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

CITY OF GAINESVILLE, FLORIDA,

Appellant/Plaintiff,

v.

THE STATE OF FLORIDA, et. al.

Appellee/Defendant,

and

THE FLORIDA DEPARTMENT OF TRANSPORTATION,

Intervenors.
_____/

LOWER TRIBUNAL
CASE NO.: 2001-CA-004478

BOND VALIDATION
PROCEEDING

INITIAL BRIEF OF APPELLANT, CITY OF GAINESVILLE, FLORIDA

This case is an appeal under Fla. R. App. P. 9.030(a)(1)(B)(i), from a final order issued pursuant to Chapter 75, Fla. Stat., that denied validation of the City's proposed issuance of revenue bonds

Marion J. Radson, City Attorney
Florida Bar No. 175570
Elizabeth A. Waratuke,
Litigation Attorney
Florida Bar No. 0458007
City of Gainesville
Office of the City Attorney
P.O. Box 1110

Steven L. Brannock, Esquire
Florida Bar No. 319651
HOLLAND & KNIGHT LLP
P.O. Box 1288
Tampa, Florida 33601-1288
(813) 227-8500
FAX (813) 229-0134

Gainesville, Florida 32602
(352) 334-5011
FAX (352) 334-2229

ATTORNEYS FOR APPELLANT/PLAINTIFF CITY OF GAINESVILLE

PREFACE

Throughout this brief, Appellant, the City of Gainesville, shall be referred to as "City". Appellee, the State of Florida and the Taxpayers, Property Owners and Citizens of the City of Gainesville, Florida, Including Nonresidents Owning Property or Subject to Taxation Therein, statutorily represented by the State Attorney, shall be referred to as the “State Attorney” or the “State”. Intervenor, the Florida Department of Transportation, shall be referred to as "DOT" or "Department of Transportation".

The appendix consists of three volumes. Reference to materials contained in the appendix shall be by the letter “V” followed by the volume number, the document number, and, if applicable, the page number.

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JURISDICTIONAL STATEMENT

This case is an appeal under Fla. R. App. P. 9.030(a)(1)(B)(i), from a final order issued pursuant to Chapter 75, Fla. Stat., that denied validation of the City's proposed issuance of revenue bonds.

STANDARD OF REVIEW

The standard of review in this case is de novo. The material facts are not in dispute. What is at issue are the legal conclusions to be drawn from these facts. Where the facts are essentially undisputed, the legal effect of the evidence will be a question of law. Town of Palm Beach v. Palm Beach County, 460 So.2d 879, 882 (Fla. 1984).

STATEMENT OF THE CASE AND FACTS

Introduction

In 1988, pursuant to State mandate to provide stormwater management services, the City established a stormwater utility. The utility charges a stormwater fee to property in the City that contributes stormwater runoff from impervious areas into the City's stormwater management system. V3-13, §27-236.

In 2001, the City adopted a resolution authorizing the issuance of revenue bonds to finance capital improvements to the City's stormwater system. V1-4B. The bonds will be repaid with revenues from the stormwater utility. V1-4B; V2-5, p. 65. The City filed this proceeding to validate the bonds pursuant to Chapter 75, Fla. Stat.

This Court has consistently held that the scope of a court's review in a bond validation proceeding is limited to "1) determining if the public body has the authority to issue the bonds; 2) determining if the purpose of the obligation is legal; and 3) ensuring that the bond issuance complies with the requirements of law". Pinellas County v. State, 776 So.2d 262, 265 (Fla. 2001). Subsumed within the inquiry as to whether the City has the authority to issue the bonds is the legality of the revenue source upon which the bond is secured. State v. City of Port

Orange, 650 So.2d 1, 3 (Fla. 1994). In this case, the City pledged the revenues from its stormwater utility fee to repay the bonds. Consequently, whether the City's stormwater utility fee is a valid fee is at issue in this case.

On June 10, 2002, the trial court entered a final judgment finding the City's stormwater utility fee to be invalid and dismissed the bond validation action. V1-1. The rationale for the trial court's decision to deny validation is not clear from its order. The court appeared to have two concerns in its oral ruling attached and made a part of its written order. First, that the City did not base its fees on an exact measurement of the stormwater runoff from each individual property, and second, that the fee was not voluntary as to certain property owners. V1-1. The City requested clarification on these and other matters. However, the trial court, without further elaboration, entered an order denying the City's motion for rehearing, clarification and/or to alter or amend that final judgment. V1-2; V1-3. The City's timely appeal followed.

The State mandate to provide stormwater services

In 1986, the Florida legislature, aware of the importance of managing and treating the State's stormwater, enacted Section 403.0891 through Section 403.0896 of the Florida Statutes as part of the Florida Air and Water Pollution

Control Act. These sections mandate that local governments establish stormwater management programs and include these programs in their local comprehensive plans. Recognizing that local governments would need a funding mechanism for the stormwater plans and programs, the legislature provided for three funding sources in addition to those already available to local governments. §403.0893, Fla. Stat. One funding source expressly authorizes local governments to create "stormwater utilities" and charge "stormwater utility fees" to fund the stormwater management systems. §403.0893(1), Fla. Stat. This option provides that local governments may "[c]reate one or more stormwater utilities and adopt stormwater utility fees sufficient to plan, construct, operate, and maintain stormwater management systems set out in the local program required pursuant to §403.0891(3), Fla. Stat." A stormwater utility is defined to mean

> the funding of a stormwater management program by assessing the cost of the program to the beneficiaries based on their relative contribution to its need. It is operated as a typical utility which bills services regularly, similar to water and wastewater services. §403.031(17), Fla. Stat. (emphasis added).

In this manner, the legislature expressly provided that local governments could establish stormwater utilities and charge utility fees to fund their stormwater programs.

Establishment of the City's stormwater utility

In 1987, in response to the State mandate to provide stormwater management services, the City began to explore methods to fund the services. V2-5, pp. 112-16. The City retained the services of CH2M Hill, a consulting engineering firm, to evaluate the City's stormwater needs and funding options in what ultimately became a two phase project. V2-5, pp. 110-13; V3-9.

In Phase I, CH2M Hill determined the needs in the City's existing stormwater management system in terms of operation, maintenance and repair of the system, capital improvements, and developing and implementing programs to address water quality impacts of stormwater. V2-5, pp. 112-16; V3-10, pp. 2-1 through 2-36. Future needs of the system were also defined. V2-5, pp. 114-16. The consultant then evaluated alternative funding options to determine which option could best provide the required funding. V2-5, pp. 113-16. Because of the magnitude of the City's need and the limitations with other funding sources, the consultant recommended to the City Commission the establishment of a stormwater management utility. V2-5, pp. 115-16. The consultant also recommended that the impervious area of property be used as the basis for the rate

structure. V2-5, pp. 121-23. Impervious area is used by the vast majority of stormwater utilities in the country as a rate structure. V2-5, pp. 120-22.

