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INTEROFFICE MEMORANDUM

CITY COMMISSION

Office of the City Attorney

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TO: Mayor and City Commissioners **DATE:** June 6, 2008

FROM: City Attorney

SUBJECT: **"Exemptions" from Special Assessments**

ISSUE

A frequently asked question is whether some entities, specifically places of religious assembly and not-for-profit entities, can lawfully be "exempted" from paying the fire services special assessment. Based on many years of litigating in this area, including challenging the County's imposition of the "privilege fee" and defending the City's stormwater utility fee, this office's opinion is that the answer is no, if the property receives a benefit from the service for which the charge is being made. To fully understand, an explanation of how a city may legally raise revenues is necessary.

TAXES, FEES, AND SPECIAL ASSESSMENTS

The City can raise revenue by three means: taxes, fees, and special assessments. If one places these three methods on a continuum, taxes would be on one end, fees on the far other end, and special assessments would be somewhere in the middle as special assessments share characteristics of both taxes and fees.

Taxes are levied throughout the taxing unit for the benefit of the residents and "are imposed under the theory that contribution must be made by the community at large to support the various functions of the government". Sarasota County v. Sarasota Church of Christ, Inc., 667 So.2d 180 (Fla. 1996). There is no requirement that there be a relationship between the amount paid and services used, in fact, one need not even use the services funded through taxes. For example, those without children still pay taxes to fund the school system.

Fees, on the other hand, "are charged in exchange for a particular government service which benefits the party paying the fee in a manner not shared by other members of society...and they are paid by choice, in that the party paying the fee has the option of not utilizing the government service and thereby avoiding the charge". City of Gainesville v. State, Dept. of Transp., 778 So.2d 519 (Fla. 1st DCA 2001). Some reasonable relationship generally exists between the amount of the fee and the value of the service.

As noted, special assessments share characteristics of both fees and taxes. While both taxes and special assessments are alike in that they are mandatory (as opposed generally to fees), they are different in that while taxes require no benefit or use of the services by the taxpayer, special assessments require that the land burdened by the assessment receive a special benefit from the assessment. There must also be a reasonable relationship between the amount charged

and the benefit received. SMM Properties, Inc. v. City of North Lauderdale, 760 So.2d 998 (Fla. 4th DCA 2000).

The three revenue sources are also different as to whom can be charged. The State, counties and school boards are "immune" from taxation. Cities are mostly "exempt" by provisions of the Florida Constitution. As to places of religious assembly and not-for-profit entities, the Florida Constitution provides that portions of property that are used predominately for religious or charitable purposes may be exempted from taxation by general law if the legislature decides to do so.

Unlike taxes, at the other end of the spectrum, fees must be paid by everyone who receives the service or benefit. Special assessments, again in the middle, are enough like taxes that courts have held that government entities cannot be charged a special assessment without a statute specifically authorizing the assessment against them. However, government entities can enter into service agreements that authorize payment in exchange for receipt of the service.

The three revenue sources are also different as far as the authority of the City to levy. The City is the most restricted in the levy of taxes as the ability to raise taxes must be constitutionally based or specifically authorized by the legislature. The City has no independent or home rule authority to levy a tax.

TEST

Because special assessments share characteristics of taxes (and to avoid having taxes disguised as special assessments), the courts have devised a strict test to determine whether a charge is a valid special assessment as opposed to a tax. To determine whether the charge is a valid special assessment, two questions are asked. First, does the property receive a special benefit from the service provided? If the answer is no, the property cannot be assessed for the service. If the answer is yes, that the property does receive a special benefit from the service, a second question is asked whether the assessment is fairly and reasonably apportioned among the properties that receive the benefit. If the answer is yes, the assessment has met both prongs of the test and is a valid special assessment.

In applying this test to places of religious assembly and not-for-profit entities, one must ask whether their properties receive a special benefit from the service provided. The answer is yes, they receive a benefit from fire services like any other improved property in the City. If the properties are "exempted" even though they receive a benefit, the second prong for a valid special assessment has been compromised in that the assessment is not being fairly and reasonably apportioned among all the properties receiving the benefit.

CASE LAW

There is no reported case law that specifically deals with the issues of whether places of religious assembly and not-for-profit organizations can be exempted from special assessments. The only case law is where places of religious assembly have challenged the imposition of special assessment against them and the courts have upheld the imposition of the assessment against them. For example, in a series of cases involving Sarasota County, a number of churches located within the county challenged the county's imposition of fire special assessments and

stormwater special assessments against them. The trial court upheld the fire special assessment against the churches, but denied the stormwater special assessment against them for reasons not relevant here. Both the churches and the county appealed. The churches argued that the fire special assessment should not be applied to them and the county argued that the stormwater special assessment should apply to the churches as well. The court of appeal upheld the imposition of fire special assessments against the churches and again denied the imposition of stormwater assessment against the churches.

The churches gave up their argument that the fire special assessment should not apply to them. The County, however, appealed to the Florida Supreme Court, arguing that the stormwater special assessment should also apply to the churches. The Florida Supreme Court agreed and found that the churches should be assessed the stormwater assessment, stating that:

> "we find that: (1) developed property, such as that owned by the Churches, receives the special benefit of the treatment of contaminated stormwater runoff caused primarily by the improvements on such property, and (2) the method of apportionment used by the County is proper because it requires the properties that create the contaminated stormwater runoff to pay for the treatment of that runoff."

Sarasota County v. Sarasota Church of Christ, Inc., 667 So.2d 180, 184 (Fla. 1996).

The Court went on to say:

> "Notably, under the County's special assessment, the Churches and other owners of developed property are now required to contribute to the costs of the stormwater management facility based on their relative contribution of polluted stormwater runoff. Previously, the costs of stormwater services in the County were funded through a flat tax. Owners of both developed and undeveloped property paid for stormwater services without regard to the property's relative contribution of polluted runoff. Moreover, given that the Churches are exempt from taxation, they paid no money whatsoever towards the cost of the specific benefits received by these services. Although we do not find that the previous funding of stormwater services through taxation was inappropriate, we do find that the stormwater funding through the special assessment at issue complies with the dictates of chapter 403 and is a more appropriate funding mechanism under the intent of that statute."

REMEDY IF THE SPECIAL ASSESSMENT IS FOUND INVALID

If the special assessment does not meet both prongs of the test, it will be found invalid. If invalid, the courts have generally ordered a refund of amounts paid, under the theory that the charge was an illegal tax. See Nelson v. Wakulla County, 905 So.2d 936 (Fla. 1st DCA 2005) ("A taxpayer is normally entitled to a refund of taxes paid pursuant to an unlawful assessment.") This is the situation that happened to a number of communities who included EMS charges in

their fire assessments (which was found to not provide a special benefit to the property, but instead to the person). The City of Miami, for example, faces a 24 million dollar exposure after a class action successfully invalidated its fire assessment ordinance because of the inclusion of charges for emergency medical services in the assessment.

CONCLUSION

The City has the authority to levy a fire service special assessment. The assessment must be levied against all properties that receive the special benefit (in this case, fire service) in an amount that is reasonably apportioned among all properties that receive the benefit. No property owner or class of owners may be exempt from the assessment without compromising the validity of the assessment.

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