

SUPREME COURT OF FLORIDA

CASE NO. SC00-912

DAVID M. POMERANCE and
RICHARD C. POMERANCE,

Petitioners,

DISTRICT COURT OF APPEAL,
FIFTH DISTRICT - NO. 5D98-2504

v.

HOMOSASSA SPECIAL WATER
DISTRICT, a political subdivision
of the State of Florida,

FIFTH CIRCUIT COURT
CASE NO. 94-2070CA

Respondent.

_____ /

RESPONDENT'S ANSWER BRIEF

Jack A. Moring, Esquire
Florida Bar No. 499160
Myers and Moring, P.A.
7655 W. Gulf to Lake Highway Post Office Drawer 3007
Suite 12
Crystal River, Florida 34429
Telephone No. (352) 795-1797
Attorney for Respondent

Sidney F. Ansbacher, Esquire
Florida Bar No. 0611300
Upchurch, Bailey & Upchurch, P.A.
St. Augustine, Florida 32085-3007
Telephone No. (904) 829-9066
Attorney for Respondent

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PREFACE

For purpose of this answer brief, the designation “R.____” refers to the record on appeal. “T.____” refers to the trial transcript included in volumes X through XIII of the record. It should be noted that the trial exhibits are included in volume four of the transcript in volume XIII of the record, from T. 540-560. The designation “A.____” refers to the appendix to this brief, and “B.____” refers to the initial brief.

STATEMENT OF FACTS AND CASE

The District takes exception to the Pomerances’ statement of facts. It is incomplete and inaccurate. It omits testimony and evidence that support the lower court’s findings and presents conflicting evidence as uncontroverted. The District has included a statement of facts in this brief to correct and supplement the Pomerances’ presentation.

The Florida Legislature created the Homosassa Special Water District pursuant to Chapter 59-1177, Laws of Florida (the “charter”) for the purpose of operating a public water supply and distribution system. Ch. 59-1177, §4 Laws of Florida. (T. 541)

In 1963, the Legislature amended the charter to expressly authorize the District to levy special assessments:

The District may provide for the construction or reconstruction of improvements to the system of a local nature and of special benefit to the properties served thereby. . . . Such special assessments shall be levied upon the property specially benefitted by such improvements in proportion to the benefits to be derived therefrom. Such benefits shall be determined and prorated according to the front footage of the properties specially benefitted by such improvements, or by any other method as the board may prescribe.

Ch. 63-1222, §2, Laws of Florida (emphasis added). (T. 211-12) (T.541)

The Pomerances own approximately nine acres of land within the District located along Highway 19, north of Homosassa. (T. 14, 540) In

1988, the residents of the District voted to extend water service past the Pomerances' land to Halls River Estates subdivision. (T. 541)

On January 13, 1992, the District Board passed a resolution initiating the extension project. (T. 542) The resolution recited that the District was desirous of providing service, “provided that those landowners to be benefitted thereby (that is, the landowners in the subdivision itself and those landowners along the route of the extension) pay for the cost of the expansion through the levy by the District of a special assessment on the lands to be benefitted.” (T. 542) It directed the District engineer and legal counsel “to undertake such plans and steps pursuant to Chapter 63-1222, Laws of Florida as amended [the District] charter, to establish and implement the special assessment district, to encompass all lands to be benefitted by this extension of water service according to law.” (Id.) (emphasis added)

On February 22, 1993, the District engineer presented a preliminary assessment roll and report to the District Board. (T. 490, 548, 552) The report expressly recited that the boundaries of the district “encompass[ed] those

properties that were identified by the Homossassa Special Water District as directly benefitting from the proposed construction.” The report expressly acknowledged that the charter required that the assessments “shall be levied in proportion to the benefits derived.” The report advised that in accordance with the charter, the front foot method of calculating the assessment was utilized. The report explained that under that method, the abutting property owners “share in the cost of improvements constructed to benefit them according to the lineal feet of pipe required to transverse the front of the property benefitted.” (Id.)

The Pomerances’ property was assessed on the basis of half its front footage to compensate for its irregular shape, consistent with front foot adjustment rules followed by “many municipalities.” (Id.)

The Board approved the preliminary assessment. (T. 544) The Board subsequently twice amended the assessment roll to reflect reduced construction costs. The Board passed the operative final assessment roll, by resolution on

March 13, 1995. (T. 548, 554) 47 parcels were assessed a total of \$161,255.67. The final assessment for the property was \$19,044.39. (Id.)

Contrary to the Pomerances' assertions (B. 12-19), the Board made an express determination that the assessed properties would derive special benefits from the project and that the assessments were proportionate to the benefits received. The March 13, 1995 resolution imposing the assessment stated:

Section 1. It is hereby found, ascertained and determined that:

A) The Board of Commissioners of the Homosassa Special Water District, Citrus County, Florida, has previously provided for the acquisition and construction of certain water improvements along Halls River Estates extension, Homosassa, Citrus County, Florida, in the District, and it is found that the properties herein will be specially benefitted by the construction of such improvements.

. . . .