The significance of impervious area is that stormwater cannot permeate in or through the area, which creates stormwater runoff. V2-5, p. 117. Stormwater runoff, like wastewater, requires a collection, conveyance, treatment and disposal system. V2-5, pp. 35-38. In a stormwater utility, a fee payer is charged for the use of that system. V2-5, pp. 37-41, 117.

Because it is the impervious area that directly impacts the need for a stormwater management system, stormwater utility fees are generally based on the amount of impervious area on the property. V2-5, p. 117. The most common rate structure unit used by stormwater utilities on the state and national level is an Equivalent Residential Unit (ERU). V2-5, pp. 120-22. An ERU is generally established as the average or median impervious area of a single-family home. V2-5, pp. 117-18.

The median amount of impervious area for a single-family residence in Gainesville was determined to be 2300 square feet. V2-5, pp. 117-18. The ERU was set at this amount. V2-5, pp. 42, 118-19. The rate was then designed by taking the total cost of the utility system and dividing it by the total number of

units of use (ERU's) to come up with a price per unit of use to recover the costs of providing the service. V2-5, pp. 119, 122.

Phase I was presented to the City Commission and public hearings held. V2-5, pp. 119, 122-123. After the presentation, public input, and deliberation, the City Commission determined that a stormwater management utility would be the best option to fund the State-mandated stormwater services and directed the consultant to continue with Phase II. V2-5, pp. 119, 122-23.

In Phase II, the consultant looked at properties in the City and on the boundaries of the City to determine whether they used the City's system because the fee would be charged only to such properties. V2-5, pp. 123-24. If a property did not use the City's system, it was not charged the stormwater fee. V2-5, pp. 124-25. Examples of properties not using the City's system were the University of Florida campus which drained into the Lake Alice Watershed, a closed system for which the University of Florida provided all stormwater management services and the City had no responsibility. V2-5, p. 124. Properties on the boundaries of the City that did not use the City's system because they drained outside the City, for example, the "In the Pines" apartment complex, were also excluded from the utility's billing system. V2-5, pp. 124-25. Further, undeveloped properties (i.e.,

properties with no impervious or semi-impervious area) were not charged a fee. V2-5, p. 38.

Once it was determined which properties use the system, the extent of use due to runoff from the impervious area needed to be determined. V2-5, p. 125. The consultant established three user classes of stormwater services: single-family residential, multi-family residential (which included apartments, mobile homes, condominiums and duplexes), and non-residential. V3-13, §27-241(b). The majority of single-family residences were assigned a flat rate of one ERU as the unit of use. Single-family residential units meeting certain criteria were individually examined for assignment of ERU's in accord with the procedures for non-residential properties set forth below.

As to multi-family residential units using the City's system, statistical samplings were done and it was determined that a lesser ERU value would be assigned to certain types of multi-family units as the impervious area of those multi-family residences was statistically less than single-family residences. V2-5, pp. 119-20. Apartments and mobile homes were assigned an ERU value of .6, condominiums and duplexes an ERU value of 1. V3-13, §27-241 (b)(2).

For the over 3,000 non-residential parcels in the City, the impervious area was measured to the nearest tenth of a percent and an ERU value established for each. V2-5, pp. 120, 125-29; V3-11, App. A. Residential properties that met certain criteria were also individually examined for impervious area. V2-5, pp. 128-29.

Every non-residential parcel, as well as each residential property meeting certain criteria, was then examined to determine what stormwater runoff attributable to the impervious area was retained on site. For any amount of retention, a credit was given against the fee, up to a credit of 100%, in which case no fee at all was charged.[1] V2-5, pp. 131-34. The fee was further refined to give credit for partially impervious area. V2-5, pp. 132-33. It took over two years to evaluate and complete the process of setting up the utility. V2-5, p. 127.

After the two phase study, the City adopted a stormwater management utility ordinance establishing a stormwater utility and related utility fees. V1-4A. The ordinance has been amended many times over the years, but the most current codified version is contained in V3-13 as amended by Gainesville, Florida

[1] At the time of the bond validation hearing, 617 parcels received credits ranging from 100% to 0.2%. Sixty parcels retain all stormwater runoff on site, receiving 100% credit and thus paying no fee at all. V2-5, pp. 161-62; V3-12.

Ordinance No. 002679, adopted by the City Commission on May 20, 2002, also contained in V3-13.

The utility fee

The City's utility provides numerous services, ranging from flood control, drainage, water quality management programs and studies to eliminate or reduce the pollutants in stormwater, and programs to comply with Federal and State water quality regulations. V2-5, pp. 35-36, 49-65; V3-7; V3-8; V3-13, §27-240. For these services, a fee is charged. The fee is based on runoff attributable to impervious and semi-impervious area on the property. V2-5, pp. 36-37. Properties that do not contribute to or use the City's system, e.g. undeveloped property, property that retains all of its stormwater on site, or property that does not drain into the City's stormwater system, are not charged the fee. V2-5, pp. 37-40, 96, 162-63; V3-13. As to non-residential property and certain single-family residences, credit is given for the amount of stormwater retained on site, up to a 100% credit, in which case no fee at all is charged. V2-5, pp. 39-40, 42-43; V3-12.

The stormwater fee applies to all properties within the City using the City's system, including all buildings and properties owned by the City and other

governmental entities. V2-5, pp. 37, 48. The rate is set by ordinance based on the revenue needed to fund the services and is approved by the City Commission after public hearings. V2-5, pp. 46-47. Stormwater charges are placed on the City's monthly utility bill along with the charges for electricity, gas, water and wastewater. V2-5, pp. 47-48. All stormwater fees go into a utility trust fund and are then used only for stormwater management services. V2-5, pp. 49-50, 135. Delinquent stormwater fees are not collected by placing a lien on the rate payer's property, but are enforced in the same manner as other delinquent utility bills. V3-13, §27-244.

The bond validation proceeding

In October 2001, the City Commission of the City of Gainesville adopted a resolution authorizing the issuance of revenue bonds to fund capital improvements to the City's stormwater management system. V1-4B. The bonds will be repaid with revenues from the City's stormwater management utility. V1-4B; V2-5, p. 66. The City filed this action to validate the bonds pursuant to Chapter 75, Fla. Stat., and the court issued an initial show cause order for a hearing on January 28, 2002. The State of Florida was represented by the State Attorney. The Department of Transportation (DOT) intervened. At the request of DOT, the hearing date was

continued to April 25, 2002, and an amended show cause order was issued for the new hearing date.

