IN THE SUPREME COURT OF FLORIDA

ALACHUA COUNTY, FLORIDA,

Appellant,

Case No.: 93,344

vs.

THE STATE OF FLORIDA,

Appellee,

and,

HOWARD J. SCHARPS, et. al.,

Intervenors.

ANSWER BRIEF OF INTERVENOR HOWARD J. SCHARPS

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

Joseph W. Little
Florida Bar No. 196749
Attorney for Scharps
3731 N.W. 13th Place
Gainesville, Fl. 32605
352-392-2211

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NOTE PERTAINING TO REFERENCES

Intervenor/appellee Scharps (hereinafter referred to as SCHARPS) has filed no separate appendix but has referred herein to appendixes supplied by Appellant Alachua County (hereinafter referred to as COUNTY) and Intervenor/appellee City of Gainesville. SCHARPS makes references to COUNTY'S appendixes with the designation "AC App." and makes references to the City of Gainesville's appendixes with the designation "CG App."

SCHARPS makes references to COUNTY'S initial brief in this appeal with the designation "AC Initial Brf."

STATEMENT OF CASE AND FACTS

Appellant COUNTY commenced this action as a bond validation suit in case No. 97-3088 CA. SCHARPS and numerous other intervenors entered the suit as respondents to contest the validation. The City of Gainesville (Case No. 97-3518 CA), Florida Power & Light Co. (Case No. 97-4368 CA) and the University of Florida (Case No. 97-4715 CA) commenced separate actions to challenge various of COUNTY'S ordinances and resolutions enacted and adopted to prepare for the bond validation. SCHARPS and certain other intervenors filed motions to dismiss and for summary judgment, and the cases were consolidated for trial. At the commencement of the trial, the court below heard argument on the pending dispositive motions and entered the order COUNTY appeals from herein, granting a final summary judgment to deny COUNTY'S bond validation petition on the ground that COUNTY'S purported bond funding "privilege fee" is in fact an unauthorized and

unconstitutional tax. (AC App. A1).

The factual preliminary background leading up to COUNTY'S filing of its bond validation suit in case no. 97-3088 CA is as follows. On August 12, 1997 COUNTY adopted Ordinance No. 97-12 to impose the "privilege tax" (which it calls a "fee") on the gross receipts of the retail sale of electricity in Alachua County made by any utility company who makes any use whatsoever of rights of way owned by COUNTY. (Ordinance No. 97-12 is hereinafter referred to as Ord. 97-12. It is found in AC App. C). On the same day (i.e., August 12, 1997), COUNTY also adopted Resolution No. 97-79, known as Capital/Improvements Revenue Bond Resolution, which referred to a certain "1997 project" as the purpose for which the funds to be raised by selling bonds would be employed. (AC App. D, Section 1.01). In connection with the bond validation petition, COUNTY'S stated purpose for imposing the "privilege tax" was to provide a revenue source to secure and pay off the bonds. Its purpose for commencing the bond validation proceeding was to seek to obtain a judicial determination that the "privilege tax" is valid. The reason for COUNTY'S appeal to this Court is to seek a reversal of the lower court's determination that it is not valid.

Thereafter, on September 9, 1997, COUNTY enacted Ordinance 97-13 to amend Ord. 97-12 to withhold collection of the privilege tax until October 1, 1998. (CG App. 1). Still later, COUNTY adopted two subsequent resolutions, R97-80 (AC App. F) and R97-101 (CG App. 2), which mandate that <u>all</u> the proceeds of COUNTY'S "privilege tax" imposed by Ord. 97-12 and collected <u>after</u> October

1, 1998 (which is the revised effective date of the application of the "privilege tax" pursuant to Ord. 97-12 as amended by Ord. 97-13) be paid into the Alachua County general fund for the purpose of lowering the county ad valorem millage rate. It is thus plain from this record that no privilege tax revenues obtained by COUNTY would be legally available to pay off bonds issued to finance the 1997 project, but that all the revenues from the privilege tax would be paid into COUNTY'S general revenue fund for general county purposes or to permit COUNTY to enact a corresponding reduction in the ad valorem millage rate. The lower court's determination (AC App. A1) that the charge imposed by Ord. 97-12 is solely a revenue measure supports the decision that COUNTY'S "privilege fee" is in fact a "privilege tax," which, being unauthorized by general law, is unconstitutional.

SUMMARY OF ARGUMENT

The basic structure of COUNTY'S Ord. 97-12 is as follows. Section 2.05 (AC App. C) imposes what purports to be a "privilege fee" (i.e., what SCHARPS herein refers to as the "privilege tax") upon the gross receipts received from all retail sales of electricity in the Alachua County made by every electric company that makes any use of COUNTY'S rights of way to distribute electricity to its customers. The total dollar amount of the fee remains the same for a given amount of gross sales whether the utility places only one pole in COUNTY'S rights of way or whether it places tens of thousands of poles in them. (§2.05(D), AC App. C). Gross receipts from customers in any municipality that also imposes a franchise fee are excepted. (§2.05(A)(2), AC App. C). The amount of the annual tax is 3% of each utility's gross receipts from retail sales of electricity in Alachua County (Section 2.05(a)(1), AC App. C), and the amount is completely independent of the extent of the use made of Alachua County's rights of way by the utility. (§2.05(D), AC App. C). The basis and justification for the "privilege tax" expressly stated in Ord. 97-12 are that it constitutes a reasonable rental charge for use of COUNTY'S rights of way. (§1.02(G), AC App. C). The text of Ord. 97-12 also implies other justifications including; cost of regulating the use of rights of way (§1.02(B), AC App. C); cost of maintaining the portions of rights of way used by electric utilities (§1.02(C), AC App. C); and, a quid pro quo for not competing in the sale of electricity. (§1.02(E), AC App. C). In fact, however, COUNTY has

admitted that the amount of the "privilege tax" imposed is not commensurate with any of the purported justifications, and seeks to support the "privilege tax" as "functionally equivalent to a franchise fee." (AC Initial Brf., p. 5). COUNTY'S proposition is unsound.

