IN THE SUPREME COURT OF FLORIDA
CASE NO. 93,344

ALACHUA COUNTY, FLORIDA, a political subdivision of the State of Florida,

Appellant,

v.

THE STATE OF FLORIDA, et al.

Appellee,

and

THE CITY OF GAINESVILLE; THE UNIVERSITY OF FLORIDA; SANTA FE COMMUNITY COLLEGE; FLORIDA POWER & LIGHT CO.; FLORIDA POWER CORP.; FLORIDA ELECTRIC COOPERATIVES ASSOC., INC.; THE TOWN OF MICANOPY; THE CITY OF ALACHUA; THE CITY OF WALDO; HOWARD J. SCHARPS,

Intervenors.
_____/

ANSWER BRIEF OF APPELLEE/INTERVENOR CITY OF GAINESVILLE

On Appeal From The Eighth Judicial Circuit,
In And For Alachua County, Florida
Case Nos.: 97-3088-CA, 97-3518-CA, 97-4368-CA, 97-4715-CA

Marion J. Radson,
City Attorney
Florida Bar No.: 175570
Elizabeth A. Waratuke,
Litigation Attorney
Florida Bar No.: 0458007
City of Gainesville - Office of the City Attorney
P. O. Box 1110
Gainesville, Florida 32602
(352) 334-5011

Frederick B. Karl, Esquire
Florida Bar No.: 41150
Annis, Mitchell, Cockey, Edwards & Roehn, P.A.
P. O. Box 3433
Tampa, Florida 33601
(813) 229-3321

ATTORNEYS FOR APPELLEE/INTERVENOR CITY OF GAINESVILLE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Authority:

Statutory Authority:

Ordinances and Resolutions:

Other Authority:

STATEMENT OF THE CASE AND FACTS

Alachua County seeks to test the constitutionality of the Privilege Fee by asking this Court to validate a bond issue which pledges the revenues of the misnamed Privilege Fee. The Privilege Fee imposed by Alachua County is a three percent charge imposed on the total amount of the electric customer's monthly bill. The charge is for the "privilege" of the electric company using the public right of way to transport the electricity. Simply described, the Privilege Fee is a thinly disguised sales tax on consumers of electricity without the statutory authority to make it legal.

The Privilege Fee ordinance, Ordinance No. 97-12, was adopted on August 12, 1997. It imposes the three percent Privilege Fee on certain gross revenue sales of all electric utilities that sell electricity in the County and have any facilities in the County's public right of way. The Privilege Fee is imposed in both the incorporated and unincorporated areas of the County.

The acknowledged purpose of the Privilege Fee is to raise revenue to reduce the millage rate and to also raise revenue from those persons and entities that are not subject to ad valorem taxes.[1] The Privilege Fee was reduced from six percent to three

---

[1]County App. F, pg. 3: "[I]t is the intent of the Board to apply franchise fee proceeds received after October 1, 1998, to provide reduction of the County-wide millage rate and thus achieve a balance in tax equity between property owners and other citizens within the County". See Also City App. 10, pg. 6, Mr. Tarbox, County Manager, "(Thank you, Mr. Chairman). For many years, Alachua County Commissions have looked for ways to diversify the

percent at the adoption hearing. As stated by Leveda Brown, the County Commissioner who made the motion to reduce the Privilege Fee, the fee was calculated to correlate to the reduction in millage the County wanted to achieve. The six percent fee would correspond to a two mill reduction in the ad valorem taxes, the three percent fee to a one mill reduction.[2] As described by the County, the Privilege Fee will be revenue neutral for those who pay property taxes — the amount raised by the fee would be offset by a reduction in the millage rate. (County App. F, pg. 2; City App. 14, pg. 7).

---

structure, the tax structure of Alachua County. We rely almost entirely on ad valorem taxes to support the County general fund. Over 50 percent of the real property in Alachua County is off the tax rolls either due to public ownership or homestead exemption. The remaining 47 percent of the property must, therefore, carry 100 percent of the burden of providing countywide services"; City App. 10, pg. 126 Chairman Summers, "I think that the amendment (reducing the Privilege Fee from six percent to three percent) will allow a few more people to pay taxes in this county"; City App. 10, pg. 123-26; City App. 13, pgs. 159-160, Exh. 21.

[2]City App. 14, pg. 6:
A. Yes. The best I can recall, it was described as a variation or a form of franchise fee which would actually allow replacement of property tax and provide a situation in which every user of services would pay some.
Q. How would it replace property taxes?
A. Well, if you could increase the number of payers or the percentage of payers beyond 46 and supposedly hold the expenditures pretty constant, which we have done here for a number of years, then you could actually lower the property tax for those who pay property tax. You could actually lower the millage.

In fact, our first consideration would have — at six percent would have lowered the millage by 2 mills. The one that we passed at three percent was actually halved for that purpose to keep it so that there would be a round number for lowering the millage, which would be 1. See Also City App. 15, pg. 20; City App. 13, pgs. 190-196, Exh. 16A, 16B, 16C.

The ordinance states that the fee is made up of three components: (1) reasonable compensation for the privileges granted in this ordinance to use and occupy the County rights of way; (2) fair rental return on the privileged use of public property for a proprietary purpose; and (3) payment of the cost of regulating the County rights of way and protecting the public in the use and occupancy of such County rights of way. (emphasis added). (County App. C, pg. 4).

The Privilege Fee ordinance and accompanying resolution, Resolution 97-80, provide for several exemptions from payment of the fee. First, the resolution directs the County staff to prepare an interlocal agreement by which the fiscal impact of the Privilege Fee on the Alachua County School Board will be made "revenue neutral". In other words, Alachua County will return to the School Board the three percent fee it would otherwise have to pay on its consumption of electricity. (County App. F, pg. 2). This effectively exempts the School Board from paying the fee.

Second, the ordinance provides that an electric utility that sells electricity inside a municipality and has a franchise agreement with or otherwise makes some payment to that municipality for use of municipal right of way, does not have to pay the Privilege Fee to the County on sales it makes within that municipality. (County App. C, pgs. 12, 5). This exemption applies even if the electric utility uses County right of way to supply customers inside that municipality. However, the City of Gainesville and Gainesville Regional Utilities are exempt from this

exemption.[3] (County App. C, pgs. 11-12, 5). The Privilege Fee ordinance, by its own terms, provides that a municipal electric utility that pays a franchise fee or other payment for the use of municipal right of way to the municipality must still pay the County's Privilege Fee.

Third, the ordinance exempts from the payment of the Privilege Fee an electric utility which makes no sales in the County, but uses the County right of way to pass through the County. (City App. 5, RFA #6, County Answer 6). In effect, these utilities will be using the County's right of way free of charge under the provisions of the ordinance.

Fourth, the ordinance exempts from the payment of the Privilege Fee any electric utility that enters into a franchise agreement with Alachua County. (County App. C, pgs. 11-12, 3-4). The ordinance is silent as to the terms of any franchise agreement.

Finally, the Privilege Fee is only imposed on electric customers. By operation, the ordinance therefore exempts from payment of the Privilege Fee other utilities which use the right of way to deliver services, i.e. gas, water, wastewater, etc.

The County Commission also adopted at the same time as the Privilege Fee ordinance Resolution 97-79, the "Capital Improvement Revenue Bond Resolution". (County App. D). The size of the bond

---

[3]Gainesville Regional Utilities is an enterprise wholly owned and operated by the City of Gainesville. Since 1927, the City has been authorized by Special Act of the Florida legislature to provide electric services to those both within and outside its municipal limits. The utility also provides gas, water, wastewater and telecommunications services.

is 20 million dollars for an unspecified "1997 Project" with debt service funded in part by the Privilege Fee. The County clearly stated that it intended to have the validity of the Privilege Fee determined on an expedited basis, so it chose the bond validation procedure. (City App. 10, pg. 8). Later, Resolution 97-79 was amended by Resolution 97-116, which more specifically stated what projects were to be funded by the bond series. (County App. E, pg. 2). Notably, none of the projects involved improvements to or changes to the County's right of way or road system.

