IN THE SUPREME COURT
STATE OF FLORIDA

CITY OF GAINESVILLE, FLORIDA,

Appellant/Plaintiff,

CASE NO. SC02-1696

v.

THE STATE OF FLORIDA, et al.,

Appellees/Defendants,

and

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Appellee/Intervenor/
Cross Appellant.
_____/

ANSWER BRIEF AND INITIAL BRIEF ON CROSS APPEAL OF APPELLEE/CROSS APPELLANT, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

ON APPEAL FROM THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR ALACHUA COUNTY, FLORIDA
CASE NO. 2001-4478-CA

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PRELIMINARY STATEMENT

The City of Gainesville, Florida, the plaintiff below and appellant herein, will be referred to as the "City." The State of Florida, defendant below and appellee herein, will be referred to as the "State." The Florida Department of Transportation, the intervenor/defendant below and appellee/cross appellant herein, will be referred to as the "Department."

For consistency with the City's form of citations to the record, citations to the three volume appendix to the City's initial brief will be in the form of (V) followed by the volume number and document number assigned by the City, and the page number(s) when appropriate. However, citations to the two volume transcript of the hearing below, which is found at volume two, documents 5 and 6 of the City's appendix, will be in the form of (T.) followed by the appropriate transcript volume and page number(s). Citations to the City's initial brief will be in the form of (IB.) followed by the appropriate page number(s). Citations to the Department's appendix to this brief, will be in the form of (A.) followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Prior to the filing of the action from which this appeal arises, the City filed a complaint and an amended complaint in Leon County Circuit Court for a declaratory judgment and to collect unpaid stormwater management charges from the Department. City of Gainesville v. State, Dep't of Transp., 778 So. 2d 519 (Fla. 1st DCA 2001). The trial court dismissed the City's amended complaint with prejudice concluding, primarily, that the stormwater management charge imposed by the City was not a user fee but, instead, was a special assessment which could not be imposed upon state property. Id. This conclusion was based upon the trial court's determination that the City's stormwater management ordinance imposed mandatory, not voluntary, charges and did not allow the party charged an option not to utilize the service. Id. The City appealed and the First District reversed and remanded for further proceedings, holding, in part:

> The lack of a bright line [between "a connection/use fee and a special assessment"] notwithstanding, we hold that the ordinance at issue here, **if it operates as the City has alleged, imposes utility service fees rather than special assessments**.

Id. at 527 (emphasis added).

In addressing the Department's defense of sovereign immunity

to the City's stormwater charges, the First District continued:

> We have specifically rejected the contention "that **sovereign immunity** is not an appropriate consideration on the motion to dismiss because it is an affirmative defense." *Charity*, 698 So.2d at 907. Instead, we held "that **failure to allege the existence of an express written contract** was properly considered on the motion to dismiss." *Id*. at 907-08. Today, too, "we affirm the trial court's order [on count two], but remand the case for the court's determination of whether Appellant is entitled to further amend [its] complaint." *Charity*, 698 So.2d at 908. **This determination will depend on whether the City can allege the existence of a written contract.** While "it was not error to dismiss this count[, we] think that this count should not have been dismissed with prejudice ... at this stage of the pleadings, and that appellant should have the opportunity to further amend [its] complaint to allege proper ultimate facts if [it] can."

Id. at 531 (citations omitted)(emphasis added). The City never followed up on the First District's suggestions on how to resurrect its action and eventually filed a voluntary dismissal.

In October 2001, the City's Commission adopted a resolution authorizing the issuance of revenue bonds to fund capital improvements to the City's stormwater management utility. (V1-4B) The City then filed a complaint in Alachua County to validate those bonds pursuant to Chapter 75, Florida Statutes. Upon an order to show cause and an amended order to show cause,

a hearing was held on the complaint on April 25, 2002. (T1.-T2.) The State Attorney represented the State and the Department intervened.

The City presented its case in chief and rested on April 25, 2002. (T1. 1-164) For the most part, the Department accepts the City's characterization of its evidence and will not repeat that testimony here. However, additional facts are necessary to clarify the City's presentation. The City notes that it looked at developed properties to determine whether they used the City's system, because the fee would be charged only to properties that used the City's system. (IB. 8)(V2-5, 123-124) However, the record establishes that a parcel of commercial property (Rousseau Enterprises/Amoco) located at 7011 Newberry Road is charged and pays the fee but does not utilize the City's system. (DOT Ex. 34, 35)(T2. 348-350)

The City also notes that its "fee is based on runoff attributable to impervious and semi-impervious area on the property" (IB. 10), yet admits that the majority of single family residences are assigned a flat rate of one "equivalent residential unit" (ERU) based upon an average impervious area. (IB. 8) The City's expert also admitted that it is more than a mere majority of residential properties that must pay the flat rate, when he testified that only about 10 to 20 of the 20,000

single family residences in the City could qualify for an on site retention credit, and then only if the lot exceeds 10,000 square feet and the impervious area exceeds 50 percent of the lot size. (T2. 152-153)

Although 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, and allows a percentage of credit based upon the property's percentage of retention. (T2. 46) That is, if a commercial property or one of the 10-20 residential properties on large lots with 50 percent impervious area retained on site 30 percent of its stormwater, it would receive a 30 percent credit. (T2. 46)

At the conclusion of the City's case, the State and the Department moved for dismissal pursuant to Florida Rule of Civil Procedure 1.420(b), the trial court reserved ruling, and the Department began presenting its case. (T1. 165-189) The Department could not complete the presentation of its entire case in the time allocated, and the trial court continued the hearing until May 23, 2002. (T1. 262, T2.)

After the first day of hearing, but prior to the second day, the City amended its ordinance, allegedly to address the State's concerns raised during the hearing that the ordinance was not

sufficiently clear to establish that the fee was only charged to parcels that discharged to or used the City stormwater system by adding the word “city” in two sections of the ordinance. (T2. 267-80)(V1-4)(T2. 273-274)(V3-13) The City also filed a motion for leave to file a supplemental complaint which included the amended ordinance. (T2. 273-274)(V1-4)(V3-13)

On that second day, without objection from the State, but over objection of the Department, the trial court allowed the City to file its supplemental complaint and to reopen its case in chief to introduce its amended ordinance. (T2. 280-82) The Department then presented the remainder of its case, proffered certain evidence the trial court excluded, and renewed its motion to dismiss. (T2. 267-373)

In rebuttal to the City’s evidence, the Department presented evidence that the ordinance is invalid and evidence that the Department, like the City, provides the City and the properties located therein with stormwater management facilities that handle the drainage and treatment of stormwater, as well as address and improve water quality. (DOT Ex. 4)(T1. 207-209)(T1. 140-141)(DOT Exs. 3, 5)(A2. 120-219) The Department’s evidence established that ten state roads within the City consisting of 119,435 lane miles are maintained by the Department. (DOT Ex. 4)(A2. 218) The Department also established that it maintains

stormwater management facilities associated with each of those state roads. (DOT Ex. 4) The Department's stormwater management facilities include drainage ditches and storm sewer pipes for transporting stormwater, retention areas to treat stormwater and to improve water quality, outfall ditches to move stormwater away from the state roads, inlets to intake stormwater, and catch basins to trap debris and sediment contained in stormwater. (DOT Ex. 4)(T1. 207-209)(A2. 218) The Department's stormwater management facilities provide flood control, drainage, and pollution control that benefit developed property in the City. (T1. 140-141)

The City also uses storm sewer pipes and outfall ditches as part of its stormwater management system, and, importantly, utilizes the Department's stormwater facilities in managing stormwater generated by developed properties within the City. (DOT Exs. 3, 5)(A2. 120-217, 219) In that regard, the Department identified twenty different locations within the City where the City's stormwater management system discharges stormwater into the Department's stormwater management system. (DOT Exs. 3, 5)(A2. 120-217, 219) Those twenty are not the only locations where the Department's stormwater system accepts stormwater from the City's stormwater system. (T1. 195)

In managing stormwater falling on fee paying properties, the

City and the Department have an integrated stormwater management system. (T1. 141-142) In planning new stormwater facilities, the City considers and uses the Department's existing stormwater management system. (T1. 140) In fact, according to Emery Swearingen, the City's Public Works Manager, the City would be "virtually negligent" to ignore the presence of the Department's stormwater facilities in the City's management of stormwater. (Proffer: Swearingen[1], April 9, 2002, p. 16, l. 6- 13)(A1. 33)

The Hogtown Creek basin is the largest watershed drainage basin in the City and is more than three times larger than the City's second largest stream basin watershed. (T1. 147-148)(DOT Ex. 3, p. 1-4)(A2. 120-217) The City's stormwater ordinance includes Hogtown Creek as part of the City's stormwater management system. (DOT Ex. 1)(A2. 103-107) The Department has an easement across a small segment in the lower downstream portion of Hogtown Creek; and in 1996, the Department performed maintenance in Hogtown Creek by removing accumulated sediment from that easement. (T1. 243)

The predominate land uses in the Hogtown Creek basin are

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[1] John Emery Swearingen, Jr., was, at the time of his deposition, the City's Public Works Manager, and had held that position for the five previous years. Prior to that time he was the Public Works Director for 10-12 years and City Engineer for almost 30 years with the City. (Deposition: April 9, 2002, p. 3-4; April 18, 2002)(A1. 23-28)

residential and commercial. (DOT Ex. 3, p. 1-4)(A2. 120-217) Development in the City creates sediment which is carried in stormwater runoff from those developed properties. (T1. 151-152) The City's consultant, CH2M Hill, evaluated water quality problems resulting from stormwater being discharged from City property into Hogtown Creek. (DOT Ex. 3) By its report dated January 1992, CH2M Hill provided its evaluation and recommendations to the City. (DOT Ex. 3) CH2M Hill found a need for improved flood control, an element of stormwater management, in Hogtown Creek. (DOT Ex. 3, p. 2-4)

Stormwater sediment is a problem in the Hogtown Creek basin, and to address this problem CH2M Hill recommended installation of sediment trapping. (T2. 148) CH2M Hill recommended that eleven separate projects be built by the City to address the City's stormwater management problems within the Hogtown Creek basin. (DOT Ex. 3, p. 2-10). These projects were needed to address water quality and flooding problems in Hogtown Creek resulting from urban runoff. (DOT Ex. 3, p. 2-2, 2-13)(A2. 120-217) The City never accepted CH2M Hill's report and neighborhood groups objected to some of the recommended projects. (Proffer: Pearson,[2] p. 64, l. 6-14)(A1. 96)

[2] Stuart Pearson, at the time of his deposition, had been employed by the City as its Stormwater Services Manager since 1991. (Deposition: April 18, 2002, p. 3)(A1. 62)

