IN THE SUPREME COURT OF FLORIDA

CITY OF GAINESVILLE, FLORIDA, Appellant/Plaintiff, v. THE STATE OF FLORIDA, et al. Appellee/Defendant, and THE FLORIDA DEPARTMENT OF TRANSPORTATION, Intervenors.	:	CASE NO. SC02-1696

This case is an appeal under Rule 9.030(a)(1)(B)(i), Fla.R.Civ.P., from a Final Order issued pursuant to Chapter 75, Fla. Stat., that denied validation of the City's proposed issuance of revenue bonds

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INITIAL BRIEF OF AMICUS CURIAE, FLORIDA LEAGUE OF CITIES, INC.

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STATEMENT OF INTEREST OF AMICUS CURIAE FLORIDA LEAGUE OF CITIES, INC.

The Florida League of Cities, Inc. ("League"), is a voluntary organization whose membership consists of municipalities and other units of local government rendering municipal services in the State of Florida. Under the League's charter, its purpose is to work for the general improvement of municipal government and its efficient administration, and to represent its members before various legislative, executive, and judicial branches of government on issues pertaining to the welfare of its members. The League is particularly interested in the case before this Court regarding the validity of the City of Gainesville's stormwater utility fee.

The issues presented in this case bring directly into question the authority of municipalities to assess user fees in general and stormwater utility fees in particular. User fees are widely employed by municipalities to offset the cost of providing important municipal services to citizens, including necessary utility services. Many municipalities have established stormwater utilities as a means of financing and implementing stormwater management programs which are vital to protecting Florida's water resources. Accordingly, this Court's ruling will affect the governmental interests of every member of the League. Concurrent with the filing of this Brief, the League has filed a motion for leave to file brief as amicus curiae in support of Appellant, City of Gainesville.

REFERENCES

Throughout this Amicus Brief, Appellant City of Gainesville will be referred to as the "City". Appellees, the State of Florida and the Taxpayers, Property Owners and Citizens of the City of Gainesville, Florida, Including Nonresidents Owning Property or Subject to Taxation, Therein represented by the State Attorney's Office, shall be referred to as the "Appellees". Intervenor, the Florida Department of Transportation, shall be referred to as "Intervenor".

The appendix consists of three volumes. Reference to materials contained in the appendix shall be by the letter "V" followed by the volume number, the document number, and, if applicable, the page number.

STATEMENT OF FACTS AND OF THE CASE

The Florida League of Cities concurs with and incorporates by reference the Statement of the Case and Facts set forth in the City's Initial Brief.

SUMMARY OF ARGUMENT

The City of Gainesville is authorized under its home rule powers to establish and fund a stormwater utility. Legislative statutes such as section 403.0893 are relevant only to determine any limitations on a municipality's home rule authority. Section 403.0893 does not express any limitation on the City's

authority; rather, it is supplemental to the City's residual home rule powers to establish and fund a stormwater utility. The only limitation on the City's authority in this case is that the stormwater utility serves a valid municipal purpose and that the stormwater fee constitutes a valid user fee. There is no question that the City's stormwater program serves a municipal purpose because state and federal laws mandate local governments to implement stormwater programs. Contrary to the lower court's conclusions, the stormwater fee is not a special assessment or an unauthorized tax. The amount of the fee is reasonably proportional to the benefits conferred by the City's stormwater program, and the fee otherwise possesses all of the characteristics of a valid user fee.

The Appellees' and Intervenor's argument (with which the Court apparently agreed) that the fee was invalid because it did not measure the precise amount of stormwater runoff from each property is unrealistic. This sort of mathematical precision is not required in order for a user fee to be considered reasonably proportional to the benefit conferred. The lower court's apparent conclusion that a user fee must be voluntary must be rejected. Even assuming the City's utility fee is involuntary (which it is not), this Court and other courts have upheld mandatory user fees, particularly when dealing with utility charges.

The lower court's invalidation of the City's stormwater utility fee by necessary implication calls into question the ability of local governments to fund

stormwater programs, as well as similar services deemed essential to public health and safety. Garbage, water, and sewer fees are all suspect because under the court's rationale they are neither voluntary nor calculated with mathematical precision. Acceptance of Appellees' argument and the lower court's position would not only cripple the operation of stormwater utilities around the state, it would bring into question the validity of scores of wastewater, sewer and garbage charges, as well.