In August of 1997, Alachua County filed this action for the validation of the bonds. Several parties, including the City of Gainesville, immediately intervened. Three parties, the City of Gainesville, Florida Power and Light, and the University of Florida filed separate actions seeking declaratory and injunctive relief and damages. The City of Gainesville's complaint is contained in City App. 3.

Extensive discovery was conducted by the parties. Numerous County witnesses were deposed by the Intervenors. Requests for admissions, deposition transcripts, and interrogatories were filed with the court.

From the evidence submitted, the trial court made the following findings of fact, which findings of fact were <u>not</u> challenged by the County in its brief to this Court:

1. The Privilege Fee is not related to the extent of use by electric utilities of the county rights-of-way.

2. The Privilege Fee is not related to the reasonable rental value of the land occupied by electric utilities within the county rights-of-way.

3. The Privilege Fee is not related to Alachua County's costs of regulating the use by electric utilities of the county rights-of-way.

4. The Privilege Fee is not related to the cost of maintaining the portion of county rights-of-way occupied by electric utilities.

5. The Privilege Fee does not represent a bargained-for agreement between Alachua County and any electric utility, but was unilaterally imposed upon the electric utilities by the county.

6. Electric utilities providing electric service to consumers in Alachua County cannot reasonably avoid the Privilege Fee by removing their equipment and facilities from the county rights-of-way.

7. The revenue derived from the imposition of the Privilege Fee is intended to fund general county operations and to reduce the county ad valorem tax millage rate. (County App. A-1, pg. 5).

Final hearing in the matter was set for April 1-3, 1998. Motions for summary judgment, filed by Florida Power and Light, Florida Power Corporation, Santa Fe Community College, and Howard Scharps were heard. The City of Gainesville joined in Florida Power and Light's Motion for Summary Judgment at the hearing without objection from any of the parties. At the conclusion of the hearing on the motions for summary judgment, the trial court

found as a matter of law that the Privilege Fee was an unlawful tax and not a fee, and made the factual findings noted above. Several other issues raised by the parties, including whether Alachua County was estopped from imposing the charge, whether the charge violated contractual rights between the City and the County, whether the City's ordinance in conflict prevailed over the County ordinance, and whether the Privilege Fee ordinance violated 42 USC §1983, were not addressed by the court. These arguments were addressed in the City's Trial Memorandum of Law (City App. 4), however, the Court noted these issues were collateral issues that would be decided if the summary judgment was overturned. This appeal followed entry of the written order.

SUMMARY OF THE ARGUMENT

The Privilege Fee is an unconstitutional tax levied by Alachua County. It is not, as argued by Alachua County, the functional equivalent of a franchise fee. It is, however, the functional equivalent of a utility tax on the use of electricity without the statutory authority to make it legal.

This Court most recently in State v. City of Port Orange, 650 So. 2d 1 (Fla. 1994), recognized that it is not the name of the charge that determines whether it is a tax or a fee, but the operation and effect of the charge. Looking at the operation and effect of the Privilege Fee, its alter ego is a utility tax on electricity, not a fee paid as a result of a franchise agreement negotiated with a utility.

Alachua County already imposes the maximum utility tax on the sale of electricity. (City App. 13, pgs. 35-36). The utility tax, as would be the case with the Privilege Fee, is separately stated on each customer's bill. Both Alachua County's utility tax and the Privilege Fee are unilaterally imposed. Both are based on a percentage of the total sales of electricity. Both have to be paid as long as electricity is used; there is no choice in paying the charge. Both are used to fund general government services. Both may have the amount of the charge unilaterally changed. The only real difference is that the County has the statutory authority to impose the utility tax, but it does not have the authority to impose its Privilege Fee.

In contrast, a fee paid in exchange for a franchise is negotiated. A franchise, which gives a business entity the right to do business within a certain geographical area, is a contract that gives vested rights to the holder of the franchise. The Privilege Fee, by the very terms of the ordinance, gives no vested rights. Since it is unilaterally imposed, it is not a contract. A franchise is an agreement that is for a specified term of years with a set fee. The Privilege Fee ordinance sets no term of years and the amount of the fee is determined in the political process, which amount may be unilaterally changed at any time.

The Privilege Fee has all of the characteristics of a tax but the name. The amount of the charge does not depend on the extent of use of the right of way. It is not related to the cost of regulating the right of way, the cost of maintaining the right of way, or the rental value of the right of way. The amount of the fee was determined by what the County wanted to raise in revenue to reduce the County's ad valorem millage rate. The money received will be used to defray the general expenses of County government. Lastly, the Privilege Fee is collected in the same manner as a tax.

What Alachua County has done through the misnamed Privilege Fee is impose an additional utility tax on electricity on its citizens through the guise of having the electric utilities pay for use of right of way which use the utilities cannot avoid. The County's real purpose for inventing the Privilege Fee becomes quite clear through the terms and history of the ordinance and resolutions: the County wanted to find a way to tax those persons

and entities in Alachua County that do not pay ad valorem taxes due to homestead exemptions or government status.

Alachua County's brief abandons all pretense (and indeed, abandons the very words of its own ordinance) that the fee is needed to regulate its right of way, to police it, or to maintain it. The remaining argument that the fee is payment for the "valuable property rights" it has given to the utilities also must fail because there are no property rights given to the utilities by the very terms of the County's own ordinance. What the County cannot disguise is that it is using the electric utilities merely as collection agencies to charge its citizens for the use of property that it holds for their benefit -- the public right of way.

Courts in other jurisdictions have found such similar charges to be taxes, and the trial court in this case is of the same mind. The circuit court, Judge Frederick Smith, has found in a well reasoned order that the County's attempt to levy an unauthorized tax labeled a Privilege Fee is impermissible. That order should be affirmed.

ARGUMENT

I.A. THE COUNTY DOES NOT HAVE THE CONSTITUTIONAL OR STATUTORY AUTHORITY TO IMPOSE THE PRIVILEGE FEE.

After the 1968 revisions to the Florida Constitution, counties have only that taxing power specifically given to them by the State. Fla. Const. Article VII §9; §125.01(1)(r), Fla. Stat. All other forms of taxation are preempted to the State. It is undisputed that if the Privilege Fee is a tax, then it is illegal because the State has not given the County the authority to impose a tax of this nature. Home rule power does not give the County additional taxing power. City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1, 4-5 (Fla. 1972).

The Privilege Fee imposed by the County is a tax. The label of "fee" is not controlling as to what the charge really is. As stated by the Florida Supreme Court in State v. City of Port Orange, supra at 3, the power to tax must not be broadened by semantics. The test of whether a charge is a fee or a tax is a functional one, determined by the characteristics of the charge. Dawson v. Kentucky Distilleries & Warehouse Co., 255 U.S. 288, 292-293 (1921). In Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388, 1399 (7th Cir. 1992), a federal court described it this way:

> "[I]f the fee is a reasonable estimate of the cost imposed by the person required to pay the fee, then it is a user fee and is within the municipality's regulatory power. If it is calculated not just to recover a cost imposed on the municipality or its residents, but to generate revenues that the municipality can use to offset

unrelated costs or confer unrelated benefit, it is a tax, whatever the nominal designation." Id. at 1399.

The burden of proving that the charge is a fee and not a tax falls on the entity seeking to impose the charge, in this case, the County. Any doubt as to the power sought to be exercised must be resolved against the County. State v. City of Port Orange, supra at 3.

Florida courts, as well as courts in other jurisdictions, have established the factors that must be considered in determining whether a charge is a tax or a fee. This brief will discuss these factors.

1. The absence of regulation or service associated with the Privilege Fee makes it invalid as a tax or a fee. Although the ordinance provides that one of the three components of the Privilege Fee is payment for the cost of regulating the right of way, Alachua County does not provide any additional regulation or services under the Privilege Fee ordinance. (City App. 5, RFA #11) The purpose of the Privilege Fee is not regulation, but, in fact, to raise revenue to reduce the County's millage rate and to raise revenue from those persons and entities not subject to ad valorem taxes. (See fns. 1 and 2).

