IN THE SUPREME COURT
STATE OF FLORIDA

CITY OF GAINESVILLE, FLORIDA,

Appellant/Plaintiff,

v. CASE NO. SC02-1696

THE STATE OF FLORIDA, et al.,

Appellees/Defendants,

and

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Appellee/Intervenor/
Cross Appellant.
_____/

REPLY 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 parties to this appeal will be referred to herein in the same manner to which they were referred in the Department's Answer Brief and Initial Brief to Cross Appeal. To wit, 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."

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 answer brief on cross appeal will be in the form of (AB.) followed by the appropriate page number(s). Citations to the appendix to the Department's answer brief and initial brief on cross appeal will be in the form of (A.) followed by the appropriate volume and page number(s).

SUMMARY OF THE ARGUMENT

The trial court erred in concluding that sovereign immunity did not bar the City from assessing stormwater charges against the Department under its ordinance and that Section 403.031(17), Florida Statutes, could not be read to require the City to consider the vast "contribution" the Department has made and continues to make every year to the City's stormwater management system in determining the Department's relative contribution to the system and in assessing its stormwater charges against the Department. The trial court also erred in precluding the admission of additional evidence establishing the extent of and the City's use of the Department's facilities which establish the Department's contribution to the City's system.

These matters are not collateral to the bond validation proceeding because they are material to the issue of whether the City has created a valid stormwater utility in accordance with the provisions of Section 403.031(17), Florida Statutes, and they go to the very heart of City's ability to collect stormwater charges from the Department and thus its ability to rely on that revenue to repay its prospective bondholders.

ARGUMENT

I. STANDARD OF REVIEW

It is the City's position that there is no dispute as to the standard by which this Court is to review the trial court's final judgment in this case. The City does not specifically say so, but it appears to believe that the standard is strictly *de novo*. In its answer brief/initial brief on cross appeal, the Department detailed its position on the proper standard of review, explaining that the Department believes that a mixed standard must apply. The legal conclusions of the trial judge in a bond validation proceeding must be supported by the competent, substantial evidence presented at trial. See, e.g., City of Winter Springs v. State, 776 So. 2d 255, 257 (Fla. 2001). As such, this Court must review the trial court's legal conclusions and determine whether they are supported by the law and by competent, substantial evidence.

As detailed in its initial brief on cross appeal, 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). As explained therein the Department's issues on cross

appeal are reviewable *de novo* by this Court.

II. THE DEPARTMENT'S ISSUES ON CROSS APPEAL ARE NOT COLLATERAL TO THE BOND VALIDATION PROCEEDING.

"Section 75.01, Florida Statutes (2000), vests the circuit courts with 'jurisdiction to determine the validation of bonds and certificates of indebetedness and *all matters connected therewith*.'" Keys Citizens for Responsible Government, Inc. v. Florida Keys Aqueduct Auth., 795 So. 2d 940, 945 (Fla. 2001) (emphasis added in Keys Citizens). In Keys Citizens, this Court concluded that under the statutory scheme for bond validation proceedings, "the citizens and property owners in the area affected by the sewer bonds were parties to the bond validation proceeding and the circuit court had jurisdiction over them." Id. at 946.

In GRW Corp. v. Dep't of Corrections, 642 So. 2d 718, 721 (Fla. 1994), this Court similarly held that Chapter 75, Florida Statutes, expressly anticipates that the judiciary will hear "all questions of law and fact" that may cast doubt on the legal validity of the indebtedness. Id. at 721 (citing People Against Tax Revenue Mismanagement, Inc. v. County of Leon, 583 So. 2d 1373, 1374 n.2 (Fla. 1991)("Chapter 75, Florida Statutes,

clearly contemplates that a bond validation proceeding is a proper vehicle for quieting all legal and factual issues that may cast doubt on the legal validity of a bond issue.")). "Such a determination by the judiciary ensures that all issues relating to the validity of the obligation are forever put to rest so that no question affecting the validity of the indebtedness and financing agreements may subsequently be raised." GRW Corp., 642 So. 2d at 721. As such, the Department is a proper party to the City's bond validation proceeding and the circuit court had jurisdiction over all issues challenging the validity of the City's stormwater utility and the City's ordinance and, thus, its ability to collect the revenue necessary to repay its prospective bondholders.

