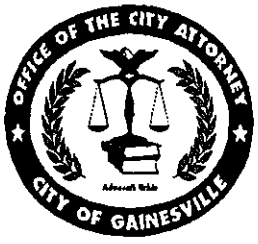

CITY OF GAINESVILLE

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RAISING REVENUES THROUGH ALTERNATIVE REVENUE STREAMS

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INTRODUCTION

Local governments in the State of Florida, as in many other states, are faced with increasing demands for services from their constituents. The challenge to the local governments is to find funding sources for these services without raising ad valorem taxes. Local governments are creating increasingly innovative "fees" to fund these services. The City of Gainesville, Florida, was faced with such an innovative fee sought to be imposed by the County of Alachua in which the City of Gainesville is situated.

Alachua County's Privilege Fee

In August, 1997, Alachua County, Florida adopted an ordinance imposing a three percent "privilege fee" on the gross revenue sales of electricity in the County. The privilege fee was imposed on the electric utilities for the "privilege" of using the County's right of way.[1] The privilege fee would be collected not only in the unincorporated areas of the County, but also within the incorporated cities, including the City of Gainesville.

Simultaneous with the adoption of the ordinance, Alachua County adopted a resolution stating its intent to use the proceeds from the privilege fee "to provide reduction of the County-wide millage rate and thus achieve a balance in tax equity between property owners and other citizens within the County". As described by the County, the privilege fee would have been revenue neutral for those who paid property taxes -- the amount raised by the fee would be offset by a reduction in the millage rate.

[1]The City of Gainesville owns and operates an electric generation and distribution system which serves approximately 70,000 customers (representing approximately 75% of the population of Alachua County).

The State of Florida, like most states, imposes constitutional limitations on the ability of local governments to tax. It was undisputed that the State had not given the County the power to impose a tax of this type. Therefore, if the charge were found to be a tax, it would be invalid. Alachua County maintained that the charge was a fee and not a tax and therefore valid under its home rule powers.

Alachua County filed a bond validation suit seeking to test the constitutionality of the privilege fee. Approximately a dozen parties intervened, including Gainesville and three other cities, three electric companies, two major educational institutions, and a private citizen. The City of Gainesville also adopted an ordinance in conflict with the County's ordinance. Three intervenors, including the City of Gainesville, filed separate actions seeking declaratory and injunctive relief and damages.

Extensive discovery was conducted and the intervenors filed motions for summary judgment with the trial court. The trial court granted summary judgment for the intervenors, making the following findings of fact as to Alachua County's privilege fee:

1. The privilege fee was not related to the extent of use by electric utilities of the County right of way.

2. The privilege fee was not related to the reasonable rental value of the land occupied by electric utilities within the County right of way.

3. The privilege fee was not related to Alachua County's costs of regulating the use by electric utilities of the County right of way.

4. The privilege fee was not related to the cost of maintaining the portion of County right of way occupied by electric utilities.

5. The privilege fee did not represent a bargained-for agreement between Alachua County and any electric utility, but was unilaterally imposed upon the electric utilities by the County.

6. Electric utilities providing electric service to consumers in Alachua County could not reasonably avoid the privilege fee by removing their equipment and facilities from the County right of way.

7. The revenue derived from the imposition of the privilege fee was intended to fund general County operations and to reduce the County ad valorem tax millage rate.

The trial court found as a matter of law that the charge was a tax and not a fee, hence it was unlawful. Several other issues raised by the parties, including whether the City's conflict ordinance prevailed over the County's ordinance and whether the privilege fee ordinance violated 42 USC §1983 were not addressed by the trial court.

The case was appealed by Alachua County directly to the Florida Supreme Court which rendered its opinion in May, 1999. Alachua County v. State, 1999 WL 311324 (Fla.). The court found that the charge was not a fee, but instead a tax which Alachua County had no lawful authority to impose.

