IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
et al.,

Appellants,

CASE NO. 83,103

v.

THE CITY OF PORT ORANGE
FLORIDA,

Appellee
_____/

ANSWER BRIEF OF AMICUS CURIAE CITY OF ORLANDO

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SUMMARY OF ARGUMENT

The City of Port Orange has the power to enact a Transportation Utility Fee ordinance under its municipal home rule powers. Article 8, Section 2, Florida Constitution provides that municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services. The only limitation on this power is that it must be exercised for a valid municipal purpose. Legislative statutes are relevant only to the extent of determining limitations of municipal authority.

There is no Florida law, statutory or organic, that would prohibit the City of Port Orange from imposing a Transportation Utility Fee as a financing mechanism in conjunction with the issuance of a bond. Since there is no specific limitation, legislative or otherwise, to the imposition of such a fee, the broad home rule powers of the City of Port Orange would allow for its imposition.

There is nothing inherent within the concept of streets, that would prohibit the imposition of a Transportation Utility Fee. The Supreme Court of Florida has approved user fees in situations involving the use of water and sewer facilities, the use of garbage facilities, and the use of Florida's beach sovereignty lands. These can be analogized as support for the Transportation Utility Fee. Lastly, the Supreme Court of the United States has held that a flat fee imposed for the use of a state's highways can be valid, which further shows that, unless there is some specific legislative

prohibition, the city may impose a user fee for the use of its transportation facilities as a part of its home rule powers.

The Transportation Utility Fee imposed by the City of Port Orange is a valid "user fee" and is not a tax. It is not a general revenue-producing device; the cost of construction and maintenance of the city's transportation facilities is allocated equitably between the property owners based on a system and methodology that are well described in the ordinance, which provides that each user is only charged for his or her use of the city's transportation facilities. Furthermore, the uses of the collected funds under the ordinance are limited to the construction and maintenance of the city's transportation facilities and, lastly, there is no question that the City of Port Orange has the right to regulate and control its streets.

The Transportation Utility Fee can be analogized to valid regulatory fees such as parking meter fees and port anchorage fees, or, more probably, the Transportation Utility Fee is a valid proprietary fee which can be analogized to fees for water and sewer service as well as fees for garbage service.

In fact, it has been held by this Court, that the repair and maintenance of streets is a proprietary function. As a proprietary function, the validity of the City of Port Orange's Transportation Utility Fee is easily upheld.

ARGUMENT

I. THE CITY OF PORT ORANGE HAS THE POWER TO ENACT A TRANSPORTATION UTILITY FEE ORDINANCE UNDER ITS MUNICIPAL HOME RULE POWERS.

This Court has provided that the scope of judicial inquiry into bond validations is sharply limited. State v. City of Panama City Beach, 529 So.2d 250 (Fla. 1988), at 251. This limited inquiry is: 1) whether the public body has the authority to issue the bond, 2) whether the purpose of the obligation is legal, and 3) whether the bond issuance complies with the requirements of law. Id, at 251.

Article 8, Section 2, Florida Constitution, 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. Each municipal legislative body shall be elected.

Implicit in the power to provide municipal services is the power to construct, maintain and operate the necessary facilities. Cooksey v. Utilities Commission, 261 So.2d 129 (Fla. 1972) at page 130.

Authority to issue bonds is extended to municipalities by § 166.111, Florida Statutes, which provides:

> The governing body of every municipality may borrow money, contract loans, and issue bonds as defined in 166.101, Florida Statutes, from time to time to finance the undertaking of any capital or other project for the purposes permitted by the state constitution and may pledge the funds, credit, property, and taxing power of the municipality for the payment of such debts and bonds.

§166.101(1), Florida Statutes, reads as follows:

> The term "bond" includes bonds, debentures, notes, certificates of indebtedness, mortgage certificates, or

other obligations or evidences of indebtedness of any type or character.

This Court has stated, in State v. City of Sunrise, 354 So.2d 1206 (Fla. 1978), that:

> Article 8, Section 2, Florida Constitution, expressly grants to every municipality in this state, authority to conduct municipal government, 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 (p. 1209)

This is a broad grant of authority.

The question before this Court, then, is whether there is any constitutional or statutory limitation on the right of municipalities to issue bonds payable by means of a Transportation Utility Fee. City of Sunrise, supra, at 1209.

