IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAR 14 1994
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

STATE OF FLORIDA
et al.,

Appellants,

vs. Case No. 83,103

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

Appellees.
_____/

On Appeal from a Final Order of the Seventh Judicial Circuit Court,
In and For Volusia County, Florida

APPELLANTS' INITIAL BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JOSEPH C. MELLICHAMP, III
SENIOR ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 0133249

ERIC J. TAYLOR
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 0337609
488-5899

OFFICE OF THE ATTORNEY GENERAL
State of Florida
The Capitol, Tax Section
Tallahassee, Florida 32399-1050
(904) 487-2142
(904) 488-5865 (FAX)

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

FLORIDA CONSTITUTION

STATUTES:

OTHER:

JURISDICTION

Pursuant to Rule 9.030(a)(1)(B)(i), Florida Rules of Appellate Procedure, this Court has jurisdiction over final orders entered in proceedings for the validation of bonds where provided by general law. On January 6, 1994, the Circuit Court for the Seventh Judicial Circuit, in and for Volusia County, Florida, entered such a final order concerning the bond issue the City of Port Orange proposed to issue related to its newly created Transportation Utility. Section 75.08, Florida Statutes (1993), provides the State the right to appeal the Circuit Court's decision to this Court.

Under Section 75.01, Florida Statutes (1993), a circuit court has "jurisdiction to determine the validation of bonds and all matters connected therewith." A suit for bond validation is a legislatively created cause of action which permits a public body corporate in the State of Florida to obtain an adjudication as to the validity of debt it proposes to incur and the regularity of proceedings taken in connection therewith. Section 75.02, Florida Statutes (1993). The issues properly before the circuit court in a validation proceeding are:

> (i) The public body's authority under the constitution and laws of Florida to issue the proposed bonds;
>
> (ii) The public body's authority to expend the proceeds of the bonds for the intended purpose;
>
> (iii) The validity of the taxes, assessments or other revenues pledged as security for the bonds and the proceedings relative thereto (including covenants relating thereto in the bond documents);
>
> (iv) The legality of the public body's legislative

proceedings with respect to the bonds and the security therefore; and

(v) Compliance by the issuer with any legally required conditions precedent to the issuance of the bonds (such as the holding of a bond election).

Section 75.02, Florida Statutes. As this Court has stated, the scope of judicial review is limited to a determination of the authority of the public body to issue the bonds, determine if the purpose of the obligation is legal, and ensure that authorization of the bonds complies with the requirement of law. Taylor v. Lee County, 498 So. 2d 424, 425 (Fla. 1986). See also, Warner Cable Communications, Inc. v. City of Niceville, 520 So. 2d 245, 246 (Fla. 1988); Risher v. Town of Inglis, 522 So. 2d 355, 356 (Fla. 1988); Lodwick v. School District of Palm Beach County, 506 So. 2d 40, 409 (Fla. 1987);

The question arises, did the circuit court have jurisdiction to hear the State Attorney's challenge to the "Transportation Utility Fee" that the City of Port Orange intends to levy against the property owners of the City and use to repay the debt obligation on the proposed bond. Section 75.02, Florida Statutes, clearly gives the circuit court the jurisdiction to determine the authority of the public body for the "assessment of taxes levied or to be levied" in support of the bond issue. This Court recognized that jurisdictional authority in State v. City of Miami, 103 So. 2d 185, 188 (Fla. 1958).

Therefore, under the circumstances of this case, the Circuit Court for the Seventh Judicial Circuit, in and for Volusia

County, Florida, had jurisdiction to determine the validity of the bonds the City of Port Orange, Florida, proposed to issue and this Court has the jurisdiction to review the decision of the Circuit Court.

STATEMENT OF THE CASE

A. FINDINGS OF FACT

The City of Port Orange (hereinafter "City") is, and at all times hereinafter mentioned, a public body of the State of Florida, as defined in Section 1.01(8), Florida Statutes, organized and existing under the provisions of the Constitution and the laws of the State of Florida.

ORDINANCE 1992-11: TRANSPORTATION UTILITY FEE

On June 2, 1992, the City enacted Ordinance No. 92-11 (the "Transportation Utility Ordinance")(Appendix 1). Ordinance 1992-11 created a Transportation Utility of the City (Appendix 1, Section 2, p.2), and adopted a Transportation Utility Fee (hereinafter "Fee"), related to the use of City roads (Appendix 1, Section 2, p.5 [Section 20-128]). The City predicated their actions on the belief that the "City faces a shortage of revenues for operation, maintenance and improvement of roads" and that "inadequate financing" [1]/ will result in later costly repairs or replacement of the roads. (Appendix 1, Section 1 (a) and (b)).

Section 2 of the Ordinance created the Fee. The collected

---

[1]/ Nowhere does the City justify the statement that there is "inadequate financing." There is no discussion that the City is at their 10 mill cap and cannot raise ad valorem taxes anymore. To the contrary, the Fee is intended, not to generate new funds, but "shall replace other general revenue funds of the City which would be required to be used for purposes of the City road system." Resolution 92-71 Section 1(f) (Appendix 2, p.2). The Fee is also intended to reduce the ad valorem tax costs for certain businesses. Transportation Study, page 12 (Appendix 3, p. 12). One of the benefits of the Fee stated in the Study is that "Government will not need to increase taxes to fund road resurfacing and ongoing maintenance." (Appendix 3, page 8 para. 4)

Fees "shall be dedicated to the operation, maintenance, and improvement of City roads." (Appendix 1, p.2). The Fee is imposed on developed lots and parcels in the City. (Appendix 1, Section 2, p.5). The Fee was calculated on the intended use of the collected funds and function of the roads within the City. [2]/

---

[2]/ Sec. 20-129 Utility fee calculation. (Appendix 1, pp. 6-7)

(a) The City Council has determined that consistent with traffic engineering principles, different functions are performed by roadways classified by the City as arterials, collectors, or local roads, and accordingly, that the costs of different classes of roadway are occasioned differently and should be allocated separately.

(b) The feel shall be set so to defray a portion of City road costs occasioned by existing development within the City. The fee shall not be used to meet capital improvement needs attributable to growth, nor to defray operating and maintenance costs attributable to traffic passing through the City.

(c) For each class of roadway in the City system, the City Council shall establish the portion or amount of total road costs to be defrayed with fee proceeds. In establishing said portion or amount, the City Council shall consider the function of each roadway class, the extent to which roads are or will be used by new traffic generated by growth or by through traffic generated outside the City, and the availability of other funds for such purpose.

(d) 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.

(i) 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 with the City.

(ii) 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.

(e) The costs of each class of roadway to be defrayed by the fee shall be divided among the developed properties occasioning such costs in proportion to the estimated trip generation of such properties; provided that there may be established maximum and/or minimum fees for each type of property.

