William M. Cobb
(1881-1939)
Thomas T. Cobb
(1916-2004)
W. Warren Cole, Jr.
(1926-2008)

Jonathan D. Kaney Jr.
J. Lester Kaney
C. Allen Watts
Harold C. Hubka
Thomas S. Hart
Scott W. Cichon
Robert A. Merrell III
Bruce A. Hanna
John P. Ferguson
Rhoda Bess Goodson
Jonathan D. Kaney III
Thomas J. Leek
Michael P. Olivari
Mark A. Watts
Heather Bond Vargas

COBB COLE since 1925

Daytona Beach • DeLand

351 East New York Avenue
Suite 200
DeLand, Florida 32724
(386) 736-7700
Fax (386) 785-1549
CobbCole.com

Robert Taylor Bowling
Joshua J. Pope
Andrea M. Kurak
Andrew C. Grant
Christopher N. Challis
Elan R. Kaney
Kathryn D. Weston
Kelly V. Parsons
Michael J. Woods
Maja S. Sander
James A. Stowers
Katherine Hurst Miller
Leanne M. Siegfried
Michael O. Sznapstajler
Caryn N. Diamond
Melissa B. Murphy

OF COUNSEL
Larry D. Marsh

RETIRED
Jay D. Bond, Jr.

November 24, 2009

Mr. Kurt Spitzer
Florida Stormwater Association
719 East Park Avenue
Tallahassee, FL 32301

Re: Updated Opinion Letter

Dear Mr. Spitzer:

You have asked me for an update to my opinion letter dated September 6, 2006, as to whether the State or its political subdivisions may refuse payment for stormwater utility services. This update is based on my consideration of the effect, if any, of the decision of the Second District Court of Appeal issued October 9 of this year. In that decision, the District Court affirmed an unpublished decision of the circuit court for Pinellas County, which had held the School Board was not liable for the stormwater fees imposed by the City of Clearwater.

First, the decision of the Second District was issued without any explanatory opinion, but with a citation to the *Gainesville III* decision by the First District Court of Appeal. The opinion of the First District in *Gainesville III* can be found at 920 So. 2d 53 (2005). A decision by the Second District Court without opinion is not controlling precedent, even in the District where it was issued. See the Supreme Court decision on the effect of *per curiam* affirmances as precedents, in *Department of Legal Affairs vs. District Court of Appea*l, *Fifth District*, 434 So. 2d 310 (Fla. 1983)

Second, the controlling precedent in such cases is not *Gainesville III* but the Supreme Court's opinion in *Gainesville II.*

In *Gainesville II* (863 So. 2d 138), the Supreme Court accepted the substance of Judge Benton's analysis in *Gainesville I*, found at 778 So. 2d 519 (Fla. 1st DCA 2001), holding that a stormwater utility fee was a service charge rather than a special assessment. In *Gainesville I,* Judge Benton restated the law distinguishing utility user fees from special assessments, concluding that based on a number of factors, the City had imposed a user fee. The state had also claimed sovereign immunity in *Gainesville 1* but the First District declared in that case that

there was no sovereign immunity and that for purposes of the stormwater utility fee, the Department of Transportation was a "person" subject to just and equitable utility fees under § 180.13(2). However, insofar as the Gainesville claim involved money damages rather than declaratory relief, *Gainesville I* held that a vendor may not sue a state agency in the absence of a written contract, and remanded the case for the taking of evidence on that issue. The City instead dismissed that case and began the bond validation case which led directly to the Supreme Court in *Gainesville II*.

In *Gainesville II*, the Supreme Court noted that there are a number of factors to be considered as to the applicability of a city or county ordinance to other political subdivisions, and no one of those factors (including involuntariness of a utility service or the absence of written contract) is determinative. The Supreme Court specifically declined to decide the Department of Transportation's cross-appeal, which had asserted that the Department enjoyed statutory immunity, since the City of Gainesville had presented its case in the form of a bond validation only. Thus, the holding in *Gainesville I* appears to be the current determinative precedent with respect to the absence of sovereign immunity.

In *Gainesville III*, a different panel of judges in the First District Court pointed out that the City of Gainesville relied upon the argument that FDOT fell within the definition of "person" subject to just and equitable rates and charges for water and sewer utility service under § 180.13, FLA. STAT. The Court noted that Chapter 180 of the Statutes does not authorize cities to operate stormwater utilities, and that therefore this particular statute did not waive sovereign immunity in the absence of a written contract for services which would waive such immunity. The Court did not examine the totality of factors announced by *Gainesville I* and followed by the Supreme Court in *Gainesville II*. In these respects only, the *Gainesville III* panel differed with the *Gainesville I* panel from the same court. Although there is a process for resolving conflicts between different panels of the same court, that process has not yet been followed.

The *Gainesville III* decision was handed down in 2005. The 2006 Legislature amended Chapter 180 and other statutes through adoption of Chapter 2006-252. Section 180.03(3) was added. It provides, in pertinent part, that a City also exercises its utility powers under Chapter 180 by the adoption of a resolution that includes "consideration of the local authority's obligations for water body cleanup and protection under state or federal programs, including requirements for water bodies listed under § 303(d) of the Clean Water Act...."

