID, in that proceeding (respectively identified as ("V") and ("T")). All documents provided for in the Appendix will be referenced as "(A)" within the Brief and shall include references to page numbers. The documents placed in the Appendix are being included within the Appendix for purposes of providing the Court with easier access to applicable legislation and the Second District Court's Record.

ISSUES PRESENTED

1. MAY A MUNICIPAL DEPENDENT SPECIAL DISTRICT, PURSUANT TO MUNICIPAL HOME RULE POWER, IMPOSE A NON-AD VALOREM SPECIAL ASSESSMENT UPON REAL PROPERTY OWNED BY A STATE GOVERNMENTAL ENTITY, IN THE ABSENCE OF EXPRESS OR NECESSARILY IMPLIED LEGISLATIVE AUTHORITY?1

2. WHETHER THE DECISION IN WEST VILLAGES IMPROVEMENT DIST. V. NORTH PORT ROAD & DRAINAGE DIST., 36 So. 3d 837 (Fla. 2d DCA 2010) CONFLICTS WITH REMINGTON COMMUNITY DEV. DIST. V. EDUCATION FOUND. OF OSCEOLA, 941 So. 2d 15 (Fla. 5th DCA 2006), AS TO A DEPENDENT DISTRICT'S AUTHORITY TO LEVY NON-AD VALOREM ASSESSMENTS AGAINST REAL PROPERTY OWNED BY ANOTHER LOCAL GOVERNMENT WHEN THERE IS NO EXPRESS CONSTITUTIONAL OR STATUTORY PROHIBITION FOR SUCH A LEVY.

1 The Drainage District is not going to restate or deviate from the certified question of great public importance. However, it is relevant to note, that the Respondent, WVID, is a local government, not a state agency.

STATEMENT OF THE CASE & FACTS

A. Nature of the Case.

This case concerns whether a municipal dependent district, the North Port Road and Drainage District (the "Drainage District"), has the authority to levy non-ad valorem assessments against real property owned by an independent special district, the West Villages Improvement District ("WVID"). At issue is the scope of a municipal dependent special district's home rule authority, and whether a municipal dependent special district may levy non-ad valorem assessments against specially benefited government real property in the absence of express or implied legislative authority or whether such a levy requires prior specific legislative authorization from the Florida Legislature. Implicit in this issue is whether the general public located within the municipal dependent special district should shoulder the financial burden of paying for the special benefits of road and drainage services provided to other local government real property within the municipal boundaries.

B. Factual Background.

Pursuant to Chapter 166, Florida Statutes, and the Florida Constitution, the City of North Port (hereinafter "City") is a municipal corporation of the State of Florida which acts by and through its elected City Commissioners. (A. 4, 7, 20,). The City Commissioners created and operate the Drainage District pursuant to

Article III, Sections 66-47 through 66-65, of the City's Code of Ordinance 08-11. (A. 9, 16-27).

The Drainage District provides an integrated system of municipal street and drainage facilities and other improvements for the benefit of property owned within the District. (A. 19-20, 50-51). The Drainage District's boundaries are coterminous with the City's jurisdictional boundaries, and the Drainage District's governing body is the City Commission. (A. 20-21).

On July 28, 2008, the City Commissioners amended the Code of Ordinances relating to the Drainage District to authorize the levy and collection of non-ad valorem assessments against all specially benefited real property within its jurisdictional boundaries, irrespective of whether the real property was governmentally or privately owned. (A. 24). The City's amendment to the Drainage District's Ordinances were codified by the City Commissioners' adoption of Ordinance No. 08-11 (hereinafter "2008 Ordinance"). (A. 16-27). The 2008 Ordinance restated the constitutional and statutory home rule authority for the Drainage District's establishment and financing of its services through the levy of non-ad valorem assessments. 2 (A. 22-23). The 2008 Ordinance also authorized the levy of non-ad valorem assessments for road and drainage services on all non-

2 The City's Code of Ordinances specifically states that the Drainage District is created pursuant to the authority contained in Chapters 166, 170 and 189, Florida Statutes, and the City's home rule authority. City of North Port, Florida Code of Ordinances, Art. III, § 66-47.

exempt, specially benefited public and private real property located within the City's jurisdictional boundaries that was not exempt or immune from non-ad valorem assessments. (A. 24). By adopting the 2008 Ordinance, the Drainage District had the right to levy non-ad valorem assessments against other governmental entities which owned real property within the City's boundaries that received special benefits from the Drainage District's services. (A. 24, 41-42, 59-60). Among the entities subject to this assessment was Respondent, WVID. (R. 1, R.1/V.3/T.18; A. 56).

