IN THE FLORIDA SUPREME COURT
Case No. 96-332

Bond Validation Appeal From A Final Judgment
Of The Sixth Judicial Circuit,
Pinellas County, Florida

PINELLAS COUNTY, FLORIDA,

Appellant,

v.

THE STATE OF FLORIDA,
THE CITY OF MADEIRA BEACH, FLORIDA,
THE CITY OF INDIAN ROCKS BEACH, FLORIDA
JAMES PALAMARA, ROBERT JOHNSON, FRED VOWINKEL
MARSHA LOPER AND JOHN DEMONT,

Appellees.

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INTRODUCTION

Pinellas County, Florida (the "County") appeals the Final Judgment of the trial court denying validation of County revenue bonds (the "bonds"). The proceeds of the bonds are intended to fund the development of reclaimed water service into portions of the County's Water Service Area ("Service Area") that, because of geography and geology, are unable to provide alternative sources of water for irrigation and other non-potable uses. The reclaimed water program planned by the County meets several important governmental objectives, including:

- Minimizing the use of existing potable water supplies for nonpotable use. Pinellas County Ordinance 97-103 §1.
- Providing properties with a source of water which is less expensive than potable water and is readily available in non-restricted amounts for irrigation. Pinellas County Resolution 98-251.
- Creating an effective and environmentally responsible use for sewage effluent by recycling such wastewater generated from the Service Area. Pinellas County Resolution 98-251.

The trial court denied the County's request to validate the bonds, stating: (1) pursuant to Chapter 153, Fla. Stat., the County was required to gain the consent of the municipalities within the Service Area before extending its reclaimed water system into the municipalities, and (2) that the $7.00 monthly Availability Charge to be charged to customers who had access to reclaimed water in the Service Area was an impermissible

tax, citing this Court's holding in *State v. City of Port Orange*, 650 So.2d 1 (Fla. 1995). The trial court threatens the ability of Pinellas County to maintain an adequate water supply to customers in its Service Area. This vast expansion of *Port Orange* and Chapter 153 severely weakens the County's ability to plan for and provide adequate water service, and to a lesser extent sewer services, to all customers in the Service Area in a cost-effective and an environmentally conscientious fashion. The holding below is contrary to the direction of the Florida Constitution and the Florida Legislature (the "Legislature").

The judgment of the trial court should be reversed and the bonds validated.

References to the Parties and the Record

In this brief, the Appellant/Plaintiff, Pinellas County, will be referred to as the "County," and Appellees/Defendants, Madeira Beach, Indian Rocks Beach, James Palamara, Robert Johnson, Fred Vowinkel, Marsha Loper and John DeMont will be referred to collectively as the "Beach Cities." The State of Florida, the original Defendant in the action below, will be referred to as the "State."

The Appendix will be referred to by the symbol "AP" followed by the tab letter followed by a page number. A copy of the order on appeal is attached to this brief and

will be referenced as "AP-R-" followed by the page number if applicable. Exhibits to items in the Appendix will be further identified by the prefix "Exh."[1]

JURISDICTION

Pursuant to Rule 9.030(a)(1)(B)(i), Florida Rules of Appellate Procedure, this Court has jurisdiction over final orders entered in proceedings for the validation of bonds where provided by general law. On July 23, 1998, the Circuit Court for the Sixth Judicial Circuit, in and for Pinellas County, Florida, entered such a final order concerning the bonds the County proposed to issue related to its water and sewer system.

Under §75.01, Fla. Stat. (1997), a circuit court has "jurisdiction to determine the validation of bonds and all matters connected therewith." A suit for bond validation is a legislatively created cause of action which permits a public body corporate in the State of Florida to obtain an adjudication as to the validity of debt it proposes to incur and the regularity of proceedings taken in connection therewith. §75.02, Fla. Stat. (1997).

This Court has mandatory jurisdiction to hear appeals from final judgments entered in a proceeding for the validation of bonds. Art. V., §3(b)(2), Florida Constitution. Section 75.08, Fla. Stat. (1997) provides that either party may appeal the trial court's

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[1] In accordance with Rule 9.220, Florida Rules of Appellate Procedure, the Consultant's Report (Exhibit D to Plaintiff's Memorandum of Law in Support of Validation filed below) is bound separately to accommodate oversized maps of the Service Area contained therein.

decision on the complaint for validation. The County timely filed its Notice of Appeal on August 17, 1999. (AP-T)

Therefore, under the circumstances of this case, the Circuit Court for the Sixth Judicial Circuit, in and for Pinellas County, Florida, had jurisdiction to determine the validity of the bonds the County proposed to issue, and this Court has the jurisdiction to review the decision of the Circuit Court.

STATEMENT OF THE CASE

This appeal arises from a final judgment denying the County's complaint to validate the revenue bond issue intended to fund, in part, the construction of water distribution lines to provide reclaimed water to a portion of the County's Service Area. The County files this Appeal to reverse the trial court and obtain an order validating the bonds.

STATEMENT OF THE FACTS

Background

The County is a "home rule" charter county.[2] The adoption of the Pinellas County Charter (the "charter") by the citizens of the County converted existing Special Laws of

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[2] The County's home rule charter was established by the Laws of Florida, Chapter 80-590, §1, and made effective by an approving referendum held on October 7, 1980. (AP-V)

the State of Florida relating to or affecting the County into County ordinances remaining "in full force and effect to the extent they are not in conflict with this Charter." *See* Pinellas County Charter, §5.02(a). (AP-V-7) It is under the authority of the charter, applicable general and special laws of the Legislature and the implementing ordinances that the County sought to set rates for its reclaimed water service and issue revenue bonds secured thereby to pay for a portion of the expansion of the County's utility system. The project is designed to extend the County's capacity to serve its water customers in the beach communities in the County with reclaimed water as an alternative to the use of potable water for non-potable uses.

At the direction of the Legislature, the County has been providing water service to the municipalities of the Pinellas County beaches (including the Beach Cities), for more than 60 years. The authority for the County to provide such water service has an extensive history in the Special Acts of the Legislature: Laws of Fla. (1953) ch. 29442 (the "1953 Special Act"), Laws of Fla. (1939) ch. 20066 (the "1939 Special Act") and Laws of Fla. (1935) ch. 17644 (the "1935 Special Act") (sometimes collectively referred to as the "Special Acts") (AP-V).[3] Under the Special Acts, the County was designated

[3] The Special Acts are incorporated into the Pinellas County Code at §126-121. (AP-V) For ease of reference, the Appellant will use citations to the Code for reference to the Special Acts.

as the provider of water to the Beach Cities and other Pinellas Beaches[4], who had suffered well "failures" and were unable to provide water for themselves. *See* City of Madeira Beach Code of Ordinances, § 15-201. (AP-AA). The authority of the County under the Special Acts to assess charges for the County's Water System, includes fees for water services and facilities, and to require mandatory hook-ups to the facilities. Section 126-124, "Powers of the County" from the 1953 Special Act states, in pertinent part, that the County shall have the power:

> (4) To prescribe, fix, **establish and collect fees, rentals or other charges for the facilities and services furnished by such water system, or any part thereof, either heretofore or hereafter constructed or acquired on an equitable basis**; provided however, that such fees, rentals or other charges, or any revision thereof, shall be fixed and established by resolution of the board of county commissioners in said county.
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> * * * *
>
> (8) To **require all lands, buildings and premises to use the facilities and services of such undertakings**, except as herein otherwise noted, in all cases deemed necessary or desirable by the county.

