IN THE SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

STATE OF FLORIDA,

Defendant/Appellant,

v. CASE NO. 83,103

THE CITY OF PORT ORANGE, FLORIDA, a political subdivision of the State of Florida,

Plaintiff/Appellee.

AMICUS CURIAE BRIEF ON BEHALF OF THE FLORIDA LEAGUE OF CITIES, INC.

Kraig A. Conn
Assistant General Counsel
Florida League of Cities, Inc.
201 West Park Avenue
Post Office Box 1757
Tallahassee, Florida 32302
(904) 222-9684
Florida Bar #0793264

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT AND STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

This Brief is submitted on behalf of Amicus Curiae, the Florida League of Cities, Inc., in support of the position of Appellee, the City of Port Orange, Florida.

Amicus League adopts and incorporates by reference arguments concerning the funding of local streets from user fees and the creation of a transportation utility fee briefed by Appellee City of Port Orange.

STATEMENT OF THE CASE AND FACTS

Amicus League adopts and incorporates by reference the Statement of the Case and Facts contained in Appellee City of Port Orange's Brief.

SUMMARY OF ARGUMENT

The City of Port Orange had the home rule powers under Art. VIII, Sec. 2(b), Fla. Const., and Ch. 166, Fla. Stat., to adopt a transportation utility ordinance and user fee. Explicit constitutional or statutory authorization to adopt the user fee was not necessary. Also, the transportation utility fee is a reasonable and valid user charge for use of the City's roadway system and is not an unauthorized tax.

Imposing a transportation utility fee upon the citizens of the City of Port Orange does not abrogate those citizens' right to travel. Rather, the fee is a reasonable response of the City to fund, in part, provision of the City's roadway system.

ARGUMENT

ISSUE I

THE CITY OF PORT ORANGE HAD THE HOME RULE POWERS TO ADOPT A TRANSPORTATION UTILITY ORDINANCE AND USER FEE WITHOUT EXPLICIT CONSTITUTIONAL OR STATUTORY AUTHORIZATION.

A. Preliminary Statement

Amicus League asserts that the collective analysis and discussion in Appellee's Brief, Amicus League's Brief and the other briefs submitted on Appellee's behalf will show that the City of Port Orange had the municipal home rule powers to adopt the transportation utility fee and that the fee is a reasonable and valid user charge for use of the City's roadway system. With this in mind, there are several tenets of municipal law useful in guiding this Court in addressing the transportation utility fee issue. Initially, this Court has recognized that:

> Where an ordinance is within the power of the municipality to enact it is presumed to be reasonable, unless its unreasonable character appears on its face. . . . If reasonable argument exists on the question of whether an ordinance is arbitrary or unreasonable, the legislative will must prevail. (Citations omitted)

City of Miami v. Kayfetz, 92 So. 2d 798, 801 (Fla. 1957). Stated somewhat differently, but conveying the same message, is this Court's statement:

> When construing statutes, the courts must assume that the Legislature intended to enact an effective law. Statutes are presumptively valid and constitutional, and will be given effect if possible. All doubts will be resolved in favor of constitutionality. Acts of the Legislature are presumed valid and an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. (Citations omitted)

A.B.A. Industries, Inc. v. City of Pinellas Park, 366 So. 2d 761, 763 (Fla. 1979). It is well settled that statutory rules of construction are applicable to municipal ordinances. Rinker Materials Corporation v. City of North Miami, 286 So. 2d 552, 553 (Fla. 1973).

"It is a fundamental tenet of municipal law that when a municipal ordinance of legislative character is challenged in court, the motives of the commission and the reasons before it which induced passage of the ordinance are irrelevant." City of Pompano Beach v. Big Daddy's, Inc., 375 So. 2d 281, 282 (Fla. 1979). "If the legislature has determined that an activity is for a municipal purpose, there will be no interference from the courts absent a clear abuse of discretion." City of Boca Raton v. Gidman, 440 So. 2d 1277, 1280 (Fla. 1983).