ARGUMENT

I. MUNICIPALITIES POSSESS HOME RULE AUTHORITY TO ESTABLISH STORMWATER UTILITIES AND ASSOCIATED FEES

A municipality is authorized by law to exercise any governmental, corporate, or proprietary power for a municipal purpose that may be exercised by the state legislature except when expressly prohibited by law. The Florida Constitution provides, in part:

> (b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.

Fla. Const. Art. VIII, § 2(b). The Municipal Home Rule Powers Act reaffirms the Constitution's broad grant of municipal home rule authority, and provides in part:

> (1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary

> powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.
> . . . .
>
> (4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited. . . .

Fla. Stat. § 166.021 (2002) (emphasis added). This Court has described the vast breadth of municipal home rule power as follows:

> Article VIII, Section 2, Florida Constitution, expressly grants to every municipality in this state authority to conduct municipal government, or perform municipal functions, and render municipal services. The only limitation on that power is that it must be exercised for a valid "municipal purpose." It would follow that municipalities are not dependent upon the Legislature for further authorization. Legislative statutes are relevant only to determine limitations of authority.

State v. City of Sunrise, 354 So. 2d 1206, 1209 (Fla. 1978).

It is well established that local governments possess the home rule authority to impose user fees or service charges to offset the costs of a utility service, such as water and sewer, or garbage. *See Pinellas v. State*, 776 So. 2d 262, 264-65 (Fla. 2001) (recognizing home rule authority to impose water and sewer fees); *Contractors and Builders Ass'n of Pinellas County v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976) (finding city had authority to impose fees for connection with

water and sewer utility); *Pinellas Apartment Ass'n, Inc. v. City of St. Petersburg*, 294 So. 2d 676 (Fla. 1974) (upholding garbage collection fees); *Cooksey v. Utilities Comm'n*, 261 So. 2d 129, 130 (Fla. 1972) (stating "implicit in the power to provide municipal services is the power to construct, maintain, and operate the necessary facilities"); *State v. City of Miami Springs*, 245 So. 2d 80 (Fla. 1971) (upholding a flat rate for sewer service).

Even where a statute authorizes a municipality to exercise a power or provide a service, this Court has recognized the statute provides supplemental authority to a municipality's residual home rule powers because municipalities are not dependant on the legislature for further authorization, and statutes are relevant only to determine the limitations on the municipalities' authority. *City of Ocala v. Nye*, 608 So. 2d 15, 16-17 (Fla. 1992) (holding that municipalities could exercise the power of eminent domain even in the absence of a specific statute expressly authorizing such authority). In *City of Boca Raton v. State*, this Court concluded that chapter 170, F.S., concerning special assessments, provided authority supplemental to a city's home rule authority to impose special assessments. *City of Boca Raton v. State*, 595 So. 2d 25 (Fla. 1992); *see also Pinellas County v. State*, 776 So. 2d 262, 265-66 (Fla. 2001) (finding chapter 153 was supplemental to home rule authority to extend reclaimed water service).

It follows that a municipality does not require additional statutory authorization to adopt stormwater utility fees. Thus, section 403.0893, F.S., which sets forth three mechanisms for funding stormwater management programs, is supplemental to the City's residual home rule authority to establish stormwater utility fees. Indeed, section 403.0893 expressly recognizes this residual home rule power in stating that local governments may use "any other funding mechanism legally available" to them to operate stormwater utility systems.[1] *See also City of Gainesville v. Department of Transportation*, 778 So. 2d 519, 523 (Fla. 1st DCA 2001) (stating section 403.0891 is like the authority granted by the constitution and by general law). In this case, the only limitations on the City's power is that the stormwater utility serves a valid municipal purpose and the resulting charge not amount to an illegal tax.[2]

[1]Another supplemental statutory funding mechanism can be found in chapter 166: A municipality may raise . . . by user charges or fees authorized by ordinance, amounts of money which are necessary for the conduct of municipal government and may enforce their receipt and collection in the manner prescribed by ordinance not inconsistent with law." Fla. Stat. § 166.201.

[2]A municipality's power to tax must be authorized by general law. *See* Fla. Const. Art. VII, § 9(a).