The hearing commenced on April 25, 2002, with the City's case in chief. V2-5. At the beginning of the hearing, in view of requests for admission and other discovery filed, as well as items judicially noticed, the court asked the parties to outline what issues remained to be determined by the court. V2-5, p. 6. Both the State and DOT agreed that the substance of the ordinance establishing the stormwater utility was the only challenge and that if the ordinance was valid there were "no other impediments to the validation of the bond". V2-5, pp. 8-11, 33-34.

At the conclusion of the City's case, both DOT and the State Attorney made ore tenus motions for dismissal pursuant to Fla. R. Civ. P. 1.420(b). V2-5, pp. 165-89. Relevant to the trial court's eventual findings,[2] DOT argued that the City's

[2] DOT made several other arguments as well, including that sovereign immunity shielded it from having to pay the fee and it was entitled to a "credit" against the stormwater fee on the single piece of DOT property that the City charges the fee (although DOT refuses to pay the fee). V2-5, pp. 8-11, 165-76; V2-6, pp. 286-301, 307-13. The court in City of Gainesville v. State, Department of Transportation, 778 So.2d 519 (Fla. 1st DCA 2001) found that DOT was not shielded from user fees by virtue of sovereign immunity. As to the "credit" issue, DOT argued that because it provides stormwater services in connection with its roads, it should be given credit for the separate parcel, which admittedly uses the City's system. V2-6, pp. 288-301, 307-13, 365-75. The City does not charge any government entity for stormwater runoff from roads. V2-5, p. 38; V2-6, p. 287. The City argued that both issues were beyond the scope of a bond validation. V2-5, pp. 14-17. At one point the trial court agreed

charge was a special assessment as opposed to a user fee because it was not voluntary nor based on use. V2-5, p. 172. DOT argued that payment of the stormwater fee was not voluntary because very few residences could retain stormwater on site and thus obtain the credit. V2-5, pp. 172-75. Further, DOT argued that the charge was not based on use because it was the same for each residential property irrespective of actual impervious area and also that it was a set charge every month, "whether it rains or not". V2-5, p. 174.

The State argued that because the ordinance did not specifically say in Section 27-241(b) (Rates for stormwater management service) that the charge was only for contribution to the City's stormwater management system, it could be interpreted that the charge was for the release to any stormwater system and was therefore not voluntary. V2-5, pp. 182-87.

The City responded that its stormwater utility fee met all criteria to be a valid fee and that statutory and case law did not require stormwater be measured on each individual parcel on a monthly basis to be a valid fee. V2-5, pp. 179-82. Further, the City argued that the use of estimates and averages where service could

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as to the "credit" argument, although it referred to the credit argument in its oral ruling, V2-5, pp. 15-18, 21-22, 151; V2-6, pp. 286-301, 307-13, 374-75.

not be feasibly precisely measured had always been upheld by the courts of this State. V2-5, pp. 180-82.

As to the State's argument on the missing word "City" in the ordinance section on rates, the City responded that the language of the ordinance read as a whole, specifically the sections on Intent (§27-236) and Authorization (§27-241) and the actual practice of the utility, clearly provided that the charge was only made for use of the City's stormwater system. Thus the charge was voluntary as it could be avoided by not using the City's system. V2-5, pp. 182, 187-89.

The trial court reserved ruling on the motions and DOT began its case. V2-5, p. 189. After DOT was unable to complete its case, the hearing was continued to May 23, 2002. V2-6.

After the April 25 hearing, but prior to the May 23 date, the City amended its stormwater utility ordinance to address the State Attorney's concerns that the ordinance was not sufficiently clear to establish that the fee was only charged to parcels that discharged to or used the City's stormwater system. V2-6, pp. 267-80; V1-4. The City added the word "city" in two sections of the ordinance and the phrase "city's stormwater management" in another section, and filed a motion for

leave to file a supplemental complaint which included the amended ordinance. V2-6, pp. 273-74; V1-4; V3-13.

At the May 23, 2002 hearing, without objection from the State, but over objection of DOT, the trial court granted the City leave to file the supplemental complaint and to reopen its case in chief for the purpose of introducing the amended ordinance. V2-6, pp. 280-82. DOT continued with the presentation of its evidence. At the end of its case, DOT renewed its motion to dismiss on the grounds previously stated. V2-6, pp. 365-73. The State, abandoning its previous issue, argued for dismissal on the ground that the fee was not voluntary as to tenants of apartments and that the State felt that the fee should instead be charged to the owners of the apartments rather than the tenants. V2-6, pp. 375-79. The court orally granted both motions to dismiss. V2-6, pp. 373-79. The court subsequently entered the written order, which included the oral ruling made at the hearing, finding that the City's fee was not "based upon the amount of stormwater a customer contributes to the system" and "persons being charged a fee, such as tenants of multi-family dwellings, do not have the option of not incurring the fee". V1-1, ¶ 7. The Court held that the City's ordinance "violates Section 403.031(17), Florida Statutes" (the definition of stormwater utility) and is invalid. V1-1.

The City filed a motion for rehearing, clarification and/or to amend the judgment on four grounds. V1-2. First, it was the City's position that the trial court's final judgment did not set forth its findings on the other elements of a bond validation in spite of the agreement of the State Attorney and DOT that the substance of the ordinance was the only challenge, and that if the ordinance were valid, there were "no other impediments to the validation of the bond". V1-2, pp. 1-3; V2-5, pp. 6-11, 33-34.

Second, the City requested clarification of paragraph 7 of the trial court's final judgment as to whether the finding of the lack of voluntariness of the fee was only as to tenants of multi-family dwellings or as to other categories of users, as the voluntariness of the fee as to all non-residential users was never challenged by the State Attorney or DOT. V1-2, p. 3.

Third, the City requested the court clarify the basis on which it found the City's fee invalid. Specifically, the City requested clarification as to whether the court found that the Equivalent Residential Unit (ERU) methodology was improper or insufficient, or whether the court was finding the fee invalid because the ordinance did not give DOT "credit" for off site movement of stormwater, an

argument raised by DOT in the hearing and referred to by the Court in its oral ruling. V1-2, p. 4.

Fourth, the City requested rehearing if the trial court was finding that the measurement of stormwater runoff from each parcel needed to be exact and that the fee needed to meet the court's definition of voluntariness to be a valid fee, as those findings were contrary to well established law. V1-2, pp. 5-7.