This Court has, on several occasions, applied the above tenets of law in cases involving utility activities of municipalities. The Town of Riviera Beach v. State, 53 So. 2d 828 (Fla. 1951), decision involved the acquisition and operation of a municipal water supply system. In Town of Riviera Beach, this Court recognized that a municipality "possesses legislative powers which it may exercise in a sovereign capacity; also a proprietary power which it may exercise for the private advantage of the inhabitants or for the private advantage of the municipality." Id. at 831. In relation to the operation of the municipal water system, this Court stated, "[c]ourts cannot interfere with reasonable discretion exercised by a town council in the management of one of its

utilities." Id.

This Court continued in Town of Riviera Beach to discuss judicial interference with the exercise of discretionary powers of municipal officials and quoted, with approval, from McQuillin, Municipal Corporations, Section 10.33 (3d Ed.):

> "Assuming that the municipal authorities have acted within the orbit of their lawful authority, no principle of law is better established than that courts will not sit in review of proceedings of municipal officers and departments involving legislative discretion, in the absence of bad faith, fraud, arbitrary action or abuse of power. The rule has been stated as follows: 'Where the law or charter confer upon the city council, or local legislature, power to determine upon the expediency or necessity of measures relating to local government, their judgment upon the matters thus committed to them while acting within the scope of their authority cannot be controlled by the courts.' Where a municipal board is authorized to do a particular act in its discretion, courts will not control that discretion unless manifestly abused, nor inquire into the propriety, economy and general wisdom of the undertaking, or into the details of the manner adopted to carry the matter into execution. A court cannot substitute its judgment for that of the municipal authorities if there is room for debate. Another statement of the rule is as follows: 'With the exercise of discretionary powers, courts rarely, and only for grave reasons, interfere. These grave reasons are found only where fraud, corruption, improper motives or influence, plain disregard of duty, gross abuse of power, or violation of law, enter into and characterize the result. Difference in opinion or judgment is never a sufficient ground for interference.' If the result of the given action, as the letting of a contract for an improvement, the construction and operation of a particular utility or the enactment of a certain ordinance, is an economic mistake, a municipal extravagance, and an improper burden upon the taxpayers, as so often urged in contests of this nature, the prevailing answer of the court is that the remedy, if any exists, is at the ballot box, rather than by injunction or other court proceeding. It may be stated broadly that this immunity from judicial control embraces the exercise of all municipal powers, whether legislative of administrative, which are strictly discretionary." (Emphasis added)

Town of Riviera Beach, 53 So. 2d at 831-832.

This Court has also addressed municipal utility issues in Mohme v. City of Cocoa, 328 So. 2d 422 (Fla. 1976). The issue in Mohme centered on disparate charges for water service between city resident customers and non-city resident customers. This Court held that a statute authorizing municipalities to add a surcharge of up to 50% on the rates and charges to consumers outside the municipal boundaries was not unreasonable or discriminatory to the non-city residents. Id. at 425. In addition, this Court recognized the "principle of law that rate-setting for municipal utilities is a legislative function to be performed by legislative bodies like local municipal governments" and that courts should only intervene to strike down unreasonable or discriminatory rates. Id. at 424-425.

Essentially, Appellant argues that the Port Orange transportation utility fee violates Florida's Constitution because it is an unauthorized tax. Under the case law cited above, Appellant had a very difficult burden of proof at trial, which carries over to this Court. That is, legislative acts, including municipal ordinances, are presumed constitutional and will be overturned only if they are arbitrary or unreasonable. City of Miami v. Kayfetz and Rinker Materials Corporation v. City of North Miami. If a constitutional construction of the law is possible, this Court should resolve all doubt in favor of constitutionality. A.B.A. Industries, Inc. v. City of Pinellas Park.

As in other cases involving municipal utility operations, this

Court should not interfere with the reasonable discretion exercised by the City of Port Orange in the management and funding of its roadway system. If the citizenry of Port Orange objects to the imposition of the transportation utility fee or the rate structure of the fee, then the remedy is at the ballot box rather than by court proceeding. Town of Riviera Beach v. State.