Currently, the County issues permits to the City owned and operated Gainesville Regional Utilities and other electric utilities and users of its right of way. (City App. 3, Exh. 5). These entities pay Alachua County for the permits. The permits give the holder the right to "construct, operate and maintain"

facilities in the County's right of way. The holder of the permit must restore the right of way that it has disturbed and also must indemnify and hold harmless the County as to certain acts. By the terms of the County's ordinance, these same County permits with the same considerations will continue to be issued under the Privilege Fee ordinance. (County App. C, pgs. 9-10).

Alachua County will provide no additional service for payment of the fee. No additional regulation is required by the ordinance. Under the ordinance, the same procedures and permits will be used, only the amount of new revenue raised by the County will increase astronomically, to about 4.2 million dollars a year. (See fn. 6, also City App. 9, Interr. 6, City App. 18, pg. 29-30, Exh. D-11). The Privilege Fee is thus a tax.

The Florida Supreme Court in Tamiami Trail Tours, Inc. v. City of Orlando, 120 So. 2d 170 (Fla. 1960), dealt with a revenue raising ordinance that provided for no additional service or regulation. The City of Orlando passed an ordinance requiring the owner of trucks using the loading and unloading zones established by the city in its streets to apply and pay for a tag permit for each truck. The permit had to be applied and paid for each year. One of the issues was whether the charge was a tax, or a fee incidental to the police power of the city to regulate traffic and parking. The Supreme Court found that the charge was a tax, stating that the "ordinance in question is naught but an attempt to impose an excise tax upon petitioners and others similarly situated, either for the privilege of using the City's freight

zones or upon the operation of their business within the City". Id. at 174.

In reaching this conclusion, the court noted that it is only in those instances where regulation is the primary purpose of a licensing ordinance that a fee can be exacted pursuant to the police power.[4] That fee may be charged in an amount sufficient to bear the expense of issuing the license and the cost of necessary inspection associated with the license and all incidental expenses connected with it. Id. at 172. However, where a license is required and a fee is exacted solely for revenue raising purposes, and the payment of such fee gives the right to carry on the business without any further conditions, it is a tax. Id. In the City of Orlando case, the court found that the ordinance did not provide "for any regulation of the licensee or 'permittee', once the permit is issued, which is the usual concomitant of a license proper and one of the distinctions between a regulatory fee exacting under the police power and a tax". Id., citing to Bateman v. City of Winter Park, 37 So.2d 362 (Fla. 1948). See Also Brewster v. City of Pocatello, 768 P. 2d 765 (Id. 1989), which found that a street restoration and maintenance fee was a tax. The court stated that "it is clear that the revenue to be collected...has no necessary relationship to the regulation of travel over its street, but rather is to generate funds for the

---

[4] The distinction between holding public property in a governmental versus proprietary capacity will be developed in more detail later in this brief.

non-regulatory function of repairing and maintaining streets". Id. At 767.

The County's ordinance is not a regulatory ordinance, it is a revenue raising ordinance. The County itself admits in its brief that the Privilege Fee is not a regulatory fee. (page 16). The Privilege Fee is a tax. There are no conditions associated with the Privilege Fee ordinance that are not already required. There are no additional services provided by Alachua County under the ordinance.

Alachua County argues in its brief that it is giving up "valuable property rights" in public property and it is therefore entitled to charge a fee for giving up these rights. If Alachua County is giving up valuable property rights, someone must be receiving those property rights. These "rights" are not going to the utilities who are given no vested rights. (County App. C, pg. 19). There are no more "rights" given up by the County in the ordinance than is already given up in the County's utility permit. The permit specifically states that it is a license for permissive use only. (City App. 3, Exh. 5, Condition 2). What the utilities are given under the ordinance is only a license and a license is not a property right. Lodestar Tower North Palm Beach, Inc. v. Palm Beach Television Broadcasting, Inc., 665 So.2d 368, 370 (Fla. 4th DCA 1996).

A recent Florida case addresses the issue of an "imposed" franchise fee. Alafaya Utilities refused to sign a franchise agreement offered it by the City of Oviedo. The city had informed

Alafaya Utilities that it needed to enter into a franchise agreement with the city and to pay the city six percent of its revenues in the city for the utility's use of city right of way. The utility refused and filed an action for injunctive relief. The lower court granted the injunction.

Before the appellate court, the City of Oviedo argued that the utility failed to demonstrate a likelihood of success on the merits. The appellate court disagreed, finding that while §337.401(1) Fla. Stat. allowed the city to prescribe and enforce reasonable rules or regulations regarding the installation of utility facilities in a right of way, "no rules or regulations have ever been adopted by Oviedo and that it imposed the current prohibitions because Alafaya would not submit to the franchise terms unilaterally imposed by Oviedo". City of Oviedo v. Alafaya Utilities, Inc., 704 So.2d 206, 207 (Fla. 5th DCA 1998).

Another interesting aspect of the City of Oviedo case as it relates to the issue before this Court, is that the city was claiming it had the ability to unilaterally impose this franchise fee because of its powers under §337.401(1) and §337.401(2), Fla. Stat. Alachua County cited the same authority for its proposition that it has the power to impose a "Privilege Fee". In City of Oviedo, however, the court found that while these sections gave the city the right to prescribe and enforce reasonable rules and regulations, these sections did not provide authority for unilaterally imposing a franchise agreement and its related fee. Id. These same sections, giving Alachua County certain regulatory

powers over its roads, are not authority for the County to impose this revenue raising ordinance over which it exercises only its police powers.

The only powers the County holds over its right of way are regulatory.[5] Consequently, the only charge it can recover is regulatory. The County has no power to turn its road system into a profit making enterprise. The law grants only regulatory powers to the County over the roads they hold in trust for the people.

2. The arbitrary manner in which the fee was set makes it invalid as a tax or a fee. The amount of the fee in the Privilege Fee ordinance was set by determining how much money the County wanted to raise in revenue. There were no studies or analyses by the County of the cost of regulating, maintaining, acquiring, or determining rental value of the right of way.[6] Consequently, there

---

[5]§125.01 The legislative and governing body of a county shall have the power to carry on county government to the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to: (m)...regulate the placement of signs, lights, and other structures within the right of way limits of the county road system.
§337.401(1) Local government entities ... that have jurisdiction and control of public roads ... are authorized to prescribe and enforce reasonable rules or regulations with reference to the placing and maintaining ... any electric transmission ... lines, pole lines, poles ... or other structures.
§337.401(2) (Local government entities) may grant to a corporation ... the use of a right of way for the utility in accordance with such rules or regulations as the authority may adopt. (emphasis added).

[6]In the lower court proceeding, Alachua County cited two pages of a 1994 service cost evaluation that was done by Griffith and Associates as a study of the cost to the County in issuing utility permits. That study recommends that the County raise its cost of a utility permit from the current average of $74.48 a permit to

was no evidence placed before the County Commission to permit a valid finding that the fee was reasonable. In order to be presumptively correct, legislative findings must be based on evidence received by the legislative body. Legislative findings "are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions and they are always subject to judicial inquiry". Seagram-Distillers Corp. v. Ben Greene, Inc., 54 So.2d 235, 236 (Fla. 1951). The record is devoid of any evidence, and the finding that a three percent fee was reasonable was based on nothing more than a comparison to fees paid by utilities for franchises. (City App. 5, RFA #5).

While the Privilege Fee is currently set at three percent, there are no proscriptions in the ordinance to prevent the Board of County Commissioners from setting the fee at any level they desire. County Manager, Richard Tarbox, put it best in his deposition when he stated that politics really set the amount of the fee and it is politics that limit the amount of the fee. (City App. 11, pg. 82-84; City App. 5, RFA #21 and 23).

Alternatively, the amount of a tax does not have to relate to a particular service or function. A tax is based on what a government entity needs to raise in revenue within the 10 mill

---

$230 a permit. (City App. 16). This is not justification for the approximately $4,200,000 a year Privilege Fee on electric utilities alone. (City App. 5, RFA #4 and #5 read in connection with City App. 8, Question 2 as to RFA #4; City App. 9, Interr.6; City App. 10, pg. 6-9, 21, 58-59).

limit set by the constitution; a local government may set it anywhere from 1 mill to 10 mills based on the revenue it needs to provide public service. However, the setting of a fee is different.