On July 1, 2002, the trial court denied the City's motion. V1-3. In a subsequent order, DOT was awarded its costs in the proceeding. V3-15. This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court erroneously concluded that the City's stormwater utility fee is not a valid fee. In reaching this conclusion, the court disregarded widespread judicial precedent, including that of this Court.

The Florida legislature recognizes water conservation and protection as the public policy of this State. The management and control of stormwater is an integral component of this policy. In fact, the State mandates that local governments provide stormwater management services. To fund these services, it expressly authorizes local governments to create stormwater utilities and charge utility fees.

The City's stormwater utility fee meets all the tests for a valid fee: 1) the fee is charged to the users of the City's stormwater system based on their use of the system; 2) no fee is charged if no use is made and a reduced fee is charged for reduced use; 3) the fee funds stormwater management services; and 4) delinquent charges are collected through standard collection procedures, instead of the placement of a lien on the property. In a previous opinion analyzing Gainesville's stormwater utility ordinance, after an extensive analysis of relevant case law, the First District Court of Appeal in City of Gainesville v. State, Department of

Transportation, 778 So.2d 519, 527 (Fla. 1st DCA 2001), specifically held "that the ordinance at issue here, if it operates as the City has alleged, imposes utility service fees rather than special assessments". The Attorney General reached the same conclusion with respect to the City's ordinance in Op. Att'y Gen. Fla. 97-70 (1997).

Contrary to the court's apparent rationale that the fee was not valid because it did not measure a property's stormwater contribution, there is no requirement in the law that fees must be established with mathematical certainty and that the use of averages and estimates is inappropriate. This Court, lower Florida courts, and courts across the nation, have routinely held that the use of averages and estimates, as well as the use of flat rates for residential users and varying rates for non-residential users, is a valid methodology to set utility fees in circumstances where the use of utility service cannot feasibly be measured exactly.

Further, municipalities are given broad latitude in establishing rates and rate structures for their utility services as it is a legislative function. "Equivalent residential units" (ERU's) are used by the majority of stormwater utilities as a rate structure and the choice to use such as a unit of measurement is clearly within the legislative discretion of the City.

The court also erred in finding payment of the City's fee involuntary. It was uncontroverted that non-residential users can either pay the fee or provide their own stormwater services, in which case there is no charge. Other non-users of the City's system, which include single-family residences and multi-family residences, are also not charged the fee if there is no use of the City's system.

In addition, mandatory fees, regardless of the individual's desire to use the service, or even actual use of the service, have been upheld by this Court. As recently as last year, this Court said that "where a governmental entity provides access to traditional utility services, this Court has not hesitated to uphold local ordinances imposing mandatory fees, regardless of whether an individual customer actually uses or desires the service". Pinellas County v. State, 776 So.2d 262, 268 (Fla. 2001).

Accepting DOT's arguments and the court's apparent conclusion that the stormwater runoff must be precisely determined, for all practical purposes eliminates stormwater utility fees as a mechanism to fund stormwater services. Indeed, such was acknowledged by both the trial court and DOT. This conclusion is contrary to statutory law and the case law of this State. As all elements of a bond validation were met, the City would request this Court vacate the orders

dismissing the validation and awarding DOT its costs, and remand this case to the trial court with directions to enter a judgment validating the bonds.

ARGUMENT

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

Introduction

In an action to validate bonds, a court considers three issues: 1) whether the public body has the authority to issue the bonds; 2) whether the purpose of the obligation is legal; and 3) whether the bond issuance complies with the requirements of law. Pinellas County v. State, 776 So.2d 262, 265 (Fla. 2001). Subsumed with the first issue is the "legality of the financing agreement upon which the bond is secured". State v. City of Port Orange, 650 So.2d 1, 3 (Fla. 1994). In this case, the stormwater fees are pledged to repay the bonds and their validity is at issue in this case. The fee's validity is the only issue as there was no dispute that the other elements of a bond validation were met.

The lower court declined to validate the bonds because it found the City's ordinance invalid. Its apparent grounds were that the fee was not calculated properly and the fee was not voluntary. These grounds and many of the arguments raised by DOT and the State Attorney have already been 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). The First District decided that Florida law permits the creation of stormwater utilities funded by utility fees and that these fees need not be set with mathematical exactitude because it is impossible to meter stormwater. Id. at 521-26. The court held that even if the use of the system was required, it did not turn the fee into a special assessment. Id. at 526-27. The court further found that DOT did not have sovereign immunity protecting it from the payment of such fees. Id. at 527-30. As shown below, the First District's rulings are consistent with the many cases that have upheld such ordinances.

The State requires local governments to provide stormwater management services

The Florida legislature has recognized the significance of preserving and protecting the water resources of the State. Part 1 of Chapter 403, Fla. Stat., is entitled the "Florida Air and Water Pollution Control Act". In its statement of intent, the legislature declared

> [P]ollution of the air and waters of this state constitutes a menace to public health and welfare.
>
> It is . . . the public policy of this state to conserve the waters of the state . . . and to provide that no wastes be discharged into any waters

> of the state without first being given the degree of treatment necessary to protect the beneficial uses of such water. . . .
>
> [L]ocal and regional air and water pollution control programs are to be supported to the extent practicable as essential instruments to provide 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. §403.021(1), (2) & (4), Fla. Stat.

The Florida Water Resources Act of 1972, Chapter 373, Fla. Stat., states in its declaration of policy that [it is the policy of the legislature]

> To prevent damage from floods, soil erosion, and excessive drainage;
>
> To minimize degradation of water resources caused by the discharge of stormwater; §373.016(3)(e) and 3(f).[3]

In connection with preserving water resources, the legislature adopted Chapters 89-186 and 89-279, which are now codified at §403.0891 through §403.0896, Fla. Stat. For the first time, local governments were mandated to develop stormwater plans and stormwater management systems. A "stormwater management system" is defined 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

[3] According to the Senate Staff Analysis and Economic Impact Statement on CS/SB 484, (1989), page 4, "[m]ore than half of all the pollutants entering Florida's surface water are carried by stormwater runoff". V3-14, p. 4.

> water to prevent or reduce flooding, overdrainage, environmental degradation and water pollution or otherwise affect the quantity and quality of discharges from the system. §403.031(16), Fla. Stat.

Local governments have specific authority to establish stormwater management utilities and charge utility fees

Recognizing that local governments would need a funding source to develop stormwater management systems, the legislature provided three funding

mechanisms in addition to those already available to local governments. These three funding sources are outlined in §403.0893, Fla. Stat.

