

CITY OF GAINESVILLE
Office of the City Attorney

Memorandum

Phone: 334-5011/Fax 334-2229

TO: Mayor and City Commissioners

DATE: December 17, 2009

FROM: City Attorney

RESOLUTION

SUBJECT: A Resolution of the City Commission of the City of Gainesville, Florida, initiating conflict resolution procedures per Section 164.101, Florida Statutes, the Florida Governmental Conflict Resolution Act, pertaining to a conflict between the City of Gainesville and the Alachua County School Board, Florida; and providing an immediate effective date.

Recommendation: The City Commission adopt the proposed resolution.

On December 15, 2009, the Alachua County School Board voted to stop paying the City's stormwater fee effective immediately. The School Board's apparent reason is that they are immune from paying the stormwater utility fee if there is no written contract providing for payment of the fee. The Board did not make any arrangements for otherwise disposing of the stormwater it discharges into the City's utility system from all of its real properties within the City of Gainesville.

Under Florida law, a procedure exists whereby government entities may seek to resolve their conflicts before resorting to litigation. The conflict resolution procedures are initiated by the passage of a resolution. Before the City files for injunctive and other relief to compel the School Board to stop using the City's utility services or to pay the utility fee associated with the services, the City Attorney's Office recommends such conflict procedures be initiated. To aid the Commission in understanding the issues involved, the background and litigation over the City's utility fee is set forth below.

Background of the City's Utility Fee

In 1986, the Florida Legislature, finding that pollution to the waters of the State was a "menace to public health and welfare" and aware of the importance of the management and treatment of stormwater runoff in preserving and protecting the water resources, mandated that local governments establish stormwater management programs. Recognizing that the local governments would need a means to fund the programs, the Legislature authorized local governments to establish stormwater utilities and attendant fees, envisioning that stormwater utilities would be "operated as a typical utility which bills sources regularly, similar to water and wastewater services".

Pursuant to the state mandate, in 1988 the City, through its public works department, established a stormwater utility and charged fees based on the property occupant's use of the City's stormwater system. For example, if all the stormwater is

discharged into the City's system, the full fee is charged. Conversely, if all of the stormwater generated by the impervious area on the property is retained on site, (i.e. there is no use of the City's system), no fee is charged. If 50% of the stormwater attributable to the impervious area is retained on site, 50% of the fee would be charged.

Litigation over the Utility Fee

Over the course of years, the City was involved in litigation with the Department of Transportation (DOT) who refused to pay the City's stormwater fee. DOT argued that the City's fee was not a fee but a special assessment or a tax. DOT recognized that if the City established a fee, the DOT would be obligated to pay. Seeking legal counsel on this issue, DOT asked the Attorney General of the State of Florida for an opinion. After analyzing the City's fee, then Attorney General Robert Butterworth wrote

"it is my opinion that the fee imposed by the City of Gainesville for utilization of the stormwater management utility is a service fee or user fee, which the City may lawfully impose on property of the State of Florida, Department of Transportation". AGO 97-70.

Despite the opinion of the Attorney General, the Department refused to pay the fee. Litigation ensued that eventually reached the First District Court of Appeal in March 2001, where DOT again argued the City's stormwater fee was a tax or special assessment instead of a fee. The First District held that the City's stormwater fee, if it operated as provided in the ordinance, was a "utility service fee" and that "sovereign immunity does not insulate DOT from having to pay the City valid utility charges". The First District remanded the case to the trial court to determine whether the City fee operated as set forth in its stormwater ordinance. The City voluntarily dismissed the case when it returned to the trial court and filed an action in Gainesville that would allow the Florida Supreme Court to eventually decide the issue.

In September 2003, the Florida Supreme Court addressed the issue of whether the City's stormwater fee was a valid utility fee or a special assessment as argued by DOT. The Court noted that distinction was important as DOT could not be charged if it was a special assessment, but "[i]f the stormwater fee is a user fee, the fee is valid and the State and DOT, as beneficiaries of the system, can be charged". In a unanimous opinion, the Florida Supreme Court found that "the stormwater fees constitute valid user fees" and under its analysis, could be charged to governments.

School Board's Actions

Today the School Board is taking the position that even though the City's fees are valid and that it can be charged the fee, it does not have to pay the fee because the City has no means of collecting the fee against the Board if the Board refuses to pay it. The Board is basing its authority for this action on a trial court's decision in Pinellas County finding that the School Board did not have to pay that City's stormwater utility fee because of sovereign immunity. The appellate court affirmed the trial court's decision without the benefit of a written opinion. That trial court based its decision on a third appellate court opinion between the City of Gainesville and DOT for payment of stormwater fees. In that third case, the City sued the DOT for past monies it owed (the

DOT during the time of the Florida Supreme Court opinion moved all of its facilities out of the City and therefore stopped incurring stormwater fees) alleging a waiver of sovereign immunity under Chapter 180, Fla. Stat. The First District found that Chapter 180 only waived sovereign immunity to collect a limited number of utilities fees, not including stormwater utility fees. In other words, the City could not compel payment of the stormwater fee against a government under Chapter 180 without a written contract. The First District did not reverse its previous ruling or the ruling of the Florida Supreme Court that the City's stormwater fee is a user fee, and that beneficiaries of the stormwater utility can be charged the stormwater fee. Neither the Pinellas County trial court opinion nor the First District appellate court opinion are authority that the School Board has the legal right to use the City's stormwater utility services while refusing to pay the utility fee.

There are other legal remedies available to the City, however, that were not the subject of the litigation or addressed by the Court in its written opinion. It is noteworthy that during oral argument before the First District on collecting the fee from DOT, one of the Judges suggested that the City "could go to court and sue the Florida Department of Transportation, and require them to keep their runoff on their own property and not use your utility...". In short, the City could ask the Court to direct a State agency to not take what it has no intention to pay for.

