IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, and the Taxpayers, Property Owners and Citizens of the City of Port Orange, Florida, including nonresidents owning property or subject to taxation therein, and all others having or claiming any right, title or interest in property to be affected by the issuance of not exceeding $500,000 Transportation Utility Revenue Bonds, hereinafter more particularly described,

Appellants,

vs.

Case No. 83,103

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

Appellee.
_____/

APPELLEE'S ANSWER BRIEF

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JURISDICTION

Appellee concurs with the statement of jurisdiction of the Appellant as set forth in Appellants' Initial Brief.

STATEMENT OF THE CASE

I. INTRODUCTION

The Appellee concurs with the Appellants' statement of the course of the proceedings below, and concurs with the section of the Appellants' statement of the facts insofar as it describes the provisions of Ordinance 1992-11 (the "Transportation Utility Ordinance"), Resolution 92-71 (the "Rate Ordinance"), and Ordinance 1992-28 (the "Bond Ordinance"). However, Appellants' statements must be supplemented by a review of certain legislative findings contained in such ordinances and resolutions, a summary of the critical findings of fact of the trial court, and a discussion of certain provisions of the Transportation Study.

II. LEGISLATIVE FINDINGS OF THE CITY COUNCIL

In Section 1 of the Transportation Ordinance the City Council of the city set forth the legislative findings of fact underlying the decision to create and implement the transportation utility.

> The City Council of the City of Port Orange hereby finds and declares:
>
> (a) The City faces a shortage of revenues for operation, maintenance and improvement of roads under its jurisdiction.
>
> (b) Inadequate financing will result in increased traffic congestion, road safety hazards, and higher long-run costs as roads deteriorate to the point where costly reconstruction is required.
>
> (c) The Local Government Comprehensive Planning and Development Regulation Act, Section 163.3177, Florida Statutes, imposes on local governments a duty to maintain adequate roads. Pursuant to this Act, the City in its comprehensive plan has established a goal of providing a safe, convenient, cost-effective and efficient transportation system. Objectives of the plan include maintaining all roads within the City at level-of-service D or better and paving all unpaved roads.
>
> * * *

(e) The State Comprehensive Plan, Section 187.201(18), Florida Statutes, encourages governments to implement innovative, fiscally sound and cost-effective techniques for financing public facilities.

* * *

(f) Adoption of a transportation utility fee which is reasonably related to the use of City roads and to costs occasioned by such use will satisfy the City's revenue needs, promote public health, safety, and welfare, and contribute to the furtherance of State and City planning goals and policies.

(Appellants' App. 1 at p. 1-2.)

Further, with respect to the methodology set forth in the Transportation Ordinance for determining road usage, the City Council found and declared that:

(1) trip generation by developed properties bears a reasonable relationship to use of City roads and to costs occasioned by such use and that calculation of the transportation utility fee on the basis of trip generation estimates, as set forth in the ITE Manual and as provided herein, will fairly and proportionately allocate the cost of providing City roads to the persons using City roads;

(2) the ITE Manual is a generally accepted and reliable guideline for estimating trip generation.

(Appellants' App. 1 at p. 4.)

In the Rate Resolution, the City Council stated its legislative findings relating to the establishment of minimum fees for certain properties:

(e) There will be certain administrative costs incurred in connection with the operation of the transportation utility and the collection of the transportation utility fees, including a computation of the fee and the preparation of trip generation count estimates. To defray these costs and to simplify the administration of the fee and the collection thereof, it is necessary to establish minimum fees for certain classes of properties and the establishment of such minimum fees will simplify and make less costly the administration and collection of the transportation utility fee.

(Appellants' App. 2 at p. 1-2.)

III. CIRCUIT COURT FINDINGS OF FACT.

The Final Judgment sets forth the findings of fact of the trial court. The trial court, based upon the testimony and other evidence presented, found that:

- the fee is imposed upon the users of the local roads and the City's methodology is a substantially accurate measure of usage.
- the local road costs to be funded with the fee revenues are attributable to use of the local roads by the fee payors.
- the local road system will substantially benefit the fee payors.
- the fees are restricted to use only for costs of the local road system.

Specifically, the court stated:

> The Transportation Utility Fees are imposed as a user fee or service charge upon the owners and occupants of developed properties within the City. Such owners and occupants are users of the City's road system and the City's measurement of that use through trip generation counts and estimates is a reasonable and substantially accurate method of determining such usage.
>
> The costs to be defrayed by the Transportation Utility Fees are the City's expenses relating to the operation, maintenance and improvement of the local road system, and such costs that are attributable to the use of the local roads occasioned by the owners and occupants of developed properties within the City.
>
> The provision of a safe, convenient and cost-effective and efficient transportation system, providing access to developed properties and providing mobility and facilitating traffic movement to and from properties located within the city, will directly and substantially benefit those persons required to pay the Transportation Utility Fee.
>
> Undeveloped lots and public right-of-ways do not cause any significant usage of the local road system. Further, the evidence demonstrated that traffic merely passing through the City travels primarily on state or county maintained roads and accordingly will have little or no impact upon the City (local) streets. Accordingly, substantially all of the users of the local road system will bear the burden of the fees.

