IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

FLORIDA KEYS COMMUNITY COLLEGE,

Appellant,

Case No. 3D11-417

v.

L.T. Case No. 2009-CA-729-K

CITY OF KEY WEST,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA

AMICUS BRIEF OF FLORIDA STORMWATER ASSOCIATION, THE FLORIDA LEAGUE OF CITIES, AND THE CITY OF GAINESVILLE

STEVEN L. BRANNOCK
Florida Bar: 319651
MAEGEN PEEK LUKA
Florida Bar: 549851
BRANNOCK & HUMPHRIES
100 South Ashley Drive, Suite 1130
Tampa, Florida 33602
Tel: (813) 223-4300
Fax: (813) 262-0604

Counsel for Amici

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Complying with state and federal statutory mandates aimed at controlling pollution from stormwater runoff, the City of Key West (the "City") established a stormwater utility to collect and process stormwater discharged from property owners within the City. Property owners could either deal with their own stormwater runoff, by building retention ponds or other facilities on their property, or could use the City's stormwater utility and let the City collect and properly discharge their stormwater waste. The City billed each property owner who used its stormwater system its proportionate share of the cost of the system.

Appellee, Florida Keys Community College ("FKCC"), a state educational institution, was one such property owner in the City. FKCC chose to discharge its stormwater through the City's stormwater utility. The City billed FKCC for the stormwater services FKCC used, and for four years, FKCC paid its stormwater bill.

Now FKCC claims that sovereign immunity protects it from paying its stormwater bill. Even more remarkably, FKCC claims the right to a refund of the bills it paid for the stormwater services it unquestionably received. On cross-motions for summary judgment, the trial court accepted FKCC's argument and ordered the City to refund FKCC's stormwater payments.

In this brief, filed on behalf of the Florida Stormwater Association, the Florida League of Cities, and the City of Gainesville, *amici* join with the City in

arguing that the trial court erred. As we demonstrate below, the Florida Supreme Court has already held that stormwater fees are valid user fees that may be charged to all users of the stormwater system, including state entities such as FKCC. In this regard stormwater fees are no different from other user fees such as water, sewage, and electricity fees. The only appellate level decision FKCC cited in support of its argument conflicts with this Florida Supreme Court precedent and the long-established body of law upon which that precedent was based. It also overlooks the extensive statutory authority requiring the City to establish a stormwater utility and bill all of its users for their fair share of the costs. Simply put, sovereign immunity cannot apply in the face of this statutory and decisional law. Moreover, it would be terrible public policy to allow major users of the City's system to simply refuse to pay their bills.

Even if FKCC were right and could simply refuse to pay its stormwater bill, FKCC is not entitled to a refund of fees legally charged for a service duly rendered and voluntarily paid for by FKCC. The summary judgment below must be reversed.

Standard of Review

Amici agree with the City that all of the issues raised in this case are legal issues subject to *de novo* review. Key West Initial Brief at 9.

INTEREST OF AMICI

The Florida Stormwater Association ("FSA") is a not-for-profit Florida corporation. It is a 300-member association consisting of city and county governments, consulting and engineering firms, academic institutions, and various special districts, that have an interest in stormwater management and finance in Florida. In particular, FSA's city and county members discharge to surface waters in the State of Florida. FSA's city and county members are regulated by the Florida Department of Environmental Protection and indirectly, by the Environmental Protection Agency.

The Florida League of Cities, Inc. (the "League") is a voluntary organization whose membership consists of municipalities and other units of local government rendering municipal services in the State of Florida. Under its charter, its purpose is to work for the general improvement of municipal government and its efficient administration, and to represent its members before various legislative, executive, and judicial branches of government on issues pertaining to their general and fiscal welfare.

