IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,103

STATE OF FLORIDA,

Appellant,

v.

THE CITY OF PORT ORANGE, etc.,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

BRIEF OF THE FLORIDA ASSOCIATION OF COUNTY ATTORNEYS, INC., AMICUS CURIAE

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STATEMENT OF THE CASE

This is a direct appeal by the State of Florida from a judgment of the Circuit Court for Volusia County, validating certain bonds to be repaid from the revenues of a transportation utility fee. Permission has been requested by the undersigned to file this brief amicus curiae on behalf of the Florida Association of County Attorneys.

STATEMENT OF THE FACTS

The City sought validation of certain bonds, the repayment of which was pledged from the receipts of a "transportation utility". Essentially the underlying ordinance creates a charge on all developed properties in the City, in two parts. One part imposes a general charge to defray the city's unfunded costs of maintaining a collector road system. The other part imposes a charge only on those properties to which access is made by local streets under the exclusive responsibility of the City. The receipts are allocated to the cost of constructing, operating and maintaining the City street system.

The City sought validation of certain bonds secured by the receipts of the transportation utility. The trial court approved the bonds, except as to the use of the receipts for noncapital purposes. The City acknowledged that it had no intention of so using the receipts. Nevertheless the State has appealed the final judgment of validation.

The facts are explicated in greater detail in the briefs of the principal parties, and in the Final Judgment.

ISSUES ARGUED BY AMICUS

I.

THE COURT HAS HISTORICALLY FAVORED THE EFFORTS OF LOCAL GOVERNMENT TO MEET THE DELEGATED RESPONSIBILITIES OF GOVERNMENT IN THE ABSENCE OF LEGISLATIVE SHARING OF RESOURCES OR CONSTITUTIONAL FISCAL HOME RULE

II.

THE VALIDATION OF BONDS SUPPORTED BY A TRANSPORTATION UTILITY FEE IS CONSISTENT WITH EXISTING DECISIONS OF THIS AND OTHER FLORIDA COURTS WITH RESPECT TO USER FEES

III.

THE STATE AND ITS SUBDIVISIONS HAVE POWER TO IMPOSE USER FEES FOR THE OPERATION AND MAINTENANCE OF PUBLIC STREETS, ROADS AND HIGHWAYS

SUMMARY OF ARGUMENT

Article VIII of the Constitution of 1968 repeals "Dillon's Rule" as to Florida local governments, and broadly authorizes cities and counties to take such actions in the interest of local self-rule as are not inconsistent with legislation. Local governments are therefore no longer dependent upon the Legislature for delegation of specific fragments of the State's power.

However, with respect to fiscal matters neither the Constitution nor the Legislature has been so generous. Article VII grants to local governments the power of ad valorem taxation, but circumscribes that power with an assortment of millage caps, exemptions and special valuation rules. *All other forms of taxation are preempted to the state*, subject to creation, abolition or delegation at the pleasure of the Legislature. In the quarter-century since the Constitution was first adopted, the Legislature has increasingly sent unfunded mandates to local governments. Over that span of years, state government's share of total expenditures in relation to local government's share has declined, from *two times* the local share in 1968, to approximately *one-half* the local share in 1992. Local governments have responded by supporting Constitutional limits on unfunded mandates (Article VII, §18). With the approval of the courts, they have also made more intensive use of user charges, special assessments and the other limited revenue measures accessible at the local government level.

The transportation utility ordinance approved by the circuit court is not a new invention. It is in one sense an extension of existing caselaw with respect to impact and user fees, and in another sense a retreat to older and more sedate revenue sources. Impact fees were first approved in this Court nearly twenty years ago as to utilities, and have long been judicially approved and in widespread use for transportation as well. In its early analyses the Court identified such fees as "user charges" even though such ordinances contemplated an abrupt

acceleration of capital cost recovery rather than older methods of amortizing capital costs along with ongoing operation and maintenance expenses in a smaller periodic user charge. The identification of transportation impact fees as "user charges" rather than "taxes" having long since been judicially established, it is no departure at all to return to periodic user charges as a method for financing the ongoing maintenance and operation of transportation facilities. It is not dissimilar to the increasing use of condominium or property owners' dues to defray the cost of maintaining private subdivision roads.