(Emphasis supplied).

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[4] The Beach Cities are two of a string of municipalities that form the barrier islands of Pinellas County. The territory included by the Special Acts included "that certain chain of islands bordering on the Gulf of Mexico from Pass-A-Grille to Indian Rocks." (AP-V-13) Of the eight beach municipalities that the County is proposing to serve with reclaimed water, only the two Beach Cities — Madeira Beach and Indian Rocks Beach — object to validation of the bonds.

The County's water system currently serves 13 municipalities within Pinellas County as well as unincorporated areas on a retail or direct billing basis[5]. (AP-N-Exh.B-1) Retail customers in the Service Area (such as the Beach Cities) are directly billed by the County for their use of water. The rates for water service are set by resolution of the Board of County Commissioners and have never been set by any type of contract or interlocal agreement between the County and any municipalities served. (AP-S-30) Rates for water are set by the County by resolution under the parameters of the County's Special Acts.

Reclaimed Water

As a supplier of water, the County must comply with a host of federal and state laws and regulations governing the distribution, treatment, use and conservation of water. (AP-N-Exh.B-2) At the forefront of such governmental regulation is a heightened emphasis on the use of reclaimed water.[6] The Legislature has endorsed and required the

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[5] The County also serves five municipalities with water on a wholesale basis, where the contracting municipalities bill the customers according to fee schedules set by the municipalities. (AP-N-Exh.B-1-2)

[6] "Reclaimed Water" is defined as "water that has received at least secondary treatment and is reused after flowing out of a domestic wastewater treatment facility." §62-40.210(21) Fla. Admin. Code.

installation of reclaimed water as an important part of the State's conservation of water efforts in the following statutory sections:

- *Fla. Stat.* §373.016(4)(a) (Supp. 1998), "Declaration of Policy" (Legislature directing the "use of water from sources nearest the area of use"; such sources shall include "reuse of nonpotable reclaimed water");
- *Fla. Stat.* §373.250 (1997) "Reuse of reclaimed water" (encouragement and promotion of water conservation and reuse of reclaimed water, as defined by the department, are state objectives and considered to be in the public interest).

The benefits of using reclaimed water include: 1) decreased demand on potable drinking water sources, 2) minimizing restrictions on the use of reclaimed water for irrigation and other outdoor uses, 3) avoiding the costs of development of new water sources, and 4) cost effectively reusing the effluent of the County's sewer system, reducing costs associated with the disposal of effluent. (AP-N-Exh.B-2)

The scope of any reclaimed water program, however, is limited because the treated sewer waste water of approximately four households must be combined in order to meet the reclaimed water needs of one household (AP-N-Exh.B-2). Thus in the County's water and sewer system, the County had to select a portion of its Service Area in which to provide reclaimed water. The County commissioned a study by Parsons Engineering Service of Tampa (the Consultant") to help determine which portion of the Service Area

would be best suited to receive reclaimed water to achieve the County's goal of maximum reduction of potable use of water. (AP-N-Exh.B-2)

Although highly treated, reclaimed water is not potable and must be delivered through specific water lines. "Transmission lines" carry the reclaimed water from the treatment facilities to the general areas of service. (AP-S-21) Smaller "distribution lines" then carry the reclaimed water lines from the transmission lines to individual property owners. (AP-S-21) From these smaller distribution lines the County installs a service stub at individual properties to connect customers to reclaimed water. (AP-S-24) The County's reclaimed water is to be used for outdoor activities such as lawn and garden irrigation, vehcile washing and other non-potable uses.

<u>The Reclaimed Water Ordinance</u>

This appeal considers the validity of fees assessed pursuant to County Ordinance No. 97-103 (AP-X), enacted in December 1997, now codified as §126-501 et seq. of the Pinellas County Code (the "Reclaimed Ordinance") (AP-W). The Reclaimed Ordinance established the use of reclaimed water within the County in order to minimize "the use of potable water of the County for nonpotable uses." §126-501, Pinellas County Code (AP-W-1). Based upon a variety of information from several sources, the County Commissioners, as the elected officials charged with oversight of the County's Water System, made findings in the Reclaimed Ordinance which included:

- Reuse of reclaimed water for irrigation saves potable water which maximizes society's goals of saving our precious resources.

- Reclaimed water is one of the most viable and effective potable water conservation alternatives.

- Reclaimed water created a water source that is exempt from watering restrictions even under drought conditions.

- Reclaimed water is provided at a lower costs to the consumer than irrigating with potable water.

- Reclaimed water beautifies the community by enhancing the appearance of our landscaping.

- Reclaimed water is safe for intended uses.

- Reclaimed water service increases the value of private property by providing an additional useful utility to preserve and enhance the asset.

(AP-X-1,2)

The Reclaimed Ordinance authorized the establishment of a "Readiness to Serve Zone" in which most customers would be charged a mandatory fee (the "Availability Charge") for reclaimed water[7]. Determination of the specific areas to be included in the "Readiness to Serve Zone" was delegated to the County's Utilities Department in the Reclaimed Ordinance. *See* §126-506, Pinellas County Code. The Availability Charge is

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[7] The Reclaimed Ordinance exempted properties from the Availability Charge that provided irrigation water through existing irrigation wells. §126-517, Pinellas County Code. (AP-W-5)

set in an amount which covers only the costs of the distribution system improvements to individual properties, terminating when these construction costs are recovered. *See* §126-517, Pinellas County Code.[8]

On January 6, 1998, the Board of County Commissioners adopted Resolution 98-01 establishing reclaimed water rates (the "Rate Resolution"). After a presentation by the County Utility Department, the Commission adopted the monthly Availability Charge and monthly usage rates for reclaimed water of $7.00 and $2.00, respectively, for single family and smaller multi-family and commercial units, and $7.00 and $0.29 per 1,000 gallons for larger commercial and multi-family users. The $7.00 fee represents a portion of the average cost to install the smaller distribution lines to the specific properties from the transmission lines (the transmission lines costs are <u>not</u> paid for by those in the Readiness to Serve Zone) that carry the reclaimed water to the customers served with the reclaimed water. (AP-S-20,21). Of the total project cost of approximately $195,000,000 and distribution line costs of approximately $22,000,000, those in the Readiness to Serve Zone pay for approximately $16,000,000 of the facilities cost. (AP-S-20,21) Pursuant to the Reclaimed Ordinance, the Utilities Department established a "Readiness to Serve

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[8] The Availability Charge will be charged to a property only when the service becomes available. §126-506, Pinellas County Code. (AP-W-2) Establishing and collecting charges for capital facilities for the Water System are specifically authorized in the 1953 Special Act. §126-124, Pinellas County Code. (AP-V-4)

Zone" for the South Pinellas County area, that included the Beach Cities and other beach communities from Sand Key to Tierra Verde. (AP-S-26; Supp. App., Section 5).