WVID was created by special act of the Florida Legislature in Chapter 2004-457, Laws of Florida, as amended. (R. 1, R.1/V.3/T.18). WVID is an independent special district located entirely within the City of North Port which was created for the purpose of financing and managing the acquisition, construction maintenance and operation of a portion of the infrastructure necessary for community development within the special district's boundaries. (R.1, R.1/V.1/T. 2 & 3). WVID is provided supplemental authority under general law in Chapters 189 and 298, Fla. Stat. (R. 1, R.1/V.3/T.18).

WVID owns nine parcels of real property within the City (and therefore within the Drainage District) that were subject to the Drainage District's non-ad valorem assessment. (R. 1/V.1/T.8). The WVID parcels subject to the assessment are: Parcel Nos. 0779-01-0300, 0779-01-0315, 0779-01-0317, 0779-02-0011,

0780-02-0011, 0780-02-0114, 0780-02-0116, 0784-00-4020, and 0801-00-1010 (hereinafter the "9 Parcels"). (R.1/V.1/T.8).

C. Course of Proceedings and Dispositions.

1. Circuit Court Determination.

Immediately following the adoption of the 2008 Ordinance, the Drainage District levied non-ad valorem assessments against the nine Parcels owned by WVID. (R.1/V.1/T.8) WVID timely filed its written objections to the non-ad valorem assessments which were denied by the Drainage District. (R.1/V.1-2/T. 9, 10, 14 &15). WVID filed a Writ of Certiorari with the Twelfth Judicial Circuit (hereinafter the "initial Petition") requesting that the trial court: (a) quash the Drainage District Director's denial of WVID's appeal; (b) modify the Resolution adopted by the City to remove the WVID's properties from the 2008-2009 tax rolls; (c) order that all non-ad valorem assessments levied by the Drainage District on WVID's properties are invalid and *void ab initio*; and (d) prohibit the Drainage District's levy of non-ad valorem assessments against WVID's properties at the present and "at any time in the future." (R. 1/V. 4/T. 18).

One of the primary arguments advanced by WVID in the initial Petition was that pursuant to Blake v. City of Tampa, 156 So. 2d 97 (Fla. 1934), the Drainage District needed express, statutory authority to levy non-ad valorem assessments against governmentally-owned property. The Circuit Court disagreed and denied

WVID's initial Petition on all grounds. (A. 28-30). In its November 14, 2008, Order, the Circuit Court held:

1. The non-ad valorem assessment was apportioned based upon a rational methodology.
2. The evidence does not show the District acted arbitrarily in adopting non-ad valorem assessments.
3. A dependent special district in this case has the authority to levy non-ad valorem assessments on specially benefited properties pursuant to both their home rule authority and statutory authority. City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992).
4. Procedural Due Process was accorded *[sic]*.
5. The essential requirements of law were observed.
6. The administrative findings and judgment are supported by competent substantial evidence.

(A. 28-30).

2. Appellate Court's Determination.

On May 13, 2009, WVID filed a second-tier Petition for Writ of Certiorari with the Florida Second District Court of Appeal, challeging the Circuit Court Judge's denial of its initial Petition and asserting that the Circuit Court applied the incorrect law to its entire review of WVID's initial Petition. (R. 1/V. 3-4/T. 18 &

21). Each party asserted essentially the same arguments raised at the Circuit Court. (R. 1/ V. 3-4/T. 18, 20 & 21).

On May 28, 2010, the Second DCA issued its ruling and, in reliance on Blake, *supra*, and City of Gainesville v. State Dept. of Transp., 778 So. 2d 519 (Fla. 1st DCA 2001), reversed the Circuit Court**.** (A. 31-39). The Second DCA certified the following question to the Florida Supreme Court to be of great public importance*:*

> MAY A MUNICIPAL DEPENDENT SPECIAL DISTRICT, PURSUANT TO MUNICIPAL HOME RULE POWER, IMPOSE A NON-AD VALOREM SPECIAL ASSESSMENT UPON REAL PROPERTY OWNED BY A STATE GOVERNMENTAL ENTITY, IN THE ABSENCE OF EXPRESS OR NECESSARILY IMPLIED LEGISLATIVE AUTHORITY?

(A.31-39)

The Second District also certified a conflict between its decision and that of the Fifth District in Remington Community Dev. Dist. V. Educational Found. of Osceola, 941 So. 2d 15 (Fla. 5th DCA 2006). West Villages, 36 So. 3d at 842. The certified conflict question between West Villages and Remington concerns substantially the same legal issue as the certified question of great public importance, to wit, whether a municipal dependent special district may levy non-ad valorem assessments against property owned by another local government in the absence of an express statute prohibiting such a levy. Because the certified

question of great public importance and the certified conflict deal with the same issues of law, they will be addressed together.