The Department's maintenance easement in Hogtown Creek is in the Westgate Regency area of the City, where bridges for three state roads cross Hogtown Creek within the easement. (T1. 249-251) Among CH2M Hill's recommendations were a project in the Westgate Regency area, which included sediment trapping, and a project in the Loblolly area which would be built upstream of the Department's easement in order to control sediment entering the Westgate Regency area. (DOT Ex. 3, p. 2-15) However, the Loblolly area project was never built by the City. (Proffer: Swearingen, April 18, 2002, p. 41, l. 23-25; p. 42, l. 1-2)(A1. 54-55)

With nothing to trap sediment upstream, the sediment enters and accumulates at the Department's easement, which the Department maintains. (Proffer: T2. 328-330) The Department offered to pay the City $2,000,000 to accept the maintenance responsibilities for

the Department's easement in Hogtown Creek. (Proffer: Pearson, p. 69, l. 24-70; p. 70, l. 1-6)(A1. 99-100) The City responded by offering to accept maintenance responsibility of this small portion of the City's stormwater management system in exchange for a payment by the Department of $6,700,000 and annual

payments of $305,000[3]. (T2. 302)(Proffer: Pearson, p. 70, l. 11-15)(A1. 100) Because the City refused to address the upstream sediment problem in Hogtown Creek, the Department hired a contractor for $2,200,000 to build two sediment traps to control sediment entering the Department's Hogtown Creek easement. (Proffer: T2. 328-330)

The City charges stormwater fees to all developed properties in the City that contribute stormwater to the City's facilities. (DOT Ex. 1, Sec. 27-241(b))(A1. 103-107) Although previously denied by the City, the Department established that the City also charges stormwater fees to a developed property located in the City that contributes stormwater solely to the Department's stormwater facilities and does not contribute stormwater to the City's facility. (T2. 348-358) The evidence also established that the Department accepts stormwater originating from properties both abutting state roads within the City and the properties located near those abutting properties; and established that stormwater from those properties is managed by the Department along with the stormwater that falls on the state roads. (T1. 141)(Proffer: T2. 331)

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[3] This could be construed as an admission by the City that it costs the Department three times more than the Department comprehends to help the City maintain this portion of the City's stormwater management facilities.

The Department's proffered Exhibit A shows properties that do not abut state roads but nevertheless contribute stormwater to facilities managed by the Department. (Proffer: T2. 331) The drainage basins on proffered Exhibit A depict numerous parcels of developed property that contribute stormwater to the Department's stormwater management system and pay stormwater fees to the City. (Proffer: T2. 331) The City's Public Works Manager estimated that at least one block on each side of every state road in the City contributes stormwater that is managed by the Department's stormwater facilities. (Proffer: Swearingen, April 9, 2002, p. 3, l. 17-18; April 18, 2002, p. 52, l. 14-18)(A1. 25, 58)

The City collected $4,010,825 in stormwater utility fees for the fiscal year ending September 30, 2001. (City Ex. 2) Of this amount, over 28 percent, or $1,161,719.75, was paid by properties adjacent to state roads. (DOT EX. 19)(A2. 234) In addition, the Rousseau commercial property located at 7011 Newberry Road in the City pays over $950 a month in City stormwater utility fees despite the fact that the stormwater contributed by this property is solely managed by the Department and does not enter the City's facilities. (DOT Ex. 34, 35)(T2. 348-350)(A2. 235, 236)

The City charges stormwater fees to the Department for its

properties located at 2006 NE Waldo Road and 2715 NE 39th Avenue; which totaled $23,736.12 for the fiscal year ending September 30, 2001. (DOT Ex. 18, State Road 24/Waldo Road and State Road 222/39th Avenue)(A2. 232-233) Correspondingly, the Department's costs to maintain the stormwater facilities that manage the City's stormwater were $46,470.30 for the fiscal year ending June 30, 2001, and $97,520.33 for the period of July 1, 2001 to April 25, 2002. (DOT Ex. 6)(A2. 219) In addition to those maintenance costs, the Department has contracted to install sediment traps in Hogtown Creek at a cost of $2,200,000. (Proffer: T2. 329)

After the presentation of all of the evidence, the trial court made its oral ruling.[4] (T2. 373-375) Thereafter, further argument was held between counsel for the State and for the City, which the trial court summarized as follows:

> a user fee must be to be [sic] something that the user can elect to not take the services for which the fee is imposed. And if the fee is assessed to the facility, the apartment complex, and the fee is charged as an adjunct to the utility bill, to the tenants there, how do the tenants have the option not to incur the user fee?

(T2. 378) The trial court then concluded "Okay. I'll hand that

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[4] This ruling is attached to the Final Judgment of Dismissal dated June 7, 2002, nunc pro tunc to May 23, 2002. (A1. 1-20) The City's motion for rehearing was denied on July 1, 2002. (A1. 21-22)

ground as Ground No. 2. Put that in the order so both of them can be looked at by an appropriate court for review." (T2. 378-379)

SUMMARY OF THE ARGUMENT

The trial court properly concluded that the City's ordinance assessing a stormwater management fee against all developed properties in the City was invalid because it was not voluntary and did not comport with the City's enabling statute authorizing such fees to be assessed to the beneficiaries of the system based upon their relative contribution to the system's need. § 403.031(17), Fla. Stat. The City's ordinance imposes a flat rate for all residential properties without consideration of their contribution to the need for a stormwater system, assessed properties that did not use the City's system, and imposed fees upon tenants of multi-family residences. The fees are not paid by choice because the property owner has no option of not utilizing the service and avoiding the fee, and thus the fee is an assessment and not a user fee. State v. City of Port Orange, 650 So. 2d 1 (Fla. 1994). The trial court's conclusions in this regard should be affirmed.

The trial court erred in concluding that sovereign immunity did not bar the City from assessing fees against the Department and that the statute could not be read to require consideration of the vast "contribution" of stormwater management facilities the Department makes to the City in assessing the fee against the Department. The trial court also erred in precluding the

admission of additional evidence establishing the extent and use of the Department’s facilities.

ARGUMENT

I. BASED UPON THE COMPETENT, SUBSTANTIAL EVIDENCE PRESENTED, THE TRIAL COURT PROPERLY CONCLUDED THAT THE CITY'S STORMWATER MANAGEMENT UTILITY FEE WAS AN INVALID USER FEE.

A. Standard of Review/Introduction.

This is a bond validation case in which the City attempted to validate a proposed bond issue to fund stormwater improvements within the City. The trial court dismissed the City's action and refused to validate the bond issue because the City's ordinance establishing the fees that would be used by the City to repay its bondholders was not based upon contribution to the need for the City's stormwater program and because the fees were not voluntary. This Court has recently restated the scope of review in bond validation cases in City of Winter Springs v. State, 776 So. 2d 255, 257 (Fla. 2001):

> This Court's scope of review in bond validation cases is limited to the following issues: (1) whether the public body has the authority to issue bonds; (2) whether the purpose of the obligation is legal; and (3) whether the bond issuance complies with the requirements of the law. . . . To comply with the requirements of the law, a special assessment funding a bond issuance must satisfy the following two-prong test: (1) the property burdened by the assessment must derive a special benefit from the service provided by the assessment; and (2) the assessment for the services must be properly apportioned among the properties receiving

> the benefit. *See Lake County v. Water Oak Management Corp.*, 695 So.2d 667, 668 (Fla.1997)(citing *City of Boca Raton v. State*, 595 So.2d 25, 30 (Fla.1992)). "[T]he standard [of review] is the same for both prongs; that is, the legislative determination as to the existence of special benefits and as to the apportionment of the costs of those benefits should be upheld unless the determination is arbitrary." *Sarasota County v. Sarasota Church of Christ*, 667 So.2d 180, 184 (Fla.1995).

The City would have this Court believe that the grounds upon which its ordinance was declared invalid by the trial court and the grounds and evidence upon which the Department and the State relied in challenging the City's ordinance had been previously "rejected by the First District Court of Appeal in City of Gainesville v. State, Department of Transportation, 778 So. 2d 519 (Fla. 1st DCA 2001)." (IB. 20) In reaching this misleading conclusion, the City ignores the operative words and the true holdings of the First District's opinion. In summary, the First District held that "the ordinance at issue here, **if it operates as the City has alleged, imposes utility service fees rather than special assessments**." Id. 527 (emphasis added). Specifically, the court held:

> While the amended complaint alleges that the "stormwater fee applies to all properties within the City using or benefitting from the system, including all buildings and properties owned by the City and all other governmental entities," it also alleges that

> the "City's ordinance does not impose any charge on undeveloped and unaltered land" and that **"[d]eveloped land is charged only to the extent that it contributes stormwater to the stormwater utility system."** Under these allegations, a landowner does have the option to refuse stormwater management services and so avoid any fees either by refraining from developing the land or, if the land has been developed, by preventing runoff from leaving the property or, as the amended complaint further alleges, by assuring that "stormwater runoff from the site does not impact stormwater utility services...."
>
> The amended complaint alleges that charges are "'based on the cost of providing stormwater management services to all properties within the city and may be different for properties receiving different classes of service.'" . . . **The City is entitled to a chance to prove that its ordinance "assess[es] the cost of the program to the beneficiaries based on their relative contribution to its need ...[and] operate[s] as a typical utility which bills services regularly, similar to water and wastewater services**. § 403.03(17), Fla. Stat. (2000).
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> * * *
>
> The boundary between special assessments and user fees is not always clear. . . . The lack of a bright line notwithstanding, we hold that the **ordinance at issue here, if it operates as the City has alleged, imposes utility service fees rather an special assessments**. . . .

Id. at 524-527 (emphasis added). The City's reliance on that opinion for the proposition that the issues presented have been previously decided is wrong. The City ignores the irrefutable

fact that the First District recognized that inasmuch as the case was before the court to review an order of dismissal, there was much fact finding to be done. The First District recognized that the City had to establish that its ordinance operated as alleged in its amended complaint in order to prevail.

Likewise, the City ignores the First District's conclusion regarding the Department's argument that sovereign immunity prevented the City from assessing fees against the Department:

> On this record, which does not reveal whether there is a written agreement between DOT and the City, DOT has demonstrated no legal reason for failing to pay the City's charges **if, as the City has alleged, the City's ordinance imposes user fees.** . . . **Absent a written agreement, however, a vendor cannot sue the state for money damages on a contract theory**. . . . While the present case is an intergovernmental dispute and the charges are authorized by ordinance, private entities may also be authorized by ordinance to furnish utility services. **In any event, the City has argued no basis for abrogating the ordinary rule immunizing the state from contract suits where the state has signed nothing. At this stage of the proceedings, however, it is not clear whether or not DOT signed an application for utility services or otherwise entered into a written agreement with the City. The City has made no allegation in this regard.**

Id. at 530 (emphasis added).

