SOUND AND FURY: PROPERTY OWNERS CANNOT DEFEAT SPECIAL ASSESSMENT WITH BALD SPECULATION THAT THEIR PROPERTY CANNOT BE DEVELOPED

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I. INTRODUCTION

The *Stetson Law Review*[1] recently addressed the Florida Fifth District Court of Appeal's decision in *Pomerance v. Homosassa Special Water District*.[2] That recent development, *Taxation: Pomerance v. Homosassa Special Water District*, concluded that the majority in a Fifth District panel improvidently affirmed Homosassa Special Water District's (the District) special assessment for potable waterlines "even though [the] property consists primarily of wetlands, has limited development potential, and receives a less[er] benefit than adjacent lands."[3] This analysis suffered from a core omission. The authors were not aware of the facts of the case, which are not apparent from the reported decision. On its facts, the *Pomerance* decision was in step with over one hundred years of case law that presumes that property adjacent to a linear public improvement derives a special benefit from that improvement.[4]

The trial court and the Fifth District majority held that the Pomerances could not prove that the line did not benefit the parcel in question.[5] The trial court reviewed conflicting testimony concerning the development potential of the Pomerances'

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1. James J. Brown & Dana Panza, *Recent Developments*, 30 Stetson L. Rev. 1241 (2001).

2. 755 S.2d 732 (Fla. Dist. App. 5th 2000).

3. Brown & Panza, *supra* n. 1, at 1241.

4. *E.g. Louisville & Nashville R.R. v. Barber Asphalt Paving Co.*, 197 U.S. 430, 433 (1905); *Bodner v. City of Coral Gables*, 245 S.2d 250, 253 (Fla. 1971); *City of Treasure Island v. Strong*, 215 S.2d 473, 475–476 (Fla. 1968).

5. *Pomerance*, 755 S.2d at 734.

property and accepted the District's expert testimony.[6] Further, the Pomerances had never applied for any permits to develop the property.[7] The District asked the courts to deny the challenge because the Pomerances could not show that the property was undevelopable until they applied for — and were denied — development permits. The District also asked the courts to defer to the longstanding case-law presumption that the waterline benefitted the property, because the split of expert testimony regarding benefit was insufficient to rebut that presumption.[8] The trial court and the Fifth District majority agreed.[9] The Florida Supreme Court originally granted conflict jurisdiction, but then dismissed the appeal.[10]

The Florida Supreme Court's order dismissing jurisdiction did not express the grounds for dismissal.[11] Despite the dismissal, the court peppered the District's attorney at oral argument with questions about the equities of assessing a property that was predominantly wetlands, for the perceived special benefits from the waterline.[12] The court might reach a different result if a future local government assesses a similar property, the owner of which has been denied development permits.

A special assessment is valid only to the extent that it benefits the assessed property.[13] Beyond that benefit, the assessment is a compensable taking.[14] A traditional regulatory-takings claim against wetlands regulations is not ripe until the owner has been denied wetlands-development permits.[15] Likewise, a property owner's challenge to a special assessment against wetlands would ripen only once development permits have been denied.

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6. *Id*.

7. *Id*. at 734–735 (Harris, J., dissenting).

8. Respt.'s Ans. Br. Jxn. at 3, *Pomerance v. Homosassa Spec. Water Dist.*, 783 S.2d 1056 (Fla. 2001) [hereinafter Respt.'s Br.].

9. *Pomerance*, 755 S.2d at 734.

10. *Pomerance v. Homosassa Spec. Water Dist.*, 783 S.2d 1056, 1056 (Fla. 2001).

11. *Id*.

12. The Author argued the District's position in oral arguments before the Florida Supreme Court on March 5, 2001 (docket number SC00-912). For an unofficial transcript of these oral arguments, see *Pomerance v. Homosassa Special Water District* <http://www.wfsu.org/gavel2gavel/transcript/00-912.htm> (Mar. 5, 2001).

13. *City of Treasure Island*, 215 S.2d at 475–476.

14. *Id*. at 476.

15. *Williamson County Regl. Plan. Commn. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186–191 (1985).

