IN THE SUPREME COURT OF FLORIDA
Case No. SCO2-1696

Bond Validation Appeal from a Final Judgment
Of the Eighth Judicial Circuit,
Alachua County, Florida
Lower Tribunal Case No.: 2001-CA-4478

CITY OF GAINESVILLE, FLORIDA
Appellant

v.

STATE OF FLORIDA, ET AL
Appellee's

ANSWER BRIEF OF APPELLEE STATE OF FLORIDA

STATE OF FLORIDA

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PREFACE

Throughout this brief, Appellee, State of Florida, shall be referred to as "State". Intervener, Department of Transportation shall be referred to as "DOT". The Appellant, City of Gainesville, shall be referred to as "City".

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STATEMENT OF FACTS

Appellee generally accepts the Statement of Facts set out by the City of Gainesville in its Initial Brief, with the following exception(s):

The State believes that the Trial Court's Order denying the bond validation clearly sets forth its reasons for so finding, contrary to the City's allegation in their Initial Brief.

Furthermore, the State adopts and accepts the Statement of Facts set out by the Department of Transportation's in its Answer Brief.

SUMMARY OF ARGUMENT

The Appellee, State of Florida, adopts any and all argument's made by the Florida Department of Transportation in its Appellate brief pertaining to the validity of the Appellant's Storm Water Management System ordinances and charges arising there from. The State of Florida does not take issue with the Amendment of the Ordinance in mid-trial or the City's re-opening of its case after the City had rested. The only additional point the State of Florida argues is that the charges to the tenants of multi-family residential units are not a valid "user fee".

The Appellant's Stormwater Ordinance's assess the Stormwater "fee" to the individual tenants of multi-family residential units, and not to the landowner. The individual tenants of these multi-family residential units have no choice but to pay the "user fee" as the tenants have no control over the property in order to make attempts to retain their proportion of stromwater on sight, thus avoiding using the City's system. As the City states in its Initial Brief, "A tenant of an apartment can avoid the fee by choosing to live in a multi-family unit that makes no use of the City's system." Appellants Initial Brief at p.36. This argument was disapproved of by this Court in State v. City of Port Orange 650 So.2d 1, at4 (Fla. 1994) where this court stated:

> "The Port Orange fee, unlike Dunedin's impact fee, is a mandatory charge imposed upon those whose only choice is owning developed property within the boundaries of the municipality." State v. City of Port Orange 650 So.2d 1, at 4 (Fla. 1994)

The apartment tenants who live in a multi-family unit that makes use of the City's system, has no control over whether the unit contributes to the system. Only the owner of the apartment complex has the choice. Therefore, the stormwater charges to the tenants are not voluntary. Because they are not voluntary, it is not a valid "user fee" as defined in State v. City of Port Orange 650 So2d 1 (Fla. 1994).

ARGUMENT

"USER FEE'S".

In the case sub judice, the Appellant has enacted its Stormwater Management Ordinances attempting to arrange funding through a utility or user fee. The City's ordinance, as enacted, is not a lawful utility "fee".

"User fees are charges based upon the proprietary right of the governing body permitting the use of the instrumentality involved. Such fees share common traits that distinguish them from taxes: they are charged in exchange for a particular government service which benefits the party paying the fee in a manner not shared by other members of society, 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**." State v. City of Port Orange 650 So2d 1 at 3 (Fla. 1994) emphasis added. In St. Lucie County v. City of Fort Pierce 676 So.2d 35 (Fla. 4th DCA 1996) the Court discussed the Port Orange case as follows:

> "In State v City of Port Orange 650 So.2d 1 (Fla. 1994), the Supreme Court set out the criteria for a valid user fee. First, the charge must be for a governmental service. Second, the charge must benefit the party paying the fee in a manner not shared by other members of society. Third**,** the charged fees are paid by choice." St. Lucie County v. City of Fort Pierce 676 So.2d 35 at 36 (Fla. 4th DCA 1996). emphasis added.

THE CITY'S ORDINANCE IS NOT A LAWFUL UTILITY FEE

The ordinance at issue here does not meet the requirements set forth in State v City of Port Orange 650 So.2d 1 (Fla. 1994) and St. Lucie County v. City of Fort Pierce 676 So.2d 35 (Fla. 4th DCA 1996), as the charges for the use of the Appellant's system for tenants of multi-family residential units is not a voluntary choice of the tenants. The Ordinances at issue provide for the tenants of multi-family residential units to be charged the stormwater "fee" individually, and not the landowner. If a landowner has not taken steps to retain all of the stormwater onsite, thereby avoiding the stormwater system charges, then the individual tenants must pay the stormwater system charges. Under the terms of the City's ordinance "[a] tenant of an apartment can avoid the fee by choosing to live in a multi-family unit that makes no use of the City's system." Appellants Initial Brief at p.36. However, this argument was disapproved of by this Court in State v. City of Port Orange 650 So.2d 1, at 4 (Fla. 1994) where this court stated:

> "The Port Orange fee, unlike Dunedin's impact fee, is a mandatory charge imposed upon those whose only choice is owning developed property within the boundaries of the municipality." Port Orange 650 So.2d 1, at 4 (Fla. 1994)

The apartment tenants who live in a multi-family unit that makes use of the City's system, have no control over whether the unit contributes to the system. Their only "choice" is where to reside, similar to the residents in the Port Orange case. Only the owner of the apartment complex has the choice to avoid or use the City's system. The individual tenants have no choice in whether or not to use the City's stormwater system, as they have no control over the property to take steps to retain stormwater on sight, thus avoiding the stormwater fee.

Therefore, the "fee" is not voluntary as to those tenants of multi-family residential properties, in which the property owner has not made improvements to retain stormwater on sight. Furthermore, there is no incentive for the property owner to make improvements to retain stormwater on sight, as the charge for the use of the City's System is billed to the tenant's. The only way a tenant can avoid the stormwater charge is to move to a complex in which the owner has made improvements to retain stormwater on sight. This "choice", like the above-cited disapproval of a similar choice in Port Orange, is not a valid choice. They must pay it or move. There is no way the apartment tenant can improve the land he/she does not own to avoid use of the City's system.

CONCLUSION

Pursuant to the definition of a valid "user fee" as stated in State v City of Port Orange 650 So.2d 1 (Fla. 1994) and St. Lucie County v. City of Fort

Pierce 676 So.2d 35 (Fla. 4th DCA 1996), the ordinance does not impose a valid fee as to those tenants of multi-family residential units because they have no means or choice to avoid use of the City's Stormwater Management System. Thus, it is not a voluntary user fee, but a mandatory charge, and therefore, not a valid user fee. Because the ordinance is not a valid user fee, the bond validation was properly denied by the trial court, which ruling should be sustained by the Supreme Court.

WHEREFORE, the State of Florida requests that the Supreme Court sustain the Trial Court's Final Judgment denying the bond validation.

STATE OF FLORIDA

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to MARIANNE TRUSSELL and ROGER WOOD, Assistant General Counsels, Florida D.O.T, 605 Suwannee Street, MS-58, Tallahassee, Florida 32399-0458; EDWARD W. VOGEL, III, Holland and Knight, 92 Lake Weir Drive, Lakeland Florida and to MARION RRADSON and ELIZABETH WARATUKE, Office of the City Attorney, P.O. Box 1110, Gainesville, Florida 32602, by U.S Mail delivery this _____ day of October, 2002.

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CERTIFICATION

I HEREBY CERTIFY that this Brief was prepared using 14 point Times New Roman type and does hereby comply with Rule 9.210(a)(2), Florida Rules of Appellate Procedure and the Administrative Order of this Court dated July 13, 1998.

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