Section III. The Board does hereby adopt and confirm the second revised final special assessment roll, heretofore filed with the Board, with such minor changes and amendments, which do not change the location of the improvements or increase the estimated costs thereof, as are shown on the corrected special assessment roll filed as of this date. Such corrected revised final special assessment roll is hereby declared to be the final special improvement assessment roll for the purpose of levying special

assessments against the properties found to be specially benefitted in order to pay for the improvements. Such assessments so confirmed are in proportion to the benefits received by each such lot or parcel of land described in such assessment roll.

(A.1; T. 548, 554) (emphasis added)

Following the imposition of the assessment, the Pomerances filed suit.

As the Pomerances stress in their statement of facts, their experts testified that the property is largely undevelopable because of wetlands. They recite in great detail the testimony of their experts that supports their theory that the property would not benefit from the water line because it is undevelopable. The credibility and weight of that testimony were in issue at the trial. The trial judge rejected this testimony in favor of the evidence supporting the assessment. It is not appropriate to reargue here the weight of the evidence on appeal. The District simply recites here substantial evidence in the record that supports the trial judge's decision.

Randy Armstrong, a wetlands consultant with extensive experience in wetlands dredge and fill permitting, categorically denied that the property was undevelopable. He testified that he was "confident" that "the agencies would

permit some reasonable use of the property.” (T. 467, 486) He testified that the wetlands impacts could be mitigated through preservation of on-site wetlands, enhancement of on-site wetlands and preservation of donation of off-site wetlands, in addition to wetlands creation. (T. 454, et eq.) Contrary to the opinion of Mr. Cromwell, the Pomerances’ expert, that there was no feasible access, he testified that highway access could be provided by making use of “the upland area that’s located down on the southern end of the property.” (T. 451-453) He testified that he relied on the Pomerances’ experts’ report, which showed the access road would only require filling one-tenth of an acre of wetlands. (T. 453-455) Although the Pomerances contend that the existing uplands were the “only part of [the Pomerances’ land] which could be developed,” (B. 2), Armstrong testified:

Q. And could you give your opinion as to reasonable best case and worst case, in addition to the access road, what you believe would be permissible in terms of expansion of that upland in the southwest corner?

A. Reasonable in terms of acreage?

Q. Yes.

A. I don't think it would be unreasonable to try to put together about, I'd say a two acre development on the roughly nine acre site.

Depending on the exact acreage of the uplands that would be in the ballpark, so to speak, for onsite mitigation. And it might require going off site to do a little bit more.

(T. 471) (emphasis added)

As the underscored testimony indicates, Armstrong's two-acre development estimate was predicated on on-site mitigation. He testified that as much as three acres could be permitted with off-site mitigation. (T. 462-463)

The Pomerances also fail to mention that the County's Director of Development Services, Gary Maidhof, testified that the Comprehensive Plan "no net loss" wetlands policy, on which their expert Cronwell relied in formulating his opinion that the property was not developable, had been eliminated in favor of the State Environmental Resource Permit (ERP) wetlands permitting program pursuant to Chapter 373, Florida Statutes. He testified that

the ERP process is “very flexible” and allows considerable discretion as to how to allow development of wetlands. (T. 260)

They also fail to mention that the wetlands on the property had been impaired by U. S. 19, which cut off the natural drainage of the property, and drainage ditches, which reduced hydroperiods and lowered water levels. (T. 399-408)

The Pomerances fail to mention that several of their experts, including their appraiser, admitted that the availability of the potable water line would benefit the property if the on-site uplands were developable. (T. 235, et seq.)

The Pomerances also fail to mention that in his preliminary appraisal of the property (for Mr. Pomerance’s mother’s estate), their appraiser estimated developable upland value at between \$100,000 to \$117,000 per acre. (T. 545) He acknowledged that he could not place an actual valuation on the property without knowing the extent to which its development could be permitted. (T. 235, et seq.)

Both Armstrong and Maidhof testified that ample land in the nearby St. Martin's Conservation and Recreation Lands (CARL) State Preserve was available for acquisition, and therefore for mitigation. (T. 260, et seq., 460 et seq.)

The District presented the testimony of engineer George McDonald, who acted as the project manager for the District. (T. 359, et seq.; T.490,et seq.)¹ He testified that the front foot method is "very standard in the industry." It is used about "half the time" both in his personal experience and in the industry. (T. 494) Additionally, he selected that method because it is provided for in the District charter. (T. 494-95)

1. The Pomerances assert that McDonald was never qualified as an expert in value or benefit analysis, and that his testimony was not in the District minutes. B. 13 and 18, N. 1. McDonald testified at length about his determination of benefit, including on questioning by Pomerance counsel, with no objection. (T. 492, et seq.) He also testified that he presented his report to the District (Id.), and the Board resolutions and minutes reflect authorization of, and reliance on, his work. (T.542, 548, 551, 552, 554).

McDonald testified that his analysis of special benefit was in two prongs. A parcel that fronts a water main and has access to the main derives a benefit from available potable water and fire protection. (T. 496) He explained that “calculation of such benefit” was “equal to what it cost to bring that benefit to the property.” (T. 521) On the wetlands issue, he testified:

A. [T]he designation of wetland does not necessarily mean the property is undevelopable. That is a separate issue. The issue is will the property benefit from having a water line available to it.

And in all the cases that I’ve worked on we have never excluded a property strictly because it has wetlands or some wetlands on it.