In preparing the case for the City of Gainesville, the City Attorney's Office reviewed numerous decisions from many states discussing the characteristics of fees and taxes. One thing is clear, rarely does the charge fall clearly into a tax or fee category, but rather into a spectrum between the two. As stated in San Juan Cellular Telephone Company v. Public Service Commission of Puerto Rico, 967 F.2d 683, 685 (1st Cir. 1992), courts "have sketched a spectrum with a paradigmatic tax at one end and a paradigmatic fee at the other". The First Circuit further elaborated in Cumberland Farms, Inc. v. Tax Assessor, State of Maine, 116 F.3d 943, 947 (1st Cir. 1997), to say "[T]he characterization of a government assessment as being either a tax or a fee is rarely a choice between black and white. Many imposts fall into the gray area in the center of the spectrum."

Courts have generally considered five factors in determining whether the charge is a tax or a fee. The label is not controlling, the test is a functional one, determined by the characteristics of the charge. Dawson v. Kentucky Distilleries & Warehouse Co., 255 U.S. 288, 292-93 (1921).

1. The absence of regulation or service associated with the charge is indicative that it is a tax as opposed to a fee.

Courts have routinely held that it is only in those instances where regulation is the primary purpose of a licensing ordinance that a fee can be exacted pursuant to police powers. The fee may be charged in an amount sufficient to bear the expense of issuing the license and all incidental expenses connected with it. Where a license is required and a fee exacted solely for revenue raising purposes, and the payment of the fee gives the right to carry on the business without any further conditions, it is a tax. See Tamiami Trail Tours, Inc. v. City of Orlando, 120 So.2d 170, 172 (Fla. 1960) (tax permit found to be a tax because the ordinance did not provide "for any regulation of the licensee or 'permittee', once the permit is issued, which is the usual concomitant of a license proper and one of the distinctions between a regulatory fee exacted under the police power and a tax".).

In Brewster v. City of Pocatello, 768 P. 2d 765 (Id. 1988) the court found a street restoration and maintenance fee to be a tax. The city had argued that the charge was a fee for a service provided by the city and thus authorized under state law. The court did not agree, contrasting the street fee to other services provided by a municipality that are based on a "user's consumption of the particular commodity, as are fees imposed for public services such as the recording of wills or filing legal actions". Id. at 768. The court went on to say" [I]n a general sense a fee is a charge for a direct public service rendered to the particular customer, while a tax

is a forced contribution by the public at large to meet public needs". Id. The court also held that the charge was not a regulatory fee.

2. The manner in which the amount of the charge is set is indicative of whether the charge is a tax or a fee.

The amount of a tax does not have to relate to a particular regulation or service. It is instead based on what the government entity needs to raise in revenue within any constitutional limits set by the state.

In Commonwealth Edison Company v. Montana, 453 U.S. 609 (1981), the United States Supreme Court was faced with the question of whether Montana's severance tax for coal violated the United States Constitution. One of the issues argued by Commonwealth Edison was that a factual inquiry into the relationship between the revenues generated by the tax and the cost incurred as a result of the taxed activity needed to be made for a determination of whether the tax was valid or not. In ruling that no such inquiry need be made, the court discussed one of the basic tenets of taxation: "[T]he simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution". Id. at 627. See also Sandstrom v. City of Fort Lauderdale, 133 So.2d 755, 757 (Fla. 2d DCA 1961) ("[W]here power to license is granted for revenue purposes, the amount of the tax is within the discretion and judgment of the municipal authorities...".).

The amount of a fee, on the other hand, is based on the cost of providing the regulation or service. Regulatory fees consist of the cost to the government of providing the regulatory service. Service fees are based on the cost of providing the service, and in the event a government is providing service in a proprietary capacity, a reasonable profit can be associated with providing the service.

In City of Jacksonville v. Jacksonville Maritime Association, Inc., 492 So.2d 770 (Fla. 1st DCA 1986), the City of Jacksonville enacted an ordinance imposing a "user fee" on ships anchored in storage in the St. Johns River. The ship owners sued, alleging that the "user fee" was in reality a tax. Both the trial and appellate courts found the fee to be a tax.