B. Municipal Home Rule Powers in Florida

Prior to 1968, the law in Florida severely restricted a municipality's ability to exercise the powers of local self-government. The control of the state's legislature over municipalities was plenary. Florida's municipalities lived under the rule that they could possess and exercise only those powers expressly granted by the legislature, those necessarily or fairly implied in or incidental to the powers expressly granted, and those essential to the declared purposes of the corporation. If reasonable doubt existed as to whether a municipality could exercise a certain power, the doubt would, as a matter of law, be resolved against the municipality. Liberis v. Harper, 89 Fla. 477, 104 So. 853 (1925); City of Clearwater v. Caldwell, 75 So. 2d 765 (Fla. 1954).

Florida's Municipal Home Rule Amendment, as proposed in SJR 5-2X (1968), and as ratified by Florida's electorate on November 5, 1968, clearly reflected a fundamental change in the rules governing the exercise of municipal power in Florida. The legislative analysis of SJR 5-2X stated "[m]unicipalities would be given additional powers to perform services unless specifically

prohibited by law" and the municipal power provision "gives municipalities residual powers except as provided by law." Louis C. Deal, "Post Mortem -- Home Rule," Florida Municipal Record, November, 1980.

Art. VIII, Sec. 2(b), Fla. Const. (1968), in part provides:

> (b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.

In sharp contrast, Art. VIII, Sec. 8, Fla. Const. (1885), stated:

> The Legislature shall have the power to establish, . . . municipalities . . . , to prescribe their jurisdictions and powers, and to alter or amend the same at any time . . . .

In 1972, this Court had its first occasion to examine the extent to which the rules governing the exercise of municipal power had changed. In City of North Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972), this Court held the city could not adopt a rent control ordinance absent specific legislative authorization. In doing so, it was generally concluded Florida's Municipal Home Rule Amendment had effected no change in the historical rules governing the exercise of municipal power.

The following year, the state legislature, clearly in response to the above view, enacted the Municipal Home Rule Powers Act, Ch. 166, Fla. Stat. (1973), Ch. 73-129, Laws of Florida.

Sec. 166.021, Fla. Stat. (1993), provides in pertinent part:

> (1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental,

corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.

(2) "Municipal purpose" means any activity or power which may be exercised by the state or its political subdivisions.

(3) The Legislature recognizes that pursuant to the grant of powers set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:

(a) The subjects of annexation, merger and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution;

(b) Any subject expressly prohibited by the Constitution;

(c) Any subject expressly preempted to state or county government by the constitution or by general law; and

(d) Any subject preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art. VIII of the State Constitution.

(4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited. . . . (Emphasis added)

Thereafter, this Court upheld a subsequent rent control ordinance enacted by the City of Miami Beach on the premise that Sec. 166.021(1), Fla. Stat. (1973), authorized municipalities to exercise any power for municipal purposes except when expressly prohibited by law. City of Miami Beach v. Forte Towers, Inc., 305

So. 2d 764 (Fla. 1974). Later, in State v. City of Sunrise, 354 So. 2d 1206 (Fla. 1978), this Court tacitly receded from the earlier holding in City of North Miami Beach v. Fleetwood Hotel, and acknowledged the vast breath of municipal home rule power. In City of Sunrise, the question before this Court was whether or not a municipality was authorized to issue "double advance refunding bonds." In answering the question affirmatively, the Court stated:

> Article VIII, Section 2, Florida Constitution, expressly grants to every municipality in this state authority to conduct municipal government, or perform municipal functions, and render municipal services. The only limitation on that power is that it must be exercised for a valid "municipal purpose." It would follow that municipalities are not dependent upon the Legislature for further authorization. Legislative statutes are relevant only to determine limitations of authority. Since there is no constitutional or statutory limitation on the right of municipalities to issue refunding revenue bonds not payable by ad valorem taxes, we hold that municipalities may issue "double advance refunding bonds" so long as such bonds are pursuant to the exercise of a valid municipal purpose.

354 So. 2d at 1209.

To date, this Court has continued to recognize the "residual" nature of municipal home rule authority.