As in Keys Citizens, the City has also raised the issue as to whether the Department's issues on cross appeal are collateral to the bond validation proceeding or not. Quoting Port Orange, this Court said in Keys Citizens, that "[s]ubsumed within the inquiry as to whether the public body has the authority to issue the subject bond is the legality of the financing agreement upon which the bond is secured." Id. at 946 (quoting State v. City of Port Orange, 650 So. 2d 1, 3 (Fla. 1994). The issues the Department raises on cross appeal are not collateral because they are material to whether the City has

created a valid stormwater utility and because they go "directly to the legality of the special type of financing method at issue here." GRW Corp., 642 So. 2d at 721.

A. The stormwater charges imposed by the City's ordinance are not voluntary under Port Orange and therefore the charges are not valid user fees and cannot be imposed against the Department.

The City continues to rely on the opinion issued as a result of its first attempt to make the Department pay its stormwater charges to support its position that its charges are user fees and not special assessments. City of Gainesville v. State, Dep't of Transp., 778 So. 2d 519 (Fla. 1st DCA 2001). City of Gainesville does not answer that question. Rather, the appellate court reopened the door to that issue that had been closed by the trial court, and allowed the City to again try to establish and prove its allegations that its charges constituted valid user fees. The City chose instead to leave the issue unresolved and dismissed its complaint.

B. The evidence established, and the City concedes, that without the Department's "contribution" to and maintenance of stormwater management facilities within the City, the City's facilities could not function, and those contributions are not limited to managing stormwater from only the state highway system.

The unrefuted facts and the undisputed evidence in this case establish that there are two stormwater management facilities within the City working together for the common good of the City and its residents. Stormwater generated by the City itself and by hundreds, if not thousands of residential and commercial properties, pass through Department owned, constructed, and maintained drainage ditches and storm sewer pipes transporting stormwater, retention areas treating stormwater and improving water quality, outfall ditches moving stormwater away from the state roads and private properties, inlets accepting stormwater, and catch basins trapping debris and sediment contained in stormwater (DOT Ex. 4)(T1. 207-209)(A2. 218) The Department performs the same function as the City, it manages stormwater that originates on properties it does not own. However, those hundreds, if not thousands of property owners, pay stormwater

charges to the City, not to the Department[1]. (T1. 140-142)(A1. 33) One commercial property never utilizes the City's facilities, but pays the City a monthly fee. (T2. 318, 350)

The City argues that the Department must accept stormwater historically flowing to its properties and that the Department has no choice but to accept it. (AB. 18-19) However, the record establishes that stormwater managed by the Department flows from the City's stormwater pipes that convey the stormwater to the Department's system, and that this stormwater would not historically flow to the Department's roads. (A1. 25, 58-59) This does not occur by happenstance, as the City acknowledges that it designs its stormwater system to interconnect with the Department's. (T1. 140-145)(A1. 32-33) This fact alone, although there is much more, establishes the Department's unique "relative contribution" to the City's stormwater management program, and refutes the City's position that "any owner or developer could ask for a credit based on the provision of stormwater facilities in other parts of the City." (AB. 17)

The Department established its commitment to water quality, good stewardship, and quality stormwater management practices and facilities, and its undeniable "partnership" with the City

[1] This point is made for emphasis, not because the Department believes it should be paid stormwater fees.

in managing stormwater within the City. Nevertheless, the City ignores the integrated nature of the two systems and ignores the mandatory language of Section 403.031(17), Florida Statutes, that:

> "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)

As a partner in the management of stormwater within the City, the Department acknowledges that it is also a beneficiary of the City's program under Section 403.031(17), Florida Statutes. However, whether as a beneficiary or a partner, the Department's relative contribution to the City's program and stormwater system is ignored by the City and by its ordinance. The City cannot continue to refuse to acknowledge the partnership or that portion of Section 403.021(17), Florida Statutes, that requires the program, and thus the City, to assess the cost "to the beneficiaries based upon their relative contribution to its need." The Department's relative contribution to the need for the program far exceeds the charges

imposed by the City.

