IN THE SUPREME COURT
FOR THE STATE OF FLORIDA

CASE NO.: SC02-1696
L.T. CASE NO.: 2001-CA-004478

CITY OF GAINESVILLE, FLORIDA,

Appellant,

vs.

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, et al.

Appellees.

JOINT BRIEF OF FLORIDA STORMWATER ASSOCIATION, INC. , EARTHJUSTICE, INC., AUDUBON OF FLORIDA, INC., and ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, INC., AMICI CURIAE

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TABLE OF CONTENTS

CITATION OF AUTHORITIES

Constitution:

Florida Constitution, Art. II, § 7(a) 2

Statutes:

Other Authorities:

STATEMENT OF THE CASE AND FACTS

The Florida Stormwater Association, Inc. (FSA) is a nonprofit corporation. Its membership consists of cities, counties, water management districts, and professionals engaged in the establishment and funding of stormwater utilities.

The Amici Curiae conservation organizations offer this brief for the Court's consideration because of their interest in protecting the lakes, streams, wetlands, estuaries, and other waters of the state from pollution from urban stormwater runoff. Earthjustice, Inc. is a national non-profit environmental organization that seeks to protect the environment by enforcing the laws designed to preserve natural resources. It has been active in litigation and advocacy throughout the United States in matters concerning abatement of water pollution. The Environmental Confederation of Southwest Florida (ECOSWF) is a Florida non-profit corporation that is engaged in advocacy primarily aimed at protecting and restoring water resources in Southwest Florida. It has engaged in many major advocacy projects to protect surface waters and ground waters in Southwest Florida, including a major case where it sued the Environmental Protection Agency to require it to comply with the Clean Water Act by adopting pollution load limits for polluted waters in Florida. Florida Audubon Society, Inc. d/b/a Audubon of Florida, is a non-profit Florida corporation with members throughout the state who use and enjoy the natural resources of Florida from impairment. A major part of Audubon of

Florida's mission is to protect those natural resources from impairment, and it has engaged in extensive programs of advocacy, public awareness, and litigation to accomplish that end. All three of these conservation organizations offer their arguments to the court on the issues of law presented here because of the imperative of developing effective funding mechanisms to control pollution from urban stormwater run-off. Rapid urban growth is resulting in a corresponding increase in pollution from urban stormwater, and poses a serious and growing threat to the integrity of the lakes, rivers, and estuaries of the state. The issues presented in this appeal concern the ability of cities to fund capital projects to control and abate pollution in urban stormwater. These projects are not merely in the public interest, they are urgently needed to protect the waters of the state from serious and sometimes irreversible damage. The public policy of the state to protect its natural resources finds clear expression in Article II, section 7(a) of the Florida Constitution. For the reasons set out in this amici brief, the longstanding law of this state indicates that the judgment of the Circuit Court should be reversed.

These amici have no cognizable interest in the specific facts of the case, and accept the statements of the parties with respect thereto.

Florida is blessed with a myriad of lakes, ponds, creeks, springs, rivers and estuaries. For more than twenty years, the State has assumed the mantle of stewardship over these resources by regulating, directly and through its water

management districts, the quality and quantity of stormwater runoff. In urban areas, much of the drainage infrastructure is publicly owned.

Larger counties with interconnected public drainage systems are also presently subject to provisions of the Federal Clean Water Act regulating the point source discharge of pollutants including stormwater, through the National Pollutant Discharge Elimination System ("NPDES") permitting system. Commencing in 2003, the Federal regulations will apply as well to smaller public systems. In addition, despite these regulations a number of Florida waterbodies have reached the limits of their ability to absorb the cumulative impacts of pollutants from all sources. The Department of Environmental Regulation has lately completed the adoption of its "impaired waters rule," Chapter 62-303, Florida Administrative Code, which begins the management and allocation of cumulative impacts of drainage and pollution.

Apart from a few grants and programs of limited scope and eligibility, the Federal and State programs are unaccompanied by funding. In urbanized areas, local governments, drainage districts, and private developers must fund their own capital construction, reconstruction, and ongoing maintenance and operation of stormwater management facilities.

The Final Judgment in this case threatens many if not most of the local government financing schemes which pay for stormwater systems in Florida, principally because the fees, assessments, or exactions imposed are not "voluntary" as viewed by the circuit court. This brief is submitted in order that the Court may be aware of the legal risks to local governments generally, and the danger to Florida's

resources of an inadequately funded program of surface water protection and remediation.

POINTS INVOLVED ON APPEAL

I. The state has expressly authorized cities and counties by general law to fund stormwater utilities in order to meet the mandates of federal and state law and implement npdes obligations under the clean water act.