One funding source is the creation of a "stormwater utility" and the resultant adoption of "utility fees" to fund the stormwater management system. Section 403.0893(1), Fla. Stat., states that a municipality may "[c]reate one or more stormwater utilities and adopt stormwater utility fees sufficient to plan, construct, operate and maintain stormwater management systems set out in the local program required pursuant to §403.0891(3)". A stormwater utility is defined as the

> funding of a stormwater management program by assessing the cost of the program to the beneficiaries based on their relative contribution to its need. It is operated as a typical utility which bills services regularly similar to water and wastewater services". §403.031(17), Fla. Stat. (emphasis added).

In this manner, the legislature clearly recognized and intended that stormwater management programs could be set up as a utility and utility fees could be charged to the users of the service. §403.0893(1), Fla. Stat. In fact, §403.0891(6), Fla. Stat., directs the State's Departments of Environmental Protection and Community Affairs to develop a model stormwater management program for local governments that contains "dedicated funding options, including

a stormwater utility fee system based on equitable unit cost approach". (emphasis added).

The City's stormwater utility fee meets all criteria for a valid fee

Once it is established that the legislature intended that local governments could set up their stormwater systems as utilities and charge utility fees, the issue is whether the City's charge is a fee as opposed to a special assessment or tax. The courts have looked at a number of factors to determine whether a charge is a fee, special assessment, or tax including: the relationship between the fee charged and the service rendered; choice in accepting the service; whether the fees collected are used only for providing the service; and the collection method for delinquent payment. By all these criteria, the City's charge is a valid fee.

1. The fee is charged to the users of the City's system based on their relative contribution to the need for the system.

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. See City of New Smyrna Beach v. Board of Trustees of the Internal Improvement Trust Fund, 543 So.2d 824 (Fla. 5th DCA 1989); City of Jacksonville v. Jacksonville Maritime Association, 492 So.2d 770 (Fla. 1st DCA 1986).

In this case, the City has established three user classes of stormwater service: single-family residential, multi-family residential, and non-residential. V2-13 §27-241(b). The charge for these classes are different because each class contributes different amounts of stormwater to the City's system. Most single-family residences pay 1 ERU, some multi-family residences pay .6 ERU's, other multi-family residences pay 1 ERU, and all non-residential properties pay a variable amount based on the impervious and semi-impervious area reduced by any amount of stormwater retained on site. For those that do not contribute to the need for the City's system, no fee is charged.

The amount of the ERU is based on the cost of providing stormwater management services and is set by the City Commission after public hearing. The ordinance contains an appeal provision for those who believe that their stormwater utility charge has been assigned or calculated incorrectly, V3-13, §27-243, and in addition to this more formal process, questions and complaints are also dealt with on an informal basis. V2-5, pp. 48-49. Thus, the fee is distributed among the stormwater users in a manner that takes into account their proportional use of the stormwater system.

The trial court's conclusion that the City's charge is not based on a ratepayer's use of the system is erroneous. Its conclusion appears to be based on two primary concerns: first, that the City did not base its fee on an exact measurement of the stormwater runoff from each individual property, and second, that the fee was not voluntary as to certain property owners. Neither concern is supported by the case law.

a. Use does not need to be calculated with mathematical exactness.

Even while recognizing the practical impossibility of its position, DOT argued, and the Court apparently found, that since the stormwater coming off each parcel of property each month was not precisely measured, the City's fee did not charge for each parcel's contribution to the City's system and was therefore invalid. V2-6, pp. 369-70, 374. However, there is no requirement in the law that in order for a fee to be valid, the use of the service must be measured with mathematical certainty. The 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.

In State v. City of Miami Springs, 245 So.2d 80 (Fla. 1971), apartment owners challenged a decision of the lower court validating sewer revenue bonds of

the City of Miami Springs. The ordinance in question applied a flat rate of $7.00 per month, unrelated to use, to single-family residences, and a variable rate based on gallons of water used to all other users. Id. at 81. There was also a minimum rate for apartments and hotels of $7.00 per month per unit. Challengers of the bond issuance argued that rates charged were arbitrary and discriminatory, specifically objecting to the flat rate, unrelated to use, for single-family residences and the variable rate based on use to all other users. Id. This Court upheld the lower court's validation of the bonds, finding that "these classifications are [not] unreasonable, arbitrary or in conflict with our State or Federal Constitution or laws". Id.

In McDonald Mobile Homes, Inc. v. Village of Swansea, 371 N.E.2d 1155 (Ill. App. 5th 1977), the constitutionality of an ordinance establishing rates for the use of the municipal sewer system was challenged. Single-family residences, apartments, motel rooms and mobile homes were all placed in one classification, commercial in another. The plaintiffs, who were the owners of mobile home parks and apartments, complained that the ordinance was "based on an unwarranted assumption that a household's or business's water consumption and sewer usage are

identical and that the rate fixed does not bear a reasonable relationship to the service provided". Id. at 1157.

The Village argued that the only practical method for it to determine sewer use was by measuring water use and that while it might be "technically possible" to establish a system to monitor sewer use, the costs involved rendered the establishment of such a system "practically impossible". Id. at 1158. The court stated that "[w]hile we agree with plaintiffs that defendant's method for determining sewer use is not scientifically precise, we believe there is a substantial correlation between water consumption and sewer use and that the Village's scheme for assessing sewer use charges is a reasonable exercise of its legislative

authority". See also, Pinellas Apartment Ass'n v. City of St. Petersburg, 294 So.2d 676, 678 (Fla. 2d DCA 1974) ("The setting of utility rates is often a complicated process and mathematical exactitude cannot be required. There does not have to be an exact correlation between the rates charged for various aspects of the service provided by the city."); Home Builders Ass'n of Utah v. City of American Fork, 973 P.2d 425, 429 (Utah 1999) ("Given the inherent and unavoidable imprecision that accompanies the quantification of such costs and the apportionment of such costs, the Court made clear that municipalities must have sufficient flexibility to deal realistically with issues that do not admit of any kind of precise mathematical equality. Indeed, the Court stated that such equality 'is neither feasible nor constitutionally vital.'"); McGrath v. City of Manchester, 398 A.2d 842, 845 (N.H. 1979) ("The fact that absolute mathematical equality is not achieved does not render the system invalid."); Watergate II Apartments v. Buffalo Sewer Authority, 385 N.E.2d 560, 564 (N.Y. App. 1978) ("Exact congruence between the cost of the services provided and the rates charged to particular customers is not required. Where only an approximation of cost or value is possible, discrepancies may have to be endured in the name of administrative flexibility so long as there exists some rational underpinning on the charges levied.").