In short, COUNTY has sought to impose its "privilege tax" upon the exercise of the privilege of making retail sales of electricity within Alachua County as if it were a "fee." In form, COUNTY'S "privilege tax" is virtually legally indistinguishable from the state gross receipt tax the Florida Legislature has imposed in Chapter 203 Florida Statutes upon the privilege of making retail sales of electricity. The state gross receipt tax statute reads, in part:

> 203.01. Tax on gross receipts for utility services
>
> (1)(a) Every person that receives payment for any utility service shall ..... pay into the State Treasury an amount equal to [2.5 percent].....
>
> (6) The tax is imposed upon every person for the privilege of conducting a utility business .....
>
> 203.012. Definitions. As used in this chapter:
>
> . . . . .
>
> (9) The term "utility service" means electricity for light, heat, or power; .....
>
> (Emphasis supplied).

The only differences of any possible legal significance between the state gross receipt tax and COUNTY'S purported "privilege tax" (which it calls a "fee") are: (1) COUNTY'S tax on the privilege of selling electricity in the county is invoked only if the utility company places at least one pole (or makes equivalent use) in

COUNTY'S rights of way; (2) the Legislature possesses the plenary taxing powers of the state pursuant to Article VII Florida Constitution, whereas COUNTY possesses only those taxing powers authorized by general law; and, (3) the Legislature has not enacted a general law to authorize COUNTY to impose the "privilege tax."

In this appeal COUNTY seeks to extend the fee theories acknowledged in cases such as *City of Pensacola v. Southern Bell Telephone Co.*, 337 So. 820 (Fla. 1905); *City of Plant City v. Mayo*, 337 So. 2d 966 (Fla. 1976); and *Jacksonville Port Authority v. Alamo Rent-A-Car, Inc.*, 600 So. 2d 1159 (Fla. 1st DCA 1992) to the different facts of this case. COUNTY is mistaken about the relevance of the prior decisions to this case. In *City of Pensacola* this Court acknowledged that a city may impose a fee upon a utility based upon the reasonable rental value of the <u>actual property occupied</u> by a utility's poles and other fixtures located in a public right of way. The theory is that a city is entitled to a fair rental value for the use of its property. COUNTY ignores the critical fact that *City of Pensacola* also explicitly acknowledged that the amount of the fee must be reasonably related to fair rental value of the property used by the utility, and that a fee that is <u>not</u> reasonably related to the reasonable rental value of the extent of the right of way actually used would not be valid. In that regard, *City of Pensacola*, relied explicitly upon the United States Supreme Court's decision in *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 13 S. Ct. 485, 37 L.Ed 380

(1893), which applied the same principle under the United States Constitution.

All of the foregoing decisions establish that a valid fee - to be distinguished from a tax - must be reasonably related to the cost of providing a service, rental, or regulation, and that the revenues must be exclusively devoted to defray the cost of providing the service, regulation or property in question. Florida law also requires cities and counties to establish accounting and funding plans to insure these conditions are implemented. *Contractors and Builders Association of Pinellas County v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976). Although this Court has acknowledged that Florida law authorizes municipalities and counties to negotiate with utility companies about what is a fair rental value for the use of rights of way and to enter into franchise agreements that impose them, it remains true, however, that a central requirement of a negotiated franchise fee is that such a charge be bargained for and agreed to by the parties. *City of Plant City v. Mayo*, 337 So. 2d 966 (Fla. 1976), *Santa Rosa County v. Gulf Power Company*, 635 So. 2d 96 (Fla. 1st DCA 1994), and *State v. City of Port Orange*, 650 So. 2d 1 (Fla. 1994).

In this action, COUNTY has conceded that the "privilege tax" in this appeal was not a negotiated and bargained for franchise fee. (COUNTY'S admissions to SCHARPS, CG App. 7 and 8). In addition, as established above, COUNTY'S sole intended purposes for the uses of the revenues obtained from its unilaterally imposed "privilege tax" are to fund the general governmental

operations of the county and reduce ad valorem tax rates. COUNTY has made no pretense that it would segregate the revenues and use them exclusively for programs related to the utilities' use of rights of way. In short, the "privilege tax" is designed and intended to raise general revenue for the general use of Alachua County. Accordingly, the court below correctly held that COUNTY'S so - called "privilege fee" is in fact a tax.

In submitting its "functional equivalent of franchise fee" proposition (AC Initial Brf., pp. 5, 9, 27-32), COUNTY has made the disingenuous argument that the law imposes no requirement to relate the amount of "fee" imposed on any utility to the extent of that utility's use of its rights of way. COUNTY contends, in effect, that because all of the county's rights of way "are there to be used," any use is equivalent to use of the whole. In substance COUNTY argues that it may impose a gross receipts "fee" upon any commercial user of its public rights of way as if the user employed <u>all</u> of county's rights of way. This rationale would permit COUNTY to impose a gross receipts tax upon all retailers in the county, none of which can be said to make <u>no use</u> of COUNTY'S rights of way. It would also permit every other Florida municipality and county to impose similar fees. Cities and counties could impose a gross receipt tax on <u>all</u> the proceeds of a newspaper company that placed a single newspaper dispensing machine on a public side walk, and on the gross receipts of a bottling company that placed a single drink dispenser in a public right of way. It would also effectively nullify Article VII §1(a), Florida Constitution.