According to this Court, the clear purpose of Article 8, Section 2(b), dealing with municipal powers, is to give municipalities the inherent power to meet municipal needs. State v. City of Panama City Beach, supra, at page 254.

In City of Sunrise, supra, this Court found that there was no constitutional or statutory limitation on the right of municipalities to issue refunding revenue bonds not payable by ad valorem taxes, and that therefore a municipality could issue such "double advance refunding bonds" so long as such bonds were pursuant to the exercise of a valid municipal purpose. (p. 1209)

In City of Panama City Beach, supra, this Court found that there was no constitutional or statutory prohibition to the City's use of arbitrage financing to acquire funds and that therefore the

City could use such arbitrage financing in its bond issuances. (p. 256)

In City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992), this Court found that the City was not required to follow Chapter 170 in imposing special assessments because the power to impose special assessments was a part of the City's home rule powers and therefore, there was no legal or constitutional prohibition in using the funds raised by such special assessments to finance bonds. (pp. 28-30) This Court also held that the special assessment was not a tax and therefore there was no legal prohibition under Article 7, Section 1(a) of the Florida Constitution. (pp. 28 & 29)

These cases show that unless there is specific legislative limitation, municipalities have broad home rule powers, especially in terms of financing public improvements. Port Orange's Transportation Utility Fee is no more legally prohibited than Sunrise's "double advance refunding bonds."

This Court has also held, that in its determination of whether a proposed financing is legally prohibited, the Court is not to consider whether said financing is wise or even fiscally sound. City of Panama Beach, at 256.

Furthermore, the final judgment validating the bonds comes to this Court with a presumption of correctness and Appellants must demonstrate from the record the failure of the evidence to support the trial court's conclusion. Wohl v. State, 480 So.2d 639 (Fla. 1985) at 641. This Appellants have not shown.

In an attempt to address the stated issue and show that the

financing mechanism, the Transportation Utility Fee, is legally prohibited under Florida law, Appellants make much of this Court's opinion in Day v. City of St. Augustine, 139 So. 880 (Fla. 1932). The complainant in Day was a citizen and taxpayer of St. Augustine who objected to the city's operation of a toll bridge across the Matanzas River, which connected Anastasia Island and the City of St. Augustine. (p. 883) It was contended that the bridge should be paid for as originally contemplated by general taxation and not by tolls. (p. 883)

The court found that the State of Florida legislature had full power and legal authority to vest in the City of St. Augustine the right to build, erect, construct, maintain and operate toll bridges and that, therefore, St. Augustine could charge citizens and taxpayers of the City for passage over the bridge. (p. 884)

The court reasoned that the erection and maintenance of a toll bridge is a public franchise and by its very nature a franchise is a kind of privilege which the general public has no inherent right to unconditionally enjoy. (p. 884) Therefore, the right to use a special facility such as a bridge constructed across a body of water is not such an inherent right in the public that either citizens or taxpayers must be permitted to use that facility free instead of being compelled to pay toll for it. (p. 885)

In dicta, the Court provided that the right to travel the public highways is subject only to the police power and the power of taxation and is quite different from the use of a special facility such as a bridge. (p. 885) The Court followed by saying:

> We **may** therefore grant the appellant's argument that a city would have no right to erect toll gates along its streets as a means of raising revenue from citizens, taxpayers, and others who travel thereon, but such principle, **if conceded**, would not necessarily apply to special facilities, the construction and operation of which are inherently the subject of franchises, and not such a right in common as the right of free travel on a city street. (p. 885) (emphasis added)

As can be seen from a review of this opinion, not only were the comments, cited by Appellant, dicta, but they were equivocal dicta.

Two years later, the Supreme Court once again addressed the issue of toll bridges in Masters v. Duval County, 154 So. 172 (Fla. 1934). In Masters, the issue was whether tolls received from operation of the bridge could be used for other county purposes, since the total cost of constructing the bridge had already been paid through the use of such tolls. The Court found that there was nothing in the constitution which forbids the collection of tolls for passage over a bridge even after it is paid for, and the use of toll proceeds for non-bridge, county purposes. (p. 174) The Court further noted that although the tolls are not taxes, tolls may be used in relief of taxation (p. 175)

In upholding the "toll bridge concept" and in upholding the use of toll proceeds for non-bridge but county purposes, the Supreme Court stated the following:

> The cardinal rule is that public highways, including bridges as a part of highways, are open to all alike, either free to all, or the toll, if any be legally authorized for passage over the road or the bridge, must be the same to all under like conditions. (p. 175)

Therefore, according to this Court, the use of roads, as well as

the bridges which are a part thereof, can be regulated to the extent of charging tolls; the limitation being that the tolls must be the same to all under like conditions.