II. FACTS AND PROCEDURE IN THE LOWER COURTS

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.[16] In 1963, the Florida Legislature amended the Charter to authorize the District expressly 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 benefited by such improvements in proportion to the benefits to be derived therefrom. *Such special 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.*[17]

The Pomerances own approximately nine acres of land within the District boundaries located along U.S. Highway 19, north of Homosassa, Florida.[18] The parcel is predominantly jurisdictional wetland, although the exact acreages of wetlands and uplands have not been determined. Somewhere between one-half acre and two acres in the southwest corner is upland. That upland is about one-hundred-feet west of U.S. Highway 19.[19]

In 1988, a vast majority of voters from among the residents of the District, together with residents of the new area to be served, voted to extend water service past the Pomerances' land to the Halls River Estates Subdivision.[20] In 1992 and 1993, the District board passed multiple resolutions initiating and approving the extension project. In support of these resolutions, the District engineer presented multiple assessment rolls and a report to the District board. The report recited that the boundaries of the District "encompass[ed] those properties that were identified by the Homosassa Special Water District as directly benefitting from

16. 1959 Fla. Laws ch. 59-1177.

17. 1963 Fla. Laws ch. 63-1222, § 17(a) (emphasis added).

18. [Petr.'s] Amend. Jurisdictional Br. at 1, *Pomerance v. Homosassa Spec. Water Dist.*, 783 S.2d 1056 (Fla. 2001) [hereinafter Petr.'s Br.].

19. Homosassa Spec. Water Dist., *Preliminary Assessment Roll and Report* (Feb. 1993) (copy on file with Author) [hereinafter *District Report*].

20. *Pomerance*, 755 S.2d at 733.

the proposed construction."[21] The report also stated that the engineers calculated the assessment based upon the "front-foot" method in accordance with the District Charter.[22] The report explained that, under the front-foot method, the abutting properties "share in the cost of improvements constructed to benefit them according to the lineal feet of pipe required to transverse [sic] the front of the property benefitted."[23]

The Pomerances' property was assessed based on the front-foot method.[24] The District engineer halved the proposed front-foot assessment to compensate for the property's roughly triangular shape. The District board adopted the halved assessment.[25]

Following the imposition of the assessment, the Pomerances filed suit.[26] They raised two principal issues.[27] The first issue, dealing with substantial compliance with election requirements under the District Charter as applied to the vote to expand the District territory, was a key point in the trial court.[28] The trial court denied that challenge.[29] On appeal, the Fifth District quickly disposed of this issue,[30] and the Pomerances did not subsequently appeal this issue to the Florida Supreme Court. The second, and potentially more troubling, issue was the allegation that the property could not be developed because of potential harm to wetlands.[31] The Pomerances stated that this concern precluded any special benefit to the property from the waterline and, therefore, barred any special assessment against the parcel.[32]

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21. *District Report*, *supra* n. 19, at 1.

22. *Id*. at 4.

23. *Id*.

24. *Pomerance*, 755 S.2d at 734.

25. The Author learned of the assessment methods and calculations that the District engineer used as a result of the Author's role as counsel for the District and in discovery pending trial.

26. *Pomerance*, 755 S.2d at 733.

27. Final Judm. at 1–6, *Pomerance v. Homosassa Spec. Water Dist.*, No. 94-2070-LA, (Fla. Cir. Ct. 5th Dist. Aug. 21, 1998) [hereinafter Final Judm.].

28. *Id*. at 1–3.

29. *Id*.

30. The majority stated, "Since the Pomerance property was already within the district, the district was authorized to extend water service to it, and to assess the property therefor, regardless of the validity of [the vote to expand]." *Pomerance*, 755 S.2d at 733.

31. Final Judm., *supra* n. 27, at 3–5.

32. *Id*.

