IN THE SUPREME COURT OF FLORIDA

CITY OF GAINESVILLE,
FLORIDA,

Appellant, CASE NO: SC02-1696
BOND VALIDATION PROCEEDING

v.

THE STATE OF FLORIDA, et al,

Appellee,

And

THE STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION,

Intervenors.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR ALACHUA COUNTY, FLORIDA
Case No.2001-CA-004478

INITIAL BRIEF OF AMICUS,CITY OF TALLAHASSEE, IN SUPPORT OF APPELLANT, CITY OF GAINESVILLE, FLORIDA

JAMES R. ENGLISH
City Attorney
Florida Bar No. 0191895
LINDA R. HURST
Assistant City Attorney
Florida Bar No. 483151
City Attorney's Office
City Hall/300 S. Adams St.
Tallahassee, Florida 32301
(850) 891-8554

TABLE OF CONTENTS

Page #s:

TABLE OF AUTHORITIES i

PRELIMINARY STATEMENT 1

STATEMENT OF THE FACTS 3

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. SCOPE OF REVIEW 5

II. Participation in Gainesville's stormwater utility is voluntary. 6

III. Gainesville's stormwater utility fees are properly computed. 9

CONCLUSION 14

CERTIFICATE OF SERVICE 15

CERTIFICATE OF COMPLIANCE 16

INDEX TO TALLAHASSEE'S APPENDIX 17

TABLE OF AUTHORITIES

Cases: **Page #:**

City of Gainesville v. State of Florida, Department of Transportation, 778 So. 2d 519 (Fla. 1st DCA 2001) ---------- 6,8,12

City of New Smyrna Beach v. Fish, 384 So. 2d 1272 (Fla. 1980) ---------- 10,11

City of Winter Springs v. State of Florida, 776 So.2d 255 (Fla. 2001)---------- 5,10

Meyer v. City of Oakland Park, 219 So.2d 417 (Fla. 1969) ---------- 11

Pinellas County v. State, 776 So.2d 262 (Fla. 2001) ---------- 8,9,10

State v. Family Bank of Hallandale, 623 So.2d 474 (Fla. 1993) ---------- 12

Turner v. City of Clearwater, 789 So.2d 273 (Fla. 2001) ---------- 5

Statutes:

Sec. 403.021 (1), Fla. Stat. (2001) --------- 13

Sec. 403.031 (17), Fla. Stat. (1998) -------- 4

Sec. 403.0891, Fla. Stat. (2001) ---------- 13

Sec. 403.0893, Fla. Stat. (1998) ---------- 15

Other Authorities:

Op. Att'y Gen. Fla. 97-70 (1997) ---------- 12

Other Materials:

A Report to the Governor and the Legislature On the Allocation of Total Maximum Daily Loads in Florida ---------- 13

Florida Department of Environmental
Protection web site ---------- 13

The Stormwater Utility, a brochure published
by the Florida Department of
Environmental Regulation ---------- 13

PRELIMINARY STATEMENT

This case raises issues of grave concern to all local governments in Florida that have established a stormwater utility funded by user fees. In Sec. 403.021, Fla. Stat. (1998), the Legislature directs local governments to "conserve the waters of the state and to protect, maintain, and improve the quality thereof."

Many counties and municipalities in Florida have chosen to fulfill this mandate by creating a stormwater utility. These stormwater utilities provide services in much the same manner as other utilities, such as garbage disposal, electricity, water, and sewer. The trial court's ruling in this case jeopardizes each and every stormwater utility in Florida that is set up as a true utility, and could impact the more traditional utilities as well.

The trial court's ruling endangers the funding of the stormwater management systems that are attempting to control and treat polluted stormwater to prevent pollution from reaching the waters of the state, waters that are important to the state for the health of Florida citizens. If the trial court's ruling stands, local governments' efforts to implement the legislative directive to protect the waters of the state will be undermined. This case, if not reversed,

will establish a precedent that will be used by owners of properties across the state of Florida to challenge the validity of other stormwater utilities. This brief supplements the well-reasoned brief filed by the appellant, City of Gainesville. Citations to the appellant's appendix will be to the document number and page number, if necessary, as follows: (Gainesville App. __ at page ___). Citations to Tallahassee's Appendix will be to the tab number and page number as follows: (Tallahassee App. Tab __, pg. __). The appellant, City of Gainesville, will be referred to as "Gainesville". The appellee, Florida Department of Transportation, will be referred to as "FDOT". The appellee, State of Florida, will be referred to as "State". The amicus, City of Tallahassee, will be referred to as "Tallahassee."

