IN THE CIRCUIT COURT
FOR THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR LEE COUNTY, FLORIDA

CITIZENS ACTION COMMITTEE OF
CAPE CORAL INCORPORATED [CACOCCI]
aka "Cape Coral Watchdogs" and
J.C. RODRIGUEZ, an individual
property owner,

Plaintiffs,

v.

THE CITY OF CAPE CORAL, a Florida
municipal corporation,

Defendant.

_____/

Case No. 04-CA 000729 JSC
CLASS ACTION

SUMMARY FINAL JUDGMENT

THIS CAUSE, having come before the Court on Defendant City of Cape Coral's Motion for Summary Judgment, and the Court being fully advised in the premise and having considered the submittals of the parties and arguments of counsel makes the following determinations:

STATEMENT OF THE CASE

On or about February 20, 2004, Plaintiffs' CITIZENS ACTION COMMITTEE OF CAPE CORAL INCORPORATED ("CACOCCI") and J.C. RODRIGUEZ (collectively, "Plaintiffs"), instituted an action against the City of Cape Coral (the "City"), its Council members, and its Mayor. The Complaint asserted six (6) counts, which the City moved to dismiss. On November 30, 2004, the

Court entered an Order dismissing the Complaint without prejudice.

On or about December 20, 2004, Plaintiffs filed its Amended Complaint against only the City contesting the validity of the City's expansion of its water and sewer utility systems and the imposition of special assessments to fund such expansion. Motions for Certification of a Class and Issuance of a Temporary Injunction were denied without prejudice. As amended, Plaintiffs' Complaint sets forth various claims which can be summarized as follows:

1. Whether the utility expansion and imposition of special assessments were enacted in violation of the Sunshine Law;

2. Whether the meetings on the utility expansion were held at a reasonable time and whether the notices for those meetings were adequate;

3. Whether the special assessments are valid under Florida law;

4. Whether the City may proceed under its home rule powers in the implementation of its special assessments rather than under the provisions of Chapter 170, Florida Statutes;

5. Whether the City can require Plaintiffs to connect to the City's utility systems after receiving notice of availability and thereafter destroy their septic tanks.

SUMMARY JUDGMENT STANDARD

Summary judgment in favor of the moving party is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(c). The Court finds that there are no genuine issues as to any material facts and that the City is entitled to a judgment as a matter of law.

FINDINGS OF FACT

In the 1980s, the City initiated a program to extend water, wastewater, and non-potable (irrigation) water utility lines to properties within the boundaries of the City. In furtherance of that process, the Council enacted Ordinance 85-87 on November 23, 1987, which established procedures for the approval of water and sewer facilities and improvements or "projects" and for the imposition and levying of special assessments to finance the acquisition and construction of water and sewer improvements within the boundaries of the City.

On March 8, 1999, the Council enacted Ordinance 8-99, which superseded Ordinance 85-87. Ordinance 8-99 authorizes the Council to create assessment areas by resolution, sets forth the procedures for the creation of the assessment areas, and

authorizes the imposition of special assessments to fund the construction of local improvements to serve those properties within the assessment areas. Ordinance 8-99 specifically provides that the City would levy the special assessments pursuant to its home rule powers.

Pursuant to those powers and the procedures contained in Ordinance 8-99, the City instituted various water and sewer improvements. These improvements consisted of water, sewer and irrigation improvements within small defined areas of the City. The purpose of these improvements was to extend water and sewer services to the properties within these areas. The cost of these improvements would be funded by the levy of special assessments against the properties which would receive the service and the benefit of these improvements. The Utility Areas within which these improvements were to be made consisted of the Pine Island Road Utility Area, Southwest One Utility Area, Southwest Two Utility Area and Southwest Three Utility Area.

The procedures utilized to approve these projects and to impose the special assessments to fund them were pursuant to the requirements of Ordinance 8-99. In each of the Utility Areas, the City Council would adopt an Initial Resolution setting forth the improvements to be made in that Utility Area and a

preliminary determination of the assessment amounts to fund these improvements. A separate resolution would be adopted for each type of utility improvement constructed within the respective Utility Area. Each Initial Resolution would also schedule a subsequent public hearing to consider the adoption of a Final Resolution and required that notice of the public hearing be published in a newspaper of general circulation and mailed to each property within the Utility Area that would be subject to the assessments.