At trial, the Pomerances' experts testified that the property could not be developed.[33] As expected, the wetlands experts for the District disagreed with that assertion.[34] In particular, the District's lead expert stated that he was "confident" that wetlands-permitting agencies would permit reasonable use of the property.[35] The District experts provided lengthy testimony explaining the various reasonable mitigation steps that could accentuate the development potential of the property. One District expert opined that two acres could be developed with conservative on-site mitigation and three acres could be developed with conservative off-site mitigation, in addition to fill for access to the upland on the parcel.[36] The unrebutted testimony was that a roughly one-hundred-foot-long, twenty-five-foot-wide access road or driveway could provide access from U.S. Highway 19 to the upland portion of the property.[37]

Additionally, the Pomerances' own appraiser estimated developable-upland value in the area between $100,000 and $117,000 per acre.[38] He acknowledged that he could not place an actual valuation on the property without knowing the extent to which development could be permitted.[39]

The trial court found that the property might be developable, but that the Pomerances had never applied for any development permits.[40] Therefore, the court held that the Pomerances did not meet their burden of proving that the waterline did not specially benefit the parcel in question.[41] The court relied on the dual presumptions under Florida law that the water or sewer line provides a special benefit to those properties that are in proximity to it, and that a legislative determination of special benefit is correct.[42]

The court also rejected the Pomerances' argument that the District board arbitrarily determined the special benefit by the

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33. Tr. Transcr. at 115, 218, 247, *Pomerance v. Homosassa Spec. Water Dist.*, No. 94-70-LA (Fla. Cir. Ct. 5th Dist. Aug. 21, 1998).

34. *Id*. at 451–453, 471.

35. *Id*. at 455–456.

36. *Id*. at 462–463.

37. *Id*. at 462–463, 471.

38. *Id*. at 218–222, 465.

39. *Id*. at 220–221.

40. Final Judm., *supra* n. 27, at 4.

41. *Id*.

42. *Id*. at 5–6 (citing *Lake County v. Water Oak Mgt. Corp*., 695 S.2d 667, 669 (Fla. 1997)).

front-foot assessment method.[43] As stated above, the front-foot method allocates special assessments based on the linear feet of pipe or roadway that is constructed across the assessed property.[44] Florida case law, and the District Charter, rebuttably presume that the front-foot method accurately determines and allocates a special benefit from linear capital improvements.[45]

III. APPEAL TO THE FLORIDA SUPREME COURT

The Pomerances filed a Notice of Appeal, seeking discretionary jurisdiction of the Florida Supreme Court pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), on April 24, 2000.[46] They claimed that the decision of the Fifth District Court of Appeal conflicted with five decisions of the Florida Supreme Court: *City of Boca Raton v. State*,[47] *Lake County v. Water Oak Management Corporation*,[48] *South Trail Fire Control District v. State*,[49] *Sarasota County v. Sarasota Church of Christ, Incorporated*,[50] and *Collier County v. State*.[51] Ironically, the Florida Supreme Court upheld the assessment in every one of these cases except *Collier*. In summary, the Pomerances contended that the lower court decision conflicted with those cases by upholding an assessment despite "land use regulations which rendered the developability of the property either nonexistent or substantially impaired."[52]

The District vehemently opposed any contention that the Fifth District decision conflicted with any one of the string of cases that the Pomerances cited.[53] First, none of the cited cases

43. *Id*. at 5.

44. For a description of the front-foot method, see text accompanying *supra* notes 17 & 22–23.

45. 1963 Fla. Laws ch. 63-1222, § 17(a)-(b); *see City of Boca Raton v. State*, 595 S.2d 25, 29–31 (Fla. 1999) (holding that while front-foot or square-foot methods of assessments are more traditional and permitted pursuant to the Florida Statutes, other methods are also permissible); *City of Treasure Island*, 215 S.2d at 478 (stating that when special assessments are levied upon property bordering an improved street, it is presumed that the abutting owner receives a special benefit that justifies an additional tax contribution).

46. Fla. Const. art. V, § 3(b)(3); Fla. R. App. P. 9.030 (2001).

47. 595 S.2d 25 (Fla. 1992).

48. 695 S.2d 667 (Fla. 1997).

49. 273 S.2d 380 (Fla. 1973).

50. 667 S.2d 180 (Fla. 1995).

51. 733 S.2d 1012 (Fla. 1999).