The case was remanded to the trial court for further proceedings on these issues. Id. However, rather than attempt

to prove that which the First District said it must in order to prevail, the City voluntarily dismissed its action. Later, the City filed a complaint in Alachua County to validate its proposed bond issue which would be funded by the City's stormwater charges. In that proceeding, from which this appeal emanates, the City had to prove that which it chose not to attempt to prove in its earlier action in Leon County.

The legal conclusions of the trial judge in the bond validation proceeding must be supported by the competent, substantial evidence presented at trial. See, e.g., City of Winter Springs, 776 So. 2d at 261. This Court must review the trial court's legal conclusions and determine whether they are supported by the law and by competent, substantial evidence.

B. The Department, like local governments, provides stormwater management services.

The importance and significance of preserving and protecting the water resources of the state were not issues below and are not disputed by the Department. In nevertheless espousing their importance, the City cites to and quotes various provisions of Chapters 403 and 373, Florida Statutes. (IB. 21-22) The City also quotes the definition of "stormwater management system" from Section 403.031(16), Florida Statutes, as:

> a system which is designed and constructed or implemented to control discharges which

> are necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use, or reuse water to prevent or reduce flooding, overdrainage, environmental degradation and water pollution or otherwise affect the quantity and quality of discharges from the system.

However, the City ignores the undisputed fact and the undisputed evidence in this case that this definition also describes the Department's stormwater management activities both within the City and throughout the state. The City is not the only party to this action with duties and responsibilities for, as well as the expense of, stormwater management or owning and maintaining a large and viable stormwater management system.

Stormwater management activities include flood control, drainage, and pollution control and benefits developed property in the City. (T1. 140-141) The Department's stormwater management facilities include drainage ditches and storm sewer pipes for transporting stormwater, retention areas to treat stormwater and improve water quality, outfall ditches to move stormwater away from the state roads, inlets to intake stormwater, and catch basins to trap debris and sediment in stormwater. (DOT Ex. 4)(T1. 207-209)(A2. 218)

The City and the Department have an integrated stormwater management system. (T1. 141-142) Jim Scholl, the City's expert in stormwater management, admitted that the Department's

facilities are just as useful as the City's for draining stormwater. (T1. 143) In planning new stormwater facilities, the City considers and uses the Department's existing stormwater management system. (T1. 140, 143) In fact, the City "would be virtually negligent" to ignore the presence and use of the Department's stormwater facilities in the City's management of stormwater. (Proffer: Swearingen, April 9, 2002, p. 16, l. 6-13)(A1. 33)

It is both short sighted and disingenuous for the City to turn a blind eye to the Department's stormwater facilities and the unrefuted evidence that without the support of the Department's facilities, the City's stormwater management program could not function.

C. Local governments are authorized to fund stormwater, but stormwater utility charges are not among the mandatory charges authorized by Section 180.02, Florida Statutes.

It is not disputed that Section 403.0893, Florida Statutes, provides for three potential funding sources for the construction, operation, and maintenance of stormwater management systems. However, upon analysis, it is evident that the City's program fails to satisfy any of these funding mechanisms and further fails to meet the statutory definition of a stormwater program which is specifically authorized to be

funded 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 which bills services regularly, similar to water and wastewater services.

§ 403.031(17), Fla. Stat. (emphasis added). First, the mere fact that a stormwater utility is "operated as a typical utility which bills services regularly, similar to water and wastewater services" does not make stormwater a valid mandatory utility simply because it appears on a utility bill. If stormwater fees were intended to be mandatory, the legislature would have included them in Chapter 180, Florida Statutes, and would not have provided for them separately in Chapter 403, Florida Statutes.

Second, the evidence established that the cost of the City's program is not assessed to the beneficiaries based on the beneficiaries' relative contribution to the demand placed on the system. Rather, the City's ordinance is cast in mandatory terms and contemplates a fee from all developed properties in the City. The ordinance imposes and collects fees based upon a flat rate from residential customers, collects fees from developed properties that do not utilize the City's system, and fails to consider or provide a fee offset for the "contribution" made by the Department's stormwater management facilities, without which

the City's facilities could not fully operate. (T1. 76-86; T2. 314-320; T1. 140-143)(A1. 33) The City's fee is not voluntary because the service cannot be declined and because, as the undisputed evidence established, only 10 to 20 of the more than 20,000 residential properties in the City could avoid paying the fee because the average property owner cannot qualify for a credit and only one residential development has qualified for a credit. (T1. 85, 152)

In support of its ordinance, the City, for the first time, relies on the provision in Section 403.0891(16), Florida Statutes, that authorizes the Department of Environmental Protection and the Department of Community Affairs to develop a model stormwater management program for local governments that contains "dedicated funding options, including a stormwater utility fee system based upon an equitable unit cost approach." However, it was never argued below that such a model program exists or that the City adopted such a program and no evidence of such was introduced below. Moreover, the phrase "equitable unit cost" is not defined in the statute or by case law, and the City did not allege, nor did it prove, what "equitable unit cost" means or that its ordinance was enacted in accordance with such a model program using an "equitable unit cost approach."

As such, the City should not be able to raise this defense

to its ordinance for the first time on appeal. See Keech v. Yousef, 815 So. 2d 718, 719-720 (Fla. 5th DCA 2002)(appellate court will not consider an issue raised for the first time on appeal). If, however, the "equitable unit cost" does and can apply to this case, under any plain meaning given to the term "equitable," the City's program is not, and further proceedings would be required to establish that which the City herein alleges for the first time.

D. The City failed to refute the evidence establishing that its stormwater utility charge is not a valid user fee.

The trial court correctly determined that the City had failed to rebut the evidence offered by the Department and the State that its ordinance was not a valid user fee and properly declined to validate the City's proposed bond issue that relied upon the City's revenues generated by the ordinance.

1. The City's fee is not charged only to users of the City's system, is not based on users' relative contributions to the need for the system, and is not voluntary.

The City begins this portion of its argument by citing City of New Smyrna Beach v. Board of Trustees of the Internal Improvement Trust Fund, 543 So. 2d 824 (Fla. 5th DCA 1989), and City of Jacksonville v. Jacksonville Maritime Ass'n, Inc., 492 So. 2d 770 (Fla. 1st DCA 1986), for the proposition that courts have "routinely looked at the relationship of the amount of the charge to the cost of providing the service in determining whether the charge is a fee, and have upheld fees that are commensurate with the service provided or costs incurred." (IB. 24) While this may be true under certain circumstances, it is not true in this instance, and the cited cases are not relevant to the issue decided below.

For instance, in City of New Smyrna Beach, the city's toll for vehicles to access the beach under Chapter 161, Florida Statutes, was held to be valid and the city's use of revenue generated was proper. City of New Smyrna Beach, 543 So. 2d 824. Conversely, in City of Jacksonville, the court concluded that a city ordinance imposing a "user fee" on certain vessels anchored in the St. Johns River was found to be an unauthorized tax and therefore illegal and void. City of Jacksonville, 492 So. 2d at

772. Neither of these cases addresses or is relevant to a Chapter 403, Florida Statutes, stormwater fee.

The City claims that the three classes of stormwater customers (single family residential, multi-family residential, and non-residential) are sufficient and different enough to support a valid fee "because each class contributes different amounts of stormwater to the City's system." (IB. 24-25) This claim is not supported by the record. The record established that single family and multi-family residences are charged a flat rate because the cost of determining and assessing the impervious area of those properties was deemed too high, compared to any increase in fees that could be generated by such individual determinations. (T1. 120) The fee charged to developed properties within the City does not take into account their proportional use of the stormwater system as the City claims. Specifically, the City's public works director admitted that a residential property with 1,500 square feet of impervious area on a one quarter acre lot is charged the same $6 fee as the residential property with 20,000 square feet of impervious area on a two acre lot. (T1. 78-83)

The City also ignores the record evidence that those who do not contribute to the City's system are charged and pay the fee. (IB. 25) The City did not dispute the Department's evidence of

a commercial property that is charged the fee but uses only the Department's system. (T2. 348-358)(T1. 141)(Proffer: T2. 331)

a. The City's fee is not based upon the cost of the program assessed to the beneficiaries based on their relative contribution to its need.

The City proclaims that "[t]he law in regard to wastewater fees, solid waste fees and, indeed, stormwater fees, abounds with examples of flat rates, estimates and averages being found as an appropriate method to set fees." (IB. 26) The City is correct only as its statement pertains to charges other than stormwater fees, which is confirmed by a simple review of the authorities cited by the City. None of the cases cited by the City addresses a stormwater utility fee authorized by Chapter 403, Florida Statutes. The Florida cases cited by the City relate to mandatory services and mandatory fees under the authority of Chapter 180, Florida Statutes, or older, similar, repealed provisions of Chapter 163 (general powers of municipalities) and Chapter 184 (municipal sewer financing), Florida Statutes. This significant distinction is ignored by the City and defeats its argument that flat rates, estimates, and averages abound in the area of stormwater fees.

The services provided in the more recent cases cited by the

City are among those services for which municipalities can require all persons or corporations living or doing business within a specified area to connect and pay under Section 180.02(3), Florida Statutes. The management of stormwater is not among those services for which connection and fees can be mandatory under Chapter 180, Florida Statutes; the City's authority for its stormwater management fee is derived from Chapter 403, Florida Statutes, not Chapter 180, Florida Statutes.

For example, the City relies on State v. City of Miami Springs, 245 So. 2d 80 (Fla. 1971), in which this Court affirmed a bond validation based upon the imposition of a flat rate for sewer services and a flat $2 per thousand gallons of water used. The City of Miami Spring's authority in that case came from now repealed Chapter 184, Florida Statutes, and neither that statutory authority nor the case is relevant to the resolution of the issues in this case. Id.

McDonald, an Illinois case cited by the City, is similarly irrelevant because it addresses the constitutionality of an ordinance establishing rates for a municipal sewer system. McDonald Mobile Homes, Inc. v. Village of Swansea, 371 N.E. 2d 1155 (Ill. App. 5th 1977). Neither the case itself nor the City reveals any correlation between the City's ordinance and Florida

law in the instant case and the Illinois constitution and the Village of Swansea's ordinance in McDonald. Id. In similarly relying on other cases, the City again fails to provide this Court with any analysis of the case or its relevance to the instant case; fails to provide any facts regarding the type of service offered, the statutory structure under which the services were authorized, the calculation methodology utilized, or any analogy to the instant case; and merely quotes an out of context phrase which is offered as proof of the trial court's error. Home Builders Ass'n of Utah v. City of American Fork, 973 P.2d 425, 429 (Utah 1999); McGrath v. City of Manchester, 398 A.2d 842 (N.H. 1979); Watergate II Apartments v. Buffalo Sewer Auth., 385 N.E.2d 560 (N.Y. App. 1978). It is of no help to this Court's analysis and of no consequence to the resolution of the issues in this case that the various courts in the cases cited by the City may have made a statement about some unidentified service under some unknown statutory scheme. According to the City, because a New Hampshire court in McGrath, 398 A.2d at 845, said "[t]he fact that absolute mathematical equality is not achieved does not render the system invalid;" and a New York court said in Watergate II, 385 N.E.2d at 564, that "exact congruence between the cost of the services provided and the rates charged . . . is not required," this Court should

reverse the findings and conclusions of the trial court in this case. Surely, much more is required for such cases to establish binding precedent or to be persuasive enough for this Court to overturn the findings of fact and conclusions of the trial court in this case.