II. Local governments are authorized by general law to impose stormwater utility charges sufficient to plan, construct, operate and maintain stormwater systems**.**

III. A balancing of interests test is to be applied in determining whether a state agency is immune from local government regulation.

SUMMARY OF ARGUMENT

Florida's initial program of stormwater regulation has been administered largely through the several water management districts. Each district has its own set of administrative rules peculiar to its geography and geology, and issues its own permits. The rules include some provisions for the qualitative treatment of stormwater prior to its discharge to the receiving waterbodies of the State.

The State has lately accepted a delegation of Federal permitting under the NPDES system. In addition, Phase 2 of the Federal Clean Water Act imposes new obligations on medium and small municipal stormwater systems beginning in 2003. Under the Local Government Comprehensive Planning Act, drainage is a mandatory element of local plans. A financially feasible capital funding system is required by the Act to provide for the necessary facilities, concurrent with the impacts of new development permits. In addition, and irrespective of new development, local governments must address the cumulative impacts of past inadequacies and obsolescence in their stormwater drainage systems.

Local governments have often been saddled with state mandates and left to their own creativity to provide the necessary funding. Under their home rule powers, they have developed an array of user fees and benefit assessments, many of which have found their way to this Court for review. The usual theory of the challengers is that the measure is a "tax" not authorized by general law, and hence pre-empted to the State under Article VII, section 1 of the Constitution.

In the case of stormwater funding, the Legislature has expressly authorized the imposition of fees or assessments sufficient to plan, build, rebuild, and maintain a comprehensive system of stormwater utilities. The challenge to that authorization in this case is in direct defiance of the legislation, and the trial court was lured into an error which threatens the statewide foundations of stormwater funding. If indeed stormwater utility fees and assessments were "local taxes" as alleged, they are nevertheless taxes which the Legislature authorized, and hence the Constitution is fully satisfied.

"In addition to any other funding mechanism legally available," local governments are authorized in Section 403.0893, Florida Statutes (1998) to create and operate stormwater utilities and to establish utility fees. They are also authorized to establish stormwater management system benefit areas or sub-areas and to establish fees "based on a reasonable relationship to benefits received." *Id.* Although many local governments have utility billing departments, stormwater utility fees may also be collected as "assessments" through the County tax collector, using the non-ad valorem levy, collection, and enforcement method provided in § 197.3632, Fla. Stat. (1998). Section 403.0893(1) expressly authorizes cities and counties to establish and operate

stormwater utilities and to recoup the costs of planning, constructing, and maintaining them. Such facilities provide for the necessary storage, transport, treatment, and disposal of stormwater runoff beyond the bounds of private property. Both private and public development activity increase the demand upon stormwater utilities.

Even in the absence of express statutory authority, the regulation of stormwater discharge, including the imposition of reasonable service charges, is well within the home rule authority of city and county governments. Such charges are distinguishable from taxes or takings when they are roughly proportional to the cost of or impact upon the public utility.

Where local government provides a recurring utility service and imposes an otherwise lawful service charge, a state agency is liable to pay it. Service charges, though they are sometimes called "assessments," are not the kind of "special assessments" from which the state is traditionally immune. That immunity exists only from nonrecurring assessments which recoup a private windfall from public construction, such as is contemplated in Chapter 170, Florida Statutes.

Article VIII, ss. 1(h) and 2, Fla. Const. (1968), and the confirming statutes which shortly followed it, destroyed the "local bill evil" and freed local populations from the shackles of Dillon's Rule.[1] *See, e.g.* Chapters 71-14 and 73-129, Laws of Florida. The courts have since consistently acknowledged that local populations are free to govern themselves in local matters. They require no express legislative imprimatur before adopting special assessments (*City of Boca Raton v. State*, 595 So.

[1]"Dillon's Rule" holds that local governments have only those powers specifically delegated by the Legislature. John F. Dillon, The Law of Municipal Corporations § 55 (1st ed. 1872)

2d 25 (Fla. 1992) or regulatory fees (Section 403.0893, Florida Statutes (1998)) provides for a method of funding of stormwater systems "in addition to any other funding mechanism legally available.")

I.