52. Petr.'s Br., *supra* n. 18, at 3–4.

53. Respt.'s Br., *supra* n. 8, at 5.

addressed the property-developability issue that the Pomerances faced.[54] Second, *City of Boca Raton* was among the many Florida Supreme Court decisions holding that the front-foot method that the District utilized is presumed to determine and allocate special benefits accurately.[55] Third, *South Trail* relied on *Meyer v. City of Oakland Park*,[56] in which the Florida Supreme Court granted great deference to another assessment for utility (sewerage) line extensions.[57] In *Meyer*, the court upheld the determination of benefit, despite the property owner's conflicting evidence that the assessed improvement "would be a financial detriment rather than a benefit to the property assessed."[58] In *Sarasota County*, the court clarified the Florida test as being the following: "[T]he legislative determination as to the existence of special benefits . . . should be upheld unless the determination is arbitrary."[59] Based on the foregoing, the District requested that the court refuse to invoke discretionary jurisdiction.[60]

On September 19, 2000, the court accepted conflict jurisdiction and set oral argument.[61] Although the order accepting jurisdiction did not state the perceived conflict, the court's subsequent order dismissing the case after oral argument stated that the perceived conflict was with *Lake County*.[62] That determination underscores the framework within which the supreme court was reviewing *Pomerance*.

Assessments for water and sewer lines, imposed on abutting properties on a front-foot basis, are hornbook examples of valid special assessments.[63] Front-foot assessments have "traditionally been upheld as a fair and reasonable means of determining

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54. *Id*. at 7–9.

55. *See City of Boca Raton*, 595 S.2d at 31 (holding that the "front foot . . . methodolog[y] for apportioning costs of special improvement projects [is] more traditional" than other methods that may be used).

56. 219 S.2d 417 (Fla. 1969).

57. *Id*. at 420.

58. *Id*. at 419.

59. 667 S.2d at 184.

60. Respt.'s Br., *supra* n. 8, at 10. The District also argued that the Pomerances' jurisdictional brief improperly alleged facts from the trial-court record and from Judge Harris's dissent. *Id*. at 5. Any alleged conflict under Article V, Section 3(b)(3) of the Florida Constitution must be apparent on the face of the majority decision. *Reaves v. State*, 485 S.2d 829, 830 (Fla. 1986).

61. *Pomerance v. Homosassa Spec. Water Dist.*, No. SC00–912 (Fla. Sept. 19, 2000).

62. *Pomerance.*, 783 S.2d at 1056.

63. *E.g.* Osborne M. Reynolds, Jr., *Handbook of Local Government Law* § 99, 352 n. 9 (2d ed., West 2001).

assessments"[64] for nearly a century.[65] Local water, sewer, and roadway improvement projects also have been rebuttably deemed to provide special benefit to adjacent parcels equally if they are front-foot assessments.[66] Courts have long deferred to the legislative judgment of improvement authorities that determined and allocated special benefit of linear utility projects by front-foot assessments of adjoining properties.[67]

The cases deferring to special assessments for water and sewer lines and roadways deal with traditional special assessments for local improvements that benefit a narrow set of parcels.[68] However, the cases that the Pomerances cited constituted a dramatic expansion in assessment law. Throughout the 1990s, the Florida Supreme Court consistently allowed county-wide assessments in such cases as *Lake County v. Water Oak Management Corporation*, *Harris v. Wilson*, and *Sarasota County v. Sarasota Church of Christ, Incorporated*.[69] In those cases, the Florida Supreme Court was concerned with a new generation of increasingly creative, county-wide assessments, together with increasingly generalized benefits allegedly associated with them.[70] Because of their county-wide orientation, those 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

64. *Bodner*, 245 S.2d at 253.

65. *Louisville & Nashville R.R.*, 197 U.S. at 433.

66. *E.g. Utley v. City of St. Petersburg*, 144 S. 58, 59–60 (Fla. 1932); *Utley v. City of St. Petersburg*, 144 S. 57, 57–58 (Fla. 1932); *A. Coast Line R.R. v. City of Gainesville*, 91 S. 118, 121 (Fla. 1922).

67. *Supra* nn. 45–46 and accompanying text.

68. Reynolds, *supra* n. 63, at 352 n. 9.

69. 693 S.2d 945 (Fla. 1997).