Last week the City Manager, the Public Works Director, and the City Attorney met with Superintendent Dan Boyd and School Board attorneys Thomas Wittmer and Susan Seigle. At this meeting the School Board representatives acknowledged their use of the City's stormwater utility and the past payment of the fee. The Public Works Director stated that the City and School Board had been working together during the past year to evaluate improvements made that lessen the School Board's impact on the City's system, thus lessening its fee.

At the conclusion of the meeting, the Superintendent agreed to consider the City's position that the stormwater fee is a valid user fee that is properly charged against a user of the system, including a government like the School Board. The City is complying with a state mandated obligation to manage and treat stormwater runoff. All beneficiaries of the stormwater utility system are legally obligated to pay for the use of the system, like any other user of any other utility.

Without further notice or discussion with the City, the School Board on December 15, 2009, approved the recommendation by the Superintendent to discontinue payment to the City effective December 15, 2009. To maintain the integrity of the system and protect all ratepayers, the City should take all reasonable steps to prevent the School Board from using the City's stormwater utility services, or any other utility services, without paying the utility fee, or to compel payment of the fee.

Conflict Resolution Process

The conflict resolution process is initiated by the passage of a resolution by the City stating its intent to initiate the process and attempt to resolve the issues in conflict. Within 5 days of the passage, a letter and certified copy of the resolution will be sent by certified mail to the Superintendent of the School Board proposing a date and location

for a public meeting between the City Manager and the Superintendent. If no resolution is reached, a joint public meeting will be held by the City with the School Board within 50 days of the receipt of the letter initiating the conflict resolution process. If no resolution is reached at this meeting, the governmental entities participate in a mediation prior to engaging in litigation. All reasonable attempts should be made to avoid costly litigation between the local governments.

By: Elizabeth A. Waratuke
Elizabeth A. Waratuke
Litigation Attorney

By: Marion J. Radson
Marion J. Radson
City Attorney

1 **WHEREAS**, the School Board of Alachua County has voluntarily used the City's
2 stormwater system and benefitted from the City's stormwater system since the inception
3 of the City's stormwater utility up to and including the present day; and

4 **WHEREAS**, the School Board of Alachua County has been paying monthly
5 stormwater utility bills for stormwater services that the Board has received from the City
6 of Gainesville since the inception of the City's stormwater utility; and

7 **WHEREAS**, on Tuesday, December 15, 2009, the School Board of Alachua
8 County voted to discontinue payment of stormwater fees to the City of Gainesville for
9 stormwater utility bills received after that date; and

10 **WHEREAS**, despite the decision to discontinue payment of stormwater fees to
11 the City for stormwater utility services, the School Board of Alachua County has made
12 no plan for discontinuing use of the City's stormwater utility system; and

13 **WHEREAS**, on Wednesday, December 9, 2009, the City of Gainesville submitted
14 a written request to the School Board for public records concerning the stormwater utility
15 fee, and the School Board responded by letter dated Monday, December 14, 2009,
16 refusing to provide some of the public records claiming the exemption of anticipated
17 "imminent litigation or adversarial administrative proceedings" that in the School Board's
18 positional response commenced on May 28, 2009;

19 **WHEREAS**, there was no anticipated "imminent litigation or adversarial
20 administrative proceedings", as that term is used in the Government-in-the-Sunshine
21 Law, between the parties as a result of a meeting between the staff of the respective
22 parties that occurred on May 28, 2009, and no such anticipated "imminent litigation or
23 adversarial administrative proceedings" could be lawfully claimed to exempt public
24 records generated by the School Board's attorneys dated June 8, 2009, September 9,
25 2009, and November 5, 2009;

1 **WHEREAS**, the Florida Governmental Conflict Resolution Act authorizes the City
2 of Gainesville to initiate the conflict resolution provisions of the Act prior to initiating court
3 proceedings against the School Board of Alachua County; and

4 **WHEREAS**, the Florida Governmental Resolution Act sets forth the procedures
5 for notice and conflict dispute resolution of intergovernmental disputes; and

6 **WHEREAS**, the Florida Governmental Resolution Act authorizes the City
7 Commission of the City of Gainesville to initiate the conflict resolution procedures
8 through the passage of a resolution by its members.

9 **NOW THEREFORE, BE IT RESOLVED BY THE CITY COMMISSION OF THE**
10 **GAINESVILLE, FLORIDA, AS FOLLOWS:**

11 Section 1: Findings: The City Commission adopts the foregoing findings as
12 provided in the foregoing whereas clauses.

13 Section 2: Intention: It is the intention of the City Commission of the City of
14 Gainesville to initiate the conflict resolution procedures of the Florida Governmental
15 Resolution Act as set forth in Chapter 164, Florida Statutes, prior to initiating court
16 proceedings to compel the School Board of Alachua County to discontinue using the
17 City's stormwater utility services or in the alternative, to pay for stormwater utility
18 services used by the School Board, and to obtain production of the public records in the
19 custody of the School Board as referred hereinabove.

20 Section 3: Issues in the Conflict: The issues in the conflict are: 1) the
21 Alachua County School Board's refusal to pay the City of Gainesville's stormwater utility
22 fee despite the School Board's recognition that the utility fee has been found to be a
23 valid fee which may be charged to the State and its political subdivisions; and 2) the
24 School Board's refusal to provide all public records relating to the issue.

25 Section 4: The Governmental Entities in Conflict: The governmental entity
26 with which the City Commission of the City of Gainesville, Florida has a conflict is the
27 School Board of Alachua County, Florida.