The court considered the fact that the user fee amount was not based on any loss of revenue to the city, or any cost analysis, but was based on what the ordinance drafter thought was "fair". Id. at 771. The court also found indicia of a tax in that no additional services were provided as a result of the fee paid, and no additional costs were incurred by the city as a result of the ship's location.

The appellate court stated that "[A]bsent the primary purpose of regulation, the exaction of a fee for the use of its port must be construed as nothing other than a tax on such privilege". Id. at 772. Fees must be just and reasonable. While there is some latitude in setting the fee, a fee must be a fair approximation of the use of the facilities for whose benefit the fees are imposed. See Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So.2d 314, 318 (Fla. 1976); Tamiami Trail Tours, supra at 172.

3. The use for which the funds from the charge are put to is indicative of whether the charge is a tax or a fee.

A characteristic of a tax is that it is imposed for general revenue-raising purposes. Alternatively, the earmarking of proceeds for expenses incurred in providing the services is evidence that the charge is a fee. Schneider Transport, Inc. v. Cattanach, 657 F.2d 128, 132 (7th Cir. 1981) cert. denied, 455 U.S. 909 (1982). In Contractors and Builders Association, supra, the Florida Supreme 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-Siraro, Inc. v. City of Hollywood, 39 Fla. Supp. 121 (17th Cir. 1973).

In finding that Dunedin's charge was a fee, the court considered two factors that distinguished Dunedin's charge from that found to be a tax in Janis and Venditti-Siraro. The court noted first, that "the fees in Janis Development and Venditti-Siraro bore no relationship to (and were greatly in excess of) the costs of the regulation which was supposed to justify their collection". Contractors and Builders Association, supra at 318. The court noted secondly, that in both Janis Development and Venditti-Siraro the money had been collected for purposes extraneous to the regulation. Therefore, those courts had properly found the charges to be taxes.

The Florida Supreme Court then 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 319-320. However, the court found that the use of the fees were 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. See also Diginet, Inc. v. Western Union ATS, Inc. and the City of Chicago, 845 F. Supp 1237, 1240 (N.D. Ill. 1994) ("There is nothing in this case to support that the [imposed] franchise fee would go only or primarily for the cost of regulation and not into the general coffers of the city. The franchise fee in this case is a tax."); Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388, 1392 (7th Cir. 1992) ("There is no pretense that the franchise fee is necessary to offset such costs as the fiber optic network may impose on the city; so far as it appears, it imposes no costs, congestion or otherwise. The

purpose of the fee is to raise revenue for the city, which is why we are calling the fee a tax".); Emerson College v. City of Boston, 462 N.E.2d 1098, 1106 (Mass. 1984) ("That revenue obtained from a particular charge is not used exclusively to meet expenses incurred in providing the service, but is destined instead for a broader range of services or for a general fund, 'while not decisive, is of weight in indicating that the charge is a tax'".); San Juan Cellular Telephone Company, supra at 685. ("Courts facing cases that lie near the middle of this spectrum have tended ... to emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation.").

4. The level of choice in electing to use the service and thus paying the charge is indicative of whether the charge is a tax or a fee.

This factor was a central issue in the case of State v. City of Port Orange, 650 So.2d 1 (Fla. 1994). The City of Port Orange had passed a "Transportation Utility Ordinance" which adopted a "transportation utility fee" based on the use of the city roads. The funding source for the bonds was to be the new and untested "transportation utility fee". The fee was imposed on all owners of developed property in the city based on a formula created by the city tied to the use of the city streets. Any unpaid charge became a lien on the property until the charge was paid. The issue in the bond validation case, was the legality of the financing agreement upon which the bond was secured -- the transportation utility fee -- and whether the transportation utility fee was a tax or a valid fee.