Recently, in City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992), the city sought to levy special assessments on downtown property to repay bonds issued to pay the cost of certain infrastructure improvements made to its downtown area. Certain property owners challenged the authority of the city to levy the special assessments in part on the grounds the city did not follow the requirements of Ch. 170, Fla. Stat. (1989), which authorizes municipalities to impose special assessments upon certain

conditions. Recognizing the city failed to follow the requirements of Ch. 170, Fla. Stat. (1989), this Court nonetheless upheld the special assessments on the grounds the city imposed the assessments under its home rule authority rather than Ch. 170, Fla. Stat. (1989):

> It is conceded that the City of Boca Raton did not follow the requirements of ch. 170 in its attempt to impose special assessments in this case. This argument cannot prevail because it is evident that ch. 170 is not the only method by which municipalities may levy a special assessment. . . . Thus, we hold that the City of Boca Raton had the authority to impose a special assessment under its home rule power.

Id. at 29-30.

More recently, in City of Ocala v. Nye, 608 So. 2d 15 (Fla. 1992), this Court held the city had the home rule authority to seek a total taking of property, rather than a partial taking of the property, in order to eliminate a business damage claim. While the legislature had expressly granted to Florida's Department of Transportation and to Florida's counties the authority to take more property than necessary for a particular project, it had not expressly granted the same power to municipalities. Also, Sec. 166.401, Fla. Stat. (1989), granting to municipalities the authority to exercise the power of eminent domain, did not expressly grant to municipalities the power to take more property than necessary for a particular project:

> Although section 166.401, Florida Statutes (1989), purports to authorize municipalities to exercise eminent domain powers, municipalities could exercise those powers for a valid municipal purpose without any such "grant" of authority. If the state has the power to take particular land for public purposes, then a municipality may also exercise that power unless it is "expressly prohibited."

> Although section 166.401(2) does not expressly grant the taking of an entire parcel by a municipality to save money, it also does not expressly prohibit a municipality from doing so.

Id. at 17.

In summary, under the 1968 Florida Constitution and the Municipal Home Rule Powers Act, a municipality is authorized by law to exercise any governmental, corporate, or proprietary power for a municipal purpose which may be exercised by the state legislature except when expressly prohibited by law. Sec. 166.021(1), Fla. Stat. The City of Port Orange, by adopting the transportation utility ordinance and user fee, did not violate Sec. 166.021(1), Fla. Stat., because there is no express prohibition in Florida law relating to transportation utility fees. The provision for a municipal road system serves a valid municipal purpose, City of Ocala v. Nye, and the imposition of the transportation utility fee is not invalid on the count of there being an express prohibition on such fees. State v. City of Sunrise.

Sec. 166.021(3), Fla. Stat., provides the legislative body of each municipality with the power to enact legislation concerning any subject matter upon which the state legislature may act, except for the subjects described in Sec. 166.021(3)(a)-(d). The transportation utility fees at issue do not implicate paragraph 166.021(3)(a) (relating to annexation, merger and exercise of extraterritorial powers); paragraph 166.021(3)(b) (relating to express constitutional prohibition); or paragraph 166.021(3)(d) (preemption to county by county charter). Finally, the transportation utility fees do not implicate paragraph

166.021(3)(c) because the imposition of such fees is not a subject expressly preempted to the state or county government by the 1968 Constitution or general law. (This point is thoroughly addressed in the Final Judgment at 14-21 and Appellee's Brief. Amicus League adopts such reasoning and arguments in full). Rather, Sec. 166.201, Fla. Stat., specifically authorizes municipalities to impose "user charges or fees authorized by ordinance" and a municipality's authority to create a transportation utility fee parallels the state legislature's authority to create and authorize a stormwater utility fee.