The inability to precisely measure stormwater was recognized by the legislature when it envisioned the stormwater utility being set up akin to a water and wastewater utility. As noted by the First District in City of Gainesville v. State, Department of Transportation, 778 So.2d 519, 525 (Fla. 1st DCA 2001), "[s]tormwater runoff, of course, like wastewater and solid waste, cannot feasibly be metered. . .". ERUs as a measurement of use are used by the majority of stormwater utilities in the country and have been upheld by courts in other states. V2-5, pp. 120-21, 136. See Teter v. Clark County, 704 P.2d 1171, 1179 (Wash. 1985) ("Respondents are not required to measure each residential lot to ascertain the exact amount of impervious surface on each one. Absolute uniformity in rates is not required." (emphasis in original)); accord Twietmeyer v. City of Hampton, 497 S.E.2d 858 (Va. 1998). The inability to precisely measure the service does not invalidate a stormwater utility fee. City of Gainesville v. State, Department of Transportation, 778 So.2d at 525-26; Teter, 704 P.2d at 1179.

b. The use of flat rates for residential services and variable rates for non-residential services is a widely accepted utility practice.

DOT also argued that the City's use of a flat ERU rate for the majority of single-family residential properties refutes that the City's charge is a fee. The trial

court may have considered this argument in reaching its conclusion that the City's charge was not based on use. As noted, however, flat rates have consistently been upheld by this Court and others where measurement of the service is infeasible or the cost of such measurement renders it practically infeasible.

In City of New Smyrna Beach v. Fish, 384 So.2d 1272 (Fla. 1980), a condominium resident challenged the constitutionality of a city ordinance setting garbage collection rates. The ordinance provided for a flat rate for single-family residences and multi-family residences of a certain size and a variable rate for all others based on the number and size of the containers. Id. at 1273. Among other issues, the resident argued that a flat rate for garbage collection for all residential units was unconstitutional. Id. at 1274. This Court found that the ordinance was constitutional and that the "establishment of different classifications and the charging of different rates for each class is not unreasonable or discriminatory". Id. at 1276. This Court noted

> [a]s the garbage output produced by a condominium unit and a single-family residence may be uniform, and not vary to a large degree, a flat rate is both just and equitable. Unlike residential customers, business customers' garbage varies by type and quantity. Id.

See also Stone v. Town of Mexico Beach, 348 So.2d 40, 42 (Fla. 1st DCA 1977) (ordinance which did not distinguish between occupied and unoccupied premises but charged a flat garbage rate for all residential users valid); State v. City of Miami Springs, 245 So.2d 80 (Fla. 1971) (upholding flat rate to single-family users for wastewater services).

In Kootenai County Property Ass'n v. Kootenai County, 769 P.2d 553 (Idaho 1989), county landowners challenged the imposition of an annual solid waste disposal fee. The county charged a fixed rate for residential dwellings, a per cubic yard of waste charge for commercial and tax exempt units, and a lesser annual charge for the poor and the elderly. Certain property was also exempt. The Idaho Supreme Court found it was a reasonable fee for services, not a tax, and was not defective even though property owners could not opt out of the charge. Id. at 557.

In regard to the flat rate set for residential dwellings and the inability to opt out of the payment of the fee, the Court found that both were reasonable. The Court stated:

> [n]o one suggests that each and every residence generates the same amount of solid waste. Presumably, the precise annual cubic yardage of solid waste from each residence could be painstakingly monitored

> and determined for each residence by county employees. However, all users would have to pay substantially more to cover the additional salaries of trash monitors. Id. at 555.

This is the situation that would occur if DOT's position were accepted. Even assuming exact measurements could be made, the cost of such exactitude would be prohibitive. To illustrate, it would be of small consolation to a single-family home owner that he only pays 17 dollars for his 2200 square foot home with 17 percent retention on site and his neighbor with 3400 square feet and 10 percent retention is paying 20 dollars, when both could be paying 6 dollars for actual stormwater service and the additional cost is due to the time and expense associated with measuring the exact amount of stormwater leaving each property. As noted by the City's consultant, the cost of physically measuring all of the single-family and multi-family units is very expensive relative to differences in impervious areas. V2-5, pp. 119-21.

Indeed, DOT admitted to the Court in its argument that setting up such a system to measure the exact amount of stormwater runoff would be, even assuming it could be done, "an incredibly costly system". V2-6, pp. 369-70. The court also agreed that accepting DOT's argument would mean that it would be "impossible, in my opinion, to compute what an individual customer should pay". V2-6, p. 374.

The use of an average or median amount of impervious area of a single-family residence as the base for the City's ERU does not negate the fact that the City's charge is a reasonable fee. It would not be feasible for the City to measure stormwater runoff from each property. A single average or flat rate for the impervious area of single-family residences and multi-family residences is used by virtually every stormwater utility that bases its rate on impervious areas. V2-5, pp. 120-21, 136. V2-9. See Teter, 704 P.2d at 1179; Twietmeyer, 497 S.E.2d at 860; Smith Chapel Baptist Church v. City of Durham, 517 S.E.2d 874, 882 (N.C. 1999); Long Run Baptist Ass'n v. Louisville and Jefferson County Metropolitan Sewer District, 775 S.W.2d 520, 523 (Ky. Ct. App. 1989).

Further, as to all non-residential properties, the City does not use averages or estimates, but measures both the impervious and semi-impervious area to determine the amount of stormwater runoff generated. V3-13, §27-241(3); V2-5, pp. 36-46, 125-30, 132-34. In 1988, when the stormwater utility was established, every non-residential parcel in the City was examined to determine the impervious areas. Over 3,000 parcels were examined and ERU's assigned to the nearest tenth of a percent. V3-11, App. A.

As with the fees found valid in City of New Smyrna Beach v. Fish, 384 So.2d 1272, Stone, 348 So.2d 40, State v. City of Miami Springs, 245 So.2d 80 and Kootenai County, 769 P.2d 553, a different rate based on actual use is established by the City's ordinance. This different rate structure does not change the City's charge from a fee, nor make it an unreasonable fee. The court in Kootenai County noted that "[w]hile the amount of solid waste generated in residences may vary from house to house, the variation is substantially less significant than it is among businesses". Id. at 556. The court further stated that it is "not irrational for the county to legislate a fixed fee for residences, which have a much less significant variance in waste output and a cubic yard fee for commercial establishments that vary significantly in the amount of waste produced". Id.

c. The establishment of a rate and rate structure is a legislative function.