The missing details reveal that in McGrath, the City of Manchester successfully defended a challenge to its sewer rental fee. McGrath, 398 A.2d at 845. On review, the court concluded that a sewer rental fee "need only bear a rational relationship to the espoused or court-supplied purpose" and upheld the master's findings that the City's different service charges were not unreasonable or inequitable. Id. (citation omitted). McGrath is easily distinguishable because the statute in this case authorizes a stormwater fee only where it is assessed to the beneficiaries of the system based upon their relative contribution to its need, not because there may be some "rational relationship" between the City's fee and its underlying purpose. If McGrath has any relevance to the instant case, it supports the proposition that a trial court's findings of fact regarding utility fees that are supported by competent, substantial evidence should not be disturbed on appeal.

Watergate II is even less on point than McGrath. There, a redevelopment company challenged "sewer rents" because they

violated the city's tax limitation agreement with Watergate II. Watergate II, 385 N.E.2d at 826. The court concluded that the sewer rents did not violate the parties' agreement and that the legislature's addition of a "flexible standard 'any other equitable basis' constitutes a logical response . . . [a]nd the disputed basis chosen by the [sewer] authority as a criterion for apportioning sewer rents seems a reasonable exercise of its power." Id. Florida's legislature provided no such flexibility to the City, nor did it authorize a fee based upon some unidentified equitable basis the City could devise for its stormwater fee in this case. The City was authorized by the legislature to charge only for the cost of its stormwater program and to assess that cost only to the "beneficiaries based on their relative contribution to its need." § 403.031(17), Fla. Stat. The City's stormwater fee is not a voluntary user fee and does not comport with its statutory authority.

The legislature has not authorized the imposition of mandatory stormwater fees, as it did with other public works services under Chapter 180, Florida Statutes. Thus, while the City argues that the legislature envisioned a stormwater utility being set up "akin to a water or wastewater utility," (IB. 28-29) any similarity is only to the fact that the legislature said that a stormwater utility is "to be operated as a typical

utility, which bills services regularly, similar to water and wastewater." §403.031(17), Fla. Stat. Similarity, the regularity or manner of billing for services cannot convert the City's stormwater fee into a water or wastewater fee because stormwater is not a utility authorized by Chapter 180, Florida Statutes, which can be mandatorily imposed upon all residents. The cost of a stormwater program must be assessed to the system's beneficiaries "based on their relative contribution to its need." § 403.031(17), Fla. Stat.

Citing City of Gainesville, 778 So. 2d 519, the City argues that stormwater runoff cannot feasibly be metered and that the ERU as a measurement of use is used by "the majority of stormwater utilities in the country and have been upheld by courts in other states." (IB. 29) However, use of the ERU is not the problem. The City's failure to adjust the ERU based upon the beneficiaries' relative contribution of stormwater to the need for the program as required by the statute is the first problem. The City's failure to enact a voluntary fee is the second problem.

In claiming that it cannot measure stormwater, the City ignores the undisputed evidence that the City does measure impervious area as a method to calculate the relative contribution of stormwater to the system to assess an individual

stormwater fee for each nonresidential property. The City similarly ignores the fact that other cities, such as the City of Port St. Lucie, Florida, and the City of Durham, North Carolina, have successfully established fee structures using ERUs based upon the amount of stormwater generated by the property. Atlantic Gulf Communities Corp. v. City of Port St. Lucie, 764 So. 2d 14 (Fla. 4th DCA 1999); Smith Chapel Baptist Church v. City of Durham, 517 S.E.2d 874 (N.C. 1999).

In Atlantic Gulf, the City of Port St. Lucie imposed a stormwater fee utilizing the ERU as its basic billing unit. Atlantic Gulf, 764 So. 2d at 15. Port St. Lucie determined that "the typical residential lot had 11,745 square feet of total area and that the typical home on such lot has 2,290 square feet of impervious surface area;" this typical home and lot was designated as the ERU in the city. Id. However, neither the analysis nor Port St. Lucie's fee structure ended there. Port St. Lucie determined that the

> number of ERU's [sic] to be assigned to a particular lot was based upon the amount of stormwater runoff potential assigned to that parcel. For example, if a lot generated twice the amount of stormwater runoff as did an ERU, that parcel would be assigned 2 ERU's [sic].

Id. at 16. Port St. Lucie assigned ERUs in proportion to the amount of runoff generated - not a flat ERU for lots with

impervious areas ranging from 1,500 square feet to as much as 20,000 square feet. (T1. 80-84) The opinion does not reveal if the charge is a voluntary user fee or an assessment, or if it applied to state properties. However, even additional categories cannot transform the City's fee into a fee that is voluntary and it is not voluntary, it is an assessment and cannot be charged against Department properties. Port Orange, 650 So. 2d 1. However, even if the City's fee is voluntary it is not automatically chargeable against Department properties. See Issue V. B. below.

The City of Durham performed a similar analysis with a somewhat similar result. Smith Chapel, 517 S.E.2d at 882. There, an ordinance was enacted pursuant to which all developed land in the city would be subject to a stormwater service charge. Id. The charges were computed at one rate for residential units with less than 2,000 square feet of impervious surface and another rate for residential units with 2,000 square feet or more of impervious surface. Id. The city also provided that other residential and nonresidential land would be charged $3.25 for each ERU. Id. Although the City of Durham's ordinance was declared invalid because it exceed the city's legislative authority, the court approved the rate scheme enacted by the city. Id. In contrast to the instant case, the

City of Durham at least created three categories of residential units.

The City's offer of Teter v. Clark County, 704 P. 2d 1171 (Wash. 1985), and Twietmeyer v. City of Hampton, 497 S.E.2d 858 (Va. 1998), to support its position, suffers from the same infirmities: no analysis, no facts, and no comparison of the relevant statutory or fee similarities or dissimilarities. (IB. 29) The missing facts reveal that the ordinance in Teter authorized a different system with fee authority different from the instant case; the Teter "sewer system" included storm and surface water sewers; and the authority given in Teter ambiguously allowed the county to establish "rates and charges" for the use of the system. Teter, 704 P.2d at 1175. In concluding that the ordinance was valid, the court relied heavily on the county's general police powers, concluding that the subject charges were "constitutionally valid under the police power." Id. at 1177-1178. Police power authority is not an issue and was not raised as a defense to the challenge to the City's ordinance in the instant case.

In addition, the challengers in Teter did not prevail because they "failed to show that the County acted arbitrarily in determining its rate schedule." Id. at 1179. In the instant case, it was not the burden of the Department or the State to

establish that the City acted arbitrarily and, importantly, there was no failure of proof. The trial court found and concluded that the City's ordinance is not voluntary and does not comply with the relevant statutory authority and those findings are supported by competent, substantial evidence and the law.

b. The City's use of flat rates for stormwater utility fees is not authorized and it is not a valid, widely accepted practice for imposing stormwater fees.

Once again, the City argues that its flat rate fee for residential properties is valid because it is a widely accepted practice for collecting for garbage, solid waste disposal, and wastewater services. (IB. 29-33) As detailed above, the distinctions between the cases relied upon by the City and this case support the result reached by the trial court, not the result advocated by the City. Those Florida cases relied upon by the City uphold flat rates for services authorized by Chapter 180, Florida Statutes, not services authorized by Section 403.031(17), Florida Statutes. Those out of state cases relied upon by the City similarly address other types of utilities and varying types of ordinances that are governed by different authorizing statutes, different interpretations, and different burdens of proof.

The City proclaims that if measurement is "infeasible" or "the cost of such measurement renders it practically infeasible" a flat stormwater rate is acceptable. (IB. 29) There is no authority to support that statement and the City's own experts offered no testimony of infeasibility when they explained how each nonresidential property was individually assessed, individual calculations were made to determine impervious area, and each property's fee was determined accordingly. (T1. 44-46, 120) Only a statistical analysis was performed for residential properties, but not because the requisite calculations could not be performed. Rather, the City's expert testified that residential properties were not individually analyzed because the cost of making such determinations was too high compared to any potential increase in fees that might result from individual determinations of impervious area. (T1. 120)

The ability to individually determine impervious area of non-residential properties was acknowledged and in fact performed by the City. Moreover, an inability excuse does not cure the City's failures, nor does it validate the City's efforts or its ordinance. First, the City failed to establish that the alleged cost of compliance with the statute could be considered a factor in determining each beneficiary's "relative contribution" to the need for the stormwater management system

or in deciding how to assess and collect for stormwater management. Not only did the City fail to establish that cost of compliance could be a factor in choosing a methodology for assessing fees, but the City also failed to offer any evidence to support its claim to this Court that the cost of compliance is prohibitive or "infeasible."

The cases offered by the City as authority for this position and to establish error by the trial court are City of New Smyrna Beach v. Fish, 384 So. 2d 1272 (Fla. 1980); Stone v. Town of Mexico Beach, 348 So. 2d 40 (Fla. 1st DCA 1977); and Kootenai County Property Ass'n v. Kootenai County, 769 P. 2d 553 (Idaho 1989). Once again, the cases relied upon are easily distinguishable from the facts and the law applicable to the instant case; distinctions the City ignores.

In Fish, as in all other cases cited by the City, the fee charged is a flat rate for a Chapter 180, Florida Statutes, service - garbage and trash removal. Fish, 384 So. 2d at 1274 (relying on Section 180.13(2), Florida Statutes (1977)). In Stone, as in Fish, the issue was garbage service for which the ordinance required payment whether the service was used or not. The First District did not directly cite to Chapter 180, Florida Statutes, in its opinion. However, the fee charged was undoubtedly a Chapter 180 fee as evidenced both by the facts of

the case and the court's reliance on State v. City of Miami Springs, 245 So. 2d 80 (Fla. 1971), which construed Section 184.09(3), Florida Statutes (1971), in reaching its conclusion that the fee was valid. Stone, 348 So. 2d at 42.