The County's Reclaimed Ordinance, subsequent Rate Resolution and selection of the Readiness to Serve Zone were based, in part, upon studies performed by the Consultant. (AP-S-26) The Rate Resolution established an Availability Charge that is based on the Consultant's report, the County's actual experience and input from the communities. (AP-S-29) The County directed the Consultant to identify which areas would best be served with reclaimed water in order to maximize the resource of reclaimed water. (AP-S-25) The particular beach areas that made up the Readiness to Serve Zone were identified in the top "Priority Zones" in the Consultant's report to the County. (Supp. App., Section 5, p.2) Based upon the Priority Zones, the County developed a Readiness to Serve Zone that combined the areas that would be most benefitted by reclaimed water and were contiguous along the coastal beaches of the County. (AP-S-28)

<u>Bond Validation</u>

In an effort to help fund the reclaimed water project, the County adopted Resolution No. 98-251 on December 8, 1998, authorizing the issuance of junior and subordinate Revenue Bonds in an amount not to exceed $8,700,000, to help finance a portion of the costs of acquisition and construction of the reclaimed water project. The

Complaint for Validation seeks to validate the authority of the County to issue the bonds and to pledge the Availability Charge as a source of security for the bonds.

The Beach Cities intervened in this proceeding as property owners who are retail water customers of the County (AP-E,F).[9] Both of the Beach Cities are within the Readiness to Serve Zone of the Service Area and the County supplies residents and businesses within those municipalities (and the municipalities themselves) with water.

The trial court held the Bond Validation hearing on July 9, 1999 in response to its Amended Order to Show Cause dated March 23, 1999.[10] (AP-C) The Beach Cities produced no witnesses in opposition to validation. The County's Utilities Department Director, Pick Talley, testified in support of validation. Talley's unrebutted testimony included the following assertions:

- Reclaimed water has been popular in other areas of the County because of the restrictions placed upon the use of potable water for irrigation by the Southwest Florida Water Management District. Reclaimed water carries no

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[9] In addition to the intervention of Madeira Beach and Indian Rocks Beach in the case as property owners, five individual citizens from the two municipalities joined the Beach Cities in their Answer and Counterclaim (AP-H). The two municipalities receive water from the County for their properties like any other retail consumer and do not own, manage or provide any water facilities or assist the Count in providing water in these incorporated areas.

[10] The Court also considered the Beach Cities' Counterclaim (AP-H) and Motion for Preliminary Injunction (AP-L) as well as the County's Motion for Judgment of the Pleadings (AP-P) with respect thereto. The Court granted the County's Motion without prejudice to the Beach Cities. (AP-R-7)

such restriction, and is less costly than potable water for the same units of production. (AP-S-23)

- The County hired the Consultant to assist it in determining where the best areas were located for the provision of reclaimed water service to maximize the benefit of the resource. Beach communities benefit from reclaimed water because there is little opportunity to put in irrigation wells because of the proximity to salt water that makes such wells unsuitable for irrigation. (AP-S-26). Reclaimed water is generally considered an increased benefit to a property, including advertisements by realtors. (AP-S-40)

- The County initially proposed an Availability Charge to finance the costs of the distribution lines over a ten year period but, after public meetings and further consideration by the County Commission, it adopted a thirty year repayment plan as set forth in the Rate Resolution. (AP-S-29,30)

- Any property that had irrigation from a well was exempt from the Availability Charge. (AP-S-44)

Final Judgment and Appeal

On July 23, 1999, the trial court entered the final judgment that is the subject of this appeal (AP-R). The trial court refused to validate the bonds on two distinct grounds. First, that the County failed to obtain the consent of the municipalities within the Readiness to Serve Zone for reclaimed water, which the trial court stated violated Chapter 153, Fla. Stat. Second, that the County failed to obtain the consent of citizens before imposition of the Availability Charge, which the Court deemed "an impermissible" tax, not a user fee. (AP-R-7) This Appeal followed.

STANDARD OF REVIEW

This Court's scope of review in bond validation cases is limited to the following issues: (1) whether the public body has the authority to issue bonds; (2) whether the purpose of the obligation is legal; and (3) whether the bond issuance complies with the requirements of the law. *See State v Osceola County,* 24 FLW S245, 1999 WL 343064 (Fla. 1999); *State v. Inland Protection Fin. Corp.*, 699 So. 2d 1352 (Fla. 1997); *Poe v. Hillsborough County*, 695 So. 2d 672 (Fla. 1997); *Northern Palm Beach County Water Control Dist. v. State*, 604 So. 2d 440 (Fla. 1992); *Taylor v. Lee County*, 498 So. 2d 424 (Fla. 1986). The County has the burden of demonstrating that the record and evidence fails to support the Beach Cities and the trial court's conclusions. *Wohl v. State*, 480 So. 2d 639,641 (Fla. 1985).

STATEMENT OF THE ISSUES

1. Whether the concept of municipal consent in Chapter 153, Florida Statutes (1997), is required where the County supplies reclaimed water service under other special and general laws?

2. Whether the County's Availability Charge is a permissible fee for water facilities or an unauthorized tax?

SUMMARY OF THE ARGUMENT

The Availability Charge is well within the County's authority as a charter county acting pursuant to a legislative mandate to provide and recover costs for the supply of water to the communities of the Pinellas Beaches, and acting pursuant to other legislative authority to provide reclaimed water sources. The Argument section of this brief opens with a discussion of the particular history of the Pinellas County Water System as it relates to the Pinellas Beach communities and Chapter 153, Fla. Stat. (1997), a supplementary area of authority for county water and sewer systems. The County will show that the trial court erroneously determined that the concept of municipal consent under Chapter 153 applied to a water system, such as the Pinellas County Water System, which predates Chapter 153 and operates under the authority of both general home rule powers and Special Acts specific to the County's water system. Alternatively, the County will show that even if Chapter 153 applies, consent of the Beach Cities was implicit in that these communities have received water from the County for decades.

Next, the County will demonstrate that the Availability Charge is not an unauthorized tax as asserted by the Beach Cities. The basis for the County assessing such a charge is from several sources, each sufficient to support validation of this revenue source for the bonds. First, as a charter county, the County has broad authority to enact ordinances not inconsistent with general law. Second, the County has been granted the

authority under the Special Acts to provide water and the ability to set water rates charging for facilities and use of water by its customers. Third, the County will show that the Availability Charge is not an unauthorized tax but is reasonably related to providing traditional utility services. In such circumstances, there is a long history of cases in Florida upholding the mandatory nature of the such charges as proper and appropriate either as fees or special assessments. Finally, the legislative directives to implement and charge for the costs of the reclaimed water programs in Chapter 403, Fla. Stat. (1997) and to require mandatory hookups under Chapter 180, Fla. Stat (1997) contemplates and authorizes the precise type of ordinance and fee schedule that the County ultimately adopted.

Individually, each of these authorities support the validity of the Availability Charge and the validation of the bonds. Together, the law supporting for the Availability Charge is expansive. The trial court erred dramatically when deeming the Availability Charge a tax, an error this Court should correct by reversal of the trial court's decision below and by validation of the bonds.