C. The Parallel Between Stormwater Utility Fees and Transportation Utility Fees

Sec. 403.031(17), Fla. Stat. (1993), defines a stormwater utility as:

> "Stormwater Utility" means the funding of a stormwater management program by assessing the cost of the program to the beneficiaries based on their relative contribution to its need. It is operated as a typical utility which bills services regularly, similar to water and wastewater services. (Emphasis added)

The Legislature has also provided several funding sources for stormwater systems. Sec. 403.0893, Fla. Stat. (1993), provides in part:

> In addition to any other funding mechanism legally available to local government to construct, operate, or maintain stormwater systems, a county or municipality may:
>
> (1) Create one or more stormwater utilities and adopt stormwater utility fees sufficient to plan, construct, operate, and maintain stormwater management systems set out in the local program required pursuant to s. 403.0891(3); . . .

Sec. 166.201, Fla. Stat. (1993), states:

> A municipality may raise . . . by user charges or fees authorized by ordinance, amounts of money which are necessary for the conduct of municipal government and may enforce their receipt and collection in the manner prescribed by ordinance not inconsistent with law.

Numerous cities have adopted stormwater utility fees pursuant to Sec. 403.0893(1), Fla. Stat., and the fees are generated "by assessing the cost of the program to the beneficiaries based on their relative contribution to its need." Sec. 403.031(17), Fla. Stat. A stormwater utility fee system is typically based upon an equitable unit-cost approach. See, Sec. 403.0891(7), Fla. Stat. (1993) (Directing the Department of Community Affairs to develop a model stormwater management program, including a stormwater utility fee system based upon an equitable unit-cost approach). That is, stormwater utility fees are not generally charged based upon an exact measurement of how much stormwater runoff each parcel of property individually generates. Rather, fees are based upon an equitable formula that assesses the cost of the program to the beneficiaries based on their relative contribution to its need.

Municipalities can adopt stormwater utility fees under their home rule powers and without Sec. 403.0893, Fla. Stat. See, Sec. 166.021(3), Fla. Stat. (1993) (providing that the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state legislature may act); Sec. 166.201, Fla. Stat. (1993); and City of Ocala v. Nye. The Legislature has recognized this residual power of municipalities in Sec. 403.0893, Fla. Stat., by stating that local governments may use "any other funding mechanism legally available" to them to

operate stormwater utility systems. The only limitations on the municipalities' power is that the stormwater utility serve a municipal purpose and that the fees generated be used solely within the stormwater utility system.

Lack of express state legislative recognition of transportation utility fees does not preclude a Florida municipality from imposing such fees. Just as a municipality has the home rule authority to impose a stormwater utility fee, a municipality has the home rule authority to impose a transportation utility fee. Under Florida's municipal home rule jurisprudence, this Court should uphold the City of Port Orange's transportation utility fee as long as the transportation utility serves a municipal purpose and the user fees paid are reasonable and are used solely within the transportation utility system. The provision of a municipal roadway/transportation system clearly serves a valid municipal purpose. See, City of Ocala v. Nye. Also, the payment of reasonable user fees may be made mandatory and may be based on a formula that estimates relative contribution to the need for the system rather than on a precise measurement of actual services used. See, State v. Daytona Beach, 34 So. 2d 309 (Fla. 1948) (en banc) (mandatory sewer fees); and Charlotte County v. Fiske, 350 So. 2d 578 (Fla. 2d DCA 1977) (mandatory uniform garbage collection fees). Finally, Port Orange's transportation utility ordinance clearly states that all funds generated by the transportation utility fee will be used solely for the construction, maintenance and operation of the City's roadway

system.

D. User Fees Generally

A user fee is defined as, "imposing a specific charge for the use of publicly-owned or publicly-provided facilities or services." Jacksonville Port Authority v. Alamo, 600 So. 2d 1159, 1162 (Fla. 1st DCA 1992), rev. den. 613 So. 2d 1 (Fla. 1992). User fees collected must be reasonable and expended primarily for the construction cost, maintenance and operation of the facility. City of Daytona Beach Shores v. State, 483 So. 2d 405, 408 (Fla. 1985). Also, the fee imposed must "reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed." Evansville-Vanderburgh Airport Authority District v. Delta Airlines, 405 U.S. 707, 717, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972).