Kootenai is similarly inapplicable because it also deals with a solid waste fee, and upholds the fee based upon interpretation of legislative police powers requiring citizens to accept certain services and fees. Kootenai, 769 P.2d at 555-556. Like Kootenai itself, none of the cases relied upon by the Kootenai court address stormwater fee charges or statutory language similar to Section 403.031(17), Florida Statutes. Id. at 556.

Relying on language from Kootenai, the City argues that to painstakingly monitor and determine each property's use or stormwater contribution would result in users paying substantially more to cover the additional salaries of monitors. (IB. 31); Id. at 555. Neither the Department nor the State argued that exact measurement and continual monitoring are necessary to a valid stormwater fee. The City proclaims "the cost of exactitude would be prohibitive" but, as detailed above, there is no evidence in the record to support that claim. (IB. 31) As previously noted, what the City's consultant said at trial was that the cost of determining and assessing the

impervious area of residential properties was deemed too high compared to any potential increase in fees which might result from such individual determinations. (T1. 120) Section 403.031(17), Florida Statutes, requires an assessment based on relative contribution, not that the ultimate revenue to the City remains the same under any methodology used.

The issue presented to the trial court was not whether the City charged a reasonable fee for stormwater management. The issue presented was whether the City's ordinance complied with Section 403.031(17), Florida Statutes. The Department and the State proved and the trial court properly concluded that it did not.

In this portion of its argument, unlike prior arguments, the City cites two out of state cases that actually address stormwater fees. Smith Chapel, 517 S.E.2d 874 (N.C. 1999); Long Run Baptist Ass'n v. Louisville & Jefferson County Metro. Sewer Dist., 775 S.W.2d 520 (Ky. Ct. App. 1989). (IB. 32) However, neither case supports the City's position or establishes error in the trial court's findings or conclusions. As addressed above, the City of Durham overcame Smith Chapel's challenge in part because the city had two classes of rates for residential properties. Smith Chapel, 517 S.E.2d at 882. In Long Run Baptist, the service charge to fund a storm drainage program was

determined not to be a tax and was upheld because the Kentucky legislature authorized the fee to be collected from all property "served by the facilities of the district." Long Run Baptist, 775 S.W.2d at 522. Based upon the statutory authority given the sewer district, the court concluded the system of classification was "founded upon a natural and reasonable basis, with a logical relation to the purposes and objectives of the authority granted . . . ." Id. at 523.

Here, the City's statutory authority is not so broad. The Florida legislature has conferred no authority to local governments to charge a fee to all properties merely "served" by their stormwater facilities. The City is authorized to assess fees against those properties benefitting from the stormwater program "based upon their relative contribution to its need." §403.031(17), Fla. Stat. The Long Run Baptist standard of reasonable basis and logical relation is not the standard by which the trial court properly judged the City's ordinance in this case, nor is it the standard by which this Court is to review the trial court's findings and conclusions.

c. The City cannot raise for the first time on appeal that the establishment of a rate and rate structure is among the City's legislative functions.

For the first time in this proceeding, the City argues that

"the establishment of a rate structure and utility rates is a legislative function, delegated to a local government's governing board." (IB. 33) Similarly, it was not argued below that "[i]t is within the sound discretion of the legislative body to determine whether a flat rate for residences is proper or whether it is the tenant of an apartment or the owner who pays for the service." (IB. 34) Although in its motion for rehearing or clarification, the City cited City of Riviera Beach v. Martinique 2 Owners Ass'n, 596 So. 2d 1164 (Fla. 4th DCA 1992), for the proposition that municipalities have latitude in establishing utility rates, the City did not argue below that its ordinance is valid because of some unidentified inherent latitude or discretion. It is well settled that

> an appellate court will not consider an issue that has been raised for the first time on appeal. Farinas v. State, 569 So.2d 425, 429 (Fla.1990).

Keech, 815 So. 2d at 718 (citations omitted). This portion of the City's brief should be stricken for failure to adhere to this principle.

Without waiver of its position that the City's argument in this regard was not raised below and cannot be raised for the first time on appeal, the Department notes that cases offered by the City to support its proposition, once again, do not address stormwater management fees established pursuant to Section

403.031, Florida Statutes. Martinique 2 is a challenge to the City of Riviera Beach's solid waste removal charge, which is mandatory under Section 180.02(3), Florida Statutes. The Fifth District concluded that once authorized to levy the charge, it was left up to "legislative judgment for the city" to establish what was "just and equitable" under Section 180.13(2), Florida Statutes. Martinique 2, 596 So. 2d at 1165. The authority to exercise its judgment and establish a "fair and equitable" stormwater management charge does not govern the City or its stormwater fee under Section 403.031(17), Florida Statutes, in this case. The Department and the State established that the City's ordinance did not comport with its enabling statute and was not voluntary and the trial court properly found the ordinance to be invalid.

2. The City's fee is not voluntary and the City charges and collects the fee when there is no use of its system.

The City's stormwater fee is not voluntary. In Port Orange, this Court addressed a city ordinance creating a transportation utility and imposing a transportation utility fee relating to the use of city roads. Port Orange, 650 So. 2d 1. The fee was to be based upon the estimated amount of usage of local roads by owners and occupiers of developed properties within the city. Id. at 2. Port Orange then authorized the issuance of bonds to

construct, renovate, and expand certain city transportation facilities, which were to be funded by a pledge of the transportation utility fees. Id. at 3. The circuit court determined the fee to be a valid user fee which the city was authorized to issue and to collect under its municipal home rule powers, and the state appealed. Id.

In distinguishing between Port Orange's tax and valid user fees, this Court opined:

> 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 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, 94 S.Ct. 1146, 1149, 39 L.Ed.2d 370 (1974); **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.**

Id. (emphasis added)(citations omitted) This Court continued:

> Thus, the impact fee in *Contractors and Builders Association v. City of Dunedin* was a valid user fee because it involved a voluntary choice to connect into an existing instrumentality of the municipality. 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.**
>
> The circuit court cites to storm-water

> utility fees as being analogous to the transportation utility fee. However, storm-water utility fees are expressly authorized by section 403.031, Florida Statutes (1993). Similarly, various municipal public works and charges for their use are authorized by chapter 180, Florida Statutes (1993). However, the City's transportation utility fee is not authorized by chapter 180, Florida Statutes.

Id. at 4(emphasis added).

Like the Port Orange tax, which was invalid because it did not fall within the city's home rule powers, the City's stormwater fee in this case is invalid because it does not fall within its statutory authority and it is not voluntary. Like the Port Orange fee, the City's stormwater fee "is a mandatory charge imposed upon those whose only choice is owning developed property within the boundaries of the municipality." Id. The City's answer to the challenge that property owners have no choice but to pay its fees is that: they can move out of the City, they can leave their property undeveloped, or they can redevelop their property to provide for 100 percent onsite retention.

The City also claims that a property owner does not pay the City's fee if the owner does not use "the City's service" because it retains 100 percent of the property's stormwater or because runoff from the property "does not drain through the City's stormwater management system." (IB. 35) The term the

"City's stormwater management system" is not defined in the ordinance and the ordinance on its face does not support the City's interpretation that the City's system means "city owned system" and not all stormwater facilities as defined in the ordinance. However, as established below, the City's "system" does not and cannot operate without the Department's "system." (T1. 140-143, 145, 147, 237) The only way for the City to operate a viable stormwater system is to include and use the Department's facilities, which the City admits it does. (T1. 140-142)(Proffer: Swearingen, April 9, 2002, p. 16, l. 6-13)(A1. 33) Moreover, as noted above, the Newberry Road property does not use the City's system or the City's service but pays the City's fee. (T2. 314-320)

The City argues that the ordinance meets the Port Orange "voluntary" test because the City provided evidence that one apartment complex in the City does not use the City's system and therefore does not pay the fee. (T1. 125) However, the choice faced by single family residents and the tenants of all other multi-family residences is to pay or move out of the City. Confronted with this Hobson's choice,[5] tenants and owners pay the

[5] An apparent freedom of choice with no real alternative. Coined after "Thomas Hobson (died 1631), English liveryman, who required his customers to take the next available horse rather than give them a choice." Anderson v. Highlands Beach Dev. Corp., 447 So. 2d 1045, 1046 (Fla. 4th DCA 1984).

fee. The City argues that it would be futile to impose the stormwater fee on the property owner instead of the tenants, because doing so would not make the fee any more or less voluntary as the property owner would simply pass the fee to the tenant. The tenant, the City proclaims, is "the ultimate user of the stormwater service." (IB. 36 n.4) The City is wrong, the tenant does not "use" the stormwater system and the tenant is not "benefitted" by the service. The owner "uses" the system to drain stormwater generated by the impervious areas of his or her property, not from the tenant's property. It is the property that benefits from the system and the owner, not the tenant, owns the property.

The evidence established that the ordinance is cast in mandatory terms and contemplates the imposition of stormwater fees on all developed property in the City. The City's "choice" to overcome the mandatory operation of its ordinance is illusory because, as the City admits, only one property has qualified for the alleged "credit." (T1. 125) Property owners must either pay the fee, pay to have the property redeveloped to retain all stormwater runoff on site, or move. There is no voluntary stormwater fee as authorized by Section 403.0893, Florida Statutes.

Once again, cases relied upon by the City in this regard are

distinguishable because they involve mandatory hookup fees under Chapter 180, Florida Statutes, and do not involve stormwater fees that are to be assessed to the beneficiaries of a stormwater program based upon their contribution to its need as authorized by Section 403.031(17), Florida Statutes. In both Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), and Keys Citizens for Responsible Gov't, Inc. v. Florida Keys Aqueduct Auth., 795 So. 2d 940 (Fla. 2001), this Court affirmed mandatory sewer connection charges. There is no mandatory connection authority or mandatory fee authority in this case.