The Florida Supreme Court found that the transportation utility fee was a tax. The court looked at several factors. One of the factors was whether the individual had any choice in paying the charge. As stated by the court "[fees] 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. at 3. The court stated that the Port Orange fee was a mandatory charge imposed upon those whose only choice was owning developed property within the boundaries of the city.

Courts have said that the choice to use the service and thus pay the fee must be a real choice. In City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1 (Fla. 1972), the city argued that the charge was a fee and not a tax in that the merchants had a choice about paying the fee because they could go out of business and thus avoid the charge. Id. at 7. In finding the charge to be a tax, the Florida Supreme Court stated that the city's argument that the charge was not a tax because it was not payable unless the merchant elected to continue in business was "no more than the statement of a legal fiction". Id.

In Emerson College v. City of Boston, supra, cited with approval by the Florida Supreme Court in State v. City of Port Orange, supra, the Massachusetts Supreme Court reviewed a fire service charge imposed by the City of Boston to determine whether it was a tax or a fee. The court described the fire service charge as a "chimera", noting that it had aspects of both a fee and a tax, but was valid in neither form.

The court in Emerson College found that the charge had fee like characteristics in the manner in which it had been calculated, but that it also had characteristics of a tax. One consideration was that the use of the service was compelled, the recipients of the charge had no choice but to use the service. The court noted that fees generally are charged for services voluntarily requested and that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge. Id. at 424-25. See also American Telephone & Telegraph Co. v. Village of Arlington Heights, 620 N.E.2d 1040, 1046 (Ill. 1993) ("White AT&T and the defendant municipalities could have voluntarily entered into a

contractual relationship under which AT&T would have agreed to pay for the undercrossing of public streets, absent such an agreement, defendants do not have the right to force AT&T to pay a toll under the guise of a franchise fee".).

This factor can be difficult to reconcile in some circumstances. One can certainly argue that there is no "choice" in connecting to a city's water and wastewater system, yet mandatory connection charges have been found to be fees by the same court deciding Port Orange. See Contractors and Builders, supra.

5. The means of collection of the charge is indicative of whether the charge is a tax or a fee.

In Florida, state law provides that collection of certain charges may be enforced by placing the charge on the ad valorem property tax bill. The charges then become a lien on the property if payment is not made. However, state law specifically prohibits service charges from being included on a bill for ad valorem taxes. The method of collection for nonpayment of the charge has been found by courts to be indicative of whether the charge is a tax or a fee. In Contractors & Builders Association, supra at 314, discussed earlier in this material, the issue was whether the impact fee was a tax or a valid fee. In finding that the charge was a fee, the court noted that "[U]nder no circumstances would the fees constitute a lien on realty". Id. at 319, fn. 8.

All charges by a local government can be analyzed using these five factors, thus falling along the continuum between a tax and a fee. Depending on where the charge falls as analyzed by the court will determine whether it is likely to be found a tax or a fee.

This paper will further analyze common local government charges or fees beginning with the charges closest to a tax, that being a special assessment. Additionally, practical advice is offered to help practitioners avoid the traps that can befall the unwary.

Special Assessments:

Unlike taxes, special assessments are assessed against real property on the premise that the property derives a special benefit from the expenditure of the money. Historically, special assessments have been imposed on that portion of a community that receives a particular improvement that enhances the value of the real property. See Atlantic Coast Line R. Co. v. City of Gainesville, 91 So. 118, 121 (Fla. 1922); Klemm v. Davenport, 129 So. 904, 907 (Fla. 1930). A valid assessment must meet two requirements: (1) the property assessed must derive a special benefit from the service provided; and (2) the assessment must be fairly and reasonably apportioned according to the benefits received. City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992).

The Florida Supreme Court has recently expanded the use of special assessments by local governments through several cases. In the first of these, Sarasota County v. Sarasota Church of Christ, 667 So.2d 180 (Fla. 1996), the court held that a special assessment for stormwater services can lawfully be imposed countywide on all developed property. While the court acknowledged that a special assessment is typically designed to benefit a specific area, "this does not mean that the cost of services can never be levied throughout the community as a whole". Id. at 183. The court found that the validity of a special assessment turns on the benefits received by the recipients of the service. Accordingly, the first prong of the test, the "special benefit", can be met if the benefit is shared by the community as a whole.

