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 REPLY BRIEF

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

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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". References to the Drainage District's Initial Brief and WVID's Answer Brief filed in this proceeding will be referred to as ("Initial Brief") and ("Answer Brief"), respectively. References to the School Board of Sarasota County's Amicus Brief and the Office of the Attorney General's Amicus Brief will be referred to as ("School Board") and ("State"), respectively. The Record on Appeal from lower court proceedings shall be referenced as follows: West Villages Imp. Dist. v. North Port Road and Drainage Dist., 36 So.3d 837 (Fla. 2d DCA 2010), will be referenced as "(R1:"); West Villages Imp. Dist. v. North Port Road and Drainage Dist., No. 08-18622 (Fla. 12th Cir. Ct. Apr. 14, 2009) will be referenced as "(R2:)". Records from those proceedings shall include the name of the pleading and the page reference.

SUMMARY OF THE REBUTTAL ARGUMENT

In its Answer Brief WVID improperly asserts new legal theories not previously raised or briefed by WVID in either of the lower court proceedings. Specifically, WVID has asserted for the first time the following: (a) that WVID has sovereign immunity from non-ad valorem assessments; (b) that the levy of non-ad valorem assessments on WVID would result in an improper draw from the state's treasury in violation of Article VII, Section 1(c), Fla. Const.; and (c) that WVID's enabling act, Chapter 2004-456, Laws of Florida, conflicts with the Article III, Sections 66-47 through 66-65, of the City's Code of Ordinance 08-11(hereinafter "2008 Ordinance") thereby makes the 2008 Ordinance invalid as to WVID.[1]

WVID's arguments that sovereign immunity insulates WVID from non-ad valorem assessment levies and would result in an improper draw from the state's treasury are intended to confuse and blur the Court's longstanding distinction between ad valorem taxes and non-ad valorem assessments. The arguments

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1 On page 1 of WVID's Answer Brief, WVID points out that the Drainage District incorrectly cited to WVID's enabling legislation as Chapter 2004-45**7**, Laws of Florida, as opposed to the correct citation of Chapter 2004-456, Laws of Florida. In as much as the Petitioner's counsel is human, this was in fact a scrivener's error. Similarly, the Petitioner's counsel will consider WVID's reference on page 7 of its Answer Brief to Article VII**I**, Section 1(c), Fla. Const., rather than Article VII, Section 1 (c), Fla. Const., a similar scrivener's error on WVID's counsels' part, based upon the assumption that WVID's counsels are also human and, therefore, they also make mistakes.

advanced by WVID are unsupported by existing caselaw, Florida Statutes and the Florida Constitution. Similarly, WVID's enabling act does not limit WVID's liability for non-ad valorem assessments, rather the language relied upon by WVID to assert a purported "conflict" is merely a recitation of current law regarding property titled in public agencies but used for private purposes. The City's home rule authority to legislate and grant its dependent district the power to levy non-ad valorem assessments on WVID's real property is not proscribed by WVID's enabling act.

For the reasons stated above, the Court should decline to review the newly asserted arguments raised in WVID's Answer Brief and confine itself to a review of those issues presented and considered within the records before the Twelfth Judicial Circuit Court and Florida Second District Court of Appeal.

REBUTTAL ARGUMENT

I. THE COURT SHOULD DECLINE TO CONSIDER THE RECENTLY ASSERTED LEGAL ARGUMENTS RAISED IN WVID'S ANSWER BRIEF.

The Supreme Court has discretionary authority to consider issues other than those upon which jurisdiction is based; however, this discretionary authority should be only exercised "when the other issues have been properly briefed and argued and are dispositive of the case." Warner v. City of Boca Raton, 887 So. 2d 1023, 1035 (Fla. 2004)(The Court refused to exercise its discretionary authority to

consider an additional issue, which was beyond the certified question, because the issue was not dispositive to the case.); Savona v. Prudential Ins. Co. of Am., 648 So. 2d 705, 707 (Fla.1995)(The Supreme Court held that the appellee failed to raise the applicability of ERISA to the federal district court or circuit court, and the Supreme Court would not conduct a de novo review and address a new legal argument that a different substantive law was dispositive and controlling.)