> The City's Ordinance authorizing the Transportation Utility Fees restricts the use of the fees to the costs of operation, maintenance and improvement, including payment of debt service on bonds, related to the local road system.

(Appellants' App. 8 at p. 8-9.)

IV. THE TRANSPORTATION STUDY

The study prepared by the City engineering staff, "City of Port Orange Transportation Utility Program", dated October 29, 1992 (the "Transportation Study"), generally describes the transportation utility concept and the factors that were used by the City in setting the fee. (See Appellants App. 3). To fully understand the cost allocations behind the fee levels for each classification of roads, it is necessary to distinguish between the different function of the different road types. The Transportation Utility Ordinance sets forth this distinction clearly:

> The following apportionment of road costs shall be used to determine the allocation of road costs attributable to a class of roads to developed properties and properties fronting local roads.
>
> (1) The primary function of arterial and collector roads is to provide mobility and facilitate traffic movement. Accordingly, costs incurred by the City on arterial and collector roads shall be allocated to all developed properties within the City.
>
> (2) The primary function of local roads is to provide access to abutting property. Accordingly, costs incurred by the City on local roads shall be allocated solely to developed properties fronting on local roads. None of said costs shall be allocated to properties fronting on private subdivision streets.

(Appellants' App. 1 at p. 6.)

The allocation of different <u>costs</u> to different groups of users, based upon the type of road use and cost of the various road types, necessarily results in different cost-per-trip rates. Following these principles, the City's road costs are allocated to the users who occasion those

costs, in the manner set forth in the Transportation Utility Ordinance and determined by the City Council to be fair and reasonable, which determination was approved by the trial court.

STATEMENT OF THE ISSUES

1. May the City of Port Orange charge the users of the local roads a fee, based upon the amount of trips generated upon the local roads by such users, to defray the costs of constructing, operating and maintaining the local roads?

2. Does the fee imposed by the City meet the dual rational nexus standard by being (1) imposed to different needs sufficiently attributable to the activity for which imposed and (2) used for the substantial benefit of the users.

SUMMARY OF THE ARGUMENT

User-charges to provide funds for the construction, operation and maintenance of streets and roads have long been accepted. Pursuant to statutorily stated State policy, express statutory authority, and its broad home rule powers, the City of Port Orange has determined to provide for the costs of constructions, operation and maintenance of the local streets within the City by collecting from the users of the streets fees proportionate to their use. The City is authorized to collect user fees to defray the costs of both governmental and proprietary function programs. The City has authority under its home rule powers to create a transportation utility. The transportation utility fee is likewise authorized under the City's home rule powers, unless the fee is legally classified as a tax (taxes must be authorized by general law). Under the "dual rational nexus" standard for determining whether a governmental imposition is a "fee" or a "tax", the transportation utility fee is properly classified as a fee, because (1) the fee receipts will be used to offset costs attributable to the use of the roads by the fee payors and (2) the funds collected are required to be applied to maintain the local road system for the substantial benefit of the users.

ARGUMENT

I. THE CITY IS NOT REQUIRED TO FUND THE CONSTRUCTION, MAINTENANCE AND OPERATION OF THE LOCAL STREETS SOLELY FROM GENERAL TAXES.

The Legislature of the State of Florida has plainly stated that it is the public policy of the State to encourage the implementation of self-sufficient, innovative, fiscally sound and cost effective methods of financing public facilities by local governments. This policy is expressly stated in the State Comprehensive Plan, specifically in Section 187.201(18), Florida Statutes, which states:

> (18) PUBLIC FACILITIES: ***
>
> (B) *Policies.* --
>
> 5. Encourage local government self-sufficiency in providing public facilities.
>
> 6. Identify and implement innovative but fiscally sound and cost-effective techniques for financing public facilities.

In accordance with this articulated State policy, and in order to provide a dedicated and effective means of funding the considerable costs of construction, maintenance and operation of the local streets, the City of Port Orange, Florida (the "City") has created the transportation utility and imposed the transportation utility fee. (Appellants' App. 1 at p. 2.)

The decision by the City to fund a portion of its road costs from a user-fee rather than from the previously utilized source, ad valorem property taxes, is a policy decision properly made by the legislative body of the City. In general, the determination of the particular source of funding for a government program is a legislative function of local government. That the burdens of the particular funding mechanism chosen may fall differently than would have been the case had an alternate funding mechanism been chosen is not grounds to successfully

challenge the mechanism chosen. Although the Appellants may not particularly favor the replacement of ad valorem property tax revenues with user fees, that does not present a legal basis for challenge of the transportation utility fee.

In making its determination of the best funding source for road costs, the City is not limited to using only general taxes because road building and maintenance are a government-type function, as the State asserts. First, it is not clear that road building and maintenance are solely a governmental function. Second, even if these activities are primarily a governmental function, the City may charge user fees sufficient to defray the costs of providing the roads.

A. ROAD BUILDING AND MAINTENANCE ARE NOT SOLELY A GOVERNMENTAL FUNCTION.

The distinction between a governmental function and a proprietary function of government is roughly based upon the distinction between those activities that can only be performed by a sovereign authority and those activities can be performed by either government or non-governmental parties. See Loeb v. City of Jacksonville, 101 Fla. 429, 134 So. 201 (1931).