In Commonwealth Edison Company v. Montana, 453 U.S. 609 (1981), the Supreme Court was faced with the question of whether Montana's severance tax for coal violated the United States Constitution. One of the issues argued by Commonwealth Edison was that a factual inquiry into the relationship between the revenues generated by a tax and the cost incurred on account of the taxed activity needed to be made for a determination of whether the tax was valid or not. In ruling that no such inquiry need be made, the court discussed one of the basic tenets of taxation: "[T]he simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution". Id. at 627. See also Sandstrom v City of Fort Lauderdale, 133 So.2d 755, 757 (Fla. 2d DCA 1961) ("[W]here power to license is granted for revenue purposes, the amount of the tax is within the discretion and judgment of the municipal authorities...").

The County's ordinance and brief are replete with language commonly used by the courts to uphold a tax or tax classification, a purely legislative decision. The cases cited in the County's brief do not support its claim that the setting of a fee is a legislative matter, that cannot be disturbed unless it is found to be arbitrary. The language in Rosche v. City of Hollywood, 55

So.2d 909 (Fla. 1952) that the "apportionment of assessments is a legislative function" deals with special assessments, not fees. In City of New Smyrna Beach v. Board of Trustees of the Internal Improvement Trust Fund, 543 So.2d 824 (Fla. 5th DCA 1989), it was the difference between a one and two dollar entry fee to the beach based on what day of the week it was, that was found to be a reasonable legislative distinction. The fee was also set after evidence was produced by the city showing the cost of maintaining the beach. Moreover, the money collected was specifically devoted to beach purposes. Id. at 826-827.

Alachua County cites no case for the proposition that the unilateral setting of a fee, without any evidence or analysis of the cost involved, is a purely legislative matter. In fact, the law is to the contrary.

In City of Jacksonville v. Jacksonville Maritime Association, Inc., 492 So.2d 770 (Fla. 1st DCA 1986), the City of Jacksonville enacted an ordinance imposing a "user fee" on ships anchored in storage in the St. Johns River. The ship owners sued, alleging that the "user fee" was in reality a tax. Both the trial and appellate courts found the fee to be a tax.

The court considered the fact that the user fee amount was not based on any loss of revenue to the city, or any cost analysis, but was based on what the ordinance drafter thought was fair. Id. at 771. The court also found indicia of a tax in that no additional services were provided as a result of the fee paid, and no

additional costs were incurred by the city as a result of the ship's location.

The appellate court stated that "[A]bsent the primary purpose of regulation, the exaction of a fee for the use of its port must be construed as nothing other than a tax on such privilege." Id. at 772. Fees must be just and reasonable. While there is some latitude in setting the fee, a fee must be a fair approximation of the use of the facilities for whose benefit the fees are imposed. See Contractors and Builders Association, 329 So.2d 314, 318 (Fla. 1976); Tamiami Trail Tours, supra at 172.

3. The stated use of the Privilege Fee proceeds makes it invalid as a tax or a fee. As established in County Resolution No. 97-80 which accompanied the adoption of the Privilege Fee ordinance, Privilege Fee proceeds will supplant ad valorem taxes. (County App. E, pg. 3). The proceeds will then be placed in the general government fund. The Privilege Fee ordinance contains no restrictions or dedications for the use of the funds. It is undisputed that the funds are not designated to regulate or maintain the right of way or the road system in Alachua County, but are to be used to pay the cost of general government.

A characteristic of a tax is that it is imposed for general revenue-raising purposes. Alternatively, the earmarking of proceeds for expenses incurred in providing the services is evidence that the charge is a fee. Schneider Transport, Inc. v. Cattanach, 657 F. 2d 128, 132 (7th Cir. 1981) cert. denied, 455 U.S. 909 (1982). In Contractors and Builders Association, supra at

314, the Supreme Court considered whether an impact fee for connecting to a water and sewer system was a tax or a fee. The ordinance calculated different charges for the connection and included within those charges an amount to cover future expansion of the system. The contractors' association argued that these fees were really a tax and not a fee, relying on the cases of Broward County v. Janis Development Corp., 311 So.2d 371 (Fla. 4th DCA 1975) and Venditti-Siravo, Inc. v. City of Hollywood, 39 Fla. Supp. 121 (17th Cir. 1973).

In finding that Dunedin's charge was a fee, this Court considered two factors that distinguished Dunedin's charge from that found to be a tax in Janis and Venditti-Siravo. The court noted first, that "the fees in Janis Development and Venditti-Siravo bore no relationship to (and were greatly in excess of) the costs of the regulation which was supposed to justify their collection". Contractors and Builders Association, supra at 318. The court noted secondly, that in both Janis Development and Venditti-Siravo the money had been collected for purposes extraneous to the regulation. Therefore, those courts had properly found the charges to be taxes.

The Supreme Court contrasted those fees to the fee sought to be imposed by the City of Dunedin. Dunedin's charge was reasonably related to the services provided. Id. at 319-320. However, it found that the use of the fees were not sufficiently restricted to the expansion of the system, therefore, the ordinance was deficient. The court noted that this deficiency could be cured by

Dunedin adopting an ordinance with appropriate restrictions on the use of the money and the ordinance would then be valid. See Also Diginet, Inc. v. Western Union ATS, Inc. and the City of Chicago, 845 F. Supp. 1237, 1240 (N.D. Ill. 1994) ("There is nothing in this case to support that the [imposed] franchise fee would go only or primarily for the cost of regulation and not into the general coffers of the city. The franchise fee in this case is a tax."); Diginet, Inc. v. Western Union ATS, Inc., supra at 1388 ("There is no pretense that the franchise fee is necessary to offset such costs as the fiber optic network may impose on the city; so far as it appears, it imposes no costs, congestion or otherwise. The purpose of the fee is to raise revenue for the city, which is why we are calling the fee a tax."); Emerson College v. City of Boston, 462 N.E. 2d 1098, 1106 (Mass. 1984) ("That revenue obtained from a particular charge is not used exclusively to meet expenses incurred in providing the service, but is destined instead for a broader range of services or for a general fund, while not decisive, is of weight in indicating that the charge is a tax"). Alachua County's intent and design to use the fee solely as a revenue raising measure for the support of government leads to the inevitable conclusion that the Privilege Fee is a tax.

4. The lack of choice in using the service and paying the charge makes the Privilege Fee invalid as a tax or a fee. The Florida Supreme Court has recently addressed a case with issues very similar to the instant case. State v. City of Port Orange, supra, involved the Supreme Court's direct review of a bond

validation. The City of Port Orange had passed a "Transportation Utility Ordinance" which adopted a "transportation utility fee" based on the use of the city roads. The funding source for the bonds was to be the new and untested "transportation utility fee". The fee was imposed on all owners of developed property in the city based on a formula created by the city tied to the use of the city streets. Any unpaid charge became a lien on the property until the charge was paid. The issue in the bond validation case, as it is here, was the legality of the financing agreement upon which the bond was secured -- the transportation utility fee -- and whether the transportation utility fee was a tax or a valid fee.

The Supreme Court found that the transportation utility fee was a tax. The court looked at several factors. One of the factors was whether the individual had any choice in paying the charge. As stated by the court "[fees] are paid by choice in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge". Id. at 3. The court stated that the Port Orange fee was a mandatory charge imposed upon those whose only choice was owning developed property within the boundaries of the City.

Alachua County's Privilege Fee is such a charge without a choice. The Privilege Fee ordinance mandates that the fee be passed directly to the customer and makes the fee ultimately a debt of the customer. The electric utilities act only as a collection agency. Electric customers in Alachua County have no more choice about paying the fee than those citizens in Port Orange -- the only

choice of Alachua County citizens is their choice of living in Alachua County.

The electric utilities also have no real choice as to collecting the fee or paying the fee. The utilities have service areas wherein they are obligated to provide service. Gainesville Regional Utilities cannot service its customer area without using or crossing the County's right of way in some way. (County App. A-1, pg. 5). It only takes a single pole or facility to incur the three percent charge on all electric utility revenues collected in the County. In addition, the utility has spent millions of dollars placing its facilities in the right of way at a time when the only charge was that established in the permitting system, significantly less than the millions of dollars per year it will now cost the utility.

