

Legistar # 980224

**CITY OF GAINESVILLE**  
Office of the City Attorney

**MEMORANDUM**

334-5011/FAX 334-2229

Box No. 46

**TO:** Mayor and City Commissioners

**DATE:** July 27, 1998

**FROM:** Marion J. Radson, City Attorney

**CITY ATTORNEY ITEM**

**SUBJECT: Collection of Stormwater Utility Fees from the Department of Transportation**

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Recommendation: The City Commission authorize the City Attorney's Office to file a lawsuit against the State of Florida Department of Transportation to judicially declare the City's stormwater fee is a valid utility fee, to collect past stormwater fees owed by the State of Florida Department of Transportation to the City, and to compel future payment of the stormwater fees.

The Florida Department of Transportation facility located on Waldo Road refuses to pay its stormwater utility fees. The legal staff for the Department of Transportation contends that the fee is not a true fee, but in the nature of a special assessment or a tax, for which the State is not liable. The Department of Transportation's past bills total \$72,120 over the last four years.

In July, 1997, legal counsel for the Department of Transportation asked the Attorney General's Office for an advisory opinion as to whether the City's utility fee was a fee, special assessment, or tax. In October, 1997, the Attorney General's Office issued the opinion. It found that "[T]he charges imposed by the City of Gainesville's Stormwater Management Utility Program ... represent a service charge imposed for stormwater utility services and may be lawfully levied against property of the State of Florida, Department of Transportation". A copy of the opinion is attached as Exhibit "A".


The Attorney General's Office found several factors that make the City's stormwater charge a valid fee as opposed to a tax or special assessment. First, the legislature specifically authorized municipalities to set up a stormwater program as a utility. Secondly, a property owner who does not use stormwater service does not pay for it, and property owners who do use the service, only pay for how much service is used. Third, non-payment of the stormwater fee is handled in the same manner as non-payment of any of the utility services, it does not become a


lien on the property. Finally, the proceeds from the stormwater fee are deposited into the stormwater fund and used only for those purposes.

After that opinion was rendered, the City Attorney's Office contacted the legal counsel for the Department of Transportation to determine whether it would begin paying the fees. On December 30, 1997, legal counsel for the Department of Transportation responded by stating "the Department will not voluntarily pay the stormwater fees". A copy of this letter is attached as Exhibit "B". Since that time, the City Manager has contacted the secretary of the Department of Transportation asking for a reconsideration of that position in light of the fact that DOT pays stormwater fees in at least one other jurisdiction, Tallahassee. As reflected in that letter attached as Exhibit "C", DOT has again refused to pay the City's stormwater fee.

It is the recommendation of management and the City Attorney's Office that a lawsuit be filed against the State of Florida to judicially declare that the City's stormwater fee is a valid utility fee, to collect past stormwater fees owed by the Department to the City, and to compel future payment of the stormwater fees.

FISCAL IMPACT: Recovered revenues will be added to the Stormwater Management Utility Fund. Litigation fees are available in the Stormwater Management Utility Fund.

Prepared by:   
Elizabeth A. Waratuke, Litigation Attorney

Approved and Submitted by:   
Marion J. Radson  
City Attorney

EAW/js



## Advisory Legal Opinion

**Number:** AGO 97-70

**Date:** October 2, 1997

**Subject:** Municipality imposing stormwater fee on state agency

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Mr. Tom F. Barry  
Secretary  
Florida Department of Transportation  
605 Suwannee Street  
Tallahassee, Florida 32399-0450

**RE: DEPARTMENT OF  
TRANSPORTATION--MUNICIPALITIES--UTILITIES--STORMWATER  
MANAGEMENT--authority of municipality to impose stormwater utility fee on state agency. s.  
403.0893, Fla. Stat.**

Dear Secretary Barry:

The department has asked for my opinion on substantially the following question:

Can the charges imposed by the City of Gainesville's Stormwater Management Utility Program pursuant to section 403.0893, Florida Statutes, be lawfully levied against property of the State of Florida, Department of Transportation?