It is a long standing rule that the Florida Supreme Court will "confine itself to a review of those questions, and only those questions, which were before the trial court . . . . Matters not presented to the trial court by the pleadings and evidence will not be considered by this court on appeal." Silver v. State, 188 So. 2d 300, 301 (Fla. 1966)(quoting Mariani v. Schleman, 94 So. 2d 829, 831 (Fla. 1957)). In *Silver*, the Court refused to allow the appellant to circumvent the trial court and bring a constitutional challenge to the Supreme Court without the question having been first presented to the trial court. Silver, 188 So. 2d at 302; see also, In re Beverly, 342 So. 2d 481, 489 (Fla. 1977) (Where the appellant, for the first time on appeal, claimed that the patient-psychiatrist statutory privilege was violated and the Florida Supreme Court declined to review the issue stating that this "Court should decline the review of questions which the trial court did not have a full and adequate opportunity to consider.")

WVID has raised new legal arguments and theories in its Answer Brief not previously raised in the Twelfth Judicial Circuit proceeding or raised to the Florida Second District Court of Appeal. This Court should refuse to exercise its discretionary authority and consider WVID's "new" legal arguments which are beyond the scope of the certified question of great public importance, beyond the question of conflict, and beyond the record from the proceedings below. WVID had multiple opportunities to raise the legal arguments set forth in pages 20 – 34 of WVID's Answer Brief, but the record demonstrates that WVID did not. Accordingly, this Court should decline to review the recently raised legal theories now advanced by WVID in its Answer Brief.

II. THERE IS NO CONFLICT OF LAW BETWEEN WVID'S ENABLING ACT AND THE DRAINAGE DISTRICT'S ORDINANCE.

To the extent that this Court considers WVID's assertion that WVID's enabling legislation, Chapter 2004-456, Laws of Florida, as amended (hereinafter "Enabling Legislation"), contains a provision limiting liability for special assessments, and thereby supersedes the Drainage District's 2008 Ordinance, WVID's argument is without merit. WVID contends that there is a conflict of law between language contained within Section 3, subsection (2) (d) of WVID's Enabling Act and the Drainage District's 2008 Ordinance, such that the enabling legislation authorizes WVID to avoid all obligations to pay the Drainage District's

non-ad valorem assessment. (Answer Brief p. 31- 34). Specifically, the subsection of the Enabling Act states:

> . . . Any property interests owned by the district which are used for nonpublic or private commercial purposes shall be subject to all ad valorem taxes, intangible personal property taxes, or non-ad valorem assessments, as would be applicable if said property were privately owned.

Ch. 2004-456 § (3)(2)(d), Laws of Fla.

WVID argues that the "necessary and obvious implication" of the above referenced subsection in the Enabling Act is that lands used for public purposes are not subject to non-ad valorem assessments. (Answer Brief p. 33). The statutory construction offered by WVID stretches the unambiguous language in the Enabling Act to give it a greater scope than that which was enacted. Such an interpretation violates the cannons of statutory interpretation that the language contained within statutes are to be given their plain and obvious meaning. See, Holly v. Auld, 450 So. 2d 217, 219(Fla. 1984)(stating in statutory construction statutes must be given their plain and obvious meaning). Further, WVID's argument also violates the doctrine of "*expression unius est exclusion alterius,*" meaning the expression of one thing implies the exclusion of the other. Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC., 986 So. 2d 1244, 1258 (Fla. 2008)(finding that had the Legislature intended for a sanction contained within a statute to be extended to a particular class, then the Legislature would have explicitly included language that provided for such extension.) Despite WVID's assertion that there is a "conflict of

law", the Enabling Act relied upon by WVID simply does not state that real property owned by the WVID shall not be subject to non-ad valorem assessments. Had the Legislature chosen to extend such an exemption to WVID in its Enabling Act, then the legislature certainly could have included language to that effect. 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).

The language relied upon by WVID within the Enabling Act to argue "conflict" is merely a recital of existing law in Florida that when public property is used for a private purpose it loses any applicable immunity and/or exemption from taxation and assessments. See, Park n Shop v. Dep't of Revenue v. W.S. Sparkman, 99 So. 2d 571 , 573-574 (Fla. 1957); Canaveral Port Authority v. Dep't of Revenue, 690 So. 2d 1226, 1227 (Fla. 1996).