(f) It is hereby found and determined that the fee calculated as provided in this Section to be charged to each developed property within the City shall be substantially proportionate to

The Ordinance recognizes that costs of different classes of roadway are occasioned differently and must be allocated separately. (Appendix 1, Section 2, p.6 [Sec. 20-129(a)]) The Ordinance required that City maintained roads be classified as arterials, collectors or local roads, and that the cost of constructing and maintaining such roads be allocated separately. Id. Because arterial and collector roads provide mobility and facilitate traffic movement to and from all properties, the Ordinance required that costs incurred by the City on arterial and collector roads be allocated to all developed properties within the City. (Appendix 1, Section 2, p.6 [Sec. 20-129(d)(i)]). The primary function of local roads, it was determined, is to provide access to abutting properties. (Appendix 1, Section 2, p.6 [Sec. 20-129(d)(ii)]) The Ordinance required the City to allocate costs incurred on local roads to developed properties fronting on local roads. None of the costs of the local roads are allocated to properties fronting on private subdivision streets. Id.

The City is required by the Ordinance to estimate the amount of usage of the local roads by the owners and occupiers of developed properties in order to allocate the total costs to each parcel of property. (Appendix 1, Section 2, p.4 [Sec. 20-127]) The Ordinance provided that the City shall use the Institute

---

the costs occasioned by said property on the three classes or roadway.

(g) The fee schedule shall be revised from time to time to reflect changes in costs, land uses, trip generation rates, and other factors affecting the fee calculation.

Transportation Engineers ("ITE") Trip Generation manual as a basis for trip estimates. [3]/ (Appendix 1, Section 2, p.5 [Sec.

---

[3]/ Sec. 20-127. Trip generation estimates. (Appendix 1, p.p. 4-5)

(a) Having reviewed information and studies prepared by the Director of Public Works of the City and by the Center for Urban Transportation Research of the University of South Florida and heard public comment at public hearings held on May 5, 1992 and June 2, 1992, and upon consideration and discussion of such material and comments, the City Council hereby finds and determines 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;

[3]/(con't) (2) the ITE Manual is a generally accepted and reliable guideline for estimating trip generation;

(3) while developed properties generate maintenance, utility-related, and other vehicle trips even when unoccupied, such properties generate fewer trips than the average reported for their land use category in the ITE Manual.

(b) Trip generation estimates shall be determined pursuant to the ITE Manual.

(1) Developed properties within the City shall be assigned to the most appropriate of the land use categories defined in the ITE Manual.

(2) Trip generation shall be measured in "average weekday vehicle trip ends," as defined in the ITE Manual. Average weekday vehicle trip ends shall be computed for each developed property based upon the ITE Manual's average trip generation rate or best-fit equation for the appropriate land use category. When faced with a choice between an average trip generation rate or a best-fit equation, the Director shall follow guidelines in the ITE Manual.

(3) If a developed property does not correspond to any land use category defined in the ITE Manual, weekday traffic counts shall be conducted at property boundaries to establish a trip generation rate.

(4) Shopping centers and business parks shall be treated as single traffic generators. Average trip generation rates or best-fit equations shall be used to compute the total number of trips generated by such developments. When necessary for billing purposes, total trips shall be divided among individual properties within the development in proportion to gross floor area.

(5) Trip generation estimates shall be adjusted for trips diverted to commercial establishments from passing traffic (pass-by

20-127(b)]).

Finally, the Ordinance created the Transportation Utility Fund ("TUF") in which all the Fees collected would be deposited and out of which all projects paid for.[4]/ (Appendix 1, Section 2, p.8 [Sec. 20-133]). The TUF "shall be used solely for operating, maintaining, and improving the City road system, and for debt service, reserve or other payments required by bonds." (Appendix 1, Section 2, p.8 [Sec. 20-133(a)]) The Fees collected "need not be spent in close proximity to such property, nor need they provide a special benefit to such property that is different in type or degree from benefits provided to the community as a whole." (Appendix 1, Section 2, p.9 [Sec. 20-133(c)])

The Fee is to be "billed and collected with the monthly utility bill" as part of a "consolidated statement" which is "paid with a single payment." (Appendix 1, Section 2, p.9 [Sec. 20-134(a) & (b)]). Any unpaid Fees "shall be a lien upon the property . . . until such fee is paid." (Appendix 1, Section 2, p.9 [Sec. 20-134(e)]) A sale of the land will not release the new owner of the unpaid Fee lien. (Appendix 1, Section 2, p.10 [Sec. 20-134(f)])

---

trips) and trips captured internally be multi-use developments (internal trips). In making such adjustments, the director shall consider results of studies reported in the ITE Manual, guidelines promulgated by governmental agencies, and any pertinent information supplied by the property owner.

[4]/ However, the City recognized that this was not the only source of the funds for the roads. The City was to use the Fee in conjunction with any monies received from the State and local gas tax.

RESOLUTION 92-71: THE TRANSPORTATION STUDY

On November 3, 1992, the Council adopted Resolution No. 92-71 which established the rates of the Transportation Utility Fees. (Appendix 2) Attached to the Resolution as Exhibit A was a study, "Transportation Utility Program, Investment Portfolio" ("Study") (Appendix 3) upon which the Fee rate structure was based. (Appendix 2, Section 1(b)) It was the "intent of the City Council that the amounts derived from the transportation utility fee shall replace other general revenue funds of the City which would be required to be used for purposes of the City road system." (Appendix 2, Section 1(f)). Accordingly, the "City Council declares its intentions that no amount shall be budgeted from the City General Fund to pay for those costs which are funded through the transportation utility." Id.. Presently, some $195,000 from the City's General Fund is used to pave the roads. (Appendix 3, p.5) In other words, the Fee is not a new additional source of revenue, but merely a replacement of those City funds presently generated through ad valorem taxation.

The City had to allocate the costs for each class of roads to the users of that class of road in proportion to the number of estimated trips generated by each user. For administrative convenience and collection, the City established minimum fees for dwellings and commercial properties generating less than 143 trips per day, and established a per trip cost for commercial properties generating in excess of 142 trips per day. (Appendix 2, Section 2) The rate to be charged to owners or occupiers of

property in the City subject to the Fee was determined by the City to be:

Property Class	Rate ($/month)
Commercial Property Generating Between 0-142 Trips Per Day:	$1.29 per month
Commercial Property Generated Between 143-6,000 Trips Per Day:	$.0002984 per trip
Dwellings on City maintained Public Roads:	$1.29 per month
Dwellings on Private Roads:	$.50 per month
Dwellings on State or County Maintained Roads:	$.50 per month

Id. Based upon the following Fee calculation set forth in Section 2 of Ordinance 1992-11 (Appendix 1, Section 2, p.6 [Sec. 20-129]):

> (d) 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.
>
> (i) 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 with the City.
>
> (ii) 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.