There is no choice involved in the County's Privilege Fee. As much as Alachua County may say there is a choice, "don't use our right of way", or "the utilities made a business choice to place their facilities there", there is in fact, no real choice. The County is engaged in fantasy and legal fiction. In City of Tampa v. Birdsong Motors, Inc., supra, the City argued that the charge was a fee and not a tax in that the merchants had a choice about paying the fee because they could go out of business and thus avoid the charge. Id. at 7. In finding the charge to be a tax, the Supreme Court stated that the city's argument that the charge was not a tax because it was not payable unless the merchant elected to continue

in business was "no more than the statement of a legal fiction". Id.

In Emerson College v. City of Boston, supra, cited with approval by the Florida Supreme Court in State v. City of Port Orange, supra, the Massachusetts Supreme Court reviewed a fire service charge imposed by the City of Boston to determine whether it was a tax or a fee. The court described the fire service charge as a "chimera",[7] noting that it had aspects of both a fee and a tax, but was valid in neither form.

The court in Emerson College found that the charge had fee like characteristics in the manner in which it had been calculated[8], but that it also had characteristics of a tax. One consideration that the charge was a tax was that the use of the service was compelled, the recipients of the charge had no choice but to use the service. The court noted that fees generally are charged for services voluntarily requested and that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge.[9] Id. at 424-425. See

---

[7] Webster's II, New Riverside University Dictionary defines chimera as 1) a mythical creature depicted as a composite of a lion, a goat, and a serpent; 2) a foolish fancy; 3) an organism with tissues from at least two genetically distinct parents.

[8]The City had calculated the fee based on the cost of funding the personnel and equipment of additional fire companies.

[9]The court discussed two other factors as significant in its finding that the charge was a tax. The court found that the service was not "sufficiently particularized as to justify distribution of the costs among a limited group ... rather than the

also American Telephone & Telegraph Co. v. Village of Arlington Heights, 620 N.E. 2d 1040, 1046 (Ill. 1993) ("While AT&T and the defendant municipalities could have voluntarily entered into a contractual relationship under which AT&T would have agreed to pay for the undercrossing of public streets, absent such an agreement, defendants do not have the right to force AT&T to pay a toll under the guise of a franchise fee".).

Further support that the County has no authority to force the City into such a unilateral, imposed fee is City of Plant City v. Mayo, 337 So.2d 966, 973 (Fla. 1976). The Supreme Court stated that cities would lack authority to impose fees of this type and "unlike other governmental levies, the charges here are bargained for in exchange for specific property rights relinquished by the cities" (emphasis added). The lack of choice by the City of Gainesville in paying this fee, the fact that it is not bargained for, and that despite the County's bold assertions to the contrary, no property rights are given up by the County, makes the Privilege Fee a tax.

5. The means of collection make the Privilege Fee invalid as a tax or a fee. The method of collecting for nonpayment of the charge is also indicative of whether the charge is a fee or tax. Alachua County's ordinance provides that nonpayment of the fee may be subject to those collection procedures outlined in §§197.3632

---

general public." Id. At 1106. Secondly, the court noted that the revenue obtained was "not used exclusively to meet expenses incurred in providing the service, but is destined instead for a broad range of services or for a general fund." Id.

and 197.3635, Fla. Stat. Those sections provide that collection may be enforced by placing the charge on the ad valorem property tax bill. The charges then become a lien on the property if payment is not made. However, §197.363(5) Fla. Stat. specifically prohibits service charges from being included on a bill for ad valorem taxes.[10]

The means of collection of Alachua County's Privilege Fee is not permitted by the procedure set forth in its ordinance if indeed the Privilege Fee is a valid service charge. Courts have considered whether the fee could become a lien on property in distinguishing between a tax and a fee. In Contractors & Builders Association, supra at 314, discussed earlier in the memorandum, the issue was whether the impact fee was a tax or a valid fee. In finding that the charge was a fee, the court noted that "[U]nder no circumstances would the fees constitute a lien on realty". Id. at 319, fn. 8.

Courts from other jurisdictions have found charges similar to the County's Privilege Fee to be taxes where there is no state statute specifically allowing such charges. In addition to the cases cited earlier in this brief, four cases are noteworthy of bringing to the attention of this Court. In City of Little Rock v. Cash, 644 S.W. 2d 229 (Ark. 1982), the City of Little Rock levied a "privilege tax" on its independent waterworks system. The

---

[10]..."However, tax certificates and tax deeds may not be issued for nonpayment of service charges, and such charges shall not be included on a bill for ad valorem taxes."

ordinance provided that the waterworks was authorized to pass the charge on to the customer by charging an additional 25 cents per month per customer. Citizens sued, arguing that it was an illegal tax. The city argued that while it was labeled a "privilege tax", the terms "franchise fee, franchise tax, rate, assessments, charges, privilege tax and privilege fee" were all interchangeable and the use of a particular term did not make it a tax. Id. at 231. However, the court found that the charge functioned as a tax. It considered that the charge was not a charge for services rendered, that it was mandatory, in a set amount, and passed on to the customer without any regard of cost to the system. Id. at 232.

In Keleherv v. New England Telephone and Telegraph Company, 947 F. 2d 547 (2d Cir. 1991), the City of Burlington adopted a "Street Franchise Fees Ordinance" which required that utilities who used and occupied the city streets pay a "franchise fee" of 2½% of their gross revenue to the city. The city filed a declaratory judgment action in federal court. The lower court had found the charge to be a tax, concluding that "the city was authorized to charge only an administrative or regulatory fee to cover the cost of regulating a utility's use of the streets, and was not permitted to raise general revenue by requiring utilities to turn over a percentage of their revenues". Id. at 548-49. The federal appeals court dismissed the action for no subject matter jurisdiction because of the finding that the charge was a tax. Id. at 550.

In Robinson Protective Alarm Company v. City of Philadelphia, 581 F.2d 371 (3d Cir. 1978), Philadelphia had an ordinance that

required private alarm companies to pay 5% of their gross revenue for the "privilege" of laying wire underneath the City streets. The lower court found the charge to be a tax. The Third Circuit examined the lower court's finding in order to determine if it had jurisdiction. The court noted that the ordinance was a "revenue raising measure collected annually in a manner similar to other gross receipts levies". Id. at 376. The revenues were also added to the "public fisc, rather than applied exclusively to contractual services owed central alarm companies". Id. Therefore, coming to the conclusion that the charge was a tax under the Tax Injunction Act, the federal court dismissed the action.

Finally, in City of Chattanooga v. BellSouth Telecommunications, Inc., 1 F. Supp. 2d 809 (E.D. Tenn. 1998), the federal court found a "franchise fee" of 5% of gross revenue imposed on telecommunications companies for "rent" of the city's right of way was enough like a tax for the federal court to lose jurisdiction. The city was using the money collected for general debts and obligations. Id. at 813. The court noted that "[o]ne of the most important characteristics and distinguishing features of a tax is that it is designated and imposed for the purpose of raising general revenues". Id. (citations omitted). See also Independent Coin Payphone Association, Inc. v. City of Chicago, 863 F. Supp. 744, 754-55 (N.D. Ill. 1994).

The authority cited by Alachua County does not support its argument that the Privilege Fee, as established in the ordinance and accompanying resolutions, is a valid fee as opposed to a tax.

Many of the legal assertions made by the County are devoid of any cite to legal authority. The legal authority the County does cite does not support the conclusion it draws.

Jacksonville Port Authority v. Alamo Rent-A-Car, Inc., 600 So.2d 1159 (Fla. 1st DCA 1992), relied on heavily by the County, is not authority for Alachua County to impose a privilege fee on the use of its right of way. In that case, the Jacksonville Port Authority (JPA) was an independent public agency that owned and operated the Jacksonville International Airport. The JPA determined that on site rental car companies, which paid 10% of their gross receipts to the authority, suffered a competitive disadvantage to off site car rental agencies, who paid nothing to the authority. The JPA imposed a six percent "Privilege Fee" on those fares that the off-site rental car companies picked up at the airport. The appellate court found that the charge was a fee as opposed to a tax.

