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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

SCOTT MORRIS, ET AL,
Appellants

v.

CASE NO. SC14-350
L.T. CASE NO. 13-CA-002406

CITY OF CAPE CORAL, ETC.,
Appellee

BRIEF OF AMICUS CURIAE CITY OF NORTH PORT, FLORIDA IN SUPPORT OF APPELLEE, CITY OF CAPE CORAL, ETC.

ROBERT K. ROBINSON
Florida Bar No. 0815081
NELSON HESSE LLP
2070 Ringling Boulevard
Sarasota, Florida 34237
(941)366-7550
(941)955-3708 (facsimile)
rrobinson@nelsonhesse.com

Attorneys for Amicus Curiae
City of North Port, Florida

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STATEMENT OF INTEREST

North Port is a municipality established and granted powers under Article VIII, Section 2 of the Florida Constitution. North Port, like Cape Coral, is a platted lot community originally developed by General Development Corporation. North Port has utilized special assessments for many years to fund basic services to its residents including fire, solid waste, roads, and drainage. North Port uses a two tiered approach for its fire rescue assessment which is similar but not identical to that of Cape Coral. North Port also utilizes a tiered approach in its road and drainage operations assessments. In addition, the City validated approximately Forty-six Million Dollars ($46,000,000.00) in transportation improvement bonds for a road and drainage capital improvement project utilizing a special assessment similar to Tier 1 of the Cape Coral assessment.

The invalidation of the Cape Coral bond, particularly its assessment methodology, will have a direct impact on North Port's continued use of special assessments and the validity of its transportation improvement bond. Municipal Home Rule powers provide amble authority for Fire assessments like Cape Corals and North Port's. The notion that one method of assessment is better over another has been rejected by Florida Courts. Valuation data such as used by Cape Coral and North Port provide a lawful basis for apportionment of fire costs related to

structures and their cost of replacement. Cape Coral's bond issuance and special assessment should be upheld.

SUMMARY OF THE ARGUMENT

The Florida Constitution and Statutes grant municipalities broad home rule powers of government which authorize the enactment of special assessments. Chapter 170 is merely supplemental authority for special assessments. Fire protection services are a fundamental government function carried out by municipalities like Cape Coral. Such services can be funded from legally valid special assessments.

Cape Coral exercised its home rule powers by enacting a special assessment to fund fire protection services. It did not rely on Chapter 170. The record reveals the in depth approach Cape Coral took before proceeding. Special assessment experts, Burton and Associates, were hired to study the issue and report to the Commission. Their report found all real property, vacant or improved, benefits from fire protection services. They identified additional benefits afforded to real property with structures. After identifying the costs of providing those services, Burton apportioned the costs between the both creating two Tiers within the assessment.

Cape Coral sought to fund Fire capital equipment purchases with a portion of the assessment through the issuance of a bond. Validation of the bond was

sought leading to this appeal. The record demonstrates substantial, competent evidence to support Cape Coral's determination of both benefit and apportionment in the legislative findings. The special assessment was thus not arbitrary. No expert testimony or other contradictory evidence was offered by Appellant. Apportionment of the structure portion of the costs of the assessment properly utilized data to estimate the replacement value of the structures. Cape Coral did not rely on the assessed value of property within its boundaries creating an unlawful tax.

ARGUMENT

I. Municipalities Possess Broad Home Rule Authority to Enact Special Assessments.

The City of Cape Coral adopted a fire assessment ordinance under its Constitutional and Statutory Home Rule Authority together with two resolutions necessary to levy the fire assessment.[1] (App. 797, also App. 815-36 and 837-63) A portion of the revenue raised from the fire assessment was to be used to finance debt to purchase vehicles, facilities, and other fire protection equipment. Toward that end, the city adopted an ordinance authorizing the issuance of debt in the amount of 1.5 Million Dollars (App. 864-77.) The note ordinance was also adopted into the City's Home Rule Authority (App. 817, 839, 864.)

[1] References to the Appellant's Appendix are cited as "App." References to Appellee's Appendix, which supplements the Appellant's Appendix, are cited as "Supp. App."