ARGUMENT

I. INTRODUCTION

As Appellant COUNTY has stated in its initial brief, this is an appeal from bond validation case brought pursuant to Chapter 75 Fla. Statute. As this Court well knows, the only issues properly litigated in a bond validation action are:

1. Does COUNTY possess the power to raise revenue from the sources it purports to pledge for the purpose of repaying the bonds that it seeks to sell for the purpose of raising funds to finance the "projects" that it wishes to construct?

2. Does COUNTY possess the power to undertake the projects that it intends to finance by selling the bonds that are at issue in this validation action?

3. Have all the procedural requirements for properly imposing the revenue source being pledged to repay the bonds (i.e., the so-called privilege fee) and for undertaking the stated projects been satisfied? In particular, if required, has an approving vote of the electorate been conducted pursuant to §12, Article VII Florida Constitution.

State v. Florida Hurricane Catastrophe Fund Corporation, 699 So.2d 685, 687 (Fla. 1997).

The court below ruled against COUNTY'S bond validation under item 1: i.e., COUNTY does not possess the authority to impose the "privilege tax" that it seeks to validate in these proceedings. (AC App. A1). In addition, SCHARPS submits that the bond

validation complaint is also facially defective on several other grounds, including that the measure would require an approving vote of the electorate of Alachua County which has not been conducted.

II. COUNTY DOES NOT POSSESS THE AUTHORITY TO IMPOSE THE "PRIVILEGE TAX"

SCHARPS respectfully submits that the following attributes of COUNTY's "privilege fee" ordinance support the decision that it is an invalid "privilege tax" and not a fee:

1. The "fee" is imposed against any provider of electricity that makes any use whatsoever of COUNTY's road rights of way. COUNTY has admitted that "one pole" on the COUNTY's rights of way is sufficient. (AC App. C, §4.05(D)).

2. The fee is based upon a flat percentage of the gross receipts of <u>all</u> <u>sales</u> of electricity made by each utility provider in the county without regard to the extent the utility provider has made use of COUNTY's rights of way beyond the use of "one pole." (AC App. C, §4.05(D)).

3. The amount of the fee is not graduated or otherwise related to:

   (a) The extent of the utility provider's use of the right of way. The presence of "one pole" invokes the same amount of fee as would the presence of thousands of poles from a given amount of electricity sales in the entire county.

   (b) COUNTY's cost of acquiring or maintaining the rights of way.

   (c) COUNTY's cost of regulating the use of the rights of way.

(d) The fair market value of the amount of rights of way being utilized by the utility provider.

4. COUNTY has unilaterally imposed the fee both in conception and amount without bargained for agreement with the utility providers. (CG App., 7 and 8).

5. COUNTY's ordinance purports to pass through the so-called fee to the ultimate consumers of electricity by purporting to make the amount of the gross receipts fee a "debt" of the consumer to the utility provider. (AC App. C, §2.05(E)).

6. County has admitted that it has no explicit general law authorization to impose this fee. (CG App., 7 and 8).

In considering these issues, the Court must be mindful that the legal posture of COUNTY's powers to imposes taxes is drastically different from its powers to enact regulatory ordinances. COUNTY's regulatory powers, as governed by Art. VIII § 1(g) Florida Constitution and Chapter 125 Fla. Stat., are indeed extensive. By contrast COUNTY's power to tax is constrained by entirely different principles, particularly Article VII § 1(a) Florida Constitution, which requires that all taxes (except for ad valorem taxes) be authorized by general law. See *Adams v. Alachua County*, 702 So.2d 1253(Fla. 1997). In this case COUNTY has admitted that no general law exists to authorize the privilege fee at issue in this case. (CG App. 7 and 8). COUNTY's power to tax is also restrained by the principle enunciated by this Court that "statutes conferring authority to impose taxes must be strictly construed and are not to be extended by implication." *City of Miami v. Kayfetz*,

385 So.2d 521, 524 (Fla. 1947).

Even if, arguendo, the court below should have determined that the privilege fee is not a tax, that determination of itself would not have ended the inquiry. While extensive, COUNTY's regulatory powers are not limitless, but are generally confined to "all powers of local government," Article VII § 1(g) Fla. Const., and to whatever other powers the Legislature has expressly granted. In this instance, COUNTY has admitted that it has no particular legislative grant of power to authorize the fee. In addition, even fees that are within COUNTY's power to exact must not be abused: they must be reasonable in amount and reasonably related either to the value of the service provided, or to the cost of the regulation the fee is invoked to defray, or to the value of the use of public property for which the fee is collected as consideration. *Bozeman v. City of Brooksville*, 82 So.2d 729, 730 (Fla. 1955). A fee that is excessive in these respects is, in fact, a tax and must be authorized by general law. Among the important decisions that have developed this law in Florida are *Broward County v. Janis Development Corp.*, 311 So.2d 371 (Fla. 4th DCA 1975) and this Court's seminal decision in *Contractors and Builders Assoc. of Pinellas County v. City of Dunedin*, 329 So.2d 314 (Fla. 1976).