In City of Daytona Beach Shores v. State, 483 So.2d 405 (Fla. 1985), this Court addressed the issue of beach user fees charged to drivers of motor vehicles for entry onto the Atlantic beaches. The Court held that the public-trust doctrine, which declares that Florida's beach sovereignty lands must be accessible to the public, does not prohibit local governments from imposing reasonable user fees for motor vehicle beach access, so long as the revenue is expended solely for the protection and welfare of the public using that particular beach, as well as for improvements that will enhance the public's use of the sovereign property. (p. 408)

Certainly, if local governments can regulate access to Florida's beach sovereignty lands, they can regulate access and use of the local government's roads.

The issue before this Court is whether a municipality is legally prohibited from imposing a Transportation Utility Fee in order to finance a bond issuance. Simply because such a fee has never been adopted by a local government in Florida, it does not follow that such a fee is legally prohibited. A municipality is granted broad powers under the Municipal Home Rule Powers Act and it is the burden of the Appellants to show that there is some law, organic or statutory, that would prohibit the imposition of a Transportation Utility Fee. Appellant has cited this Court's opinion in Day v. City of St. Augustine, supra, as support for the

proposition that such a fee is legally prohibited. However, a review of the language of the Supreme Court in Day, shows that the statements relied upon were dicta and were not unequivocal in their terms. Furthermore, this Court's opinions in Masters v. Duval County, supra, and City of Daytona Beach Shores v. State, supra, refute Appellant's interpretation of the Day opinion and support a finding by this Court that the imposition of a Transportation Utility Fee is not legally prohibited under Florida law.

In further support of Appellee's position in this matter, this Court has affirmed the imposition of "user fees" in several situations which can be analogized to the instant situation. In City of Miami Springs, the City adopted an ordinance authorizing the construction of a sewer disposal system, and the issuance of sewer revenue bonds providing funds for paying the cost of the system. State v. City of Miami Springs, 245 So.2d 80 (Fla. 1971), at page 81. One of the grounds on which the state contended that the sewer revenue bonds were invalid was that the rates charged for sewer services to different classes of users were arbitrary and discriminatory. (p. 81) The basic objection was that the sewer ordinance applied a flat rate, unrelated to use, to single-family residences and a variable rate based on actual use to "all other users." (p. 81)

This Court did not find these classifications unreasonable, arbitrary, or in conflict with state or federal constitutions or laws. (p. 81) Though this case dealt more with the reasonableness of the classification system under the rate schedule, it can still

be applied by this Court to show the allowance of user fees for use of a public facility. It can be argued that a citizen has just as much right to use a sewer facility that has been constructed for public use as he or she would to use a transportation facility that has been constructed for public use. And, this Court upheld the sewer use fee and even stated that the imposition of the fee, regardless of use, was valid.

Also, this Court has addressed user fees charged for garbage service facilities in the City of New Smyrna Beach v. Fish, 384 So.2d 1272 (Fla. 1980). The Court upheld a flat fee for all residential units for garbage collection service, regardless of use, and upheld charges to businesses for garbage service which were based on use.

As was the case in City of Miami Springs, the issues raised before this Court, in Fish, dealt with the validity of the classification system underlying the fee. But Fish does represent that municipalities have the power to impose user fees for the use of public facilities and services.

This Court cited State v. City of Miami Springs, supra, in support of its position in Fish, as well as Stone v. Town of Mexico Beach, 348 So.2d 40 (1st DCA 1977). In Stone, the First District Court of Appeal approved a flat rate for residential units, regardless of use, for garbage collection.

This Court, in Fish, also cited in support of its position, Charlotte County v. Fiske, 350 So.2d 578 (2d DCA 1977). In Fiske, the County established a **mandatory** garbage disposal system financed

by an annual $51.00 "special assessment" on each residential unit. (p. 579) While commercial properties were not assessed, they were nonetheless required by the ordinance to contract for the service with the franchised disposal company or to obtain a permit to haul their own garbage. (p. 579)

The First District Court of Appeal upheld the "special assessment," unrelated to use, reasoning first, that the term "special assessment" is a broad one which embraces "fees" and "service charges" when assessed for special services. (p. 580)

Secondly, the Appellate Court held that the ordinance imposing the "special assessment" for garbage disposal upon residential units but not upon commercial units was not clearly shown to be arbitrary or discriminatory or without basis in reason. (p. 580) Finally, the Appellate Court held that the assessment was equal or approximate to the benefit received because the entire cost of the garbage disposal service to the residential units was equally distributed among such units. (p. 581)

It can certainly be argued that citizens have just as much of a right to use garbage service facilities as they do to use transportation facilities, and fees have been allowed for the use of garbage service facilities.