To suggest that the building and maintaining of streets is not done, nor has it ever been done, by private enterprise is simply wrong. Private residential subdivisions, industrial parks and other developments frequently have streets that are built and maintained by private enterprise, just as the water, sewer and electric service for such facilities may be provided by private enterprise. The maintenance costs for such private roads are in many instances supported by condominium-type fees imposed on the properties within the development served by the private roads. In fact, one of the earliest proprietary-type functions of government was the construction and operation of roads for which a usage change was imposed. Such usage-charges, known as tolls, have long been an accepted means of providing funds for the operation and

maintenance of roads. Toll roads are not solely a governmental activity. In many states, such as California and Virginia, toll roads may be built and operated by private enterprise. Indeed, Florida Statutes, Section 334.30, enacted in 1991, expressly provides for private construction and operation of toll roads.

While the distinction between a governmental function and a proprietary function may have at one time been demarked by a bright line, in recent years the location of such line has become unclear. As "privatization" initiatives have expanded the activities of private enterprise into what were once clearly government-only activities, such as public schools, prisons, postal service, and security, and as local and state governments have broadened the scope and reach of their activities through statutory and home rule legislation, the usefulness of the governmental-proprietary function analysis in the context of governmental powers has been substantially eroded. Further, Appellants' argument that costs of governmental functions must be paid from taxes is not now, and has never been, correct. For example, most regulatory activities are clearly (and solely) a governmental function, yet the costs of regulation have routinely been imposed upon the persons benefitting from the regulated activity, or responsible for creating the need for regulation, through regulatory fees.

Thus, building and maintaining roads and streets is not solely a governmental type function, but in many instances is a proprietary-type function. The City has the power to impose fees with respect to proprietary activities. See Florida Statutes, Section 166.201. However, even if building and maintaining roads and streets were to be characterized as a governmental function, this would not require that the costs be funded solely from general taxes.[1] With

[1]To state, as the Appellants' brief does, that governmental functions are primarily funded by taxes while proprietary functions are funded with fees and charges ignores the reality of local government budgeting and financing. For example, waste management, generally characterized as primarily a proprietary activity, rarely if ever generates fees sufficient to offset costs and must be funded with tax revenue contributions, while many cities generate surpluses from the proprietary operation of water, sewer or electric utilities that are used to supplement general fund revenues.

respect to governmental functions, the City may impose fees sufficient to defray its costs upon the persons benefitting from the activity or responsible for creating the need for the facilities, provided that the fees include the "dual rational nexus" standard (discussed at length in the next section).

Day v. City of St. Augustine, 104 Fla. 261, 139 So.880 (1932), is not inconsistent with the City's ability to charge a user-fee to those using the local roads. While the result of the decision in Day was to invalidate the charge levied in that case, the legal principles recognized the validity of imposing costs on those whose benefit from the facility or give rise to the need for the facilities. The Day court wrote approvingly of special assessments and tolls; both link use and benefit to payment. What the Court in Day disapproved was a method of imposing a charge for use of the roads for the purpose of augmenting the general revenues of the City of St. Augustine. The charge in that case was a general revenue raising measure -- there was no correlation between the cost of providing the facilities and the revenue raised, nor was there any clear restriction as to the use of the funds for the particular purpose. For these reasons, the charge in Day was held to be an invalid tax that interfered with the public's right to use the public streets.

Nor does the existence of a right to use a governmental facility or service, even one characterized as a governmental function, necessarily require the such use be "service charge free", as the Appellant assents. The civil judicial system is a perfect example -- each citizen has a clear right to access and use the civil judicial system, but there are imposed various user-fees designed to help offset the cost of operating the system. Similarly, in City of Daytona Beach Shores v. State, 483 So.2d 405 (Fla. 1985), the Court expressly recognized the inherent right of Florida citizens to have access to and to use the beaches, under the public trust doctrine.

Nonetheless, the Court upheld an access fee, the proceeds of which were to be used for beach maintenance and related costs.

Further, a recent Florida case has upheld the authority of local governments to impose charges to defray the cost of clearly governmental functions. In Rushfeldt v. Metropolitan Dade County, 19 Fla. L.Wkly. D106 (3DCA, 1994), the Third District Court of Appeals approved the imposition of special assessments to pay for enhanced police services.

The distinction between a governmental function and proprietary function, as it relates to the authority of a local government to impose charges in connection with such function, is not, as Appellant asserts, the power to impose such charges. The proper distinction is the ability of the local government to make a profit, a "reasonable return" on its investment over and above its costs. Government is permitted to make a reasonable return on proprietary activities. State v. City of Miami, 155 Fla. 180, 19 So.2d 790 (1944), City of Pompano Beach v. Ollman, 389 So.2d 283 (1980). Government may not, on the other hand, raise revenues above its costs from governmental activities. See, e.g., Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976), and City of Daytona Beach Shores v. State, 483 So.2d 405. Thus, even assuming the building and maintenance of roads and streets is indeed a purely government function, the City is not prevented from imposing its user-charge, but is merely denied the ability to make a profit above its costs. In this case, the City's costs are far in excess of the expected receipts from the fees, and the City's ordinance clearly restricts the use of those receipts only to the payment of the costs of building, operating and maintaining the local street system.