The City's characterization of recent challenges to bonds supported by utility fees as evidence of this Court's having "called into question" the voluntary nature of the fee in Port Orange underscores the City's misreading of this Court's opinions as well as the City's misapprehension of its own authority to impose stormwater fees. (IB. 37) Port Orange is the controlling authority on the requirements for a charge to be a valid user fee. The trial court properly concluded that the City's charge was not a valid user fee because the provisions of the City's stormwater ordinance and the charges it imposes are mandatory and the party paying the fee is not benefitted in a manner not shared by other members of society. Moreover, this

Court's passing reference to Section 403.031(17), Florida Statutes, in a footnote in Pinellas County v. State, 776 So. 2d 262 (Fla. 2001), does not change the undeniable fact that the fee in that case was not a Section 403.031, Florida Statutes, stormwater management fee, and that the case is therefore inapplicable to the resolution of the issue in this case. (IB. 37)

3. Whether the City used stormwater fees for stormwater purposes was not an issue below.

The fact that the City's stormwater fees are used for stormwater purposes cannot convert an invalid fee into a valid fee. Neither the State nor the Department argued below that the City's fee was invalid because the revenue it generated was used for general revenue purposes and the trial court did not find the City's ordinance to be invalid because its fees were used for such purposes. Therefore, the City's argument that its fee is not a tax because "[a] characteristic of a tax is that it is imposed for general revenue raising purposes," is misplaced and has no bearing on this appeal or its outcome. (IB. 38-40)

4. The lack of lien capability does not validate the City's ordinance or its fee.

The City's argument appears to be that because lien capability is an attribute of a tax or a special assessment and

not an attribute of a user fee, and there is no such lien capability in the City's ordinance, the City's charge must be a valid fee and not a tax or a special assessment. (IB. 40-41) This circular reasoning does not cure the defects in the City's ordinance, nor does it transform an invalid ordinance into a valid ordinance or an assessment into a user fee. Contrary to the City's position otherwise, Florida courts have not widely considered the ability to place a lien on property for unpaid fees to be a pivotal factor in determining whether a charge is a user fee, a special assessment, or a tax. (IB. 40) Contractors & Builders' Association, 329 So. 2d at 319, the only authority cited by the City for this proposition barely mentions a lien and its passing reference to Section 403.031(17), Florida Statutes, in a footnote, has no precedential value to the outcome in this case.

On the other hand, it is no mere oversight that this Court in Port Orange did not include lien capability in identifying the common traits of user fees 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, 94 S.Ct. 1146, 1149, 39 L.Ed.2d 370 (1974); 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.

Port Orange, 650 So. 2d at 3 (citing City of Daytona Beach Shores v. State, 483 So. 2d 505 (Fla. 1985))(other citations omitted). Those common traits of user fees are not found in the City's fee in this case.

5. The City's stormwater fee is a special assessment.

The City recognizes that it "could" have chosen the special assessment option of collecting stormwater fees. The Department suggests it should have. The attributes of the City's fee are those of a special assessment, and not the attributes of a valid user fee. This Court in State v. Sarasota County, 693 So. 2d 546 (Fla. 1997), and Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180 (Fla. 1995), upheld special assessments to fund the county's stormwater management program and validated a proposed bond issue to fund the program. The first three criteria of this Court's analysis of the county's special assessment describe the City's fee in this case:

> (1) the assessment applies to the two classes of developed real property that contribute most of the stormwater runoff requiring treatment; (2) the assessment does not apply to undeveloped real property given that the undeveloped real property actually contributes to the absorption of stormwater runoff; (3) the properties assessed receive a special benefit from the funded stormwater services through the

> treatment of polluted stormwater contributed by those properties; and (4) the cost of those services has been properly apportioned.

Sarasota Church of Christ, 667 So. 2d at 182. Sarasota County created a valid special assessment as authorized by Section 403.0893(2), Florida Statutes. Id. at 185. The City's fee in the instant case satisfies the Sarasota County special assessment criteria, but it does not satisfy the criteria of a valid user fee. Port Orange, 650 So. 2d at 3 (valid user fees are paid by choice; the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge).

II. COMPETENT, SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S DENIAL OF THE CITY'S BOND VALIDATION.

The State and the Department challenged the City's ordinance, fee structure, and assessment. Neither the State nor the Department challenged the City's general authority to issue bonds or to construct, operate, and finance a stormwater management utility. Because the City's ordinance authorizes the imposition of an invalid fee, the bonds could not be validated because their funding source, the fees generated by the ordinance, was invalid. The trial judge properly concluded as much, made his oral ruling, and entered a proper final judgment. (A1. 1-20)

This Court's footnote in State v. Osceola County, 752 So. 2d 530, 533 n.7 (Fla. 1999), did not urge trial courts to address the elements of a bond validation in their final judgments as the City suggests. Rather, this Court noted that the County prepared the final judgment in advance of the hearing and it addressed "none of the issues raised by the state during the bond validation proceedings. . . ." Id. The shortcoming sought to be corrected by this Court was the failure of a final judgment to "treat the material issues raised by the State Attorney in such cases." Id. The trial court in this case addressed the challenges to the City's ordinance raised by both the State and the Department and in doing so complied with this Court's directive.

III. IF THE TRIAL COURT'S JUDGMENT IS REVERSED, THIS COURT MAY REVERSE THE COST AWARD IN FAVOR OF THE DEPARTMENT.

When a final judgment is reversed, reversal of a prevailing party's cost award is appropriate. Amorello v. Tauck, 27 Fla. L. Weekly D1721 (Fla. 4th DCA July 24, 2002). However, it is noted that counsel for the City specifically agreed to the award, which the trial court noted in its order. See Whiteley v. Whiteley, 329 So. 2d 352, 353 (Fla. 4th DCA 1976)(When a party or its counsel agrees to the imposition of a penalty or a condition, the party cannot be heard to later complain.).

IV. COMMENTS WITH RESPECT TO THE AMICUS BRIEFS.

In an effort to convince this Court that the City's stormwater management charge is a valid user fee and that the Department should be obligated to pay that fee, numerous entities have filed amicus briefs on behalf of the City. The amici variously argue that the courts are blurring the distinction between assessments and user fees; that home rule authorizes the City's ordinance even if it violates the City's fee authorizing statute; and that cases upholding ordinances enacted under Chapter 180, Florida Statutes, and not under Chapter 403, Florida Statutes, control the outcome of this appeal.

First, the amici ignore the fact that this Court has clearly articulated the definitive test for determining whether a charge is a valid user fee. Port Orange, 650 So. 2d at 3. To the contrary, this Court has not receded from that test, which has continually been employed by Florida courts. See St. Lucie County v. City of Fort Pierce, 676 So. 2d 35 (Fla. 4th DCA 1996); Harris v. Wilson, 656 So. 2d 512 (Fla. 1st DCA 1995).

Second, home rule authority does not relieve the City from specific statutory requirements, in this instance, the requirements of Section 403.031(17), Florida Statutes. See Cook v. City of Jacksonville, 27 Fla. L. Weekly S495, S497 (Fla. May

23, 2002)(where no general law prohibited county from taking particular action, authority resided in home rule powers). In addition, the City did not raise below that its home rule powers authorize its stormwater fee. An amicus curiae is not at liberty to inject new issues in a proceeding, but is not confined solely to arguing the parties' theories in support of a particular issue. Keating v. State ex Rel. Ausebel, 157 So.2d 567 (Fla. 1st DCA 1963). However, in the absence of jurisdictional or fundamental error, it is axiomatic that it is the function of the appellate court to review errors allegedly committed by the trial court, not to entertain for the first time on appeal issues which the complaining party could have, and maybe should have, but did not, present to the trial court. Abrams v. Paul, 453 So. 2d 826 (Fla. 1st DCA 1984).

ARGUMENT

ISSUES ON CROSS APPEAL

V. THE TRIAL COURT ERRED IN DETERMINING THAT: SOVEREIGN IMMUNITY DID NOT BAR THE CITY FROM REQUIRING THE DEPARTMENT TO PAY THE CITY'S STORMWATER FEES; THE DEPARTMENT'S CONTRIBUTION TO THE CITY'S NEED FOR ITS STORMWATER SYSTEM COULD NOT BE CONSIDERED IN INTERPRETING THE STATUTE; AND THE DEPARTMENT'S EVIDENCE OF ITS CONTRIBUTION TO THE CITY'S STORMWATER SYSTEM WAS NOT RELEVANT AND THEREFORE INADMISSIBLE.

A. Standard of Review.

It is well established that the construction of statutes,

ordinances, contracts, and other written instruments is a question of law that is reviewable *de novo*, unless their meaning is ambiguous. Dixon v. City of Jacksonville, 774 So. 2d 763, 765 (Fla. 1st DCA 2000)(citations omitted). Thus, the Department's first two issues on cross appeal regarding sovereign immunity and the plain reading of Section 403.031(17), Florida Statutes, are issues of law and are reviewable *de novo* by this Court.

The Department's third issue is that the trial court erred in refusing to allow the Department to introduce additional evidence of its contribution to the City's stormwater system. Typically, the standard by which to review the admissibility of evidence is abuse of discretion. Nardone v. State, 798 So. 2d 870 (Fla. 4th DCA 2001). However, because the evidence in question deals squarely with the application of Section 403.031(17), Florida Statutes, this Court should review the trial court's ruling under the *de novo* standard applied to this Court's review of the trial court's interpretation of the statute.

B. Sovereign immunity bars the City from collecting stormwater fees from Department.

In Florida, sovereign immunity is the rule rather than the exception. Pan-Am Tobacco Corp. v. Dep't of Corrections, 471

So. 2d 4, 5 (Fla. 1984), and it is well settled that statutes in derogation of the common law principle of sovereign immunity are to be strictly construed. Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 364 (Fla. 1977). This Court applied this rule of construction to an interpretation of Section 768.28, Florida Statutes (1975), in Carlile, holding:

> That statute is clearly in derogation of the common law principle of sovereign immunity and must, therefore, be strictly construed:
>
> > Statutes in derogation of the common law are to be construed strictly, however. They will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced. A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard. 30 Fla.Jur. Statute, Sec. 130.
>
> Inference and implication cannot be substituted for clear expression. Dudley v. Harrison, McCready & Co., 127 Fla. 687, 173 So. 820 (1937).

Carlile, 354 So. 2d at 364.

Local governments may impose and collect valid user fees on state property when applications for services or written

agreements therefor have been entered into. City of Gainesville, 778 So. 2d at 530 (the City failed to raise any basis for abrogating the Department's sovereign immunity and it was not clear on the record presented if the Department signed an application for utility services or otherwise entered into an agreement with the City); County of Brevard v. Miorelli Eng'g, 703 So. 2d 1049 (Fla. 1997). Municipalities are also not generally impose taxes or special assessments on state property. Port Orange, 650 So. 2d 1 (taxation by a city must be expressly authorized either by the Florida Constitution or grant of the Florida legislature); Blake v. City of Tampa, 156 So. 97, 99 (Fla. 1934); St. Lucie County, 676 So. 2d 35. The City's ordinance does not create or impose a voluntary user fee, it creates and imposes a special assessment, and therefore, without a specific waiver of sovereign immunity, the City's fee cannot be assessed against property owned by the Department.

In order for an assessment to be chargeable against state property, the enabling legislation must contain clear and specific language to that effect. Board of Public Instruction of Dade County v. Little River Valley Drainage Dist., 119 So. 2d 323 (Fla. 3d DCA 1960). Language in Section 403.0893(3), Florida Statutes, that "all property owners within the area may be assessed a per acreage fee" does not provide the requisite

specific legislative authority or intent to impose an assessment on state property. Id. In Little River Valley, similar language was found insufficient to impose a special assessment for drainage district benefits on state property. There, Section 298.36, Florida Statutes (1953), authorized "an assessment or tax for drainage benefits upon 'all lands in the district to which benefits have been assessed.'" Id. at 326. The Third District concluded that this "general authority to levy taxes on lands to which benefits have been assessed as provided for in § 298.36 was made without any reference to property of the Board of Public Instruction" and therefore could not be charged against or collected from such properties. Id.