A. COUNTY'S "PRIVILEGE TAX" IS AN UNAUTHORIZED TAX

As the court below held, the most basic flaw in COUNTY'S "privilege tax," i.e., the so-called "privilege fee," is that it is a tax and has not been authorized by general law. (AC App. A1). Accordingly, the court below correctly held the measure to be

unconstitutional under Article VII §1(a) Florida Constitution, which provides:

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

Article VII §1(a) Florida Constitution. (Emphasis supplied).

In reviewing this decision in this appeal, this Court must be mindful that whether or not a monetary imposition is a tax instead of a fee is not to be determined by the label COUNTY has put upon it, but is to be determined by its inherent characteristics. *Janis Development Corp.*, supra, *City of Dunedin*, supra, and *City of Tampa v. Birdsong Motors, Inc.*, 261 So.2d 1 (Fla. 1972). In *Bateman v. City of Winter Park*, 37 So.2d 363, 363, (1948) this Court examined the difference between a tax and a fee, and stated:

> The difference between a liquor license fee and a tax may be thus stated:
>
> Where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the police power; But where the fee is exacted solely for revenue purposes, and payment of such fee gives the right to carry on the business without the performance of any other conditions, it is a tax. (Emphasis added).

(Emphasis supplied).

This Court's decision in *Tamiami Trail Tours, Inc. v. City of Orlando*, 120 So.2d 170 (Fla. 1960), exemplifies this point. In that case a city ordinance required owners and operators of trucks using freight loading and unloading zones established on city

streets to apply for a permit, which was issued upon payment of a $10 fee for a single permit. This Court held this so-called "fee" to be an invalid tax and not a regulatory fee, saying:

> Assuming, arguendo ... that in the exercise of its police power to regulate and control traffic the city could enact a licensing ordinance regulating the operations of the petitioners for this purpose, the fact remains that the ordinance shows on its face that the requirement for the permit and fee has nothing whatsoever to do with regulating the loading and unloading of freight and/or traffic.
>
> It is, of course, well settled that the power to regulate includes the power to license as a means of regulating, and that a reasonable license fee may be charged in an amount sufficient to bear 'the expense of issuing the license and the cost of necessary inspection or police surveillance connected with the business or calling licensed, and all the incidental expenses that are likely to be imposed upon the public in consequence of the business licensed.' State ex rel. Harkow v. McCarthy, 1936, 126 Fla. 433, 171 So. 314, 317. But it is only in those cases where regulation is the primary purpose of a licensing ordinance or statute that the exaction of a fee therefor can be especially referred to the police power. 2 Cooley on Taxation (3d ed.) p. 1127. And where a license is required and a fee exacted solely for revenue purposes and the payment of such fee gives the right to carry on the business without any further conditions, it is a tax. See Bateman v. City of Winter Park, 1948, 160 Fla. 906, 37 So.2d 362; 33 Am.Jur., Licenses s 19, p. 341.
>
> . . . . . The fact that all or a part of the revenue derived from the permit fees may be allocated by the City Tax Collector to the cost of collecting the fee and to the police department for the enforcement of its traffic ordinance establishing freight zones (although there is no hint or suggestion in the ordinance that this will be done) cannot change the essential character of the provisions of the ordinance respecting the tag permits and fees and, as shown, in this respect it is a non-regulatory, purely revenue- producing, measure.
>
> The conclusion is therefore inescapable that, insofar as its provisions relating to 'tag permits' are concerned, the ordinance in question is naught but an attempt to impose an excise tax upon petitioners and

others similarly situated . . . . .

120 So. 2d at 172-174. (Emphasis supplied).

It is true, of course, that COUNTY stated in Ord. 97-12 that the "privilege tax" is, in effect, a rental charge for the use of its property interests in its rights of way. (§1.02(G), AC App. C). This claim is also facially invalid for the same reason the so-called regulatory fees were invalid in *Bateman* and *Tamiami Trail Tours*; i.e., the entire fee ordinance shows on its face that there is no relationship between the extent or character of a utility provider's use of the rights of way and the amount of the fee. Ord. 97-12 flatly states:

> (D) The Electric Utility Privilege Fee is imposed against each Electric Utility upon its privileged use of County Rights-of-Way and is calculated as a percentage of the Gross Revenues received by the Electric Utilities from the retail sale of electricity to their customers within the County. <u>The Electric Utility Privilege Fee is not based on the extend and scope of the Electric Facilities that are located in County Rights-of Way.</u>

(AC App. C, §2.05(D)). It is thus plain that the "privilege tax" is not a valid fee but is in fact a tax. This, of itself, defeats COUNTY'S "functional equivalent of a franchise fee" analogy.

Consider this example. Suppose Utility A and Utility B both have exactly the same total amounts of gross receipts from retail sales of electricity in Alachua County. Suppose also that Utility A uses only 1 square foot of COUNTY's rights of way while Utility B uses hundreds of square miles of COUNTY's rights of way. Despite the grossly disparate extent of use of the rights of way, Utility A would pay exactly the same total dollar amount of fee as would Utility B. In short, COUNTY'S "privilege tax" is indistinguishable

from the utility tax that the Florida Legislature has imposed in Chapter 203 Florida Statutes, except the Legislature possesses the power to impose the tax on the privilege of selling utility services whereas COUNTY does not. Hence, on its face, COUNTY's "fee" shows that it is not commensurate either with the cost of regulation or the value of property provided. Consequently, the court below correctly held the imposition to be an unauthorized and invalid tax. A purported fee that shows on its face to be an invalid tax is void. *Bozeman v. City of Brooksville*, 82 So.2d 729, 730 (Fla. 1955). The "functional equivalent of a franchise fee" argument fails because it would empower cities and counties with virtually the same taxing authority as provided the state itself and would effectively neutralize Article VII §1(a) Fla. Const.