ARGUMENT

I. JURISDICTION.

The Florida Supreme Court has discretionary jurisdiction pursuant to Rules 9.030(a)(2)(A)(v) and 9.030(a)(2)(A)(vi), Florida Rules of Appellate Procedure, to review the decision by the Florida Second District Court of Appeal in the matter of West Villages Improvement Dist. v. North Port Road & Drainage Dist., 36 So. 3d 837 (Fla. 2d DCA 2010). The Florida Second District Court of Appeal certified the following question to be of great public importance:

> MAY A MUNICIPAL DEPENDENT SPECIAL DISTRICT, PURSUANT TO MUNICIPAL HOME RULE POWER, IMPOSE A NON-AD VALOREM SPECIAL ASSESSMENT UPON REAL PROPERTY OWNED BY A STATE GOVERNMENTAL ENTITY, IN THE ABSENCE OF EXPRESS OR NECESSARILY IMPLIED LEGISLATIVE AUTHORITY?

The Second District Court of Appeal also certified conflict with the decision out of the Fifth District Court of Appeals in Remington Community Dev. Dist. v. Education Found. of Osceola, 941 So. 2d 15 (Fla. 5th DCA 2006).

II. THE MUNICIPALITY OF NORTH PORT HAS EXERCISED ITS HOME RULE AUTHORITY TO AUTHORIZE THE NORTH PORT ROAD AND DRAINAGE DISTRICT TO LEVY NON-AD VALOREM ASSESSMENTS AGAINST ALL SPECIALLY BENEFITED REAL PROPERTY, INCLUDING REAL PROPERTY OWNED BY BENEFITED GOVERNMENTS.

A. Standard of Review.

The standard of review for a certified question of great public importance is whether the district court of appeal's decision was erroneous. Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 912 (Fla. 1995); Pan American Bank of Miami v. Alliegro, 149 So. 2d 45 (Fla. 1963). The standard of review for reviewing conflicting decisions of District Court of Appeals is *de novo*. Linn v. Fossum, 946 So. 2d 1032, 1036 (Fla. 2006).

B. Municipal Home Rule Authority Provides that Municipalities Can Legislate On Anything Not Expressly Prohibited by Law.

"Municipal home rule authority" is a well established principle memorialized in both the 1968 Florida Constitution and subsequently enacted Florida Statutes. See, Art. VIII, § 2 (b), Fla. Const.; Ch. 166, Fla. Stat. Under the 1885 version of the Florida Constitution, Florida's municipalities operated under "Dillon's Rule" which required an express grant of legislative authority for a municipality to exercise any power. City of Boca, 595 So. 2d at 27. Dillon's Rule in practice resulted in municipalities "flooding" the Florida Legislature with requests to advance and adopt a multitude of bills to resolve local problems. Id. When Florida's Constitution was amended in 1968 and adopted by voter referendum, municipalities were provided broad "home rule powers," thereby

reversing the need for Legislative involvement in each local problem. Id.

Article VIII, Section 2(b), of the 1968 Florida Constitution provides:

> (b) **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**. Each municipal legislative body shall be elective.

Art. VIII, § 2(b), Fla. Const. (emphasis added).3

In 1973 municipal home rule authority was further codified by the Florida Legislature through the adoption of the Municipal Home Rule Powers Act, Section 166.011, *et seq.*, Fla. Stat. The Municipal Home Rule Powers Act defines "municipal purpose" as "any activity or power which may be exercised by the state or its political subdivisions." Section 166.021(2), Fla. Stat. See, City of Ormond Beach v. County of Volusia, 535 So. 2d 302, 304 (Fla. 5th DCA 1989) ("municipal purposes" include the conduct of municipal government, exercise of a municipal function, or provision of a municipal service). The Municipal Home Rule Powers Act contains express provision for expanded authority to municipalities. Section

3 Talbot D'Alemberte, the reporter for the Constitutional Revisions Commission, commented that the 1968 and 1885 Florida Constitution differed in that under the 1968 Florida Constitution "all municipalities have governmental, corporate and proprietary powers unless provided otherwise by law, whereas under the 1885 Constitution, municipalities had only those powers expressly granted by law." City of Boca at 27 (citing 26A Fla. Stat. Ann. 292 (1970)(Commentary by Talbot "Sandy" D'Alemberte)).

166.021, Fla. Stat. It specifically provides:

> (4) 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 extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited. . .**

Section 166.021(4), Fla. Stat. (emphasis added).