In order for Section 403.0893, Florida Statutes, to authorize the City to impose a stormwater assessment on state property it must specifically mention that the State of Florida and its subdivisions are liable for the assessment. Id. There is nothing in Chapter 403, Florida Statutes, generally, or Section 403.0893, Florida Statutes, specifically, that could be construed by this Court as constituting the requisite specific waiver of the state's sovereign immunity necessary to impose and collect the City's fee for Department properties.

The ordinance's reliance upon estimates and averages coupled with the absence of any fee adjustments tied to the actual

contribution to the system of any given property, fee adjustments for properties having less or more than the estimated average impervious area, or adjustments for offsite stormwater management, refutes the City's claim that its charges are based upon a given property's actual use of or contribution to the stormwater management system. Every developed property pays the City's fee. The fee is not 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. Port Orange, 650 So. 2d at 3. The City's fee is a special assessment, not a user fee. Id.

The City's stormwater fees are not based upon the cost of the program assessed to the beneficiaries based on their relative contribution to the need for the system and are mandatory. §403.031(17), Fla. Stat. The fee charged by the City is not a user fee because it is not voluntary and it is not based on property owners' relative contributions to the need for stormwater management. Section 27-241(b)(3) of the ordinance imposes the fee based on an average square footage of impervious area and not use, as is a typical, voluntary utility. Moreover, the ordinance does not allow a user to refuse the service. Section 27-241(b) of the ordinance states:

> There is levied against all owners or occupants of all real property in the city,

> with improvements or uses thereon which contribute stormwater runoff to and/or which benefit from the city's stormwater management system, a monthly fee . . . .

The fact that the ordinance creates a stormwater management "utility" and calls the charge a "user fee" is irrelevant. One must look at the substance of the charge and not merely that the City administratively seeks to collect it in a monthly utility bill. In Port Orange, this Court ignored the fact that the charge was called a "transportation utility fee" and concluded:

> It is our view that the power of a municipality to tax should not be broadened by semantics which would be the effect of labeling what the City is here collecting a fee rather than a tax.

Port Orange, 650 So. 2d at 3. See also Alachua County v. Adams, 702 So. 2d 1253 (Fla. 1997).

Because the City's stormwater charge operates as a special assessment, it cannot be imposed upon Department properties or collected from the Department. If, however, this Court should determine that the City's ordinance imposes a valid user fee, this Court should find and conclude that the substantial contribution of stormwater facilities and services, either on site or off site by the Department or any other assessed entity, which are an integral part of the City's stormwater management system, must be considered in assessing any fee under Section 403.031(17), Florida Statutes, as detailed below. However, in

order to collect such a user fee, there must exist a written agreement between the City and the Department. The court in City of Gainesville, upon which the City relies, specifically agreed that sovereign immunity applied to the City's stormwater fee, if the City could establish that the fee was a user fee and not an assessment. City of Gainesville, 778 So. 2d at 530. The First District acknowledged that the City had "argued no basis for abrogating the ordinary rule immunizing the state from contract suits where the state has signed nothing." Id. The court continues that the City had made no allegation that the Department had "signed an application for utility services or otherwise entered into a written agreement with the City." Id. In this case, the City has admitted that no application or written agreement exists. (A2. 238) This shortcoming goes to the heart of the City's bond validation because, by its bond offering, the City is asserting that the funds generated by Department properties are and will be available to repay the bondholders. Because this is not true, the bonds could not be validated.

C. Under any plain reading of Section 403.031(17), Florida Statutes, the extensive stormwater management facilities owned and maintained by the Department within the City, must be considered in determining the Department's "contribution to the

> **need" for the City's program, and in assessing any fee against property owned by the Department.**

There can be no doubt from this record that the Department's stormwater management facilities, which include drainage ditches and storm sewer pipes for transporting stormwater, retention areas to treat stormwater and improve water quality, outfall ditches to move stormwater away from the state roads, inlets to intake stormwater, and catch basins to trap debris and sediment contained in stormwater (DOT Ex. 4)(T1. 207-209)(A2. 218), satisfy the definition of a "stormwater management system" under Section 403.031(16), Florida Statutes:

> [A] system which is designed and constructed or implemented to control discharges which are necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use, or reuse water to prevent or reduce flooding, overdrainage, environmental degradation and water pollution or otherwise affect the quantity and quality of discharges from the system.

The trial court below and the City in its initial brief ignore this unrefuted fact and the undisputed evidence that there are two stormwater management facilities within the City working together for the common good of the City and its residents.

The Department is as responsible for stormwater management as the City and the Department, like the City, owns and maintains a large and viable stormwater management system. (T1.

143, 194-195, 237, 249-254)(T2. 284-286, 301-302, 346-364)(Proffer: T2. 326-339) However, the Department charges neither property owners[6] nor the City for the use of its system. The undisputed evidence established that the City and the Department have an integrated stormwater management system, and that in planning new stormwater facilities, the City admits that it considers and uses the Department's existing stormwater management system. (T1. 140-142) In fact, the City's own engineer testified that it "would be virtually negligent" to ignore the presence and use of the Department's stormwater facilities in the City's management of stormwater. (Proffer: Swearingen, April 9, 2002, p. 16, l. 6- 13)(A1. 33)

The Department's stormwater facilities and their support of the City's stormwater management program cannot be ignored. However, this is precisely what the trial court did when it rejected the Department's position that the City must consider the Department's extensive stormwater management facilities in determining the Department's "contribution" to the need for the City's stormwater management program and in assessing fees

[6] As detailed in paragraph D. below, the Department's stormwater facilities collect and treat stormwater from not only private properties abutting state roads, but also from private properties within several blocks of state roads. (T2. 346-365)(Proffer: T2. 326-340)(DOT Exs. 4-17; Proffered Ex. A)(A2. 103-233, 237)

against Department owned properties.

Despite its substantial contribution to the City and its residents, the Department did not seek below and does not seek here, the ability to charge for the use of its stormwater facilities, nor does the Department seek money from the City. Rather, it is the Department's position that the statute requires that the "contribution" to the need for a stormwater program must constitute the basis for the City's stormwater fee. The Department has made and annually makes contributions to the City's stormwater program. Therefore, the Department should be given a credit for these contributions against any fees the City claims are owed by the Department for stormwater management.

Section 403.031(17), Florida Statutes, provides:

> "Stormwater utility" means the funding of a stormwater management program **assessing the cost of the program to the beneficiaries based on their relative contribution to its need**. It is operated as a typical utility which bills services regularly, similar to water and wastewater services. (emphasis added)

In establishing a stormwater management program and funding it through the issuance of bonds, the City must first determine the cost of the program and then assess the cost of the program to the beneficiaries of the program based upon each beneficiary's relative contribution to the program's need. § 403.031(17),

Fla. Stat. The New American Heritage Dictionary defines "contribute" as:

> 1. To give or supply in common with others; give to a common fund or for a common purpose. . . .

New American Heritage Dictionary 318 (5th ed. 1991). Black's Law Dictionary defines "contribute" as:

> To lend assistance or aid, or give something to a common purpose; to have a share in any act or effect; to discharge a joint obligation. . . .

Black's Law Dictionary 328 (6th ed. 1990).

The City recognizes that the Department's stormwater facilities assist the City's system and that those facilities share in the common purpose and effect of the City's system. (T1. 140, 143, 145, 147, 159-160, 194-195, 237-254)(T2. 284-286, 302-304, 346-364)(Proffer: T2. 326-339) It is undisputed that the Department's stormwater facilities contribute to the common goal and joint obligation to enhance the collection and treatment of stormwater and improve water quality.

Stormwater management is composed of flood control, drainage, and pollution control, and benefits developed property in the City. (T1. 140-141) The purpose of the City's stormwater management program and facilities is to collect and treat stormwater within the City. The purpose of the Department's stormwater facilities is to collect and treat stormwater within

the City with the primary purpose to ensure public safety and infrastructure investment by moving stormwater runoff away from the State Highway System. It was error for the trial court to ignore the undisputed evidence that the City's stormwater facilities and the Department's stormwater facilities have a common purpose - to collect and treat stormwater within the City. It was also error for the trial court to ignore the plain meaning of the words of Section 403.031(17), Florida Statutes, in concluding that the City was not required to consider the Department's extensive contributions to the City's stormwater management program.

It has been settled and long established by this Court that while extrinsic aids and rules of statutory construction and interpretation are available to courts where statutes are ambiguously worded, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)(citation omitted). This Court has also said that "[t]he cardinal rule of statutory construction is that the courts will give a statute its plain and ordinary meaning" and that "[t]he plain ordinary meaning of words may be ascertained

by reference to a dictionary." Weber v. Dobbins, 616 So. 2d 956, 958 (Fla. 1993); Green v. State, 604 So. 2d 471, 473 (Fla. 1992). In this case, the language of Section 403.031(17), Florida Statutes, is not ambiguous, unreasonable, or illogical, and there is, therefore, no authority or need to go beyond its clear wording and plain meaning to expand or narrow its reach. See Palm Beach Community College Found., Inc. v. WFTV, Inc., 611 So. 2d 588 (Fla. 4th DCA 1993).

But, if construction and interpretation of a statute are necessary, a trial court should take into consideration such factors as "the evil to be corrected, and the purpose of the enactment . . . ." State Bd. of Accountancy v. Webb, 51 So. 2d 296 (Fla. 1951). In addition, if a literal interpretation of the statute would lead to an unreasonable conclusion, the Court should interpret the statute in accord with the clear purpose and intent of the legislature. Conascenta v. Giordano, 143 So. 2d 682 (Fla. 3d DCA 1962). However, it is a universal rule that statutes must be construed as to avoid absurd results. Sharon v. State, 156 So. 2d 677 (Fla. 3d DCA 1963).

The Department believes that construction is not necessary and that literal application of the statute satisfies each of the above principles. First, the literal application of the statute considers the "evil to be corrected," i.e., uncollected

and untreated stormwater runoff; provides an application that recognizes and fosters the legislative purpose of providing for a "coordinated statewide program of air and water pollution prevention, abatement, and control for the securing and maintenance of appropriate levels of air and water quality;"[7] and avoids an absurd result.