THE STATE HAS EXPRESSLY AUTHORIZED CITIES AND COUNTIES BY GENERAL LAW TO FUND STORMWATER UTILITIES IN ORDER TO MEET THE MANDATES OF FEDERAL AND STATE LAW AND IMPLEMENT NPDES OBLIGATIONS UNDER THE CLEAN WATER ACT

A. CONSTRUCTING AND OPERATING A STORMWATER SYSTEM IS NOT OPTIONAL

Local governments are subject to NPDES standards as set forth in the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*. As part of their obligations under the Clean Water Act, local governments are specifically charged with improving water quality in the water bodies within their jurisdictions, including the inspection and identification of pollutant discharges in local waters. To avoid duplication, Florida adopted § 403.0885, Fla. Stat., empowering the Department of Environmental Protection to establish a federally approved state NPDES program. In concert with state NPDES legislation, § 403.067, Fla. Stat., established a framework for identifying, evaluating, and prioritizing impaired water bodies. Additionally, the Legislature adopted §§ 403.0891 through 403.0896, Fla. Stat., which required local governments to develop stormwater management systems which are consistent with the Surface Water Improvement and Management Act, §§ 371.451 through 373.4595, Fla. Stat.

As part of Florida's commitment to protect water resources, the Legislature adopted § 403.067, Fla. Stat., which requires the use of Total Maximum Daily Load ("TMDL") when assessing the relative health of Florida's waters. A TMDL is the total

pollutant loading allowed into a water body that will not cause the water body to violate water quality standards. The TMDL evaluation process originated with the Federal Water Pollution Control Act of 1972 and was expanded by the Clean Water Act of 1977 and the Water Quality Act of 1987. The Acts require Florida to define water quality standards for designated uses, such as recreation, and identify water bodies for which the ambient water quality did not meet established standards. Water bodies not meeting the established standards as a result of man-induced conditions are considered "impaired." Florida is required to submit a list of impaired water bodies to the Environmental Protection Agency ("EPA") every two years. The 1998 TMDL list identified impaired water segments covering approximately 33 percent of Florida's land. A majority of impaired water bodies were generally centered in higher population areas.

Florida has been a national leader in the adoption of state-wide stormwater regulations. In 1981 Florida became the first state to require all new development and redevelopment projects to treat stormwater. In 1987, the Federal Clean Water Act Reauthorization, Section 402(p), was established to update the scope of the federal NPDES regulations to designate certain stormwater discharges as "point sources" of pollution. The point source discharges covered by the 1987 Act include discharges associated with industrial activity, construction sites disturbing five or more acres of land, and master drainage systems of local governments with populations exceeding 100,000 persons. Since most master drainage systems in Florida are interconnected, EPA has implemented a permitting program (MS4) on a county-wide basis in the fifteen counties which meet the population criteria. These master permits include: (1)

drainage districts established by Chapter 298; (2) all incorporated cities within these counties; (3) all unincorporated territory of the county; and (4) DOT facilities.

In addition to point source regulations under the Clean Water Act, water management districts also regulate point source discharge through water management district permitting processes. For example, 40C-42.022, Florida Administrative Code provides:

> (1) A permit is required under this chapter for construction (including operation and maintenance) of a stormwater management system which serves a project that exceeds any of the following thresholds:
>
> (a) Construction of 4,000 square feet or more of impervious or semi-impervious surface area subject to vehicular traffic, such as roads, parking lots, driveways, and loading zones;
>
> (b) Construction of more than 9,000 square feet total of impervious surface; or
>
> (c) Construction of 5 acres or more of recreational area. Recreation areas include but are not limited to golf courses, tennis courts, putting greens, driving ranges, or ball fields.

NPDES Phase 2 becomes effective in early 2003. Phase 2 of NPDES will expand Florida's stormwater permitting program to include the need for NPDES stormwater permits for construction sites between one and five acres. While water management district permits generally focus on storage, rate of discharge and other quantitative issues related to point source discharge for new construction, qualitative requirements under NPDES Phase 2 will gain in importance. Local governments with a population of 10,000 will now be required to obtain NPDES permits for their stormwater management systems. If the decision in this case is affirmed without modification, limitation or clarification, the local governments will be stripped of their

main financing device at the precise moment when their obligations multiply. It is highly likely that widespread development moratoria, and a resulting deluge of "temporary takings" cases, would soon fill the court system.

B. LOCAL GOVERNMENT COMPREHENSIVE PLANNING MANDATES A STORMWATER ELEMENT AND A CAPITAL FACILITIES ELEMENT WHICH IS FEASIBLY FUNDED PRIOR TO NEW DEVELOPMENT

In addition to the requirements to fund and implement stormwater management systems found in §§ 403.0891 through 403.0896, Fla. Stat., and the Clean Water Act, Florida's Growth Management Act, § 163.3180, *et. seq.* and Rule 9J-5, Florida Administrative Code, mandate stormwater drainage to be in place concurrent with the impact of new development. The level of service must be supported by a funded capital improvement plan which also addresses any backlogged needs. Local governments face the dual challenge of meeting more stringent surface water quality standards while locally funding the infrastructure to accommodate new growth.

