IN THE SUPREME COURT OF FLORIDA

CITY OF GAINESVILLE, FLORIDA,

Appellant,

vs.

Case No. SC02-1696
Lower Case No. 2001-CA-004478

STATE OF FLORIDA, ET AL.

Appellees.
_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ALACHUA COUNTY
STATE OF FLORIDA
CIRCUIT CIVIL NO. 2001-CA-004478

BRIEF OF AMICUS, CITY OF LARGO, FLORIDA, IN SUPPORT OF APPELLANT, CITY OF GAINESVILLE, FLORIDA

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STATEMENT OF THE CASE AND FACTS

The *amicus curiae*, the City of Largo, Florida, accepts the statement of the case and facts filed by Appellant, City of Gainesville, Florida.[1] Largo, a municipality located in Pinellas County, has enacted and charges a stormwater utility fee. Largo files this amicus brief to address only the issue of whether the stormwater utility fee imposed by the City of Gainesville is a valid user fee. If Largo's stormwater utility fee is deemed a special assessment and not a user fee in accordance with the lower court's ruling in this case, a number of developed properties in Largo will be exempted from paying Largo's fee.

SUMMARY OF ARGUMENT

Revenues from stormwater utility fees imposed against owners of developed property by the City of Gainesville are used for the sole and only purpose of paying the cost of construction, operation, repair, maintenance, and improvement of a utility system to manage stormwater. Undeveloped property owners are not subject to the fees and developed property owners may elect not to pay the City's stormwater fee by retaining the stormwater on site. Those who retain some stormwater on site are entitled to a credit. This

[1]In this brief, the Appellant, City of Gainesville, will be referred to as "City". The Appellee, Florida Department of Transportation, will be referred to as "FDOT". The amicus, the City of Largo, Florida will be referred to as "Largo".

voluntary nature of the fee and the restricted use of revenues are characteristic of a proper user fee under Florida law.

Moreover, the City's use of rates based on average impervious area of a typical single-family residential property is consistent with Florida law, which allows user fees to be based on the cost of making the system available or to be based on estimates and flat or minimum fees. Thus, since the City's stormwater fee is proper, the circuit court's Order dismissing the City's Bond Validation Complaint must be reversed.

ARGUMENT

I. INTRODUCTION.

In 1986, the Florida legislature began to require local governments, including municipalities, to establish programs to manage stormwater and to include such programs in their local comprehensive plans. Section 403.0891, Fla. Sta. In order to plan, construct, operate, and maintain a stormwater management system under this new requirement, Section 403.0893(1), Florida Statutes allows a local government to create one or more "stormwater utilities" and adopt "stormwater utility fees," in addition to any other funding mechanism legally available. A "stormwater utility," under Section 403.031(17), funds the stormwater management program "by assessing the cost of the program

to the beneficiaries based on their relative contribution to its need." In response, many Florida cities have adopted stormwater utility fees to provide funding for maintenance of and capital improvements to stormwater utility systems.

The circuit court, in dismissing the City of Gainesville's Supplemental Bond Validation Complaint, found that the City's Stormwater Management Utility Ordinance violates Section 403.031(17), Florida Statutes because the fees imposed by the Ordinance are computed unlawfully. In rendering this holding, the circuit court interprets Section 403.031(17) as requiring the City "to compute the fees charged for its services based on the amount of stormwater a customer puts into the system." The circuit court also found that the City's stormwater fee was involuntary since persons being charged a fee, such as tenants of multi-family dwellings, do not have the option of not incurring the fee.

The holding by the lower court ignores obvious characteristics of the City's stormwater utility ordinance that are hallmarks of a proper user fee under Florida law. For example, the holding fails to address the fact that the City's use of revenues from stormwater utility fees is properly limited to funding of maintenance and operation of the stormwater system, rather than for general City revenue. In addition, because property owners within the City may

elect not to pay the fee by properly retaining stormwater on site, the voluntary nature of the City's charge is a strong indication that it is a proper user fee.

In requiring the City to calculate stormwater fees based on the amount a property owner puts into the system, the circuit court also ignores well-established case law that permits the establishment of utility rates based on a number of factors unrelated to a customer's contribution to a utility system. For example, Florida courts have upheld utility fees based on the cost of making the system available to potential users of the system without regard to whether the customer actually uses or desires to use the service. Utility fees based on reasonable estimates of usage, as opposed to actual use, also have been held to be lawful. Flat fees and minimum fees–both of which do not require close measurement of actual use of the system–have been found to be proper as well. Moreover, in redefining how the City's stormwater utility fee may be calculated, the circuit court improperly interferes with the City's broad authority to establish utility rates. Thus, because the City's stormwater utility fee is proper, the circuit court's dismissal of the City's Supplemental Complaint must be reversed as a matter of law.