It is well settled that the establishment of a rate structure and utility rates is a legislative function, delegated to a local government's governing board. Mohme v. City of Cocoa, 328 So.2d 422, 424 (Fla. 1976). DOT's and the State Attorney's disagreement with the methodology of how the fee is set up or whether the apartment owner or tenant should bear the charge is irrelevant to the legitimacy of the rate structure. V2-6, pp. 369-70, 377. It 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. See City of Riviera Beach v. Martinique 2 Owners Association, 596 So.2d 1164, 1165 (Fla. 4th DCA 1992) ("whether to charge a condominium building for waste collection and removal on the basis of how many containers are necessary or on the basis of how many residential units there are in the building is a legislative judgment for the city to make."). In this case, the Gainesville City Commission, after public hearings in which the options were reviewed and debated, made the legislative decision to bill tenants of apartment complexes as users of the system, rather than the property owners. V2-5, p. 119. This was a decision within the Commission's sound discretion.

As the First District Court of Appeal stated in City of Gainesville v. State, Department of Transportation, 778 So.2d at 525, "[i]n setting utility rates, moreover, municipalities enjoy a certain latitude". The court cited to a long line of Florida Supreme Court cases for the principle that the setting of utility rates is a legislative function and that courts will only strike down the rates when the rates are "unreasonable or discriminatory". Id. See also Krupp v. Breckenridge Sanitation District, 19 P.3d 687, 694 (Colo. 2001) ("Mathematical exactitude is not

required, however, and the particular mode adopted by the government entity in assessing the fee is generally a matter of legislative discretion. . . . Because the setting of rates and fees is a legislative function that involves many questions of judgment and discretion, we will not set aside the methodology chosen by an entity with ratemaking authority unless it is inherently unsound"); McQuillin Mun. Corp. §35.37 (3rd Ed. Revised) (rates and service charges).

2. **The fee is not charged if there is no use of the system.**

DOT and the State Attorney argued that the City's utility fee was not a valid fee because the fee was not "voluntary", citing to State v. City of Port Orange, 650 So.2d 1 (Fla. 1994). The trial court found the fee not voluntary, although it is not clear whether it found that the fee was not voluntary just as to tenants of apartment complexes or as to all users. V1-1, ¶ 7; V2-6, pp. 376-78. In any event, a finding that the fee is not voluntary is erroneous as to any and all classes of users under the City's stormwater fee.

To avoid the City's stormwater fee, the user merely needs to show that there is no use of the City's service. This occurs in two ways. Either runoff from a property does not drain through the City's stormwater management system, or the property retains on site 100% of the stormwater runoff attributable to its

development. For any on-site stormwater retention or detention, the non-residential account holder will pay a correspondingly reduced fee. This is an option utilized by many businesses and by those residential users who have the capacity to do so. A tenant of an apartment can avoid the fee by choosing to live in a multi-family unit that makes no use of the City's system. V2-5, pp. 125, 163-64. Thus, the City's fee meets the criteria for voluntariness set forth by this Court in State v. City of Port Orange.[4]

Further, the element of choice cannot be considered in isolation when evaluating whether a charge is a fee, and often can be difficult to reconcile in the provision of services where public welfare, health and safety are involved. For example, in Contractors and Builders Ass'n of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976) this Court found that a sewer connection charge could be a valid fee even though all properties were required, at their own expense, to connect to the sewer system. Id. at 317. The City's stormwater fee, allowing full credit to those who establish their own stormwater system, is certainly more voluntary.

[4]Would the fee be any more or less voluntary if it were charged to the landlord instead? The landlord would almost certainly pass this fee to the tenants, the ultimate user of the stormwater service.

In Keys Citizens for Responsible Government, Inc. v. Florida Keys Aqueduct Authority, 795 So.2d 940 (Fla. 2001), this Court again upheld mandatory sewer connection charges that were the subject of a bond validation. The Court stated there was "little doubt that all residents. . .can be required to connect to a central sewer system by virtue of the mandatory connection ordinance". Id. at 947. The Court cited to Stern v. Halligan, 158 F.3d 729, 734 (3d Cir. 1998) for the proposition that "[i]t cannot escape our notice that from the inception of such sanitary programs. . . courts have routinely rejected constitutional challenges to mandatory connection requirements". The mandatory nature of the use of the service and resultant fees do not necessarily make the charge a special assessment or tax. See, e.g. City of New Smyrna Beach v. Fish, 384 So.2d 1272 (Fla. 1980) (ordinance imposing mandatory garbage collection and requiring payment of reasonable fee approved); accord McQuillin Mun. Corp. §24.250 (3rd Ed. Revised) (garbage collections), §31.30 (sewer connections).

The voluntary nature of the fee discussed in State v. City of Port Orange, 650 So.2d 1, was again called into question when applied to a "traditional utility service" by this Court. Recently, in Pinellas County v. State, 776 So.2d 262 (Fla. 2001), in vacating an order denying a bond validation and remanding back to the

trial court to enter a judgment validating the bonds, this Court again upheld a local ordinance imposing mandatory fees for reclaimed water service. This Court stated "where a government entity provides access to traditional utility services. . . this Court has not hesitated to uphold local ordinances imposing mandatory fees, regardless of whether an individual customer actually uses or desires the service". Id. at 268. The footnote to that statement includes a cite to "§403.031(17), Fla. Stat. (1997) (providing that stormwater management programs are to be operated as a typical utility which bills services regularly, similar to water and wastewater services.)". This Court cited a long line of Florida cases upholding both mandatory fees and flat rate fee structures. Id. at 268-269.

In any event, it seems clear that State v. City of Port Orange, 650 So. 2d 1 (Fla. 1994), supports a stormwater utility fee. It was argued before this Court, and found by the circuit court, that the transportation utility fee proposed by the City of Port Orange was analogous to stormwater fees, and therefore valid. This Court, in rejecting this analogy, stated, "stormwater 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.

3. **The revenue from the fee is used only for stormwater purposes.**

The City deposits all revenue collected from the stormwater fees into a stormwater utility trust account. V3-13, §27-242. The account is used only to fund stormwater management utility services. V2-5, pp. 49-66, 135. The earmarking of proceeds for expenses incurred in providing the service is evidence

that the charge is a fee as opposed to tax. Schneider Transport, Inc. v. Cattanach, 657 F.2d 128, 132 (7th Cir. 1981). A characteristic of a tax is that it is imposed for general revenue raising purposes.

In Contractors and Builders Ass'n v. City of Dunedin, 329 So.2d 314, this Court considered whether an impact fee for connecting to a water and sewer system was a tax or a fee. The ordinance calculated different charges for the connection and included within those charges an amount to cover future expansion of the system. The contractors' association argued that these fees were really a tax and not a fee, relying on the cases of Broward County v. Janis Development Corp., 311 So.2d 371 (Fla. 4th DCA 1975) and Venditti-Siravo, Inc. v. City of Hollywood, 39 Fla. Supp. 121 (17th Cir. 1973).