The second prong of the special assessment test was expanded in State v. Sarasota County, 693 So.2d 546 (Fla. 1997). The court, having previously held that developed properties were specially benefited, now approved the method of apportioning stormwater fees against all

properties with impervious surfaces. The court found that these properties contribute a greater portion of the stormwater runoff and are appropriately assessed at a higher rate than properties without such services.

On the same day the Florida Supreme Court handed down the State v. Sarasota County case, it also held that fire protection services and solid waste disposal can be funded by special assessment. In Lake County v. Water Oak Management Corporation, 695 So.2d 667 (Fla. 1997), the court further liberalized the first prong of the special benefit test. The property owners argued that the law in Florida required a local government to prove that a "unique" benefit is provided to real property or, at least, one that is different in type or degree from benefits provided to the community as a whole. The court stated that the test was not whether the services provided a unique benefit or one that was different in type or degree than the benefit to the community as a whole, but rather whether there is a "logical relationship between the services provided and the benefit to the real property". Id. at 669.

Although the court recognized that this new test could open the floodgates for the use of special assessment, the court noted that a special assessment must still benefit real property. Thus, the court was quick to point out that general law enforcement activities, the provision of courts, and indigent health care do not benefit real property. Id. at 670.

In the most recent Florida Supreme Court case on this subject, Collier County adopted an ordinance creating an "Interim Governmental Services Fee". In Florida, state law provides that real property is assessed on January 1 of each year. If improvements have been made but are not substantially completed on that date, no value is placed on the property. Consequently, no taxes are received on that value until the following year although the government must provide services before then.

Collier County attempted to capture some of the costs by charging a pro rata share of certain services against the properties once they became substantially completed, but before January 1. The county set the charge up as a special assessment or fee and filed an action for bond validation. Collier County v. State, 733 So.2d 1012 (Fla. 1999).

The Florida Supreme Court held that the charge was a tax, concluding that the first prong -- the special benefit test-- had not been satisfied. The county argued that the first prong was satisfied by establishing that the charge was "rationally related" to the demand for services. The court stated that the test was instead whether a "direct special benefit" was provided, noting that otherwise "the distinction between taxes and special assessments would be forever obliterated". Id. at 1017. The services to be funded from the assessment: sheriff, libraries, parks, election services, public health services, and public works, were services that "provide no direct special benefit to real property". Id. at 1018. The court went on to state "[I]n rejecting the criticism that our decision in Water Oak Management would open the flood-gates for municipalities and counties to impose improper taxes labeled as special assessments, we made clear that services such as general law enforcement activities, the provision of courts and indigent health care are, like fire protection services, functions required for an organized society". Id. at 1017. The charge was also held not to be a valid user or impact fee.

The challenge for local governments is to demonstrate on the record the benefit to the real property that is assessed. If it can be shown that the real property derives a special benefit from the service, such as enhancing the value of the property or providing for lower insurance premiums, then the courts may be convinced that the special assessment method is appropriate and valid. However, to be valid, the assessment must still meet the apportionment test; that is, the assessment must be properly apportioned as to the special benefit received by the assessed

real property. See St. Lucie County - Fort Pierce Fire Prevention and Control District v. Higgs, 141 So.2d 744 (Fla. 1962). In Lake County, supra, for example, the assessment was based on a demonstrated benefit to different classes of land uses rather than benefit based solely on the value of the property.

Franchise Fees:

Another well-recognized means of raising revenues by local governments is through franchise fees. These fees are the "consideration paid by the utility for the grant of the franchise". City of Hialeah Gardens v. Dade County, 348 So.2d 1174, 1180 (Fla. 3d DCA 1977).