Notices of the respective public hearings were published in the Cape Coral Daily Breeze (the "Breeze"). The *Breeze* has been published in Cape Coral for forty years and is distributed six times per week (Monday - Saturday). The *Breeze* contains information of a public character, interest or of value to the residents or owners of property in Cape Coral and is available to the public generally for the publication of official or legal notices. The *Breeze* is for sale to the public generally through subscriptions, in machines or by bulk for resale. The *Breeze* is also distributed free to non-subscribers on Saturday. The *Breeze* is written in the English language and therefore, at least 25% of its words are in the English language. The *Breeze* is also qualified to be entered as a second-class matter or as a periodical at a post office in the City of Cape Coral, Lee

County, Florida. The *Breeze* satisfies the requirements of a newspaper authorized to publish legal notices as contained in § 50.011, Fla. Stat.

Additionally, in accordance with the requirements of the Initial Resolutions direct notice was mailed via first class mail to each owner of property within each Utility Area which would be subject to the special assessments. To perform this mailing, the City contracted with Government Services Group, a private consulting firm with experience in this area. Government Services Group would mail the notices utilizing the addresses contained within the data base of the Lee County Property Appraiser's office. The City also established a procedure that if any mailed notice was returned undelivered, they would attempt to update the address information for that property owner and resend the notice.

For each of the Utility Areas, a public hearing was held by the City Council that had been noticed both by publication and through the individual mailed notice to each affected property owner. At each of those respective meetings, the City Council adopted the Final Resolutions which approved the water, sewer and irrigation expansion programs and imposed a special assessment against those properties that would receive the service to pay for these improvements. A separate Final

Resolution was adopted for each utility improvement within the given Utility Area.

All of the public hearings at which the Final Resolutions in this case were considered were held at 5:00 p.m. In the past, Council meetings had generally begun at 1:00 p.m., however, to increase public participation, the Council changed its meeting time to 5:00 p.m. At all times relevant to this lawsuit, the meetings began at 5:00 p.m.

In addition to the public hearings for the adoption of the Initial Resolution and the Final Resolutions, the City also held various informational sessions for the public. These meetings were advertised and allowed residents to attend and obtain information about the utility expansion program.

Initially, after the completion of the Pine Island Road project, the remaining projects were to commence in numerical order, i.e. Southwest One followed by Southwest Two and concluding with Southwest Three. However, growth in the Southwest Three Area was more rapid than expected, so the City decided to begin the Southwest Three project prior to the Southwest Two project. This resulted in the construction of the water and sewer improvements within the Southwest Three Utility Area substantially earlier than had been originally planned. This resulted in various property owners being required to begin

payment of the special assessments earlier than they had anticipated.

CONCLUSIONS OF LAW

A. Citizens Action Committee of Cape Coral, Inc. fails to establish "association standing"

As a preliminary matter, the standing of the CACOCCI to represent the interests of its purported members in this action has been raised by the City. The CACOCCI is not subject to the assessment programs and holds no property in its own name. Its standing, if it exists, is on behalf of its members. The undisputed facts establish that the CACOCCI lacks "associational standing."

Under Florida law, in general,

> an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Florida Home Builders Ass'n v. Dep't of Labor & Employment Sec., 412 So. 2d 351, 353 (Fla. 1982).

CACOCCI has submitted numerous affidavits, but such affidavits fail to state that those individuals are members of CACOCCI. Since the record reveals no evidence showing CACOCCI's membership and that any of such members has standing to sue in

his or her own right, CACOCCI lacks "associational standing." CACOCCI similarly fails to establish the second prong as the record lacks sufficient evidence to show CACOCCI's purpose and how the rights it seeks to protect are germane to this purpose. Finally, CACOCCI lacks associational standing because it seeks relief in the form of damages, which is inappropriate. See Warth v. Seldin, 422 U.S. 490, 515, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (!975). Though the Court finds that CACOCCI lacks "associational standing," the City is nevertheless entitled to a judgment as a matter of law even if they are deemed to have standing for the purpose of the issues raised in this matter.

B. The special assessments were enacted in accordance with the Sunshine Law

In its Amended Complaint, Plaintiffs assert three grounds upon which they claim the City violated the Florida Sunshine Law and Article I, section 24 of the Florida Constitution. Plaintiffs allege the Council violated the Sunshine Law and Article I, section 24 of the Florida Constitution by holding meetings with one another, staff, and third parties to discuss various proposals regarding the special assessment for central water and sewer facilities without noticing the meetings to the public or holding the meetings open to the public. (Pls.' Amend. Compl., ¶¶ 26-28, 59.) Second, Plaintiffs claim that the City violated the Florida Sunshine Law by providing deficient

notice of the public meetings concerning the special assessment because such notice was not published in a newspaper of general circulation and by holding meetings at inappropriate times. (Pls.' Amend. Compl., ¶¶ 14, 29, 33-36, 58.) Finally, Plaintiffs assert City Council members violated the Florida Sunshine Law by utilizing computer "instant messaging" during a public meeting. (Pls.' Amend. Compl., ¶¶ 60-61.)