The State misconstrues existing Florida precedent when it argues that there is an absolute right to "free" transportation facilities. Nothing is "free", and so long as the cities and counties are faced with increasing responsibilities and no new delegated revenue sources, they must make the best of their traditional sources. This ordinance is an example.

ARGUMENT

I.

THE COURT HAS HISTORICALLY FAVORED THE EFFORTS OF LOCAL GOVERNMENT TO MEET THE DELEGATED RESPONSIBILITIES OF GOVERNMENT IN THE ABSENCE OF LEGISLATIVE SHARING OF RESOURCES OR CONSTITUTIONAL FISCAL HOME RULE.

The role and privilege of a friend of the court is to illumine some of the broader policy issues embedded in a particular case or controversy, from a perspective which is perhaps more detached than that of the protagonists in the appeal. This amicus believes that it is helpful to the Court to approach its decision in this case by first considering the necessity of the City's action below, and the policy alternatives available to it.

This City is similar to other cities, and the counties which the members of this amicus serve. Its responsibilities seem constantly to increase, either because of civic expectations or because of mandates from state and Federal governments, while local citizens become more restive under the burden of traditional taxes. Such taxes do not require, and often do not exhibit, a clear relationship between the amount paid and the direct benefits received. Both from a standpoint of political prudence and the absence or unattractiveness of the tax alternative, many local governments have turned to the use of revenue measures in which a clearer nexus can be demonstrated between burden shared and benefits conferred. Impact fees, other user charges, and special assessments are the most common demonstrations of governmental charges which have a stronger nexus between burden and benefit than do traditional taxes.

Nor is such a policy choice entirely voluntary on the part of local governments. Florida's tax structure places the residual power over distribution of tax authority in the Legislature. Yet with the advent of local government home rule under the 1968 Constitution, the Legislature is institutionally more detached from local government issues than formerly, and beset with its own statewide responsibilities. It is small wonder that the Legislature has been politically reluctant to share its limited power to create or increase taxes, with local governments. In such an environment, local governments have made innovative applications of other traditional revenue measures, and the courts have been generally deferential to the policy choices born of these struggles. This amicus suggests that such deference is due, not only because the choices available to local governments are few, but also because the selection of revenue measures which require a linkage of benefits and burdens is sound public policy, in which the Court should not interfere because no organic law is offended.

The 1968 Constitution has generally been thought to have created home rule for Florida's cities and counties. In point of fact, it has reduced the necessity of local governments to resort to special acts of the Legislature to address specific local problems, but it is too strong a statement to say that local governments enjoy unbridled constitutional home rule.

Under Article VIII, §2 of the Constitution, cities nominally may exercise "any power" for municipal purposes except as otherwise provided by law. However, this Court early held that such powers were not self-executing (*City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972)). Soon thereafter, the Legislature gave voice to municipal home rule through adoption of Chapter 73-129. But it was acknowledged that such power was subject to legislative amputation. *See* Marsicano, "Municipal Home Rule Under the Constitution of 1968", Florida Municipal Record, October 1983, pp. 1-2.

Article VIII, §1(h) made noncharter counties likewise dependent upon the legislative delegation of powers of self-government. The legislature has been temporarily generous with that power in Fla. Stat. §125.01. Charter counties are also subject to legislative interdiction of their home rule powers by general law; *see* Article VIII, §1(g).

In the quarter-century since adoption of this Constitution, the burden of providing government services has increasingly descended from the state to the local level. In 1988-89, for the first time the collective expenditures of Florida's county governments surpassed the expenditures of the state government, net of state transfers to cities, counties and school districts[1] The cumulative expenditures of cities and counties now are about twice the expenditures of state government, reversing the proportions which existed at the time of the Constitution's adoption.

