

IN THE SUPREME COURT OF FLORIDA

**CASE NO. SC06-410
1ST DCA CASE NO. 1D05-710**

CITY OF GAINESVILLE, FLORIDA,
a municipal corporation,

Petitioner,

v.

STATE OF FLORIDA DEPARTMENT
OF TRANSPORTATION,

Respondent.

ON REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL
TALLAHASSEE, FLORIDA

**BRIEF ON JURISDICTION
OF THE CITY OF GAINESVILLE, FLORIDA**

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BRIEF ON JURISDICTION

Pursuant to Rules 9.030(a)(2)(A) and 9.120, Fla. R. App. P., Petitioner/Appellant below, City of Gainesville, Florida (“City”) requests that this Court review the opinion of the First District Court of Appeal below because it expressly and directly conflicts with decisions of this Court and other Florida District Courts of Appeal. Resolving this conflict is important because the decision below puts municipalities at risk for having to furnish state and federal agencies not just stormwater utility services but a wide variety of municipal utility services without payment. Additionally, reversing the decision below would return consistency to the application of sovereign immunity, or, rather, the waiver of sovereign immunity, to allow suit against state agencies for the collection of statutorily authorized charges similar to charges authorized by written contracts.

STATEMENT OF THE CASE AND FACTS

In 1986, the Florida legislature articulated the strong public policy supporting the proper management and treatment of the state’s stormwater, and enacted sections 403.0891 through 403.0896 of the Florida Statutes as part of the Florida Air and Water Pollution Control Act. This Act mandated that local governments establish stormwater management programs and

authorized the creation of “stormwater utilities” to fund the stormwater management systems. Section 403.0893(1), Fla. Stat. In 1988, the City of Gainesville built a stormwater system and adopted a stormwater utility ordinance establishing a stormwater utility and related utility fees. City of Gainesville, Ord. sec. 27-236.

The Florida Department of Transportation (“FDOT”) formerly owned two parcels within the City. Without notice to the City, the FDOT disposed of some of the stormwater from these two parcels by dumping it into the City's stormwater system instead of building a retention pond or otherwise properly disposing of its stormwater runoff. Subsequently, the City discovered the FDOT's use of the City's system, and billed the FDOT for the stormwater services. The FDOT refused to pay its bill.

The City filed two previous lawsuits concerning its stormwater fees. These two lawsuits resulted in decisions by the First District Court of Appeal and, most recently, this Court, establishing the City’s stormwater fee was a valid user fee and the FDOT was subject to pay the fee.

The First DCA decision resulted from a 1998 lawsuit the City filed against FDOT. The City's two-count Complaint sought, first, declaratory relief holding the City’s stormwater utility fee to be a valid user fee rather

than a tax or special assessment, and second, to collect unpaid stormwater utility fees from the FDOT. The trial court dismissed both counts, and the City appealed to the First District Court of Appeal. As to the first count, the DCA reversed the trial court, and found the City's stormwater utility fee to impose a utility service fee rather than a special assessment. City of Gainesville v. State of Florida, Department of Transportation, 778 So.2d 519 (Fla. 1st DCA 2001) (hereinafter "FDOT 1"). As to the second count, which the DCA characterized as an action in contract, the DCA affirmed the dismissal, but provided a roadmap for subsequent litigation of the City's collection action by suggesting at least two different avenues for collecting unpaid stormwater utility fees from FDOT. Id. at 531. First, the City could cure its breach of contract count by proving the existence of a written contract. Second, the DCA suggested that the FDOT would be liable for fees as a person within the meaning of section 180.13(2). Id. at 528 n.5.

Taking footnote 5 of FDOT 1 as its inspiration, the City ultimately filed the Complaint that is the basis for this appeal against FDOT under 180.13(2). The new complaint did not allege a contract theory, or any other kind of breach of contract claim, but a statutory cause of action based on the Legislature's waiver of sovereign immunity provided in section 180.13(2).

The decision in this Court resulted from a bond validation proceeding in which the City sought to issue bonds with the stormwater fee as collateral. In the bond validation proceeding (hereinafter "FDOT 2"), the same issue of the nature of the fee arose as was addressed in FDOT 1. The FDOT opposed the validation arguing that it had no obligation to pay because the fee was a tax or assessment rather than a user fee. Thus the central focus of the bond validation proceeding was whether the fee was a utility fee to which the FDOT was subject or a tax to which it would be exempt.