Each dwelling in the City was to pay $.50 per month for the "costs incurred by the City on arterial and collector roads" but only those dwellings on City owned streets were to pay an additional $.79 for the "costs incurred by the City on local roads." Dwellings located on arterial and collector roads and on

private roads do NOT share in the costs in maintaining any of the City owned streets even though persons living on arterial and collector roads and on private roads do transverse over City owned "local roads." (Appendix 1, Section 2, p.6 [Sec. 20-129(d)])

The Study breaks down just what the City really intended to do by the Fee. Page 1 of the Study is a narrative of the Fee concept and how the City intends to meet its road needs. The City begins with the statement that to the present, "the City has been able to meet most of the maintenance, repair and resurfacing needs from the three (3) existing revenue sources." [5]/ (Appendix 3, p.1) But with increased costs and competition, the "long-term program" for the roads would have to be "shifted to the property tax rate or a new source of revenue . . ." Id. So, in order to prevent having to raise property taxes on non-exempt or Homestead exempt property, the City chose a "new source of revenue . . . such as [the Fee]." Id.

What the City really intends to do is turn the streets of the City into a *utility* like water, sewer and garbage. Id. The fees collected will be dedicated to the roads and based on estimated trips generated. Id. Using the ITE Manual, the City estimated that each residential unit generated an average 9.55

---

[5]/ The City does not here describe what the "three (3) existing revenue sources" are. However, the three revenue sources can only be State gas taxes, local option gas taxes and revenues generated by ad valorem taxation of City property.

trips per day.[6]/ Id. Under its estimate, the City projects an annual shortfall of $17,918 for non-residential, $2,765 for privet residential and $467,558 for public residential. Id. The City estimates that commercial properties generate little use of City owned roads, Id., yet the City itself estimates that 40.63% of all trips generated in the City are commercial trips (Appendix 3, p.14). The City apparently assumes that non-City residents which use commercial properties in the City, i.e. shopping centers, hotels, tourist attractions, etc., do not use

---

[6]/ Rounding off the 9.55 trips per day by an average residential home to 10, and applying that figure to the monthly rates, we find the following cost comparison between residential dwellings on City roads and those on arterial and private roads and a comparison between residential dwellings on City roads and commercial properties:

Residential to Residential

With a monthly cost of $1.29 per month, dwellings on public roads pay $.0046 per trip while those on arterial or collector roads or private roads pay to the City's costs of City roads only $.0016 per trip. Thus, there is nearly a 3 times difference between the two types of dwellings. The problem is that this formula envisions that persons living on private roads do not use the local roads at all. Such an assumption is preposterous.

Residential to Commercial

A. With a monthly cost of $1.29 per month, dwellings on public roads pay $.0046 per trip while commercial properties generating up to 142 trips per day pay $.0004542 per trip (figure calculated on 142 trips per day multiplied by 20 days of business per month and divided by the $1.29 per month charge for such businesses).

B. With a monthly cost of $1.29 per month, dwellings on public roads pay $.129 per trip while commercial properties generating between 143 to 6,000 trips per day pay $.0002984 per trip.

As can be seen from the City's own figures, dwellings on City streets bear the brunt of the costs of the City's Fee scheme where large commercial businesses, which are estimated to cause the most trips, pay the least (just about 20 times less) per trip.

City streets for any purpose including "short-cuts."

The actual planned annual expenditures to build and maintain the City's streets are found on page 2 of the Study under "Program Narrative." (Appendix 3, p.2) On page 3 the City acknowledges that they receive about 60.6% of their street dollars from the State (funded portion) with the remaining, in the past, coming from State Revenue Sharing, local gas taxes and funds received from ad valorem taxation (unfunded portion). (Appendix 3, p.3) Page 3 clearly shows that residents on private roads, residents on arterial roads and commercial property pay absolutely nothing toward the "unfunded costs related to paving unpaved roads, new construction and resurfacing subdivision streets." Id. The residents on the City-owned roads are expected to pay 100% of the construction and repair of the city streets. It does not matter if the City's streets are also used by non-City residents or residents who live on private roads or arterial roads. Id. The capital projects planned are set forth on page 10. (Appendix 3, p.10)

As stated before, the intent of the City was not to create an additional source of revenue but replace an existing tax on property. In the Study, the City staff recommended:

> "[G]oing to the full fee based system ***by reducing millage*** equal to the dollar amounts currently used to fund the transportation program." (e.s.)

(Appendix 3, p.7) See also (Appendix 3, p.8, para.4 - "Benefits of TUF")["Government will not need to increase taxes to fund road resurfacing and ongoing maintenance"]. Evidence of the millage

reduction savings is set forth on page 12. (Appendix 3, p.12 - "Commercial Property Savings TUF Versus Millage"). According to the City's chart, using millage reduction and shifting the majority of the cost to residences, K-Mart, for example, will save over $1,072.00 per year ($771.00 in millage reduction and $301 in the Fee structure). Id.

An estimation of the revenue to be generated by the Fee is set forth on page 14 of the Study. [7]/ (Appendix 3, p.14) Based upon the rate schedule, residences are to raise $241,708.88 in a year while businesses will generate $11,844.00, for a total of $253,552.88. Id. By percentages, residences raise more 95% of the total revenue while businesses generate less than 5%. However, the City admits that of the 100% of trips generated, commercial trips equal 40.63% of all trips. Id. That would mean, if the City were attempting to raise $250,000.00 from trip generation, businesses should be contributing $101,575.00 (40.63% of $250,000) rather than the $11,844.00 they are actually going to generate.

ORDINANCE 1992-28: THE BOND ORDINANCE

On November 3, 1992, the Council enacted Ordinance No. 1992-28 (the "Bond Ordinance") (Appendix 4). The Bond Ordinance authorized the issuance of bonds not exceeding 500,000 Transportation Utility Revenue Bonds (the "Bonds"). (Appendix 4, p.6, Section 3(a)). The bonds do not constitute general

---

[7]/ Pages 16 - 21 are projections of revenue generated under a higher rate scheme.

obligation bonds (Appendix 4, pp. 10-11, Section 10). The bonds are to finance the costs of the acquisition, constructing, renovating, expanding, improving and equipping certain transportation facilities located in the City, substantially in accordance with plans and specifications now on file or to be on file with the City (the "Project"). Fees placed in the Transportation Utility Trust Fund are to repay the bond obligations. (Appendix 4, Section 5, pp. 7-8). The Bond Ordinance provides that no holder of the bonds shall ever have the right to require or compel the City to levy taxes on any real property of or in the City to pay the debt service on the Bonds, or to make any of the sinking fund, reserve, or other payments provided for therein, and that the Bonds do not constitute an indebtedness of the City within the meaning of any constitutional or statutory limitation or provision.