The Florida Supreme Court recognized the continued viability of franchise fees in the Alachua County privilege fee case. The court stated: "(a) franchise is defined as 'a special privilege conferred by the government on individuals or corporations that does not belong to the citizens generally by common right...' When granted, a franchise becomes a property right in the legal sense of the word." Alachua County, supra at 3, citing to City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So.2d 219, 223-24 (Fla. 5th DCA 1991). The court distinguished franchise fees from taxes as follows: "...this Court stated that unlike other governmental entities, the charges here [meaning franchise fees] are bargained for in exchange for specific property rights relinquished by the cities". (e.s.) In contrast, the court stated "...a tax is a forced charge or imposition, it operates whether we like it or not and in no sense depends on the will or contract of the one on whom it is imposed". State ex rel. Gulfstream Park Racing Association v. Florida State Racing Commission, 70 So.2d 375, 379 (Fla. 1953).

A valuable right surrendered by a government in a franchise is the right to provide competitive service. In Florida Public Service Commission v. Florida Cities Water Company, 446 So.2d 1111 (Fla. 2d DCA 1984), the court held that the county's ability to grant the utilities

the authority to do business without competition "was the essence of the franchise agreement". Id. at 1114. Once relinquished, "there was nothing left upon which the franchise agreement could operate". Id. at 1113.

In determining the legality of a franchise fee versus a tax, there is a trend in the courts to look at the ultimate destination of the revenue raised by the franchise fee. If the revenue goes to fund general services, then this is one salient factor in reaching a decision of fee vs. tax. See, City of Chattanooga v. Bell South Telecommunications, Inc., 1 F. Supp.2d 809 (E.D. Tenn. 1998) and cases cited therein.

In view of recent lower court decisions, local governments should examine the consideration for the franchise and the rights that are granted. If the sole consideration for the franchise is the right to occupy the right of way, it would be advisable that there be a relationship between the use and extent of the right of way, the cost of regulation, and the amount of the fee. Of course, the courts will look to state law in each jurisdiction to determine whether the revenue is a fee or a tax.

Privilege Fees:

Moving further down the continuum is the airport "privilege fee". Many airports have adopted a fee levied against the gross receipts of nontenant companies (usually rental car companies) who use the airport. In the seminal case Evansville-Vanderburgh Airport Authority District v. Delta Airlines, 405 U.S. 707 (1972), the United States Supreme Court evaluated airport charges as user fees, regarding it "as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the cost of their construction and maintenance may constitutionally be imposed". Id. at 714.

Following Evansville, a number of cases have upheld airport gross receipt fees as a user or privilege fee. See Alamo Rent-A-Car v. Sarasota-Manatee Airport Authority, 825 F.2d 367 (11th Cir. 1987); Club Car Rentals of Gainesville, Inc., d/b/a Budget Rent-A-Car of Gainesville v. City of Gainesville and the Gainesville Regional Airport Authority, Case No. GCA 85-0177-MMP, 1988 WL 294258 (N.D. Fla., May 6, 1988); Alamo Rent-A-Car v. City of Palm Springs, 955 F.2d 30 (9th Cir. 1992); and Ace Rent-A-Car, Inc., Enterprise Leasing of Indianapolis, Inc. v. Indianapolis Airport Authority, 612 N.E. 2d 1104 (Ind. Ct. App. 1993). In upholding a 6% gross receipts fee, the court in Jacksonville Port Authority v. Alamo Rent-A-Car, Inc., 600 S.2d 1159 (Fla. 1st DCA 1992) considered the following crucial factors: 1) the fee was not a general revenue source of a sovereign government but was governed on entirely different principles – the receipt of a special benefit from the airport, i.e., the generation of customers; 2) the fee was related to the use of the airport facilities.