In the face of these increasing responsibilities at the local level, there has been a paucity of sharing of state resources. The Constitution allows to local governments only the ad valorem tax, and even that tax is hemmed about with millage caps and further legislative tinkering with those caps[2]. Homestead exemptions have quintupled since adoption of the Constitution; and various "special valuation" measures authorized to the legislature for agricultural lands, high water recharge lands, stock in trade and livestock. Each of these erosions in the property tax began constitutionally or statutorily with the Legislature, rather than with local governments

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[1]Florida counties in 1988-89 spent $12,062,013,358, while state expenditures totalled $11,406,705,554. *See* Local Government Financial Report, Department of Banking and Finance, October 1-September 30, 1988-89. The most recent compiled report, for FY 1991-92, shows that combined city and county expenditures reached $26,100,388,447.

See Florida Dept. of Education v. Glasser, 622 So.2d 944 (Fla. 1993); *Board of County Commissioners of Hernando County v. Florida Dept. of Community Affairs*, 626 So.2d 1330 (Fla. 1993).

which have been expected to do more with less as a result.

There have been some defensive reactions at the local government level. In 1990, with broad support from cities and counties, Article VII, §18 was added to the Constitution, restricting but not prohibiting the legislature's power to tamper with local government revenues or budgets through unfunded new legislative mandates or the legislative contraction of existing local revenue sources.

Perhaps the more constructive and creative reaction has been the attempts by local governments to utilize to the fullest the revenue sources available to them. Particularly in the face of the "concurrency" mandates of Fla. Stat. §163.3180 (1993) and its predecessors, these governments have been required to devote an increasing proportion of their revenues to the capital costs of infrastructure to serve population increases. Many governments have adopted a variety of impact fees, which this Court and other Florida courts have judicially approved as "user charges" or valid regulatory fees. *See, e.g. Contractors and Builders Association v. City of Dunedin*, 329 So.2d 314 (Fla. 1976) (water and sewer impact fees); *Home Builders and Contractors Association of Palm Beach County v. Board of County Commissioners of Palm Beach County*, 446 So.22 140 (Fla. 4th D.C.A. 1983), *rev. den.* 451 So.2d 848 (road impact fees); *Hollywood, Inc. v. Broward County*, 431 So.2d 606 (Fla. 4th D.C.A. 1983) (park and recreation impact fees); *St. Johns County v. Northeast Florida Builders Association, Inc.*, 583 So.2d 635 (Fla. 1991) (school impact fees).

Perhaps in tacit recognition of the fiscal strangulation of local governments and the reluctance of voters to approve long-term debt, this Court has been historically deferential to such efforts by local governments to make new use of existing powers. In addition to its approval of a broad array of impact or user charges, the Court has given its approval to the

"lease-purchase" of public properties, a method of financing which bridges the two extremes of "pay as you go" budgeting and long-term general obligation debt. That approval came first as to simple equipment leases in *State v. Brevard County*, 539 So.2d 461 (Fla. 1989), and as to considerably more complex transactions involving school leases in *State v. School Board of Sarasota County, et al.*, 561 So.2d 549 (Fla. 1990).

Finally, in *City of Boca Raton v. State*, 595 So.2d 25 (Fla. 1992), this Court expressly acknowledged the repeal of "Dillon's rule" in Florida by the Constitution of 1968, and declared that a municipality may act upon any subject matter on which the legislature may act, in the absence of some direct prohibition. There, the Court allowed a special assessment district to be created by a local ordinance not in conformity with a state law, and distinguished the assessment from a tax even though the benefit was to be measured by an ad valorem method.

In the twenty-year journey from *Fleetwood* to *Boca Raton*, this Court has with more and more sweeping statements acknowledged that residual home rule authority should rest with local government in the absence of restrictive legislation. Particularly in revenue matters, this Court has expressed its tolerance for the policy judgments of local officials in the creative and flexible use of their limited array of taxes, user fees and charges, and special assessments. Thus the Court has prevented or delayed what may otherwise have been a fiscal emergency among local governments arising from the shifting and enlarging of their responsibilities without any redistribution of statewide resources.