Since 1968, Florida Courts have repeatedly upheld municipalities' broad authority to use their municipal home rule powers to legislate through the enactment of ordinances, concurrently with the Legislature, on any subject which is not preempted to the State. City of Hollywood v. Mulligan, 934 So. 2d 1238, 1243 (Fla. 2006); City of Venice, 429 So. 2d 1241, 1244 (Fla. 2d DCA 1983). Preempted subject matters reserved by the Florida Legislature relate to the following subjects: annexation, merger, and extraterritorial power; any subject prohibited by the Florida Constitution; any subject expressly preempted to the state or county government by the Constitution or by general law; and any subject preempted to a county pursuant to a county's charter. Section 166.021(3), Fla. Stat.

Home rule authority provides municipalities with the authority to act for all municipal purposes and to exercise any governmental, corporate or proprietary power except when expressly prohibited by law. City of Boca, *supra*; City of

Ormond Beach, *supra*. Municipal home rule authority enables municipalities to provide municipal services by constructing, maintaining, and operating necessary facilities. Cooksey v. Utilities Commission, 261 So. 2d 129, 130 (Fla. 1972)3. Thus, in the absence of a statutory or constitutional prohibition or preemption, municipalities can legislate on any matter as long as the legislation serves a municipal purpose. Section 166.021, Fla. Stat.

C. Municipalities Are Authorized to Levy Non-Ad Valorem Assessments Except When Specifically Prohibited By Law.

Non-ad valorem assessments are charges assessed by local governments against real property because that property derives some special benefit for a particular service or facility. City of Gainesville v. State, 863 So. 2d 138, 145 (Fla. 2003). Non-ad valorem assessments are not based upon property value, but rather upon the cost of a service or facility and the special benefit received by a particular property. Section 197.3632(1)(d), Fla. Stat.; Lake County v. Water Oak Management Corp., 695 So. 2d 667, 669 (Fla. 1997). Such assessments become a lien against the benefited property coequal to county or city taxes. Section 197.3632(1)(d), Fla. Stat. To be valid, a non-ad valorem assessment must: (1) provide a special benefit to assessed property; and (2) the assessment must be fairly and reasonably apportioned. City of Boca, 595 So. 2d at 25. As explained by the Florida Supreme Court, both the determination of the special benefit and the appropriate apportionment of non-ad valorem assessments are legislative functions

which should be upheld unless the determination is arbitrary or grossly unequal. Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180, 183-184 (Fla. 1995).

A special benefit is conferred on property when there is a "logical relationship" between the services provided and the benefit to real property. Lake County v. Water Oak Management Corp., 695 So. 2d at 669. An assessment will be deemed fairly apportioned when the assessment represents "a fair proportional part of the total cost of improvement" that does not exceed the proportional benefits provided as compared to other assessed parcels affected by improvement. South Trail Fire Control Dist. v. State, 273 So. 2d 380, 384 (Fla. 1973). The manner of the assessment is immaterial; it may vary as long as the amount of the assessment for each parcel is not in excess of the proportional benefits as compared to other assessments on other parcels. City of Boca Raton v. State, 595 So. 2d 25, 31 (Fla. 1992); Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d at 18; South Trail Fire Control District v. State, 273 So. 2d at 384 .

Non-ad valorem assessments differ from taxes in that taxes are levied by a particular taxing unit for the general benefit of the community at large to support the government, the administration of law, and the exercise of various functions the sovereign is called on to perform. City of Boca, *supra*; Sarasota County, *supra*. By contrast, non-ad valorem assessments are based upon the special benefit

to the benefited property from a particular service and the fair apportionment of the assessment for that service. City of Boca at 29. Even if an entity's real property is exempt from an ad valorem tax, an entity still may be subject to non-ad valorem assessments. See e.g., Sarasota County, 667 So. 2d at 187 (upholding the levy of a special assessment for stormwater services against a tax-exempt church).

The seminal case on the dual authority for a municipality to levy non-ad valorem assessments is City of Boca, 595 So. 2d 25 (Fla. 1992). In the City of Boca, the city funded certain municipal infrastructure improvements through the issuance of bonds that would be repaid by benefited property owners through the levy of non-ad valorem assessments. Id. at 26. The State of Florida challenged the City's levy of the non-ad valorem assessments, claiming that Chapter 170, Fla. Stat., preempted the ability of the city to levy assessments under any circumstance beyond those specifically enumerated. Id. at 29. The Florida Supreme Court rejected the State's position, citing to the broad scope of a municipality's home rule authority and finding that Section 170.01, Fla. Stat., provided supplemental authority supporting the levy of non-ad valorem assessments. Id. at 30.