70. *See Lake County*, 695 S.2d at 669 ("It is not necessarily that the benefits be direct or immediate, but they must be substantial, certain, and capable of being realized within a reasonable time."); *Harris*, 693 S.2d at 949 ("Because the amount of the assessment reflects the actual cost of providing . . . services . . . to the properties subject to the assessment, the cost is equally distributed among the assessed properties and bears a rational relationship to the benefits received by the properties assessed . . . ."); *Sarasota County*, 667 S.2d at 183 ("[T]he validity of a special assessment turns on the benefits received by the recipients of the services and the appropriate apportionment of the cost thereof.").

> 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 special 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.[71]

In *Lake County*, *Harris*, and *Sarasota County*, the court upheld assessments for county-wide stormwater facilities, fire-protection and solid-waste services, and a solid-waste disposal facility, respectively.[72] In each case, the court deferred to the local government's legislative determination of special benefit and allocation.[73] Justice Wells dissented vigorously in each case, contending that the majority eviscerated the traditional special-benefit test.[74] In *Lake County*, he objected that the majority's adoption of a "logical relationship" test between the service and the assessment "revises history and definitely erases the distinction between a special assessment and a tax."[75]

The court drew the line in *Collier County v. State*, holding that the county went too far when it imposed an "Interim Governmental Services Fee" to support eleven allegedly "growth-sensitive" public services.[76] 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."[77] As the court recognized, requiring only a rational relationship between a special assessment or impact fee and *county-wide* services would abolish the distinction between a fee and a tax.[78]

Unlike the assessments in *Collier County*, it cannot seriously

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71. 667 S.2d at 183 (citing Justice Grimes's analysis in *City of Boca Raton*, 595 S.2d at 29).

72. *Lake County*, 695 S.2d at 670; *Harris*, 693 S.2d at 946; *Sarasota County*, 667 S.2d at 182.

73. *Lake County*, 695 S.2d at 669; *Harris*, 693 S.2d at 948; *Sarasota County*, 667 S.2d at 185.

74. *Lake County*, 695 S.2d at 670 (Wells, J., dissenting); *Harris*, 693 S.2d at 949 (Wells, J., dissenting); *Sarasota County*, 667 S.2d at 187 (Wells, J., dissenting).

75. 695 S.2d at 671 (Wells, J., dissenting).

76. 733 S.2d at 1016.

77. *Id.* at 1017.

78. *Id.*

be suggested that the assessment that covered the Pomerance property was imposed for the benefit of the public at large rather than for the special benefit of the assessed properties. Singularly local in scope (nine acres),[79] the assessment was at the opposite end of the benefits spectrum from the county-wide assessments involved in the 1990s series of cases. Nothing in the Florida Supreme Court's analysis of those county-wide assessments casts doubt upon the validity of the traditional special-assessment application and methodology involved in the *Pomerance* case. Nothing in that recent series of cases suggests that the Florida Supreme Court abandoned the rule of judicial deference that it adopted in *Atlantic Coast Line Railroad v. City of Gainesville*[80] and has followed consistently ever since. Those county-wide assessment cases certainly do not call for strict scrutiny of garden-variety assessments for local improvements, as the Pomerances advocated.

IV. THE MORE DIFFICULT UNANSWERED ISSUE: VALIDITY OF ASSESSMENTS ON DEVELOPABLE LAND

Nonetheless, the Pomerances raised a question that would be more difficult to answer under changed circumstances: Would the assessment be valid if the Pomerances had applied for and been denied development permits for their property? Although the Pomerances' briefs focused more on the above-noted Florida Supreme Court cases,[81] the amicus curiae brief that the Pacific Legal Foundation filed in support of the Pomerances addressed this issue more squarely.[82] The Pacific Legal Foundation brief noted that

> [t]his case is not, of course, a regulatory takings case. But it does raise a closely related issue: [H]ow should courts treat assertions that the property has been rendered useless when determining whether a governmental agency has fairly assessed the affected property for a special benefit? Of particular import to this case is the question of what a landowner must do to prove that an assessment will not

79. Petr.'s Br., *supra* n. 18, at 1.

80. 91 S. 118, 121 (Fla. 1922).