(T. 500) He was not aware of any issuance of assessments being waived because the property “was wet.” (T. 500)

McDonald testified that sewer lines are available within one-quarter mile south of the property, and that sufficient capacity existed to serve the property. (T. 504-506) Evidence also was presented showing that Citrus County had a capital improvement plan to bring a public sewer line past the property in the near future-subject to funding. (T. 528, et seq.)

The court found for the District, and against the Pomerances. (R. 1722)
The court held that they failed to prove the special assessment was arbitrary, as required by Florida law regarding special assessments. (R. 1724, et seq.)
The court found that the “front foot” methodology was authorized by the District charter, and otherwise reasonable. (Id.)

The Pomerances appealed. The Fifth District affirmed, Judge Harris dissenting. (Fifth District R. 15-21)

SUMMARY OF ARGUMENT

The Pomerances first attack the special assessment against their property on the theory that the District did not make the determination of special benefit and proportionate assessment required by the two-prong test set forth in Sarasota County v. Sarasota Church of Christ, 667 So.2d 180 (Fla. 1995). Their underlying contention, that no such determination was made, is contrary to the record. The Board expressly made that determination in the 1995 resolution in enacting the assessment. The contention is also contrary to law, as it is presumed that such a legislative determination was made when a local

improvement assessment is levied against abutting properties on a front footage basis.

The Pomerances failed to demonstrate that the District acted arbitrarily in imposing the assessment. Levying the assessment on a front foot basis was expressly authorized by District charter and recommended by its engineer. It was supported by Florida law holding such assessments are presumptively valid.

Contrary to the Pomerances' assertions throughout their brief, their experts did not "conclusively establish" that the property is undevelopable. As both the trial court and district court of appeal found, there was conflicting evidence on this point. The trial court's rejection of this claim was supported by substantial competent evidence.

Essentially, the Pomerances claim that there has been a regulatory taking of their property. However, they have not applied for permits and no agency has denied them a permit. Absent an actual denial of development rights, the court should not entertain their claim that the property was undevelopable.

The Pomerances are asking the court to subject the assessment to the most rigorous scrutiny. This is the antithesis of the deferential review required by the case law. Requiring an improvement authority to evaluate regulatory impacts on each assessed property as a condition to imposing an assessment for a water or sewer line on a front foot basis would overrule over 75 years of precedent holding that such assessments are presumptively valid.

ARGUMENT

I. THE DISTRICT'S SPECIAL ASSESSMENT MEETS THE REQUIREMENTS OF THE DISTRICT CHARTER AND FLORIDA LAW.

The Two-Prong Test and Standard of Review

The Pomerances argue that the District's waterline special assessment fails to meet the two-prong test adopted by the supreme court for determining the validity of special assessments. In Sarasota County v. Sarasota Church of Christ, 667 So.2d 180 (Fla. 1995), the court explained the test and attendant standard of judicial review:

[A] valid special assessment must meet two requirements: (1) the property assessed must derive a special benefit from the service provided; and (2) the assessment must be fairly and reasonably apportioned according to the benefits received. These two prongs both constitute questions of fact for a legislative body rather than the judiciary.

. . . .
[T]he 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.

Id. at 183-84 (citations omitted; emphasis added). This is a most deferential standard of review. Indeed, as the court explained in Rosche v. City of Hollywood, 55 So.2d 909 (Fla. 1952):

Generally, all presumptions are in favor of the validity of assessments for local improvements, and the burden of proof is on persons attacking the validity of assessments to show that they are invalid. . . . The apportionment of assessments is a legislative function and if reasonable men may differ as to whether land assessed was benefited by the local improvement, the determination as to such benefits of the city officials must be sustained.

Id. at 913. Accord Meyer v. City of Oakland Park, 279 So.2d 417, 420 (Fla. 1969).

An assessment for construction of a water or sewer line, imposed on the properties abutting the line on a front-footage basis, is a hornbook example of

a valid special assessment under the two-prong test. As to the first prong, this court has long expressly recognized and consistently held that local water, sewer and roadway improvement projects satisfy the special benefit requirement. Indeed, in Atlantic Coast Line R. Co. v. City of Gainesville, 83 Fla. 275, 91 So. 118 (1922), the court held that the special benefits of such improvements are so obvious they are presumed:

When such assessments are levied upon property bordering upon an improved street, it is assumed or presumed that such abutting property receives a peculiar benefit from the improvements that justifies special contributions being paid by the abutting owner in addition to an exclusive of the general tax which he pays as one of the general public.

Such special assessments, when levied on property that actually abuts on a improved street are sustained by the courts without regard to the question of whether or not a particular piece of property abutting thereon derives any benefit from the improvements, upon the presumptions that such property must necessarily be benefitted, and that the benefit that derives from the improvements is peculiar to its location as property abutting on the street. In determining the proportion of the expense for street improvements that each abutting property must bear, the city must adopt a fair and reasonable rule of apportionment, and it has been held, and it is the rule in the state, that what is known as the front-foot rule is fair and reasonable for distributing the expense of the improvement. Where this rule or some other fair and reasonable one is adopted the act of the city in the exercise of its legislative discretion will not be disturbed by the courts.