Section 403.0891(6), Fla. Stat., specifically authorizes and requires the Department of Environmental Protection to establish a model stormwater program which sufficiently funds retrofitting of existing stormwater systems, in addition to the expansion of systems, in order to create compatible stormwater management programs between local governments, water management districts, and DEP.

Section 163.3177(10)(h), Fla. Stat., requires infrastructure, including stormwater drainage, to be in place concurrent with new development.

> (h) It is the intent of the Legislature that public facilities and services needed to support development shall be available concurrent with the impacts of such development in accordance with s. 163.3180. In meeting this intent, public

> facility and service availability shall be deemed sufficient if the public facilities and services for a development are phased, or the development is phased, so that the public facilities and those related services which are deemed necessary by the local government to operate the facilities necessitated by that development are available concurrent with the impacts of the development. The public facilities and services, unless already available, are to be consistent with the capital improvements element of the local comprehensive plan as required by paragraph (3)(a) or guaranteed in an enforceable development agreement . . . . (Emphasis added.)

The capital improvements element of local comprehensive plans is the portion of the plan which requires local governments to establish financial feasibility service levels and realistic budgets and timetables for funding of growth as well as removal of existing backlogs and system deficiencies. Section 163.3191, Fla. Stat., requires local governments to self-evaluate and assess the progress and implementation of their comprehensive plans.

> (2) The report shall present an evaluation and assessment of the comprehensive plan and shall contain appropriate statements to update the comprehensive plan, including, but not limited to, words, maps, illustrations, or other media, related to:
>
> . . .
>
> (c) The financial feasibility of implementing the comprehensive plan and of providing needed infrastructure to achieve and maintain adopted level-of- service standards and sustain concurrency management systems through the capital improvements element, as well as the ability to address infrastructure backlogs and meet the demands of growth on public services and facilities. Section 163.3191(2).

Section 163.3180(1)(a), Fla. Stat., specifically identifies drainage as one of the services which must be provided concurrent with development impact on a "statewide basis."

Section 163.3180(4)(a) further provides:

> (4)(a) The concurrency requirement as implemented in local comprehensive plans applies to state and other public facilities and development to the same extent that it applies to all other facilities and development, as provided by law. (Emphasis added.)

According to Fla. Admin. Code R. 9J-5, the intent of the concurrency management system is to "establish an ongoing mechanism which ensures that public facilities and services needed to support development are available concurrent with impacts of such development." Fla. Admin. Code R. 9J-5.0055. Fla. Admin. Code R. 9J-5.055(1) sets forth the general requirements imposed on local governments as part of the State's concurrency management system:

> Each local government shall adopt, as a component of the comprehensive plan, objectives, policies and standards for the establishment of a concurrency management system. The concurrency management system will ensure that issuance of a development order or development permit is conditioned upon the availability of public facilities and services necessary to serve new development, consistent with the provisions of Chapter 163, Part II, Florida Statutes, and this Rule. The concurrency management system shall include:
>
> (a) A requirement that the local government shall maintain the adopted level of service standards for roads, sanitary sewer, solid waste, drainage, potable water, parks and recreation, mass transit, if applicable, and public schools if imposed by local option. (Emphasis added.)

Local governments must not only meet new performance guidelines for stormwater drainage, the concurrency requirements of Florida's Growth Management

Act mandate that these facilities and systems are in place prior to new development and redevelopment. If stormwater management systems are not provided -- which meet the performance criteria in the TMDL guidelines -- development and redevelopment will stop. Local governments are under an affirmative obligation to meet the stormwater management system mandates of Florida and federal law but are required to fund these improvements locally.

Level of Service standards for stormwater management and water quality treatment are specified by rules of the Department of Environmental Protection and the several Water Management Districts of the State, not local government ordinance.

II.

LOCAL GOVERNMENTS ARE AUTHORIZED BY GENERAL LAW TO IMPOSE STORMWATER UTILITY CHARGES SUFFICIENT TO PLAN, CONSTRUCT, OPERATE AND MAINTAIN STORMWATER SYSTEMS

In an era when the expectations of an urbanizing population and the structural weaknesses of state revenue have shifted many unfunded mandates to local governments, cities and counties have become creative in broadening their own revenue bases. A number of user fees and special assessments have been developed and judicially approved under home rule powers. A few have been disapproved. See *City of Boca Raton v. State*, 595 So. 2d 25 (Fla. 1972); *Hanna v. City of Palm Bay*, 579 So. 2d 320 (Fla. 5th DCA 1991). In virtually every case where a challenge was brought, the basis of the challenge has been that the charge in question was a tax not authorized by general law. *Id.* at 323.