The City undertook to validate the debt under Chapter 75, Florida Statutes (App. 878-900.) After a lengthy evidentiary hearing with both witnesses and exhibits, the trial court entered its final judgment of validation on December 11, 2013 (App. 746-786.) The appeal to this Court timely followed.

This Court has original jurisdiction to consider bond validation cases. Rule 9.030 Fla. R. App. P. The Court's review in bond validation cases is limited to the following issues:

1) Whether the public body has authority to issue the bonds;

2) Whether the purpose of the obligation is legal; and

3) Whether the bond issuance complies with the requirements of law.

City of Winter Springs v. State, 776 So. 2d 255 (Fla. 2001). See also *Strand v. Escambia County,* 992 So. 2d 150 (Fla. 2008).

Appellants' have raised no issue with either the first or second issue in this appeal. An issue has been raised as to whether the bond issuance complies with the requirements of law. Such implicates the City's use of a special assessment to fund the bond issuance in this case.

Because Appellants have focused primarily upon the authority granted to a City to enact special assessments under Chapter 170, it is necessary to discuss the City's broad Home Rule powers which were, in fact, relied upon by Cape Coral for

the enactment of the assessment ordinance, assessment resolutions, and debt ordinance.

Prior to 1968 all municipal powers were dependent upon a delegation of authority by the Florida Legislature in either a general or special Act. *City of Boca Raton v. State*, 595 So. 2d 25, 27 (Fla. 1992). Due to a flood of local bills authorizing various municipal acts, including matters involving special assessments, the Florida Constitution was amended in 1968 to grant municipalities "broad Home Rule powers" as found in Article VIII §2(b).

Because confusion existed as to the implication of broad Home Rule powers after 1968, the Florida Legislature enacted the Municipal Home Rule Powers Act in 1973, which can now be found in Chapter 166. Case law following both the Constitutional Amendment and the enactment of the Municipal Home Rule Powers Act acknowledged the vast breadth of municipal Home Rule power. *See State v. City of Sunrise*, 354 So. 2d 1206 (Fla. 1978). See *City of Boca Raton*, 595 So. 2d, 28.

In 1992 the Florida Supreme Court in *City of Boca Raton v. State* determined once and for all that cities can levy special assessments under its Home Rule authority unless expressly prohibited by certain provisions of Chapter 166.021 Florida Statutes or preempted by State or County government by the Constitution or by general law.

For reasons unknown, Appellants' maintain Cape Coral was mandated to use Chapter 170 to enact its special assessments. *City of Boca Raton v. State* addressed the applicability to Chapter 170 in relation to a City's Home Rule powers concerning special assessments. The Court found that this Chapter "shall be construed as an additional and alternate method for the financing of improvements referred to herein." *City of Boca Raton v. State*, 595 So. 2d at 29. The amendments to Section §197.3632 Florida Statutes also confirm that such is additional authority for local governments to impose and collect non ad-valorem assessments supplemental to their Home Rule powers. *Id.* at 30.

Prior to the adoption of the 1968 Constitution, special assessments were done through general or special acts before the Florida Legislature. The authority for the governmental entity was dependent upon the language contained within those general or special acts. Reliance on case law decided under the 1885 Constitution and specific special acts authorizing assessments is questionable in light of the current Home Rule authority for municipalities. Home rule powers for municipalities provide them with greater flexibility in the governance of their jurisdictional boundaries and afford them deference in the exercise of those powers. The actions of Cape Coral enacting a special assessment in part to finance debt for fire services equipment should be judged in accordance with its Home

Rule powers upon which Cape Coral relied and not the alternative method for assessments found in Chapter 170.

II. The Cape Coral Assessment Satisfies the Two Prong Test for a valid and Lawful Special Assessment.

Since at least 1969, fire protection service special assessments levied by local governments have been regarded as valid special assessments by the Florida Supreme Court. *Fire District No. 1 of Polk County v. Jenkins*, 221 So. 2d 740 (Fla. 1969); *South Trail Fire Control Dist. v. State*, 273 So. 2d 380 (Fla. 1973). As recently as 1997 and 2002, the Supreme Court has validated fire rescue services financed by special assessments for the entire unincorporated area of Lake County and the Cities of Mineola, Lady Lake, and North Lauderdale. *Lake County v. Water Oak Management Corp.*, 695 So. 2d 667, 668 (Fla. 1997); *City of North Lauderdale v. SMM Properties, Inc.*, 825 So. 2d 343 (Fla. 2002). *See also Desiderio Corp. v. City of Boynton Beach*, 39 So. 2d 485 (Fla. 4th DCA).