Though sometimes addressing commerce clause issues, the Supreme Court of the United States has penned several opinions supporting the imposition of a flat fee upon motor vehicles for the privilege of using a state's highways. Airport Authority v. Delta Airlines, 405 U.S. 707, 31 L.Ed. 2d 620, 92 S.Ct. 1349, (1972) at

31 L.Ed 2d 628.

In a case involving the imposition of a tax for maintenance of highways, the Supreme Court stated the following in upholding the tax:

> The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the state to ensure safety and convenience and the conservation of the highways. . . . Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Clark v. Poor, 274 U.S. 554, 47 S.Ct. 702, 71 L.Ed. 1199 (1927), at 71 L.Ed 1201.

In another case, involving a license fee imposed upon buses, the Supreme Court stated:

> It is true also that a state may impose, even on motor vehicles engaged exclusively in interstate commerce, a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways. . . and this power also may be delegated in part to a municipality by appropriate legislation. Sprout v. South Bend, 277 U.S. 163, 48 S.Ct. 502, 72 L.Ed. 833 (1928), 72 L.Ed. at 837.

In another case involving a statute imposing an annual license fee for the maintenance of highways and imposed upon common carriers, the Supreme Court upheld the fee and stated that: "Its validity in this aspect is attested by decisions so precisely applicable alike in facts and in principle as to apply a closure to debate." Aero Mayflower T. Company v. Georgia Public Service Commission, 295 U.S. 285, 55 S.Ct. 709, 79 L.Ed. 1439 (1935), at 79 L.Ed. 1443.

In Airport Authority, supra, the Supreme Court analogized decisions concerning highway tolls and flat fees for the use of highways to the issue facing the Court, which concerned a $1.00

charge for each commercial airline passenger to help defray the costs of airport construction and maintenance. 31 L.Ed. 2d 620, at 628. In discussing the case law regarding the issue of highway tolls and flat fees, the Court stated:

> We have also held 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. Airport Authority, 31 L.Ed. 2d 620, at 628.

In Hendrick v. Maryland, the State of Maryland built and was maintaining a system of improved roadways and imposed a registration fee on motor vehicles using this road system. Hendrick v. Maryland, 235 U.S. 610, 35 S.Ct. 140, 59 L.Ed. 385 (1915). The money collected under the provisions of the registration fee would be used in construction, maintenance and reparation of the streets of Baltimore and roads built or aided by the county or the state itself. Id, at 59 L.Ed. 390. The Supreme Court reasoned that:

> . . .there can be no serious doubt that where a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce. 59 L.Ed. 391

Pursuant to a Michigan state statute, the Manistee River Improvement Company removed certain obstacles from the Manistee River, which improvements allowed the floating of logs and lumber down the stream; these improvements consisted principally of cutting new channels at different points and by confining the waters at other points by embankments. Sands v. Manistee River

Improvement Company, 123 U.S. 288, 8 S.Ct. 113, 31 L.Ed. 149 (1887). In upholding the imposition of the fee, the Supreme Court reasoned that:

> There is no analogy between the imposition of taxes and the levying of tolls for improvement of highways; . . . Taxes are levied for the support of government and their amount is regulated by its necessities. Tolls are the compensation for the use of another's property, or of improvements made by him; and their amount is determined by the cost of the property, or of the improvements, and considerations of the return which such values or expenditures should yield. 31 L.Ed 151

Certainly an individual has as much right to use a waterway as a city street.

While the Supreme Court cases cited above may not be factually applicable to the instant case, they do exemplify the High Court's position as to the public's right to use a highway system and the government's ability to regulate that use through the imposition of fees.

This Court should also note § 403.0893, Florida Statutes, which provides that local governments may create a stormwater utility and collect fees for the construction, operation, and maintenance of a stormwater system. The fee is to be based on a per-acreage rate and must bear a relationship to the benefit received from the stormwater services. The use of a stormwater system can be easily analogized to the use of a transportation system. A citizen certainly has no more inherent right to one than to the other.

