IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Defendant/Appellant,

vs.

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

Plaintiff/Appellee.

CASE NO. 83,103

INITIAL BRIEF OF AMICUS CURIAE FLORIDA CHAMBER OF COMMERCE

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Amicus Curiae, the Florida Chamber of Commerce, in support of the position of Appellant, the STATE OF FLORIDA.

STATEMENT OF THE CASE AND FACTS

This matter arises from a bond validation proceeding in the Circuit Court, Seventh Judicial Circuit, in and for Volusia County, Florida, in which the Circuit Court entered a Final Judgment dated January 6, 1994, holding that the issuance of not exceeding $500,000 aggregate principal amount of Transportation Utility Revenue Bonds of the CITY OF PORT ORANGE, FLORIDA is for a proper, legal and corporate public purpose and is fully authorized by law, and that the pledge of the Transportation Utility Fees and the Bond are validated.

As to the details of the case and facts, Amicus Curiae Florida Chamber of Commerce incorporates herein by reference the Statement of the Case and Facts contained in the Initial Brief of the STATE OF FLORIDA.

SUMMARY OF ARGUMENT

The Port Orange "transportation utility fee" is not a "fee" but an illegal tax which may not be imposed by a municipality.

ARGUMENT

THE "TRANSPORTATION UTILITY FEE" IS AN IMPERMISSIBLE TAX AND NOT A USER FEE

The CITY OF PORT ORANGE ("City") has attempted, through the magic of semantics, to turn an unconstitutional tax into a user fee. First, the City labeled its road system a "utility", and then, because towns may levy fees on users of utilities, inaugurated a "transportation utility fee" to be imposed on the town's property owners and occupants for the purpose of repairing and maintaining local city streets. The central issue in this case is whether the fees which the City proposes to collect from the owners or occupants of developed properties on city streets are actually user fees properly imposed upon the payers for their use of the City's streets, or whether the "fees" are in fact taxes which the City may not lawfully levy.

Municipalities may exercise any power for municipal purposes except when expressly prohibited by law. Art. VIII, § 2(b), Fla. Const.; § 166.021(1), Fla. Stat. (1991). Municipalities may not legislate on any subject matter preempted to the state or county government by the Florida Constitution or general law. § 166.021(3), Fla. Stat. (1991). Municipalities can levy ad valorem taxes on real estate and tangible personal property, but can impose no other taxes. Art. VII, §§ 1(a), 9, Fla. Const. See also, Contractors & Builders Association of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976) (a municipality cannot impose a tax, other than an ad valorem tax, unless authorized by law).

A municipality is permitted, however, to impose user charges, often referred to as "user fees", to raise revenues. § 166.201, Fla. Stat. (1991).

> Fees imposed by a governmental entity tend to fall into one of two principal categories: user fees, based on the rights of the entity as proprietor of the instrumentalities used, Opinion of the Justices,

> 250 Mass. 2591, 597, 148 N.E. 889 (1924), or regulatory fees (including licensing and inspection fees), founded on the police power to regulate particular businesses or activities... Such fees share common traits that distinguish them from taxes: they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner "not shared by other members of society," National Cable Television Ass'n v. United States, 415 U.S. 336... (1974); they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge, Vanceburg v. Federal Energy Regulatory Comm'n, 571 F.2d 630, 644 n. 48 (D.C. Cir. 1977)...and the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses.

Emerson College v. City of Boston, 462 N.E.2d 1098 (Mass. 1984).

For there to be any distinction between a tax and a fee, in the case of a user fee there obviously must be a distinct and direct connection between the use of a service, commodity, or facility and the payment of the charge for using it -- as well as a fair relation between the charge and the benefit for which one is paying the charge. Such connections and relationships are not present in the Port Orange Transportation Utility scheme.

Furthermore, a user fee requires that there be a "user" to make use of something and pay the charge for using it. Those who use something -- a toll road, or city water, for example -- must pay for using it, and those who do not use it cannot be required to pay for it. There is no reasonable connection in the Transportation Utility scheme between a person's actual use of the roads and the price he or she must pay for using them.

For example, a person who owns a home in Port Orange and a clothing store on a downtown street in Port Orange would have to pay a "fee" based on his ownership of his residence, which presumably pays for his family vehicles' use of the town roads. But he would also have to pay a fee based on his store, even though the business owns no vehicles, and even

though most of his customers will have paid for their use of the roads because of the "fee" imposed on their residences.

To benefit from something is not the same as using something. Use must be direct; the user consumes something, for instance, for which use he must pay in proportion to his use. Benefit, on the other hand, may be indirect and not connected with use at all, as where business owners outside Port Orange benefit from the existence of the City and its roads even if they never go into town.