The "privilege fees" cases COUNTY has relied upon both below and in this appeal are readily distinguishable from this case. *Jacksonville Port Authority v. Alamo Rent-A-Car, Inc.*, 600 So.2d 1159 (Fla. 1st DCA 1992), involved a gross receipts fee based upon the gross revenues accrued from the rental of automobiles made at <u>airport locations</u> owned by the Authority -i.e., the amount of the fee was directly related to the extent of the use made of the Port Authority's facilities. 600 So.2d at 1163. The Port Authority did not attempt to extend its fee to gross receipts accrued from all transactions made in all locations throughout the county to include those not located on the Authority's premises. By contrast, in this case COUNTY's "privilege tax" applies wholly independently of the extent of use of COUNTY's rights of way, and instead extends to

all revenues collected in Alachua County. (AC App. C, §2.05(1)). Moreover, in *Jacksonville Port Authority* the fees were imposed and collected in the Authority's proprietary capacity and not "under the auspices of the general police power." By contrast, COUNTY holds rights of way in its public roads as a public trust in its governmental capacity. *Sun Oil Company v. Gerstein*, 206 So.2d 439 (Fla. 3rd DCA 1968).

This Court's decision in *City of Plant City v. Mayo*, 337 So.2d 966 (Fla. 1976) is also readily distinguishable. In *Plant City* the electric utilities had bargained with the city for a franchise to use the city's rights of way, and the parties had agreed to the amount of the bargained for fee as consideration for the franchise contract. The case involved no dispute as to the power of the city to enter into a bargained for franchise agreement. Instead, the legal issue addressed by this Court in *Plant City* concerned the validity of a Public Service Commission order that permitted the utility providers to pass through the amount of the city franchise fees directly to consumers within the municipalities as separately stated charges. Hence, in *Plant City* this Court dealt with the question of whether a contractually bargained for rights of way charge was to be defused in the general rate structure to all the consumers of the utility, or was to be passed through as separately billed items only to those consumers within the cities imposing the charges. By contrast, *Plant City* did not address itself to the power of the municipality to bargain with a utility for a franchise fee, a matter which this Court coincidentally addressed as follows:

> Although the label most appropriately assigned to the payments at issue is not determinative of the treatment or legal effect attendant to these costs, we have absolutely no difficulty in holding that the franchise fees payable by Tampa Electric are not "taxes." The cities would lack authority to impose taxes of this type, and, unlike other governmental levies, the charges here are bargained for in exchange for specific property rights relinquished by the cities.

337 So.2d at 966. (Emphasis supplied). By contrast, in this case COUNTY has admitted that it has unilaterally imposed the so-called franchise fee without a negotiated or bargained for agreement (CG App. 7 and 8) and that the amount of the fee does not relate to any specific property interests relinquished to any particular utility provider. (AC App. C, §2.05(D)).

Similarly, *Santa Rosa County v. Gulf Power Company*, 635 So.2d 96 (Fla. 1st DCA 1994), acknowledged that a county possesses the power to bargain with electric utility providers for franchise fees for use of public rights of way. Moreover, *Santa Rosa County* explicitly relied upon the contractual aspect of this Court's decision in *City of Plant City*, as follows:

> We therefore conclude that the trial court erred to characterize the franchise fee at bar which constituted consideration for the contractual grant of the right to use County rights-of-way as taxes.

(Emphasis supplied). 635 So.2d at 103. In fact, this point proved to be determinative in *Santa Rosa County*; that is, the district court held the plan in question to be defective because it did not include an agreement to its franchise terms by all the utilities in the county. 635 So.2d at 103. Hence, *Santa Rosa*

County applied and did not extend the "bargained for" requirement of *City of Plant City*. In sum, COUNTY's "privilege tax" is readily distinguishable from the *Santa Rosa County* fee because COUNTY'S tax was unilaterally imposed and is not based upon bargained for terms and consideration agreed to by the utilities.

Finally, this Court should be mindful that COUNTY's so-called privilege fee, as construed and imposed, is not distinguishable in character from the state gross receipts tax imposed by the Florida Legislature upon the privilege of conducting retail sales of electricity in Chapter 203 Fla. Stat. That statute includes these provisions:

> 203.01. Tax on gross receipts for utility services
>
> (1)(a) Every person that receives payment for any utility service shall report by the last day of each month to the Department of Revenue, under oath of the secretary or some other officer of such person, the total amount of gross receipts derived from business done within this state, or between points within this state, for the preceding month and, at the same time, shall pay into the State Treasury an amount equal to a percentage of such gross receipts at the rate set forth in paragraph (b). Such collections shall be certified by the Comptroller upon the request of the State Board of Education.
>
> (b) Beginning July 1, 1992, and thereafter, the rate shall be 2.5 percent.
>
> . . . . .
>
> (5) The tax imposed pursuant to this part relating to the provision of any utility services at the option of the person supplying the taxable services may be separately stated as Florida gross receipts tax on the total amount of any bill, invoice, or other tangible evidence of the provision of such taxable services and may be added as a component part of the total charge. Whenever a provider of taxable services elects to separately state such tax as a component of the charge for the provision of such taxable services, every person, including all governmental units, shall remit the tax to the person who provides such taxable services as a part

> of the total bill, and the tax is a component part of the debt of the purchaser to the person who provides such taxable services until paid and, if unpaid, is recoverable at law in the same manner as any other part of the charge for such taxable services. For a utility, the decision to separately state any increase in the rate of tax imposed by this part which is effective after December 31, 1989, and the ability to recover the increased charge from the customer shall not be subject to regulatory approval.
>
> (6) The tax is imposed upon every person for the privilege of conducting a utility business, and each provider of the taxable services remains fully and completely liable for the tax, even if the tax is separately stated as a line item or component of the total bill.
>
> 203.012. Definitions
>
> As used in this chapter:
>
> . . . . .
>
> (9) The term "utility service" means electricity for light, heat, or power; natural or manufactured gas for light, heat, or power; or telecommunication services.