§ 403.0891, FLA. STAT., addresses the state, regional and local stormwater management plans and programs. § 403.0885 establishes the state NPDES program under which MS4 permits are issued and the impairment or protection of water bodies including (but not limited to) listed water bodies, is considered. § 403.031(17) defines a stormwater utility 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." Thus the basis of the *Gainesville III* decision, narrowly reading the authority of cities to establish utilities, has been undermined.

Chapter 2006-252 also added similar language with respect to water body cleanup and protection, to § 153.73. That statute gives authority to counties (if such authority is needed) to create water and sewer districts. Subsection (13) specifically authorizes such districts to impose special assessments on the properties of counties, school districts and other political subdivisions of the state. § 153.83 further forbids free utility service to such political subdivisions. It would be ironic indeed if legislation were construed to immunize other political subdivisions from the stormwater fees and assessments of cities, but not counties.

It is easier to defend a utility charge, and to come within the specific statutory authorization, if it is structured as a utility fee rather than a special assessment. A special assessment, in its traditional form, is a means of recouping the special benefit or incremental and disproportionate addition to property value which occurs as to some parcels when a general program of public improvements is executed. The legal theory is that there is a general public benefit which accrues to all properties in the jurisdiction, and a special benefit which is typically limited to those most proximate to the improvement, such as those lots which may directly abut a new sewer line. There is a general health benefit arising from the installation of central sewage systems, but there is a disproportionate increase in value to the abutting properties only.

Unlike private investors, the State does not acquire and hold property based on the possibility of increases in value, and there is no windfall where the value of state-owned property increases. If there were no immunity, then the State's power to budget and control its expenditures would be compromised.

In recent years, special assessments have strayed from their historic use as a one-time charge to recoup a special benefit or enhancement of property value. They have become more common as a means to recoup the ongoing costs of providing a service which enhances property value or use, such as for solid waste pickup, fire services, etc. This has blurred the distinction between special assessments and user fees in the case law.

An express contract for stormwater utility service may not necessarily be limited to a formal writing, if the terms and conditions otherwise can be made out from documents which evidence a meeting of the minds of the parties, such as was the case in an application for annexation and the terms of the annexation ordinance spelling out an undertaking of the city to extend its utilities. *Waite Development, Inc. v. City of Milton*, 866 So. 2d 153 (Fla. 1st DCA 2004). Moreover, in *Gainesville II*, the Supreme Court expressly held that voluntariness was only one factor in determining whether a stormwater utility charge was a valid user fee. Also, some jurisdictions impose unitary utility fees, so that a customer opting for potable water service may not selectively refuse wastewater or stormwater utility services. A local government has regulatory authority to require surface water management systems for development within its

bounds. *Turkey Creek, Inc. v. City of Gainesville*, 570 So. 2d 1055 (Fla. 1st DCA 1990). Alternatively or in addition, the local government may operate a stormwater utility. Use of the stormwater utility, and payment of utility charges therefor, may be made mandatory notwithstanding the immunity of a governmental agency from special assessments. The voluntariness of the fee is not dispositive. *City of Cocoa v. School Board of Brevard County*, 711 So. 2d 1322 (Fla. 5th DCA 1998) (although school board and community college were immune from special assessments, record was insufficient to justify dismissal of city's claim for unpaid stormwater utility fees even if use of the utility was involuntary).

Gainesville III became final in the First District in 2006, after the decision of the Fifth District in *Cocoa* and without reconciling that decision, or the prior decision of the Second District in *City of Clearwater v. School Board of Pinellas County*, 905 So. 2d 1051 (Fla. 2d DCA 2005). Thus, in the absence of a clear statement from the Supreme Court disavowing *Gainesville II* (which is unlikely in view of its context as a bond validation case), or consensus among and within the District Courts of Appeal, I do not find that *Gainesville III* or the recent *Clearwater* decision are controlling, and each case must be determined by balancing the factors and interests as *Gainesville I* announced and *Gainesville II* affirmed.

Judge Benton in *Gainesville I* pointed to the need for an equitable balancing of interests in resolving immunity claims between contending governments on a case-by-case basis, as evidenced in the decision in *Hillsborough Association for Retarded Citizens v. City of Temple Terrace*, 332 So. 2d 610 (Fla. 1976). Application of that test in any contest between a state entity and a local stormwater utility should more often than not yield a decision in favor of payment for local utility services.

The most persuasive factual argument is that the state and its subdivisions are not entitled to free services from a required utility. Since public utilities are barred by case law from overcharging their paying customers by more than their fair share, the effect of providing free service is that there will be a shortfall in the stormwater utility fund, and stormwater services must necessarily be subsidized by the general fund. Clearly that is not the intent of the Legislature in enacting § 403.0892, FLA. STAT. to provide for "dedicated funds for stormwater management". That statute was intended to authorize, not to frustrate, stormwater utilities.

Nevertheless, to minimize confusion in the applicable judicial precedents, it would be wise to structure a stormwater utility ordinance so as to define the payment for stormwater service as a utility fee rather than a special assessment.

Kindly advise if there are remaining questions or items needing clarification.

Sincerely,

C. Allen Watts
Allen.Watts@CobbCole.com
Fax (386) 944-7965

CAW/tav