II. THE CITY'S STORMWATER UTILITY SERVES A VALID MUNICIPAL PURPOSE

Stormwater utilities serve a valid municipal purpose because they support a mandated stormwater management program with a dedicated, recurring funding source. Florida's cities and counties are charged with developing stormwater management systems as part of the state's overall water resource management strategy. *See* Fla. Stat. § 403.021(2002) (recognizing local and regional pollution control programs as essential to water quality); Fla. Stat. § 373.016(3) (2002) (stating legislative policy to minimize the degradation of water resources caused by stormwater). Local governments are required to include a stormwater management program as part of their comprehensive plans, and required to conduct continuing reviews of the costs of stormwater management systems and stormwater's effect on water quality and quantity in conjunction with the Department of Environmental Protection and water management districts. Fla. Stat. § 403.0891(3) & (4) (2002). Based on this review, local and state governments must establish and implement priorities and goals to better manage and treat stormwater, protect against flooding and thereby preserve water quality. Fla. Stat. § 403.0891(4).

Stormwater management is not just a state directive, it is mandated by the federal government through the issuance of National Pollutant Discharge Elimination System ("NPDES") permits. *See generally*, Fla. Stat. § 403.0885

(2002); Fla. Admin. Code Ch. 62-624. Local government responsibilities (and associated expenses) for stormwater planning and management will increase as new state and federal water quality programs develop. A prime example of this increasing responsibility is the Total Maximum Daily Load (TMDL) Program.

A TMDL defines the total pollutant load that is allowed to be discharged into a water body without causing a violation of water quality standards. Fla. Stat. § 403.031(21) (2002). Once a TMDL is developed, the pollutant "load" is allocated among contributing dischargers to the water body, including wastewater, industrial, urban stormwater, septic tanks, agricultural, and other sources of pollutants. Fla. Stat. § 403.067(6)(b) (2002). Under the TMDL program, these sources may then be required to take steps to improve water quality. Fla. Stat. § 403.067(7). Municipalities and other local governments are charged with working with DEP in developing and executing the TMDL program. Fla. Stat. § 403.067(1).

It cannot be disputed that stormwater programs such as the City's utility serve a valid municipal purpose. Such programs help meet state and federal mandates for pollution and flood control. Stormwater programs are an integral part of state and federal strategies for water resource management.

III. THE CITY'S STORMWATER UTILITY FEE IS A VALID USER FEE

The lower court appeared to have two concerns about the City's stormwater utility fee. First, the court was concerned that the fee was not based upon the actual amount of stormwater runoff generated by each property. VI-1, ¶ 7. Second, the court was concerned that the stormwater fee was not voluntary as to certain types of residential users (apartment tenants).[3] *Id*. Based upon these concerns, the court invalidated the City's fee as an illegal tax, or a special assessment. Amici respectfully submits the City's stormwater utility fee has all of the characteristics of a valid user fee and the lower court's bases for invalidating the fee is therefore erroneous.

Several characteristics distinguish a user fee from a tax. The primary characteristic of a user fee is that there is a special benefit or relationship between the fee that is paid and the benefit that is conferred. *See, e.g., Pinellas County v. State*,

[3]These are the same arguments advanced by the Department of Transportation in the First District Court of Appeal. In reversing a motion to dismiss in favor of DOT, the First District held that if the City's stormwater ordinance operated as alleged in the City's complaint, then the stormwater charge was a valid user fee rather than a tax or special assessment. *City of Gainesville v. Department of Transportation*, 778 So. 2d 519 (Fla. 1st DCA 2001). The Attorney General reached the same conclusion on the same issues. Op. Att'y Gen. Fla. 97-70 (1997).

776 So. 2d 262, 266-68 (Fla. 2001) (discussing characteristics of user fees). Stormwater charges have been held to provide the requisite special benefit to the payer's property. *Sarasota County v. Sarasota Church of Christ* 667 So. 2d 180, 185 (Fla. 1996); *State v. Sarasota County*, 693 So. 2d 546, 548 (Fla. 1997); *City of Gainesville v. Department of Transportation*, 778 So. 2d 519, 524-27. This special benefit criterion is even incorporated into Chapter 403's definition of a stormwater utility. *See* Fla. Stat. § 403.031(17) (2002) (defining a stormwater utility as "the funding of a stormwater management program by assessing the costs of the program to the beneficiaries based on their relative contribution to its need."). Another consideration for distinguishing a valid fee from a tax is how the money is used. Taxes are assessed to raise general revenue and user fees are typically set apart from general revenues to specifically offset the service being provided. *See State v. City of Port Orange*, 650 So.2d 1, 3-4 (Fla. 1994). In this case, the revenues derived from the stormwater charge are used solely for the City's stormwater program. V2-5, pp. 49-50, 135.