91 So. at 122 (emphasis added). Accord Rosche v. City of Hollywood, supra.; Klein v. City of New Smyrna Beach, 152 So.2d 466, 470 (Fla. 1963) (sewer improvements); Cape Development Co. v. City of Cocoa Beach, 192 So.2d 766, 773 (Fla. 1966) (drainage and roadway); Bodner v. City of Coral Gables, 245 So.2d 250, 253 (Fla. 1971) (sewer); Murphy v. City of Port St. Lucie, 666 So. 2d 879 (Fla. 1995) (water and sewer); ACORN v. City of Florida City, 444 So.2d 37, 39 (Fla. 3d DCA 1983) (sewer); City of Hallendale v. Meekins, 237 So.2d 318, 320 (Fla. 4th DCA 1970), adopted, cert. discharged, 245 So.2d 253 (Fla. 1971) (sewer).

Likewise, as to the second prong, the front foot method has “traditionally been upheld as a fair and reasonable means of determining assessments.” Bodner v. City of Coral Gables, 245 So.2d at 253. Accord Louisville & Nashville R.R. Co. v. Barber Asphalt Paving Co. 197 U.S. 430 (1905); City of Boca Raton v. State, 595 So.2d 25, 31 (Fla. 1992) (recognizing that front foot apportionment is the “more traditional” method); Atlantic Coast Line R. Co.,

91 So. at 118 (“the front foot rule is a fair and reasonable one for distributing the expense of the improvements”).

In the foregoing cases, the court stressed that the judiciary must defer to legislative judgment of the improvement authority on both the special benefit and apportionment issues. The Pomerances would have the court throw deferential review out the window and subject the assessment to what amounts to strict scrutiny. They would have the court disregard the long-standing presumptions that support the assessment, re-weigh the evidence presented at trial, make its own findings of fact, and substitute its judgment for the legislative determination of the Board on the benefit and apportionment issues. They are asking the court to rule that the Board’s determination was arbitrary when, in fact, it is supported by the District charter and is presumptively valid under Florida law.

For the most part, the Pomerances ignore the relevant case law dealing with special assessments for local improvements. Instead, they contend that the assessment conflicts with recent decisions dealing with countywide

assessments, particularly Sarasota County, Lake County v. Water Oak Management Corporation, 695 So.2d 667 (Fla. 1997), Harris v. Wilson, 693 So.2d 945 (Fla. 1997), and Collier County v. State, 773 So.2d 1012 (Fla. 1999). In those cases, the court was concerned with a new generation of increasingly creative countywide assessments and the increasingly generalized benefits associated with them. Because of their countywide orientation, these assessments pushed the constitutional limits under the traditional distinction between valid special assessments and unauthorized taxes. As the court explained in Sarasota County:

[A]lthough special assessments and taxes are both mandatory, a special assessment is distinct from a tax. Taxes are levied throughout a particular taxing unit for the general benefit of residents and property and are imposed under the theory that contributions must be made by the community at large to support the various functions of the government. Consequently, many citizens may pay a tax to support a particular government function from which they receive no direct benefit. Conversely, special assessments must confer a specific benefit on the land burdened by the assessment and are imposed under the theory that the portion of the community that bears the cost of the assessment will receive a special benefit from the improvement or service for which the assessment is levied.

667 So.2d at 183 (citing Justice Grimes’ analysis in City of Boca Raton, 595 So.2d at 29).

In Sarasota County, Water Oak Management and Harris, the court upheld assessments for countywide stormwater drainage facilities, fire protection and solid waste services, and a solid waste disposal facility, respectively. The court gave great deference to the county legislative judgment on the special benefit and allocation issues. Indeed, in his vigorous dissenting opinions, Justice Wells protested that the majority had gone too far and liberalized the traditional special benefit test. In Water Oak Management, he took particular issue with the majority’s adoption of the “logical relationship test,” stating that in so doing “the majority revises history and definitely erases the distinction between a special assessment and a tax” 695 So.2d at 671.

The court drew the line in Collier County, holding that the county went too far when it imposed an “interim government services fee” to support eleven allegedly “growth sensitive” public services. The court held that the requisite special benefit was “not satisfied by establishing that the assessment is

rationally related to an increased demand for county services.” Id. at 1017. As the court recognized, requiring only a rational relationship between the assessment and countywide services would abolish the distinction between a fee and a tax.

Unlike the assessments in Collier County, et al., it cannot be seriously suggested that the assessment in this case was imposed for the benefit of the public at large rather than the special benefit of the assessed properties, so as to resemble a tax. Singularly local in scope (47 parcels), the assessment is at the opposite end of the benefits spectrum from the countywide assessments involved in those cases. There is nothing in the court’s analysis of those assessments that casts doubt about the validity of the traditional special assessment application and methodology involved in this case. There is nothing in them that suggests the court has abandoned the rule of judicial deference that it adopted over 75 years ago in Atlantic Coast Line and has followed consistently ever since. They certainly do not call for strict scrutiny of garden-variety assessments for local improvement such as the Pomerances are advocating.