As the Appellant has stated, the right of the citizens of Florida to use the public highways and streets is subject to the police powers of state and local governments and to the power of taxation for the building and maintenance of the roads. There is no substantive distinction

between the limitation, if any, imposed upon the exercise of the public's rights to use the roads by the levy of a tax and the charging of a fee; in either case the limitation is no greater than that required to ensure that the facilities are available. If it is permissible to tax for the use of public ways in order to provide funds to build and maintain them, and such tax would not impermissibly impair the right to freely travel the public street, then it must be permissible to impose a user-fee for such usage because the impairment of the right is no greater and the governmental purpose is the same.

In summary, the City's transportation utility fee is a reasonable user-charge which will raise funds solely for the building, operation and maintenance of the local streets. Even if roads are characterized as a governmental function, the City may legally impose user-charges to offset the costs of governmental functions. Further, because the monies raised are required to be used solely to provide and maintain the streets, the fee does not create a legally impermissible limitation upon the citizens' right to freely use the public streets in the City.

II. THE CITY IS AUTHORIZED TO CREATE A TRANSPORTATION UTILITY AND TO IMPOSE TRANSPORTATION UTILITY FEES.

A. A UTILITY IS THE FUNDING OF A GOVERNMENTAL PROGRAM BY CHARGING THE COST OF THE PROGRAM TO THE BENEFICIARIES.

A utility may be defined as the funding of a governmental program by charging the cost of the program to the beneficiaries based upon their relative contribution to its need. Thus, for example, Section 403.031(16), Florida Statutes (1992), defines a stormwater utility as:

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

The validity of stormwater utilities has previously been upheld by Florida courts. See City of Port Orange v. State, Case No. 88-0913-CA-01, Division D (Fla. 7th Cir. Ct. 1988).

The City of Port Orange has created a transportation utility for the purpose of funding a portion of the maintenance and improvement of the local road system in the City by charging the costs thereof to the persons who benefit from the local road system, based upon their contribution to the need for the local road system, as measured by their use of the system.

B. THE CITY HAS FULL AUTHORITY UNDER ITS HOME RULE POWERS AND FLORIDA STATUTES 166.201 TO CREATE THE TRANSPORTATION UTILITY AND TO RAISE REVENUES THROUGH USER CHARGES.

Article VIII, Section 2(b) of the 1968 Constitution of the State of Florida and the Municipal Home Rule Powers Act grants broad home rule powers to Florida municipalities. Section 2(b) of Article VIII provides in pertinent part:

> 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 powers for municipal purposes except as otherwise provided by law. (Emphasis added.)

The Honorable Paul W. Danahy, Jr., who was Chairman of the House Committee on Local Government, described the effect of this constitutional provision as follows:

> "a municipality need not seek legislation unless it is needed to remove a special prohibition against performing a function; the absence of a specific prohibition means that the municipality may proceed in the manner deemed appropriate at the local level." (Emphasis added.)

See, Memorandum from Representative Paul W. Danahy to members of the Florida House of Representatives, Feb. 18, 1969, as granted in Sparkman, The History and Status of Local Government Power in Florida, 25 Fla. L. Rev. 271 (1973), at 273. Talbot "Sandy" D'Alemberte, the reporter for the Constitutional Revision Commission (later the Dean of the Florida State University School of Law) described the difference between the above quoted provisions of the 1968 and 1885 Constitutions as follows:

> "The apparent difference is that under the new language, all municipalities have governmental, corporate and proprietary powers unless otherwise provided by law, whereas under the 1885 Constitution, municipalities had only those powers expressly granted by law."

Commentary by Talbot "Sandy" D'Alemberte, 26A West's Florida Statutes Annotated 292.

In the first litigated case involving the scope of municipal powers decided after the adoption of the 1968 Constitution, the Florida Supreme Court held that a statute was needed to define the scope of the term "municipal purpose," as used in Section 2(b). City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla. 1972). The Legislature responded in 1973 by enacting the Municipal Home Rule Powers Act (which is codified in Chapter 166, Florida Statutes). The Municipal Home Rule Powers Act was declared to be constitutional by the Florida Supreme Court in City of Miami Beach v. Forte Towers, Inc., 305 So.2d 764 (Fla. 1974).

Section 166.021, Florida Statutes (a section of the Municipal Home Rule Powers Act), sets forth the scope of municipal home rule powers. The pertinent provisions of that section are as follows:

> **166.021 Powers. --**
> (1) As provided in S.2(b), Article VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.
>
> (2) "Municipal purpose" means any activity or power which may be exercised by the state or its political subdivisions.
>
> (3) The Legislature recognizes that pursuant to the grant of power set forth in S.2(b), Article VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:

> (a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to S.2(c), Article VIII of the State Constitution;
>
> (b) Any subject expressly prohibited by the constitution;
>
> (c) Any subject expressly preempted to state or county government by the constitution or by general law; and
>
> (d) Any subject preempted to a county pursuant to a county charter adopted under the authority of Ss.1(g), 3, and 6(e), Article VIII of the State Constitution.
>
> (4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited. . . . (Emphasis added.)