D. Municipalities Have Authority to Create Dependent Districts and to Levy Non-Ad Valorem Assessments.

Chapter 189, Florida Statutes, provides authority for a municipality to create dependent special districts for the purpose of providing municipal services. See, §189.402(1), Fla. Stat. Municipalities also have additional power pursuant to their

home rule authority to create dependent special districts to serve municipal purposes. See, City of Ormond Beach v. County of Volusia, 535 So. 2d at 304. A "dependent special district" is defined broadly as a special district whose governing board's membership may be identical to that of the governing body of a single municipality. Section 189.403(2), Fla. Stat. A municipality is authorized to create dependent special districts within the boundary lines of the municipality. Section 189.4041(3), Fla. Stat.

Given the breadth of home rule powers provided for Article VIII, Section 2(b), Florida Constitution and in the Municipal Home Rule Act, in the absence of an express prohibition, a municipality may create a dependent special district to provide municipal services and authorize the dependent special district, by ordinance, to levy non-ad valorem assessments to fund municipal services.

E. In the Absence of an Express Statutory or Constitutional Prohibition, the Drainage District has Home Rule Authority to Levy Non-Ad Valorem Assessments on Specially Benefited Real Property Owned by Governmental Entities.

The rules of statutory construction require that statutes be interpreted as they are written and be given their plain and obvious meaning, and further that the language used within the statutes be given its natural effect. Florida Dept. of Revenue v. Florida Mun. Power Agency, 789 So. 2d 320 (Fla. 2001); McKenzie Check Advance of Florida, LLC v. Betts, 928 So. 2d 1204 (Fla. 2006); Dolly Bolding Bail Bonds v. State, 787 So. 2d 73 (Fla. 2d DCA 2001). More

importantly, when the law expressly describes a particular situation to which the law applies , an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded. Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC, 986 So. 2d 1244, 1258 (Fla. 2008) (upholding the canon of statutory construction "*expressio unius est exclusion alterius"* - the mention of one thing implies the exclusion of another).

There is no blanket statutory exclusion or exemption that precludes non-ad valorem assessments from being levied against all governmentally-owned property. Further, it is clear that the Florida Legislature is aware that all governmental property is not exempt from non-ad valorem assessments since it has legislated exemptions from these assessments. See, e.g., §§1002.33(18)(d), Fla. Stat. (charter school facilities are exempt from "assessments for special benefits"); § 617.07(1), Fla. Stat.(property of a fair association shall be exempt from special assessments). Had the Florida Legislature intended to enact a blanket exemption applicable to all governmental real property from all non-ad valorem assessments, it would have done so in a manner similar to the clear exemptions from ad valorem taxation. 4 There is nothing in Chapter 170, Fla. Stat., that limits a municipality's ability to levy non-ad valorem assessments on specially benefited governmental

4 While not applicable in this case, there are also clear examples of the Legislature's adoption of exemptions from ad valorem taxes provided for within Chapter 196, Fla. Stat.

property. To the contrary, the Florida Legislature has provided that a municipality has discretion to decide whether to levy non-ad valorem assessments on religious institutions, schools and certain subsidized housing. See, § 170.201 (2), Fla. Stat. (property owned or occupied by a religious institution, education facility or certain subsidized housing or education shall be exempt from special assessments "if the municipality so desires.").

There is no express prohibition in Chapters 189, 197 or 298, Fla. Stat., that prevents the levy or payment of a non-ad valorem assessment on specially benefit real property owned by an improvement district. Lastly, there is no express prohibition in the Florida Constitution that exempts all government property, including improvement districts, from levies of non-ad valorem assessments. By identifying only certain governmental entities as being exempt from specific types of taxes and assessments, it therefore follows that the Legislature did not intend to exclude other governmental entities. Remington, 941 So. 2d at 16.

The City Commission specifically stated in its 2008 Ordinance that the City was using its statutory and home rule authority to legislate and vest the Drainage District with the authority to levy assessments for road and drainage services against specially benefited, non-exempt public property. Neither the Florida Constitution nor Florida Statutes expressly precludes such legislation.

In the absence of a specific constitutional or statutory provision that

expressly exempts all government properties from non-ad valorem assessments, it stands to reason that the Florida Legislature has recognized that municipalities, including the City, have the authority to levy non-ad valorem assessments on all specially benefited real property, including real property owned by governments. Accordingly, the Drainage District's adoption of 2008 Ordinance authorizing the levy of non-ad valorem assessments against specially benefited real property, including government property, was proper and consistent with Florida law.

F. In Remington. the Fifth DCA Correctly Held that, Absent a Specific Legislative Prohibition or Exemption, A Special District Could Levy A Non-Ad Valorem Assessment Against Another Governmental Entity.