A major distinction in the JPA's fee and Alachua County's fee is that JPA operated the airport in its proprietary capacity as opposed to a governmental capacity. As stated by the appellate court in Alamo, "the crucial point in resolving the tax issue is to recognize that the JPA does not purport to regulate its airport system under the auspices of the general police power, but rather to do so as a function of its proprietary status." Id. at 1164 (emphasis added).

In this case, Alachua County does not hold the right of way in its proprietary status, it holds the right of way in its

governmental or sovereign capacity.[11] The County, in its governmental capacity, is given the power through the various state statutes it cites to regulate the use of its right of way (see fn. 5), but as been held by the courts "[T]he legal power to regulate is not necessarily the legal power to tax". Diginet, supra at 1399.

The County seeks to confuse the issue by arguing that the utility companies use the right of way in a proprietary manner. However, it is how the County holds the right of way that is the key issue. The status of the entities who use the right of way (governmental or proprietary) is not the issue,[12] but how the County

---

[11]Whatever may be the quality or quantity of the estate of the city in its streets, that estate is essentially public and not private property, and the city in holding it is considered the agent and trustee of the public and not a private owner for profit or emolument. The interest is exclusively publici juris and is in any respect wholly unlike property of a private corporation, which is held for its own benefit and used for its private gain and advantage. Expressed otherwise, whatever the nature of the title of the municipality in streets and alleys, whether a fee simple or only a qualified or conditional fee or a perpetual easement, it is such as to enable the public authorities to devote them to public purposes. The power to maintain and regulate the use of the streets is a trust for the benefit of the general public, of which the city cannot divest itself, nor can it so exercise its power over the streets as to defeat or seriously interfere with the enjoyment of the streets by the public. In other words, as noticed above, in supervising the uses of its streets, a municipal corporation is engaged in a function essentially public and governmental. (citations omitted). McQuillin The Law of Municipal Corporations Section 30.40 (3rd Ed.). (emphasis added)

[12]The city in American Telephone & Telegraph Co. v. Village of Arlington Heights, supra, argued that since American Telephone & Telegraph Co. was making a profit from the streets, it should be required to pay the fee for using the streets. The court said "[T]he fact that American Telephone & Telegraph Co. was a for-profit corporation is of no moment. One may reasonably ask, if the

holds the right of way (governmental or proprietary) that determines what charge the County may lawfully impose on the right of way. Holding the right of way under its governmental capacity, Alachua County cannot use it to make a profit.

The County holds the road system in its governmental or sovereign capacity. In State v. City of Port Orange, supra at 3, the court stated that the maintenance and improvement of an existing municipal road system was an exercise of a sovereign function.[13] Thus, a user fee for the use of those roads was improper as "[u]ser fees are charges based upon the proprietary right of the governing body permitting the use of the instrumentality involved". Id. User fees are not for traditional governmental services. See also American Telephone & Telegraph Co. v. Village of Arlington Heights, supra at 1044 ("Municipalities do not possess proprietary powers over the public streets. They only possess regulatory powers. The public streets are held in trust for the use of the public".)

Alachua County tries to create the impression in its brief that because it owns some of its right of way in fee simple, it has a proprietary interest in the right of way (County brief, pg. 22).

Salvation Army or the Sisters of Frances were proposing to lay a fiber optic cable, would the law be otherwise? It would not." Id. at 1047.

[13]Black's Law Dictionary 4th Ed. defines "sovereign right" as follows: "A right which the state alone, or some of its government agencies can possess...distinguished from such 'proprietary' rights as a state, like any private person may have in property or demands which it owns". (emphasis added)

It cites a definition of right of way as its authority. All that cite does is define right of way, which a government can own in fee or through an easement. Alachua County has acquired its right of way in different ways and holds different interests in all. (City App. 12). The County's cite has nothing to do with how a government holds the property. Neither the County or its amicus cite any authority for their premise that the County exercises proprietary powers over its right of way as opposed to regulatory powers.

Several other factors also distinguish the charge in the Alamo case from that imposed by Alachua County. First, cost and benefit studies had been considered by the JPA before setting the fee amounts and the JPA had made findings based on this evidence. Jacksonville Port Authority, supra at 1161. Alachua County did not do this. Secondly, the fees were dedicated to support and fund only airport expansion in Jacksonville. Id. at 1164. This is also not the case with Alachua County; the fees will go to general support of government. Thirdly, the charge was only on those fares that Alamo actually picked up at the airport, it was not a charge on all Alamo fares. Id. Thus, unlike Alachua County's charge on the total gross receipts of all sales of electricity once one facility is placed in the right of way, Alamo's fee was only a charge on the actual use of the airport, i.e., the fares picked up at the airport. By picking up one fare at the airport, Alamo did not pay the fee on fares it picked up at the bus station. Finally, Alamo had a real choice about paying the charge, if it did not want

to pay the charge on the customers it picked up at the airport, it simply need not pick up any customers at the airport and get its fares elsewhere.

The County's arguments in its brief are situationally convenient. Where it suits the County's purpose, it argues that the utilities are being charged the fee because they use the right of way in a "privileged" manner. Later in the brief, when convenient for the County, it argues that since the charge is being passed on to the customer as a separate line item, it is not a burden on the utility and does not affect the rate structure. The true payor of the fee does not use the service in a "privileged" manner different from any other member of society.

Despite argument to the contrary, Santa Rosa County v. Gulf Power Co., 635 So.2d 96 (Fla. 1st DCA 1994) cert. denied, 645 So.2d 452 (Fla. 1994), also does not validate the use of the County's Privilege Fee and it is factually distinguishable. Santa Rosa County involved the grant of franchises to utilities within the unincorporated areas of Santa Rosa and Escambia Counties. The court held that franchise fees were not taxes because they were bargained for in exchange for a franchise agreement. In the instant case, it is uncontroverted that Alachua County did not bargain for any fees in exchange for any property rights. The fees were unilaterally imposed within the corporate limits of Gainesville and the unincorporated area over the City's objection.

Similarly, the County's reliance on City of Pensacola v. Southern Bell Telephone Co., 37 So. 820 (Fla. 1905), is misplaced.

The gravamen of this ninety-three year old decision (pre-1968 constitutional amendment) revolved around the power of a municipality to charge $2 per pole to telephone and telegraph companies operating under the Florida Constitution and laws in effect at that time. The ordinance did not use the term "rent" and there is language in the opinion that indicates the charge was regulatory.

The world is also a very different place today than it was in 1905 when City of Pensacola was decided. Electric utilities are public service companies. A contemporary analysis of the utility's place in the road system is contained in Nerbonne v. Florida Power Corporation, 692 So. 2d 928 (Fla. 5th DCA 1997). Orange County had been given right of way for public road purposes by Nerbonne's predecessors in 1952. In 1991, Orange County permitted Florida Power Corporation to construct a power line over the easement. Nerbonne sued, arguing that permitting the power line exceeded the scope of the easement.

Recognizing that the issue had not been directly decided in Florida, the 5th DCA looked to other jurisdictions and determined that the majority of the courts concluded that "construction of a power line which does not interfere with highway travel is a proper use of a highway easement and is not regarded as imposing an additional burden on servitude on the underlying estate". Id. at 929. One of the cited cases, Fisher v. Golden Valley Elect. Assn., 658 P. 2d 127 (Alaska 1983), contained language that is strikingly appropriate to the issue before this Court:

> The reasoning underlying this position is that electric and telephone lines supply communications and power which were in an earlier age provided through messengers and freight wagons traveling on public highways. So long as the lines are compatible with road traffic they are viewed simply as adaptations of traditional highway uses made because of changing technology.
> The easement acquired by the public in a highway includes every reasonable means for the transmission of intelligence, the conveyance of persons, and the transportation of commodities which the advance of civilization may render suitable for a highway.

Nerbonne, supra, at 929. The right of way acquired in trust for the citizens of Alachua County is also appropriately used to supply them with electricity.

The final order in the Baker County case also cited by the County should also not influence this Court's decision. The decision never went beyond the trial court as the appeal was dismissed because the parties voluntarily entered into a franchise agreement that resulted in a settlement. The Baker County ordinance was applicable only in the unincorporated area of the County. Baker County also repealed its "Privilege Fee" ordinance.