The provisions of the 1968 Constitution and the Municipal Home Rule Powers Act abrogated the doctrine of reservation of authority, commonly known as Dillon's Rule, and wrought a fundamental and sweeping change in the powers of municipalities. In State v. City of Sunrise, 354 So.2d 1206 (Fla. 1978), the Florida Supreme Court acknowledged the vast breadth of municipal home rule powers. The Court stated the issue in that case as follows: "The question we must decide is whether or not a Florida municipal corporation is authorized by law to issue 'double advance refunding' [revenue] bonds?" Id. The Court held that municipalities may issue such bonds under their constitutional home rule powers, stating that:

> Municipalities are not dependent upon the Legislature for further authorization. Legislative statutes are relevant only to determine limitation of authority. Id. at 1209.

See also City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992).

Under the 1968 Constitution and the Municipal Home Rule Powers Act, a municipality is authorized by law to exercise any governmental, corporate, or proprietary power for a municipal purpose which may be exercised by the State Legislature except when expressly prohibited by law, and a municipality may legislate on any subject matter on which the Legislature may act except for subjects described in paragraphs (a), (b), (c) and (d) of §166.021(3), Florida Statutes.[2] Thus, unless the City's imposition of the transportation utility fee pursuant to its home rule ordinance is invalid on account of §166.021(1), Florida Statutes (because of a violation of an express prohibition of superior law), or unless the same is invalid on account of §166.021(3) (because the subject matter is subject to one of the preemptions described in paragraphs (a), (b), (c) or (d) of §166.021(3), Florida Statutes) the imposition of the transportation utility fee must be found to be valid.

There is no express prohibition in Florida law relating to transportation utility fees; in addition, the transportation utility fees at issue do not implicate paragraph 166.021(3)(a) (relating to annexation, merger and exercise of extraterritorial power); paragraph 166.021(3)(b) (relating to express constitutional prohibition); or paragraph 166.021(3)(d) (preemption to county by county charter).

The limitation set forth in paragraph 166.021(3)(c) provides that a municipal legislative body may not legislate on any subject matter expressly preempted to the state or county government by the 1968 Constitution or general law.[3]

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[2]There is little question that the Legislature may act on the subject of roads and streets, and the methods of funding the building, operation and maintenance of local street systems. As the Appellant's Brief states, the Legislature could have enumerated streets and roads as one of the activities which Chapter 180.06, Florida Statutes, specifically authorizes cities to operate as a "public utility". (Appellants Brief at 22.)

[3]The Appellants' Brief states several times that the legislature has plenary power over the roads, perhaps suggesting the City has no power over roads. In fact, City has significant powers, both statutory (see Florida Statutes, Section 187 et. seq.) and through home rule (e.g., to impose impact fees to defray road costs).

The only basis upon which preemption to the state can be asserted in this case is Article VII of the 1968 Constitution. Article VII, Section 1(a), provides:

> (a) No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law.

Article VII, Section 9 of the 1968 Constitution states in pertinent part:

> (a) Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes on intangible personal property and taxes prohibited by this constitution. (Emphasis supplied).

These provisions of the 1968 Constitution preempt to the state the power to authorize municipalities to levy taxes. Thus, if the transportation utility fee is characterized as a tax, the City has no home rule power to impose the charge. If, however, the transportation utility fee is properly characterized as a fee, then there is no such preemption and the City has the power under the foregoing constitutional provision (and the statutory provision quoted below) to impose the charge. The following section addresses the legal standards for determining whether a charge imposed by local government is a valid fee or whether it is properly characterized as a tax.

In addition to the home rule powers described above, Section 166.201, Florida Statutes, specifically authorizes municipalities to impose and collect service and user fees.

> **166.201. Taxes and charges**
> A municipality may raise, by taxation and licenses authorized by the constitution or general law, or by user charges or fees authorized by ordinance, amounts of money which are necessary for the conduct of municipal government and may enforce their receipt and collection in the manner prescribed by ordinance not inconsistent with law.

Under Section 166.201, taxes and licenses must be authorized by general law, while user charges or fees may be authorized by ordinance.[4] There is currently no general law specifically authorizing transportation utility charges as a tax, and the characterization of the transportation utility fee as a valid fee is also necessary under the statute.

C. TRANSPORTATION UTILITY FEES ARE PROPERLY CHARACTERIZED AS "FEES" BECAUSE THE FEES ARE IMPOSED ON THE BASIS OF THE AMOUNT OF USE AND ARE RESTRICTED TO OFFSET THE COSTS OF ROAD IMPROVEMENT, OPERATION AND MAINTENANCE.

All fees have as one purpose to raise revenue.[5] Thus, it is not accurate to state that taxes are enacted to raise revenues while fees are not. The correct principle is that taxes are imposed to raise general revenues from activities, events or things that are not necessarily related to the purpose for which the revenues will be spent, while fees are imposed where there is a rational relationship between the activity, event or thing subject to the fee and the expenditure of the revenues -- generally the fees correspond to the cost or value of providing the activity, event or thing. See Petroleum Carrier Corporation v. Selco Petroleum Carrier, Inc., 312 So.2d 457 (Fla. 1st DCA 1975).

Preliminarily, neither the mandatory nature of the fee nor the right to access to public ways characterizes the fee as a tax.