In Remington, the Fifth District Court of Appeal considered whether a charter school was exempt from the payment of a community development district's non-ad valorem assessments. Id. at 15-16. After carefully examining the applicable statutes governing charter schools at the time, the Fifth DCA determined that there was no specific exemption from non-ad valorem assessments for charter schools included within the charter school statute and consequently there was no statutory exemption that prohibited the district from levying a non-ad valorem assessment against the school. Id. at 17.

There is nothing in Chapters 166, 170, 189, 196, 197 or 298, Fla. Stat., that confirms that the Florida Legislature intended to exempt improvement districts from non-ad valorem assessments. Pursuant to the standard set forth in

Remington, in the absence of a clear statutory exemption from non-ad valorem assessments, government property is not exempt and is therefore subject to the levy.

In contrast, Second District Court of Appeal in West Villages, *supra*, held as a matter of law that a dependent special district cannot levy non-ad valorem assessments against other local governments unless there is specific statutory provision authorizing such a power. West Villages, 36 So. 3d at 841. This decision directly conflicts with Remington's holding that permitted one government to levy against another local government because there was no clear legislative exemption from the assessment. Remington, 941 So. 2d at 16. Accordingly, these decisions by the Second DCA and Fifth DCA directly conflict and cannot be reconciled.

G. Upholding the Blake Decision Violates the Principles of Home Rule Authority Clearly Provided For Within the Florida Constitution and the Municipal Home Rule Powers Act.

In quashing the circuit court's order, the Second District Court of Appeal relied upon Blake v. City of Tampa. Blake was a 1934 decision and therefore predated both the 1968 Florida Constitutional Revision and the 1973 Municipal Home Rule Powers Act by more than thirty years. Thus, in making its ruling, the Blake court never considered any of the home rule principles that are now law. Accordingly, reliance on this decision is misplaced.

As stated in both the 1968 revision and in the text of the Municipal Home Rule Power Act, the law in Blake is no longer the law within Florida. More specifically, Blake provides that

> [W]ith 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 other public quasi corporations, or to political subdivisions to be subject to special assessments. **But public property will not be deemed to be so included unless by special enactment or necessary implication.**

Blake, 156 So. at 99 (emphasis added). In contrast, following these major constitutional and legislative enactments, a municipality has all of the powers not otherwise expressly prohibited by law. Article VIII, § 2(b), Fla. Const.; Section 166.021 (1), Fla. Stat.

In reaching its determining that Blake still remained controlling authority, the Second District Court of Appeal cited to both the City of Gainesville v. State Dept. of Transport., 778 So. 2d 519(Fla. 1st DCA 2001) (hereinafter "Gainesville I") and City of Gainesville v. State Dept. of Transport., 863 So. 2d 138 (Fla. 2003) (hereinafter "Gainesville II"). In Gainesville I, the issue was whether the City of Gainesville could charge a state agency, the Florida Department of Transportation (hereinafter "FDOT"), a stormwater utility fee. Gainesville I, 778 So. 2d at 522. In reliance on Blake, the FDOT argued that the city was impermissibly trying to impose a tax or special assessment against it and that the city could only do so with

specific legislative authorization which did not exist. Gainesville I, at 521-22. Ultimately the entire argument from FDOT about Blake was rendered moot because the Court found that the fees at issue were utility fees, not special assessments, and found clear statutory authority for the collection of utility fees for managing stormwater runoff. Gainesville I at 523. In light of the facts presented and statutory authority relied on by the court, Gainesville I contains no meaningful discussion regarding whether the city had supplemental home rule authority to levy the utility fee against state owned property.

In Gainesville II, the Florida Supreme Court considered a challenge to a bond validation proceeding brought by the FDOT, which claimed that the City of Gainesville's funding source for the bond, a stormwater utility fee, was really a special assessment. Gainesville II at 143-144. In a footnote, this Court cited to Gainesville I and Blake while referencing the FDOT's argument in Gainesville I. Gainesville II at 143, fn 3. In dicta, the Court stated that a state agency would be exempt from special assessments under Blake absent a statute either "explicitly or 'by necessary implication'" authorizing the special assessments on state property. Id. Based on the limited reference and discussion by this Court in Gainesville II, the home rule authority of the City of Gainesville was not considered nor required for the Court to reach its decision and validate the bond. As with Gainesville I, there was no meaningful determination on the breadth or limits of home rule

authority.

The Second District Court of Appeal's reliance on the holdings of Blake, Gainesville I, and Gainesville II ignores the home rule authority conferred to municipalities under the 1968 Florida Constitution and Chapter 166, Fla. Stat. It is unclear how the Second District Court of Appeal arrived at its conclusion that the home rule principles are only "general" in nature when they are clearly codified in the 1968 Florida Constitution, throughout Chapter 166 and case law. Article VIII, Sec. 2(b), Fla. Const.; Ch. 166, Fla. Stat.; State v. City of Sunrise, 354 So. 2d 1206 (Fla. 1978).