The trial court noted the two principal out-of-state decisions in the matter of transportation utility charges. In *Bloom v. City of Fort Collins*, 784 P.2d 304 (Co. 1989), the Colorado Supreme Court approved an ordinance which imposed a special fee on developed lots to defray the expenses of maintaining the abutting streets. But in *Brewster v. Pocatello*, 768

P.2d 765 (Idaho 1988), the Idaho Supreme Court found that the City lacked the required authority to enact a street restoration and maintenance fee. The trial court found the *Fort Collins* decision to be more persuasive in view of the similarities between the Colorado and Florida constitutional provisions for local government home rule, and the continuing viability of "Dillon's rule" in Idaho constitutional jurisprudence.

The trial court correctly perceived the issue and the precedents of this Court in parting company with "Dillon's rule". Any return to it at this juncture would require not only the reversal of the judgment below, but also a recession from this Court's prior decision in *Boca Raton* which expressly rejects Dillon's rule as part of Florida's constitutional structure.

The interpretation of our organic laws in such a way as to avoid destructive confrontations or failures within or between other levels of the government, and to foster the necessary resilience and lubrication in the links of our political machinery, is one of the irreducible functions of the Court. A consideration of the political equilibrium suggests that the Court should continue in that model and approve the initiative of the City.

Having suggested a historic, economic and jurisprudential context for the consideration of this case, this amicus now turns to the specific justification for the ordinance under review:

II.

THE VALIDATION OF BONDS SUPPORTED BY A TRANSPORTATION UTILITY FEE IS CONSISTENT WITH EXISTING DECISIONS OF THIS AND OTHER FLORIDA COURTS WITH RESPECT TO USER FEES

The State suggests that the City has no legal authority to turn its streets into a public utility, and that the transportation utility fee is in truth a tax because it is not voluntary and there

is no rational relationship between the fee and the actual use of the facility.

The issue of legal authority to impose assessments or user fees for improvement and maintenance of streets previously "free" is addressed in greater detail in the final point of this brief. It will suffice here to observe that special assessments for street improvements or utility construction have a long history of judicial approval upon a demonstrable link between burden and benefit, are rarely voluntary, and have never been deemed taxes.

Beginning with *Dunedin*, this Court has approved the use of impact fees for a variety of public services. The State suggests that there is a distinction between "governmental services" and "closed system" or "proprietary" services of the local government, but that distinction will not pass scrutiny.

The Court first approved, in principle, the use of impact fees to raise revenue in *Dunedin, supra*, 329 So.2d 314. In that case, the City had ceased to raise its water and sewer capital construction funds for expansion through bond issues, seeking instead to collect such capital as a front-end charge against only those customers whose advent made necessary the expansion of the utility. The City argued, and this Court held, that a properly-limited impact fee was not a tax (for which there was admittedly no legislative authority) nor a special assessment (as to which the City conceded that it had not complied with statutory procedures; *but cf. Boca Raton, supra*). The Court accepted the reasoning of then-District Judge Grimes in the court below[3] that the fee was actually a user fee rather than a tax.

The State correctly observes that a water and sewer utility is a "closed system", the use of whose services is measurable. However, the State overlooks the fact that in *Dunedin*, the

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[3]*City of Dunedin v. Contractors and Builders Association*, 312 So.2d 763 (Fla. 2d D.C.A. 1975).

user charge approved was not based on any direct measurement of any particular customer's demand, but on an estimate of average future usage by all customers of a class, upon which capital forecasts must necessarily be based.

Nor have impact fees and other user charges been limited to so-called "proprietary" systems in the traditional sense. In *Palm Beach County, supra,* 446 So.2d 140, the District Court took up the subject of transportation impact fees, against the specific argument that such fees were actually taxes. In that case, the ordinance in question imposed fees upon new construction in each of forty zones within the County, for the purpose of raising construction funds for roads within the respective zones. The District Court carefully considered the question in light of the previous decision of this Court in *Dunedin* and its own decision in *Hollywood, Inc. v. Broward County, supra*, and concluded that the ordinance in question met the dual rational nexus test laid down in those cases.

