IN THE SUPREME COURT OF FLORIDA
CASE NO. SC02-1696

CITY OF GAINESVILLE, FLORIDA,
Appellant/Plaintiff,

vs.
THE STATE OF FLORIDA, et. al.
Appellee/Defendant,
and

THE FLORIDA DEPARTMENT OF TRANSPORTATION,

Intervenors.
_____/

LOWER TRIBUNAL
CASE NO.: 2001-CA-004478
BOND VALIDATION

REPLY/ANSWER BRIEF OF APPELLANT, CITY OF GAINESVILLE, FLORIDA

This case is an appeal under Fla. R. App. P. 9.030(a)(1)(B)(i), 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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PREFACE

Throughout this brief, Appellant, the City of Gainesville, shall be referred to as "City". Appellee, 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, statutorily represented by the State Attorney, shall be referred to as the AState Attorney@ or the AState@. Intervenor, the Florida Department of Transportation, shall be referred to as "DOT" or "Department of Transportation".

The record on appeal consists of three volumes. For ease of reference, the volumes referenced in this brief are contained in the Appendix to the City=s initial brief. Reference to materials shall be by the letter AV@ followed by the volume number, the document number, and, if applicable, the page number.

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THE CITY'S APPEAL

I. THE TRIAL COURT ERRED IN FINDING THE CITY'S STORMWATER MANAGEMENT UTILITY FEE INVALID

Standard of review and scope of review.

Despite the impression created by DOT's 74-page Answer/Initial Brief, the issues before this Court are very narrow. The scope of review in a bond validation proceeding is limited to A1) determining if the public body has the authority to issue the bonds; 2) determining if the purpose of the obligation is legal; and 3) ensuring that the bond issuance complies with the requirements of law.@ Pinellas County v. State, 776 So. 2d 262, 265 (Fla. 2001). DOT concedes the City=s authority to enact the ordinance related to the bonds in question, and to construct, operate, and finance a stormwater management utility. The only issue is the validity of the revenue stream to fund the repayment of the bonds, that is, the validity of the stormwater utility fee. This can be reduced to two queries: (1) was the City required to base its fee on a more exact calculation of the property=s contribution to the stormwater system and (2) is the fee involuntary as to apartment dwellers so as to run afoul of this Court=s decision in State v. City of Port Orange, 650 So. 2d 1, 3 (Fla. 1994).

The standard of review in this case is not in dispute. As this case presents only issues of law, the standard of review is de novo. DOT does not challenge this standard of review in its brief. DOT=s brief does attempt to expand the scope of review under the guise of standard of review by discussing the standard of review applicable in determining whether a special assessment complies with the law. This case is not about special assessments; the City does not claim that special assessments

could be charged to state-owned properties. The standard of review for special assessments is therefore irrelevant in this case.

The City=s stormwater fee meets the criteria for a valid fee.

As detailed in the City=s Initial Brief, the courts have looked at a number of factors to determine whether a charge is a user fee, special assessment, or tax, including: the relationship between the fee charged and the service rendered; choice in accepting the service; whether the fees collected are used only for providing the service; and the collection method for delinquent payment. The City contends that the application of these criteria prove that the stormwater fee is a valid user fee. The trial court, however, held that the City=s stormwater fee was not a valid fee, and criticized the exactitude with which the City measures the individual customers= relative contribution to the need for the City=s stormwater system and the voluntary nature of some customers=, particularly apartment dwellers=, use of the service. In reaching this conclusion, the trial court erroneously disregarded widespread judicial precedent approving the use of flat rates, averages and estimates and the extent to which use of the service must be voluntary.

1. The City appropriately measures the users= relative contributions to the need for the system in determining the amount of the fees.

The trial court apparently found fault with the method of calculation by which the City measures the individual user=s relative contribution to the need for the City=s stormwater system, and, therefore, the amount of the stormwater fee charged. However, it was not factually disputed that the fee is only applicable to those properties who do use the system and that it is based on the City=s formula calculating the user=s relative contribution to the system.

Under the City=s ordinance, residential properties are charged a flat rate because

the variances between their use of the system does not vary that significantly from residence to residence. DOT conceded that the costs of an individual assessment outweigh any benefits achieved by the individual assessment, even if it could be done. V2-6, pp. 369-70. Additionally, DOT submitted no evidence that any minor differences between residential contributions would have any measurable impact on the system.