As specifically set forth in §166.021(4), the Florida legislature intended that §166.021 be construed as "extend[ing] to municipalities the exercise of powers . . . not expressly prohibited by the constitution, general or special law . . . **and to remove any limitations, judicially imposed or otherwise**, on the exercise of home rule powers other than those expressly prohibited." Id. (emphasis added). Thus, by the very language of this section, those decisions which, like Blake, require specific legislative authority before a municipality may act are statutorily invalid and have been overruled.

By relying so heavily on Blake in its West Villages decision, the Second District carved out an exception for home rule authority in direct conflict with Article VIII, Section 2(b), of the Florida Constitution and Chapter 166, Fla. Stat.

In so doing, the court has returned municipalities to the quagmire of Dillon's Rule governance as it pertains to non-ad valorem assessments. This decision disregards long-standing judicial interpretations of home rule authority and the principle that matters not otherwise expressly preempted by the legislature remain within the legislative purview of municipalities. See e.g., Tribune Co. v. Cannella, 458 So. 2d 1075 (Fla. 1984); State v. City of Sunrise, 354 So. 2d 1206 (Fla. 1978). See also City of Venice, 429 So. 2d 1241, 1244 (Fla. 2d DCA 1983) ("there must be 'express preemption' by the legislature before a municipality may be prohibited from acting in a given area").

H. Blake Unfairly Shifts the Entire Financial Burden for Providing Special Benefit Services From the Benefited Government To the Drainage District's Citizens.

If the Second District Court of Appeal's ruling in West Villages is left to undisturbed, then governmental landowners will not contribute to the funding of municipal services that specially benefit their properties. As a result, the entire burden for that government's portion of the costs of municipal services will be shouldered by the rest of the assessed landowners within the dependent district (or municipality). Those other landowners will be stuck making up that shortfall, while the "exempted" governmental landowner receives a windfall. The imposition of a government landowners' share of non-ad valorem assessments on a dependent district's assessed public is certainly not fair, and may, if challenged,

even give rise to an improper taking. Parrish v. Hillsborough County, 123 So. 830, 832 (Fla. 1929) (a special assessment for road and street improvements on only the landowners abutting the roads, rather than the general public "in effect authorizes private property to be taken for public use . . . without just compensation and without due process of law"). Further, if a dependent district's assessed public is required to pay a portion of the costs for the benefits running to another governmental property owner, such an offset runs afoul of the fundamental principles of non-ad valorem assessments under Florida law -- namely that the landowner who receives the special benefit of a municipal service should pay the landowner's proportional share for that benefit.

Under the facts at bar, it is inequitable for all of the assessed landowners within the Drainage District (and therefore the City) to pay for the road and drainage services that benefit WVID. Similarly, why should the specially assessed landowners within the Drainage District pay for the special benefits conferred to all other governmental landowners (i.e., community development districts, improvement districts, school boards, counties, state parks and state agencies) within the Drainage District?

If West Villages and Blake are upheld, each local government levying non-ad valorem assessments to fund their services will be forced to exclude all governmental properties from their benefit and burden analysis during their non-ad

valorem assessment adoption proceedings. Assuming this occurs, the levying local government entity will have built in a skewed formula for its non-ad valorem assessments that would never provide an accurate determination of the actual benefits and fair apportionment of the cost for municipal services for each assessed landowner. Consequently, any non-government landowner could then challenge the validity of the non-ad valorem assessments for failure to satisfy the fair apportionment prong for the services. Thus, the levying local government would be exposed to legal challenges to its non-ad valorem assessments.

CONCLUSION

Among the powers held by municipalities and transferable to their dependent districts is the power to levy non-ad valorem assessments unless specifically prohibited by law. There is no specific general law, special law or constitutional provision which contains a blanket prohibition against the levy of non-ad valorem assessment on specially benefited governmentally owned real property. Further, the Fifth District Court of Appeal specifically found in Remington that in the absence of an expressed exemption from the levy of non-ad valorem assessments, a non-ad valorem assessment levied by one governmental entity on another would stand. The Remington decision cannot be reconciled with the Second District Court of Appeal's decision.

The Florida Second District Court of Appeal in West Villages has improperly relied on Blake , a decision rendered in 1934, when that was decision was subsequently superseded by the adoption of the 1968 Florida Constitution and the Municipal Home Rule Powers Act. The Florida Second District Court's reliance on Blake, carves out an exception to the long standing principle that municipalities have all governmental powers except those specifically prohibited by law or the constitution.