Taxes are the traditional and proper means of making the populace in general pay for benefits which do not lend themselves to a measurable relation between user and thing used, while fees have been directly tied to use of services or facilities. See, e.g., Commonwealth Edison Co. v. Montana, 453 U.S. 609, 621-622 (1981) (a tax provides revenue for the general support of the government, while a user fee imposes a specific charge for the use of publicly-owned or publicly-provided facilities or services). Ochs v. Town of Hot Sulphur Springs, 407 P.2d 677, 679 (Colo. 1965) (taxation has been defined as that burden or charge upon all property laid for raising revenue for general public purposes in defraying the expense of government).[v] "A fee is designed to defray the expense of operating and improving the facility upon which it is imposed, whereas a tax is used to defray general municipal expenses." Thrifty Rent-a-Car System, Inc. v. City and County of Denver, 833 P.2d 852, 854 (Col. App. 1992).

There appear to be only two cases which have dealt with the equivalent of a "transportation utility fee," and those cases are in conflict. One is Brewster v. City of Pocatello, 768 P.2d 765, 768 (Id. 1987), in which the Supreme Court of Idaho stated while a municipality may provide sewer, water and electrical services to its residents,

> ... those services, in one way or another, are based on user's consumption of the particular commodity, as are fees imposed for public services such as the recording of wills or filing legal actions. In a general sense a fee is a charge for a direct public service rendered to a particular consumer, while a tax is a forced contribution by the public at large to meet public needs.

The Brewster decision disapproved a scheme which appears to have been virtually identical to Port Orange's. Pocatello's ordinance imposed a street maintenance fee on all owners or occupants of property in the city pursuant to a formula reflecting the traffic estimated to be generated by the particular property. Pocatello's residents had several times voted down proposals to fund such road work, and so the government obviously concocted the "fee" plan in order to exact the payment without voter approval. Prior to the enactment of the "fee" ordinance, ad valorem tax revenues had been used to pay for road maintenance.

The Idaho Supreme Court viewed "all issues in this case as being subsumed in the question as to whether the street maintenance fee imposed by the Pocatello ordinance is a fee [authorized by Idaho statute] or ... it is a disguised tax and hence invalid.... The sole issue appears to be whether absent legislative authority a municipality may impose a fee on the owners or occupants of property which abut public streets and which streets are open to public passage by the public in general." 768 P.2d at 766. The court disagreed with the argument that the funds sought to be collected constituted a fee reasonably related to services to be provided by the city, and so were not a tax. The court's reasoning applies precisely to the case at bar:

> We view the essence of the charge at issue here as imposed on occupants or owners of property for the privilege of having a public street abut their property. In that respect it is not dissimilar from a tax imposed for the privilege of owning property within the municipal limits of Pocatello. The privilege of having the usage of city streets which abuts one's property is in no respect different

> from the privilege shared by the general public in the usage of public streets.
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> * * *
>
> Even assuming that the city possessed authority to declare all of its streets subject to the payment of a toll, such would not justify the imposition of a fee upon an owner or occupier of property adjacent to such a toll facility solely because of such occupancy or ownership.
>
> We hold therefore, that the attempted imposition of the "fee" by the city of Pocatello is in reality the imposition of a tax.

768 P.2d at 768.

In the circuit court, the City of Port Orange relied on Bloom v. City of Fort Collins, 784 P.2d 304 (Colo. 1989), which held that a "transportation utility fee" was a valid "special fee" and not a tax. As the dissenting opinion in Bloom explains, the majority opinion is seriously flawed. The majority fell back on an "in our view, this is the way it is" shortcut to conclusions which avoided the inconvenience of installing all the rungs in the ladder. After defining different kinds of taxes and fees, the majority held that the levy on owners of developed property was a "special fee", although a provision for using surplus funds for purposes other than road work had to be eliminated from the ordinance in order to prevent the charge from being a tax and therefore illegal. "Unlike a tax, a special fee is not designed to raise revenues to defray the general expenses of government, but rather is a charge imposed upon persons or property for the purpose of defraying the cost of a particular governmental service." 784 P.2d at 308.

The Bloom majority stated the following illogical chain of reasoning: A. "It is true that a tax levied directly upon properties must be ad valorem -- that is, it must be based on the relative valuations of the properties to which the tax applies." Id. B. "The transportation utility

fee...is not based upon the value of the developed lot subject to the fee, nor does the fee fluctuate with the assessed value of the lot." Id. C. Therefore, the transportation utility fee is not a tax. (That is, since it can't legally be a tax, it must be a fee!) What such "reasoning" proved was that the charge was an unlawful tax, and not that it was something other than a tax.