1. Council member meetings did not violate the Florida Sunshine Law

In their Amended Complaint, Plaintiffs allege that Utility Engineer Wayne Wolfharth met privately with other staff and Council members in violation of the Sunshine Law. (Pls.' Amended Compl., ¶¶ 26-27, 59.) However, the evidence in the record shows that any meetings between Mr. Wolfharth and staff or a Council member was purely for "fact-finding" purposes and at no time did two "decision-makers" meet to discuss matters that would come before the Council so as to bring such meetings within the ambit of the Sunshine Law.

The Florida Sunshine Law applies to any gathering of two or more members of the same board or commission to discuss a matter on which foreseeable action will be taken by that board or commission. See § 286.011, Fla. Stat.; Hough v. Stembridge, 278 So. 2d 288 (Fla. 3d DCA 1973). Nevertheless, not all meetings are governed by the Sunshine Law. Meetings between a council

member and his or her staff are generally not governed by the Act. Occidental Chemical Co. v. Mayo, 351 So. 2d 336, 341 (Fla. 1977), disapproved in part on other grounds, Citizens v. Beard, 613 So. 2d 403 (Fla. 1992); School Bd. of Duval County v. Florida Publishing Co., 670 So. 2d 99, 101 (Fla. 1st DCA 1996). The Sunshine Law only applies when the group, and not an individual member, has decision-making authority. Cape Publications, Inc. v. City of Palm Bay, 473 So. 2d 222, 225 (Fla. 5th DCA 1985); Lyon v. Lake County, 765 So. 2d 785 (Fla. 5th DCA 2000) Therefore, when a council member privately congregates with his or her staff or other individuals for purposes of "fact-finding," the meeting is not within the purview of the Sunshine Law. Bennet v. Warden, 333 So. 2d 97 (Fla. 1976); Dascott v. Palm Beach County, 877 So. 2d 8, 12 (Fla. 4th DCA 2004).

The undisputed facts show that no meetings occurred at which two or more "decision-makers" discussed a matter on which foreseeable action would have been taken by the Council and any meeting between staff and a member of the City Council was solely for the purpose of fact finding. The uncontroverted facts also establish that to the extent that any Council members were present together outside of public meetings, that these

occasions were for social purposes and no official actions were taken, nor discussed.

Plaintiffs also allege that a member of the City Council (Mr. Rosado) violated the Sunshine Law by communicating via "instant messaging" with other members of the City Council during a meeting. (Pls.' Amend. Compl., at ¶ 61.) The record contains no evidence that Mr. Rosado ever utilized instant messaging during Council meetings, let alone used such medium to communicate with other Council members. Rather, the record establishes that he did not.

Plaintiffs also assert that a purported past violation of the Sunshine Law by Arnold Kempe and Richard L. Stevens, as reported in a Report of the Grand Jury, supports their claim that a violation of the Sunshine Law has occurred with respect to this case. This argument is unpersuasive, as there is no evidence in the record demonstrating the relevance of that violation to the issues presented in Plaintiffs' Amended Complaint. To the contrary, that violation and Plaintiffs' claims are wholly unrelated.

2. The City Provided Proper Notice of its Meetings

The Sunshine Law requires the City to give "reasonable notice" of its meetings. § 286.011(1), Fla. Stat. The statute does not define "reasonable notice" and there are no guidelines

governing notice for all meetings. Thus, the quality of notice depends on the facts and circumstances of the individual situation. Yarbrough v. Young, 462 So. 2d 515 (Fla. 1st DCA 1985); Rhea v. City of Gainesville, 574 So. 2d 221 (Fla. 1st DCA 1991).

The City provided "reasonable notice" to its citizens of its public hearings, consistent with the requirements of its Ordinances and the Sunshine Law. The City published notices in the *Breeze*, which is a newspaper of general circulation within the City. The City further provided affected property owners with individual mailed notice in a manner that is reasonably calculated to reach the intended party. Plaintiffs assert that a genuine issue of material fact exists because several of its members allegedly did not receive such notices, however, this is not the standard to be applied. The standard is whether the notice provided is reasonable and not whether each and every person actually received and read the notice. The Court finds that the notice provided for the City's public meetings was reasonable and consistent with the requirements of the Sunshine Law and its Ordinances.