The City of Gainesville, like the City of Key West, operates a stormwater utility and collects a fee from the users of the utility. The City of Gainesville is currently involved in litigation with the School Board of Alachua County ("SBAC") regarding the SBAC's refusal to pay the stormwater utility fee. *City of*

Gainesville v. School Board of Alachua County, Case No. 2010-CA-5432 (8th Cir. Alachua County). The SBAC is taking the same position that FKCC is taking in the instant case. This litigation is still at the trial level. Moreover, Gainesville was also directly involved in the trilogy of Gainesville stormwater cases that will be cited by all of the parties in this case. As an active litigant in the series of cases both sides will cite, the City of Gainesville can provide this Court with a unique perspective on that litigation which the parties cannot provide. The City of Gainesville's direct interest in the outcome of this litigation, and its involvement as a participant in previous stormwater cases, makes its participation as amicus curiae especially appropriate.

The precedential value of this case will have far-reaching effects. The issue presented by this case – whether Appellant, as a state entity, is immune from the requirement of paying stormwater fees – is of great interest to the all three amici and the cities and counties and other governmental units that they represent across the state. The ability of these city and county governments to dispose of their stormwater properly will be dramatically impacted by this Court's decision.

Moreover, state stormwater customers around the state are watching this case with great interest. Many have stopped paying their stormwater bills or are threatening to do so. Thus, the decision could have a significant revenue impact on stormwater utilities around the state.

ARGUMENT

I. Sovereign Immunity Does not Insulate FKCC from Paying its Stormwater Bill.

Recognizing the dangers of pollution from stormwater runoff, the Florida Legislature mandated that local governments establish stormwater management programs.[1] These programs are designed to ensure that stormwater runoff does not pollute local lakes, rivers, and streams. § 403.0891, Fla. Stat. (2010); § 187.201(7) and (12), Fla. Stat. (2010). Moreover, these stormwater management programs must also comply with the federal Clean Water Act. § 180.03(3). To that end, the legislature has authorized local governments to create "stormwater utilities" and charge "stormwater utility fees" to fund these utilities. § 403.0891, §403.0893, Florida Statutes (2010). Such stormwater utilities are "operated as a typical utility which bills services regularly, similar to water and wastewater services." § 403.031(17). The cost of stormwater management is then charged to the users of the system based on their proportionate use of the system § 403.031(17).

Adhering to this statutory mandate, the City established a stormwater utility to collect, treat, and discharge stormwater runoff. FKCC is one such user of the utility. FKCC does not dispute the City's right to operate such a utility or its right to charge those who are utilizing its services (with the exception of FKCC).

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[1] The *amicus* brief filed in this case on behalf of various environmental groups contains an extensive discussion of the pollution threat posed by stormwater and the state and federal regulatory framework aimed at countering this threat.

The City's Stormwater Utility Fee is Valid.

The First and Second Districts and the Florida Supreme Court have already held that stormwater utility fees are valid and may be charged to governmental entities such as FKCC. Because so much emphasis has been placed on these cases, we begin with a discussion of the trilogy of cases between the City of Gainesville and the Department of Transportation ("DOT") and follow with a discussion of the litigation against the City of Clearwater and the Pinellas County School Board which resulted in a reported decision and a later *per curiam* affirmance.

Starting with the Gainesville trilogy, DOT, like FKCC, refused to pay its stormwater bill and was sued by Gainesville. *City of Gainesville v. State Dept. of Transp.*, 778 So. 2d 519, 522-23 (Fla. 1st DCA 2001) (*Gainesville I*). DOT challenged the legality of the fee arguing that Gainesville's stormwater charge was a special assessment or a tax, rather than a utility fee. *Gainesville I*, 778 So. 2d at 521. Florida law is long-settled that cities may not tax or impose assessments on the state. *Id.* Florida law was equally settled, however, that the state must pay user fees such as fees for electricity, water, sewage, and garbage. *Id.* at 523. *Gainesville I* held that the stormwater utility fee was a user fee and that the DOT had demonstrated "no legal reason for failing to pay the City's charges." *Id.* at 530.