The Bloom majority then went on to find, at 784 P.2d 310, that the levy was a "special fee" because it was "a charge imposed on persons or property and reasonably designed to meet the overall cost of the service for which the fee is imposed." Id. The "service" received by property owners was effective access to other parts of the city. The Bloom majority did not, however, choose to analyze the difficult question why it was constitutional to levy this "fee" on a certain group of people when the city "could have elected to impose the fee on a larger segment of the public -- for example, all licensed drivers residing within the city or all adult residents in the city." The answer was purely dogmatic: "We, however, do not view the class of persons liable for the fee ... so limited in relation to the nature of the service as to render the ordinance invalid." Id.

Two dissenting justices discussed the difficulties which the Bloom majority had simply avoided facing:

> A special fee, or utility fee, is a charge imposed upon persons or property in exchange for a particular government service that benefits the party paying the fee in a manner not shared by other members of society. ... The essence of a special fee is that it is charged in exchange for a specific government service that is requested by an individual and directly benefits that individual.

784 P.2d at 312.

The dissenters emphasized that a "fee" is paid in exchange for a service that directly benefits the person paying the fee, and that the person paying the fee has asked for certain services which presumably bestow upon him a benefit not shared by other members of society.

> Road maintenance expenditures are traditional governmental expenditures that benefit the public at large. ... The revenues from the fee at issue here are not restricted to providing maintenance of any particular streets. There is no necessary direct benefit derived by a property owner upon whom the fee is imposed that is not shared by other members of society. In short, the transportation utility fee has none of the essential characteristics of a special fee.
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> * * *
>
> The majority's approach seems to allow any government service to be financed by a fee that bears some relationship to the benefit produced by the service. This approach undermines the constitutional requirements of ad valorem taxation.

784 F.2d at 313-14.

A further obvious distinguishing feature of user fees is that because they are imposed only on those who use some public facility or service, those who do **not** pay the fee to use the facility must where possible be barred from using it, as when a home's water is turned off if the water bill is not paid, or else forced to pay. The fallacy of the Port Orange scheme is therefore further illustrated by the fact that everybody can use the city streets, and nobody can be barred from doing so, but only certain people will be forced to pay the "fee" for maintaining the streets.

The City of Port Orange, by departing entirely from the principle of the connection between a fee and a particular person's use of a public facility, and confusing "users" with "general beneficiaries", has simply imposed a tax under a different name. If this Court were

to approve such camouflage it would open the way to any Florida city imposing "user fees" on property owners to pay for just about any public expenditure which might conceivably benefit any inhabitant of the town.

The City will no doubt argue that its ordinance attempts to tailor the amount of the "fee" on each property to the amount of road use which will be "generated" by that property. But even if such a correlation could be accurately drawn from standardized "trip generation" statistics (highly dubious), it would not be enough to turn the tax into a fee. A similar argument was made by a city in Emerson College v. City of Boston, supra, where a "fee" for "augmented fire protection services" was to be imposed on owners of certain types of buildings in addition to their property taxes, whereas other building owners, deemed members of the "general public", received fire protection without any charge beyond their property taxes. The Massachusetts Supreme Court agreed with the city's argument that in its correlation to the costs of funding the personnel and equipment of Boston's fire companies, the charge bore "some resemblance to a user fee," but the court went on:

> The AFSA charge fails, however, to comply with another essential characteristic of a fee. Fees are legitimate to the extent that the services for which they are imposed are sufficiently particularized as to justify distribution of the costs among a limited group ... rather than the general public. The benefits of "augmented" fire protection are not limited to the owners of AFSA buildings.

462 N.E. 2d at 1105. The court held that the "fee" was invalid.

Other out-of-state decisions casting light on this issue include City of North Little Rock v. Graham, 647 S.W.2d 452 (Ark. 1983), which held that a "public safety fee" was an unconstitutional tax. The "fee" was to be assessed on the monthly water bill of each household, business, and apartment residence in North Little Rock, except for people earning less than

$6,000 per year, and the money was to be used to raise the salaries and benefits of policemen and firemen. The Arkansas Supreme Court concluded that because the charge was not to pay for a specific, special service but was a means of raising revenue to pay additional money for services already in effect -- "the traditional governmental functions of police and fire protection" -- the charge was a tax and not a fee. 647 S.W.2d at 453.