1. MANDATORY FEES ARE NOT NECESSARY TAXES.

While many user fees are voluntary in nature -- that is, the user has the option to use or not use the service being provided -- this is not a requirement. Thus, for example, the Florida

[4] Appellants' Brief states that the Legislature has authorized by general law some forms of taxation by the City, and includes among the listed examples regulatory fees, building inspection fees, special assessments and public utilities charges. These examples are not taxes. See, e.g. City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992).

[5] A unique exception may be parking meter fees, which are designed as an economic disincentive to occupying a parking space beyond a specified period.

courts have upheld mandatory sewer fees, see State v. City of Daytona Beach, 24 So.2d 309 (Fla. 1948) (en banc); mandatory garbage collection fees, Charlotte County v. Fiske, 350 So.2d 578 (Fla. 2d DCA 1977); and mandatory stormwater utility fees, City of Port Orange v. State, Case No. 88-0913-CA-01, Division D, Circuit Court in and for Volusia County, Florida (1988) (Copy at Appellee's App. B). Simply put, the local government may provide a service, require that the property owners or citizens take that service, and impose a fee for the service. While the citizens may challenge the reasonableness of the amount of the fee, the requirement that it be paid will be upheld where the other requirements of a user fee are present.

2. INHERENT RIGHT TO ACCESS AND USE ROADWAYS DOES NOT PROHIBIT FEES FOR USE.

There is an inherent right to use the roads and streets built and maintained by local government. State v. McCarthy, 171 So.314 at 315 (Fla. 1936). The right to such use does not, however, present the imposition of fees relating to that use. Toll charges are the primary user fee relating to roads. Tolls have a long history of being upheld by the Florida courts where the toll is imposed to defray costs of operation, maintenance and improvement and the use of the funds collected is restricted to such purposes. See Taylor v. Lee County, 498 So.2d 424 (Fla. 1986) (county home rule provision authorized imposition of tolls).

Further, in a related area where access is guaranteed to the public, the Florida Supreme Court has upheld imposition of access fees. The public trust doctrine as applied to Florida's beaches guarantees citizens the right to use and enjoy the seashore. This did not prevent cities in Volusia County from imposing access fees, as long as the revenue collected was properly earmarked and expended. City of Daytona Beach Shores v. State, 483 So.2d 405.

3. THE VALIDITY OF FEES IS DETERMINED UNDER DUAL RATIONAL NEXUS STANDARD.

The legal standard for determining the validity of a governmental fee is set forth in cases decided by the state Supreme Court. User fee case law in Florida primarily addresses two different types of fees which present slightly different legal issues. Many cases address user fees for proprietary utility services, such as water and sewer charges and electric charges, and these cases focus on the reasonableness of the rates being charged. In general, so long as the local government is not making an inordinate profit from the proprietary operation, the courts have upheld these types of user fees. The second type of user fee cases have involved user fees usually related to non-proprietary functions and involuntary exactions or fees. These cases have included a multitude of impact fee cases relating to, among other things, roads, schools and parks; cases relating to fees for stormwater management; and cases relating to fees for garbage collection and disposal. These cases have focused more closely on the nature of the fee and the characterization of the charge imposed as a "fee" or a "tax". In these cases, the standard for determination of the validity of a fee is clearly set forth.

The legal standard is as follows:

> Reasonable user fees are permissible so long as they offset needs sufficiently attributable to the activity for which imposed and so long as the funds collected are required to be applied for the substantial benefit of the user.

Hollywood, Inc. v. Broward County, 431 So.2d 606 (Fla. 4th DCA 1983); Home Builders and Contractors Association of Palm Beach County, Inc. v. Palm Beach County, 446 So.2d 140 (Fla. 4th DCA 1983); see also Charlotte County v. Fiske, supra, 578 So.2d at 580-581 (applying this type of analysis to garbage collection fees in the nominal form of special assessments).

This standard has been referred to as the "dual rational nexus" test. Jurgensmyer and Blake, Impact Fees: An Answer to Local Government's Capital Funding Dilemma, 9 Fla. S.U.L. Rev. 415 (1981); Hollywood, Inc., supra at 611. That is, the test requires that there be

a rational nexus between creation of the need and the activity of the payer -- the need must be sufficiently attributable to the activity. Further, the test requires that there be rational nexus between the payment of the fee and the receipt of a benefit.

The dual rational nexus formulation of this legal standard was first applied in Florida in impact fee cases. The preeminent impact fee case in Florida is Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976). In that case, the Florida Supreme Court upheld impact or connection fees imposed upon new users of a utility system. The fee shifted to the new user expansion expenses incurred on his account; the expenses exceeded the revenues to be received from the fee. The need for the expansion facilities was sufficiently attributable to the subdivision development to provide a rational nexus; use of the funds for expansion expenses provided sufficient benefit to the subdivision residents.[6]

The holding in Dunedin was summarized accurately in Hollywood, Inc.:

> From City of Dunedin, Wald [Corporation v. Metropolitan Dade County, 338 So.2d 863 (Fla. 3d DCA 1976)] and Admiral Development [Corporation v. City of Maitland, 267 So.2d 860 (Fla. 4th DCA 1972)], we discern the general legal principle that reasonable dedication or impact fee requirements are permissible so long as they offset needs sufficiently attributable to the subdivision and so long as the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents. In order to satisfy these requirements, the local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in 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. The developer, of course, can attempt to refute the government's showing by offering additional evidence.