In addressing the nature of the City's stormwater utility fee, this Court held that, "the stormwater fees constitute a user fee, not a special assessment," City of Gainesville v. State of Florida, Department of Transportation, et al., 863 So.2d 138, 145 (Fla. 2003), and, "if the stormwater fee is a user fee, the fee is valid and the state and DOT, as beneficiaries of the system, can be charged." Id. at 144. Simply put, in FDOT 2, the Supreme Court conclusively ruled that the City's stormwater utility fee is a valid user fee. Id. In other words, the City had the right to bill (and presumably collect) for the services FDOT took from the City.

Despite these previous decisions, the panel below ruled that section 180.13(2) did not apply and that FDOT, although subject to a utility fee,

could take the service, refuse to pay its bill, and then claim sovereign immunity in the subsequent collection action. As shown below, this decision conflicts with decisions of this and other Courts.

SUMMARY OF THE ARGUMENT

The opinion on appeal conflicts directly with this Court's ruling in FDOT 2, the bond validation case. In FDOT 2, this Court necessarily determined that bonds secured by the City's stormwater utility fee were backed by a valid, legal financing source. A valid, legal financing source can only mean one that may be collected from those who refuse to pay. This Court relied on the First DCA's opinion in FDOT 1 that section 180.13(2) was "an applicable and valid statute" in the context of a municipality collecting unpaid stormwater utility fees from a state agency. The opinion below conflicts with FDOT 2 by pulling the legs out from under the Supreme Court's validation of the City's bonds by ignoring the applicability of section 180.13(2), and by ignoring that the validation means nothing if the City cannot collect its bills.

The opinion below also errs by relying on the rejected, absolutist position that waivers of sovereign immunity cannot be implied. This position conflicts directly with this Court and other DCAs that have carved

out several implicit waivers of sovereign immunity from the general rule. By failing to consider the possibility of an implied waiver of sovereign immunity, the lower court expressly and directly conflicted with opinions of this Court and other District Courts of Appeal.

ARGUMENT

I. THE OPINION BELOW CREATES AN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE FLORIDA SUPREME COURT IN THE BOND VALIDATION CASE (FDOT 2).

An essential element of the Supreme Court's decision to validate the City's stormwater utility bonds was that Gainesville has the power to run its stormwater utility, and to bill *and collect* for those services. City of Gainesville v. State of Florida, Department of Transportation, et al., 863 So.2d 138, 141 (Fla. 2003). The whole purpose of the bond validation proceeding is to assure investors that the city has the ability to pay back its investors. Id. "Subsumed within the inquiry as to whether the public body has the authority to issue the subject bond is the legality of the financing agreement upon which the bond is secured." Id. at 143, citing State v. City of Port Orange, 650 So. 2d 1, 3 (Fla. 1994). Chapter 403 authorizes the City to establish a stormwater utility, and states that it shall be operated "as a typical utility," but it does not supply the day to day mechanics of running

the utility, and is silent as to the issue of collection of utility fees. Section 403.031(17), Fla. Stat. Section 180.13(2), however, provides for the collection of unpaid utility fees. If the City's power to bill and collect stormwater utility fees does not come from chapter 180, from where does it come? Implicit in the bond validation is the determination that the City can bill and collect for its services, but this power can only come from chapter 180, as supported by section 403.031(17) which says that a stormwater utility will be operated as a "typical utility." Is there another possible source of that power to bill and collect? If not, the First DCA's decision that chapter 180 does not apply conflicts with this Court's FDOT 2 decision which recognized chapter 180 as a basis to validate the bonds.¹

The lower court's decision eviscerates the Supreme Court's validation of bonds based on the City's ability to fund repayment of the bonds by billing *and collecting* stormwater utility fees. This Court's validation of the

¹ Curiously, while the First DCA rejects the application of chapter 180 to the collection of unpaid stormwater utility fees from the FDOT in the opinion on appeal, it continues to embrace its earlier finding that, "Department of Transportation is a 'person' within meaning of section 180.13(2), Florida Statutes." Childers v. State, 2006 WL 237081 (Fla. 1st DCA Feb. 2, 2006) citing City of Gainesville v. State Department of Transportation, 778 So. 2d 519, 528 n. 5 (Fla. 1st DCA 2001). Of course, this Court also looked favorably on this First DCA FDOT 1 case as a "thorough opinion" in FDOT 2. City of Gainesville, 863 So. 2d at 143.

financing structure means nothing if the City cannot collect the funds from FDOT to repay the City's investors.