Alachua County had argued that its privilege fee "took root" in cases permitting the unilateral imposition of a "privilege fee" on non-tenant rental car companies using the airport facilities to pick up customers at the airport, citing to Jacksonville Port Authority, supra. However, a key distinction between the airport privilege fee and the fee sought to be imposed by Alachua County was that local governments operate the airports in their proprietary capacity. As stated by the appellate court in Jacksonville Port Authority, "the crucial point in resolving the tax issue is to recognize that the JPA does not purport to regulate its airport system under the auspices of the general police power, but rather to do so as a function of its proprietary status". Id. at 1164. Local governments hold right of way in their governmental capacity.[2] See also

[2]Whatever may be the quality or quantity of the estate of the city in its streets, that estate is essentially public and not private property, and the city in holding it is considered the agent and trustee of the public and not a private

American Telephone and Telegraph Co. v. Village of Arlington Heights, supra at 1044. ("Municipalities do not possess proprietary powers over the public streets. They only possess regulatory powers. The public streets are held in trust for the use of the public.").

While airports are unique operations, local governments that own and operate facilities in their proprietary (versus governmental) capacities can look to fund these operations and facilities through the imposition of a privilege fee on the users of the facility. In view of the case law, it would be advisable that a cost analysis support, at least in part, the imposition of the fee and that the fee relate to the benefits and the extent of use of the facilities on those who are required to pay the fee. See the Authority's cost analysis contained in Alamo Rent-a-car, Inc. v. Sarasota-Manatee Airport Authority, 825 F.2d 367 (11th Cir. 1987).

Utility Fees:

While it may seem that what a local government calls a utility fee would clearly fall on the fee end of the continuum, Florida is struggling right now with one type of utility fee, stormwater fees. Florida law provides that local governments are required to provide a stormwater management plan and provide stormwater services in their local comprehensive plans. Recognizing that local governments would need a funding mechanism for these state mandated plans and programs, the legislature provided for three funding sources in addition to those already available to local governments. §403.0893, Fla. Stat.

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owner for profit or emolument. The interest is exclusively publici juris and is in any respect wholly unlike property of a private corporation, which is held for its own benefit and used for its private gain and advantage. Expressed otherwise, whatever the nature of the title of the municipality in streets and alleys, whether a fee simple or only a qualified or conditional fee or a perpetual easement, it is such as to enable the public authorities to devote them to public purposes. The power to maintain and regulate the use of the streets is a trust for the benefit of the general public, of which the city cannot divest itself, nor can it so exercise its power over the streets as to defeat or seriously interfere with the enjoyment of the streets by the public. In other words, as noticed above, in supervising the uses of its streets, a municipal corporation is engaged in a function essentially public and governmental. (citations omitted). McQuillin: The Law of Municipal Corporations Section 30.40 (3rd Ed.).

The first of those funding sources was for local governments to create stormwater utilities and charge stormwater utility fees for dealing with the stormwater, much as water, wastewater, and other utilities are provided for and billed by counties and municipalities. Another alternative was for a "benefit area" to be created and those in the benefit area would be assessed a per acre fee, in essence, a special assessment.

As to the utility fee option, §403.0893(1), Fla. Stat., provided that local governments may "[C]reate one or more stormwater utilities sufficient to plan, construct, operate, and maintain stormwater management systems" required by state law. 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. Thus, Florida's legislature expressly contemplated the establishment of stormwater utility fees as typical utility fees as opposed to special assessments, which are an additional option.

In the last year, four stormwater utility fee cases have been before Florida courts with challenges to the validity of the stormwater charge as a fee. Gainesville has had one of these cases.

Gainesville's stormwater utility charge is intended to be set up as a fee and indeed we believe that it meets all criteria discussed in this paper. First, the amount of the stormwater fee is set by dividing the cost of providing stormwater services by the number of billable units. Second, stormwater services are provided in exchange for the charge, if no service is provided to an area, no charge is made. Third, the fees collected are used only for stormwater purposes. Fourth, there is a choice in using the service. The user need only retain the stormwater caused by the development on site to not be charged a fee. Gainesville has a graduated system of charges

ranging from 1 to 100 percent, depending on the amount of stormwater retained on site. Finally, delinquent stormwater charges are collected by standard utility collection means rather than becoming a lien on the property.