431 So. 2d at 611.

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[6] An amendment to the City's ordinance was required to accomplish this restriction.

The Dunedin dual rational nexus test has been applied in numerous impact fee cases. See, e.g., Hollywood, Inc., supra (upholding impact fees for parks); Wald Corporation v. Metropolitan Dade County, 338 So.2d 863 (Fla. 3d DCA 1976), (upholding required dedication of land for drainage canal or payment of impact fee); Home Builders and Contractors Association of Palm Beach County, Inc. v. Palm Beach County, 446 So.2d 140 (Fla. 4th DCA 1983).

Although subsequent to Dunedin the dual rational nexus standard has usually been applied by the Florida courts in the context of impact fees, it is an appropriate legal standard for other types of fees. The impact fees at issue in Dunedin had characteristics of both proprietary and non-proprietary fees. Dunedin, 329 So.2d at 318.

4. TRANSPORTATION UTILITY FEE ANALYZED UNDER THE DUAL RATIONAL NEXUS TEST.

In order to sustain the validity of the Transportation Utility Fee under the dual rational nexus standard, the City must demonstrate that (1) there is a reasonable connection between the need to maintain and improve the local road system and the use of the local road system by the owners of developed property within the City (i.e., that the need is sufficiently attributable to the use); and (2) there is a reasonable relationship between the expenditure of the funds and the benefit to the owners of developed property within the City (i.e., the funds are sufficiently earmarked for the benefit of the payors).

The City's transportation utility fee is based upon the concept that each user of the local road system will be assessed for his share of the cost of maintaining and improving the system, as measured by his use of that system. Using industry standard manuals commonly utilized in impact fee calculations and actual sample counts at commercial properties, the City has determined the number of trips generated by each residential and commercial property. This

establishes the amount of use reasonably estimated to be made of the local road system by each payor.

The City has established a detailed and precise methodology for measuring the use of the local road system. For administrative convenience, the City has established minimum fees for the residential class of users. The City has performed traffic courts to determine commercial property usage. If a user believes that his usage has been improperly calculated, the legislative scheme provides an appeal process. While one may not like the transportation utility fee concept, or the City's particular implementation methodology, the argument that it lacks a rational relationship to usage is contrary to the testimony and factual findings of the trial court.

While the results of the method chosen by the City to determine usage may not be absolutely perfect, it does "reflect a fair, if imperfect, approximation of the use of the facilities for whose benefit [the fees] are imposed." See Evansville-Vandorburgh Airport Authority District v. Delta Airlines, Inc., 405 U.S. 707 (1972). Further, a fee structure may establish minimum or maximum fees, or flat fees for a given range of service. Water and sewer utilities invariably establish both minimum monthly fees and incremented rate structures under which different volumes of use are differently charged. See, e.g., City of New Smyrna Beach v. Fish, 384 So.2d 1272 (Fla. 1980) (upholding garbage fees based upon flat monthly fee for single-family residences and volume fee for multi-family buildings); State v. City of Miami Springs, 245 So.2d 80 (Fla. 1971) (upholding sewer fees based upon flat monthly fee for certain users and minimum fees for other users). The local government has broad discretion in establishing the fee rate structure, so long as the rates are just and reasonable, and a rate structure will be overturned by the Court only when it is arbitrarily or discriminatory. Id. See also, Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority, 825 F.2d 367 (11 Cir. 1987).

The second prong of the dual rational nexus test is established by the specific restriction of the funds collected to pay the cost of maintenance and improvement of the local road system. The application of the revenues to maintain local roads will substantially benefit the owners of developed properties within the City by ensuring adequate access to their property. While it is true that there will be a general community benefit, it is not necessary that the benefit be limited only to the payors. See Home Builders and Contractors Association of Palm Beach County, Inc. v. Palm Beach County, 446 So.2d 140 (Fla. 4th DCA 1983).

The issue of general community benefit has been the critical distinguishing factor in the two cases addressing transportation utility fees decided by the Supreme Courts of Colorado and Idaho. In Bloom v. City of Fort Collins, 784 P.2d 304 (1989 Co.) (En Banc), the court held that "the transportation utility fee is not a property tax but rather is a special fee imposed upon owners or occupants of developed lots fronting city streets and that such fee . . . is reasonably related to the expenses incurred by the city in carrying out its legitimate goal of maintaining an effective network of city streets." Id., at 305.