The case then took a curious turn. Although the Court had held that the stormwater utility fee was valid as to DOT, the Court held that further proceedings

were necessary as to the City's action to collect past due fees from the DOT. The Court was concerned that Gainesville's collection action might be barred by sovereign immunity and remanded to allow further development of the record on the sovereign immunity issue. *Id.* at 531. The Court appeared to believe that Gainesville needed to demonstrate a written contract with DOT before it could sue for past due fees. *Id.* As we discuss below, this assumption was incorrect, because the statutory and common law framework (some of which was cited in the *Gainesville I* opinion itself) made clear that sovereign immunity was waived as to utility user fees such as stormwater fees. *See id.* at 528 n.5

Rather than continuing this litigation, Gainesville dismissed *Gainesville I* in favor of a bond validation proceeding it had filed relating to its stormwater utility. Gainesville was considering whether to float bonds to finance its stormwater system and had filed a bond validation proceeding to resolve any disputes about its authority to charge stormwater fees, including its dispute with DOT. *City of Gainesville v. State,* 863 So. 2d 138 (Fla. 2003) (*Gainesville II*). Throughout the validation case, the DOT continued to argue that it had no obligation to pay its stormwater bills.[2] It was important to resolve this issue because Gainesville was dependent upon its stormwater revenue to repay the bonds. The purpose of the

[2] The DOT also challenged Gainesville's "impervious area" method of calculating the fee, which is the same method utilized by the vast majority of stormwater utilities, including Key West in this case. *Gainesville II*, 863 So. 2d at 147-48. The Supreme Court approved the impervious area method as reasonable. *Id.*

bond validation was to determine whether Gainesville's charges were valid (thus, assuring the bondholders of the financial safety of the bonds). *Id.* at 141.

Reaching the same conclusion as the First District in *Gainesville I*, the Supreme Court held that the stormwater utility fee was a valid user fee which could be charged to the state. *Id.* at 145. The Court validated the bonds, settling for all time the issue of the validity of the City's stormwater charges to DOT. *See e.g., Keys Citizens For Responsible Gov't, Inc. v. Florida Keys Aqueduct Auth.*, 795 So. 2d 940 (Fla. 2001); § 75.09, Florida Statutes (2010). As to past due fees, however, the Court declined to reach the issue of waiver of sovereign immunity, holding that it was beyond the scope of the validation proceeding. *Id.* at 148.

Despite the holdings of *Gainesville I and II*, the DOT persisted in its refusal to pay the past due fees. The City then brought a collection action against the DOT, suing under a quasi-contractual theory and also arguing that the statutory framework demonstrated a waiver of sovereign immunity. *City of Gainesville v. Florida Department of Transportation,* 920 So. 2d 53 (Fla. 1st DCA 2005) (*Gainesville III*). The DOT defended the City's collection action arguing that, because the City had no written contract with the DOT, sovereign immunity barred the City's suit to collect past due fees. The First District Court of Appeal agreed, holding that the City's collection action for past due fees was barred by sovereign immunity. As we show below, the First District's decision was in error.

FKCC Misreads the Gainesville Trilogy

Before discussing the First District's erroneous application of sovereign immunity, it is important to address precisely what the Gainesville trilogy decided (and did not decide). Soon after *Gainesville III*, state entities like FKCC stopped paying their stormwater bills misreading *Gainesville III* as establishing some sort of exemption from stormwater fees. To the contrary, *Gainesville I* and *II* had already confirmed that stormwater utility fees were legal and could be charged to the state. Reaching this conclusion, the Courts merely applied long-established Florida law that the state must pay user fees, such as fees for water and electricity, just like anyone else. Thus, any suggestion that stormwater fees are somehow unlawful as to sovereigns or that sovereigns are exempt, has already been rejected by the Florida Supreme Court. *Gainesville II*, 863 So. 2d at 141, 145.

The narrow (and as we show below, incorrect) ruling of the First District in *Gainesville III* was that, if the state refused to pay its stormwater bill, the collection action for past due fees may be barred by sovereign immunity. This was the sole issue before the Court because only DOT's past due fees were at issue. DOT's obligations going forward were not at issue because DOT had moved its facilities from the City and was no longer using the City's stormwater services.