The Record Belies the Pomerances' Contention that the
District Made No Determination of Special Benefit

The Pomerances attack the assessment on the theory that “the District made no finding or determination of any benefit to any of the assessed properties.” (B. 14) They contend that the District “relied solely upon” the desire to extend the line to Halls River Estates expressed in the January 3, 1992 resolution. (B. 15) Based on this contention they argue at length that the assessment violated Florida law and the requirements of its charter. (B. 12-19)

The Pomerances' contention that the District did not make a determination of special benefit is simply contrary to the record. The 1992 resolution expressing the “desire” to extend service merely initiated the project. The Pomerances ignore the operative resolution adopted on March 13, 1995, which actually approved and implemented the final special assessment. It expressly stated that “it is found that the properties herein will be specially benefited by construction of such improvements.” (A. 1; T. 548, 554) (emphasis added) Further, the resolution found that the assessments are proportionate, as follows:

“Such corrected revised final special assessment roll is hereby declared to be the final special improvement assessment roll for the purpose of levying special assessments against the properties found to be specially benefitted in order to pay for the improvements. Such assessments so confirmed are in proportion to the benefits received by each such lot or parcel of land described in such assessment roll.”

(Id. at 3) (emphasis added)

Admittedly, the District did not make an express legislative finding of special benefit as to each individual parcel. However, as the District Court of Appeal noted, the assessing authority is not required to make specific legislative findings as to each parcel. City of Treasure Island v. Strong, 215 So.2d 473 (Fla. 1968); City of Hallendale v. Meekins, supra.

On the other hand, the District did make the express finding that “properties herein” (undeniably including the subject property) would be “specially benefitted by construction of such improvements.” Accordingly, the Pomerances’ claim that the assessment was defective because no such determination was made is unfounded.

The Express Findings of the 1995 Resolution

Are Bolstered by the Presumption that the District Made a
Determination of Special Benefit and Fair Apportionment

As demonstrated above, the District did, in fact, expressly determine that the assessed properties would be specially benefitted and proportionately assessed. Even so, such an express legislative determination was not essential. For example, in City of Treasure Island v. Strong, 215 So.2d 473 (Fla. 1968), the court was concerned with the validity of an assessment of waterfront properties for construction of a groin system to control beach erosion. The assessing authority did not make any express determination that the system would benefit the assessed properties. The court observed:

[I]t does not appear an official determination of special benefits must be made and set forth in express terms in all cases in the resolution authorizing a special assessment. Certain types of improvements authorized by enabling legislation by their nature give rise to presumptions of special benefits to lands assessed for the cost of such improvements.

Id. at 477, 488 (emphasis added). The court took note of Atlantic Coast Line, where it recognized and discussed the presumption of special benefit to

adjacent properties in connection with street improvement projects. Applying that rationale to the groin project, the court concluded:

[W]e think it is not fatal to the validity of the special assessments because the City failed to make a formal determination of the benefits accruing to the property ownerships assessed. Under Article VI, Section 52 of its Charter, the City was empowered by the Legislature to issue revenue certificates for the construction of an erosion control groin system and to assess the cost of such an improvement project against the “abutting property and any other property within the city that is of sufficient proximity to such improvements to receive benefits of protection therefrom.” [emphasis in original] By the use of this language in the Charter, we believe the Legislature itself necessarily determined that the construction of an erosion control groin system by the City presumably would result in benefits inuring specially to the properties protected thereby.

Id. at 478 (emphasis added)

Likewise, it is clear from the District charter that the state legislature itself “necessarily determined” that construction of the water line would specially benefit the lands fronting the line. The charter specifically authorizes the District to determine and prorate benefits according to front footage:

“Such special assessments shall be levied upon the property specially benefitted by such improvements in proportion to the benefits to be derived therefrom. Such benefits shall be determined and prorated according to the front footage of the properties specially benefitted by such improvements or by any other method as the Board may prescribe.”

(T. 541) (emphasis added) The front foot approach presumes, of course, that the properties fronting the water line will be specially benefitted in proportion to their front footage. (T. 521)

The language of the charter is virtually identical to former Florida Statute 170.02, by which the legislature authorized municipalities to levy special assessments for street and sewer improvements. Ch. 9298, §2, Laws of Florida (1923). The authorization was and is consistent with Florida law deeming the front foot method the preferred method of determining and apportioning special benefits. See authorities cited above, page 16-18.

The District proceeded in accordance with its charter, strengthening the presumption that it made the requisite determination. The operative provisions of the 1992 resolution directed the District engineer and counsel to proceed

“pursuant to Chapter 63-1222, Laws of Florida, as amended [the charter] to establish and implement the special assessment district to encompass all lands to be benefitted by this extension of water service according to law.” (T. 542)

The engineers prepared and presented to the Board a report in support of their proposed assessment. The engineers expressly determined that there would be a special benefit to the assessed properties. (T. 490, et seq., 548, 552)

In an attempt to distinguish Treasure Island, the Pomerances deny the obvious and again insist that the District made no determination that the new water line would benefit adjoining properties, and instead predicated the assessment on the desire of some of the residents in the service area. (B. 15)

This argument is simply contrary to the record. They also attempt to distinguish the case because the plaintiffs there did not timely object to the assessment. This ignores the find that the court was applying the Atlantic Coast Line rationale, which cannot be so distinguished.

The Pomerances’ main arguments depend on the premise that the District did not make any determination of special benefit. As demonstrated above,

that premise is simply wrong. The record establishes that the District made an express determination of special benefit and the case law establishes that in any event, such a determination is presumed.