Article VII, s. 1(a) of the Constitution of Florida provides that "all other forms of taxation [i.e., other than the ad valorem tax] shall be pre-empted to the state except

as provided by general law." (Emphasis added.) Article VII, s. 9(a) is the reciprocal of s. (1)(a), and provides that counties and municipalities "may" be authorized by general law to levy other taxes for their respective purposes.

The obligation to create and fund stormwater management systems differs from many other local government obligations because it is a top-down obligation imposed by Federal and state legislation, irrespective of local preferences. The Court is not called upon in this case to rein in some local fiscal experiment, because of an absent or conflicting state law. Rather, in this case the duty originates at the state level, and so does the authority to fund it.

This Court recently addressed the question of what constitutes a "general law" in the sense required by Article VII, s. 1(a). In *City of Miami v. McGrath*, 27 Fla. L. Weekly S677a (July 11, 2002), the Court affirmed the invalidation of Chapter 99-251, which had purportedly created § 218.503(5), Fla. Stat. The statute would have allowed only the City of Miami to impose a discretionary "surcharge" of 20% upon the sale or rental of parking facilities, to be expended for specified purposes.

Two facts are apparent in the *McGrath* decision. First, the statute under review did not explicitly authorize a “tax.” It referred to a “surcharge.” Yet it was clear to all of the parties and the Court that the parking surcharge could not be defended as a fee for services or an assessment related to benefits, either of which would fall within the home rule authority of the City. If the proceeds had been limited to the defraying of costs of the local transit system, perhaps the surcharge would have had a sufficient rational nexus to be defensible on a basis other than as a “tax.” But in the McGrath

case, the relationship between the surcharge and its permissible expenditures clearly could not meet such a standard.

The second fact apparent in the decision was that if the statute in question had truly been a "general" law, there were no other challenges to its validity. If the statute had authorized every city of over 100,000 in population to impose a parking surcharge and to use the proceeds for acquisition of fire equipment, the measure would clearly be a tax, but it would be a constitutionally authorized tax. Its constitutional strength would be no less than that of a local option sales tax, tourism tax, or gas tax, all of which are authorized by general law. *Smith v. Florida Dep't. of Revenue*, 512 So. 2d 1008 (Fla. 1st DCA 1987) (local option gas taxes); *Miami Dolphins, Ltd. v. Metropolitan Dade County*, 394 So. 2d 981 (Fla. 1981) (tourism tax); *Leon County v. Dep't. of Revenue*, 648 So. 2d 1215 (Fla. 1st DCA 1995) (recognizing gas tax authorized by general law).

In the case of stormwater utilities and their supporting fees and charges, cities and counties are expressly authorized to establish and fund such utilities. Section 403.0891, Fla. Stat., requires local governments to develop stormwater management programs which are "mutually compatible" with the programs of the State and the water management districts. The statute requires that compatibility to be expressed in the drainage and capital facilities elements of local government comprehensive plans under Chapter 163. The Department of Environmental Protection is required to develop a model stormwater program "including a stormwater utility fee system based on an equitable unit cost approach. Funding options shall be designed to generate

capital to retrofit existing stormwater management systems, build new treatment facilities, operate facilities, and maintain and service debts." (Emphasis added.)

The inclusion of retrofitting as a permitted object of stormwater utility fees is a clear point of distinction from the kinds of user impact fees approved in *Contractors and Builders Association of Pinellas County v. City of Dunedin*, 329 So. 2d 314, 321 (Fla. 1976). In the *Dunedin* decision, this Court was careful to point out that impact fees collected from new construction could be used only to build facilities or new capacity made necessary by growth, and that when older facilities must be renovated to meet new standards, all users must share in the cost, to avoid a windfall to any.

The authority in § 403.0891(6) to fund system-wide retrofitting or upgrading of treatment quality thus directly contradicts that part of the Final Judgment which holds that each user's charge must be based on some quantifiable flow of stormwater.

> The cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent. When new facilities must be built in any event, looking only to new users for necessary capital gives old users a windfall at the expense of new users.
>
> When certificates of indebtedness are outstanding, new users, like old users, pay rates which include the costs of retiring the certificates, which represent original capitalization. State v. City of Miami, supra. New users thus share with old users the cost of original facilities. For purposes of allocating the cost of replacing original facilities, it is arbitrary and irrational to distinguish between old and new users, all of whom bear the expense of the old plant and all of whom will use the new plant. The limitation on use of the funds, shown to exist De facto in the present case, has the effect of placing the whole burden of supplementary capitalization, including replacement of fully depreciated assets, on a class chosen arbitrarily for that purpose.

The trial court based that finding upon the definition of a stormwater utility contained in § 403.031(17), which states: "'Stormwater utility' means the funding of a stormwater management program by assessing the cost of the program to the beneficiaries based on their relative contribution to its need. It is operated as a typical utility . . . similar to water and wastewater services."