This distinction between the legality of the stormwater fee and the ability to collect that fee when it becomes past due is important. For example, FKCC seeks

a refund of the stormwater fees it previously paid. But a refund is appropriate only if the stormwater fee was illegal. Thus, there can be no right to a refund here because the Florida Supreme Court has already confirmed the legality of the stormwater fee, regardless whether sovereign immunity bars a collection action.[3]

Gainesville III and The Trial Court Decision are in Error; FKCC's Refusal to pay its Stormwater Bill is not Protected by Sovereign Immunity.

Amici join the City's argument that sovereign immunity does not protect FKCC from its stormwater bill. As a threshold matter, FKCC does not contest that it uses the City's stormwater services, nor does it challenge the reasonableness of the bill. Nor does it contest the statutory framework that permits the City to establish its stormwater utility and to charge every user of its services their proportionate share of the bill. These concessions are dispositive. No legal principle allows FKCC to avoid paying its bills for a statutorily authorized service it voluntarily took.

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[3] There are other important consequences from this distinction. Even if a collection action for past due fees were barred by sovereign immunity, if the fee is legal, the City will have remedies preventing the sovereign from taking the service but refusing to pay its bills going forward. For example, the City might file a mandamus action or a declaratory judgment action coupled with a request for injunctive relief. The City of Gainesville is litigating just such a case right now against a school board. *City of Gainesville v. School Board of Alachua County*, Case No. 2010-CA-5432 (8th Cir. Alachua County). The new Gainesville case presents a simple proposition: If the School Board does not want to pay its stormwater bill, then it must stop disposing of its stormwater using the City's services. If it wishes to use the system, then it must pay for those services.

Any analysis of the issue must begin with the long-established proposition reiterated by the Florida Supreme Court that sovereigns must pay user fees, like any other user of a service. Thus, just as FKCC must pay its electric and water bill, it must pay its stormwater bill. *Gainesville II*, 863 So. 2d at 146. Nothing in *Gainesville II* or the cases upon which it relies suggests that it is legal to charge the user fee but somehow illegal to collect it. Aside from *Gainesville III* no other reported case reaches that astounding conclusion.

This principle is reinforced by the fact that the Florida Supreme Court reached its conclusion on the legality of the stormwater fees in the context of a bond validation. The very purpose of a bond validation is to determine the legality of the bonds and the collection stream that will repay the bonds, so that the bondholders can be assured of the financial safety of the bonds (which enables the bonds to be sold in the first place). *See* § 75.09 (final judgment is "forever conclusive"); *State v. Manatee County Port Auth.*, 171 So. 2d 169, 171 (Fla. 1965). DOT challenged the legality of the stormwater fee as to state entities, and the Supreme Court rejected its challenge. This settled for all time the issue of the validity of the stormwater fee as to sovereigns like DOT and FKCC.

Thus, the First District's sovereign immunity holding in *Gainesville III* was wholly inconsistent with the holding of the Supreme Court in *Gainesville II* (not to mention its own decision in *Gainesville I*). It would defy the very purpose of the

bond validation itself to hold that a City can charge a user fee to an entity like DOT but not collect it. What comfort does this provide the bondholder dependent upon that revenue stream? Indeed, the bond validation statute addresses this directly, stating that all issues concerning the revenue stream are settled, "including any remedies provided for their collection." § 75.09, Fla. Stat.

This conclusion is buttressed by the stormwater Constitutional and statutory framework, which clearly demonstrates a waiver of sovereign immunity as to the collection of stormwater fees. Under the Constitution, a City has the governmental powers to enable it to perform its municipal functions, and it may exercise that power except as otherwise provided by law. Article VIII, Section 2, Fla. Const. No law insulates the FKCC from the City's stormwater powers. To the contrary, the Florida Legislature has specifically stated that the elimination of stormwater waste is a priority. § 187.201(7)(b)(12), Fla. Stat. To that end, the legislature has authorized cities to create stormwater utilities and to charge stormwater utility fees. § 403.0893(1). The stormwater utility is to be "operated as a typical utility which bills services regularly, similar to water and wastewater services." §403.031(17). The costs of the stormwater program are to be charged to the users of the system based on their relative contribution to its need. § 403.031(17).