The Fort Collins court determined that the Transportation Utility Fee is not a property tax, an excise tax or a special assessment, then analyzed the fee as a "special fee":

> We finally consider whether the transportation utility fee constitutes a special fee -- that is a charge imposed on persons or property and reasonably designed to meet the overall cost of the service for which the fee is imposed. *See generally Loup-Miller Const. Co.*, 676 P.2d at 1174-75; *Western Heights Land Corp.*, 146 Colo. at 468-69, 362 P.2d at 158. The transportation utility fee imposed upon owners or occupants of developed property fronting city streets and the revenues generated thereby are used for the purpose of defraying the expenses connected with the operation and maintenance of city streets. The owners and occupants of developed lots subject to the fee receive the benefit of a program of city maintenance calculated to provide effective access to and from residences, buildings, and other areas within the city. To be sure, the city council could have chosen some other method of raising funds for street maintenance, but the mere

existence of alternatives is not a sufficient reason to invalidate the particular method chosen. *See Western Heights Land Corp.*, 146 Colo. at 466-67, 362 P.2d at 157. The city council also 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 of the city. We, however, do not view the class of persons liable for the fee -- i.e., the owners or occupants of developed lots fronting city streets -- so limited in relation to the nature of the service as to render the ordinance invalid.

We recognize that the transportation utility fee is not conditioned on the voluntary choice of owners or occupants of developed lots. We have never held, however, that a service fee must be voluntary. In upholding an ordinance imposing a sewer service charge upon apartment building owners in *Loup-Miller*, 676 P.2d 1170, and again in approving an ordinance imposing a storm drainage fee on property owners in *Zelinger*, 724 P.2d 1350, we did not turn our decisions on whether the fee was voluntary or on the availability of the services from a nongovernmental source.

> Rather, we based our decisions on the fact that the fees were reasonably designed to offset the overall cost of services for which the fees were imposed.

We are thus satisfied that where, as here, a municipality imposes a special fee upon owners or occupants of developed lots fronting city streets for the purpose of providing revenues for the maintenance of city streets, and where the fee is reasonably designed to defray the cost of the service provided by the municipality, such fee is a valid form of governmental charge within the legislative authority of the municipality.

Central to the Fort Collins court's decision was the determination that the owners and occupants of developed properties received the benefit of local road system maintenance program to provide effective access to their properties.

In contrast, the Supreme Court of Idaho, in Brewster v. Pocatello, 768 P.2d 765 (1988 Idaho), found that the City of Pocatello lacked the required statutory authority to impose a street restoration and maintenance fee. The court characterized the fee as a charge "imposed on occupants and owners for the privilege of having a public street about their property." Id., at

767. Because "the privilege of having the usage of city streets which about one's property, is in no respect different from the privilege shared by the general public in the usage of public streets . . .", the Court held the "fee" was in reality the imposition of a tax. Id.[7]

The Idaho court failed to uphold the fee because the benefit received was no different than the benefit to the general public. The court in Fort Collins had specifically acknowledged the general benefit, but did not allow a lack of exclusivity to invalidate the fee.

Florida case law supports the Fort Collins analysis. As noted above, Florida courts have required a rational nexus between the collection and use of the funds, and have found this requirement to be satisfied "so long as the funds collected are sufficiently earmarked for the substantial benefit of the [payors] . . ." Hollywood, Inc. v. Broward County, 431 So.2d at 611. While the impact fees at issue in Hollywood, Inc. were required to be used to pay for facilities required to service growth, there was no requirement that the specific facilities directly benefitted the particular subdivision. Further, Palm Beach County did not invalidate an impact fee notwithstanding that there was a general community benefit. See also Charlotte County v. Fiske, 350 So.2d 578, 581 (Fla. 2d DCA 1977) (county-wide fee for garbage disposal "the mere fact that the community at large . . . peripherally may also enjoy the cleaner and garbage-free environment does not change" [the fact that the residential properties received the benefit also]); Turner v. State ex rel Gruver, 168 So.2d 192 (Fla. 3d DCA 1964) (fee for garbage services).

The Colorado and Idaho decisions are also distinguished due to the strong home-rule powers of Colorado municipalities (Fort Collins, 784 P.2d at 305), whereas Idaho continues to

[7]Florida, Colorado and Idaho all require that a municipality be authorized by general law to levy taxes. In addition, Idaho continues to follow Dillon's Rule and does not grant home rule powers to municipalities. Thus, the Idaho Court was not able, in the absence of express statutory authorization, to find authority to impose the charge as a user fee under broad home rule powers. Colorado, like Florida, grants home rule powers to municipalities, and the Colorado Court did find that the home rule power granted authority to impose the charge there at issue as a special user-fee.

follow Dillon's Rule (see Pocatello, 768 P.2d at 766). Florida, of course, is a strong municipal home rule state.

CONCLUSION

Pursuant to its municipal home rule and statutory powers, the City has created a transportation utility and imposed a fee upon the users of the local road system. The charge meets the standards under existing case law for legal characterization as a fee, rather than a tax. Therefore, the City requests this Court to affirm the judgment of the trial court validating the legality of the bonds, including the transportation utility fee pledged as security therefor, and all proceedings relating thereto.

Respectfully submitted,

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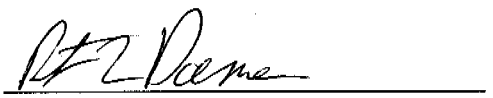
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellee's Answer Brief has been furnished to Eric J. Taylor, Assistant State Attorney, Office of the Attorney General, PLO 1, the Capital 32399-1050, and Stanley James Brainerd, General Counsel, Florida Chamber of Commerce, 136 S. Bonough Street, Tallahassee, Florida 32302, by U.S. Mail this 5th day of May, 1994.



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