For all of the above stated reasons, the City of North Port's Road and Drainage District respectfully requests this Honorable Court: (a) reverse and quash the Second District Court of Appeal's erroneous decision in West Villages Improvement Dist. v. North Port Road & Drainage Dist., 36 So. 3d 837 (Fla. 2d DCA 2010) that a municipal dependent special district must have express or necessarily implied legislative authority to levy a non-ad valorem assessments on real property owned by a governmental entity; (b) hold that that a municipal dependent district has authority pursuant to home rule power to levy non-ad valorem assessments against specially benefited government property unless prohibited by general law, special law or the Florida Constitution; (c) uphold the decision in Remington Community Dev. Dist. v. Educational Found. Of Osceola, 941 So. 2d 15 (Fla. 5th DCA 2006); and (d) hold that the North Port Road and Drainage District had authority pursuant to the City of North Port's home rule

powers to levy non-ad valorem assessments against West Villages Improvement District's specially benefited property.

Respectfully Submitted,

/s/ MAGGIE D. MOONEY-PORTALE
TERRY E. LEWIS, ESQUIRE
Florida Bar No. 276685
MAGGIE D. MOONEY-PORTALE, ESQUIRE
Florida Bar No. 0555924
Lewis, Longman & Walker, P.A.
1001 3rd Avenue West, Suite 670
Bradenton, Florida 34205
Telephone (941) 708-4040
Facsimile (941) 708-4024
Co-Counsel for Petitioner

- AND -

ROBERT K. ROBINSON, ESQUIRE
Florida Bar No. 815081
JACKSON C. KRACHT, ESQUIRE
Florida Bar No. 548561
Nelson Hesse, L.L.P.
2070 Ringling Blvd
Sarasota, Florida 34237-7002
Telephone (941) 366-7550
Facsimile (941) 955-3710
Co-Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by *U.S. First Class Mail* on this 24th day of November, 2010, to:

Margaret E. Wood, Esquire
Caldwell Pacetti Edwards Schoech & Viator, LLP
250 South Australian Avenue, Suite 600
West Palm Beach, FL 33401
Phone: (561) 655-0620
Fax: (561) 655-3775

Philip M. Burlington, Esquire
Burlington & Rockenbach, P.A.
Courthouse Commons
444 West Railroad Avenue, Suite 430
West Palm Beach, Florida 33401
Phone: (561) 721-0400
Fax: (561) 621-0465
Attorneys for Respondent

Robert L. Nabors, Esquire
Bethany A. Burgess, Esquire
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
Phone: (850) 224-4070
Fax: (850) 224-4073

Harry "Chip" Morrison, Jr., Esquire
Florida League of Cities, Inc.
301 South Bronough Street, Suite 300
Tallahassee, Florida 32302-1757
Phone: (850) 222-9684
Fax: (850) 222-3806
Attorneys for Amicus Curiae, Florida League of Cities, Inc.

Arthur S. Hardy, Esquire
Hunter W. Carroll, Esquire
Matthews, Eastmore, Hardy, Crauwels & Garcia, P.A.
1777 Main Street, Suite 500
Sarasota, Florida 34236
Phone: (941) 366-8888
Fax: (941) 954-7777
Attorneys for Amicus Curiae, School Board of Sarasota County

John W. Costigan, Esquire
Darby Green, Esquire
407 South Calhoun Street, M11, Suite 520
Tallahassee, Florida 32399-0800
Phone: (850) 245-1000
Fax: (850) 245-1001
Attorneys for Florida Department of Agriculture and Consumer Services

/s/ MAGGIE D. MOONEY-PORTALE
MAGGIE D. MOONEY-PORTALE, ESQUIRE
Florida Bar No. 0555924

CERTIFICATE OF COMPLIANCE

Counsel for Petitioner, North Port Road and Drainage District, certifies that this brief has been prepared in Times New Roman, 14-point font, in compliance with the requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2). An electronic copy of the brief has been provided in accordance with AO04-84.

/s/ MAGGIE D. MOONEY-PORTALE
TERRY E. LEWIS, ESQUIRE
Florida Bar No. 276685
MAGGIE D. MOONEY-PORTALE, ESQUIRE
Florida Bar No. 0555924
Lewis, Longman & Walker, P.A.
1001 3rd Avenue West, Suite 670
Bradenton, Florida 34205
Telephone (941) 708-4040
Facsimile (941) 708-4024
Co-Counsel for Petitioner

- AND -

ROBERT K. ROBINSON, ESQUIRE
Florida Bar No. 815081
JACKSON C. KRACHT, ESQUIRE
Florida Bar No. 548561
Nelson Hesse, L.L.P.
2070 Ringling Blvd
Sarasota, Florida 34237-7002
Telephone (941) 366-7550
Facsimile (941) 955-3710
Co-Counsel for Petitioner