One of the State of Florida properties located in the City of Gainesville had for years refused to pay the City's stormwater charges. They requested an opinion from the Office of the Attorney General as to whether the City's stormwater charge was a tax or a fee and whether they were obligated to pay it. In AGO 97-70, the Office of the Attorney General opined that the City's stormwater charge was a proper service or user fee, and that the "City may lawfully impose it on property of the State of Florida Department of Transportation". Despite the opinion, the State continued to refuse to pay the fee. The City filed an action for declaratory judgment and past monies owed. The State filed a motion to dismiss arguing that the charge was a tax or special assessment.

The trial court in Leon County, without the taking of testimony or other evidence, found that the City's stormwater fee was a special assessment because the user had no choice but to use the service. At the hearing, the court stated that the choice to retain the stormwater on site was placing an obligation on the State that the City could not do. The City has appealed the trial court's decision.

In a second case, City of Cocoa v. School Board of Brevard County, 711 So.2d 1322 (Fla. 5th DCA 1998), the City of Cocoa filed an action against the School Board of Broward County for unpaid stormwater utility fees. The School Board had moved to dismiss the complaint contending that the charges were special assessments for which they were not liable. The trial court granted the motion to dismiss, finding that the charge was a special assessment because "property owners do not have an option of not utilizing the government service and thereby

avoiding the charge". Id. The Fifth District Court reversed the trial court and sent the case back for further proceedings, noting that the legislature intended to create a utility fee and it was not apparent that Cocoa's charge was not a fee. The case is currently in the discovery stage. The City of Cocoa's ordinance provides a maximum retention credit of 25%.

In City of St. Petersburg v. School Board of Pinellas County, 711 So.2d 535 (Fla. 2nd DCA 1998), the appellate court per curiam affirmed the trial court finding that the City of St. Petersburg's stormwater charge was a special assessment. No appeal was taken by the City of St. Petersburg. St. Petersburg's ordinance provides a maximum retention credit of 30% and delinquent charges are collected by liens on the property.

The most recent challenge to stormwater charges set up as utility fees is occurring in a bond validation filed by the City of Clearwater, Florida. The school board of the county and a local college filed a response arguing the charge is a tax or special assessment. On August 24, 1999, the trial judge, the same one who decided the City of St. Petersburg case, entered a final judgment validating the bonds. The order states that the "Stormwater Utility System constitutes a utility enterprise of the City". The judgment contains handwritten crossed out language stating that "such utility fees do not constitute a special assessment on the properties affected". The court stated that the issue of whether the charge was a special assessment was a collateral issue to the validation proceeding.

Other states have recognized stormwater charges as proper utilities. In City of Detroit v. State of Michigan, 803 F.2d 1411 (6th Cir. 1986), the court ordered that a county must pay for the city's treatment of stormwater runoff from county roads as the treatment was a "service". See also, Teter v. Clark County, 704 P. 2d 1171 (Wash. 1985).

As with the other charges discussed in this paper, the more cost analysis that can be incorporated into setting the amount of the fee, the more likely the courts are to find the charge a fee.

CONCLUSION

The next millennium will inevitably result in the development of additional mechanisms to fund services provided by local governments. The traditional method of raising revenues through the imposition of taxes is generally limited by express constitutional or statutory authority and, of course, the political climate. In the last half of this century, local governments through the exercise of their home rule powers have created fee mechanisms to defray the cost of providing government services. Courts have had to distinguish the taxes from the fees by applying certain tests. Local governments are well advised to consider the classic tax at one end of a spectrum transitioning with impact fees, regulatory fees, franchise fees, airport privilege fees, utility services fees, and finally proprietary voluntary fees at the other end. Greater legal scrutiny is required of fees that are closer in form to taxes than those fees that are voluntarily paid for a specific service. The only limitation is the creativity of local government attorneys and financial consultants who will continue to explore new revenue streams to fund the ever-growing needs of the citizens.