(Emphasis supplied). The only difference between COUNTY's so-called privilege fee ordinance (AC App. C) and the state's gross receipt tax is the requirement that a utility provider place at least "one pole" in COUNTY's rights of way. The net revenue effect is exactly the same. In net effect, COUNTY'S "privilege tax" is the "functional equivalent" of the state's gross receipts tax on the retail sales of electricity and not a "franchise fee." Accordingly, this Court should uphold the decision below that COUNTY'S imposition is a revenue measure and an unauthorized tax.

Although this point is unnecessary to determine the facial invalidity of the privilege fee, this Court should be mindful that COUNTY has officially resolved:

> It is the intent of the Board to apply franchise fee proceeds received after October 1, 1998, to provide

> reduction of the County-wide millage rates and thus achieve a balance in tax equity between property owners and other citizens within Alachua County.

(R 97-80, AC App. F). COUNTY has also admitted that one or more members of the Board of County Commissioners stated in COUNTY's public meetings that a purpose of the privilege fee is to lower ad valorem tax millage. (COUNTY'S admissions to SCHARPS, CG App. 7 and 8). Hence, COUNTY has plainly admitted that the purpose of the "privilege fee" is to raise revenue for the general operations of the county and to lower ad valorem tax rates. It is, thus, indisputably not a fee, but is a revenue raising measure and a tax under any lawful precedent.

B. COUNTY'S "PRIVILEGE TAX" CONSTITUTES AN UNAUTHORIZED AND INVALID SALES TAX ON CONSUMERS OF ELECTRICITY

COUNTY's privilege fee ordinance states:

> The Electric Utility Privilege Fee imposed pursuant to this Ordinance shall additionally be a debt of the Electric Utility Customer to the Electric Utility until paid and, if unpaid is recoverable by the electric utility in the same manners as the original charge for such electrical services.

§2.05(E)(AC App. C, pg. 13). COUNTY'S ordinance thus purports to pass through the so-called privilege fee as a direct imposition upon electricity consumers. This attribute characterizes the so-called fee as a consumer sales tax on the sale of electricity. Because such a tax is unauthorized by general law, it is unconstitutional and void under the direct holding of *City of Tampa v. Birdsong Motors, Inc.*, 261 So.2d 1 (Fla. 1972).

In *Birdsong Motors*, the city purported to impose a license tax

on businesses measured by the amounts of annual gross sales. Even though the statute did not include a direct "pass through" to consumers, such as § 2.05 (E) above, this Court determined that the true economic consequences of the tax would be borne by consumers and ignored the label that the City had put on the measure. In holding the measure to be an unauthorized sales tax, this Court reasoned:

> Petitioners [i.e., CITY] argue that the tax is distinguishable from a sales tax because it is not payable unless the merchant elects to continue in business during the year following the making of the sales. This argument amounts to no more than the statement of a legal fiction. More importantly, it permits the city to accomplish indirectly what it is prohibited from doing directly.
>
> This Court can take judicial notice that a vast majority of businesses remain in operation from year to year. Thus, distinguishing a sales tax from the present tax on the basis that the merchant need not elect to continue in business during the following year thereby avoiding the tax, is pure fictionalizing. Characterizing the present ax as a sales tax is doubly reinforced in that the City imposes another flat license tax for the privilege of operating respondent's business. It is evident that the City, after having imposed the traditional valid tax, is attempting to increase its revenue by taxing the sales within the City.

261 So.2d at 6, 7. (Emphasis supplied).

Birdsong Motors makes plain that this Court examines the operational effect of impositions to determine their true character and does not placidly accept labels. If this Court deemed the *Birdsong Motors* tax on gross sales to be a sales tax even without a pass through to consumers, then, a fortiori, COUNTY's "privilege

tax" with a direct pass through to consumers is also a sales tax. Because COUNTY's sales tax has not been authorized by general law, it is unconstitutional and void on this ground which is independent of the grounds stated by the court below. *Birdsong Motors*.

C. COUNTY HAS NO POWER TO AUTHORIZE UTILITY PROVIDERS TO PASS THROUGH COUNTY'S "PRIVILEGE TAX" TO ULTIMATE CONSUMERS

Even if it be assumed, arguendo, that COUNTY should possess the authority to impose the so-called privilege fee upon utility providers, it would still be wholly lacking in power to authorize the utilities to pass through the fees to consumers as a debt to the utilities as it purports to do in §2.05(E) of its ordinance. (AC App. C) Instead, the Legislature has delegated to the Florida Public Service Commission exclusive authority to approve rate structures for all electric utilities, §366.04(2)(b) Fla. Stat., and to fix rates for all investor owned utilities. § 366.041 Fla. Stat. Indeed, in *Florida Power Corporation v. Seminole* County, 579 So.2d 105 (Fla. 1991), this Court held that the PSC's power to regulate rates and services preempted a county's power to require utilities to place power lines underground because to do so would impose costs that would necessarily affect rates. The PSC's authority also extends to whether or not a utility's costs may be passed through to consumers, §366.041 Fla. Stat., and specifically extends to whether or not governmental franchise fees may be passed through to consumers. *City of Plant City v. Mayo*, 337 So.2d 966 (Fla. 1976). It thus follows that this portion of COUNTY's bonding plan is facially invalid by virtue of the infringement of its

revenue source to secure the bonds (i.e., the "privilege tax") upon the exclusive jurisdiction of the PSC. Accordingly, the decision denying COUNTY's petition to validate the bonds should be upheld on this independent ground.