In short, the City was authorized to establish a stormwater utility, operate it like any other utility, and charge the users of its system a user fee. FKCC is a user

under the statute and can be charged a user fee, just like any other user of the system. Nothing in the statute suggests that sovereigns are exempt from this user fee. In light of the fact that Florida law is long-established that sovereigns must pay user fees, it is impossible to read a sovereign exemption into this statutory framework. If the legislature had intended to exempt sovereigns from this particular user fee, it would have done so. *See Barnett v. Dep't of Mgmt. Services*, 931 So. 2d 121, 132 (Fla. 1st DCA 2006) (it is assumed that the legislature adopts the statute with an understanding of the legal context in which the statute will operate). The fact that it did not is dispositive. Like any other user, FKCC must pay its bills in the face of this clear statutory framework. *See Bill Stroop Roofing, Inc. v. Metro. Dade County*, 788 So. 2d 365, 367 (Fla. 3d DCA 2001) (court refuses to allow sovereign immunity to protect a sovereign from disgorging an illegally collected tax).

Although not necessary in light of the clear statutory authorization in Chapter 403 to charge users a stormwater fee, the Florida statutory framework governing municipal utilities also grants the authority to charge and collect for municipal utility services. *See* § 180.13(2), Fla. Stat. According to that section, a municipality may "establish just and equitable rates or charges to be paid to the municipality for the use of the utility by each *person*, firm or corporation whose premises are served thereby . . . ." *Id.* Similarly, the municipality is authorized to

collect its fee as well and sue the user if the fee remains unpaid: "if the charges so fixed are not paid when due, such sums may be recovered by the said municipality by suit in a court having jurisdiction . . . ." *Id.* Additionally, the state is required to construct its improvements to comply with local government stormwater systems. §373.4596, Fla. Stat.

A sovereign, as a user of the system, is a "person" within the meaning of the statute. *See Gainesville I,* 778 So. 2d at 529 n.5 (defining "person" in Chapter 180 to include sovereigns)*; South Florida Water Management District v. Layton*, 402 So. 2d 597 (Fla. 2d DCA 1981) (finding SFWMD to be included within the definition of persons in Section 704.01, Fla. Stat); *see also Klonis v. State of Florida, Department of Revenue*, 766 So. 2d 1186 (Fla. 1st DCA 2000) (statute that allowed suit against an "employer" was broad enough to allow suit against a sovereign); *Jones v. Brummer*, 766 So. 2d 1107 (Fla. 3d DCA 2000) (same).

In each of these cases, the fact that a "person" or "employer" could be sued was a specific enough reference to constitute a waiver of sovereign immunity. As noted above, the argument is even stronger in the historical context here. If sovereigns must pay user fees, why shouldn't sovereigns be included within the definition of "persons" in Chapter 180 and "users" in Chapter 403? It is black letter law that a statute should be construed so as to give effect to the legislative intent. *Starr Tyme, Inc. v. Cohen*, 659 So. 2d 1064 (Fla. 1995) (give the statute its

plain and ordinary meaning); *City of New Smyrna Beach v. Board of Trustees of the Internal Improvement Trust Fund*, 543 So. 2d 824 (Fla. 5th DCA 1989) (construe a statute so as to ascertain and give effect to the legislative intent).

Ironically, the First District itself recognized the problem with a contrary construction in its original *Gainesville I* decision: "[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." *Gainesville I*, 778 So. 2d at 529. Inexplicably, *Gainesville III* ignored this earlier holding, we believe in error.

FKCC may argue that Chapter 180 does not specifically refer to stormwater utilities. As Key West points out in its brief, Chapter 180 should be read to include stormwater utility services, particularly in the statute's current form. We join in that conclusion. Equally important, Chapter 403, which focuses specifically on stormwater, is clear enough by itself. Chapter 403 allows the City to establish a stormwater utility and charge each user a proportionate share. § 403.031(17).