ARGUMENT

I. CHAPTER 153, FLA. STAT. (1997) DOES NOT PROHIBIT IMPLEMENTATION OF AN AVAILABILITY CHARGE FOR RECLAIMED WATER BY THE COUNTY.

A. Chapter 153 is supplemental and non-controlling authority for the County's water system.

The Court below denied the validation of the bonds in part because the County did not gain the consent of all the municipalities within the "Readiness to Serve Zone" of the Service Area. The Court's rationale, however, relied upon an incomplete reading of Chapter 153, Part I of the Florida Statutes (1997) entitled: "County Water System and Sanitary Sewer Financing."[11] Citing §153.03, Fla. Stat. ("General Grant of Power"), the Court determined that the municipal consent requirement of §153.03(1) (1997)[12] applied to the instant case and stated: "The Plaintiff may not extend its reclaimed water facility into incorporated municipalities without their consent." (AP-R-5)

Despite the seemingly restrictive language of §153.03(1), that subsection must be read in conjunction with other provisions in Chapter 153 that contain language

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[11] The County does not rely on Chapter 153 as the source of its authority to implement the Availability Charge. Thus, the mandatory nature of the provisions of Chapter 153 is a threshold issue to this appeal.

[12] Fla. Stat. §153.03(1) (1997) states, in pertinent part, that: "Any of the several counties of the state which may hereafter come under the provisions of this chapter as hereinafter provided is hereby authorized and empowered: (1) To purchase and/or construct and too improve, extend, enlarge, and reconstruct a water supply system or systems or sewage disposal system or systems, or both, provided, however, that none of the facilities provided by this chapter may be constructed, owned, operated or maintained by the county on property located within the corporate limits of any municipality without the consent of the council, commission or body having general legislative authority in the government of such municipality . . .".

specifically declaring that Chapter 153 is not the exclusive means for accomplishing the purposes therein. Rather Chapter 153 is the additional and alternative authority that counties may choose to employ. To provide for this, the Legislature deemed the provisions of Part I, including the municipal consent requirement of §153.03(1), to be supplemental and in the alternative, to any County powers already in existence, stating in §153.20:

> **Alternative Method.**
>
> (1) This chapter shall be deemed to provide an additional and alternative method for the doing of the things authorized hereby and shall be regarded as supplemental and additional to the powers conferred upon the commission by other laws, and shall not be regarded as in derogation of any powers now existing. This chapter being necessary for the welfare of the inhabitants of the several counties of the state shall be liberally construed to effect the purposes thereof.
>
> (2) This chapter shall not repeal any local or special act or law conferring upon any of the several counties or county commissions the powers and duties or any of them imposed hereby, but it shall be deemed to be an alternative or additional method for such counties or county commissions to effect the purposes of this chapter.

(emphasis supplied). *See also* §153.88, Fla. Stat. (1997) ("The provisions of this law shall be liberally construed to effect its purposes and shall be deemed cumulative, supplemental and alternative authority for the exercise of the powers provided herein.")

The specific language of §153.20 leaves little, if any, room for argument. If a county, such as Pinellas, had other authority to build, maintain and expand its water

system, then nothing in the Chapter was intended by the Legislature to inhibit the authority with such an “alternative” and “additional” source of authority. The County has such supplemental authority.[13] *See* § 126-124 (4), Pinellas County Code (codification of the 1953 Special Act) (the County has power to collect fee for "facilities and services" furnished by such water system).

The only reported decision directly interpreting §153.20 addressed the same issue that is before this Court: the applicability of Part I of Chapter 153 to the water system of the County. *See Mountain v. Pinellas County*, 152 So.2d 745 (Fla. 2d DCA 1963). *Mountain* involved a dispute between the County and a private water supplier from the Crystal Beach community located in Pinellas County. In *Mountain*, the private water supplier in Crystal Beach sought to enjoin the County from installing its water system in Crystal Beach or, in the alternative, that the County be required to pay for its water system as required by §153.03(8). The Second District Court of Appeal rejected this claim, citing §153.20, “Alternative Method”, as evidence that Chapter 153 is supplemental to the authority provided by the Special Acts of 1953, 1939 and 1935 regarding the County’s water system.

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[13] The County’s existing Special Acts were first enacted in 1935, supplemented in 1939 and supplemented again in 1953. The Legislature subsequently enacted Chapter 153 in 1955.

> But on reading the general act it becomes apparent that a county which is otherwise empowered by a special act to install and operate such a facility may elect to do so rather than proceed under Chapter 153 . . . Moreover, in §153.20 it is expressly provided that the general act is alternative and supplemental and is not to be regarded as in derogation of existing powers or as repealing any such special acts. We conclude, therefore, . . . that the county did not proceed under and was not bound by the provisions of Chapter 153, Fla. Stat.

Mountain v. Pinellas County, 152 So.2d at 747-48.

This principal enunciated in *Mountain* is directly on point to this case. Both cases involve parties attempting to use Part I of Chapter 153 to gain concessions from the County in the operation of its water system expansion. In both cases, however, the parties opposing the County must contend with the fact that the Legislature required the County through special, distinct and direct authority to provide water to areas of the County, both municipal and unincorporated. The County has provided water for 64 years under the Special Acts. The fact that §153.20 specifically gives deference to preexisting special acts is a fact that this Court, like the Second District in *Mountain*, should find compelling.

The trial court's attempt to distinguish this case from *Mountain* on the grounds that the other party in that case was a "community", as opposed to a municipality, should not be persuasive to this Court. Section 153.20 applies to "any law or special act" and does not have the limitation imparted to it by the trial court. The municipal consent

requirement of §153.03(1) at issue in this case, like the compensation provision of §153.03(8) at issue in *Mountain*, are both provisions supplemental to any existing law. As such, this Court should find that Chapter 153 does not prohibit the addition of reclaimed water in its Service Area by the County, and thus the consent of the municipalities is not required in this case.

The reliance of the trial court and the Beach Cities on *Hodges v. Jacksonville Transportation Authority*, 353 So.2d 1211 (Fla 1st DCA 1977) as a basis for the requirement of municipal consent in a water case completely fails to account for the supplementary nature of Chapter 153 for county water systems. In *Hodges*, the First District in construing §338.01, Fla. Stat. (1977)[14] cited the language of a statute requiring that highway authorities gain the consent of incorporated cities and towns before planning limited access highways. *Hodges*, 353 So.2d at 1213. Unlike the supplementary authority of Chapter 153, however, the authority of the Jacksonville Transportation Authority under §338.01 to build limited access highways through municipalities was conditional upon municipal consent. Upon an actual reading of the statute at issue in *Hodges*, there is no legitimate comparison between the two statutory schemes. Unlike Chapter 153, there is

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[14] The published opinion of *Hodges*, the Beach Cities' Memorandum of Law in Opposition to Bond Validation and the trial court's Final Judgment all incorrectly cite the statute at issue in *Hodges* as §388.01, which is actually a Mosquito Control provision repealed in 1959. It is the belief of Counsel for the Appellant that the actual statute at issue is Fla. Stat. §338.01 (1977), "Authority to establish limited access facilities," which is also the subject matter of the opinion in *Hodges*. It is upon this assumption that Appellant makes its argument above.

nothing in Chapter 338 that specifies that it is supplementary authority. The County requests the Court follow the plain meaning of §153.20 and declare that Chapter 153, Part I, is superseded by the County's authority to provide water to the Beach Cities under the Special Acts, which do not require municipal consent for the reclaimed water facilities improvements to the water system.