The Florida Supreme Court has devised a two part test to determine the validity of a special assessment. The first is that the property assessed must derive a special benefit from the service provided. *City of Boca Raton v. State*, 595 So. 2d 29; *Atlantic Coast Line R.R. v. City of Gainesville*, 91 So. 118 (1922). The second prong of the test requires the assessment to be fairly and reasonably apportioned among the properties that receive the special benefit. *City of Boca*

Raton v. State, 595 So. 2d 29; *South Trail Fire Control Dist. v. State*, 273 So. 2d 380.

The focus of the City of North Port's Amicus Curiae brief is the validity of the methodology utilized by Cape Coral in support of its fire services special assessment. North Port has utilized a similar assessment for its fire district in addition to having used the services of Cape Coral's expert, Burton & Associates. In addition, North Port has utilized a simplified two tier assessment methodology for a capital road project that is also financed through special assessments with an accompanying bond validation.

In this case, the Supreme Court's review of Cape Coral's special assessment must be deferential. "No system of appraising benefits or assessing costs has yet been devised that is not open to some criticism." *Desiderio Corp. v. City of Beach*, 39 So. 3d 493; *South Trail Fire Control Dist v. State*, 273 So. 2d 383. The Supreme Court has set a uniform standard for judicial review of both prongs of the special assessment test. The Legislative determination as to the existence of special benefits, and as to the apportionment of the costs of those benefits, **should be upheld unless the determination is arbitrary** (emphasis mine**).** *See Sarasota County v. Sarasota Church of Christ, Inc.,* 667 So. 2d 180, 184 (Fla. 1995).

The arbitrary standard asks the question whether the legislative body's determinations are supported by competent substantial evidence. *See City of Boca*

Raton v. State, 595 So. 2d 25, 30-31 (Fla. 1992). If the legislative body's determinations are supported by competent substantial evidence, they are entitled to a presumption of correctness. *See City of Winter Springs v. State,* 776 So. 2d 255, 261-262 (Fla. 2001).

The burden of the Appellant in this case to challenge the special assessment is steep. "The property owner has the burden to rebut the presumption of correctness…and such presumption can be overcome only by strong, direct, clear, and positive proof." *Desiderio Corp. v. City of Boynton Beach*, 39 So. 3d 487, 498 (Fla. 2010). Evidence of the mere disagreement of experts is insufficient basis for disturbing the local government's findings. *City of Winter Springs v. State*, 776 So. 2d at 261.

In order to apply the two prong test to Cape Coral's special assessment, it is essential to understand the basis upon which the assessment was enacted. Burton developed a two tier assessment methodology in support of Cape Coral's fire services and facilities. Burton found that all parcels in the City received a special benefit from the City's fire protection services and facilities. Florida courts have long agreed with this conclusion. *Desiderio Corp. v. City of Boynton Beach*, 39 So. 3d 487, 495 (Fla. 2010); *Fire District No. 1 of Polk County v. Jenkins*, 221 So. 2d 740, 741-42 (Fla. 1969)

Burton found that the benefit to all parcels in the City from fire protection included enhancing property value, marketability and potential for development; limiting liability by containing fire and preventing it from spreading to other parcels; being able to immediately respond to fire and provide medical aid; and, allowing heightened use and enjoyment of the property (App. 914, 916-918). Similar fire protection benefits were upheld in *Fire District No. 1 of Polk County v. Jenkins*, 221 So. 2d 740, 741-42 (Fla. 1969).

The Tier 1 assessment recommended by Burton and adopted by Cape Coral apportions seventy percent (70%) of the cost of fire services to all parcels based on "Response Readiness". An additional cost was identified concerning improved parcels wherein the structure or structures added additional costs for fire protection services. Burton identified this as the Tier 2 portion of the assessment for "Protection from Loss of Structures" and allocated thirty percent (30%) to improved parcels only.