II. THE TRANSPORTATION UTILITY FEE IMPOSED BY THE CITY OF PORT ORANGE IS A VALID "USER FEE" AND IS NOT A TAX

The Fourth District Court of Appeal, in addressing the

difference between a fee and a tax, held that an impact fee imposed upon developers of property was, in reality, a tax. Broward County v. Janis Development Corporation, 311 So.2d 371 (4th DCA 1975). The Appellate Court reasoned that 1) the amount of the land use fee was not equitable with the land allocation (the amount of the fee greatly exceeded the cost of meeting the transportation needs brought about by the new development) and further 2) that there were no specifics as to where and when the moneys collected were to be expended for roads. Janis Development Corporation at 375.

In 1983, eight years later, the Fourth District Court of Appeal held that an impact fee on new development for the purpose of constructing roads made necessary by the increased traffic generated by such new development was a valid impact fee and not an impermissible tax. Home Builders v. Board of Palm Beach County Commissioners, 446 So.2d 140 (4th DCA 1983). The Appellate Court distinguished Janis on the following grounds:

1. The money generated by the ordinance in Janis far exceeded the cost of meeting the needs brought about by the new development. However, the costs of construction of additional roads, in Home Builders, would greatly exceed fair share fees imposed by the ordinance. Home Builders, p. 144.

2. The ordinance in Janis was lacking in specific restrictions regarding the use of revenue received. The court reasoned that "The amount and use of the funds (in Janis) simply did not jibe with the concept of regula-

tion; it smacked more of revenue raising which is descriptive of a tax." Home Builders, p. 144. (Parenthetical language added) In contrast, the fees collected in Home Builders would be localized by virtue of a zone system. Home Builders, p. 145.

The distinctive features of a tax and a fee as described above, were also outlined by this Court in Contractors and Builders Association v. City of Dunedin, 329 So.2d 314 (Fla. 1976).

In City of Dunedin, the city had imposed water and sewer connection fees which complainants alleged were unconstitutional taxes. (p. 318) The complainants cited Janis in support of their position, but the Supreme Court distinguished Janis because the fees, in Janis, bore no relationship to (and were greatly in excess of) the costs of the regulation which were supposed to justify their collection. (p. 318) In contrast, the Court reasoned, evidence was adduced at trial that the connection fees, in City of Dunedin, were less than the costs the city was destined to incur in accommodating new users of its water and sewer systems. (p. 318)

However, the Court further stated that the connection charges were valid only if the use of the money collected was limited to meeting the costs of water and sewer infrastructure expansion. (p. 320) The Court then held that the ordinance imposing the water and sewer connection charges was defective for a failure to spell out the necessary restrictions on the use of fees it authorized to be collected. (p. 321)

The First District Court of Appeal described a further dis-

tinctive feature of taxes in Jacksonville v. Jacksonville Maritime Association, 492 So.2d 770 (1st DCA 1986). The Appellate Court held that the City's user fee on anchored vessels in port was an unconstitutional tax, and reasoned that the City had no authority to regulate the anchorage of a vessel in port, and therefore no authority to require a fee. Jacksonville, at page 772.

In Tamiami Trail Tours, Inc., v. City of Orlando, 120 So.2d 170 (Fla. 1960), this Court determined that a tag permit fee imposed by the City for the privilege of using freight loading and unloading zones was an invalid excise tax. (p. 173) The Court reasoned that the tag permit fee was not a proper regulatory fee and that the fee was for the privilege of loading and unloading freight on City streets and not a fee for the use the City streets. (p. 172) The Court further reasoned that no standards were prescribed for the guidance of the City Tax Collector in granting or denying a permit to use the freight zones, nor did the ordinance provide for any regulation of the permittee, once the permit was issued. (p. 172)

The Court distinguished its parking meter decisions by saying that parking meters were inherently regulatory and any fee charged due to a parking meter was a regulatory fee. (p. 173) This Court approved parking meter fees in State v. McCarthy, 171 So. 314 (Fla. 1936), reasoning that parking meter fees were imposed as a bona fide exercise of police power, and not primarily for the raising of revenue. (p. 316) The Court provided further:

> That the aim of the ordinance is to regulate traffic and keep such traffic as liquid as is reasonably possible,