The City's stormwater charges 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 they 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 as required by law. Every developed property must pay the City's fee.

It is of little consequence that the City's charge is called a user fee and not a special assessment on the basis that it is not mandatory because owners can dig retention ponds on their properties and retain stormwater on site. This sort of "Hobson's choice[2]" is no choice at all. The City's expert confirmed as much when he admitted that more than a mere majority of all residential properties in the City must pay the flat rate. (T1. 152-153) In fact, 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

[2] 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).

the lot size. (T1. 152-153) Teresa Scott, the City's public works director, testified similarly when she admitted on cross examination that most residential lots simply are not large enough to be able to satisfy the ordinance's on site retention requirement to obtain a credit. (T1. 83) In her words, it is "most likely" that the average residential property would not be able "to do anything" to obtain a credit. (T1. 86)

The City also argues that the lack of an agreement between it and the Department is irrelevant because the comment in City of Gainesville,[3] upon which the Department relies, refers to the need for an agreement only when seeking damages. (AB. 14-15) To the contrary, a written agreement is relevant, because for true user fees, if a customer does not pay the bill, the City can either sue for the amounts due and/or turn off the service. The City cannot turn off this stormwater service and it cannot sue the Department to collect because there is no written agreement between the Department and the City to abrogate the Department's sovereign immunity. City of Gainesville, 778 So. 2d at 530.

True user fees also allow "users" to opt out and simply no longer receive the service. For example, choose not to pay your electric bill and the City no longer sends its electricity

[3] "Absent a written agreement, however, a vendor cannot sue the state for money damages on a contract theory." City of Gainesville, 778 So. 2d at 530 (citation omitted).

through its wires into your home, choose not to pay your water bill and the City stops water from flowing through its pipes into your home, etc. Choose not to pay the stormwater management fee and the City stops it from raining on your property?

Also, with typical utilities and voluntary user fees, the more you use, the more you pay. Section 27-241(b)(3) of the City's 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), City of Gainesville, Stormwater Management Utility Program. The City's 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. See Id. The fact that the ordinance creates a stormwater management "utility" and the City calls its charge a "user fee" is irrelevant. One must look to the substance of the charge and not merely to the fact that the City administratively seeks to collect it in a monthly utility bill.

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. Sarasota County created a valid special assessment as authorized by Section 403.0893(2), Florida Statutes. Sarasota Church of Christ, 667 So. 2d 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 and the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge).

CONCLUSION

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.

Sovereign immunity precludes the City from assessing and collecting its stormwater fee from the Department. Section 403.031(17), Florida Statutes, requires the City to establish its charges based upon the Department's unique "relative contribution" to the integrated stormwater system the City utilizes as its own. The City and its ordinance ignore this requirement. Because the ordinance is invalid, the revenue generated by the ordinance is either nonexistent or unreliable and therefore cannot support repayment to the City's anticipated bondholders. The trial court erred in refusing to consider the Department's relative contribution to the need for the City's stormwater management program and in preventing the Department from establishing the magnitude of its relative contribution.

These issues are not collateral to the bond validation proceeding and directly affect the validity of the City's stormwater utility and its ordinance, as well as the validity of the financing arrangement the City established to repay its prospective bondholders.

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 April, 2003, 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 Tallahassee, **JAMES R. ENGLISH, ESQUIRE**, City Attorney, and **LINDA R. HURST, ESQUIRE**, Assistant City Attorney, City Attorney's Office, City Hall, 330 South Adams Street, Tallahassee, Florida

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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