The Pomerances Failed to Demonstrate by
Clear and Positive Proof that the District's
Determination of Special Benefit was Arbitrary

The issue here is not whether the assessment was “simply unfair in a practical sense” to the Pomerances’ particular property. Atlantic Coast Line R. Co. v. City of Winter Haven, 112 Fla. 807, 151 So. 321, 325 (1933). Under the applicable two-prong test, the District’s express and implied determination that the assessed properties would receive a special benefit must be upheld “unless the determination is arbitrary.” Sarasota County, 667 at 184. (emphasis added) The presumption that it was not “can be overcome only by strong, direct, clear and positive proof.” Meyer v. City of Oakland Park, 219 So.2d 417, 420 (Fla. 1969) (emphasis added).

The Pomerances’ burden to show that the District acted arbitrarily in this case is a formidable one. An arbitrary action is one that is “not supported by

facts or logic, or despotic.” Agrico Chemical Co. v. State, 365 So.2d 760, 763 (Fla. 1st DCA 1978) (emphasis added).

There is no evidence whatsoever in the record whatsoever to show that the District’s action was unsupported by facts or logic. The District’s determination that the project would specially benefit the properties along the line was not only supported, but is presumed, by Florida law. The District’s imposition of the assessment on the basis of front footage was not only supported but was expressly authorized by its charter. It was also supported by Florida law recognizing that the front foot is the traditional methodology and holding that when it has been utilized, such “exercise of legislative discretion will not be disturbed by the courts.” Atlantic Coast Line, 91 So. at 127. See also discussion and other citations at page 17.

In developing the assessment, the District did not act despotically. To the contrary, it directed its counsel and engineer to develop the assessment pursuant to its charter and according to law. The engineer’s report advised that the assessed lands would be specially benefitted and proportionately assessed.

The Board followed the engineer's recommendations and enacted the assessment as presented.

The only "proof" presented to the Board to suggest that the improvements would not benefit the Pomerances was counsel's argument that the property was undevelopable. She submitted reports prepared in connection with Mr. Pomerance's mother's estate, but no supporting testimony. See, e.g., Lanahan Lumber v. McDevitt and Street, 611 So.2d 591 (Fla. 4th DCA 1993) (attorney argument is not probative). The District declined to capitulate, and approved the assessment on authority of the charter. As discussed above, there was ample legal and factual support for that decision. Accordingly, by definition, it was not arbitrary.

At Trial, the Pomerances Failed to Overcome the
Presumption of Validity by Strong and Positive
Proof that the Property Was Undevelopable

The Pomerances claim that the evidence at trial "clearly established" that their property cannot be developed, and, therefore, would not benefit from the water line:

Herein, the Pomerances' property is not specially benefited by the Respondent's waterline improvement in any way. The testimony at trial clearly established that the Pomerances' property cannot be developed or used for any commercial purpose. The testimony at trial further established that the Respondent's waterline improvement provides no benefit to the property if, in fact, the property cannot be developed. Petitioners' expert witnesses established that the Petitioners' property cannot be used or developed as a result of the predominant wetlands.

(B. 19) (citations omitted).

Once again, the Pomerances ignore the substantial evidence to the contrary that supported both the District's legislative determination of benefit and the trial court's determination of the weight and credibility of conflicting evidence on this point. As the District Court of Appeal explained below:

[I]t was the Pomerances' burden to overcome the presumptions that their property was benefitted from the improvement, and the presumption that the district correctly determined that the property received a special benefit. At trial, the parties presented conflicting expert testimony regarding the amount of the property that was wetlands, and the amount of the property that could be developed. The trial court found that the Pomerances did not prove by a preponderance of the evidence that there was no benefit to the property from the extension of water service to it. Because that finding is supported by the evidence, we cannot disturb it on appeal.

(DCA opinion, 3-4).

The District's wetlands expert, Randy Armstrong, contradicted the Pomerances' experts on the development potential of the property. He testified that with only on-site mitigation, a two-acre development was permissible. (T. 471) With off-site mitigation, a larger development would be feasible. (T. 462, 463) He also contradicted their testimony as to the problems with access to US Highway 19. He testified that he relied on the Pomerances' own report which showed the access road would only require one-tenth of an acre of fill to construct on the southern boundary. (T. 453-455)

The Pomerances claim that "maximum value" of the property is \$58,000. However, their appraiser testified this valuation was based on the uncertainty of developability until permits were sought. (T. 234-235, 236-237). His appraisal indicated that developable property in that location was worth \$100,000 or more per acre. (T. 212; 545)

The Pomerances also argue (B. 21) that the maximum benefit to the property would be \$2,000 - \$5,000, the cost of a well. Under this logic, a

property with a well or a septic tank could never be assessed for the installation of central water and sewer because those improvements would add no value to the property. In any event, there was conflicting evidence on this point. Mr. McDonald testified that the value of the benefit was equal to the cost of installing the water line. (T. 521) This testimony is consistent with Florida law on front foot assessments. City of Winter Haven, 151 So. at 34 (the determination the property assessed on front foot basis “has received special benefits equal to the assessments, is conclusive against all collateral attacks.”)