Although DOT also concedes that a variety of other fees are charged by flat rates, estimates, and averages, it argues that these fees are distinguishable from a stormwater utility fee simply based upon the placement of the various enabling statutes within Florida Statutes. DOT does not challenge the longstanding, judicially approved practice of using flat rates, estimates, and averages to determine charges for fees for municipal public works authorized by Chapter 180, Fla. Stat., but attempts to distinguish these fees from the stormwater fees authorized in Chapter 403, Fla. Stat., by arguing that fees under 180 are Amandatory@, and thus different from stormwater fees referenced in 403.

First, fees under Chapter 180 are not Amandatory fees@. A municipality may create areas of service, and may mandate that those in the areas of service connect to water, sewage and related services and pay fees. Secondly, DOT offers no explanation why the mandatory nature of the connection makes any difference to the rate structure of a fee. Why should the use of flat rates, estimates and averages be appropriate under Chapter 180, but not under Chapter 403? DOT has no answer. Moreover, DOT never even establishes why a stormwater utility would not be authorized under Chapter 180. There simply is no material difference in the authority

to set a water or sewer utility fee under Chapter 180 and the authority to set a stormwater fee under Chapter 403.

DOT suggests that the stormwater fees in the cases of Atlantic Gulf Communities Corporation v. City of Port St. Lucie, 764 So. 2d 14 (Fla. 4th DCA 1999) and Smith Chapel Baptist Church v. City of Durham, 517 S.E. 2d 874 (N.C. 1999) were valid fees (as contrasted to the City=s fee) because there was a more detailed level of analysis done to determine stormwater runoff from the property. It is not possible to reach this conclusion from these cases because it was not the exactitude of the measurement of stormwater as it related to the fee that was the issue in either case, and there is not a sufficient discussion of how the fee was structured. In any event, both cases involved fees in which averages and estimates of impervious area were the basis for the fee, regardless of whether there was a more detailed breakdown for residential properties.

Just as it is appropriate for the same garbage fee to be charged to each residential household regardless of whether the homeowner carries 20 or 40 pounds to the curb, so is it appropriate for stormwater to be so charged whether there is 1500 square feet or 3000 feet of impervious area. These minor differences have virtually no impact on the cost of providing service. Where the residential size is large enough, however, to make a significant difference in the rate, the City conducts an individual assessment.

1 DOT argues that because a residential property with 1500 square feet of impervious area on a one-quarter acre lot is charged the same fee as a residential property with 20,000 square feet of impervious area on a two acre lot, that the fee does not take into account their proportional use of the City=s system. Page 24, DOT=s Answer/Initial Brief. To the contrary, this example shows that the City does take the two different lots= proportional use into account. Obviously, as the lot size increases, more stormwater attributable to the impervious area can be handled on site, thereby not increasing its contribution to the City=s system. V2-5, p. 92.

As set forth in its initial brief, the setting of utility rates and structure is within the legislative discretion of the City and the court must give deference to the City=s legislative determinations.[2] There may be many ways to set the rate structure and rates, all of which may establish valid user fees. The only question for this Court is whether the City=s choice is reasonable and non-discriminatory. See Mohme v. City of Cocoa, 328 So. 2d 422, 424-25 (Fla. 1976) (AOur courts will intervene to strike down unreasonable or discriminatory public utility service rates Y; however, courts will not themselves fix prospective rates.@)

2. Use of the City=s stormwater system is voluntary to all, including apartment dwellers, and all potential users are able to avoid the fee.

The trial court also took issue with the voluntariness of the City=s stormwater fee, but only as to apartment dwellers. As to all other users, even DOT and the State concede that those subject to the stormwater fee may obtain full or partial credit by retaining stormwater onsite, thus declining or limiting use of the City=s stormwater system.[3]

[2] DOT argues that the City has raised for the first time that the rate and rate structure is among the City=s legislative functions. To the contrary, the City=s power and authority in connection with its stormwater utility has been the central issue of the case from the beginning.

[3] DOT states in its brief that A[a]lthough the ordinance provides for a credit only for 100 percent on site retention, the record establishes that the City applies the ordinance differently than written and enacted, . . .@. Page 4, DOT=s Answer/Initial Brief. This is simply incorrect. The ordinance itself provides for varying amount of credit based on the amount of stormwater retained on site and sets forth the formula for the calculation. V3-13, '27-241(b)(3)27" \l "-"