B. Chapter 153 does not apply to home rule counties.

Given the express acknowledgment that Chapter 153 serves a supplemental and alternative purpose, if other statutory or constitutional authority exists for the exercise of the same powers granted in Chapter 153, then a county may choose not to invoke the authority of Chapter 153 and subsequently avoid the restrictions contained therein. The Special Acts discussed in Part I, section A above are just one such area of alternative authority.

With the advent of home rule in 1968, an additional area of alternative authority was established, making the provisions of Chapter 153 arguably obsolete. In *Speer v. Olson*, 367 So.2d 207 (Fla. 1978), this Court affirmed this principle when considering the authority of Pasco County to issue water and sewer bonds. This Court held that Pasco County had home rule power to authorize water and sewer system bonds. Where additional authority such as Chapter 153 is available, a public entity may reject Chapter 153 and use other applicable law. *Speer, supra*, 367 So.2d at 212-13.

Following *Speer*, a series of cases also hold that statutory authority may be supplementary, to be invoked at the option of the governmental entity. *See Taylor v. Lee County*, 498 So.2d 424 (Fla. 1986) (Chapter 159 was an alternative method to issuing bonds; County could proceed alternatively under home rule power of Chapter 125); *City of Boca Raton v. State*, 595 So.2d 25 (Fla. 1992) (special assessment improvement bonds for downtown revitalization did not have to comply with requirements of Chapter 170 where City was proceeding under its home rule power); *Rowe v. St. Johns County*, 668 So.2d 196 (Fla. 1996) (public convention facility bonds issued solely under home rule power did not have to comply with statutory provisions of Chapter 159 and Chapter 125 relating to issuance of bonds for convention centers). Thus, under the broad home rule powers of Chapter 125, Fla. Stat., this Court should find that Chapter 153 is only supplementary and not controlling on the County's issuance of bonds for its water system.

C. Even if Chapter 153 is applicable, the County has the consent of the Beach Cities to provide water.

The County does not believe that Chapter 153 is applicable to this matter. Assuming, *arguendo,* that the law is applicable and municipal consent is required, the Beach Cities have given consent to the County by the delegation to the County of the responsibilities to supply water to its citizens. As discussed above, the County has been the sole supplier of water to the Pinellas Beaches since the 1935 Special Act. The Beach

Cities now seek to pick and choose what types of water to accept or reject from the County. The Beach Cities seek to have a veto power over operational decisions that the County must make in providing water throughout the region. Such a position is untenable under Chapter 153, which specifically includes reclaimed water in its definition of "water system" in §153.02(3). "Water system" is defined as "any plant, wells, pipes, reservoirs, system, facility, or property used or useful or having the present capacity for future use in connection with the obtaining or supplying water and alternative water supplies, including, but not limited to, reclaimed water . . . ". Section 153.02(3), Fla. Stat. (1997) (emphasis supplied). In the 64 years since the passage of the 1935 Special Act, there has never been any further consent of the municipalities regarding water projects of the County beyond the fact that, upon failure of their own water systems, they have relied upon the County as its water supplier. (AP-S-30)

The Beach Cities' argument should be rejected on its face, where it consents to receive water from the County, but seeks to opt out of the reclaimed water portion thereof. Such a position is inconsistent with the intent of the Chapter 153, which specifically includes reclaimed water as part of its definition of water system, and should be rejected by this Court.

II. VALIDATION OF THE BONDS IS PROPER BECAUSE THE BONDS ARE SECURED BY A LEGAL AVAILABILITY CHARGE, NOT AN UNAUTHORIZED TAX.

The trial court ignored explicit and direct constitutional and statutory authority for the County to assess the Availability Charge, instead relying on this Court's decision in *State v. City of Port Orange*, 650 So.2d 1 (Fla. 1995) in deeming the Availability Charge an unconstitutional tax. *Port Orange* held that the city could not of its own authority, impose a tax without legislative authority, lest it be deemed unconstitutional. Id. at 4. *Port Orange* is distinguishable on several clear grounds, as will be demonstrated below.

A. The Availability Charge is properly adopted because the County is a home rule charter county.

The trial court's Final Judgment fails to consider the general powers of the County under home rule and its voter-approved charter. Florida charter counties derive their sovereign powers from the state through Article VIII, §1(g) of the Florida Constitution which provides in pertinent part:

> Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by the vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law.

The Supreme Court "has broadly interpreted the self-governing powers granted charter counties under Article VIII, Section 1(g) of the Florida Constitution." *State v. Broward County*, 468 So.2d 965, 969 (Fla. 1985) (citations omitted). "In the absence of preemptive federal or state statutory or constitutional law, the paramount law of a charter

county is its charter." *Hollywood v Broward County*, 431 So.2d 606, 609 (4th DCA), *rev. denied*, 440 So.2d 352 (1983).

In *City of Ormond Beach v. County of Volusia*, 535 So.2d 302 (Fla. 5th DCA 1989), several cities within Volusia County, a charter county, adopted a position similar to the Beach Cities here regarding a county-wide impact fee to pay for county roads. The cities adopted resolutions exempting properties within their respective city limits from the fee. The Court found that Volusia County had the authority under its home rule powers and its charter to levy the fee.

> The cities in essence are attempting to veto an otherwise legitimate effort on the part of the county to raise funds to pay for the county road system, which traverses the municipalities as well as unincorporated areas. . . The attorneys for the cities candidly admit their client wished to opt out in order to force the county to consult with them in planning county roads and expending funds within the county. This goal, however, is absolutely contrary to the scheme of general law in Florida which gives the planning, building and maintaining function for county roads exclusively to the counties – not to the cities.

City of Ormond Beach, 535 So.2d at 304-305 (emphasis in original).

This matter is directly analogous to *Ormond Beach*. The Beach Cities are attempting to thwart the County's plan to carry out its duty to all customers of the County's water system with reclaimed water. Like the county roads in *Ormond Beach*, the County's water system stretches through several municipalities as well as unincorporated Pinellas County, and the responsibility for building and maintaining the

facilities are delegated to the County pursuant to the Special Acts. Under such circumstances, the Beach Cities should not be permitted to overrule the County Ordinances (in the event of conflict, the County's charter provides specifically that its provisions shall prevail). The County's charter mandates that its authority to provide water throughout the Service Area, and any attempt to opt out of by the Beach Cities should be rejected using the same rationale used by the Fifth District in *Ormond Beach*.

The City of Port Orange conceded to this Court that its municipal home rule powers did not authorize its creation of a "transportation utility fee" if the fee was considered a tax. *Port Orange*, 650 So.2d at 2. Thus, the sole issue in that case was whether the newly-created fee was considered a tax not authorized by general law. By contrast, the fact that the County is charging for water service, a long-standing arrangement, makes this a different case. The fees collected from the Availability Charge do not go to the general revenue fund, but are tied to the improvements of the reclaimed water distribution lines, expiring when the costs are recovered. These are not the indicia of a tax (see Part II, subsection C *infra)*. Because there is no preemptive federal or state statutory or constitutional law, the County's charter authorization of the Availability Charge is proper under home rule powers. This court should continue to broadly interpret the self-governing powers granted charter counties under the Constitution and uphold the Availability Charge.