> and that the cost of parking privileges, and the extra cost of supervising and policing parking, is placed by the ordinance where it belongs, on those who individually enjoy such privilege. (pp. 316 & 317)

In Tamiami, this Court explained its reasoning as to the parking meter decisions as follows:

> . . . petitioners could not avoid the payment of a toll for the use of a toll bridge or toll road exacted by the state from the public as a whole on behalf of the holders of the unpaid bonds from the proceeds of which such road or bridge was constructed. In its commonly accepted sense a toll is "a proprietor's charge for the passage over a highway or bridge, exacted when and as the privilege of passage is exercised," . . . and since such a toll would be exacted by the state on behalf of the true proprietors -- the unpaid bond holders -- we do not conceive it to be a "license, fee or tax" in lieu of which the auto mileage tax is imposed upon petitioners. (pp. 173 & 174)

The Transportation Utility Fee at issue in this case can be justified either as a "proprietor's charge for passage over a highway" or a regulatory fee as in the situation of parking meters or an anchorage fee. But it is not a tax.

1. It is not a general revenue-producing device; the cost of construction and maintenance of the City's transportation facilities is allocated equitably between the property owners based on a system and methodology that are well described in the ordinance, and provide that each user is only charged for his or her use of the City's transportation facilities.

2. The uses of the collected funds under the ordinance are limited to construction and maintenance of the City's transportation facilities, which use is further limited by the classifications of the city's roads as arterial,

collector, or local.

3. There is no question that the City of Port Orange has a right to regulate its streets.

In Woods v. City of Palatka, 63 So.2d 636 (Fla. 1953), this Court addressed the constitutionality of a provision of the City Charter which provided that "The City of Palatka shall not be liable for personal injuries due to defective conditions, excavations, or obstructions in streets, sidewalks, alleys, avenues, parks or public grounds . . ." (pp. 636 & 637)

The Appellant in Woods, sought to recover for injuries sustained when she fell into a hole in the sidewalk. In holding that the City of Palatka could not constitutionally exempt itself from liability for negligence in the discharge of its duty to exercise reasonable diligence in repairing defects in sidewalks, the Court distinguished between a governmental function for which an agency of the State is immunized from liability and a proprietary function for which an agency of the State cannot claim constitutional immunity. (pp. 636 & 637)

Specifically, the Court reasoned that:

> In this jurisdiction, the repair and upkeep of the streets of a municipality "is a corporate function, for the abuse of which, by the negligence or wrongful conduct of its agents in the course of their regular employment, the City is liable.". . . and this Court has held that, in the exercise of a "proprietary" function, as distinguished from a "governmental" function, a governmental agency of this State cannot constitutionally be immunized from liability for its torts.(p. 637)

In 1975, the Fourth District Court of Appeal of Florida stated that: "For years Florida has held that the construction, mainten-

ance and repair of streets in a municipality is a corporate or proprietary function as opposed to a governmental function." Gordon v. City of West Palm Beach, 321 So.2d 78 (4th DCA 1975) at page 79.

There can be little doubt then, under Florida law, that the repair and maintenance of a City street is a proprietary function. Based upon this conclusion, the Transportation Utility Fee sought to be imposed by the City of Port Orange is even more analogous to the user fees imposed for use of a sewer disposal system and approved by this Court in City of Miami Springs, supra, and user fees imposed for garbage service, approved by this Court in City of New Smyrna Beach v. Fish, supra.

In fact, since the repair and maintenance of a City's streets is a proprietary function, the rationale of the First District Court of Appeal of Florida in Jacksonville Port Authority is especially applicable. Jacksonville Port Authority v. Alamo Rent-a-Car, Inc., 600 So.2d 1159 (1st DCA 1992) Alamo operated an off-airport rental and parking business and the Authority, in order to help fund a $101,000,000.00 construction expansion program, imposed a user fee for access to the public airport roads and terminal ramps of 6% of the gross receipts of those non-tenant rental car companies. (p. 1160) One of the stated purposes for the imposition of the fee was to fund Airport expansion. (p. 1161) The trial court held that the fee was an illegal tax and that the Jacksonville Port Authority exceeded its legal authority by imposing an unreasonable fee not related to or commensurate with Alamo's use of the facilities furnished. (p. 1161)

> The (trial) court went on to find that Alamo's use of the JPA facilities "is identical to that of the taxis, limousines and hotel vans, in that the JPA provides no additional or different services or facilities to Alamo as compared to those other airport commercial users." (pp. 1161 & 1162)
> (parenthetical language added)