B. COURSE OF THE PROCEEDINGS BELOW

Pursuant to law, due and proper notice addressed to the State of Florida, and the several property owners, taxpayers 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 by the city of the bonds herein validated, was published in a newspaper of general circulation, The News Journal, Daytona Beach, Florida, in the City, once each week for two (2) consecutive weeks, the first publication being at least 20 days prior to the date of the

validation hearing, as required by law; all as appears from the affidavit of the publisher of filed herein.

On October 4, 1993, the Complaint testing the validity of the bonds was filed in the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida. (Appendix 5) The Circuit Court issued an Order to Show cause (Appendix 6), setting a hearing for November 18, 1993. The State Attorney for the Seventh Judicial Circuit answered the Complaint on October 19, 1993. Memorandums on the issues were filed by both the City and the State. The Final hearing was held November 18, 1993, with the Circuit Court issuing its Final Judgment (Appendix 8) on January 6, 1994, approving the validity of the bonds but limiting the bonds' proceeds use "solely for capital projects." (Appendix 8, IV, para. 4) .

STATEMENT OF THE ISSUES

1. (a) Whether the City of Port Orange can abridge the public's inherent right to the free use of city streets?;

   (b) Whether the City can transform its street system into a "utility," like an electric, water or sewer utility, and charge the developed property within the City a "service or user" fee for the use of the streets like the service charge for electricity, water and sewer?

2. Whether the City of Port Orange's Transportation Utility Fee is a true "user charge or fee" authorized

by Section 166.201, Florida Statutes, or a tax that has not been authorized by general law?

SUMMARY OF THE ARGUMENT

The City of Port Orange has turned its street system into a public utility and are charging its citizens a monthly fee for the right to use the streets. Such an action is unconstitutional as the City has no legal authority to either turn its streets into a public utility or to condition the right of its citizens to use the public streets upon the payment of a fee. This action destroys the citizens' inherent right to free use of the highways subject only to the police power and taxation.

The Fee created is not a fee under any definition given to a fee. It is a tax because it is a revenue raising measure that has no relationship to the actual use of any public facility and is not voluntary in the sense that the more one uses the facility the more one pays. It is a flat monthly fee to the majority of the citizens going to the improvement of a general public facility in which the individual payer receives no direct benefit in proportion the his or her use of the facility.

Because the Fee violates the inherent right to use the highways and is a tax not authorized by Section 166.201, Florida Statutes, the Fee must be declared invalid and the bonds use of such fee denied.

ARGUMENT

The first issue before the Court is whether the City of Port Orange can eliminate for its citizens the long recognized "inherent right" of the free use of the public streets and, instead, turn its street system into a fee generating "utility," thereby, conditioning the right of its citizens to use the City's street on the payment of a monthly fee, no matter if the streets are used at all or how much use each developed property generates or suffer legal action or a lien upon their property. Secondly, even if the Florida Constitution and Legislature authorized such a street "utility," there is the issue of whether the fee charged by the City is really a "tax" rather than a true "fee." If the City's Fee is a "fee," they can impose it under Section 166.201, Florida Statutes. However, if the Fee is a "tax," it is illegal for the City to impose such a tax under Section 166.201 as no statutory authority exists to permit cities to impose such a flat tax for the use of the streets.

The State takes the position that, subject to the police power and the Legislature's authorization of taxation, the Legislature has the plenary power over the roads of the State, including city streets. The public has the inherent right to use the roads of the State, including city streets, and the public has a free right to travel that cannot be impeded without a compelling state interest. The City cannot turn its street system into a fee generating utility, replacing ad valorem dollars. Secondly, the "Transportation Utility Fee" is NOT a

"fee" in the true sense of the term but is, rather, a "tax" which the City has no authority to impose. It is not a "fee" as the amount charged has no rational relationship to the amount paid by each person and any direct benefit received by the payer compared to benefits shared by the public at large.

The City claims the Fee is a "fee" or "user charge" imposed upon developed property for the use of the City's streets. The State asserts that this is not a service fee or user charge, but rather is a hybrid tax made up of various provisions from ad valorem taxes, special assessments, impact fees and user charges. Furthermore, the removal of the right to the free use of the streets and the imposition of a "tax" for which the City has no authority to impose, require this Court to strike the City of Port Orange's "Transportation Utility Fee" and invalidate its use as a source to fund the repayment of capital bonds for the construction and resurfacing of the City's Streets.

I. THE FLORIDA LEGISLATURE HAS NOT RECOGNIZED SUCH A THING AS A "TRANSPORTATION UTILITY"; THE CITY OF PORT ORANGE CANNOT TURN ITS ENTIRE STREET SYSTEM INTO A TOLL ROAD FACILITY

Historically, city streets have been funded out of ad valorem taxation applied to all non-exempt property in the city, State gas taxes, local option gas taxes, special assessments against specific benefited properties, impact fees, and State revenue sharing money. What the City is doing here is a new creature; it has never before existed in this State. The weakness of the City's assertions below, and the Final Judgment, is that

the City has not cited to a single example in the Constitution or Florida Statutes to where the City has the legal authority to remove from its citizens the inherent right to travel freely over the City's streets and place a monetary condition on the citizens, and primarily the private residences as opposed to commercial, to use the Port Orange's streets.

The heart of what the City has done is to turn the streets of the City into a fee generating enterprise. The fees raised are to replace the present ad valorem tax dollars now spent on the roads. The first question to be asked, what constitutional or statutory authority authorizes the City to turn their previously free streets into a fee generating enterprise. It is the position of the State that the City cannot do what it is attempting to do because the Constitution and statutes do not permit such an enterprise and that it is unconstitutional for a city to charge for the use of a governmental, as opposed to a proprietary, facility. What the City has done is akin to charging residents for each appearance of the police or fire departments.

It has long been recognized in this State of the inherent right of the citizens of Florida to free travel on the public highways, including city streets, subject only to the police powers and the power of taxation for the construction and upkeep of the roads. See Day v. City of St. Augustine, 104 Fla. 261, 139 So. 880, 885 (1932); City of Miami v. South Miami Coach

Lines, Inc., 59 So. 2d 52, 55 (Fla. 1952). This Court has even said that "a city would have no right to erect toll gates along its streets as a means of raising revenue from citizens, taxpayers, and others who travel thereon." Day v. City of St. Augustine, 139 So. at 885. Furthermore, the Legislature has the plenary power over all roads and streets in the State.

The "inherent" right to travel has its genesis in the theory that the right to use the streets are a governmental function as contrasted to public works which are a proprietary function of government. Governmental functions are those duties owed by the government to the general public at large as part of the compact between the government and the people, acting as the sovereign. Hamler v. City of Jacksonville, 97 Fla. 807, 122 So. 220, 221 (1929). As such, it "governs and controls the inhabitants within its jurisdiction." Id., 122 So. at 221. Such powers include police and fire protection. See City of Miami Beach v. Jacobs, 315 So. 2d 227 (Fla. 3rd DCA 1975); Op. Att'y Gen. Fla. 82-09 (1982).