II. THE OPINION BELOW CREATES AN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF THE FLORIDA SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL THAT HAVE FOUND IMPLIED WAIVERS OF SOVEREIGN IMMUNITY.

In addition to erroneously refusing to recognize the legislature's express waiver of sovereign immunity for the collection of unpaid stormwater utility fees founded in section 180.13(2), the court below relied on an erroneous and discredited premise. The lower court treated the Spangler notion that, "[w]aiver of sovereign immunity will not be implied," as absolute dogma. City of Gainesville v. State of Florida Department of Transportation, 920 So. 2d 53, 54 (Fla. 1st DCA 2005), citing Spangler v. Florida State Turnpike Authority, 106 So. 2d 421, 424 (Fla. 1958). This single-minded approach to the sanctity of sovereign immunity runs contrary to this Court's holding in various cases including Pan-Am Tobacco Corporation v. Department of Corrections, 471 So. 2d 4 (Fla. 1984).

The First DCA's decision that sovereign immunity can never be waived has been discredited repeatedly by this Court and lower courts. Implied waivers have been found to exist in instances of written contracts (Pan-Am Tobacco Corporation v. Department of Corrections, 471 So. 2d 4

(Fla. 1984)), cases of implied covenants to written contracts (Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So. 2d 696 (Fla. 4th DCA 1988)), actions to refund some improperly assessed taxes (Broward County v. Mattel, 397 So. 2d 457 (Fla. 4th DCA 1981)), and suits to refund improperly collected fees (Bill Stroop Roofing, Inc. v. Metropolitan Dade County, 788 So. 2d 365 (Fla. 3rd DCA 2001)). Similarly, municipalities have been estopped from claiming sovereign immunity to avoid lawsuits on improperly executed agreements (Killearn Properties, Inc. v. City of Tallahassee, 366 So. 2d 172 (Fla. 1st DCA 1979)). In short, this Court and other District Courts of Appeal have held that implicit waiver of sovereign immunity may result from egregiously improper actions by state agencies or subdivisions. As the Third DCA emphasized, an implicit waiver of sovereign immunity, “injects greater morality in government than would allowing the retention of illegal exactions.” Bill Stroop Roofing at 368 n. 5.

These words could have been written for this case. Here, the FDOT took stormwater services from the City, without the City's notice or permission. This Court has already ruled that the City's stormwater fee is valid, and that the FDOT is subject to it, and that investors can rely on the City's right to bill and collect for these services. The decision below to

render the FDOT immune from suit for the services it surreptitiously took from the City conflicts with the many decisions confirming that waiver of sovereign immunity may be implied in the right circumstances.

III. IT IS IMPORTANT THAT THE CONFLICTS BE RESOLVED.

As may be expected, the issues presented by this case are of extreme interest to every municipality that provides utility services to government agencies. That is, most Florida municipalities. Several municipalities and the Florida League of Cities have expressed interest in preparing amicus briefs in the event this Court grants review. Ironically, the First DCA stated the importance of this issue in FDOT 1 when noting that 180.13(2) was “an applicable and valid statute” in this situation, and that, “[a]ny other construction of the statute would put municipalities at risk for having to furnish state and federal agencies not just stormwater utility services but all municipal utility services without payment.” City of Gainesville, 778 So.2d at 529 n. 5.

CONCLUSION

For all the foregoing reasons, this Court should accept jurisdiction over this case and resolve the conflicts created by the decision below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Marianne A. Trussell, Deputy General Counsel, Florida Department of Transportation, Haydon Burns Building, MS 58, 605 Suwannee Street, Tallahassee, Florida 32399-0458 on this 27th day of March 2006.

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CERTIFICATE OF COMPLIANCE

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

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