B. The Special Acts authorize the County to set water fees such as the Availability Charge.

In addition to the general home rule powers, the County acts pursuant to a series of Special Acts, which specifically authorize charges such as the Availability Charge. Since 1935, the County has been mandated by the Legislature to be the provider of water to the beach communities. In the series of special acts that govern the County's Water System (the 1935, the 1939 and the 1953 Special Acts), the County is authorized to set reasonable rates for the facilities and the use of water by its customers. Today, the County is still charged with that responsibility and has the authority to promulgate rates accordingly. Such rates are assessed on an "equitable basis" under §126-124 of the Pinellas County Code (a codification of the 1953 Special Act). (AP-V-2) There is no referendum required to establish water rates in Pinellas County, and the recent establishment of the reclaimed water rates is merely a subset of the water charges that have been in place for more than 60 years between the County and its customers. Thus, the Availability Charge is duly authorized by the well-established law governing the County.

Neither the trial court nor the Beach Cities have asserted any other grounds on why the Special Acts should not control the legality of the Availability Fee except for the Chapter 153 argument discussed in Section I above. The Special Acts clearly and distinctively give the County the authority to set water rates within the County. The 1953

Special Act, in fact, is not limited to water supplied, but includes "fees, rentals or other charges <u>for the facilities</u> . . .". §126-124(4) (AP-V-2) Moreover, the 1953 Special Act permits the County "to require all lands, buildings and premises to use the facilities and services of (the water system)." §126-148(8) (AP-V-3) The Availability Charge is within this authority of the Special Acts to charge through its facility costs, to set fees and require hook-ups.

As discussed in Section III below, it is the policy of the State to encourage the use of reclaimed water wherever possible, as part of the water supply. There is no basis for this Court to exclude reclaimed water from the general authority granted in the Special Acts. Clearly, it would be an anomaly if this case produces a result where the County has the authority to modify and expand its potable water system throughout the Beach Cities, but cannot construct and/or expand reclaimed water as part of that system with similar fee schedules. As water charges authorized by the Special Acts of the Legislature, the Availability Charge is properly assessed.

C. The Availability Charge is an Authorized Fee, Not a Tax.

In addition, if this Court does not find that the Availability Charge is properly authorized by the charter or by the Special Acts, it should be deemed a properly adopted utility fee or special assessment under well-established case law approving such charges.

1. Utility Fees

The Availability Charge is a properly assessed utility facilities fee. Governmental fees must result in a benefit to those paying the fee not shared by persons not required to pay the fee. *Collier County v. State,* 733 So.2d 1012, 1018 (Fla. 1999). In *Port Orange*, however, this Court stated that such fees must involve a voluntary choice to use the governmental service. *Port Orange*, 650 So.2d at 4. It was upon this "voluntary v. mandatory" language that the trial court appears to have concluded that the Availability Charge[15] was a tax, noting that "[a] voluntary user fee would permit those who choose to use the reclaimed water to pay for the service and would not indiscriminately burden those property owners who have no need or desire to use reclaimed water." (AP-S-6)

When a governmental entity is providing traditional utility services, however, there has never been resistance by Florida courts to uphold local ordinances with mandatory fees, regardless of whether an individual customer actually uses or desires the service. *State v. Town of Mexico Beach*, 348 So.2d 40 (Fla. 1977) (mandatory flat rate for garbage service, regardless of use, not contrary to constitutional standards); *State v. City of Miami Springs*, 245 So. 2d 80 (Fla. 1971) (flat rate for sewer charges to all single family residences, unrelated to actual use was not unreasonable, arbitrary or in conflict with State or Federal constitutions or law); *Riviera Beach v Martinique 2 Owners Association*, 596 So.2d 1164 (Fla. 4th DCA 1992) (solid waste removal ordinance applied

[15] In fact, the Reclaimed Ordinance §126-517, Pinellas County Code permits residents to opt out of the Availability Charge if they have an irrigation well on their property. (AP-W-5)

to unoccupied condominiums without regard to actual use); *Town of Redington Shores v. Redington Towers, Inc.*, 354 So.2d 942 (Fla. 2d DCA 1978) (mandatory sewer charges against unoccupied property applied from date the sewer main was available to be used; sewage charges were reasonably related to the value of service rendered either as actually consumed or as readily available).

The nexus between water systems and sewer systems has been recognized previously by this Court to make them equivalent for purposes of construing the applicability of fees from the systems. In *State v. City of Miami*, 27 So.2d 118 (Fla. 1946), this Court affirmed the validation of sewer revenue bonds issued by the City of Miami. The Court noted that "[a] sewer system is complimentary to a water system. A sewer system would be of no value without a water system and a water system would be entirely incomplete without a sewer system. So the principles of law which would apply to one system must likewise apply to the other." *State v. City of Miami*, *supra*, 27 So.2d at 124. In validating the sewer bonds, this Court recognized the unique nature of such fees, concluding that the fees did not violate the Constitution. "This is true because the imposition of fees for the use of the sewage disposal system is not an exercise of the taxing power, nor is it the levy of a special assessment." *Id.*

Unlike *Port Orange*, which this Court construed as an attempt to convert the roads of the municipality into a toll road system, the delivery of governmental utility services

are justifiably given more deference. *City of New Smyrna Beach v. Fish*, 384 So.2d 1272 (Fla. 1980) (ordinances fixing garbage and trash collection rates entitled to a presumption that legislative determinations or findings of fact are correct and should not be voided absent clear showing that they are arbitrary, oppressive, discriminatory or without basis in reason or justification). In construing municipal waste removal fees, the Fourth District noted: "The term 'just and equitable' as used in §180.13(2) is a brake primarily in the legislative rate-making, not on later judicial review. That is to say, the cities are given broad authority to establish their own rates for municipal utilities' charges. The amount or form of these rates take in a representative democracy is something that is left to a civically vigilant electorate." *Riviera Beach*, supra, 596 So.2d 1164. The County Commission properly made findings concerning the potable water shortage in the Service Area and determined that a mandatory facilities charge was required. (AP-Z-3)

In the case of a precious resource like water, mandatory connections (and the subsequent charges flowing therefrom) have long been held to be a proper exercise of a governmental power to regulate the welfare of its citizens. *See Stern v. Halligan*, 158 F.3d 729, 734 (3d Cir. 1998) (upholding constitutionality of mandatory connection to municipal water supply) *citing City of Mountain Home v. Ray*, 267 S.W.2d 503 (Ark. 1954); *Schmidt v. Village of Kimberly*, 256 P.2d 515 (Idaho 1953); *Township of Bedford v. Bates*, 233 N.W.2d 706 (Mich.Ct.App. 1975); *New Jersey v. Mayor of*

Patterson, 51 A. 922 (N.J. 1902); *McNeill v. Hartnett County*, 398 S.E.2d 475 (N.C. 1990), *Bigler v. Greenwood*, 254 P.2d 843 (Utah 1953). *See also Hutchinson v. City of Valdosta*, 33 S.Ct. 290 (1913) (affirming mandatory connection to sewer system). The Legislature requires mandatory connections to all sewer systems in §381.00655, Fla. Stat. (1997). The County is merely instituting its reclaimed water system in a manner consistent with the law regarding mandatory facilities charges for utilities.