A. Stormwater fees, such as the stormwater utility fee imposed by the City of Gainesville, which are voluntary and are used solely for the purpose of maintaining and operating a utility, are proper user fees.

This Court has had the occasion to address, at length, the different characteristics of a valid user fee as compared with a tax in fee's clothing. *See* Collier County v. State, 733 So.2d 1012 (Fla. 1999). An important characteristic of a proper user fee, the courts have found, is whether revenues from the fee are used solely for construction, maintenance, and operation of the utility as opposed to general revenue raising purposes. Id. Fees which are used to defray the operating cost of a government to exercise its sovereign functions as a whole, are considered a tax. Id. at 1019. Thus, fees used to pay for services such as law enforcement, courts, libraries, or similar type benefits are impermissible because the services to be funded provide no direct benefit to the property. Id. at 1016. On the contrary, fees which provide a source for capital improvements to existing facilities instead of defraying costs of operating in the exercise of sovereign functions are proper. Alachua County v. State, 737 So.2d 1065, 1069 (Fla. 1999).

Cities, such as the City of Gainesville, deposit all revenue collected from the stormwater utility fees into a stormwater utility trust account. The account is used only to fund the

stormwater management utility and is not used to fund general exercises of sovereign powers. This is a hallmark of a proper user fee which the circuit court ignored.

The lower court's holding also fails to take into consideration the voluntary nature of the City's ordinance. Under the clear terms of the City's ordinance, a stormwater fee is not charged for undeveloped land, for property that does not drain stormwater into the City's system, or for property that retains its stormwater on site. On the contrary, if the property owner elects to send stormwater into the City's stormwater management system, then a stormwater fee may be imposed. Additionally, under a credit system, a property owner is only incrementally liable for stormwater fees if the owner partially retains stormwater on site. Thus, because a property owner may opt not to pay the fee by not using the City's system to manage stormwater generated by development on the property, the City's fee is lawful. Fees paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoid the charge, are by definition proper user fees. State v. City of Port Orange, 650 So.2d 1, 3 (Fla. 1995).

B. Florida law does not require utility user fees to be calculated strictly based on the amount of actual use of the utility–availability to the utility is sufficient "use" in order to confer a special benefit to the party paying the fee.

An important characteristic of a proper user fee, this Court has found, is a fee that is "charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society." City of Port Orange, 650 So.2d 1. What constitutes a special benefit to those paying the fee has been broadly defined. An example particularly applicable to stormwater utility fees is the Availability Charge imposed by Pinellas County, which was addressed in one of the most recent cases on this issue, Pinellas County v. State, 776 So.2d 262 (Fla. 2001).

The controversy in that case began when Pinellas County proposed to incorporate into its existing water and sewer facilities a reclaimed water service component. The reclaimed water service would dispose of the system's wastewater in an environmentally acceptable manner by making treated, non-potable water available to those portions of the County's service area which had been selected as being suited for utilization of reclaimed water for irrigation and other non-potable uses. The County proposed to fund the reclaimed water service with sewer

revenue bonds, and to pledge, as partial security for the bonds, the proceeds to be obtained from a proposed "Availability Charge." This charge would apply only to those properties in the service area to which the new facilities would extend, allowing, but not requiring, customers in the area to access the reclaimed water service. Those properties having pre-existing wells were to be exempt from reclaimed water service fees, while properties electing to use the reclaimed water would be subject to additional connection charges and fees based upon usage.

This Court found that the County's Availability Charge, which had no connection to actual usage of reclaimed water, nevertheless had "all of the earmarks of a valid utility facilities user fee." Pinellas County, 776 So.2d at 267. In so holding, the Court specifically held that there is no question that the Availability Charge provides a special benefit to those paying the fee, which is the unlimited **access to**, as opposed to usage of, reclaimed water for non-potable, outdoor uses. Id. The unlimited access to the reclaimed water, the Court concluded, was a benefit which is not shared by persons not required to pay the fee. Id. at 267-268. The Court thus rejected the trial court's conclusion 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. Id. This Court found the trial court's holding on what constitutes a special benefit to be "too narrow." Id. at 268.