In sum:

The charges imposed by the City of Gainesville's Stormwater Management Utility Program, developed pursuant to section 403.0893, Florida Statutes, represent a service charge imposed for stormwater utility services and may lawfully be levied against property of the State of Florida, Department of Transportation.

The City of Gainesville joins in your request.

Section 403.0893(1), Florida Statutes, authorizes a municipality to:

"[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 s. 403.0891(3)."

The statute provides that "[a]ll property owners within said area [the stormwater management system benefit area] may be assessed a per acreage fee to fund the planning, construction, operation, maintenance, and administration of a public stormwater management system for the benefited area." [1]



This office, in Attorney General's Opinion 90-47, considered whether stormwater fees imposed by the City of Orlando pursuant to section 403.0893(1), Florida Statutes, could be charged against property owned by the State of Florida. The fees discussed in that opinion were imposed upon property within the city regardless of use and were based upon the property having received some particular benefit from the stormwater system. The provisions of section 197.363, Florida Statutes, were used by the city to collect the fees, but this statute specifically prohibits the use of ad valorem tax bills for service charges. These factors led to the conclusion that the fees were special assessments that, in the absence of legislation subjecting the state to liability, could not be assessed against state property. It was noted in the opinion that, to the extent the city sought to impose the fees as service charges, however, the state could be liable for such charges.

A special assessment is an enforced contribution from a property owner imposed on the theory that the property assessed derives some special or peculiar benefit in the enhancement of value as a result of the improvement or service funded by the proceeds.[2] A user fee or service charge is a fee imposed for the use of the particular governmental facility or service which benefits the person paying the fee in a manner that is not shared by other members of society. The other characteristic of user fees is that they are paid by choice; that is, the person paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge.[3]

In *Contractors and Builders Association of Pinellas County v. City of Dunedin*,[4] The Supreme Court of Florida considered the nature of impact fees and compared such fees to user or service fees, which the municipality was authorized to impose pursuant to statute and home rule powers. The court recognized a distinction between such fees and special assessments, stating:

The fees in controversy here are not special assessments. They are charges for use of water and sewer facilities; the property owner who does not use the facilities does not pay the fee. Under no circumstances would the fees constitute a lien on realty.[5]

While state property used for public purposes is not generally subject to taxes or special assessments, the state may be liable for charges for services it uses.[6]

The City of Gainesville has established a stormwater management utility program in accordance with section 403.0893, Florida Statutes.[7] The city code requires that the city "establish a program of user charges and connection fees for stormwater management service to be levied against all developed property within the city to accomplish the functions of said utility." [8]

Section 27-241(a) of the Gainesville Code provides the authority for the utility to assess charges for services:

"The stormwater management utility is empowered by this article to establish charges for the use and discharge to the city's stormwater management system.[9] Such charges shall be based on the cost of providing stormwater management services to all properties within the city and may be different for properties receiving different classes of service." [10]

The service charges authorized by the code apply to all benefited properties within the city, including those properties classified as nonprofit or tax-exempt for ad valorem tax purposes. The charge is authorized for all government properties, including properties of the City of Gainesville, city-owned buildings, parks, and other properties.[11] The code specifically provides that "[s]tormwater management service charges shall not be levied against undeveloped property that has not been altered from the natural state[.]" Farmland, gardens, and landscaped areas shall also be exempt except for any roads, parking, or structures associated with that property.[12]

Section 403.0893(3), Florida Statutes, provides that "[a]ll property owners within said area [a stormwater management system benefit area] may be assessed a per acreage fee to fund the planning, construction, operation, maintenance, and administration of a public stormwater management system for the benefited area." However, under the program created by the City of Gainesville, only developed property or other property that benefits from the city's system is assessed, and that assessment is based on the "cost of providing stormwater management services" to such properties. If property is undeveloped so that it does not contribute runoff to the stormwater management system, or if the owner retains stormwater on site and does not contribute to the system, then no fee is assessed.