STATEMENT OF THE FACTS

Amicus, Tallahassee, adopts Appellant, City of Gainesville's, Statement of the Facts.

SUMMARY OF ARGUMENT

The ruling at issue was entered at the end of a bench trial on Gainesville's Supplemental Complaint. (Gainesville App. 4) The trial court granted the appellees' motions to dismiss, which had been taken under advisement at the end of Gainesville's case in chief. (Gainesville App. 5 at page 189)

The trial court finds that Gainesville's stormwater ordinance violates Section 403.031 (17), Florida Statutes, which defines "stormwater utility", because the fees imposed by Gainesville are not "based upon the amount of stormwater a customer contributes to the system" and are not voluntary because "tenants of multi-family dwellings" have no option to avoid the fee. (Gainesville App. 1) The trial court erred on both points.

The ruling should be overturned not only for the reasons set forth in Gainesville's brief, but also because the trial court erred by failing to attach a presumption of correctness to the legislative findings in Gainesville's stormwater ordinance. The trial court's failure to attach the presumption of correction to Gainesville's ordinance is an unsettling precedent for all legislative actions by local governments in Florida.

ARGUMENT

I. Scope of Review

The Court's scope of review in bond validation cases, as outlined in many cases from this Court, is limited to: (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, for example, *City of Winter Springs v. State of Florida,* 776 So.2d 255, 257 (Fla. 2001).

Gainesville's authority to issue revenue bonds for its stormwater utility is at issue. Unless this Court overturns the trial court's ruling that Gainesville's stormwater utility ordinance is invalid (Gainesville App. 1), not only will Gainesville be unable to issue the revenue bonds necessary to support its stormwater utility system, but also the rest of the State's stormwater utilities that are funded by user's fees are at risk.

In reviewing the trial court's refusal to validate Gainesville's revenue bonds, the Court must consider whether the evidence supports the trial court's decision. *Turner v. City of Clearwater*, 789 So.2d 273, 279 (Fla. 2001). Unless Gainesville's action authorizing revenue bonds to improve

its stormwater utility is arbitrary, the action is entitled to a presumption of correctness. *Winter Springs,* 776 So.2d at 257.

II. <u>Participation in Gainesville's stormwater utility is voluntary.</u>

The trial court erred in ruling that the Gainesville ordinance is invalid because it is not voluntary. In *City of Gainesville v. State of Florida, Department of Transportation,* 778 So.2d 519 (Fla. 1st DCA 2001) (Hereinafter referred to as Gainesville #1), the First District Court of Appeal considered FDOT's argument that the Gainesville ordinance sets up an assessment, not a valid utility. The First District Court of Appeal stated as follows: **"[W]e hold that the ordinance at issue here, if it operates as the City has alleged, imposes utility service fees rather than special assessments."** (emphasis added) *Id*. at 527. The record in this case demonstrates that the Gainesville ordinance creates a valid municipal utility.

The fees for the system are based on how much polluted stormwater is put into the Gainesville system. (Gainesville App. 13, 5 at pages 35-39) Each nonresidential property has been "ground-proofed", that is, actually inspected to determine the amount of impervious area that drains into the

Gainesville system. (Gainesville App. 5 at page 40) Residential properties were not individually inspected; rather, an average Equivalent Residential Unit (ERU) was set for most residences in Gainesville. (Gainesville App. 5 at page 42) This system of setting stormwater utility fees is common throughout Florida for municipalities that choose to fund their stormwater systems through the user fee option rather than assessments or special benefit units.

The testimony of Gainesville's expert, Teresa Scott, Gainesville Public Works Director, demonstrates that Gainesville's system fits the definition of a traditional municipal utility. (Gainesville App. 5, pages 29-108) Those who pay the fees benefit from the service, and use of the utility is voluntary. Citizens who feel they are being charged improperly may appeal, as provided by the Gainesville ordinance. (Gainesville App. 5 at pages 48-49)

As Gainesville repeatedly shows, the utility fees are voluntary because they can be avoided by retaining stormwater on site. The fact that individual apartment dwellers are billed for the stormwater fee is insufficient to render the ordinance invalid. In ruling that the fee is involuntary because some apartment dwellers cannot avoid the fee, the trial court erred as a matter of law.