The Court's ruling in *Port Orange* should not be used as a means to threaten decades of governmental utility services in Florida, and in particular the County's ability to provide water and sewer services in the manner its elected officials determined to be most appropriate. The fact that such a fee is mandatory is not necessarily indicative that it is an unconstitutional tax. *See State v. City of Miami Springs, supra; City of City of Cincinnati v. United States*, 153 F.3d 1375, 1378 (Fed. Cir. 1998) (involuntary nature of storm drainage service charge was not dispositive on determination of fee versus tax issue; some instances in which involuntary charge would nevertheless be considered a permissible fee for services rather than an impermissible tax).

The Florida Public Service Commission has upheld mandatory reuse availability fees for reclaimed water as to newly developed properties. *In re Application for Approval of Reuse Project Plan in Seminole County by Alafaya Utilities, Inc.,* Slip. Op. F.P.S.C. 1998 WL 174506 (March 16, 1998). Other jurisdictions have also upheld

availability or readiness to serve charges. In *Lepre v D'Iberville Water and Sewer District*, 376 So. 2d 191 (Miss. 1979), the district passed an ordinance making it mandatory that all residents connect onto the water and sewer system. The district also required a minimum charge of $7.50 irrespective of whether individuals actually connected. Lepre refused to connect and refused to pay the charge. The Mississippi Supreme Court upheld the mandatory connection and specifically found the charge not a tax. "Defendant also contends that the imposition or charge on him as a non-user amounts to a tax. While it may be argued that this charge taken on many aspects of a tax, it is not a tax according to the holding of our Supreme Court." *Lepre*, supra, 376 So. 2d at 194 (citations omitted).

In *McMillan v Texas Natural Resources Conservation Commission*, 983 S.W. 2d 359 (Tex. Ct. App. 1998), McMillan challenged an annual standby fee imposed on undeveloped property. Under Texas law a "standby fee" means a charge, other than a tax, imposed on undeveloped property for the availability of potable water, sanitary sewer or drainage facilities and services. *McMillan* at 983 S.W. 2d at 360 FN2. McMillan specifically challenged the standby fees as taxes prohibited by the Texas Constitution. The Court specifically found the standby fees not to be taxes. "Because standby fees are not equally distributed, but instead are imposed only on property that can take advantage of available benefits, they are not taxes and the Constitutional limitations of Article VIII

do not apply." *McMillan,* 983 S.W. 2d at 365. The State of Colorado also authorizes availability of service fees. *See Crested Butte South Metropolitan District v. Hoffman*, 790 P.2d 327 (Colo. 1990).

In *City of River Falls v. St. Bridget's Catholic Church of River Falls*, 513 N.W. 2d 673 (Wis. Ct. App. 1994) the Court validated a charge for the costs of providing water for public fire protection.

> The church's argument incorrectly assumes that to be a fee, a charge must be assessed for commodities actually consumed. As we previously stated, if the primary purpose of a charge is to cover the expense of providing services, supervision or regulation, the charge is a fee and not a tax.
>
> Here, the purpose of the PFP charge is to cover the public utility's expense of making water available, storing the water and ensuring that water will be delivered in case it is needed to fight fires at the utility customers' properties.

513 N.W. at 676. The New Jersey Supreme court in *Airwick Industries, Inc. v Carlstadt Sewerage Authority*, 270 A.2d 18 (N.J. 1970), in approving sewer fees to improved and unimproved properties, articulated its rationale for charges to unconnected properties.

> That the actual users of the facility receive a benefit for which they should pay, is self-evident. It does not follow, however, from the fact that unimproved properties do not make any present use of the facilities, that they receive no present benefit therefrom. To the contrary, upon completion of installation, the unimproved properties also receive an immediate benefit from the mere availability of the system for service. All properties within the section serviced are beneficiaries of the expenditure--the improved for immediate present use and the unimproved for potential future use. Both classes receive an immediate enhancement in value from

> the mere existence of the system. The only equitable manner to distribute the original cost, is for the unimproved properties to bear part of that cost in exchange for the increment in value received and for the potential standby service.

Airwick Industries, supra, 270 A.2d at 25. *See also McNeill v. Harnett County, supra,* 398 S.E. 2d at 483.

The weight of Florida's utility fee cases as well as those from other jurisdictions demonstrates that the Availability Charge is appropriate, even when mandatory. Unlike *Port Orange* or *Collier County*, individuals paying the Availability Charge benefit from the service of reclaimed water in a manner not shared by those not paying the fee. The County's Board of County Commissioners found that reclaimed service provides water more readily available for irrigation because it is exempt from watering restrictions applicable to potable water. (AP-X-2) Reclaimed water's flat rate structure also provides most users with less expensive water. (AP-X-2) This is a special benefit available to property owners in the Readiness to Serve Zone from any countywide or citywide benefit present in *Port Orange* or *Collier County*.

Similarly, this Court stated in *Alachua County v. State of Florida*, 24 FLW S212, 1999 WL 311324 (Fla. 1999) that where a privilege fee imposed on utilities would be deposited in the general revenue fund to provide tax relief to ad valorem taxpayers, such use of the fee indicates that it was an unlawful tax. *Alachua County, supra* at n.1. In

contrast to the general revenue producing fee in *Alachua*, the County's Availability Charge will be directly related to the facility costs incurred by the County to provide reclaimed water. In fact, the Availability Charge will only cover a portion of the cost to install the distribution lines, and an even smaller portion of the overall cost of the County's project, which includes transmission lines and treatment facilities. The Availability Charge will expire when the costs for the facilities are recovered in 30 years. These are not the indicia of a tax.

The ability of a local government to collect the costs associated with the supply of services was affirmed by this court in *City of Daytona Beach Shores v State*, 483 So.2d 405 (Fla. 1985). Reasonable user fees for motor vehicle beach access were proper, "so long as the revenue expended solely for the protection and welfare of the public using that particular beach, as well as for improvements that will enhance the public's use of sovereign property." Id at 408. In *Port Orange*, this Court adopted the *City of Daytona Beach Shores* concept of user fees. *Port Orange, supra,* at 3.

The County's Availability Charge is in harmony with this Court's previous rulings on similar utility charges. Unlike *Alachua*, the Availability Charge is directly related to the reclaimed water distribution line costs incurred by the County. It specially benefits the property by providing a less expensive irrigation water source immune from watering restrictions. The mandatory nature of water, sewer and garbage fees are not the sole area

of inquiry in the determination of whether a charge is a tax or a lawful fee. The Availability Charge, when all of the above-described factors are considered, is more properly characterized as a fee related to a utility service, and its legality should be affirmed by this Court.