This Court, in City of Daytona Beach Shores v. State, 483 So. 2d 405 (Fla. 1985), upheld imposition of beach access fees even in light of the public's guaranteed right to access the beaches, finding that the fees were reasonable and the revenue collected was used to maintain and improve beach access. Interestingly, the United States Supreme Court has recognized "that a state may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, so long as the fee is not excessive." Evansville-Vanderburgh Airport Authority District, 405 U.S. at 715.

In evaluating the City's transportation utility fees under the above standards, the ordinance makes clear that the fees are to be

charged to users of governmentally provided facilities and that the fees are based on a fair and reasonable approximation of those who use the facilities. The City's fee schedule, summarized in the Final Judgment at 8, is not excessive or unreasonable when the total collections of the fee are compared with the amount of funds required to maintain and improve the City's roadway system. Also, the ordinance clearly states that the fees are to be expended solely for the construction, maintenance and operation costs of the facilities. Thus, under a standard user fee analysis, the transportation utility fee should be upheld. As the Final Judgment at 16 states, "the local government may provide a service, require that the property owners or citizens take that service, and impose a fee for the service. While the citizens may challenge the reasonableness of the amount of the fee, the requirement that it be paid will be upheld where the other requirements of a user fee are present."

In their service and user fee analysis, Appellant asserts:

> The key elements running through all service fee and user fee situations is that . . . the operation of the facility are [sic] quantifiable and the costs of operations certain; that there are units of measure by which the users of the facility can be charged, . . .; and that the costs charged to the user must be measurable to an identified use of the facility so that the greater the use, the greater the charge to the user. . . . In user facilities, there is no such thing as a flat, one price, charge with no relationship to the amount of use by any particular person. (Emphasis added)

Appellant's Brief at 33-34.

Appellant fails to recognize that numerous service or user fees are flat based fees based upon access to the system or

facility rather than a charge based on a per unit used measured basis. Examples include garbage collection fees and sewerage fees, which typically charge a flat fee based upon a residential, commercial or industrial basis, not on a per pound or per gallon basis. See, Charlotte County v. Fiske, 350 So. 2d 578 (Fla. 2d DCA 1977). A similar type analysis is used in establishing stormwater utility fees. Sec. 403.0893, Fla. Stat. Appellant's assertion that there is "no such thing as a flat, one price charge" is simply unsupportable. Therefore, the methodology used by Port Orange in developing its transportation utility fee schedule is not unreasonable and is not without precedent.

Central to Appellant's and Amicus Chamber's argument is the notion that a prohibition exists against imposing user fees for the provision of certain municipal services. These services are loosely identified as "traditional government services" and appear to include fire and police service and the provision of roads. Appellant's Brief at 22. Apparently, according to Appellant, these "traditional services" may only be funded through general revenue sources. Without citation to authority, Appellant categorically states imposing user fees on the provision of such services is prohibited.

Amicus League asserts that such a proposition has no basis in law, pointing to Appellant's lack of authority for the proposition.

In order to impose a "user fee" the expense must reasonably be associated with the use of the service. As is evident, the "traditional government services" identified by Appellant, police,

fire, and roads, have been typically funded from general revenue sources because of the administrative difficulty in reasonably allocating the cost to the user of the services. For example, providing fire protection services generally benefits all citizens living within a municipality and such services are typically funded through general revenue sources. However, use of the general revenue funding source for fire service does not necessarily exclude the use of other funding sources.

Amicus League asserts that there is no constitutional or statutory prohibition against a municipality funding its provision of fire service through a user fee program. However, in order to do so, the municipality must develop a reasonable methodology for distributing the expenses of fire service to those who benefit from the service. Most all municipalities, however, have opted against a user fee funding mechanism because of the administrative difficulty entailed in developing a reasonable methodology. Importantly, the mere option not to pursue a user fee funding source should not be interpreted as a necessary prohibition on the use of such a source, as Appellant has inappropriately done.