This holding, if undisturbed, is the equivalent of requiring a rain gauge and an outflow measurement on each parcel of improved property, and a periodic billing for the gallonage of stormwater which flows from the site. Presumably in times of drought, the operating government would receive little or no revenue.

The problem with the trial court's judgment is that it confuses use of the system with benefits from the system. The ultimate purpose of a stormwater management system is to control the quantity, storage, transmission, discharge and quality of storm flows. The trial court concentrated only on actual quantity, and ignored the other benefits of the system.

By way of analogy, the entire community benefits from the control of mosquitos which breed in standing water and might transmit malaria or encephalitis. Would the State suggest that mosquito control can be funded only by charges against properties which actually harbor stagnant water? Or perhaps the change would be only if there were water in which mosquitos were proved to be actually breeding, or only if those mosquitos were proved to be actual carriers of the disease, or only if those mosquitos were proved to have flown beyond the boundary of the property?

Florida law does not require so crabbed a view. In *State v. City of Miami Springs*, 245 So. 2d 80 (Fla. 1971), this Court held that a flat rate of $7 per month for

residential sewage service, regardless of actual use of the sewage system, was not unreasonable, arbitrary or in conflict with any state or Federal constitutional principle. Similarly, in *Stone v. Town of Mexico Beach*, 348 So. 2d 40 (Fla. 1st DCA 1977), *cert. denied* 355 So. 2d 517 (Fla. 1978), two residents challenged the town's charge of $3.50 per month for garbage service. One resident argued that he occupied his cottage only four months out of the year, and the other argued that he never produced any garbage to be picked up by the town. The court analogized the garbage rates to the sewer rates approved by this Court in *City of Miami Springs*, *supra*, and approved the flat rates.

More recently, this Court in *Pinellas County v. State*, 776 So. 2d 262, 268-69 (Fla. 2001) approved an availability or "readiness to serve" charge for treated wastewater made available to a portion of the County's service area, regardless of whether the customer made any actual use of the available water. The Court noted that where a governmental body provides access to traditional utility services, the Court "has not hesitated to uphold local ordinances imposing mandatory fees, regardless of whether an individual customer actually uses or desires the service," citing *Stone v. Town of Mexico Beach*, 348 So. 2d 40 (Fla. 1st DCA 1977); *State v. City of Miami Springs*, 245 So. 2d 80 (Fla.1971); *Riviera Beach v. Martinique 2 Owners Ass'n*, 596 So. 2d 1164 (Fla. 4th DCA 1992); *Town of Redington Shores v. Redington Towers, Inc.*, 354 So. 2d 942 (Fla. 2d DCA 1978).

In *State v. City of Port Orange*, 650 So. 2d 1, 3 (Fla. 1994), the Court invalidated a transportation charge on the basis that it was not voluntary and was therefore a tax.

> [F]ees share common traits that distinguish them from taxes: they are 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, *National Cable Television Assn. v. United States*, 415 U.S. 336, 341 (1974) (citations omitted); and they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge. *Emerson College v. City of Boston*, 391 Mass. 415, 462 N.E.2d 1098, 1105 (1984) (citing *City of Vanceburg v. Federal Energy Regulatory Comm'n*, 571 F.2d 630, 644 n. 48 (D.C. Cir.1977), *cert. denied*, 439 U.S. 818 (1978) (citations omitted)).

Id. at 3.

As thus defined, the stormwater utility charge would qualify as a tax. But this Court distinguished stormwater fees from the transportation fee there invalidated, because stormwater fees were "expressly authorized by s. 403.031, Florida Statutes (1993)." But the *Port Orange* decision was careful to distinguish that situation from stormwater fees which were authorized by general law. The Court has not heretofore analyzed stormwater fees or assessments by the test of "tax" as set forth in *Port Orange*; see *Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So. 2d 180 (Fla. 1995). But if it is a tax, it is nevertheless a tax which is authorized by "general law" in Chapter 403. In that event, the trial court's analysis of its rational nexus and its voluntary character were constitutionally irrelevant.

III.

A BALANCING OF INTERESTS TEST IS TO BE APPLIED IN DETERMINING WHETHER A STATE AGENCY IS IMMUNE FROM LOCAL GOVERNMENT REGULATION

A. LOCAL GOVERNMENTS ENJOY HOME RULE REGULATORY AUTHORITY IN THE ABSENCE OF CONTRARY GENERAL OR SPECIAL LEGISLATION

This part of the Argument addresses broadly the implications of the Department of Transportation's argument below that it is immune from the Gainesville ordinance. Such a claim, if sustained, could weaken the legal foundations of many other ordinances where substantial amounts of government property lie within the jurisdiction.