In distinguishing the charges in these cases from the City of Dunedin's charge, this Court considered two factors: the relationship between the fee and the service and the use of the fees received. Contractors and Builders Ass'n, 329 So.2d at 318. The Court contrasted those fees to the fee sought to be imposed by the City of Dunedin. Dunedin's charge was reasonably related to the services provided. Id. at 318-21. However, it found that the use of the fees was not sufficiently restricted to the expansion of the system, therefore, the ordinance was

deficient. The Court noted that this deficiency could be cured by Dunedin adopting an ordinance with appropriate restrictions on the use of the money and the ordinance would then be valid. Id. at 322-23.

The City does not use any of the funds collected from the stormwater utility fee for purposes other than stormwater management. Therefore, this criteria for a valid fee is met.

4. **A delinquent fee is collected by standard collection procedures, not by the placing of a lien on the property.**

The method of collection for nonpayment of the charge is also indicative of whether the charge is a fee, a tax or a special assessment. The City's stormwater utility ordinance provides that collection of a delinquent fee can be made by one of two methods: referral to a collection agency or referral to the City Attorney's Office to file a civil lawsuit. The delinquent charge is not collected by placing a lien on the property as is done with special assessments or taxes. See §197.3632 and §197.3635, Fla. Stat.

In distinguishing between a tax, a special assessment and a fee, courts have considered whether a delinquent fee could become a lien on property. This Court, in Contractors and Builders Ass'n, 329 So.2d at 314, also discussed whether the

impact fee at issue was a special assessment. In finding that the impact fee was a valid fee and not a special assessment, this Court noted that "[t]he fees in controversy here are not special assessments. . .Under no circumstances would the fees constitute a lien on realty". Id. at 319, fn. 8.

The City's stormwater utility fee is not a special assessment

DOT argued, and the lower court may have found, that the City's stormwater utility fee is in reality a special assessment. Indeed, DOT argued that stormwater charges are by their very nature, special assessments, because "you can't control where the water falls" and "you can't measure that amount". V2-6, p. 369.

The legislature did authorize the imposition of a special assessment as one means of funding the services. See §403.0893(3) Fla. Stat. (a municipality may "[c]reate. . .one or more stormwater management system benefit areas. All property owners within said area may be assessed a per acreage fee. . ."). Some local governments have chosen to fund their stormwater management services by the use of special assessments. This Court reviewed such an assessment in Sarasota County v. Sarasota Church of Christ, Inc., 667 So.2d 180 (Fla. 1995).

While the City could have chosen the special assessment option provided for in §403.0893(3), Fla. Stat., the City chose to set it up as a utility, an option

specifically authorized by the Florida legislature. Just as the fee in Contractors and Builders Ass'n was a valid fee, even though water and sewer charges are often set up as special assessments, so is the City's stormwater charge a valid fee, even though it could also be done as a special assessment. Both the First District Court and the Attorney General considered DOT's argument that the City's stormwater charge was a special assessment and rejected that argument. City of Gainesville v. State, Department of Transportation, 778 So.2d at 527, Op. Att'y Gen. Fla. 97-70 (1997).

II. THE TRIAL COURT ERRED IN DENYING VALIDATION OF THE BONDS.

In its final judgment of dismissal, the trial court made no findings as to whether the other elements of a bond validation had been met. The City requested in its motion for clarification and rehearing that the court make findings as to whether the other elements of the bond validation had been met. V1-2, pp. 1-3. The court, in entering an order simply denying the City's motion, declined to do so. V1-3.

At the beginning of the hearing, the trial court, noting the requests for admissions, requests for judicial notice and other discovery in the record, asked

both DOT and the State Attorney to outline what aspects of the bond validation they challenged. V2-5, pp. 6-11. Both the State Attorney and DOT agreed that the substance of the City's ordinance was the only challenge and that if the ordinance were valid there were "no other impediments to the validation of the bond". V2-5, pp. 6-11, 33-34. In fact, during the presentation of the City's case, the trial court reminded the City that this was the only issue remaining and urged the City to "greatly simplify and curtail your evidentiary showing" to the "extent you feel comfortable with it". V2-5, p. 34.

It was admitted that the City has statutory authority to issue bonds and the authority to construct, operate and finance a stormwater management utility to fund a stormwater management system. V2-5, pp. 6-11. All stormwater utility ordinances and the bond resolution were judicially noticed upon the stipulation of the parties. V2-5, pp. 6-11; V2-6, pp. 281-82. The City is mandated by state law to provide stormwater services, therefore, expenditures for stormwater services serve a valid public purpose. As indicated, the only issue was the validity of the City's ordinance and whether it levied a valid fee.

Therefore, the trial court erred in not addressing the other elements of a bond validation in its final judgment. Indeed, in State v. Osceola County, 752 So.2d 530

(Fla. 1999), this Court urged trial courts in bond validations to address in their final orders all relevant issues raised by the parties in the proceeding. Id. at 533, fn. 7.

III. THE TRIAL COURT'S AWARD OF COSTS TO DOT SHOULD BE REVERSED.

Because the trial court's decision to deny the validation of these bonds must be reversed, this Court should also reverse the award of costs in favor of DOT. DOT is not entitled to costs if it does not prevail.

CONCLUSION

In response to the State of Florida's recognition of water conservation and protection, and the State's mandate to local governments to develop stormwater plans and management programs, the City of Gainesville created a stormwater utility. Acting under express authority of State law, the City opted to fund the stormwater management system through the payment of utility fees charged to the users of the system. The amount of the fee is directly correlated to the use of the system and property owners who do not use the system pay no fees. The City's stormwater fee is a valid fee.

The trial court committed reversible error when it found the City's utility fee invalid. As all other elements of a bond validation were met, this Court must vacate the orders of the trial court dismissing the action and awarding DOT its costs, and remand the case with instructions to enter an order validating the bonds.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Lee C. Libby, Assistant State Attorney, Eighth Judicial Circuit, in and for Alachua County, Florida, Post Office Box 1437, Gainesville, FL 32602 and by U.S. Mail to Marianne A. Trussell, Assistant General Counsel, Florida Department of Transportation, Haydon Burns Building, MS 58, 605 Suwannee Street, Tallahassee, FL 32399-0458 this _____ day of September, 2002.

_____
Marion J. Radson
City Attorney

_____
Elizabeth A. Waratuke
Litigation Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Fla. R. App. P. 9.210(a).

_____
Marion J. Radson
City Attorney

_____
Elizabeth A. Waratuke
Litigation Attorney