The city's utility ordinance provides that "stormwater management [will be established] as a city utility enterprise in accordance with F.S., s. 403.0893 and shall establish a program of user charges and connection fees for stormwater management service to be levied against all developed property within the city to accomplish the functions of said utility." [13] Bills for stormwater accounts are collected by the city in the same manner as is used to collect other utility bills. [14] Any charges not paid are subject to the same penalties for delinquencies, and are collected like other delinquent utility fees. No lien is placed on the property subject to these fees for delinquencies in payment. [15] All revenues from the user fees and connection charges collected under this program are deposited into a stormwater management utility trust fund, and expenditures related to the utility are paid therefrom. Expenditures from the trust fund for activities not related to the city's stormwater management utility are not permitted. [16]

To summarize: City of Gainesville Stormwater Management Utility fees are imposed on property that contributes runoff to the city's stormwater management system and requires use of that system; varying charges for this service are based on the percentage of water generated from the property and not retained on site; property owners may choose to use the system or to contain such runoff on their own property and, if no service is provided to a property, the property is not charged; stormwater utility fees are collected, along with other Gainesville utility fees, by inclusion on a monthly utility bill; delinquent stormwater utility bills, like other city utility bills, are handled by collection procedures and no lien is placed on property for nonpayment of these fees; finally, City of Gainesville Stormwater Utility fees are collected and deposited into a trust fund for uses related to the city's stormwater management utility, and expenditures that are not related to such activities are prohibited.

While a stormwater management utility fee may be imposed as either a special assessment or as a service fee, [17] based on its characteristics 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.

Sincerely,

Robert A. Butterworth  
Attorney General

RAB/tgk

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[1] Section 403.0893(3), Fla. Stat.

[2] *See, Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So. 2d 180 (Fla. 1995), holding that a valid special assessment must meet two requirements: property assessed must derive a special benefit from the service provided; and the assessment must be fairly and reasonably apportioned according to the benefits received.

[3] *See, State v. City of Port Orange*, 650 So. 2d 1 (Fla. 1994); Op. Att'y Gen. Fla. 90-47 (1990).

[4] 329 So. 2d 314 (Fla. 1976).

[5] 329 So. 2d at 319. And see, Op. Att'y Gen. Fla. 89-85 (1989) in which this office concluded that the flat fee imposed for voluntary garbage collection by the county was a service charge and not a special assessment.

[6] *See, Op. Att'y Gen. Fla. 77-94* (1977) (community college is not exempt from payment of contractual franchise charge imposed by a municipality upon a public utility, separately stated on a bill to utility customers, as such fee represents its proportionate share of such fee or operating cost as a part of the total charges for utility services provided to and received by the community college); Op. Att'y Gen. Fla. 70-56 (1970) (state agencies required to pay franchise fee imposed by a municipality on telephone company which, pursuant to Public Service Commission regulations, passed such fee onto its customers as an increase in telephone service charges).

[7] Section 27-236, Gainesville Code.

[8] *Id.* This section provides that "[t]hese functions include, but are not limited to, maintenance, planning, design, construction, regulation, surveying, and inspection as they relate to stormwater management facilities of the city."

[9] Section 27-241(a), Gainesville Code.

[10] *Id.*

[11] Section 27-241(b)(4), Gainesville Code.

[12] Section 27-241(b)(5), Gainesville Code.

[13] *Supra*, at note 7.

[14] *And see, s. 403.031(17)*, Fla. Stat., providing a definition for "[s]tormwater utility" and stating that such a utility "is operated as a typical utility which bills services regularly, similar to water and wastewater services."

[15] Section 27-244, Gainesville Code.

[16] Section 27-242(b), Gainesville Code.