The line between special assessments and user fees is often blurred, and there is no bright line test for distinguishing between the two. *City of Gainesville v. Department of Transportation*, 778 So. 2d 519, 526 (Fla. 1st DCA 2001). The purpose for the charge and how it is collected may be used to differentiate them. Special assessments are specific levies "designed to recover the costs of

improvements that confer local and peculiar benefits within a defined area." *Id.* (quoting Laura H. Dietz, Am.Jur.2d, *Special or Local Assessments* § 2, at 631-32 (2002)). In contrast, user fees are typically monthly charges that are paid according to the proportion or degree of use or benefit. *Id.* For instance, utility fees are usually charged on a monthly basis, and the amount of the charge is based upon how much of the service is used. Finally, unpaid special assessments are collected by placing a lien against the property, whereas user fees are not. *See Contractors and Builders Ass'n of Pinellas County v. City of Dunedin,* 329 So. 2d 314, 319 n.8 (Fla. 1976). This Court recognized such distinctions in concluding that mandatory hook up fees for water and sewer service were not special assessments, stating:

> Special assessments are another commons means of financing sewer construction. Fla. Stat. s. 170.01 (1973). The fees in controversy here are not special assessments. They are charges for the use of water and sewer facilities; the property owner who does not use the facilities does not pay the fee. Under no circumstances would the fees constitute a lien on realty.

Id. The manner in which the City's stormwater fee is collected shows that it is a user fee rather than a special assessment. The fee is charged on a monthly basis like a regular utility fee, and unpaid fees do not become a lien against the property. V2-5, pp. 47-48; V3-13, §27-244.

The lower court erred in invalidating the City's fee on the basis that it was not voluntary. Whether a fee is voluntary is not dispositive of whether it is valid, or an invalid tax. In fact, the voluntary aspect of a fee has been disregarded when assessing the validity of certain utility fees. *See Pinellas County v. State*, 776 So. 2d 262 (Fla. 2001) (mandatory reclaimed water fee); *Charlotte County v. Fiske*, 350 So. 2d 578 (Fla. 2d DCA 1977) (mandatory uniform garbage collection fees); *Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976) (mandatory water and sewer fees); *State v. Daytona Beach*, 34 So. 2d 309 (Fla. 1948) (en banc) (mandatory sewer fees). Stormwater service fees are recognized

as traditional utility fees akin to water or sewer service fees. *See Pinellas County v. State*, 776 So. 2d 262, 268 n. 11 (Fla. 2001); *City of Cocoa v. School Bd. of Brevard County*, 711 So. 2d 1322, 1323 (Fla. 5th DCA 1998); Fla. Stat. § 403.031(17). As stated by the First District,

> The management and treatment of stormwater runoff confers a benefit on the owner of the land the stormwater runs off of that resembles the benefits solid waste collection and sanitary sewers provide. . . . Managing stormwater runoff, especially through storm sewers, is closely analogous to managing wastewater. Charges for managing wastewater are routinely deemed user fees.

City of Gainesville, 778 So. 2d at 527 (citations omitted). Accordingly, the validity of Gainesville's stormwater utility fee should have been viewed in same manner as these other utilities.

Although the City's fee possesses all of the aforementioned indicia of a valid user fee, the lower court apparently felt the fee did not meet the criterion of being reasonably related to the benefit conferred. *See* V1-1, ¶ 7 (finding fee was not "based upon the amount of stormwater a customer contributed to the system"). Essentially, this concern goes to the methodology used for determining the amount of the fee. The lower court erred in invalidating the fee on this basis. The City's legislative decision as to its rate classifications for different properties and its use of Equivalent Residential Unit (ERU) methodology to set the fee clearly meets the standard of being reasonably proportional to the benefit received.

A. The Method of Fee Assessment is a Legislative Decision Entitled to Deference

It is well established that the method of fee assessment is a legislative decision and will be upheld unless the fee is not fairly or reasonably in proportion to the benefit received. *City of Boca Raton v. State*, 595 So. 2d 25 (Fla. 1992); *City of Naples v. Scatena*, 240 So. 2d 837 (Fla. 2d DCA 1970). In *City of Boca Raton v. State*, this Court determined that a city is not required to specifically itemize a dollar amount of benefit to be received by each parcel. *Boca Raton*, 595 So. 2d at 31. This deference to the local government's legislative decision has been used to

uphold both the amount of the fee and the classifications used for determining who should pay. *See City of Naples v. Scatena*, 240 So. 2d 837, 839-40 (Fla. 2d DCA 1970) (upholding validity of classifications of properties for garbage charges); *Stone v. Town of Mexico Beach*, 348 So. 2d 40, 42 (Fla. 1st DCA 1977) (upholding flat rate fee for garbage collection regardless of whether a property owner used the service). It is particularly appropriate to accord deference to rate setting decisions. As one court explained:

> The setting of utility rates is often a complicated process and mathematical exactitude cannot be required. There does not have to be an exact correlation between the rates charged for various aspects of the service provided by the city.