Appellant also implies that the City must exhaust all of its available taxing sources, ad valorem, public utilities, occupational license, etc., to fund the provision of roads before the City can turn to alternative funding sources. However, under Appellant's reasoning, road impact fees could not be collected until the City reaches the ten mil cap for ad valorem taxes, as well as capping out all other taxing sources. Such reasoning is

patently flawed based on this Court's recognition of municipal home rule powers to impose impact and other user based fees. Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976). To infer that Florida's municipalities must exhaust their ad valorem taxing powers and all other funding sources created by the Legislature before they may explore alternative funding sources is a through-back to the days of Dillon's Law, and is a failure to recognize the most fundamental concept of municipal home rule powers embodied in Art. VIII, Sec. 2(b), Fla. Const., and Ch. 166, Fla. Stat.

A case specifically upholding a public road impact fee is Homebuilders and Contractors Association of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County, 446 So. 2d 140 (Fla. 4th DCA 1983), rev. den. 451 So. 2d 848 (Fla. 1984). In this case, Palm Beach County adopted an ordinance imposing an impact fee on new development for the purpose of constructing roads made necessary by the increased traffic generated by the new development. The ordinance used a formula to set fees which took into consideration the cost of road construction and the number of motor vehicle trips generated by different types of land use. The fee schedule was set at $300 per unit for single family homes, $200 per unit for multi-family, $175 per unit for mobile homes, with other amounts for commercial or other development. Id. at 142.

Initially, the Fourth DCA held that the county had the home rule power and authority to enact the impact fee ordinance. Id. at 143. The court next rejected the Home Builders' contention that

the ordinance was invalid because of the disparity between the people who benefitted from the new roads and the people who paid the impact fee. Id. Also, the court rejected the Home Builders' contention that the ordinance was arbitrary and violated equal protection rights. Using a rational basis test, the court determined that the ordinance bore a reasonable relationship to a legitimate state purpose. And, finally, the court rejected the argument that the impact fee was in reality a tax rather than a fee. Id. at 144-145.

The Fourth DCA's analysis of the road impact fee issues addressed in Home Builders v. Palm Beach County is very informative to addressing the issues raised in this case on transportation utility fees. All such issues have been thoroughly addressed in Appellee's Brief, Amicus League's Brief and the other briefs submitted on Appellee's behalf and should lead this Court to uphold the City's transportation utility fee.

E. Transportation Utility Fees in Non-Florida Cases

In the Final Judgment, the lower court judge thoroughly analyzes the imposition of transportation utility fees in other jurisdictions. Final Judgment at 21-24. Specifically, the Colorado Supreme Court has upheld a similar transportation utility fee to the City of Port Orange's, finding that the fee was a reasonably determined user fee rather than a tax and that the Colorado municipality had the home rule powers to adopt the fee. Bloom v. City of Fort Collins, 784 P. 2d 304 (Co. 1989) (en banc). Appellant's attempts to distinguish the Fort Collins decision from

the case at hand are unsupportable. Initially, the Colorado Supreme Court may not have addressed the right to travel issue based upon the United States Supreme Court's conclusions in Evansville-Vanderburgh Airport Authority District v. Delta Airlines. Appellant's Brief at 38-40. (The right to travel issue is addressed in ISSUE II of this Brief.) Also, the Colorado Supreme Court's fee analysis in Fort Collins is abundantly reasonable and would provide clear guidance to this Court if desired.

Appellant argues that the case at issue should be handled similarly to the Idaho Supreme Court's determination in Brewster v. City of Pocatello, 768 P. 2d 765 (Idaho 1988). In this case, the Idaho Supreme Court failed to uphold a transportation utility fee because the City lacked the statutory authority to impose the fee and the Court held the "fee" was in reality the imposition of a tax. Id. at 767. In the Final Judgment, the lower court clearly distinguishes the Fort Collins decision from the Brewster decision, and demonstrates how Florida case law supports the Fort Collins analysis. Final Judgment at 23-24.

ISSUE II

THE CITY OF PORT ORANGE TRANSPORTATION UTILITY FEE DOES NOT IMPLICATE THE RIGHT TO TRAVEL AND IS NOT SUBJECT TO REVIEW UNDER THE COMPELLING STATE INTEREST STANDARD.