Now we have come full circle. Prior to *Dunedin*, it was the practice of most municipalities to raise capital revenue as a small component of periodic user charges or utility rates, over an extended period of time. A portion of the periodic user charge paid debt service on the capital, and a portion paid the operation and maintenance expenses of the utility. *Dunedin* held that it was permissible to raise the capital part of such revenues through fees imposed on a limited class of customers, so long as the dual rational nexus test was met. Where that test is met, the revenues have not lost their character as user charges. They are different only in degree, not in kind, from the more customary utility rates. *Palm Beach County* has approved that same analysis as to transportation fees, and now we are simply applying that same conclusion to the "operations and maintenance" expense as opposed to the capital expense of constructing and maintaining a transportation system.

A user charge is a user charge, and perhaps it is more so when the charge is for the actual use and maintenance of the system rather than for the capital cost of constructing the system in the first place. Where the raising of capital costs through "impact fees" has been approved as user charges, *a fortiori* the raising of operating and maintenance costs by that method is permissible.

The State's argument that public streets must be "user charge free" recalls the perhaps apocryphal story of the citizen who complained at a budget hearing, "The taxpayers should not have to pay for this. The Government should pay for it!" The broad argument that nothing can impair the right of a citizen to free travel on the public streets could conceivably call into question even the Constitutional and additional motor fuel taxes, which are a form of user fee earmarked for construction and maintenance of the transportation systems.

Surely the State would concede that the maintenance and operation of a public street system can be funded by those who benefit. For example, Fla. Stat. §170.01 expressly authorizes special assessments against benefitted properties for the expense of "construction, *reconstruction, repair,* paving, *repaving*, hard surfacing, *rehard surfacing, widening, guttering and draining of streets, boulevards and alleys.*"

It is curious that the State would here take the position that the transportation utility fee should fail because it does not benefit the affected property owners. In *North Palm Beach County Water Control District v. State*, 604 So.2d 440 (1992), the State took essentially the opposite view, and argued that bonds should be invalidated because the underlying assessments benefitted *only* the affected property owners. This Court reviewed the enabling legislation authorizing the district to levy a tax, and recognized that the "tax" was really a special assessment.

In *Hanna v. City of Palm Bay*, 579 So.2d 320 (Fla. 5th D.C.A. 1991), the District Court reviewed a street resurfacing program of the City which was funded by a citywide special assessment program. The Court agreed that there was no special or disproportionate benefit to any property because all properties were equally benefitted, and therefore invalidated the assessment. The decision was based on the rationale that "there exists no inherent power for levying special assessments to fund local improvements", and is thus discredited by this Court's subsequent decision in *Boca Raton*. However, it has not been specifically rejected, and therefore there may be doubt as to whether a citywide special assessment program is lawful. Considering the fact that such assessments are often challenged on the basis that those assessed are not benefitted, or that others are benefitted who were not assessed[4], it is difficult to understand how there can be complaint when all in a community are benefitted and all are assessed, for surely there is a "benefit" thus derived when properties in such a community are compared to properties in communities where no such improvements were made. However, the case remains troublesome if special assessments are to be used as a tool for raising operation and maintenance funds for transportation.

The distinction between a special assessment and a user charge is that the special assessment is imposed in proportion to a benefit conferred *on* property, while a user charge is imposed in proportion to a burden inflicted *by* property. Either method is authorized to cities and counties by virtue of their statutory or constitutional home rule powers.

The distinction between assessments and user charges (at least, the kind of user charges now referred to as "impact fees") is also often explained by the "dual rational nexus" test for

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[4]*Rushfeldt v. Metropolitan Dade County*, 630 So.2d 643 (Fla. 3d D.C.A. 1994)

user charges. In the case of a special assessment, there need be only a rational nexus between the assessment imposed, and the benefit received. In the case of the user charge, dual rational nexi are required by the decisions. The first is comparable to the special assessment requirement; there must be a nexus between charge imposed and benefit received. The additional nexus required of user charges, but not of special assessments, is that there must be a rational relationship between the amount of the charge and the burden imposed or potentially imposed by the subject property on the utility or service in question.