Proprietary functions are those activities that can be engaged in by both government and private enterprise [8]/, government choosing to do the activity when private enterprise chooses, for whatever reason, not to become involved. They are those activities that will achieve some special benefit and

---

[8]/ Classic examples of such proprietary functions include water, sewer, garbage, public recreation, docks, yacht basins, airports, golf courses, hospitals, stadiums, parking lots and tourist facilities.

advantage to the local, urban community embraced within the city's boundaries. Loeb v. City of Jacksonville, 101 Fla. 429, 134 So. 201 (1931). Governmental functions have been financed by taxes while proprietary functions are financed primarily by fees and charges that support the self sufficiency of the proprietary function.

The proprietary activities engaged in by governments are called either "public works" or "public utilities." When one examines Chapters 125, 166 and 180, Florida Statutes, the common thread that weaves through them is that the "public works" or "public utilities" that are addressed therein are projects or facilities that can be done by private enterprise as well as the government, and often are. The building and maintaining of the public streets is not done, nor has it ever been done, by private enterprise. [9]/ In examining Section 180.06, Florida Statutes, the Legislature could have listed streets as an authorized activity the cities could have engaged in as a "public utility." The Legislature chose not to do so for the very reason that streets a governmental function, not a proprietary function.

The services of building and maintaining the roads are a governmental duty, just like police and fire protection. Such duties are owed, service charge free, to the citizens of the State. Since the duty is owed to the public at large, the costs of raising revenue for the construction and maintenance of the

---

[9]/ The State recognizes that goverments at all level can, and do, contract with private companies to construct, pave and resurface roads and streets.

streets is by taxation. While special assessments and tolls are also used, the former requires a particular, special identifiable benefit be bestowed on the real property assessed for the public improvement, while the latter is restricted to particular, isolated projects costing a great deal of money for which the use of the public facility can be accurately measured and the revenues incurred by the use of the facility are first used to repay the construction and then to operate and maintain the facility. This Court recognized the special nature of both in Day v. City of St. Augustine, supra, and the fact that they are both different from the inherent right in the public to use the public highways. Id., 139 So. at 885.

As the State has cited above, "a city would have no right to erect toll gates along its streets as a means of raising revenue from citizens, taxpayers, and others who travel thereon." Day v. City of St. Augustine, 139 So. at 885. But that is exactly what the City has done with the creation of the Fee. In essence, the City has erected a toll gate at the driveway of each dwelling and commercial business and have conditioned the right to use the City's streets on the payment of the Fee. Failure to pay the Fee could result in legal action against the property owner or occupant and a lien upon the land. This action by the City eliminates, for the residents of Port Orange, their inherent right to the free use of the City streets.

Because the City does not have the Constitutional or statutory right to destroy the public's right to freely travel on

the public highways, the City of Port Orange's Ordinance 1992-11 must be declared invalid.

II. WHAT THE CITY OF PORT ORANGE HAS TERMED A "FEE" IS IN REALITY A "TAX"

Even if the City could turn it street system into a "utility," the question still remains whether the City has chosen a constitutionality or statutorily correct method of raising revenues to accomplish its stated purpose. While a local government may elect to engage in certain activities, the authorization for the engagement in the activity alone does not automatically approve the fiscal methods by which an activity is to be financed. The right to engage in an activity and the method in which the activity is financed require two totally different types of legal analysis. Even if the City can create a "street utility," the City still must comply with the Florida Constitution and Florida Statues in the financing of the utility.

The City admits through its ordinances that the Transportation Utility Fee ("Fee") is not an ad valorem tax, a special assessment or an impact fee. The question is, just what is the "Transportation Utility Fee?" The City calls this revenue measure a "fee." However, the name given to a levy is not important, its character and the practical effect of its operation are what matters. City of De land v. Florida Public Service Co., 119 Fla. 804, 161 So. 735, 738 (1935). What this Court must determine is two-fold; first, it must be decided if the Fee is a true "fee" or if it is a "tax." After having

determined what it kind of revenue measure it really is, this Court must determine if the City has the authority to levy such a "fee" or "tax."

A. LIMITATIONS ON THE CITY OF PORT ORANGE TO RAISE REVENUE

The Florida Constitution and the Florida Statutes both limit and authorize taxation by cities. The Florida Constitution both grants and limits the taxing power of municipalities. The Florida Constitution first directs that the Legislature to authorize cities to levy ad valorem taxes. [10]/ Article VII, Section 9(a), Florida Constitution. The Constitution then limits the cities' power to tax by providing that the authority to levy all other taxes "may be authorized by general law." Id. See also Article VII, Section 1(a), Florida Constitution ("No tax shall be levied except in pursuance of law). If a tax is imposed by a city that is not "authorized by general law," then such a tax is invalid and unenforceable. State ex rel. Hurner v. Culbreath, 140 Fla. 634, 192 So. 814 (1939). Thus, a city cannot impose a tax unless authorized by law. Article VII, Section 1 and 9, Florida Constitution; Contractors and Builders Assoc. v. City of Dunedin, 329 So. 2d 314, 317 (Fla. 1976); City of Tampa v. Birdsong Motors, Inc., 261 So. 2d 1 (Fla. 1972). See also Belcher Oil Co. v. Dade County, 271 So. 2d 118 (Fla. 1972).

Certain taxes, such as sale and use taxes, have been

---

[10]/ Section 9(b) of the Florida Constitution places a cap on that authorization of a millage not in excess of 10 mills.

preempted to the State, except as authorized by general law. [11]/ Heriot v. Pensacola, 108 Fla. 480, 146 So. 654 (1933). Statutes attempting to confer the authority to tax on a municipality must be strictly construed. City of Tampa v. Birdsong Motors, Inc., supra. There can be no extension by implication; the statute is not to include any matter not specifically included therein. Id. If there are any doubts, the right to tax must be resolved against the municipality. Id.

The starting point to determine the statutory range of authority possessed by the City, or any other municipality in Florida, to raise revenue is Part III of Chapter 166, Florida Statutes, entitled "Municipal Finance and Taxation." Section 166.201, Florida Statutes, states

> 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. [12]/

---

[11]/ See Section 212.081(3)(b), Florida Statutes.

[12]/ Section 166.201, Florida Statutes, was enacted as part of Section 1, Chapter 73-129, Laws of Florida. As enacted, Section 166.201 read

> A municipality may raise, by taxation and licenses authorized by the constitution or general law, ***and*** 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. (e.s.)

There has been no amendment to Section 166.201 since its initial enactment. The State can find no reason why the word "and" was replaced with "or" or why two commas were eliminated from the

The key restriction in Section 166.201 is the requirement that any taxation or licenses sought to be imposed by a city ***must*** be "authorized by the constitution or general law."