Burton concluded the benefit of protection from structural loss is best represented by the investment in the structure or the cost of replacing the structure. Burton and Cape Coral needed a readily available source of data for determining the replacement cost of these structures. They determined that the best and most reliable source of this data was found in information from the Lee County Property Appraiser's data base.

Appellants' primary attack on the Tier 1 portion of the assessment is it lacks substantial competent evidence because the assessment for small parcels is in excess of the proportional benefits they receive as compared to the assessments on larger parcels. The only factual basis for this claim is the cross examination of the Fire Chief during the evidentiary hearing in October of 2013. The Fire Chief testified that it would take more resources to fight a fire on 100 acres than it would on a small 88 X 125 foot lot.

Such testimony does not establish Cape Coral's determination of benefit to all properties in the City for the Tier 1 portion of the assessment to be arbitrary. It should be noted that Appellants provided no independent expert testimony of their own relative to the benefits received by properties within the City, either large or small. Appellants have the burden to rebut the presumption that the findings of Cape Coral concerning the special assessment are supported by competent substantial evidence. Similar assessments using a prorated cost divided evenly over all parcels in a City have been upheld by Florida courts. *See Donovan v. Okaloosa County.*, 82 So. 3d 901 (Fla. 2012) (upholding a special assessment methodology for beach restoration where the recreation benefit was allocated to all benefited properties on a prorate basis.)

On the Tier 2, Appellants' argue the apportionment using of Lee County Property Appraiser data is arbitrary and constitutes an improper tax. It should be

noted at the outset that Cape Coral is not relying upon the assessed value of improved real property in its city. Instead, Cape Coral simply obtains present replacement value data representing an approximation of the replacement value of improvements on these structures. Appellants claim that under no circumstance can data of this type be utilized in support of a special assessment for fire services.

The two pre 1968 Constitution cases cited for this argument include *St. Lucie County-Fort Pierce Fire Prevention and Control District v. Higgs*, 141 So. 2d 744 (Fla. 1962) and *Fisher v. Board of County Commissioners of Dade County*, 84 So. 2d 572 (Fla. 1956). It should be noted that in both cases the authority for the implementation of the special assessments came from pre-1968 Constitution special acts of the Florida Legislature. The Supreme Court in both cases was required to look at the language of those special acts in order to determine the validity of the assessments.

In *Higgs* the special act interchangeably uses the words 'tax' and 'assessment' throughout. Although the Supreme Court eventually determines the authority granted was for a special assessment that is not entirely clear from a reading of the case. The "assessment" was based solely on the ad valorem value of all real and personal property. The Supreme Court affirmed the Circuit Judges determination that no parcel of land was specifically or peculiarly benefited in proportion to its value and that, instead, this was a tax and not an assessment. *St. Lucie County-*

Fort Pierce Fire Prevention and Control District v. Higgs, 141 So. 2d at 745. The Supreme Court later discussed the *Higgs* case in *Lake County v. Water Oak Management Corp.*,695 So. 2d 667, 668 (Fla. 1997) noting that "no parcel of land was specially or peculiarly benefited in proportion to its value" *Id* at 670.

The *Higgs* "assessment" stands in stark contrast to that done by Cape Coral. The Cape Coral assessment does not rely solely upon the ad valorem value for the apportionment of Tier 2 costs. In fact, the information obtained from the Lee County Property Appraiser's data base is nothing more than that - data - upon which to estimate the replacement value of improvements on property for the allocation of the Tier 2 assessment. The Burton report and his testimony reveal a thorough consideration of the costs associated with protecting structures, including the most logical way to determine the structural loss in the event of a fire; i.e., present replacement value. Florida courts have long held that the "manner of the assessment is immaterial and vary within the District as long as the amount of the assessment for each tract is not in excess of the proportional benefits as compared to other assessments on other tracts." *South Trail Fire Control Dist. v. State*, 273 So. 2d at 384.