Prior to Florida's 1968 Constitution, all cities were considered creatures of the legislature. They had only those particular powers which the legislature saw fit to confer on them. Rarely did the legislature expressly subject state agencies to local regulation.

Under the Constitutions of 1885 and before, the State exercised close control over cities and counties by two methods. The Legislature adopted general laws, applicable to all cities, and giving particular powers to every city to exercise a particular duty or provide a particular service or to levy a particular tax or charge. The Legislature also often adopted special acts, not applicable statewide but conferring or limiting the powers of individual cities or counties, or creating special districts of defined or limited powers. For example, every municipal charter is a special act of the Legislature.

Thus it is not surprising that there is a historical or vestigial instinct on the part of the Department of Transportation that it is an agency of the sovereign, and not subject to regulation by lesser creatures of the sovereign. But it is not the state government, or the legislature, which is sovereign; it is the people. Whether the people speak through their state government, or their county or city government, their wishes are entitled to some degree of deference. Where they speak differently through

different levels of their government, the multiple voices must be harmonized, not silenced.

The 1968 Constitution provided that municipalities may exercise "any power" for municipal purpose, so long as no general or special law restricted the power. *See* Art. VIII, § 2, Fla. Const. (1968). This was the constitutional opposite of the pre-1968 view, and the courts were slow to embrace it. *See* §§ 166.021 *et seq*., Fla. Stat. (1998) When the question returned to the courts, the Florida Supreme Court bowed to the Legislature's will, and recognized the existence of local home rule power. *See Volusia County v. Dickinson,* 269 So. 2d 9 (Fla. 1972).

Article VIII, § 1(f) of the 1968 Constitution provides that noncharter counties shall have such power of local self-government as is provided by general or special law. In Chapter 125, Florida Statutes, implements the provisions of Florida Constitution (1968), which gives counties not operating under county charters, such as Pasco County, such powers of self-government as are provided by general or special law. This provision of the Florida Constitution also authorizes the board of county commissioners of such a county to enact ordinances in the manner prescribed by Chapter 125, Florida Statutes, which are not inconsistent with general law.

> The intent of the Legislature in enacting the recent amendments to Chapter 125, Fla. Stat., was to enlarge the powers of counties through home rule to govern themselves.
>
> 125.01(1), FLA. STAT., (1975), grants to the governing body of a county the full power to carry on county government. Unless the Legislature has pre-empted a particular subject relating to county government by either general or special law, the county governing body, by reason of this sentence, has full authority to act through the exercise of home rule power.

Id. at 210-11; *See also, State v. Orange County*, 281 So. 2d 310 (Fla. 1973).

Noncharter counties, authorized by general law such as § 125.01, Fla. Stat. (2001) are not dissimilar to charter counties or to cities in the breadth of their home rule authority. In *City of Boca Raton v. State*, 595 So. 2d 25 (Fla. 1992), the Court held that the 1968 Constitution and the statutes which acknowledged the home rule it had wrought, marked the demise of Dillon's Rule. Chapter 170, authorizing local government special assessments, is now merely an additional authorization. So long as an assessment meets the basic two-prong test of benefit to the property and fair apportionment, it is within the home-rule power of the City.[2]

B. THE BURDEN OF PROOF IS UPON A STATE AGENCY TO DEMONSTRATE IN A LOCAL FORUM THAT THE PUBLIC INTEREST IN ITS FAVOR OUTWEIGHS THE PUBLIC INTEREST SERVED BY LOCAL REGULATION

The amenability of state agencies to local development regulation was addressed in *Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace,* 332 So. 2d 610 (Fla. 1976).

Judge Grimes searched for the appropriate factors to be considered in a "balancing of interests" test. He quoted with approval from *Orange County v. City of Apopka*, 299 So. 2d 652 (Fla. 4th DCA 1974):

> The zoning authority is then in a position to consider and weigh the applicant's need for the use in question and its effect upon the host unit's zoning plan, neighboring

[2]The Court in *Boca Raton* pointed to its recent decision in *Taylor v. Lee County*, 498 So. 2d 424 (Fla. 1986) (noncharter counties acting under the home rule authority of Chapter 125 need not comply with Chapter 159, Fla. Stat. (1998)).

> property, environmental impact, and the myriad other relevant factors. If the applicant is dissatisfied with the decision of the zoning authority, it is entitled, pursuant to Section 163.250, F.S. 1971, F.S.A. to a judicial determination *de novo* wherein the circuit court can balance the competing public and private interests essential to an equitable resolution of the conflict.[3]

Id. at 576.