The Baker County case is also directly contradictory to another final order of the Eighth Judicial Circuit in Florida Power and Light Company v. City of Hawthorne, Case No.: 85-863-CA, aff'd without opinion 509 So.2d 933 (Fla. 1st DCA 1987), in which summary judgment was entered in favor of Florida Power and Light. (City App. 17).

In the Hawthorne case, the trial court found that the City of Hawthorne's attempt to impose a "user charge" by ordinance on

Florida Power and Light was in reality the imposition of a tax.[14] Florida Power and Light's franchise agreement with Hawthorne had expired and the two parties were unable to come to terms on a new agreement. Hawthorne then imposed the same amount that it formerly received from Florida Power and Light to make up for the lost revenues. Florida Power and Light sued, alleging, among other issues, that the charge was a tax.

The court found that the Hawthorne charge was a tax. The court examined the factors outlined earlier in this memorandum that courts consider in determining whether a charge is a tax or a fee. The court considered these factors:

- the purpose of the ordinance was to replace the franchise fees formerly collected by the City pursuant to its agreement with Florida Power and Light that expired in 1984.
- the ordinance was intended to produce revenues not primarily related to any regulatory activity on the part of the City.
- [the charge did] not stem from a contract or agreement or other expression of consent by Florida Power and Light. (City App. 17, pgs. 1-2).

---

[14]Looking beyond the designation of "user charge" placed on the charge by the City, the court stated: "[W]hile said section (166.201, Fla. Stat.) may give the City the power to enact legitimate user charges as fees, it does not authorize the imposition of an otherwise unauthorized tax by calling the tax a 'user charge'. Florida courts have long held that it is the operation and effect of a particular burden, not what it is called, that determines whether it is a tax. If the City's contrary view were correct, municipalities could exercise unlimited taxing power without any constitutional or statutory authority simply by designating each new tax a 'user charge'. (City App. 17, pg. 2).

Based on these factors, the court found the charge to be "in essence a franchise tax which municipalities lack authority to impose", citing to City of Plant City v. Mayo, supra at 966. (City App. 17, pgs. 1-2).

The court in the Hawthorne case found that neither City of Pensacola v. Southern Bell Telephone Co. supra, nor City of St. Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893), cited by Hawthorne, supported its argument. (City App. 17, pgs. 2-3). It noted:

> Neither of these cases were decided within the context of the requirements of Article VII, §9(a) of the Florida Constitution or existing Florida Statutes. Moreover, these two older cases involved a rental charge based on the extent to which city property was used by the telephone and telegraph companies there involved. The charge was a certain amount per utility pole placed on city property. In the instant case, no such nexus is made between the extent of the charge imposed and the extent to which city property is utilized by Florida Power and Light. The court in City of St. Louis distinguished a rental charge, graduated on the extent a city's property is used, from a tax graduated on the level of business done by the telegraph company on the revenues it derived from such business.

I.B. THE PRIVILEGE FEE IS NOT THE "FUNCTIONAL EQUIVALENT" OF A FRANCHISE FEE AND THE COUNTY'S AUTHORITY DOES NOT SUPPORT ITS ARGUMENT THAT IT HAS THE AUTHORITY TO IMPOSE THE PRIVILEGE FEE

Despite Alachua County's legislative finding, the County's Privilege Fee is not the "functional equivalent" of a fee paid in exchange for a franchise. A franchise fee is not paid simply to use a government's right of way, it is a fee paid in exchange for a franchise.

Case law has long defined a franchise as "a special privilege conferred upon an individual or corporation by governmental authority to do something that cannot be done of common right". Leonard v. Balen Street Wharf Co., 52 So. 718 (Fla. 1910). The purpose behind a franchise has been described as thus: "to secure for the public an efficient, safe and dependable service by requiring bonded operators if necessary to avoid ruinous competition, to require the use of first class standard equipment, and to enforce such other interests as may be deemed advisable in the interest of the public". Jarrell v. Orlando Transit Co., 167 So. 664 (Fla. 1936).

A franchise is more than permission to use a government's right of way. In Florida Public Service Commission v. Florida Cities Water Company, 446 So.2d 1111 (Fla. 2d DCA 1984), the county had turned over its authority over the utilities to the PSC. The utilities argued that they were not required to continue to pay fees under the previous franchise agreement because the county was no longer providing any services under the agreement. The court noted that the services the county was providing were available to all utilities regardless of whether they had a franchise with the county. Therefore, they were not services under the franchise agreement. Id. At 1114.

The county also argued that the utilities continued to obtain benefit under the franchise agreement by maintaining its facilities on public right of way. The court found that "[B]y itself, the

right of way provision was not sufficient to keep the franchise agreement alive".

Several key components exist in a franchise fee that are not present in the County's Privilege Fee. First, and most importantly, a franchise fee is negotiated payment to the government entity. The seeker of the franchise is able to determine the value of the special privileges it may acquire. In no case does the government entity unilaterally impose the amount of the franchise fee or the conditions of the franchise agreement.

The County argues to this Court that consent to the fee and the amount is "constitutionally irrelevant" to the validity of the Privilege Fee. Yet this argument ignores this Court's history of holding that consent is a crucial difference between a tax and a fee. See State v. City of Port Orange, supra, and cases cited therein.

Secondly, a franchise gives the holder the right to conduct business within a certain geographical area, a right that it would not otherwise have. The Privilege Fee ordinance gives nothing of the kind to an electric utility. It merely provides that those who are already providing service in the area under the auspices of state law must now pay a new fee to use the right of way.

Third, because it is a negotiated agreement, a franchise is a contract. It has the characteristics of a contract and is governed by contract law. It is a property right. The holder of the franchise is given the special privilege for a term of years at a

price that is set for those years. Many times a non-compete agreement is given.

The Privilege Fee ordinance, by its very terms, does not grant any vested rights to the City's Gainesville Regional Utilities or any other payer of the fee. The County acknowledges in its brief that a franchisee is an agreement "for a specified term of years. (citations omitted)". (page 27). There is no specified term paid to the County for the "privilege" of using the County's rights of way. In fact, the terms of the ordinance can be unilaterally changed by Alachua County at any time. There is nothing to prevent the current commission or its successor commission from changing this ordinance and increasing the fee to six percent as recommended by their staff, or to ten percent, or any amount that the politics will bear. In other words, the term of the privilege lasts from commission meeting to commission meeting.

Fourth, the County has no authority to grant franchises within the jurisdictional limits of Gainesville or any other city. The County cites no authority for its proposition that it can unilaterally impose its "functional equivalent of a franchise fee" within the corporate limits of a municipality. The amicus brief filed by the City of Altamonte Springs on behalf of the County takes issue with the County on this point and recognizes that Alachua County does not possess the authority to grant franchises within the corporate limits of any municipality. (Amicus Brief of Altamonte Springs, pages 21-24).

The courts have long recognized the authority of cities to grant franchises within their corporate limits. Likewise, the courts have recognized the authority of counties to grant franchises within the unincorporated areas of the county. See cases on franchises cited in County's brief, page 27. The County cites no legal authority for its proposition that it possesses the power to negotiate franchises within the jurisdictional limits of a municipality. Simply stated, Alachua County has no authority to impose its "functional equivalent of a franchise fee" in the City of Gainesville or any other city. If this Court were to accept the County's imaginative proposition, a municipal franchise could not grant any rights to a franchisee without a similar franchise entered into by a county. A county could literally control municipal franchises by denying all franchises unless the agreements met their particular terms. The landscape of Florida governmental franchises would be dramatically changed. The franchising authority of cities would be effectively emasculated. This legal sophistry defies logic, good business practice, custom, and law.

Alachua County cannot prevent the City of Gainesville from operating its electric utility in Alachua County. The City of Gainesville possesses the express authority and power to operate an electric utility anywhere within Alachua County by special act of the legislature. Moreover, the City has the statutory right to place its electric utility lines "both within and without the

limits of the City".[15] For more than 30 years the County has issued regulatory permits to the City granting the right to use the County rights of way. (City App. 12, pgs. 66-67). The County cannot now choose to ignore these rights and require the City to pay an additional Privilege Fee for the use of the same rights of way for the same purpose.