Pinellas Apartment Ass'n, Inc. v. City of St. Petersburg, 294 So. 2d 676, 678 (Fla. 2d DCA 1974). The lower court in this case gave no deference whatsoever to the City's legislative decision to set the fee based on the degree of stormwater runoff from different types of properties.

B. <u>The Fee Is Reasonably Related To The Benefit Conferred</u>

The circuit court's conclusion that the City's stormwater fee is not based upon the use of the system is erroneous. The City imposes the fee only on developed properties that use the stormwater system, based upon an equitable unit-cost approach. V2-5, pp. 37-40, 96, 162-63; V3-13. That is, the stormwater fees are not generally charged based upon an exact measurement of how much stormwater runoff each parcel of property individually generates. Rather, fees are based upon an equitable formula that assesses the cost of the program to the beneficiaries based on their relative contribution to its need. The equitable cost unit or ERU approach used by the City is the most common method of assessing stormwater utility fees. V2-5, pp. 120-21, 136. In fact, the legislature specified the use of the ERU method in directing the Department of Community Affairs to develop a model stormwater management program. *See* Fla. Stat. § 403.0891(7) (2002). Moreover, the First District Court of Appeal expressly approved the use of ERU methodology because "stormwater runoff, of course, like wastewater and

solid waste, cannot feasibly be metered." *City of Gainesville v. Department of Transportation*, 778 So. 2d 519, 525 (Fla. 1st DCA 2001). Appellees are urging this Court to require the sort of mathematical precision that has been rejected by the First District and numerous other courts. As discussed in the City's Initial Brief, there is no question that the City's fee and use of the ERU methodology is reasonably related to the benefits conferred by the City's stormwater management program.[4] The League adopts and concurs with this analysis.

Moreover, the implications of Appellees' rationale demonstrate the absurdity of their position. Stormwater, wastewater and garbage services are all essential services that cannot be feasibly measured with the precision that Appellees would require. As discussed in the City's Initial Brief, it is an administrative impossibility and economically wasteful. Acceptance of Appellees' argument and the lower court's position would not only devastate the operation of stormwater utilities around the state, but would bring into question the validity of scores of wastewater, sewer and garbage charges as well.

CONCLUSION

It is well established that municipalities possess the home rule authority to impose stormwater utility fees. This authority is supplemented by section 403.0893, F.S., which codifies three common methods for funding stormwater

[4]It is noteworthy that the ordinance provides a process for challenging the assessment of any fee. Thus, property owners have a forum in which to present evidence as to how the actual amount of stormwater runoff differs from the average used by the ordinance, or to demonstrate that their property does not in fact contribute to the City's system.

programs. In this case, the City of Gainesville chose to fund its stormwater program by establishing a stormwater utility and charging utility fees. The City's stormwater program serves an important municipal purpose because local governments are mandated by state and federal law to implement stormwater programs. It is clear that the City's stormwater utility fee possesses all of the characteristics of a valid user fee and cannot be characterized as an illegal tax or as a special assessment. Therefore, this Court should vacate the orders of the lower court and remand the case with instructions to enter an order validating the bonds.

Respectfully submitted this ____ day of September 2002.

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered via U.S. Mail this _____ day of September, 2002 to: Lee C. Libby, Assistant State Attorney, Eighth Judicial Circuit, in and for Alachua County, Florida, Post Office Box 1437, Gainesville, FL 32602, Marianne A. Trussell, Assistant General Counsel, Florida Department of Transportation, Haydon Burns Building, MS 58, 605 Suwannee Street, Tallahassee, FL 32399-0458, Edward W. Vogel, III, Holland & Knight, 92 Lake Wire Drive, Lakeland, FL 33815, Marion J. Radson, City Attorney, City of Gainesville, Office of the City Attorney, P.O. Box 1110, Gainesville, FL, 32602, Elizabeth A. Waratuke, Litigation Attorney, City of Gainesville, Office of the City Attorney, P.O. Box 1110, Gainesville, FL, 32602, this _____ day of September, 2002.

_____
HARRY MORRISON, JR.

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
HARRY MORRISON, JR.