3. The time of the City's meetings was not unreasonable

Plaintiffs assert that the Sunshine Law was violated because meetings were held at inconvenient times. This claim is

without merit. The undisputed evidence established that previously the meetings were held at 1:00 p.m. To increase public participation, the Council changed the meeting time to 5:00 p.m. At all times relevant to this lawsuit, the public meetings were held at 5:00 p.m. There is no requirement under the Sunshine Law that the meetings be held at a specific time. The issue is whether the timing of a meeting is so unreasonable as to effectively deny public participation. That is not present in this matter, the scheduling of a hearing to begin at 5:00 p.m. is a reasonable time to allow public participation. Additionally, the evidence establishes that meetings of the City Council were also televised and recordings of the meeting available to the public. The scheduling of meetings is a legislative function and unless clearly arbitrary, the determination of the governing body should prevail.

C. The challenged ordinances created valid special assessments

For a special assessment to be valid under Florida law, the assessment must satisfy a two pronged test. First, the assessed property must derive a special benefit from the improvement or service provided by the assessment. City of North Lauderdale v. SMM Props., Inc., 825 So. 2d 343 (Fla. 2002); City of Naples v. Moon, 269 So. 2d 355 (Fla. 1972); Atlantic Coast Line R. Co. v. City of Gainesville, 91 So. 118, 121 (Fla. 1922). Second, the

special assessment must be fairly apportioned among the benefited properties. City of Boca Raton v. State, 595 So. 2d 25, 30 (Fla. 1992).

In determining whether these two criteria have been satisfied, courts properly defer to the enacting body's legislative findings unless the decision was arbitrary. Sarasota County v. Sarasota Church of Christ, 667 So. 2d 180, 184 (Fla. 1995). The City in its adopted resolutions made such findings and, absent a showing that these findings are arbitrary, the Court should defer to those determinations.

1. The assessed property derives a special benefit from the services provided by the assessment

To satisfy the first prong for a valid special assessment, the property subject to the special assessment must receive a special benefit from the improvement or service being provided. However, the improvement or service need not provide a "unique benefit"; "rather the test is whether there is a 'logical relationship' between the services provided and the benefit to real property." Lake County v. Water Oak Management Corp., 695 So. 2d 667, 669 (Fla. 1997).

Property has been found to receive a special benefit from a variety of services or improvements including, water, sanitary sewers, stormwater, street lights, fire service, solid waste services, roads and sidewalks. Rushfeldt v. Metropolitan Dade

County, 630 So. 2d 643, 645 (Fla. 3d DCA 1994), rev. den., 639 So. 2d 980 (Fla. 1994). In the present case, the purpose for which the City imposed the special assessments -- the expansion of water, sewer, and non-potable water lines -- has been repeatedly upheld as providing the requisite special benefit so as to allow the improvements to be funded by special assessments. See Meyer v. City of Oakland Park, 219 So. 2d 417 (Fla. 1969); Hallandale v. Meekins, 237 So. 2d 318 (Fla. 4th DCA 1970), aff'd, 245 So. 2d 253 (Fla. 1971); Murphy v. City of Port St. Lucie, 666 So. 2d 879 (Fla. 1995).

The properties within the City, subject to the special assessments, receive a special benefit through better quality and more reliable water and sewer service, which will add to the use and enjoyment of the property. Moreover, the undisputed record establishes that properties subject to the assessments will also receive a special benefit through increase in property values greater than the amount of the special assessment. An increase in property values has been recognized as a special benefit to property. See Meyer, 219 So. 2d 417. The Court finds that the expansion of the water and sewer improvements provides a special benefit to the property that are subject to the assessment.

2. The costs of providing the special assessment program are fairly and reasonably apportioned among the benefited properties

The City's special assessment also satisfies the second prong of the test, which requires the costs of the special assessment to be fairly and reasonably apportioned among the benefited properties. City of Boca Raton, 595 So. 2d at 29; Atlantic Coast Line R. Co. v. City of Winter Haven, 112 Fla. 807, 813, 151 So. 321, 323 (Fla. 1933).

Property subject to the special assessments is required to pay only its fair share of the cost of the improvement and no more. To fairly and reasonably apportion the costs of the improvements, the City allocated the actual costs based on the square footage of the properties within the respective Utility Area. This is a reasonable allocation method and one that has been upheld by Courts in the assessment of other improvements.