Ochs v. Town of Hot Sulphur Springs, supra, found that a "frontage tax" and "water frontage tax" levied on property owners and allocated to the street department, equipment fund, and water system were an unlawful form of tax (neither ad valorem nor a special assessment conferring special benefit on the property being assessed), "nothing more than a devise [sic] or a scheme, unsupported by any permissive revenue producing authority, to provide funds for the general community benefit, and hence violative of the due process of law guarantees of the federal and state constitutions." 407 P.2d at 680.

Florida cases in which fees or assessments have been challenged and found valid are distinguishable from the invalid charges in the Port Orange ordinance. In Charlotte County v. Fiske, 350 So. 2d 578 (Fla. 2d DCA 1977), the court upheld an annual "special assessment" on each residential property in a certain county sanitation district, the proceeds of which were exclusively used to pay a private garbage disposal company to dispose of garbage in that district; a statute expressly authorized counties to collect service charges, special assessments, or taxes to pay for garbage collection and disposal.

"Impact fees" have of course been found valid, but they have no similarity to "transportation utility fees". See, e.g., ; Hollywood, Inc. v. Broward County, 421 So. 2d 606 (Fla. 4th DCA 1983) (holding valid an ordinance requiring developer/subdivider, as a condition

of plat approval, to dedicate land or pay a fee to be used in expanding a park system sufficiently to accommodate the new residents of the platted development); Contractors & Builders Association of Pinellas County v. City of Dunedin, supra (impact fees not exceeding a pro rata share of reasonably anticipated costs of capital expansion required because of new development are valid if they are not inconsistent with a state statute and if the money is used strictly for meeting the costs of the capital expansion).

Despite the complete lack of similarity between impact fees and the Port Orange fee, the City relied heavily in the court below on the "rational nexus" or "reasonable connection" test used in impact fee cases to evaluate the constitutionality of subdivision exactions. The test is whether there is a reasonable connection between the required dedication or fee and the anticipated needs of the community because of the new development on which the fee is imposed. See, Hollywood, Inc. v. Broward County, supra, at 611-12 (Fla. 4th DCA 1983), stating that,

> ...the local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth of population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision. In order to satisfy this latter requirement, the ordinance must specifically earmark the funds collected for use in acquiring capital facilities to benefit the new residents.

See also, Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863 (Fla. 3d DCA 1976), cert. denied, 348 So. 2d 955 (Fla. 1977); Home Buildings 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) (validity of impact fee on new development for the purpose of constructing new roads made necessary by the increased traffic generated by such development).

The test of impact fees assumes **in advance** that impact fees as such are valid[1], and the test is simply to determine whether there is a reasonable connection in a particular case between the alleged generation of new population and the need for new facilities. The "rational nexus" test is irrelevant to the present question whether a charge on existing real properties is a tax or a fee. But even if the "rational nexus" test were somehow applicable, rather than a smoke screen, the "transportation utility fee" ordinance would fail the test because it does not specifically earmark the funds collected for use in benefitting the properties taxed. If the City should say, "But maintenance of the road system benefits all owners of developed property," that is not equivalent to a showing that particular new or expanded facilities will benefit a particular group of newcomers to an area. In fact that argument's logical extension would be the statement (discredited earlier in this brief) that an "impact fee" could be imposed on all existing properties in a town or county as a means of financing road improvements. The "rational nexus" test is a simple and useful tool for a particular purpose, but it has no application to the question before this Court.

Hanna v. City of Palm Bay, 579 So. 2d 320 (Fla. 5th DCA 1991), is instructive, and its underlying facts are somewhat similar to those of the instant case. The City of Palm Bay government, after three unsuccessful attempts to get voter approval to increase the millage rate in order to finance city-wide road rehabilitation, resorted to "special assessments" on property

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[1]"In principle...we see nothing wrong with transferring to the new user of a municipally owned water or sewer system a fair share of the costs new use of the system involves." Contractors & Builders Association of Pinellas County v. City of Dunedin, supra, at 319.

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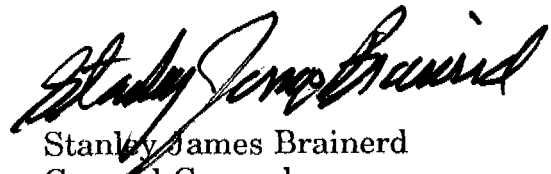
CONCLUSION

Based on the arguments presented above, this honorable Court should reverse the Final Judgement of the lower court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Eric J. Taylor, Assistant Attorney General, P.O. Box 10366, Tallahassee, FL 32302-2366 and Maureen Sikora, Esquire, 1000 Center City, Port orange, Florida 32119 on this eighth day of March, 1994.

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