With all due respect to the trial court, the plain wording and plain meaning of the statute does not support the interpretation developed by the trial court, or the trial court's narrow and unrealistic interpretation that "contribute" as used in Section 403.031(17), Florida Statutes, can mean only how much water the property contributes to the system. (T2. 307) The word contribute is not defined in the statute and should not be so narrowly defined as the trial court did in this case. The ordinary meaning and common usage of simple, workaday words, such as "contribute" should be immediately apparent. See Cantanese v. Ceros-Livingston, 599 So. 2d 1021, 1023 (Fla. 4th DCA 1992).

Contrary to the trial court's conclusion otherwise, the Department's plain reading of the word contribute does not render the statute "unworkable." (T2. 307) The trial court believed the Department's reading and application of the word

[7] Section 403.021(4), Florida Statutes.

and the statute was unworkable because the trial court failed to recognize both the unique position of the Department's facilities within the City and the Department's unique contributions to the City's stormwater system. The trial court erroneously believed that under the Department's reading, any property owner could contribute materials, such as "15 loads of fill dirt which the city used to berm a channel or put inside a drain [sic] ditch," and the City would have to consider it a "contribution" under the statute and allow the property owner a credit against its stormwater fee. (T2. 296) That is neither a reasonable nor a logical reading or interpretation of the statute.

In fiscal year 2001-2002, the Department's cost of maintaining its stormwater facilities within the City was approximately $59,000. (T2. 297) The Department has also contracted to spend $2.2 million to build sediment traps in Hogtown Creek. (T2. 328) When the Department offered the City $2,000,000 to take over the Department's maintenance responsibilities within that small segment of Hogtown Creek, the City, obviously believing it would cost three times that amount to perform the work the Department performs in that area, countered with an offer of $6,700,000 to do the work, plus annual payments of $305,000. (T2. 302)(Proffer: Pearson, p. 70,

l. 11-15)(A1. 100) The Department's contribution to the City's system is unique not only because of its value to the system, but because it is unlikely that any other "contribution" has been or could be integrated into and become a viable part of the City's stormwater management system. Without the Department's stormwater facilities, the City's program will not work. (T1. 140-143, 147-149, 159-161, 194, 237, 239-254, 285)(T2. 236-339, 346-364) No other property owner or entity could make such a claim. No other property owner could offer evidence to support a similar application of the statute or to support a claim for a credit or offset for some amorphous "contribution" to the City's system as envisioned by the trial court. A reading of the plain words of the statute supports the position that the Department's contribution of stormwater facilities to the City's need for its stormwater program must be considered, and the trial court erred as a matter of law when it concluded otherwise.

D. The trial court erred in excluding additional evidence of the Department's "contribution" to the City's stormwater management program under Section 403.031(17), Florida Statutes.

The City is not the only party to this action with wide ranging and far reaching duties and responsibilities for stormwater management or of owning and maintaining a large and

viable stormwater management system. The Department's evidence was undisputed that within the City the Department owns and maintains drainage ditches and storm sewer pipes for transporting stormwater, retention areas to treat stormwater and improve water quality, outfall ditches to move stormwater away from the state roads, inlets to intake stormwater, and catch basins to trap debris and sediments contained in stormwater. (DOT Ex. 4)(T1. 207-209)(A2.218) It was also unrefuted below that the City and the Department have an integrated stormwater management system and that in planning new stormwater facilities, the City considers and uses the Department's existing and anticipated stormwater management system. (T1. 140-142)(Proffer: T2. 322-340)

Notwithstanding the undisputed evidence of the existence and function of the Department's stormwater facilities within the City, the trial court would not allow the Department to offer additional evidence to expand upon and explain the extent of its contribution to the City's stormwater program. (T2. 310-313) The Department made an oral offer of proof of the testimony and exhibits it would have presented rather than calling the witnesses and having them testify, the process requested by the trial court. (T2. 313, 321-340)

Beginning its proffer, the Department filed the depositions

of two City employees, Stu Pearson, taken on April 18, 2002, and Emery Swearingen taken on April 9 and April 18, 2002. (Proffer: T2. 322-323) Excerpts of those depositions containing the relevant testimony proffered are contained in the Department's appendix to this brief. (A1. 23-102) The City's objections to both the introduction of and the use of this testimony were properly overruled by the trial court in accordance with Florida Rule of Civil Procedure 1.330(a)(2). (Proffer: T2. 324-326)

As detailed to the trial court, the Department would have presented additional testimony of Mr. Yongman Roberts, assistant maintenance engineer for the Department, who would have identified Hogtown Creek and the creeks that make up the Hogtown Creek basin and would have described how the basin relates to the entire City. (Proffer: T2. 326) Mr. Roberts would have described the creek, the basin, the Department's easement along Hogtown Creek, sediment deposits in the Department's easement, sediment threats to downstream wetlands, sediment accumulation hazards to the Department's bridge structures crossing Hogtown Creek, and the need to control sediment to assure the creek functions properly. (Proffer: T2. 327)

Mr. Roberts would have testified to the need for sediment traps all along Hogtown Creek and the benefit such traps would provide to the City. (Proffer: T2. 328) In addition, Mr.

Roberts would have explained the magnitude of the sediment problem in Hogtown Creek; the serious flooding problem in the area in 1996; the City's acknowledgment of a sediment problem; the fact that the City's own analyst recommended building sediment traps upstream of the Department's easement; the City's $6.7 million counteroffer to the Department's offer to assume the Department's maintenance responsibilities in Hogtown Creek; and the service the Department provides to the City in managing sediment in the Hogtown Creek easement. (Proffer: T2. 329-330)

The Department also would have presented additional testimony of Mr. Ron Cox, the Department's district two drainage engineer. (Proffer: T2. 330-334) Mr. Cox would have identified various exhibits depicting selected state roads and their corresponding conveyance facilities, treatment facilities, and drainage basins. (Proffer: T2. 331) Mr. Cox would have explained the history of the Department's stormwater management efforts; how, prior to 1986, no stormwater permit was required for anyone to connect to the Department's stormwater facilities; and that at such time there was no limit to the amount of stormwater the Department would accept from such properties; and he would have identified properties that even today discharge stormwater into Department drainage basins without permit.

(Proffer: T2. 332)

Mr. Cox also would have explained how stormwater drains from the Department's Waldo Road site, one of the two properties for which the City assesses a fee against the Department; how the majority of that stormwater travels through Department stormwater facilities; and how much of the water is treated in Department treatment facilities and is purified, while some of it passes through portions of the City's facilities. (Proffer: T2. 333-336) Similarly, he would have explained the route of stormwater through Department stormwater facilities from the other Department property located within the City, known as the state warehouse, as well as from commercial properties such as Sam's Club and WalMart, which also utilize Department drainage facilities. (Proffer: T2. 337-338)

The trial court erred in refusing to acknowledge the Department's stormwater facilities and their contribution to the City's stormwater management program. Even if the trial court could not recognize from the testimony previously admitted that the City's stormwater management program could not operate without the Department's extensive and integrated stormwater facilities, the proffered testimony clearly established the extent of the Department's contribution to the City's program as measured by its annual maintenance costs.

The Department does not seek to charge the City or anyone else for the use of its facilities. Despite the fact that the cost of construction and annual maintenance of the Department's facilities far exceeds the fees assessed against the Department's two properties located within the City, the Department seeks no money from the City or its residents. The Department seeks only a credit for the Department's "contribution" to the City's stormwater management program against the City's assessment as contemplated by the clear language of Section 403.031(17), Florida Statutes. The trial court erred in excluding this additional evidence and in refusing to consider either the admitted evidence or the proffered evidence supporting the Department's reading of Section 403.031(17), Florida Statutes, and the plain wording of the statute and the plain meaning of the word "contribute."

CONCLUSION

It is apparent from a careful reading of City of Gainesville, 778 So. 2d 519, that the First District Court of Appeal has not rejected the positions taken by the Department or the State in the proceeding below or in this appeal. Rather, the First District remanded the cause for further proceedings for the City to establish that its ordinance operated as alleged. The City never attempted to do so then and failed in its efforts to do so in this case.

In this bond validation proceeding, the City's ordinance was established to be invalid because it does not comply with Section 403.031(17), Florida Statutes, and it is not a voluntary user fee. Port Orange, 650 So. 2d 1. Based upon a proper interpretation of the law and the competent, substantial evidence presented, the trial court concluded that the City's stormwater ordinance and stormwater fee, which would provide the funds to repay its anticipated bondholders, were invalid. These findings and conclusions should be affirmed.

As to the issue of whether sovereign immunity precludes the City from assessing and collecting its stormwater fee from the Department, the trial court erred in concluding that it did not. If the City's fee is an assessment, it cannot be collected from the Department and if it is a user fee, it cannot be collected

from the Department without a written application or agreement. Little River Valley Drainage Dist., 119 So. 2d 323; City of Gainesville, 778 So. 2d at 530; Miorelli, 703 So. 2d 1049.

The trial court also erred in failing to give meaning and effect to the plain ordinary meaning of the words of the statute by failing to acknowledge and credit the Department for its significant and substantial contributions to the integrated stormwater system the City utilizes as its own. The trial court similarly erred in failing to allow the Department to introduce additional evidence of the extent of its contribution to stormwater management in the City. The trial court's rulings in this regard must be reversed. This Court should conclude that sovereign immunity is a bar to collecting the City's fee from state properties and that the term "contribute" in Section 403.031(17), Florida Statutes, should be read to include substantial offsite improvements utilized by the City in providing stormwater management to its residents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail on this ____ ____ day of November, 2002, to Counsel for State of Florida, **LEE LIBBY, ESQUIRE**, Assistant State Attorney, State Attorney's Office, Eighth Judicial Circuit, Post Office Box 1437, Gainesville, Florida 32602; Counsel for City of Gainesville, **MARION J. RADSON, ESQUIRE**, and **ELIZABETH A. WARATUKE, ESQUIRE**, City of Gainesville, Office of the City Attorney, Post Office Box 1110, Gainesville, Florida 32602; Co-counsel for City of Gainesville, **EDWARD W. VOGEL, III, ESQUIRE**, 92 Lake Wire Drive, Lakeland, Florida 33802; Counsel for Florida Stormwater Association, **C. ALLEN WATTS, ESQUIRE**, and **TY HARRIS, ESQUIRE**, Cobb & Cole, 150 Magnolia Avenue, Post Office Box 2491, Daytona Beach, Florida 32115-2491; Counsel for Florida Audubon Society d/b/a Audubon of Florida, **ERIN L. DEADY, ESQUIRE**, 444 Brickell Avenue, Suite 850, Miami, Florida 33131; Counsel for Earthjustice, Inc., and Environmental Confederation of Southwest Florida, **DAVID GUEST, ESQUIRE**, 111 South Martin Luther King, Jr., Boulevard, Tallahassee, Florida 32301; counsel for City of

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_____
MARIANNE A. TRUSSELL

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing has been prepared using Courier New 12 point font.

_____
__ MARIANNE A. TRUSSELL