Land use regulation, at issue in *Temple Terrace*, is but one species of permissible local government regulation. Stormwater regulation is a subspecies of land use regulation, and there is no reason why such regulation or related utility ratemaking should be governed by different principles.

It has since become clear that in the placement of its major transportation facilities, the Department of Transportation *must* consider (though it is not necessarily bound by) local government comprehensive plans. In *Save Anna Maria, Inc. v. Florida Dep't. of Transp.*, 700 So. 2d 113 (Fla. 2d DCA 1997). Where the Department constructs its roads and bridges, it must submit to stormwater regulation.

A fortiori a state agency must do so where the placement of its local facilities is volitional. The instant case partially involves the choice to place support facilities within the City of Gainesville. Those services might easily have been placed anywhere, with similar utility to the Department and with no disservice to the Department's mission or the public convenience.

The Court may take notice of the fact that Gainesville is host to a substantial amount of property belonging to the State. Gainesville is not unique. University campuses, prison facilities, and state government offices are widely distributed. These

[3]Section 163.250, Fla. Stat. (1971), has been repealed.

facilities may vary as to their placement in urban, suburban or rural settings. The geology and topography of these sites, their proportion of coverage by rooftops and parking lots, and their onsite stormwater retention capabilities may vary. So does the drainage which flows from them. It is impossible to say that in every case, or in no case, there is an impact on the public stormwater utilities provided by the members of these amici. It is impossible to say that the balance of public interests must always be struck in favor of, or against, a state immunity from local regulation and related service charges. Thus, dismissal of a local government's claim outright is rarely if ever appropriate.

C. EXEMPTION OR IMMUNITY OF A BENEFITTED PARTY FROM PROPORTIONAL FEES WOULD RENDER THE FEES UNLAWFULLY DISPROPORTIONAL AS TO REMAINING PAYERS

The Department of Transportation does not seem to have considered who will pay its share of the stormwater utility costs within the City of Gainesville, if the Department does not. It is a cliche, but true, that there is no such thing as free lunch. If the Department does not pay, then all others must pay more than their share.

But we have already seen that service fees and assessments cannot be predicated upon more than a fair share. The second prong of the dual rational nexus test holds that service or user fees must be proportional to, and cannot exceed, the pro rata share of the costs. *See Contractors and Builders Ass'n of Pinellas County v. City of Dunedin,* 329 So. 2d 314, 320. Likewise, assessments cannot exceed in amount the "special benefit" enjoyed by the assessed property, which is sometimes equated with the cost of providing the service. *See Sarasota Church of Christ,* 667 So. 2d at 183.

There remains no method of paying the Department's share of the cost, unless general taxes of the City are increased. But if those who pay stormwater fees are also assessed general taxes to pay for the Department's refusal, then the sum total of their payments once again exceeds a pro rata share, and disrupts the uniformity of taxation required in Art. VII, § 2, Fla. Const. For example, in *Northeast Florida Builders Ass'n*, 583 So. 2d 635, 639 (Fla. 1991), the ordinance before the Court had allowed cities to opt out of a countywide school impact fee ordinance. The Court noted that by excusing municipal feepayers, the school board would ultimately be required to increase taxes in order to build schools only within the cities, thus disrupting the uniformity of taxation countywide which the Constitution requires. Thus the Court held that the ordinance could not be effective until *everyone* who impacted the school system paid the required amount.

No less is required here. Gainesville is only one of a number of local jurisdictions which are host to a disproportionate concentration of state-owned properties. Nothing in the Constitution requires or permits a disproportionate share of local taxes to be appropriated for the benefit of the entire constituency of a state agency.

CONCLUSION

Irrespective of its disposition of the particular decision below, the court should declare that, whether called utility fees or assessments or taxes, all charges imposed under § 403.0893, Fla. Stat. (1998), are authorized and state agencies are not immune.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Counsel for State of Florida, **Lee Libby, Esquire,** Assistant State Attorney, State Attorney's Office, Eighth Judicial Circuit, Post Office Box 1437, Gainesville, FL 32602; Counsel of City of Gainesville, **Marion J. Radison, Esquire,** and **Elizabeth A. Waratuke, Esquire,** City of Gainesville, Office of the City Attorney, Post Office Box 1110, Gainesville, FL 32602; Co-Counsel for City of Gainesville, **Edward W. Vogel, III, Esquire,** 92 Lake Wire Drive, Lakeland, FL 33802; Counsel for Department of Transportation, **Marianne A. Trussell**, Esquire, Deputy General Counsel, Department of Transportation, Hayden Burns Building, MS-58, 6-05 Suwannee Street, Tallahassee, FL 32399-0458, this _____ day of September, 2002.

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Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the above computer-generated brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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