Appellant implies that imposition of the transportation utility fee infringes upon the public's right to travel, and as such, should be scrutinized under a compelling state interest standard. Appellant's Brief at 18. Appellant's reliance on right

to travel analysis is misplaced in this case. This case is concerned with a municipality's ability to charge a user fee for the provision of city road services. There is no requirement that municipalities provide paved or unpaved roads to their citizens in order for those citizens to enjoy constitutionally inferred rights to travel. There is also no law restricting a Florida municipality's authority to impose a reasonably determined user fee for the construction, operation and maintenance of city roads.

The United States Supreme Court has specifically rejected a right to travel argument in a case on the payment of user fees for state provided facilities. In Evansville-Vanderburgh Airport Authority District v. Delta Airlines, 405 U.S. 707, 714, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972), the Supreme Court stated:

> We therefore regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike. The principle that burdens on the right to travel are constitutional only if shown to be necessary to promote a compelling state interest has no application in this context. The facility provided at public expense aids rather than hinders the right to travel. A permissible charge to help defray the cost of the facility is therefore not a burden in the constitutional sense. (Citations omitted)

The United States Supreme Court's focus in right to travel cases is the assurance of unhindered migration. The Supreme Court states, "[t]he analysis in all of these [right to travel] cases, however, is informed by the same guiding principle -- the right to migrate protects residents of a state from being disadvantaged, or from being treated differently, simply because of the timing of

their migration, from other similarly situated residents." Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 904-905, 106 S.Ct. 2317, 90 L.Ed. 2d 899 (1986) (plurality opinion). The transportation utility fee at issue in this case does not deter travel, act to impede travel as its primary objective, or use any classification which serve to penalize the exercise of the right to travel. Id. at 903. Also, the fee does not classify residents according to the time they establish residence thereby resulting in the unequal distribution of rights and benefits among otherwise qualified bona fide residents. Id.

The ordinance at issue in this case permits the City to impose a reasonably determined utility fee to fund the City's provision of roadway services. The provision of such services, if provided at all, will be paid for by the City's inhabitants either from City general revenue, special assessment or user fee. Regardless of the funding manner, the source of the funds remain constant -- the citizenry. Because the transportation utility fee concerns itself solely with the funding manner of providing city road services, Amicus League asserts Appellant's reference to right to travel analysis is inapplicable to this case.

Because imposition of the transportation utility fee does not implicate the right to travel, the fee is not subject to analysis under a compelling state interest standard. Rather, because imposition of the transportation utility fee is a legislative act, it must be upheld by this Court if the actions of the Port Orange City Council in adopting the fee were not arbitrary, capricious or

unreasonable. City of Miami v. Kayfetz and Town of Riviera Beach v. State. The lower court determined that the fee ordinance was "duly and validly enacted by the City" and that the utility fee "is a valid user fee . . . authorized under municipal home rule powers." Final Judgment at 27. The evidence accepted by the lower court supports the conclusion that imposition of the transportation utility fee is a reasonable action of the Port Orange City Council and, as such, should be upheld by this Court.

CONCLUSION

Based on the arguments presented in this Brief, Appellee's Brief, and the other Briefs submitted on Appellee's behalf, this honorable Court should affirm the Final Judgment of the lower court.

Respectfully Submitted,

Kraig A. Conn
Assistant General Counsel
Florida League of Cities, Inc.
201 West Park Avenue
Post Office Box 1757
Tallahassee, Florida 32302-1757
(904) 222-9684
Florida Bar #0793264

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: MAUREEN S. SIKORA, City Attorney, City of Port Orange, 1000 City Center Circle, Port Orange, Florida 32219-9619; PETER L. DAME, Esquire, Squire, Sanders & Dempsey, 2100 Enterprise Center, 225 Water Street, Jacksonville, Florida 32202; ERIC J. TAYLOR, Assistant Attorney General, P.O. Box 10366, Tallahassee, Florida 32302-2366; and STANLEY JAMES BRAINERD, General Counsel, Florida Chamber of Commerce, 136 S. Bronough Street, Tallahassee, Florida 32302; this 5th day of May, 1994.

Kraig A. Conn

KRAIG A. CONN