2. *Special Assessment*

If not deemed a permissible utility fee, then the Availability Charge should be affirmed as a special assessment. This Court's two prong test for a special assessment is: 1) the property burdened by the assessment must derive a "special benefit" from the service provided by the assessment; and 2) the assessment for services must be properly apportioned. *Lake County v. Water Oak Management*, 695 So.2d 667 (Fla. 1997). The Availability Charge meets both prongs of the test. First, the service provides a "direct special benefit" to the customers in the Readiness to Serve Zone. Like the fire services at issue in *Water Oak Management* that lowered insurance premiums and enhanced the value of property, the Availability Charge lowers water costs to customers, offers irrigation and other non-potable water service not impacted by watering restrictions and increases property values. (A-X-1,2). *See also City of Hallandale v. Meekins*, 237 So.2d 318, 321 (Fla. 4th DCA 1970) (approving sewer system assessment; sewer system is "by its nature" designed to afford special benefits to abutting property; no benefit conferred to the public generally). Like the sewer system and the fire services described

above, the Availability Charge will support a valuable asset – reclaimed water supply -- in the Beach Cities that directly ties to the property subject to the Availability Charge.

Second, the County provided ample evidence as to the fairness of the apportionment of the fee, the second prong of the test to determine if a fee is a valid special assessment. All monies collected by the Availability Charge are pledged to repay the bonds that will fund construction of the distribution lines that connect individual property owners to the reclaimed water transmission lines. The County's established fee structure has the property owners only paying a fraction of the costs of the entire program because the majority of the costs will be underwritten by the County's sewer customers or from other funding sources, such as grants. (AP-S-21,22). Because those with reclaimed water availability in the Readiness to Serve Zone will be getting an additional benefit not available to all in the County, the County deemed it appropriate to allocate a portion of the distribution line costs to those property owners who will receive a special benefit therefrom.

III. THE AVAILABILITY CHARGE IS AUTHORIZED BY, AND CONSISTENT WITH, FLORIDA STATUTES §403.064, §373.250 AND §180.02.

The Legislature has made the use of reclaimed water a top priority for all local governments, and provides for the allocation of costs for the implementation of reclaimed water programs:

- Section 403.064, Fla. Stat. (1997) "Reuse of reclaimed water," subsection (8) states: "Local governments may and are encouraged to implement programs for the reuse of reclaimed water. Nothing in this chapter shall be construed to prohibit or preempt such local reuse programs."

- Section 403.064, Fla. Stat. (1997) "Reuse of reclaimed water" subsection (9) states: "A local government that implements a reuse program under this section shall be allowed to allocate the costs in a reasonable manner."

- Section 373.250, Fla. Stat. (1997) "Reuse of Reclaimed Water" states: "The encouragement and promotion of water conservation and reuse of reclaimed water . . . are state objectives considered to be in the public interest."

The County has followed this legislative directive and allocated and implemented costs in a reasonable manner for its reclaimed water project pursuant to §403.064(9), based on extensive input from the public and expert consultants. (AP-S-26,29) Again, the Availability Charge is in harmony with the Legislature's directive to use reclaimed water under § 373.250 and § 403.064, Fla. Stat.

The trial court found that the mandatory nature of the Availability Charge made it a tax, as opposed to a "voluntary user fee." (AP-R-6) The County Commission determined that the Availability Charge should be compulsory in order to further the health and welfare of its citizens through the reclaimed water program. (AP-X). The mandatory nature of such a fee is specifically contemplated by the Legislature in the legislation which the County relied upon, for the implementation of the Availability

Charge. *See* §180.02(3), Fla. Stat. (1997). The Legislature provided for mandatory connections to water and sewer supplies, including reclaimed water systems:

> ". . . It is lawful for such a municipality to create a zone or area . . . **requiring all persons or corporations living or doing business with said area to connect**, when available, with any sewerage system or alternative water supply system, including, but not limited to, reclaimed water . . ."

§180.02(3), Fla. Stat. (emphasis supplied). The Legislature has found it in the public interest to provide for mandatory use of reclaimed water as part of municipal water systems in §180.02(3). Standing alone, §180.02(3) is compelling authority for validation of the bonds because it so clearly indicates the State's policy of mandatory zones for reclaimed water connections.

Chapter 180 is applicable to this case because, as a charter county, the County has all the powers of a municipality, including the powers under §180.02(3), and thus has the authority to create a mandatory reclaimed water service area. *State ex rel Volusia County v. Dickinson*, 269 So.2d 9 (Fla. 1972). In *Dickinson*, this Court considered whether Volusia County, as a charter county, had the power to levy an excise tax in the county. In answering the question in the affirmative, the Court noted the functional equivalence of municipalities and charter counties for taxation purposes:

> When §1(g), Article VIII and §9(a), Article VII are read together, it will be noted that charter counties and municipalities are placed in the same category for all practical purposes. That upon a county becoming a charter

> county it automatically becomes a metropolitan entity for self-government purposes. This is so because §1(g) of Article VIII provides a charter county 'shall have all powers of local self-government not inconsistent with general law . . . . The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law.' This all inclusive language unquestionably vests in a charter county the authority to levy any tax not inconsistent with general or special law as is permitted municipalities.

Dickinson, supra, 269 So.2d at 10-11. *See also McLeod v. Orange County*, 645 So.2d 411 (Fla. 1994) (affirming validation of bond issue and confirming three county ordinances of charter county; charter counties have "authority to levy any tax that a municipality may impose."); *State v. Broward County, supra* (broad powers of charter counties not merely limited to taxing power but also include those powers granted municipalities § 166.111, Fla. Stat.) Thus, the Availability Charge is a fee consistent with the provision in §180.02(3) for mandatory connections to reclaimed water systems which the County, as a charter county, is authorized to require for its water program.

This Court recognized the importance of statutory authority for governmental fees in its holding in *Port Orange*, noting that unlike permitted mandatory fees such as stormwater fees or various municipal public works and charges for their use authorized by Chapter 180, the City's "transportation utility fee" was without statutory or constitutional authority. *Port Orange, supra,* 650 So.2d at 4; *Collier County v. State, supra*, (county may assess taxes authorized by Legislature, as well as special assessments

and user fees). The various statutory authorizations provide a critical distinction between the County's Availability Charge and *Port Orange's* "transportation utility fee" that the trial court failed to address. The Legislature has authorized both the development of reclaimed water systems and mandatory reclaimed water connections, which the trial court ignored in its denial of the validation of the bonds. As such, the County's Availability Charge is properly levied under general law, and should be upheld by this Court.

CONCLUSION

For all of the foregoing reasons, the trial court's decision in refusing to validate the bonds should be reversed. This Court should enter an Order validating the bonds and dismissing the claims of the Beach Cities with prejudice.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to Lee Wm. Atkinson, Esquire, Tew, Zinober, Barnes, Zimmet & Unice, 2655 McCormick Drive, Prestige Professional Park, Clearwater, Florida 33759, and Marie C. King, State Attorney's Office, P.O. Box 5028, Clearwater, Florida 34618-5028, this the 3rd day of September, 1999.

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Grace E. Dunlap

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August 31, 1999

CERTIFICATION

The undersigned does hereby certify that this Brief used 14 point Times New Roman type and does hereby comply with Rule 9.210(a)(2), Florida Rules of Appellate Procedure and the Administrative Order of this Court dated July 13, 1998.

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Grace E. Dunlap