The Appellate Court reversed and made the following findings:

1. The United States Supreme Court distinguished between a tax and a user fee, defining a tax as providing revenue for the general support of the government, while defining a user fee as imposing a specific charge for the use of publicly-owned or publicly-provided facilities or services. (p. 1162)

2. In Airport Authority v. Delta Airlines, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed. 2d 620 (1972), the Supreme Court evaluated airport charges as user fees, regarding it as "settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the cost of their construction and maintenance may constitutionally be imposed." (p. 1162)

3. The fees collected need not relate only to use of the airport roads and shuttle stops, but may apply to general airport maintenance and operational costs. (p. 1163)

In holding that the fee was not a tax but was a valid user fee, the Court relied heavily on its determination that operation of the airport system was a proprietary function. (p. 1164) Citing this Court's language in City of Dunedin, supra, the First District Court of Appeal stated that "under the constitution, Dunedin, as the corporate proprietor of its water and sewer systems, can exercise the powers of any other such proprietor." (p. 1164) Therefore, as a proprietor, the JPA may charge a user fee for those who benefit from the use of their airport system, just as any other proprietor of any facility could.

Analogizing Alamo to the present set of facts, the City of Port Orange as a proprietor of its transportation facilities may

properly charge a user fee for those who benefit from the use of said facilities. As in Alamo, there is no issue concerning whether the fee is a tax because a tax could only be found if the City of Port Orange were acting in its governmental capacity, and this Court has held, in Woods, that repair and maintenance of streets is a proprietary function.

Furthermore, and by analogy, this Court has upheld user fees for the rendition of proprietary services in the form of water and sewer services, and garbage services. In fact, as this Court will recall, the garbage fee assessed in Fiske, supra, was a mandatory garbage fee. The Second District Court of Appeal did not seem concerned that the garbage fee was not voluntary and neither did this Court in Fish, supra, in which Fiske was cited as support.

CONCLUSION

The City of Port Orange has the power to enact a Transportation Utility Fee ordinance under its Municipal Home Rule Powers. Article 8, Section 2, Florida Constitution, expressly grants to every municipality in this State, authority to conduct municipal government, perform municipal functions, and render municipal services. Legislative statutes are relevant only to determine limitations of authority. There is no prohibition under Florida law to the City's imposition of a Transportation Utility Fee. The construction and maintenance of a transportation facility is certainly pursuant to a municipal purpose and there is no rule that public highways are so inherently different from other public facilities that a fee for their use is legally prohibited. In fact, this Court has stated that:

> The cardinal rule is that public highways, including bridges as a part of highways, are open to all alike, either free to all, or the toll, if any be legally authorized for passage over the road or the bridge, must be the same to all under like conditions." Masters v. Duval County, 154 So. 172 (Fla. 1934) at page 175.

Furthermore, this Court has upheld user fees for public water and sewer facilities as well as user fees for public garbage facilities, which can both be analogized to public transportation facilities. Also, the Supreme Court of the United States has held, in several situations, 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.

The Transportation Utility Fee imposed by the City of Port Orange is a valid "user fee" and is not a tax. The fee is not a

general revenue producing devise; the cost of construction and maintenance of the City's transportation facilities will be allocated between the property owners and each user will only be charged for his or her use of the City's transportation facilities. Secondly, the uses of the collected funds are limited to construction and maintenance of the City's transportation facilities, and do not become part of general revenue.

The fee can be distinguished from a tax either as a regulatory measure (as the parking meter fees were in McCarthy, the anchorage fees were in Jacksonville Maritime Association, or the beach access fees in Daytona Beach Shores) or as a proprietary measure (as the water and sewer fees were in Miami Springs, as the garbage fees were in Fish, or as the airport fee was in Alamo).

However, the repair and maintenance of city streets is a proprietary function. The City of Port Orange, as a proprietor of its transportation facilities, may charge a fee for those who benefit from the use of these facilities. Just as any other proprietor of any other public facility may charge a fee for those who benefit from the use of such facility. The City of Port Orange is in no different situation than the proprietor of a garbage facility or the proprietor of a water and sewer facility who charge fees for use of their service and facilities.

Based on all of the foregoing, the City of Orlando, as amicus curiae in this matter, requests that this Honorable Court affirm the opinion of the trial court.

DATED this 3 day of May, 1994.

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U. S. Mail this 3 day of May, 1994, to:

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