III. WVID'S CONTENTION THAT IT POSSESSES SOVEREIGN IMMUNITY FROM NON-AD VALOREM ASSESSMENTS MISSTATES APPLICABLE LAW.

To the extent this Court considers WVID's newly raised argument that WVID possesses sovereign immunity that precludes the levy of non-ad valorem assessments against a political subdivision of the state, this argument is also without merit. The Drainage District does not disagree with WVID's assertions that the state, its agencies, departments, subdivisions, counties and school boards

are all immune from "taxation" unless such immunity has been clearly waived. Alford v. State, 107 So. 27, 29 (Fla. 1958); Dickinson v. City of Tallahassee, 325 So. 2d 1 , 3 (Fla. 1975); Canaveral Port Auth., 690 So. 2d at 1228; Markham v. Broward County, 825 So. 2d 472, 473 (Fla. 4th DCA 2002); Andrews v. Pal-Mar Water Control Dist. Dep't. of Revenue**,** 388 So. 2d 4, 5 (Fla. 4th DCA 1980). However, contrary to the assertions by WVID and the Amici Curiae parties, the longstanding principle of the state and its' subdivision's immunity from "tax" does not extend to immunity from non-ad valorem assessments. A "non-ad valorem assessment" is not a "tax" since a non-ad valorem assessment is based upon the peculiar benefits conferred to the property from the particular service. (Initial Brief p.21.)

The Drainage District does not contend the City or Drainage District can unilaterally preempt the reservation of the taxing authority held by state as set forth in Article VII, Section 1, Fla. Const., through the passage of a local ordinance. (Answer Brief p. 20-27). The clear language contained within Ordinance 2008 only provides for the levy of a non-ad valorem assessment on specially benefited government property, the ordinance does not authorize the levy of an ad valorem tax or other form of taxation upon government property.

The Drainage District recognizes the fundamental difference and distinction between a tax and "non-ad valorem assessments," there is not an analogous

constitutional provision to Article VII, Section 1, Fla. Const., that reserves authority to levy non-ad valorem assessments in the state. Collier Co. v. State, 733 So. 2d 1012, 1014 (Fla. 1999) (stating that a local government's ability to levy non- ad valorem assessments are not subject to the same constitutional restrictions governing the levy of a tax); Lake Howell Water and Reclamation Dist. v. State, 268 So. 2d 897, 899 (Fla. 1972) (The Court states that nothing in the Florida Constitution "places special assessments for local improvements under the restrictions pertaining to ad valorem taxes."); Whitney v. Hillsborough Co., 127 So. 486, 490-491 (Fla. 1930) (stating there is no express provision in the 1885 Florida Constitution as to the imposition of special assessments); Riverside Park Co. v. City of Titusville, 151 So. 382, 382 (Fla. 1933)(The Court found that special assessments for street improvements did not violate the constitutional prohibition that "[n]o tax shall be levied except in pursuance of law."); Lainhart v. Catts, 75 So. 47, 53 (Fla. 1917) (The Court stated "there is no express provision in the Constitution as to special assessments for local improvements.") Neither WVID nor the Amici Curiae parties have been able to cite to specific provisions of the Florida Constitution, statute, or any reported Florida case for the proposition that sovereign immunity extends to non-ad valorem assessments.

Other than the holding in Blake v. City of Tampa, 156 So. 2d 97 (Fla. 1934), which has been fully discussed in the Drainage District's Initial Brief, there is

simply no caselaw, constitutional or statutory restriction cited by WVID or the Amici Curiae parties, that implies that local governments possess sovereign immunity from the levy of non-ad valorem assessments. (Initial Brief p. 26-30). Further, subsequent cases that reference the Blake decision, City of Gainesville v. State Dep't. of Transp., 778 So. 2d 519 (Fla. 1st DCA 2001) ("Gainesville I") and City of Gainesville v. State Dep't. of Transp., 863 So. 2d 138 (Fla. 2003)("Gainesville II"), do not extend sovereign immunity from non-ad valorem assessments to a local government, nor do Gainesville I and II address the implication of a municipality's home rule authority to levy non-ad valorem assessments on such purported immunity. (Initial Brief p. 27-30).

While WVID references Section 298.36(1), Fla. Stat., in support of its argument that a waiver or sovereign immunity from non-ad valorem assessment must be expressed in a manner analogous to the "waiver" provided for in that statute, a review of the legislative history of Section 298.36, Fla. Stat., demonstrates that water control districts were provided with specific authority to levy ad valorem and non-ad valorem by the Florida Legislature in 1913. (Answer Brief p.#27). The date and timing of the enactment of the precursor to Section 298.36, Fla. Stat., is significant because prior to the 1968 revisions to the Florida Constitution, Florida operated under Dillon's Rule which provided that local governments could only exercise those powers expressly granted in state statutes.