At most, the Pomerances raised questions about the developability of the property, but they have not overcome the presumptions as to special benefits and the correctness of the District’s legislative acts. Although Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126 (Fla. 2000), involved school impact fees rather than special assessments, the case is an example of that “strong, direct, clear and positive proof” required to overcome the presumption of benefits. Meyer, 219 So.2d at 420. Previously, in St. Johns County v. Northeast Florida Builders Association, 583 So.2d 635 (Fla. 1991), the court held that assessing new homes with school impact fees satisfied the

analogous benefits prong of the dual rational nexus test because new schools would be available to serve such homes, even though school children might not ever actually live in some of them. Id. at 639.

In Aberdeen, the court held that the benefits test was not met as applied to the Aberdeen community because it was subject to 30-year, irrevocable deed restrictions banning minors from living there, thus flatly negating the benefits from the availability of new schools. The landowner thus conclusively demonstrated that the community would not receive any direct benefit from the fees.

In contrast, the Pomerances fell far short of overcoming the presumption that their property would benefit from the availability of water service. The property is not subject to land use regulations that prohibit development, much less irrevocably.

At most, there was conflicting evidence as to the development potential of the property. The trial judge who observed the witnesses and heard the testimony found against the Pomerances on this issue. Her determination was

supported by substantial competent evidence and should not be disturbed on appeal.

The Court Should Not Entertain the Claim
That the Property Was Undevelopable When
There Has Been No Denial of Development Rights

The Pomerances argue that the property is undevelopable because it has substantial jurisdictional wetlands. Agency jurisdiction, however, simply requires permitting review. Unless and until the landowner, in good faith, applies for and attempts to obtain a development permit, determining the developability of the property is at best an exercise in educated speculation.

The Pomerances are saying in so many words that there has been a regulatory taking. If so, they have a remedy under Florida law - inverse condemnation. It is respectfully suggested that the burden on a landowner to demonstrate a regulatory taking in order to avoid liability for an assessment should be at least as great as it would be in an inverse condemnation action. A landowner who succeeds in avoiding an assessment still owns the property

and can still attempt to develop or sell it. On the other hand, the landowner who prevails in an inverse condemnation wins compensation but loses the property. There is no chance for the land owner to have its cake and eat it too.

The final denial of a development permit is a condition precedent to an inverse condemnation claim based on a regulatory taking theory. In Key Haven v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153 (Fla. 1982), the court held that neither an “as applied” takings claim nor a challenge to administrative action should be allowed until after administrative remedies are exhausted. Once the administrative remedies are exhausted, the aggrieved party may appeal the administrative action to a court of competent jurisdiction. Alternatively, the party may waive its administrative appeal rights, accept the denial of the permit and sue for a taking.

The Pomerances’ claim is simply not ripe under Key Haven. Even assuming that everything that the Pomerances say is true, the District has done nothing more than levy an assessment for the presumptive benefit of making

central water available. No one has denied them the right to develop their property.

Essentially, the Pomerances contend that exhaustion of administrative process with the regulatory agencies would be futile. In Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990), the landowner claimed that a land use plan designation of the property constituted a compensable taking and that it would be futile to apply for a permit. The court rejected this argument. The court noted:

Eide's determination of what is consistent with the sector plan is not controlling here; the County and the Florida Courts are arbiters of what is consistent. As stated above, the sector plan did not rezone any land commercial or non-commercial; it merely dictates that all future development be consistent with it.

Id. at 727.

As the Eide court recognized, mere regulation of property does not constitute a taking. Likewise, mere regulation of the property does not render exhaustion of administrative remedies futile. This is equally true in this case.

In Heck v. United States, 134 F.3d 1468 (Fed. Cir. 1998), the court held a takings claim was not ripe where the Corps "deactivated" a fill permit

to develop 13 acres of jurisdictional wetlands. The court rejected the argument that further attempts to seek permits would be futile:

[T]he futility exception simply serves “to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved. In this case, by contrast, Heck’s first application was never rejected because it was never complete.

Id. at 1472.

See, also United States v. Riverside Bayview Homes, 474 U.S. 121, 127 (1985): “[T]he very existence of a permit system implied that permission may be granted, leaving the landowner free to use the property as desired.” So too, in this case, the Army Corps’ preliminary jurisdictional analysis done just prior to trial merely confirmed that permission for development must be sought.

This court should similarly discount the Pomerances’ argument their property is undevelopable until they at least try to seek some permits. All they have established is that the Army Corps -- and no other agency --has preliminarily determined that much of the property is jurisdictional wetlands. As shown in Heck, this is not equivalent to an agency determination the

property cannot be developed. It certainly is not equivalent to an irrevocable restriction, such as the one involved in Aberdeen at Ormond Beach.

It is respectfully submitted that absent a permit denial, this court should not sanction a regulatory taking defense to liability for special assessment. Requiring an improvement authority to attempt to routinely determine the developability of individual properties would necessarily require the authority to predict what development permitting agencies would allow. Under the Pomerances' logic, the authority would have to do what amounts to environmental and regulatory due diligence assessments for every parcel. This would effectively overrule Florida law on the presumption of special benefit and the front foot rule. No doubt it would greatly increase the cost of local infrastructure improvement projects. It would also make it possible for the landowner to have its cake and eat it too, as discussed above.