81. Petr.'s Br., *supra* n. 18, at 3.

82. Br. Amicus Curiae of P. Leg. Found. in Support of Petrs., David M. & Richard C. Pomerance at 11, *Pomerance v. Homosassa Spec. Water Dist.*, 783 S.2d 1056 (Fla. 2001) [hereinafter Br. Amicus Curiae P. Leg. Found.].

benefit the assessed property.[83]

The Pacific Legal Foundation argued that the trial court and the Fifth District "raised the barrier too high for landowners who challenge a special assessment on the ground that regulations have rendered the property unable to derive any significant benefit from the project financed by the assessment."[84] It asserted that the lower courts' acceptance of a regulatory-takings argument was too onerous. In support of its argument, the Pacific Legal Foundation cited an opinion from the United States Circuit Court of Appeals for the Eleventh Circuit, *Zipperer v. City of Fort Myers*.[85] In *Zipperer*, the Eleventh Circuit noted that "a special assessment lien prioritization constitutes a constitutional deprivation only if it is so palpably punitive or arbitrary as to confer no benefit on the landowner, or 'force[s] a landowner to make an improvement that, while valuable to others, is useless to him.'"[86] The Pacific Legal Foundation observed as follows:

> To avoid [the] specter of an assessment being so disproportionate as to fail constitutional muster, therefore, Florida courts have been careful to ensure that there is an adequate relationship between the assessment and a benefit to the property. What the courts have not heretofore addressed however, is the case where property is so heavily burdened by regulatory restrictions that its ultimate development is unlikely or impossible. Put another way, the Court in *Norwood* pointed out that an unjustifiable assessment could give rise to a claim for a taking. But what if the property may already be subject to a taking through confiscatory regulation?[87]

The Pacific Legal Foundation correctly observed that a plaintiff seeking a regulatory-takings judgment "must first obtain

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83. *Id*. at 3.

84. *Id*. at 4.

85. 41 F.3d 619, 625 (11th Cir. 1995) (quoting *Furey v. City of Sacramento*, 780 F.2d 1448, 1454 (9th Cir. 1986)). *Zipperer* is quoted in Brief Amicus Curiae of Pacific Legal Foundation, *supra* n. 82, at 7.

86. Br. Amicus Curiae P. Leg. Found., *supra* n. 82, at 8.

87. *Id*. (citing *Village of Norwood v. Baker*, 172 U.S. 269, 279 (1898)). If, in fact, the question was "of great public importance," rather than "directly conflict[ing]," then the Pomerances should have sought supreme court discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v) (2001), rather than Subsection (iv). Because the supreme court's order dismissing the case after oral argument did not explain why the court no longer believed there was a conflict, we do not know if the other Section would have conferred jurisdiction. *Pomerance*, 783 S.2d at 1056.

a final agency decision that the regulation has actually denied the applicant economically beneficial or productive use of the property."[88] The amicus brief cited *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[89] and numerous other cases in support of this rule of law.[90]

The Pacific Legal Foundation stated that a landowner "not seeking inverse condemnation damages, but merely relief from an [allegedly] inappropriate assessment," should not be held to as exacting and difficult a standard as a regulatory-takings plaintiff.[91] Its rationale was that,

> under the trial court's test, a [special] assessment could be imposed, upheld, and paid for long before the landowner is able to meet a takings-like standard that the property cannot utilize the benefit because of existing regulatory constraints. That, of course, would sidestep entirely the Florida Supreme Court's admonition that there must be a sense of "proportion" or "logical relationship" between the benefit and assessment.[92]

Instead, the Pacific Legal Foundation proposed a standard requiring the landowner to demonstrate,

> based on expert evidence and opinion that, (1) the property is burdened by substantial regulatory constraints and (2) that these regulatory constraints on their face make it more likely than not that the property will not benefit from the proposed assessment.[93]

The District disagreed with the contention that there should be a lower burden in opposing an assessment than in a regulatory-takings case under these facts.[94] A fundamental difference is that 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 case obtains compensation, but loses the property to the condemning authority. The Pomerances conceivably could have obtained a windfall benefit to their

88. Br. Amicus Curiae P. Leg. Found., *supra* n. 82, at 9.

89. 473 U.S. 172, 186–194 (1985).