Following Section 166.201, Florida Statutes, the Legislature, by general law, has stated some forms of taxation authorized to the cities of the State. Section 166.211, Florida Statutes, authorizes ad valorem taxes; Section 166.221, Florida Statutes, regulatory fees covering the costs of local regulation of professions and occupations; Section 166.222, Florida Statutes, building inspection fees covering the costs of the building permit program; and Section 166.231, Florida Statutes, permitting a tax on certain enumerated public and private utility services or products. Additionally, in Chapter 170, Florida Statutes, the Legislature has given the cities authority to assess and collect money from the residents for special assessments on any capital project benefiting the affected properties. Finally, in Chapter 180, Florida Statutes, the Legislature has permitted the cities to construct and operate the public utilities enumerated in Chapter 180. See City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992).

The present restrictions on the taxes and fees of a municipality are consistent with the laws prior to the enactment of Chapter 166, Florida Statutes (1993). Prior to the passage of

---

initial act.

Chapter 73-129, Laws of Florida [13]/, the powers of municipalities were set forth in Chapter 167, Florida Statutes (1971). The power of a city to impose taxes were set forth in Section 167.43, Florida Statutes (1971), which stated

> The city or town council may raise, by tax and assessment upon all real and personal property , and by license on professions, business and occupations carried on within the corporation, all sums of money which may be required for the improvement and good government of the city, and for carrying out the powers and duties herein granted and imposed; and enforce the receipt and collection of the same in the manner now provided by the laws of the state for the assessment and collection of state taxes and licenses.

The cities also had the power of special assessment (Section 167.01 and Section 167.11, Florida Statutes (1971)), public service tax (Section 167.431, Florida Statutes (1971)), and water works and fire protection tax (Section 167.45, Florida Statutes (1971)). Under Section 167.73, Florida Statutes (1971), a city could provide

> (1) . . . by ordinance . . . for the establishment and collection of reasonable charges to be paid to the city, town or village or corporation for the use of [garbage, trash, rubbish or other refuse] service by each person, firm or corporation whose premises are served thereby; . . .
>
> (2) . . .by ordinance . . . for the establishment and collection of reasonable fees and charges to be paid to the city, town or village for the use of [any system of public recreation, any wharf, dock, yacht basin, airport, golf course, hospital, stadium, parking lot, or tourist camp, or any facility designed and intended to render a direct service to the users thereof] facility or service by each person, firm or corporation using the same.

Under the prior law, the cities also had the power of special

---

[13]/ Codified as Chapter 166, Florida Statutes.

assessment (Chapter 170, Florida Statutes (1971)) and charges for use of public utilities (Chapter 180, Florida Statutes (1971)).

The only question that remains is how the "taxation and licenses authorized by the constitution or general law, or by user charges or fees authorized by ordinance" are defined by Florida law.

B. AD VALOREM TAXES; EXCISE TAXES; SPECIAL ASSESSMENTS; REGULATORY FEES; AND SERVICE AND USER FEES AND TOLLS

1. TAXES

Taxes are enacted under the "taxing power" authority possessed by a state. Historically, this Court has defined a tax as:

> . . . an enforced burden of contribution imposed by sovereign right for the support of government, the administration of the law, and to execute the various functions the sovereign is called on to perform.

Klemm v. Davenport, 100 Fla. 627, 129 So. 904, 907 (1930). See also City of Orlando v. State, 67 So. 2d 673, 674 (Fla. 1953). The power of the State to lay and collect taxes is an attribute of sovereignty and exercised through legislative statute. State ex rel. Arthur Kudner v. Lee, 150 Fla. 35, 7 So. 2d 110 (1942). See also Belcher Oil Co. v. Dade County, 271 So. 2d 118 (Fla. 1972). This sovereign, inherent right to impose a tax is only limited by the Constitution, not granted by it. Gaulden v. Kirk, 47 So. 2d 567 (Fla. 1950). And, if the effect of the legislation is to raise revenue, it is a general tax no matter what name it is given. c.f., American Can Co. v. City of Tampa, 152 Fla. 798,

14 So. 2d 203, 210 (1943).

a. ***Ad Valorem Taxes***

Ad valorem taxes are direct taxes; they are laid directly on real and personal property and based on the value of the property. City of De Land v. Florida Public Service Co., 161 So. at 738. Each piece of property is directly valued and the rate of taxation ("millage rate") is imposed on the property's valuation to determine the amount of taxes imposed on a particular piece of property. Such taxes are against the property and are a lien on the land if the taxes are not paid. Ad valorem taxes are the primary method by which the counties and cities of the state raise their revenue.

b. ***Excise Taxes***

An excise tax is an indirect tax; indirect in the cost of the tax can be passed on by the taxpayer to the ultimate consumer. An excise tax is a tax on some right, privilege or occupation. Gaulden v. Kirk, 47 So. 2d at 574.

c. ***Special Assessment***

A special assessment is a tax in the broad sense (Day v. City of At Augustine, 139 So. at 885), as opposed to a fee. It is not, unlike a tax, used to raise revenue for general governmental purposes. A special assessment is a charge made for an improvement to governmental property, such as a road or sewer system, that confers a specific benefit on property abutting, adjoining or effected by the improvement. City of Boca Raton v. State, 595 So. 2d 25, 29 (Fla. 1992). A special assessment is

imposed on the theory of those who receive the benefit should have to pay for the benefit. Klemm v. Davenport, 100 Fla. at 631-634, 129 So. at 907. The key element is, of course, that there is a quantifiable benefit that can be shown to attach to the properties affected by the service provided. Atlantic Coast Line R.R. v. City of Gainesville, 83 Fla. 275, 91 So. 118, 121 (1922). Additionally, the assessment must be apportioned among the properties receiving the special benefit. City of Boca Raton, 595 So. 2d at 29. Cities are authorized to use special assessments by virtue of Chapter 166 and Chapter 170, Florida Statutes (1993). City of Boca Raton v. State, supra.