III. COUNTY HAS NO AUTHORITY TO IMPOSE A FEE UPON GROSS RECEIPTS THAT HAS NO RELATIONSHIP TO COST OF REGULATION, COST OF SERVICE PROVIDED, OR TO REASONABLE RATES OF RETURN ON USE OF PROPERTY

For reasons stated herein, SCHARPS submits that even if this Court should accept, arguendo, COUNTY's assertion that its privilege fee is a "fee," in fact, and not a "tax," the fee is nevertheless facially invalid.

In *Bozeman v. City of Brooksville*, 82 So.2d 729, 730 (Fla. 1955) this Court invalidated a so-called fee ordinance because:

> We think the ordinance shows on its face that the fees exacted have no reasonable relation to the cost of issuing the license or any expenses which may reasonably be expected to be incurred in enforcing the ordinance, which is the criterion for determining the validity of a regulatory fee exacted under the police power.

Similarly, in *E.H. Finlayson v. Conner*, 167 So.2d 569, 573 (Fla. 1964), this Court reiterated, "To be valid such charges only need to be commensurate with the services required to be rendered by the licensing body." (Emphasis supplied).

To the same point, in *Contractors and Builders Association of Pinellas County v. City of Dunedin*, 329 So.2d 314, 318 n.5 (Fla. 1976) and other decisions, this Court has acknowledged that a governmental body may make a "reasonable rate of return" on the use of its property being employed in a proprietary capacity. This

requires, of course, that the amount of the charge or "profit" obtained from the use of the property be commensurate with the value of the property employed. For example, *Jacksonville Port Authority v. Alamo Rent-A-Car, Inc.*, 600 So.2d 1159, 1164 (Fla. 1st DCA 1992), applied this principle to uphold a franchise fee based upon a percentage of receipts obtained from direct use of proprietary property for the specific benefit of the franchisee.

By contrast, COUNTY's fee ordinance does not meet the criteria imposed by any of the foregoing cases. COUNTY does not contend that the amount of the fee is related to the cost of services or regulation, but if facts maintains: "The Electric Utility Privilege Fee is <u>not</u> based on the extent and scope of the Electric Facilities that are located in County Rights-of Way." (§2.05(D), AC App. C). Thus, COUNTY'S "privilege tax" fails the *Bozeman* and *Finlayson* test. Nor is the amount of the fee commensurate to a fair return on the value of COUNTY's property made use of. Hence, it fails the *City of Dunedin* test. Nor has the fee been bargained for. (CG App. 7 and 8). Hence, it fails the *City of Plant City* and *Santa Rosa County* test. Finally, the fee is not limited to a percentage of revenues obtained from the direct and immediate use of COUNTY's property to furnish a specific benefit to a limited population (i.e., rental cars for airport patrons) as in *Jacksonville Port Authority*. Instead, COUNTY's fee is unrelated to the extent of use of COUNTY's property (beyond "one pole") and constitutes an effective imposition upon all consumers of electricity--which the law deems to be an essential public utility-

-within the county. Hence, COUNTY's fee fails the *Jacksonville Port Authority* test.

It is true that COUNTY possesses "all powers of local self government." Article VIII §1 (g) Florida Constitution. It is also true, however, that "powers of local self government" do not include powers that have been repudiated as unlawful and those that have never been authorized for local use. COUNTY's fee facially extends into a range that Florida law prohibits. For that reason, even if this Court should deem the imposition to be a fee and not a tax, it is nevertheless unauthorized and invalid. Accordingly, the decision below denying COUNTY'S petition to validate should be denied on this independent ground.

IV. COUNTY'S APPEAL MUST BE DENIED BECAUSE THE COMPLAINT DOES NOT ALLEGE THAT THE BORROWING HAS BEEN APPROVED BY VOTE OF THE ELECTORATE AS REQUIRED BY ARTICLE VII § 12 FLA. CONST.

Because the court below held that COUNTY'S so-called "privilege fee" is in fact an unauthorized "privilege tax" and denied the bond validation petition on that ground alone, it did not reach the issue posed by application of Article VII Section 12 Florida Constitution. SCHARPS respectfully submits that the absence of voter approval provides an independent basis to sustain the judgment below.

Although COUNTY's initial BOND resolution (AC App. D) does not directly pledge the ad valorem taxing power of Alachua County as security for the repayment of bonds it seeks to validate, and although COUNTY's Bond resolution does provide, "No holder of any BOND or any Credit Bank or Insurer shall ever have the right to

compel the exercise of an ad valorem taxing power to pay such BOND" (AC App. D, § 4.01, p. 29), these provisions do not eliminate the application of Article VII § 12 Fla. Constitution to this case. That provision provides, in part:

> Section 12. Local Bonds. Countries. . . may issue bonds. . . payable from ad valorem taxation ad maturing more than twelve months after issuance only:
>
> > (a) to finance or refinance capital projects authorized by law and only when approved by vote of the electorate.

Article VII §12 Florida Constitution (Emphasis supplied).