Thus, the element of special benefit is not tied only to whether an individual customer actually uses or desires to use the service. Instead, special benefit is conferred by the mere availability of use of the utility system. On this point, the case of Town of Redington Shores v. Redington Towers, Inc., 354 So.2d 942 (Fla. 2d DCA 1978), is also instructive. In that case, owners of a condominium apartment building filed an action seeking a declaration of its rights with regard to sewage and garbage service charges assessed by the Town of Redington Shores. The sole point presented on appeal was whether the trial court correctly found that sewer charges may not be assessed on unoccupied, unused units in the condominium building, even though the building was connected to the sewer system. The trial court had ruled that 89 unoccupied units were not in any way benefitted by the Town's sewer system and were not required to pay sewer charges. The Second District Court of Appeal disagreed, however, holding that the unoccupied units were subject to the charges which, the court concluded, were reasonably related to the value received from "the service rendered

either as actually consumed or as readily available for use." Town of Redington Shores, 354 So.2d at 943-944. This is because "it is not necessary to restrict the term 'use' to flow of sewage." Id. at 944. Instead, the realities of sewer maintenance and financing require that the **availability** of sewer services be interpreted as tantamount to actual use. Id. [Emphasis added.]

The nexus between sewer systems and stormwater management systems makes them equivalent for purposes of construing applicable fees. *See* Pinellas County, 776 So.2d at 269, FN 10. In fact, the Florida legislature specifically mandates that a stormwater utility be operated as a typical utility which bills services regularly, similar to water and wastewater services. Section 403.031(17), Fla. Sta. Sewer and stormwater utilities are particularly similar because, like sewerage, stormwater cannot be physically metered in such a way as to render an accurate measurement of input into the system. Thus, like the Pinellas County Availability Charge and the Town of Redington Shores' sewage and garbage service charges, stormwater utility fees are not required to be tied only to actual **input** into the stormwater management system, but may be based on the cost of making the system **available** to potential users of the system. Thus, the fact that a developed property owner, such as the Florida Department of Transportation, has unlimited ability to

use the stormwater management system is sufficient special benefit, even if it does not actually use, or desires to use, the system. To hold to the contrary, as the circuit court did, would not take into consideration the unique realities of maintaining and financing a stormwater management system. These realities were recognized by the legislature in drafting Section 403.031(17), which did not require local governments to charge based only on a strict measurement of use, but allowed fees based on relative contribution to the need of the system as a whole. As the case law authorizes, it is not necessary to restrict the notion of "use" to actual flow into the stormwater system. Where a governmental entity provides **access** to traditional utility services, this Court has not hesitated to find mandatory fees to be lawful user fees **regardless of whether an individual customer actually uses or desires the service**.[2] Pinellas County, 776 So.2d at 268. Thus, the circuit court's holding requiring the City to calculate stormwater fees based precisely on input into the system is too narrow and must be reversed.

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[2]The City of Gainesville fee is subject to even less challenge since it allows a property owner to be exempt from the charge by retaining the stormwater attributable to the development on site, and the City does not impose a mandatory fee.

C. Florida law allows utility fees to be based on reasonable estimates of use, flat or minimum charges, and differential rates depending on the type of property.

A large part of the challenge by the FDOT to the City of Gainesville's stormwater utility fee is the argument that the fee is not directly tied to the cost of the program, as required by Section 403.031(17), Florida Statutes. FDOT also argues that although its various developed properties receive different levels of stormwater benefits, it is not assessed at different rates. Instead, under the specific terms of Gainesville's Ordinance, as with many if not all cities that impose a stormwater utility fee, the City charges for use and discharge to the City's stormwater management system based on a three-tiered system depending on the class of development. Differential rates are set based on either an average estimated impervious surface area for residential properties or an actual measurement of impervious and retention areas for commercial properties.

FDOT's challenges to the City's fees are misplaced because the courts of this state have long held that utility fees based on an estimate of usage, flat or minimum charges, or differential charges based on the type of property, are all lawful user fees.

With regard to the use of estimates to set utility rates, the Fourth District Court of Appeal properly has determined that

stormwater utility fees may be based on estimates of impervious surface area in Atlantic Gulf Communities Corp., v. the City of Port St. Lucie, 764 So.2d 14 (Fla. 4th DCA 1999). In that case, the City of Port St. Lucie found that the typical residential lot had 11,745 square feet of total area and that the typical home on such lot had 2,280 square feet of impervious surface area. This typical home and lot were designated as the equivalent residential unit ("ERU") within the city, and the ERU was implemented as the basic billing unit for stormwater utilities. Once the city determined the amount of the stormwater utility budget for a given year, the total budget was divided by the total number of ERUs in the system and each property owner was billed for the number of ERUs assigned to the owner's parcel multiplied by the applicable dollar per ERU charge. The largest owner of vacant and undeveloped property in the city filed a declaratory action against the city, challenging the validity of the stormwater utility code. Although the trial court struck portions of the city's stormwater policy, the majority of the city's ordinance, including those portions establishing rates based on estimated impervious areas, was found not to be arbitrary, capricious, unreasonable, or in direct conflict with Chapter 403. Atlantic Gulf Communities Corp., 764 So.2d at 17.