Strict Scrutiny of Individual Assessed Parcels Is Not
Required to Sustain the Validity of the Assessment

The Pomerances contend that it was arbitrary to impose the assessment “on a front footage basis” without considering “any land use regulations which

rendered the developability of the property either non-existent or substantially impaired.” (B. 25) They are saying that the improvement authority must examine individual assessed properties to determine how wetlands and other land use restrictions affect their developability as a condition precedent to assess it for bringing central water or sewer to the property. The law does not require such close scrutiny, but rather judicial deference.

The special benefits test focuses on the burdened community, not individual properties. As the court stated in Sarasota County:

“[S]pecial assessments must confer specific benefit on the land burdened by the assessment and are imposed under the theory that the portion of the community that bears the cost of the assessment will receive a special benefit from the improvement or service for which the assessment is levied.”

667 So.2d at 183 (emphasis added)

The court specifically rejected parcel-by-parcel scrutiny in Cape Development v. City of Cocoa Beach, 192 So.2d 766 (1966). The court explained:

Appellants next contend that there should be a determination by the City (presumably on the assessment role) a specific dollar amount showing the amount of benefit for each parcel, along with the dollar assessment against the property. This procedure is not required by the statute.

....

The City has established as a fact by competent evidence that the properties affected would in fact receive more benefits than assessments levied against the various properties. Therefore, the resolutions passed by the City in implementing and authorizing the issuance of these improvement certificates have complied with provisions of Chapter 170, Florida Statutes. Contained therein are sufficient findings that the property is to be benefitted greater than the assessment to be charged against said property. There are over a thousand parcels of properties affected in this improvement project, and to require a municipality to itemize and set forth opposite each parcel the amount in dollars said parcel would benefit from said improvements is unduly tedious and beyond the requirements set forth in the statutes; the interpretation by Appellants that such is necessary is, in our opinion, a strained and illogical interpretation of the requirements of the statute.”

Id. at 773. Accord City of Boca Raton, 595 So.2d at 31 (municipality “was not required to specifically itemize a dollar amount of benefit to be received by each parcel”). As previously stated, the pertinent provision of the District charter is virtually identical to the former Florida Statute 170.02 discussed in Cape Development.

The special benefit test for special assessments is analogous to the benefits prong of the dual rational nexus test for impact fees. In St. Johns County, the court expressly held that the analogous benefits test for impact fees does not have to be met with respect to every home subject to school impact fees:

[W]e see no requirement that every new unit of development benefit from the impact fee in the sense that there must be a child residing in the unit who will attend public school. It is enough that new public schools will be available to serve that unit of development. Id. at 639. (emphasis added)

In Aberdeen at Ormond Beach , the court expressly held that the benefits test applies at the “subdivision” level. That is to say, when the assessment of impact fees against a development community meets the benefits (and needs) test, the fees are valid as applied to the units in that community, even those that do not house children.

It is respectfully submitted that the special assessment benefits test applies to the assessed properties as a community. The test requires that “the portion of the community that bears the cost will receive a special benefit,”

Sarasota County, 667 So.2d at 183 (emphasis added). So applied, the test assures that the purpose of the assessment is sufficiently local so that it does not constitute a tax, imposed for the general benefit of the public at large. The proportionality prong focuses on the legislative methodology for apportioning the assessment throughout the assessed community. The issue is whether the legislative determination on these issues was arbitrary, not whether the result, in every individual instance, was perfect, or even fair. As the court explained in City of Winter Haven:

The mere fact that the answer might complain of the imposition of a burden which is simply unfair in a practical sense, but not amounting to unjust discrimination or confiscation in a legal sense, would admittedly be no defense. This is so because, as was held in the case just cited, the power of the legislative authority is not measured or limited by what is fair, just, equitable, or reasonable in a practical sense, when that authority, by competent action, and without any abuse of power, has been fit to impose the burden of assessments, unfair in a practical sense, but not in excess of the permissive power exercised.

151 So. at 325 (emphasis added)

The Pomerances would require the improvement authority to determine special benefit and fair apportionment on a lot by lot basis. Requiring a lot-by-

lot regulatory analysis would eradicate or reverse the long standing presumptions and principles governing special assessments. It would abolish the presumption that the legislative determinations of special benefit and proportionate assessment are correct. It would abolish the presumption of validity, and overrule over 75 years of case law holding that the front foot method is presumptively valid.

CONCLUSION

For the foregoing reasons, the court is respectfully requested to affirm the orders of the circuit court and district court of appeal.

MYERS AND MORING, P.A.
Jack A. Moring
Florida Bar No. 499160
7655 W. Gulf to Lake Highway, Suite 12
Crystal River, Florida 34429
(352) 795-1797

UPCHURCH, BAILEY AND UPCHURCH, P.A.

By: _____
Sidney F. Ansbacher
Florida Bar No. 0611300
Post Office Drawer 3007

St. Augustine, Florida 32085
Telephone No. (904) 829-9066

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this Respondent's Answer Brief on Jurisdiction is 14 point proportionately spaced Times New Roman, in accordance with this Court's administrative order dated July 13, 1998.

Sidney F. Ansbacher

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail service to KAREN O. GAFFNEY, Karen O. Gaffney, P.A., 221 West Main Street, Suite D, Inverness, Florida 34450, Attorney for Petitioners, and Frank A. Shepherd, Esq., Pacific Legal Foundation, P.O. Box 522188, Miami, Florida 33152-2188, this ___ day of October, 2000.

Sidney F. Ansbacher