The State complains that the rate schedule established by the City's ordinance is too "flat" and unresponsive to the variations in actual use of the transportation network by individual property owners, or by others not charged.

As to the issue of some users escaping charges, the complaint is reminiscent of the appellant's complaint in *Palm Beach County, supra,* 446 So.2d at 143:

> ...since anyone can drive a vehicle over any of these roads, regardless of whether he lives in the zone or has paid the impact fee, there is too great a disparity between those who pay and those who receive the benefit, making the charge in reality a tax which the county does not have the power to impose."

The District Court in *Palm Beach County* rejected that argument under equal protection analysis, holding that a benefit accruing to the community generally does not adversely affect the validity of an impact fee or user charge so long as the fee does not exceed the pro rata cost of improvements (first rational nexus) and the improvements adequately benefit the development that is the source of the fee (second rational nexus).

As to the issue of the "flat rate" charge rather than a "per trip" or usage toll, it is clear that the government providing a public service or utility may craft fees in such a way as to take into account the cost of merely having the service available. For example, in *City of New*

Smyrna Beach v. Fish, 384 So.2d 1272 (Fla. 1980) this Court upheld the power of a city to establish standby or minimum service charges for garbage and trash service to condominiums, notwithstanding the fact that many of the units so assessed were occupied only seasonally and did not make any use of the available service during the "off-season".

Even more persuasive is this Court's decision in *St. Johns County v. Northeast Fla. Builders Association, Inc.*, 583 So.2d 635 (Fla. 1991), approving school impact fees. There, it would have been unconstitutional to measure the impact fee by the actual usage of the school system, because it would have offended the guarantee of free public schools. Nevertheless the Court approved a modified form of the fee which imposed a charge on all properties based on the average or *potential* demand for public school facilities which each new property represented.

It is thus demonstrable from the existing decisions of the Court that the user charge for the maintenance of the City's transportation system is within its inherent power, and meets the "dual rational nexus" test required for such charges. The charge is thus distinguishable from a tax. The only remaining issue is whether there is something distinctive about public streets that immunizes their users from a user charge.

III.

THE STATE AND ITS SUBDIVISIONS HAVE POWER TO IMPOSE USER FEES FOR THE IMPROVEMENT, OPERATION AND MAINTENANCE OF PUBLIC STREETS, ROADS AND HIGHWAYS

The State says that "a city would have no right to erect toll gates along its streets as a means of raising revenue from citizens." As support, it cites repeatedly the case of *Day v. City*

of St. Augustine, 104 Fla. 261, 139 So. 880 (Fla. 1932). That quotation is incomplete; it omits the preceding language of the Court: "We may therefore grant the appellant's argument that. . ." and the trailing language: "but such principle, *if conceded*, would not necessarily apply [to the facts of the case]." 139 So. at 885. The statement from *Day* is thus reduced to dictum or an oblique reference to an immaterial argument of the unsuccessful appellant.

Actually, the City prevailed in *Day*. The issue was whether the City, once it had initially financed a bridge over the Matanzas River with general obligation bonds to be supported by ad valorem taxes, could impose a toll as a substituted means of paying the bonds. The Court found that the City's right to do so had been expressly conferred by legislative franchise, and that there was no inherent right of the public to prevent the imposition of tolls on a bridge whose passage was initially free.

In *City of Daytona Beach Shores v. State*, 483 So.2d 405 (Fla. 405), the City had imposed a beach ramp fee at the seaward end of a number of platted public streets, the revenues from which were limited to beach maintenance purposes. Upon a challenge to the fee, the trial court held that "once a street is publicly dedicated to free use by the public, the public's right to free use thereof vests, and the municipality may not thereafter impose a fee for ordinary passage." The trial court's conclusion was based on a finding that the ramps were public right of way transferred to the City by virtue of Fla. Stat. §337.29(3). Upon intermediate review, the District Court rejected the whole argument about whether the City owned the road, and held the ramp fee invalid as a user charge. *City of Daytona Beach Shores v. State*, 454 So. 2d 651 (Fla. 5th D.C.A. 1984). On further review, but without expressly addressing the road question, this Court reversed the lower courts and held that the ramp toll was permissible as a user charge for the beach-related services, which included the ramp maintenance on the street ends.