In *State v. Halifax Hospital Authority*, 159 So.2d 231, 232 (Fla. 1963), this Court stated this rule:

> We have held that any device whereby the exercise of the ad valorem taxing power is pledged and can directly be compelled to meet the obligation of the securities is a 'bond' which requires freeholder approval. . . The nature of the security issued and the covenants of the bond contract, rather than the name given to the security must be the determining factors.

This Court applied this principle in *County of Volusia v. State of Florida*, 417 So.2d 968 (Fla. 1982), wherein a bond covenant pledged all non-ad valorem revenues of the county and also pledged the county's agreement to do everything necessary to obtain the revenue required to pay off the bonds. Even without an explicit pledge to employ the taxing power, this Court applied the *Halifax* principle to invoke the election requirements of Article VII § 12 Fla. Const. In short, this Court held that the expansive pledges in *County of Volusia* would place such heavy pressure upon the county to use ad

valorem taxes as a funding source for other governmental operations that voter approval was required. Hence, sweeping bond covenants may indirectly "pledge" ad valorem taxes to such an extent as to require a vote. Similarly, this Court has also held that when doubt exists as to whether a bond issue invokes an election pursuant to the constitution, Article VII § 12, that doubt must be resolved in favor of a vote. *Spearman Brewing Co. v. City of Pensacola,* 187 So. 365, 367 (Fla. 1939), and *City of Ft. Lauderdale v. Kraft*, 21 So.2d 461, 462 (Fla. 1945) (". . .if there [is] any reasonable doubt that the evidence of indebtedness may be issued without the approval of a majority of the freeholders at an election held for that purpose, such doubt will be resolved against the validity of the instrument proposing the indebtedness.")

The portion of COUNTY's bond resolution that invokes Article VII § 12 Florida Constitution is § 5.10 (AC App. C), which states:

> The Issuer [i.e., COUNTY] covenants to do all things necessary as required by Act to maintain the levy and collection of the Electric Utility Privilege Fee and Electric Utility Franchise Fee. If for any reason the Electric Utility Privilege Fee Ordinance or any Electric Utility Franchise Fee ordinance is found not legally sufficient to produce the full amount of Electric Utility Privilege Fee Proceeds and Electric Utility Franchise Fees which such fees might produce in order to meet all the requirements of this Resolution, the Issuer shall adopt such amending or replacement ordinance or ordinances as may be necessary for such purpose.

(Emphasis supplied).

COUNTY's pledge has obligated it "to do all things necessary," including the adoption of amending or new ordinances, to assure that the indebtedness to be created by these bonds is paid. (The

pledge refers to powers under the "Act," which is defined [AC App. D, §1.01, p.2] to include the county home rule powers act, Chapter 125 Fla. Stat. and other statutory powers). This "all things necessary" pledge is not limited to the franchise fee but includes the potential employment of all COUNTY's powers to raise revenue to pay the bonds. This pledge is no less expansive than the pledge condemned by this Court in *County of Volusia v. State of Florida*, supra. Given this expansive pledge, legal precedents and the *Spearman Brewing Co.* principle that when doubt exists, the bonds cannot be validated without an approving vote, SCHARPS respectfully submits that this Court should affirm the decision below on this independent ground.

CONCLUSION

SCHARPS respectfully submits that the court below correctly held COUNTY'S "privilege fee" to be an unauthorized "privilege tax" and unconstitutional under Article VII § 1(a) Florida Constitution. This decision is in keeping with this Court's routine rejection of governmental attempts to "fictionalize" the character of an imposition as a means to support unconstitutional taxes. *Birdsong Motors*. Moreover, because the measure is plainly and solely a revenue raising measure, the court below properly rejected COUNTY's attempts to dress it up as a regulatory fee, a service fee, a fee based upon the benefit obtained from the use of COUNTY's property, or the "functional equivalent of a franchise fee."

In addition, as explained fully above, COUNTY's petition is

defective and must be denied for these independent reasons:

- The so-called privilege fee operates as an unauthorized sales tax on consumers .

- COUNTY's attempt to pass through the privilege fee to consumers is unauthorized by law and preempted by the Public Service Commission's exclusive jurisdiction over electricity rate structures and rates of public utilities and the exclusive jurisdiction of municipal governments to set rates for municipal utilities.

- COUNTY has effectively pledged ad valorem taxing power without a vote as required by Article VII § 12 Fla. Const.

For all these distinct and independently sufficient reasons, SCHARPS respectfully submits that COUNTY's appeal must be denied.

Respectfully submitted,

Joseph W. Little
Attorney for Scharps
Fla. Bar No. 196749
3731 N.W. 13th Place
Gainesville, Fl. 32605
352-392-2211

CERTIFICATE OF SERVICE

I certify that a copy of this brief was mailed or hand delivered to Mary A. Marshall, Esq., Alachua County Attorney, P. O. Box 2877, Gainesville, Fl. 32602, Robert L. Nabors, Esq., and Harry F. Chiles, Esq, P. O. Box 11008, Tallahassee, Fl. 32302, Rod Smith, Esq., State Attorney, P.O. Box 1437, Gainesville, Fl. 32602-1437, Elizabeth A. Waratuke, Esq., City of Gainesville, P. O. Box 1110, Gainesville, Fl. 32602, Ron Adams, Esq., et. al., Steel, Hector & Davis, LLP, 200 S. Biscayne Boulevard, Suite 4000, Miami, Fl. 33131-2398, Robert W. Pass, Esq., P. O. Drawer 190, Tallahassee, Fl. 32302 and the lawyers of the intervenors listed on the City of Gainesville's certificate of service on this 31 day of August 1998.

Joseph W. Little