The city's stormwater utility thus could use non-ad valorem assessments to collect the fee.

Like fees based on estimates of use, Florida courts have also consistently held as lawful fees based on different classes of users. For example, in the case of State v. City of Miami Springs, 235 So.2d 80 (Fla. 1971), the city passed a sewer ordinance which charged a flat rate of $7.00 per month for single family residences, without regard to use, and a variable rate based on actual use for all other users. This Court found that this fee was a lawful user fee and that these classifications were not unreasonable, arbitrary, or in conflict with the state or federal constitutions or laws. City of Miami Springs, 235 So.2d at 81. The courts in this state also have upheld flat or minimum fees as lawful and have rejected arguments that such fees must require proof of contribution to the utility system and distinguish between occupied and unoccupied premises. Stone v. Town of Mexico Beach, 348 So.2d 40 (Fla. 1st DCA 1977) (flat garbage collection fee for residential owners under the age of 65 years at $3.50 per month and which did not distinguish between occupied and unoccupied premises or require proof of any production of garbage held to be constitutional). Thus, utility customers may be lawfully charged for utility usage based on a flat rate. Utility charges need not

be precisely based on actual usage measured by some meter to be valid user fees. Contractor and Builders Association of Pinellas County, 329 So.2d 314 (Fla. 1976) (differential utility rates and charges may be "just and equitable" notwithstanding the differential).

The rationale for allowing fees based on estimates, differential rates depending on class of property, and flat or minimum fees recognizes the inherent difficulty in calculating fees for some municipal services based on exact usage. Thus, accepted user fees, such as parking, highway access, sewage, and beach or park access, have been imposed by local governments as minimum parking charges, flat toll fees, or flat admission fees. As another example, many cities charge a flat fee for use of services, such as reclaimed water or charge for sewer based on a percentage of the amount of water used.[3] In each of these instances, there is no way to calculate a precise fee measured exactly by usage since these services cannot be metered or otherwise measured. Nevertheless, these types of charges have been upheld as valid user fees. City of New Smyrna Beach v. Board of Trustees, 543 So.2d 824 (Fla. 5th DCA 1989) (fees charged for each vehicle operating on beach for beach maintenance reasonable).

[3]Amicus, City of Largo, charges a flat fee of $10 per month for reclaimed water usage.

More importantly, Florida courts have recognized that user fees may do more than simply cover the cost of providing services but may take into account the cost of future expansion of the utility. By way of example, a fee charged to new users as a precondition for municipal water and sewerage service by the City of Dunedin was held to be a lawful user fee even though the avowed purpose of the charge was to raise money in order to expand the water and sewerage systems as a whole, so as to meet the increased demand which additional connections to the system were anticipated to create. Contractor and Builders Association, 329 So.2d 314. In rejecting the new users' argument that the fee was an impermissible tax, this Court held that:

> Water and sewer rates and charges do not cease to be just and equitable merely because they are set high enough to meet the system's capital requirements, as well as to defray operating expenses. We see no reason to require that a municipality resort to deficit financing, in order to raise capital by means of utility rates and charges. **On the contrary, sound public policy militates against any such inflexibility.** [Emphasis added.]

Contractors and Builders Association, 329 So.2d at 319-320.

In upholding fees based on calculations other than strictly usage, the courts are recognizing the broad authority given to cities to establish their own rates for municipal utilities' charges. City of Riviera Beach v. Martinique 2 Owners Ass'n., 596 So.2d 1164, 1165 (Fla. 4th DCA 1992). User fees are in fact charges

based upon the proprietary right of the governing body permitting the use of the instrumentality involved. State v. City of Port Orange, 650 So.2d 1, 3 (Fla. 1994). Thus, the circuit court's attempt to limit the City of Gainesville to a stormwater utility rate calculated only precisely on the basis of contribution to the system improperly limits this inherent governmental authority and must be reversed.

II. CONCLUSION

Based on the foregoing, the circuit court's dismissal of the City of Gainesville's Bond Validation Complaint must be reversed and this Court should find that stormwater utility fees, such as that imposed by the City of Gainesville, are lawful user fees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Elizabeth Ann Waratuke, Esquire and Marion J. Radson, Esquire, City of Gainesville, Office of the City Attorney, P. O. Box 1110, Gainesville, Florida 32602; Marianne Aubel Trussell, Esquire, Haydon, Burns Building, MS58, 605 Suwanne Street, Tallahasse, Florida 32399-0458; and Lee C. Libby, Esquire, State Attorney's Office, 8th Judicial Circuit, P. O. Box 1437, Gainesville, Florida 32602, this ___ day of November, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing satisfies the requirements of Florida Rules of Appellate Procedure 9.100.

_____

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