In *Masters v. Duval County*, 154 So. 172 (Fla. 1934), citizens challenged the authority of the County to impose a toll for passage over the St. Johns River Bridge, *except to pay for operating, maintenance and repair of the bridge*, after the bridge construction bonds had been fully retired. It appeared that the County wished to continue collection of the toll to finance another bridge. The Court rejected the challenge to the tolls as taxes, and held that the County could continue their collection and the use of the proceeds for other county purposes. It was apparently conceded by both parties that user charges might continue for the operating, maintenance and repair.

In deciding *whether* a particular action of another branch of government is appropriate, it is often useful to consider *why* that action might have been taken. It cannot escape notice that, as explicated under the first Point of this brief, local governments do not have surplus revenues. It also cannot escape notice that many new developments are increasingly conscious of security, and to that end private or limited access streets are more commonplace. Although such streets are sometimes constructed and maintained with public assistance (*see North Palm Beach County, supra,* 604 So.2d 440), many local or subdivision streets are constructed and maintained by homeowners' associations or condominium associations. The residents of such developments in essence pay twice, if their gasoline taxes and general taxes are used to maintain the local subdivision streets elsewhere in the community. They pay for their own street maintenance through homeowners' dues or condominium association, and they pay for the local streets of others through their gasoline and general taxes. It is thus arguable that they confer a "windfall" upon their fellow citizens.

It is therefore competent for a local government to resolve to redistribute the burden of local street maintenance costs among those directly benefitting rather than across the entire

population. When, as here, a city does so, there is a more equitable distribution of costs. All in the City must pay for the collector roads and principal streets, but the local access streets, publicly maintained, are now paid for only by those who principally benefit from that maintenance. Those who do not abut such streets or principally benefit from them are not taxed for their maintenance. Such a scheme, far from being an unconstitutional tax, is well within the inherent powers of local governments.

The Court would do well to consider the words of Justice Field in *Sands v. Manistee River Improvement Company*, 123 U.S. 288, 8 S.Ct. 113, 31 L. Ed. 149 (1887):

> There is no analogy between the imposition of taxes and the levying of tolls for improvement of highways; and any attempt to justify or condemn proceedings in the one case, by reference to those in the other, must be misleading. 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. The legislature, acting upon information received, may prescribe, at once, the tolls to be charged; but, ordinarily, it leaves their amount to be fixed by officers or boards appointed for that purpose, who may previously inspect the works, and ascertain the probable amount of business which will be transacted by means of them, and thus be more likely to adjust wisely the rates of toll in conformity with that business. This subject, like a multitude of other matters, can be better regulated by them than by the legislature. In the administration of government, matters of detail are usually placed under the direction of officials. The execution of general directions of the law is left, in a great degree, to their judgment and fidelity. Any other course would be attended with infinite embarrassment.

CONCLUSION

The judgment of the circuit court should be affirmed, and the Court should in so doing specifically opine that those governmental services and facilities, the capital exactions for which have previously been judicially approved as impact or user fees, may likewise be operated and maintained through user fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a 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, and PETER L. DANE, Esq., Squire, Sanders & Dempsey, 2100 Enterprise Center, 225 Water Street, Jacksonville, Florida 32202, and ERIC J. TAYLOR, Assistant Attorney General, The Capitol, Tax Section, Tallahassee, Florida 32399-1050, and PAUL GOUGELMAN, Esq., Post Office Box 639, Melbourne, FL 32902-0639, and GEORGE NICKERSON, Esq., Post Office Box 11008, Tallahassee, FL 32302-3008, this 5 day of MAY, 19 94.

C. Allen Watts

C. ALLEN WATTS