Williams v. Town of Dunnellon, 169 So. 631, 637 (Fla. 1933). In other words, the enactment of the precursor to Section 298.36, Fla. Stat., was the only way a water control district could levy ad valorem and non-ad valorem assessments on government property. Furthermore, home rule authority to levy non-ad valorem assessments without a specific grant of statutory authority did not exist at the time of the enactment of Section 298.36, Fla. Stat. Consequently, WVID's assertion that it enjoys sovereign immunity from non-ad valorem assessments is without legal support.

IV. WVID'S ASSERTION THAT A NON-AD VALOREM ASSESSMENT WOULD CAUSE AN IMPROPER DRAW FROM THE STATE'S TREASURY FAILS AS THAT CONTITUTIONAL RESTRICTION DOES NOT APPLY TO NON-AD VALOREM ASSESSMENTS.

To the extent this Court considers WVID's newly raised argument that the District is prohibited by Section 166.021(3)(b), Fla. Stat., from levying non-ad valorem assessments because Article VII, Section 1(c), Fla. Const., prohibits state funds to be drawn from the treasury except pursuant to an appropriation made by law, this argument is also inapplicable to non-ad valorem assessments.[2] (Answer Brief p. 27-31). Article VII, Section 1(c), Fla. Const., relates to the power to

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[2] Article VII, Section 1(c) of the 1968 Florida Constitution , formerly known as Article IX, Section 4, Fla. Const. (1885), states:

> "No money shall be drawn from the treasury except in pursuance of appropriation made by law."

appropriate **state funds,** and Florida courts have repeatedly held that such a power is legislative and is to be exercised only through duly enacted statutes. Chiles v. Children A, B, C, D, E, and F, 589 So.2d 260, 265 (Fla. 1991). This provision gives the Legislature the power to decide how, when, and for what purpose the state's funds shall be applied in carrying on the government. Lainhart, 75 So. at 54; Republican Party of Fla. v. Smith, 638 So. 2d 26, 28 (Fla. 1994). The intent of this constitutional provision appears to reserve unto the Legislature the authority to control the inner workings of state government.

WVID has failed to point out how or in what manner a levy of a non-ad valorem assessment by the Drainage District will violate this Constitutional provision in a manner that impairs state government or state funds. Lainhart, 75 So. at 54 (commenting that the complainant neglected to point out how or in what manner the drainage district violated this constitutional provision). Revenue raised by WVID (through its own levy of non-ad valorem assessments) is not paid into the state treasury, but is raised and held by WVID for certain permitted uses identified in its Enabling Act and Chapters 189 and 298 of the Florida Statutes. WVID's Enabling Act and Chapter 298, Fla. Stat., provide WVID with authorization to finance, plan, and maintain roadways, road and their associated elements within WVID, and consequently, pay the Drainage District for road and drainage services specially benefiting WVID's property. Ch. 2004-456 §§(3)(2)(i)

and (7), Laws of Fla. (providing Legislative authorization for WVID to finance, plan, construct, install, operate and maintain roadways and all other customary elements or appurtenances consistent with the City of North Port's Ordinances, and providing alternative authority to levy maintenance assessments). Accordingly, the Drainage District's levy of non-ad valorem assessments on specially benefited real property held by WVID will not violate Article VII, Section 1(c), Fla. Const.

V. WVID IS AN INDEPENDENT SPECIAL DISTRICT, NOT A STATE AGENCY.

WVID spends a considerable amount of time in its Answer Brief asserting its status as a "political subdivision of the state," implying that the Drainage District's levy will be a levy on "state property," and cause an impermissible expenditure of "state funds." (Answer Brief p. 27-31). These assertions by WVID imply that WVID's posture is similar to that of a "state agency."[3] There is no evidence in the record or under applicable Florida law that WVID is a state agency, an arm of the executive branch, or that WVID's revenue is paid into the general treasury such that the state treasurer would be required to expend "state money" to reimburse the Drainage District for non-ad valorem assessments owed.[4] An

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3 The Florida's executive branch is governed by Article IV, Fla. Const., and Chapters 14-20, Fla. Stat.

4 The agencies that compose the executive branch are composed into no more than 25 departments, exclusive of those specifically provided for in the Florida Constitution. Art. VI § 6, Fla. Const.; § 20.02(2), Fla. Stat.