In sum, the statutory framework makes clear that the legislature has envisioned a stormwater system in which all users pay for their use of the service. The City is required to provide those services, and all users, including sovereigns, must pay for those services if they use them. FKCC is just such a user and is obligated to pay its bills, like every other user.

The *Clearwater* Case has no Persuasive or Precedential Force

The only other stormwater fee sovereign immunity litigation that reached the appellate level arose from a similar case in Clearwater in which the trial court, also in reliance on *Gainesville III*, ordered a refund of stormwater fees paid by the Pinellas County School Board. Ultimately, the Second District affirmed that conclusion *per curiam*. *City of Clearwater v. School Board of Pinellas County*, 17 So. 3d 1287 (Fla. 2d DCA 2009). Obviously, the *per curiam* decision has no precedential value. But a review of a previous decision by the Second District arising out of the same case provides some assistance. In that case, the Pinellas County School Board, like DOT argued that the Clearwater ordinance constituted a special assessment and not a user fee. In *Clearwater I*, the Second District confirmed that a stormwater user fee, like any other user fee, was valid and the school board would be obligated to pay it:

> Our supreme court has referred to stormwater management programs as being among the traditional utility services provided by governmental entities. Because school districts are not exempt from payment of user fees for traditional utility services, the circuit court erred in ruling that the School Board was exempt from paying a user fee imposed by the City for stormwater management services.

Clearwater v. Sch. Bd. of Pinellas County, 905 So. 2d 1051 (Fla. 2d DCA 2005).

The Court, however, did not have enough evidence before it to determine whether the Clearwater ordinance imposed a user fee as opposed to a special assessment. Thus, the case was remanded to the trial court where the School

Board continued to argue on remand, and on the later appeal, that Clearwater's stormwater ordinance was not a user fee. *Clearwater*, 905 So. 2d at 1058. Thus, the Second District's later *per curiam* affirmance of the judgment entered by the trial court could easily have been based on the conclusion that, under the particular facts of the *Clearwater* case, the fee at issue was a special assessment and not a user fee. In any event, we do not know the Court's reasoning, which is precisely the reason that the Second District's *per curiam* decision has no weight here.

Finding Sovereign Immunity in the Face of This Clear Statutory Framework Would be Bad Public Policy.

Two points are clear from the statute. Preventing polluted stormwater runoff is a high priority, and users of stormwater systems should pay for that service. Imposing fees on users is an important part of that public policy. User fees are a primary incentive to encourage customers to conserve more and to use less. A city can only collect so much stormwater. There is only so much capacity in any stormwater system, and the lakes, rivers, and streams can only accept a finite amount of stormwater runoff. Far better is a system that encourages users to deal with their own stormwater, by reducing the amount of impervious area and retaining stormwater on site, allowing it to percolate back to the aquifer. What incentive would FKCC, the DOT, a school board, or any other sovereign have to properly handle its stormwater if someone else is picking up the bill? Placing fees on the user connects the use with the incentive to conserve.

On a similar note, why is it fair for sovereigns to shift the cost of their use to other users of the system. This is particularly true in a city like Gainesville where a large percentage of its users are governmental. It is impossible to run a fair and efficient stormwater system if many of its users can simply ignore their bills.

In short, FKCC's sovereign immunity claim must be rejected. Just as FKCC must pay its electric and water bills, it must pay its stormwater bill as well.

II. FKCC is not Entitled to a Refund

Even if FKCC is allowed to escape from paying its stormwater bill, it certainly is not entitled to a refund of past fees because those fees were legal and FKCC paid them voluntarily. There is no legal basis for recovering fees voluntarily paid to the City for a lawful service duly rendered by the City.

The City had the Authority to Charge Stormwater Fees.