2. FEES

A true "fee", on the other hand, is not enacted to raise revenue, rather fees are charged for services rendered and are to commensurate with the cost of the services rendered. See, Finlayson v. Connor, 167 So. 2d 569, 573 (Fla. 1964); State ex rel. James v. Gerrell, 137 Fla. 234, 188 So. 812 (1938). For example, in the case of Petroleum Carrier Corporation v. Silco Petroleum Carrier, Inc., 312 So.2d 457 (Fla. 1st DCA 1975), the District Court had to determine if a required payment was a "fee" or a "tax." The determining definition used by the court was the purpose behind the monetary imposition; was the measure imposed to raise revenue or was there a rational relationship between the monies collected with the services rendered. The court found the "fee" really a tax because it was exacted solely for revenue

purposes without any conditions of regulation or control. Id., 312 So. 2d at 459-461.

a. ***Regulatory Fees***

A regulatory fee is part and parcel part of a regulatory system when there has been an authorization for public control over an item, occupation or other conduct. It is the money necessary to regulate and control and the amount collected must be commensurate to the cost of regulation. City of Jacksonville v. Ledwith, 26 Fla. 163, 7 So. 885, 893 (1890).

b. ***Impact Fees***

An impact fee is a method of paying for new public improvements that result from new growth. St Johns County v. Northeast Florida Builders Association, Inc., 583 So. 2d 635, 638 (Fla. 1991). There are, however, limitations to the use of impact fees. Such fees must be used for capital costs only and they must be collected on a pro rata basis. City of Dunedin, 329 So. 2d at 320. This Court approved a test for impact fees in that there must be a rational nexus between the need for new facilities and the persons being charged the fee and a connection between the expenditures of the funds and benefits accruing to the persons charged. St Johns County, 583 So. 2d at 637.

c. ***Service and User Fees and Tolls***

User fees and tolls are not taxes. They are a charge for the use of governmentally owned facilities. See, e.g. Masters v. Duval County, 114 Fla. 205, 154 So. 172, 175 (1934). They are the monies collected for the use of recreational facilities, golf

courses, airports and other facilities that are provided by government. See, e.g., Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., 405 U.S. 707 (1972); Jacksonville Port Authority v. Alamo Rent-A-Car, Inc., 600 So. 2d 1159 (Fla. 1st DCA 1992). The fee imposed must "reflect a fair, if imperfect approximation of the use of the facilities for whose benefit they are imposed." Evansville-Vanderburgh, 405 U.S. at 717. Furthermore, the fees collected must be reasonable and expended primarily for the construction costs, maintenance and operation of the facility. See City of Daytona Beach Shores v. State, 483 So. 2d 405, 408 (Fla. 1985). A toll is a form of user fee. It is the name given to the charge levied upon persons using toll roads and toll bridges. It is a charge on the special use of a public facility. Masters v. Duval County, 114 Fla. 205, 154 So. 172, 175 (1934); Day v. City of St. Augustine, 139 So. at 885.

The key elements running through all service fee and user fee situations is that the facility owned by the government or private person is a "closed" system, that is, the operation of the facility are quantifiable and the costs of operations certain; that there are units of measure by which the users of the facility can be charged, such a kilowatts for electricity, time for parking and gallons for water; and that the costs charged to the user must be measurable to an identified use of the facility so that the greater the use, the greater the charge

to the user. [14]/ The same theory of amount of use determines amount of fee paid also apples to other proprietary functions as garbage, public recreation, yacht basin, airport, golf courses, stadiums, and parking lots. In user facilities, there is no such thing as a flat, one price, charge with no relationship to the amount of use by any particular person.

C. THE CITY OF PORT ORANGE'S "TRANSPORTATION UTILITY FEE" IS NOT A "FEE", IT IS A TAX

In comparing the practical operation and effect of the City's Fee, it is clear that the Fee is a tax. By admission, the City concedes the following:

a. that this is not an ad valorem tax on property as the Fee is not imposed on all real property of the City, only the developed property, and that the rate is not based upon the assessed value of the property. While the Fee has the attribute of the ad valorem tax in that the City attempts to impose a lien on the property if the Fee is not paid, the Fee is really a replacement and a lowering of present ad valorem millage for the City's wealthier residents, hotels and commercial properties. It shifts that part of the City's traditional ad valorem taxation from the non-exempt properties to exempt properties (i.e. churches) and Homestead exempt portion of residences. The City's

---

[14]/ Jacksonville Port Authority v. Alamo Rent-A-Car, Inc., 600 So. 2d 1159 (Fla. 1st DCA 1992), is a good example of the amount charged relating to the use of the facility. Alamo was charged a fee of 6% of their gross receipts. The more that Alamo used the airport, the more they earned, the greater the fee paid.

own charts show that at least $195,000 in ad valorem taxes will be replaced by approximately $250,000 in Fee collections.

b. that the Fee is not a special assessment for the reconstruction of the roads. The City has declared that there will be no special benefit to any particular piece of real property as all the properties in the City will benefit equally from the reconstruction and resurfacing of the City's streets. (Appendix 1, Section 2, p.9 [Sec. 20-133(c)])

The Fee is not a:

a. Regulatory fee as the charge is a "tax" in the legal sense, the Fee is designed to raise revenue without further conditions or regulations. City of Jacksonville v. Ledwith, supra; Petroleum Carrier Corporation v. Silco Petroleum Carrier, Inc., supra. The Fee has absolutely no regulatory aspects whatsoever; no business, profession, occupation or conduct of any sort is controlled or restrained;

b. Impact fee as the Fee fails both prongs of the test set forth by this Court in St Johns County, supra. There exists no rational connection between the Fee on all properties and the growth in any population for which new capital expenditures are necessary. In fact, the City admits that none on the monies collected will go to any new construction caused by growth. (Appendix 1, Section 2, p.6 [Sec. 20-129(b)]). Secondly, there is no rational connection between the expenditures and any benefits accruing to the property owners. Whatever benefits that do accrue inure to the community at large with no special benefit

to any particular subdivision or area of the City. (Appendix 1, Section 2, p.9 [Sec. 20-133(c)]) Rather, there is an inverse connection between the expenditures and benefits; a few streets will benefit each year but the community at large will pay for the improvements, not just the properties affected.

c. Service Fee, user fee or toll as there is no proprietary service, such as water and sewer that is being offered to the citizens and there is no rational relationship between the rate structure and the amount of use. The streets are free to use by the citizens of Port Orange and the State, subject to general "taxation" for their upkeep. The citizens of Port Orange, and Port Orange alone, cannot have their inherent right of free access over the public highways conditioned by the payment of any fee for their use. As this Court has stated "a city would have no right to erect toll gates along its streets as a means of raising revenue from citizens, taxpayers, and others who travel thereon." Day v. City of St. Augustine, 139 So. at 885. But that is exactly what the City has done in essence; it has erected a toll gate at the driveway of each dwelling and commercial business and have conditioned the right to use the City's streets on the payment of the Fee. Furthermore, unlike all service fee and user fee charges, there is no rational basis to the amount charged and the actual use of the public facility. For example, the longer one drives on the Florida Turnpike, the more one pays; the more water one uses, the more one pays; the longer one parks, the more one pays; and the more one crosses a

toll bridge, the more one pays. There is no such thing as a one price user fee. All service charges and user fees are measurable by some unit of measure whether time, gallonage or distance. The Fee fails to take into consideration the amount one uses the City's streets. A person with two trips per day pays the same rate as one who make twenty trips a day. A family with one car pays the same rate as a family with four cars. The amount of use does not increase the costs to the user and, thus, the greater user does not pay his fair share to the operation and maintenance of the roads. The gas tax, whether state or local, are more akin to a user fee. The more one travels the more gasoline purchased the more gas taxes raised.