90. Br. Amicus Curiae P. Leg. Found., *supra* n. 82, at 9–10.

91. *Id*. at 14.

92. *Id*. at 13.

93. *Id*. at 14.

94. *See* Respt.'s Br., *supra* n. 8, at 7–8 (agreeing that the "logical relationship" standard is appropriate for review of special assessments).

property if the assessment for the extension of the waterline was denied because of the speculation that the property was unable to be developed, but they then were able to develop property or sell it for an increased price because of the extension of the potable waterline.

Nonetheless, the Pomerances' claim would be far stronger if they had actually applied for and had been denied permits to develop their property. A special assessment is valid only if it actually provides a benefit to the assessed property.[95] To the extent that a special assessment exceeds the benefit, it constitutes a taking of the assessed parcel without due process[96] or just compensation.[97] Accordingly, Florida case law addressing special assessments *should* be consistent with regulatory-takings authority. Just as one cannot claim a standard regulatory taking until reasonable permit attempts are denied,[98] the ripeness bar should also apply to parallel special-assessment challenges.

The Florida Supreme Court certainly indicated at oral argument that it was prepared to review a *ripe* case that challenged an assessment against developable land. The court peppered the District's attorney with questions for twenty minutes about the equity of assessing undevelopable land for a waterline. The *Pomerance* case apparently raised an issue that troubled the court. Despite the troubling issue, the court may well have retained jurisdiction and reversed the lower courts if the Pomerances had been able to *prove* that their land was unable to be developed. This appellee's attorney believes that the court is waiting for the "right" case to make that point.

However, the wait might be fruitless. A practical impediment limits the chances of a regulatory taking based on similar facts. The complete denial of development permits would itself subject any permitting agency to a regulatory-takings challenge. If that claim was successful, then the permitting authority would receive title to the parcel from the thwarted landowner. In any event, an assessing-utility authority is far less likely to assess a parcel that has been denied permits than a parcel that is merely acknowledged to contain wetlands.

Another irony is the overall impact of such an assessment challenge. An objection to utility assessment of a property with

95. *City of Boca Raton*, 595 S.2d at 29.
96. *City of Treasure Island*, 215 S.2d at 475–476.
97. *Summerland, Inc. v. City of Punta Gorda*, 134 S. 611, 613 (1931).
98. Reynolds, *supra* n. 63, at § 125, 495.

wetlands harms any regulatory-takings claim if development permits are subsequently denied. Good-faith, investment-backed expectations are central to a regulatory-takings claim.[99] A landowner who pays assessments in good-faith furtherance of a development scheme should be able to show those payments as part of its basis in the parcel. Certainly, that landowner should be able to show access to utilities in determining fair-market value.[100] Nonetheless, a landowner who objects to an assessment due to the alleged inability to develop has severely undermined any claim that the payment of the assessment is a good-faith investment that should be reflected in the parcel's perceived fair-market value. Further, the objection harms the claim that proximity to the utility increases the fair-market value.[101] The overarching result is devastation of any claim of reasonable, investment-backed expectations in the parcel. This might preclude *any* regulatory-takings claim if permits are denied.[102]

Pomerance is an extreme example of front-foot assessments, but it *is* consistent with prevailing law. One may assume that the Florida Supreme Court wants to rein in assessments of parcels that contain substantial wetlands. Nonetheless, practical limitations mean that case might not be coming for a while.

99. *State Dept. of Envtl. Protection v. Burgess*, 772 S.2d 540, 543 (Fla. Dist. App. 1st 2000).

100. *See* Fla. B., *Florida Eminent Domain Practice & Procedure* § 9.35, 9-64 to 9-65 (5th ed., Fla. B. 1996 & Supp. 2000) (stating that the relationship between a piece of land and utilities is one factor that a buyer and seller consider in determining the fair-market value of the land).

101. *See Burgess*, 772 S.2d at 543 (holding that the owner's absence of good-faith expectations that the property would be developed barred a takings challenge).

102. *Id*.