Developers of multi-family housing decide whether to send stormwater into the City's system at the time the complex is constructed. Other similar decisions are made at that time also. For example, a developer may choose a master water meter for water service for the apartment complex rather than individual meters, requiring the landlord to bill the tenants for the water and sewer service rather than the City.

It is common knowledge that when a tenant decides which apartment complex to live in, the tenant reviews the rental fee and other charges to be paid. If he/she does not want to pay the fees, including a stormwater fee, he or she may choose another apartment complex. In that sense, the payment is voluntary.

This Court has recently indicated that whether connection to a utility service is voluntary is not dispositive of whether the fee is a user fee or a special assessment. *Gainesville,* 778 So.2d at 527*, citing Pinellas County v. State*, 776 So.2d 262 (Fla. 2001), in which this Court stated "where a governmental entity provides access to traditional utility services, this Court has not hesitated to uphold local ordinances imposing mandatory fees, regardless of whether an individual customer actually uses

or desires the service." *Pinellas County*, 776 So.2d at 268.

Pinellas County is instructive on the issue of voluntariness. It, like the instant case, was an appeal from a circuit court order denying validation of proposed revenue bonds. The Pinellas County bonds were to be used to fund a reclaimed water service system. *Id.* at 264. Funds from an "Availability Charge" to be paid by users of the reclaimed water would be pledged as security for the bonds. The trial court found in the bond validation proceedings, that the Availability Charge was a tax, not a user fee.

This Court reversed, finding the Availability Charge to be a valid utility facilities user fee because (1) the Availability Charge provided a special benefit to those paying the fee, and (2) the trial court's focus was too narrow in finding that the fee was not voluntary. *Id.* at 268. This Court found that although the municipalities that used the water service system that included the reclaimed water component could not choose to refuse the reclaimed water component, the program was still voluntary because "the 'voluntary choice' was made by all customers within the served municipalities when they opted either to receive the integrated water service or not." *Id.*

In the same sense, an apartment dweller makes the "voluntary choice" to pay the stormwater fee when he/she opts to live in an apartment complex that drains into the Gainesville stormwater management system.

III. Gainesville's stormwater utility fees are properly computed.

The trial court also erred in ruling that the Gainesville fee is incorrectly computed. By ruling that Gainesville's "fees are not charged based upon the amount of stormwater a customer contributes to the system," the trial court holds Gainesville to an impossible standard of precision in measuring the amounts of stormwater flowing into its management system. Such precision is not required in a municipal utility. *Pinellas County*, 776 So.2d at 268-69.

This issue is capably covered by Gainesville in its initial brief filed herein. As a municipality, Tallahassee is concerned that the trial court's ruling would impact not only similar municipal stormwater systems across the state, but also other municipal services that are funded by similar flat rates, such as sewer services and garbage collection.

This Court's reasoning in *City of New Smyrna Beach v. Fish*, 384 So.2d 1272 (Fla. 1980), a case challenging

garbage and trash collection rights and fees, is persuasive in the instant matter. The Court states that a municipality has the right to put utility consumers under reasonable classifications based upon such factors as:

> "the cost of service, the purpose for which the service … is received, the quantity or the amount received, the different character of the service furnished, the time of its use or any other matter which presents a substantial difference as a gound of distinction."

Id. at 1274. The Court further states that since garbage output produced by a condominium and a single-family residence may not vary to a large degree, a flat fee is both just and equitable. The same reasoning would apply to stormwater runoff in the instant case.

Gainesville's ordinance is entitled to a presumption of correctness in this matter. *Winter Springs,* 776 So.2d at 258. By substituting its own judgment for that of Gainesville's locally elected officials, and failing to attach a presumption of correctness to the legislative determination, the trial court erred as a matter of law. *Id.*

Without a clear showing that Gainesville's findings in its stormwater management ordinance are arbitrary, oppressive, discriminatory or without basis in reason or justification, the ordinance should stand. *New Smyrna*

Beach, 384 So.2d at 1276. The fee methodology in the Gainesville ordinance is valid and reasonable, and is based upon legitimate distinctions between the fee payers. *Id.*

There is no evidence in the record before this Court to overcome the presumption of correctness to which Gainesville is entitled. The appellees failed to present any evidence that the ordinance is unreasonable or that the legislative findings therein are arbitrary. Likewise, the trial court made no such findings in the final order. (Gainesville App. 1) Gainesville's ordinance was a legislative function; if reasonable men may differ as to the method used for fee calculations, the determination of the city's officials should be upheld. *Cf. Meyer v. City of Oakland Park,* 219 So.2d 417, 420 (Fla. 1969).