"agency" is defined as "an official, officer, commission, authority, council, committee, department, division, bureau, board, section or another unit or entity of government."[5] § 20.02(11), Fla. Stat.

To the extent this Court entertains the arguments advanced by WVID, there is no evidence in the lower court records that WVID is anything but a special purpose, local government.[6] WVID is a water control district pursuant to its

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[5] School Boards do not fall within the executive branch. Dunbar Elec. Supply, Inc., v. School Bd. of Dade Co., 690 So. 2d 1339, 1340 (Fla. 3d DCA 1997).

[6] Unlike WVID, the Everglades Drainage District was created by a legislative act in 1905. It's act created a Board of Drainage Commissioners empowered to oversee state-wide land development and flood control. The 1905 act was re-enacted in 1913 and created the Everglades Drainage District with a Board of Commissioners and authority to preside over 11 counties in Southeast Florida for the purpose of draining the swamp and making land available for development. This particular district always had authority to undertake important state missions related to regional flood control and development.

The Everglades Drainage District act subsequently became Florida's general drainage law and was eventually codified as Chapter 298, Florida Statutes. However, Chapter 298 authorized the creation of local drainage districts so that land owners could attack common flood control problems. There are approximately 90 of these "local" districts (now called water control districts). And, all but a few are sub-county in size.

The Everglades Drainage District eventually morphed into an even more obvious "state agency" when it became the Central and Southern Flood Control District ("C&SFCD") in 1949 with the passage of Chapter 378, Florida Statutes. As the C&SFCD, this agency acted as a conduit and local sponsor for Federal and State funding to fully implement the flood control/ water supply plan for all of Florida from the headwaters of the Kissimmee River to Everglades National Park. In 1972, with the passage of Chapter 373, Florida Statutes, the C&SFCD became

Enabling Act, Chapters 189 and 298 of the Florida Statutes. It is a "public body corporate and politic", and maintains status as a political subdivision of the state, but it is not a "state agency". Ch. 04-456 § 2 (1), Laws of Fla.

VI. ALL OTHER ARGUMENTS RAISED IN WVID'S ANSWER BRIEF HAVE BEEN PREVIOUSLY ADDRESSED IN THE LOWER COURT RECORDS.

All remaining arguments raised by WVID in its Answer Brief including, those contained within Point II, have been previously addressed and fully briefed for the lower courts. (Answer Brief p. 38-50). Accordingly, the Drainage District would refer the Court to the Drainage District's briefs in lower court records on the following issues: (a) the Drainage District's compliance with the statutory notice

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the South Florida Water Management District with enlarged water management responsibilities. While the legislation that originally created the Everglades Drainage District eventually served as a model for the creation of many more drainage (water control) districts, the Everglades Drainage District was always an arm of state government with an important state mission, to make more of Florida habitable. The smaller districts, like WVID, that utilized the same model are clearly local political subdivisions with little or no connection to state governments. See, Forrest T. Izuno, A Brief History of Water Management in the Everglades Architectural Area, Cir. 815, Univ. of Fla. IAFS (1989); see also, Florida Department of Community Affairs, Division of Housing and Community Development, Special District Function Totals, http://floridaspecialdistricts.org/OfficialList/about.cfm (last visited March 7, 2011); Gail Clement, Reclaiming the Everglades, Everglades Timeline, Fla. Int'l. Univ., http://everglades.fiu.edu/reclaim/timeline/timeline6.htm (last visited March 8, 2011).

provision provided for in Section 197.3632, Fla. Stat.; (b) whether the Drainage District's services benefited WVID's properties; and (c) whether WVID's properties are "common elements" within the subdivision and are therefore exempt from assessment. (R1: Respondent's Motion to Dismiss and In the Alternative Response in Opposition to the Petition for Writ, p. 16-25; R2: North Port Road and Drainage District's Response in Opposition to Appellant's Petition for Writ of Certiorari, p. 20-34).

CONCLUSION

For all of the reasons raised by the City of North Port's Road and Drainage District in its Initial Brief and Reply Brief, the 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 may be granted authority pursuant to a city's 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); (d) hold that the North Port Road and Drainage District was granted 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; and (e) hold that West Villages Improvement District is not immune or exempt from the levy of non-ad valorem assessments by the North Port Road and Drainage District.

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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.

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