FKCC's first premise is that it is entitled to a refund because the stormwater fee is unlawful. As we have discussed extensively above, the *Gainesville I, Gainesville II,* and *Clearwater I* decisions have already resolved this issue. Each decision holds that if a stormwater fee is a valid user fee, it may legally be charged to a sovereign. This conclusion is confirmed by the statutory framework in Chapters 403 and 180 authorizing these charges.

The fact that FKCC now hides behind the shield of sovereign immunity in defense of the action does not render the City's original charges illegal. FKCC

misunderstands the distinction between the City's ability to collect and the validity of the fee or obligation. Even if sovereign immunity hobbles the City's efforts to collect from FKCC, this does not mean that FKCC can ignore those unequivocal decision finding the fee valid. Sovereign immunity is a shield that may be used defensively. No case allows it to be used as a sword to collect a refund.

The SBAC Paid the City's Fees Voluntarily.

Even if the charge were unlawful, FKCC cannot recover for payments it voluntarily made. The City billed FKCC for services rendered. FKCC did not contest that the service was rendered, the method of calculation, nor the amount of the bill. Instead, it chose to pay for that service. Long-established Florida law is clear, if a party pays a fee or tax voluntarily, it may not later seek a refund, even if its payment was based on a mistaken legal assumption. *North Miami v. Seaway Corp.*, 9 So. 2d 705, 707 (1942). *Seaway* is virtually on point. Plaintiff paid taxes to the City of North Miami for ten years, although it later turned out that the property was not within the boundaries of North Miami. Plaintiff sought a refund. Citing the general rule that taxes or fees voluntarily paid could not be refunded, the Court rejected the refund request. *Id.* at 706-07.

Nor did it matter that either the city or the plaintiff were mistaken about the law. Paying a tax or fee under the mistaken impression that the tax or fee is legal does not justify a refund. According to the Court:

> Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as a reason why the state should furnish him with legal remedies to recover it. Ignorance or mistake of the law by one who voluntarily pays a tax illegally assessed furnishes no ground for a recovery.

Id. at 707. *See also Taylor, Bean & Whitaker Martg. Corp. v. GMAC Mortg. Corp.*, 2007 WL 1114045 (M.D. Fla. Apr. 12, 2007) (money voluntarily paid "cannot be recovered back merely because the party, at the time of payment, was ignorant, or mistook the law, as to his liability").

FKCC may argue that it paid under protest, but this is irrelevant. This and other Courts consider a payment to be involuntary only if paid under the threat of "harsh penalties" or "severe" sanctions. *Broward County v. Mattel*, 397 So. 2d 457, 460 (Fla. 4th DCA 1981); *City of Miami v. Fla. Retail Federation*, 423 So. 2d 991, 993 (Fla. 3d DCA 1982). There were no such "severe" sanctions at issue here. *Cf. Mattel*, 397 So. 2d at 460 (attorneys threatened with losing their license to practice); *Florida Retail Federation*, 423 So. 2d at 992 n.2 (non-payment could result in a 60-day jail sentence).

FKCC is not entitled to a refund.

CONCLUSION

For all the foregoing reasons, *amici* join with the City of Key West in urging that the decision below be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to Barton W. Smith, Esquire, Barton Smith, P.L., 309 ½ Whitehead Street, Key West, Florida, 33040, William Devane, Jr., DeVane & Dorl, P.A., 5701 Overseas Highway, Suite 12, P.O. Box 500177, Marathon, Florida 33050, and Michael T. Burke, Johnson, Anselmo, Murdoch, et al., 2455 E. Sunrise Blvd., Suite 1000, Ft. Lauderdale, Florida 33304 on this 6th day of June 2011.

STEVEN L. BRANNOCK
Florida Bar: 319651
MAEGEN PEEK LUKA
Florida Bar: 549851
BRANNOCK & HUMPHRIES
100 South Ashley Drive, Suite 1130
Tampa, Florida 33602
Tel: (813) 223-4300
Fax: (813) 262-0604

Counsel for *Amici Curiae*
Florida Stormwater Association
Florida League of Cities
City of Gainesville

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2).

STEVEN L. BRANNOCK
Florida Bar No. 319651