The Florida Department of Transportation (FDOT) is attempting a third bite at this apple. First, **at FDOT's request**, the Attorney General issued an opinion expressly finding that Gainesville's stormwater utility fees are proper user fees and may be lawfully levied against FDOT. Although not binding on the Court, the Attorney General's opinion is entitled to careful consideration. Especially since the opinion is on the precise issue before the Court, it should be regarded as highly persuasive. Op. Att'y Gen.

Fla. 97-70 (1997); *State v. Family Bank of Hallandale*, 623 So.2d 474, 478 (Fla. 1993).

Then, in Gainesville #1, FDOT claimed that Gainesville's fees represented an unlawful special assessment against the State of Florida. *Gainesville,* 778 So.2d at 519. As stated above, the First District Court of Appeal found that if Gainesville's ordinance operates as alleged, it imposes valid utility service fees (rather than special assessments), which FDOT should pay. *Id.* at 527.

Now, in the instant case, FDOT attempts for the third time to avoid paying Gainesville for use of its stormwater management system. If FDOT succeeds in this case, it will negatively affect every municipality in the state with a stormwater management system funded by user fees.

It is ironic that a state agency is undermining efforts not only of local governments, but also of the environmental arm of the State, to meet the legislative mandate in Sec. 403.0891, Fla. Stat. The statute requires that the Florida Department of Environmental Protection (FDEP) work with local governments to develop mutually compatible stormwater management programs to address the menace to public health and welfare by polluted stormwater. See Sec. 403.021(1), Fla. Stat. (2001)

On its web site (www.dep.state.fl.us), FDEP emphasizes the importance of local governments in addressing urban stormwater pollution. (Tallahassee App. 1) It stresses that over 95 cities and counties in the state have established stormwater utilities to fund stormwater programs throughout Florida. In a report to the Governor and Legislature on a program to reduce pollutants in water bodies within the state, FDEP emphasized the importance of stormwater utility fees to fund the program. (Tallahassee App. 2) Finally, in a brochure published by FDEP's predecessor agency, the Florida Department of Environmental Regulation touted stormwater utility programs such as Gainesville's as "innovative alternatives", mentioning specifically that charges would be determined according to the parcel's size and its percent of impervious or paved area. (Tallahassee App. 3)

On the one hand, the State, through FDEP, is encouraging local governments to set up stormwater utilities such as the Gainesville program. On the other hand, the State, through FDOT, is attacking the very system previously encouraged as an innovative alternative.

CONCLUSION

To aid local governments throughout the State in implementing the legislative mandate to manage polluted stormwater, the Court is requested to recognize the presumption of correctness due Gainesville's legislation and to recognize that Gainesville's stormwater utility is a valid utility under Sec. 403.0893, Fla. Stat. (1998). The trial court's order should be reversed, and the case remanded with instructions for the trial court to validate the revenue bonds sought by Gainesville.

Respectfully submitted,

_____
JAMES R. ENGLISH
City Attorney
Florida Bar No. 0191895
LINDA R. HURST
Assistant City Attorney
Florida Bar No. 483151
City Attorney's Office
City Hall/300 S. Adams St.
Tallahassee, Florida 32301
(850) 891-8554
Attorneys for City of Tallahassee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this _____ day of September, 2002, to:

Elizabeth A. Waratuke
Litigation Attorney
City of Gainesville - Office of the City Attorney
Post Office Box 1110
Gainesville, Florida 32602

William Cervone
Lee Libby, Assistant State Attorney
State Attorney's Office, 8th Judicial Circuit
P.O. Box 1437
Gainesville, Florida 32602

Marianne Trussell
Deputy General Counsel
Florida Department of Transportation
605 Suwannee Street, MS 58
Tallahassee, Florida 32399-0458

_____
James R. English

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Fla.R.App.P. 9.210(a)(2) this ____th day of September, 2002.

_____
James R. English

INDEX TO TALLAHASSEE'S APPENDIX

DOCUMENT: **TAB #:**

A Report to the Governor and the Legislature On the Allocation of Total Maximum Daily Loads in Florida ---------- 1

Florida Department of Environmental Protection web site ---------- 2

The Stormwater Utility, a brochure published by the Florida Department of Environmental Regulation ---------- 3