The City also provided for betterment fees, which allowed a property owner outside the Utility Area to nevertheless connect to the utility lines by paying the fees set in the respective ordinances, subject to approval of the City Council. Plaintiffs argue that the amount of the betterment fees differ from the assessment amount and therefore such fees are invalid. However the betterment fees are calculated differently from the assessment in that they take into account the cost that a

developer is actually required to expend in extending lines to connect into the City's system. Those are costs that the City would have to bear under the assessment program. The provisions relating to betterment fees are reasonable and not inconsistent with the levy of special assessments by the City. The City's assessments are fairly apportioned and satisfy the second prong of the test for a valid special assessment.

Plaintiffs also raise the failure of the City to comply with the requirements of Chapter 170, Fla. Stat. The water and sewer expansion program and the assessments imposed to fund it are pursuant the City's home rule powers. Having elected to proceed under such authority, it need not comply with the requirements of Chapter 170. Chapter 170 is a supplemental, additional and alternative procedure which may be used for the making of various local improvements. However it is not the exclusive method available to local government. See § 170.21, Fla. Stat.; City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992).

3. The modification of the construction sequence does not render the assessment invalid

One of the most significant areas of concern expressed by the Plaintiffs is the modification of the construction sequence, whereby the Southwest Three Utility Area was completed prior to the Southwest Two Utility Area. Though the Utility Areas were

initially planned to be constructed in numerical sequence, a larger increase in growth in the Southwest Three Utility Area required that its construction be scheduled prior to that of the Southwest Two Utility Area. Though this modification in the sequence of the construction may have resulted in the imposition of assessments earlier than anticipated, that does not render them invalid. The modification of the construction schedule was the result of a change in circumstances and based upon a reasonable evaluation of need in the respective Utility Areas. As such, no cause of action is stated as to this modification.

D. The City can require Plaintiffs to connect to the City's utility system

The City may require the citizenry within an assessment area to connect to utility lines once that service is available. Keys Citizens for Responsible Gov't, Inc. v. Florida Keys Aqueduct Auth., 795 So. 2d 940 (Fla. 2001); Hutchinson v. City of Valdosta, 227 U.S. 303, 33 S. Ct. 290, 57 L. Ed. 520 (1913); City of Trenton v. New Jersey, 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937 (1923); Peoples Water Service v. Adkinson, 184 So. 2d 707, (Fla. 1st DCA 1966).

Plaintiffs assert that the City's Ordinances, which require connection to the City's system within 180 days of its

availability, is contrary to § 381.00655, Fla. Stat.[1] That provision requires connection to available sewer systems within one (1) year if the property owner's current sewage treatment and disposal system is functioning and ninety (90) days if the property owner's system is in disrepair. However, that provision is not a limitation on the ability of the City to provide more stringent requirements, as that section specifically provides: "Nothing in this paragraph limits the power of a municipality or county to enforce other laws for the protection of the public health and safety." § 381.00655(1)(a), Fla. Stat.

In addition, the City can lawfully require citizens within the Utility Areas to cease use of their septic tanks and destroy the same and such government actions do not constitute an unconstitutional taking. Under Florida law, the City can obligate its citizens to discontinue use of existing septic tanks when the City finds that it is reasonable to do so to protect the health and welfare of the population. State v. City of Daytona Beach, 160 Fla. 204, 207, 34 So. 2d 309 (1948). Moreover, the City can require the destruction of existing septic tanks as an abandoned septic tank poses a threat to

[1] Initially the City required connection within 90 days, however, that Ordinance has been amended and it currently requires connection within 180 days of availability.

public health. Logan v. Childs, 51 Fla. 233, 41 So. 197 (Fla. 1906). Such actions do not constitute a taking.

Plaintiffs have filed various documents purporting to raise a genuine issue of material fact. However, even to the extent that such documentation is adequate under Fla. R. Civ. P. 1.510, the Court finds that it does not raise such an issue. Viewed in their entirety, the documentation establishes only that there is disagreement as to the need for the water and sewer expansion program, the financial burden of the assessments, and that the individuals were upset at the timing of the expansion into their particular Utility Area. Mere disagreement with the decisions of the City Council does not raise a genuine issue of material fact.

The Court finds that all other claims of the Plaintiffs are without merit. For the foregoing reasons, there are no genuine material facts in dispute and Defendant is entitled to judgment as a matter of law.

NOW THEREFORE, it is Ordered and Adjudged that the Defendant's Motion for Summary Judgment is granted and Summary Final Judgment is entered on behalf of the Defendant as to each and every claim asserted by the Plaintiffs.

DONE AND ORDERED in chambers at Fort Myers, Lee County, Florida, this 21 day of April, 2006.

JOHN S. CARLIN
CIRCUIT COURT JUDGE

Copies furnished to:

Gregory T. Stewart
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