Furthermore, the *Fisher v. Board of County Commissioners of Dade County* case in no way stands for the proposition that value can never be utilized as data

for the apportionment of a special assessment. *Fisher* merely held that in this case the following:

> It is not to be understood from this opinion that we are holding that such homestead property as there may be in the Golden Shores Special Improvement Services District may not be assessed for special benefits in the true sense or that most of the property in the district may not receive some benefit from street improvements and street lighting, but the special benefits must be made to appear and there must be adequate factual data in the record to support the conclusion that the homesteads involved here received peculiar special benefits charged against them as required by our Constitution.
>
> *Id.* at 579

Thus, from a careful reading of both *Higgs* and *Fisher,* neither stands for the proposition that value can never be the source of data for the apportionment of part of the special benefit received by the assessed property. To the contrary, *City of Boca Raton* and *City of Naples v. Moon, 269 So. 2d 355 (Fla. 1972)* both stand for the proposition that the value of property benefitted can be taken into consideration in the determination of the apportionment for the cost of a special assessment. The *Boca Raton* case is not distinguished merely upon the fact that it deals with an urban improvement assessment versus the fire assessment in the case at hand.

The final aspect which distinguishes the *Higgs* and *Fisher* cases (apart from the lack of home rule as a basis of the assessment) is the apparent attempt in both by the governmental authorities to avoid the homestead exemption found in the

Florida Constitution. Even the *Higgs* case authorized the assessment beyond the $5,000.00 homestead exemption existing at that time.

CONCLUSION

The Cape Coral assessment is authorized by municipal home rule. No reliance was placed on Chapter 170 for authorization to place the assessment. A logical relationship exists between the fire services provided and the benefit to real property. Both Tier 1 and Tier 2 portions of the assessment were not arbitrary and were otherwise supported by substantial and competent evidence. Appellants' offered no independent evidence of their own in the form of expert testimony on the subject of benefits and apportionments of a special assessment. The Burton report and testimony were more than mere conclusions similar to those disapproved in the *Fisher* case. The 1200 page record is replete with factual data to support his conclusions. The Cape Coral bonds financed with a portion of the fire special assessments must therefore be validated as having complied with the requirements of law. See *City of Winter Springs v. State*; *City of Boca Raton v. State*; *Myer v. Oakland Park;* 219 So. 2d 417 (Fla. 1969); *South Trail Fire Control District v. State*.

Respectfully submitted on April 24, 2014.

NELSON HESSE LLP
2070 Ringling Boulevard
Sarasota, Florida 34237

(941) 366-7550
(941) 955-3708 *Facsimile*
Attorneys for City of North Port

By: Robert K. Robinson
ROBERT K. ROBINSON
Florida Bar No. 0815081
rrobinson@nelsonhesse.com

CERTIFICATE OF COMPLIANCE

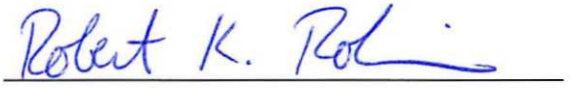
I hereby certify that this Brief is computer-generated in 14-point Times New Roman font in compliance with Florida Rule of Appellate Procedure 9.210(a).

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of April, 2014, a true and correct copy of the foregoing was served on the following by email:

Anthony W. Kunasek Assistant State Attorney State Attorney's Office 2000 Main Street, 6th Floor Ft. Myers, Florida 33901 akunasek@sao.cjis20.org	Scott Morris Morris Law Firm, P.A. 514 Southwest 3rd Street Cape Coral, Florida 33991 Attorneys for Appellants scott@morrislawfirm.org
Mark G. Lawson James C. Dinkins Mark G. Lawson, P.A. PO Box 14043 Tallahassee, Florida 32317	Major B. Harding Steven M. Hogan Ausley & McMullen, P.A. 123 South Calhoun Street Tallahassee, Florida 32301

mlawson@markglawson.com mlawson@gmail.com jdinkins@markglawson.com james.c.dinkins@gmail.com	Attorneys for Amicus Curiae Government Services Group, Inc. mharding@ausley.com shogan@ausley.com
Susan H. Churuti Bryant Miller Olive, P.A. One Tampa City Center, Suite 2700 Tampa, Florida 33602 Attorneys for Appellee City of Cape Coral schuruti@bmolaw.com	Larry A. Barton lbperf@juno.com John Cataldi Jcataldi@comcast.net



Robert K. Robinson