What the Fee really is a tax. Granted, the City has attempted to disguise the Fee as a service fee but the Fee is really a tax. It is by and large a flat rate imposition on the developed property of the City. It is used to finance a governmental, as opposed to a proprietary, function of the City. The benefits accrue to all the citizens of the City without any benefit going to any particular class or region. The Fee does not go to any proprietary City facility or improvements thereto; rather the Fee is being imposed for general highway construction and maintenance, a duty owed by the City to the general public. The Fee is a bare charge for the general right to highway use without relation to the actual use of the highways.

In supporting its decision below, and finding no Florida cases on point as this is a case of first impression in this

State, the trial court relied upon the Supreme Court of Colorado's decision in Bloom v. City of Fort Collins, 784 P.2d 304 (Col. 1990), which upheld what appears to be an identical ordinance of the City of Fort Collins, Colorado, imposing a like "fee" on developed properties in that city for use in the maintenance of the city streets. (Appendix 8, pp.21-23) However, the State asserts there are such material differences between this case and the Fort Collins case that makes Fort Collins inapplicable to the issues in this case. First, at no time in that case was the issue of the destruction of the public's inherent right to free use the public streets ever at issue as it is here. Second, there was no discussion whatsoever by the Colorado Supreme Court on that state's constitutional provisions permitting or restricting the city's right to impose taxes on the citizens of Fort Collins. Had there been such a discussion, the trial court below would have seem immediately a weakness in the majority's position. Colorado does have home rule powers in its Constitution, though it is limited to cities with populations over 200,000. Article XX, Section 6, Colorado Constitution. However, the taxing powers of the cities are not in Article XX but are in Article X, Colorado Constitution. Specifically, Section 7 of Article X, Colorado Constitution, limits the taxing power of municipal governments in Colorado to those taxes vested in the municipalities by the general assembly. Lastly, there was no discussion by the trial court below of any comparison between Florida law and Colorado law.

The State asserts that the majority opinion does not reflect the state of the law in Florida. The majority appears to find no difficulty imposing a flat fee on the property owners or occupants without regard to the actual usage of the streets or the fact that streets are governmental functions rather than fee a generating proprietary function. The majority came to the conclusion that since the fee was not on property like an ad valorem tax, it must be a legitimate fee. There is absolutely no real discussion of the attributes of a non-ad valorem tax and how a "fee" differs from a non-property "tax."

The State contends that the dissenting opinion more reflects the state of the law in Florida. In his dissent, Justice Lohr correctly finds that 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" Fort Collins, 784 P.2d at 312-313 (J. Lohr, dissenting). Citing other cases, Justice Lohr states that a "charge becomes a tax when it is used to finance or maintain traditional government function." Id., at 313. Finding that "[r]oad maintenance expenditures are traditional governmental expenditures that benefit the community at large," Justice Lohr notes that the fees charged by the City of Fort Collins, like those proposed by Port Orange, "are not restricted

to providing maintenance of any particular streets." Id.

The trial court below rejected consideration of the Supreme Court of Idaho's opinion of Brewster v. City of Pocatello, 115 Idaho 502, 768 P.2d 765 (1988), because Idaho continues to follow "Dillon's Rule" which has been rejected in this State by the 1968 Florida Constitution. (Appendix 8, p.23). However, the State asserts that the trial court misunderstood the difference between the inherent power of a municipality and that same municipality's ability to impose taxes on its citizens. Had the trial court understood this, the court would have seen the Idaho has a constitutional provision not unlike Article VII, Section 9 of the Florida Constitution that limits a city's power to tax to that granted by general law. The Idaho Supreme Court described their constitutional provision, Article 7, Section 6, Idaho Constitution, in the case of Sun Valley Co. v. City of Sun Valley, 109 Idaho 424, 708 P.2d 147 (1985). Brewster v. City of Pocatello, 768 P.2d at 766. Both Florida and Idaho have constitutional provisions that restrict the power or cities to impose taxes; Idaho's constitutional language in Article 6, Section 7, is "but may by law invest in the corporate authorities . . . the power to assess and collect taxes for all purposes of the corporation" [15]/ where our Article VII, Section 9 states " . . . municipalities . . . may be authorized by general law to levy other taxes, for their respective purposes . . " Consequently,

---

[15]/ Of interest is the fact that the Colorado and Idaho Constitutions language is, except for two words, identical to each other.

the power possessed by a city to carry out governmental function in Idaho has no bearing on their ability to imposes taxes. Like in Florida, the Idaho Constitution separates municipal powers from the taxing powers. Article XII, Idaho Constitution.

Having stated an Idaho city's limitation to tax, the Idaho Supreme Court struck a transportation fee nearly identical to the one proposed by Port Orange. The court found the Idaho fee was in reality a tax. The court found no relationship to any regulatory power and the fee, paying for the privilege of using Pocatello's streets, was no different that the privilege shared by the general community in using the streets. Brewster, 768 P.2d at 767. This case is instructive here as, like in this case, the Idaho Supreme Court found the issue of the case 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.

Id., at 766. The State asserts the the Brewster opinion more closely follows the state of Florida law and is the case this Court should follow.

Because the Fee is really a tax, the State requests this Court to strike the Fee as violative of Section 166.201, Florida Statutes, as the Florida Legislature has never authorized a city to impose a tax of this nature on the owners and occupants of developed property in a city.

CONCLUSION

For the reasons stated above, the State asserts that the Court must declare invalid the City of Port Orange's Ordinances 1992-11 and 1992-28 as the underlying Transportation Utility Fee, enacted in Ordinance 1992-11, violate the citizens inherent free right to use and travel on the public streets on the City and State. There is absolutely no authority in the City to condition its citizens' right to use the streets to the payment of a monthly fee. Such a regulation of the use of the streets is contrary to the governmental powers of the State. Furthermore, the Fee so imposed is not a "fee" but really a tax. It is a tax that the Legislature has not authorized the City to impose.

Therefore, the State requests this Court to reverse the judgment of the trial court, invalidate the two Ordinances and halt all sales of bonds based on the Fee.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JOSEPH C. MELLICHAMP, III
SENIOR ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 133249

ERIC J. TAYLOR
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 0337609

OFFICE OF THE ATTORNEY GENERAL
State of Florida
The Capitol, Tax Section
Tallahassee, Florida 32399-1050
(904) 487-2142
(904) 488-5865 (FAX)

Counsel for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded 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, Esquire, Squire, Sanders & Dempsey, 2100 Enterprise Center, 225 Water Street, Jacksonville, Florida 32202, this 14 day of March, 1994.

ERIC J. TAYLOR