[17] *Compare, Op. Att'y Gen. Fla. 91-27* (1991), in which stormwater utility fees imposed by the City of St. Petersburg were determined to be service or user fees rather than impact or service availability fees; *and Op. Att'y Gen. Fla. 90-47* (1990), concluding that the City of Orlando was imposing its

**stormwater fees as special assessments.**

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RECEIVED  
JAN 2 1997  
CITY LAW DEPARTMENT

**FLORIDA**  **DEPARTMENT OF TRANSPORTATION**

LANTON CHILDS  
GOVERNOR

THOMAS F. BARRY, JR.  
SECRETARY

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December 30, 1997


Marion J. Radson, Esquire  
Office of the City Attorney  
200 East University Avenue  
Suite 425  
Gainesville, Florida 32601

Dear Marion:

Subject: FDOT/City of Gainesville Stormwater Utility Fees

Thank you for your correspondence and the enclosures. As this matter has statewide significance to the Department of Transportation, I consulted the General Counsel for the Department, Pam Leslie. I am advised that a policy decision has been made by Tom Barry, Secretary for the Department of Transportation, that the Department will not voluntarily pay the stormwater fees.

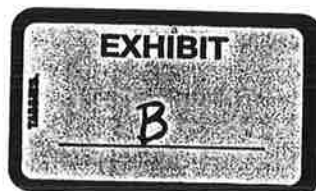
Very truly yours,

  
Kenneth S. Davis  
District General Counsel

KSD/dsh

cc: Pam Leslie, Esquire  
Ken Morefield, P.E.

St:\r:\users\lad203dh\davis\radson.ltr







June 30, 1998



Wayne Bowers, City Manager  
City of Gainesville  
Post Office Box 490  
Gainesville, Florida 32602-0490

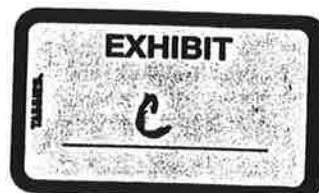
Re: City of Gainesville Stormwater Management Utility Program Ordinance

Dear Mr. Bowers:

Because the opinion of the Attorney General regarding the City of Gainesville's charges under its Stormwater Management Utility Program Ordinance is only advisory and neither addresses nor answers the issues raised, the Department has determined that it does not form a legal or rational basis for payment of those fees. In the legal memorandum provided to the Attorney General with its June 5, 1997, request for the issuance of a legal opinion on the subject, the Department expressed several areas of concern over the City's stormwater "user charges" and "connection fees." The Department questioned the ability of the City to impose these charges because they are not true "user" fees and because the Department, as a sovereign, is immune from payment of certain taxes and special assessments. In addition, the fees were questioned because the Department's properties receive little or no special benefit from the service, the assessment is not logically related to the service provided, and the Department is given no credit or consideration for its own stormwater runoff mitigation or the runoff of other properties handled off site either partially or fully by the Department.

Without detailed analysis, the Attorney General's opinion simply classifies the City's fees as valid user fees, but does not address the fees' characteristics that support such a conclusion, the issues of sovereign immunity, the Department's independent and functional drainage systems which manage storm water runoff, the Department's treatment of its own stormwater from its own property, or the fact that Department facilities relieve the City of the burden of handling stormwater from other properties by allowing stormwater to flow through and into the Department's systems. In fact, because the Department pays all costs associated with its drainage systems, the Department is in more of a position of being a recipient of stormwater fees rather than an obligor for such fees. For these reasons, the Department continues to believe that it is not legally obligated to pay the City's fees.

Understandably, you raise the Department's payment of certain other localities' stormwater fees as rationale for payment of the City's fees. However, each locality's fee is structured differently, and Department drainage systems vary by location and provide varying degrees of relief to local stormwater systems. As such, it is appropriate for the Department to analyze and address each fee on a case by case basis and payment in one locality should not be construed as acquiescence to

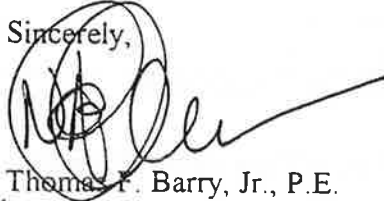


Wayne Bowers  
June 29, 1998  
page 2

payment in another. Therefore, the Department must maintain its position that it will not voluntarily pay the City of Gainesville's stormwater fees.

I trust this clarifies the Department's position on this matter.

Sincerely,



Thomas F. Barry, Jr., P.E.  
Secretary

cc: Nick Serianni, Assistant Secretary for District Operations  
Huey Hawkins, District 2 Secretary  
Kenneth Davis, District 2 General Counsel