II. THE AMOUNT OF THE ELECTRIC UTILITY PRIVILEGE FEE IS UNREASONABLE.

A. The Privilege Fee Is Invalid As To The Amount Charged.

The amount of the Privilege Fee was set based on the amount of revenue that the County wanted to receive from the fee. (See fns. 1 and 2). There is no relationship between any costs imposed by the electric utilities on the right of way and the amount of the fee.

The same reasons that establish that the Privilege Fee is a tax make it also an invalid fee if this Court were to somehow find the fee not to be a tax. As discussed in this brief, the County's

---

[15]Section 1.04(6) of the City Charter, as created by Chapter 12760, Laws of Florida, 1927, and as amended by Chapter 90-394, Laws of Florida, 1990, as follows: "Section 1.04 Special Powers. In addition to its general powers, the City may acquire, build, construct, erect, extend, enlarge, improve, furnish, equip, and operate as a separate bulk power supply utility or system, electric generating plants, transmission lines, interconnections, and substations for generating, transmitting, and distributing, and exchanging electric power and energy both within and without the limits of the city, including specifically all powers and immunities granted by Chapter 75-375, Laws of Florida". (emphasis added).

authority does not support its argument that the setting of a fee is a purely legislative matter. Also, as discussed in this brief, the Privilege Fee is not a franchise fee and the County's attempted logic as to the correlation of the two fails.

The County cites Jacksonville Port Authority, supra, as its support that it is a legislative determination as to what is a reasonable fee. However, that case does not stand for the proposition that there need be no nexus between the service and the fee.

While the parties in Alamo stipulated that there was "no direct correlation" with the cost analysis done, there was still a cost analysis used in setting the fee. Id. at 1161. The six percent figure paid by the off-site rental car companies was not arbitrarily set, but was a reduced fee from the ten percent paid by on-site car companies. It was estimated in the case that there was a two to three percent benefit for the on-site companies due to walk up business, therefore, a corresponding reduction in the amount of the fee to six percent for off-site companies. Jacksonville Port Authority does not stand for the proposition that a fee should be upheld unless it is shown to be arbitrary.

Likewise, in Rosalind Holding Co. v. Orlando Utilities Comm'n., 402 So.2d 1209, 1212, fn. 18 (Fla. 5th DCA 1981) cited by the County, the court stated in dicta that "[S]ix percent for a true franchise fee is fairly standard in Florida". (emphasis added). Putting aside the issue that the Privilege Fee is not a franchise fee, this case lends no support to the County's argument

that the setting of a unilaterally imposed fee is a purely legislative matter.

In fact, the setting of a fee is not a purely legislative matter. In Contractors and Builders Association, supra, there was clearly a correlation between the costs imposed on the use of the system and the amount charged in the fee. As stated by the court, "[T]he municipality seeks to shift to the user expenses incurred on his account". Id. at 318. A correlation is entirely proper. In Emerson College, supra, at 1105, the court recognized that proprietary or user fees "must be based on fair recompense for the public moneys expended for initial construction and for adequate maintenance of the facilities used".

The County makes the statement in its brief that the Intervenors suggested to the lower court that "the fee should be calculated on the number of actual poles or other electric facilities placed within the County rights-of-way", fn. 21, County brief, page 35. Such statement by the County is completely without any cite to the record or other authority. The City has never taken such a position as to a proprietary charge for use of the right of way. Any attempt by the County to use this as evidence that the City would agree to a proprietary fee for use of the right of way is proper is simply misleading.

The County uses tax analysis and language in its argument that the amount of the fee is proper. The County argues that the charge is for the "privilege" of using the right of way and therefore it does not matter to what extent the electric utility uses the right

of way. This is tax language — a charge that is not based on use.

The amount of the Privilege Fee is unreasonable and is best pointed out by the impact on the citizens of the City of Gainesville. By the City's estimates, the Privilege Fee will result in approximately 3.5 million dollars per year being collected from Gainesville Regional Utility electric customers. The County has approximately 25 miles of right of way within the City limits. Assuming electric facilities exist on all of that right of way, City of Gainesville residents will be paying almost $80,000 per year per linear mile of right of way. (See fn. 6, also City App. 18, pgs. 29-30, Exh. D-11).

The Privilege Fee, in addition to being invalid as a tax, is also invalid as a fee because there is no relationship between the amount charged and the service. The determination by the County Commission that the amount was reasonable was not based on any evidence and is therefore not proper.

B. The Decision To Separately State A Franchise Fee On A Customer's Bill Has Been Preempted To The Florida Public Service Commission By General Law.

It is difficult to understand why the County included this point in its brief. There is no finding of fact or conclusion of law in the Circuit Court's Final Summary Judgment regarding the process to be used in collecting the Privilege Fee. Moreover, the lower court included a list of collateral issues, including this

one, and said it is ... "made moot by the dispositive ruling that the Privilege Fee is an unconstitutional tax". (County App. A-1).

One can only assume it is included to provide the County one more opportunity to argue the invalid point that the Privilege Fee is somehow similar to a franchise fee. That issue is addressed under I(A) and (B) in the County's and the City's briefs.

It is true that attention has been called to the pass through language of the Privilege Fee ordinance, and properly so, because it goes to the question of whether the Privilege Fee can be considered as reasonable compensation for the use of public right of way for proprietary purposes. In fact, because of the pass through, it is not the utility paying the charge, but the customers. Thus, the people who already own the right of way (held for them by the County) are paying for the use of their own property. The City concedes that the Florida Public Service Commission (PSC) has the preemptive right to specify the manner in which electric utilities collect franchise fees. We further agree that the PSC has spoken to the point by adopting an appropriate rule. However, it is not conceded that the County was obliged to provide for the pass through to customers. The Privilege Fee is simply not the same as a franchise fee. See argument on this point supra.

Under the provisions of §166.231, Fla. Stat., local governmental entities may levy a public service tax up to, but not exceeding 10% of the electric utility services furnished within their boundaries. When one considers that the service tax,

sometimes known as the utility tax, is levied unilaterally, charged to the customers within the jurisdiction of the entity making the levy, and proceeds are used as general revenues, it becomes clear that what the County attempted to do was to increase the allowable levy from 10% to 13% without statutory authority. It does not become a franchise fee because the County says in its ordinance it is the functional equivalent and requires the pass through to the customers.

The City urges this Court to affirm the lower court's decision and hold the proposed Privilege Fee is an unauthorized and therefore unconstitutional tax. Assuming that is the outcome, the issue as to whether it should be shown as a separate item on the electric bill becomes moot as the court has indicated. Should this Court decide to reverse the lower court, the issue is a collateral issue that will have to be adjudicated in subsequent proceedings.

Accordingly, for the purpose of this brief, the argument that the Florida Public Service Commission has the power to control the way franchise fees are shown on the electric bill is a non-issue.

CONCLUSION

The Privilege Fee is invalid in any form - fee - tax - or charge. Alachua County takes a sprig of franchise law, a dash of user fee law, and a pinch of special assessment law, and creates this chimerical creature known as the "Privilege Fee".

Alachua County, under the claim of constitutional home rule, strives to make a profit-making enterprise out of its roads that are held in trust for the public. No law supports this tax.

The placement of electric transmission lines is compatible with the use of the right of way. For many years the City's electric utility has paid fees and has received permits from the County to place these lines in the right of way. The City's utility has no choice but to use the right of way to provide an essential public service.

If the County's creativity is accepted, the opportunities for governments to tax their citizens are unlimited. Alachua County has explored the imposition of the "Privilege Fee" not only on electric utilities, but also on other public utilities like water and natural gas. If the Court approves this fee, there is nothing to prevent the County or other local governments, or the state and federal governments, from imposing a "Privilege Fee" for the use of its right of way.

The County's imagination tempered only by political pressure is the only limitation if this Privilege Fee is declared valid.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to the people listed on the attached service list, this 31st day of August, 1998.

Marion J. Radson
City Attorney

Elizabeth A. Waratuke
Litigation Attorney