IN THE

SUPREME COURT OF FLORIDA

CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY, a Florida corporation, HALLMARK DEVELOPMENT COMPANY, INC., a foreign corporation licensed to do business in the State of Florida, KENNETH A. MARRIOTT, VERNON M. MILLER, and GEORGE C. WAGNER,

Petitioners,

vs.

CITY OF DUNEDIN, FLORIDA,

Respondent.

CASE NO. 47,662

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA IN AND FOR THE SECOND DISTRICT

AMICUS CURIAE BRIEF ON BEHALF OF FLORIDA LEAGUE OF CITIES, INC., ON THE MERITS

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

This Amicus Curiae hereby adopts by reference the decision below of the Second District Court of Appeal of Florida in City of Dunedin v. Contractors & Builders Ass'n, 312 So.2d 763 (Fla.App.,2nd Dist., 1975), as a concise Statement of the Case and Statement of the Facts in this certiorari proceeding based upon the certification of that District Court of Appeal that its said decision "is one which passes upon a question of great public interest . . . ." (Transcript of Record, hereinafter referred to as "TR", 430).

On August 4, 1975, Ralph A. Marsicano and Burton M. Michaels, general counsel and staff attorney, respectively, of the Florida League of Cities, Inc., filed in this certiorari proceeding their Motion For Leave To File Brief Amicus Curiae, And To Participate In Oral Argument, which was granted by Order of the Court of August 5, 1975, "to file brief only without prejudice to share oral argument time if permitted by the Counsel for the parties."

This Amicus Curiae, because of its limited capacity in this certiorari proceeding, has avoided presenting any detailed analysis and critique of the lengthy Statement of the Case and Statement of the Facts appearing in the Brief of Petitioners On The Merits. But, one glaring generalization erupts on page 1 of the Statement of the Case that cannot pass without comment.

The last paragraph at the bottom of page 1 of the Brief of Petitioners On The Merits contains a broad sweeping statement with which this Amicus Curiae disagrees. This Amicus Curiae respectfully submits that in lieu thereof the following should be considered to be the question certified by the Second District Court of Appeal to be of great public interest:

> THIS PETITION FOR CERTIORARI INVOLVES THE CERTIFIED QUESTION OF GREAT PUBLIC INTEREST OF WHETHER UTILITY CONNECTION CHARGES, IMPOSED BY A MUNICIPAL OWNER OF A UTILITY SYSTEM TO PROVIDE FOR THE EXPANSION OF THE SYSTEM, ARE USER CHARGES OR TAXES.

At page 766 of 312 So.2d the Second District Court of Appeal stated in its Opinion below:

> ". . . The court below concluded that the connection charge was, in reality, a tax. If this is so, it cannot be sustained because a municipality cannot impose a tax, other than ad valorem taxes, unless authorized by general law.[2]" [citing in footnote 2: "Fla.Const. Art. VII, §§ 1, 9 (1968); City of Tampa v. Birdsong Motors, Inc., Fla.1972, 261 So.2d 1."]

In reversing the trial court, the District Court held at page 766 of 312 So.2d:

> "The imposition of fees for the use of a municipal utility system is not an exercise of the taxing power nor is it the levy of a special assessment. State v. City of Miami, 1946, 157 Fla. 726, 27 So.2d 118. In our view, connection fees such as those involved in this case do not constitute a tax[3] but a charge which may be made for the use of the utility service pursuant to the authority of its charter and Fla.Stat. § 180.13 (1971),[4] providing they meet the criteria hereafter set forth. We hold that where the growth patterns are such that an existing water or sewer system will have to be expanded in the near future, a municipality may properly charge for the privilege of connecting to the system a fee which is in excess of the physical cost of connection, if this fee does not exceed a proportionate part of the amount reasonably necessary to finance the expansion and is earmarked for that purpose. Having announced the rule, we must now determine its applicability to the instant case."

The Second District Court of Appeal then went on in its Opinion to hold that the evidence in the case clearly upheld the validity of the ordinances in question, the reasonableness of the classifications therein, and the fees charged thereunder.

It is respectfully submitted that it is the above decision that the Second District Court of Appeal certified to the Supreme Court of Florida as being "one which passes upon a question of

great public interest. . . ." (TR 430) Such decision bears little resemblance to the question on certiorari profered in the last paragraph at the bottom of page 1 of the Brief of Petitioners On The Merits in the Statement of the Case.

POINTS INVOLVED

This Amicus Curiae also disagrees with the Points Involved set forth on page 28 of the Brief of Petitioners On The Merits and argued on pages 28 through 120 therein. The Petitioners' Points Involved not only fail to come to grips with the questions decided by the Second District Court of Appeal below in City of Dunedin v. Contractors & Builders Ass'n, supra, but miss the mark in framing even the question of great public interest certified by the District Court to the Supreme Court of Florida (TR 430). This Amicus Curiae respectfully submits that the Points Involved in this certiorari proceeding are in reality the following:

POINTS INVOLVED

I

WHETHER UTILITY CONNECTION CHARGES IMPOSED BY A MUNICIPAL OWNER OR OPERATOR OF A UTILITY SYSTEM TO PROVIDE FOR EXPANSION OF THE UTILITY SYSTEM, ARE USER CHARGES OR TAXES.

II

WHETHER THE CITY OF DUNEDIN HAD THE POWER IN 1972, PRIOR TO THE MUNICIPAL HOME RULE POWERS ACT, TO IMPOSE WATER AND SEWER CONNECTION CHARGES ON NEW SERVICE CONNECTIONS INTO ITS RESPECTIVE UTILITY SYSTEMS TO PROVIDE FOR EXPANSIONS OF SUCH SYSTEMS.

ARGUMENT

I

WHETHER UTILITY CONNECTION CHARGES IMPOSED BY A MUNICIPAL OWNER OR OPERATOR OF A UTILITY SYSTEM TO PROVIDE FOR EXPANSION OF THE UTILITY SYSTEM, ARE USER CHARGES OR TAXES.

The threshhold question decided below by the Second District Court of Appeal in City of Dunedin v. Contractors & Builders Ass'n, supra, squarely answers the above Point Involved in these words at page 766 of 312 So.2d:

> "The imposition of fees for the use of a municipal utility system is not an exercise of the taxing power nor is it the levy of a special assessment. State v. City of Miami, 1946, 157 Fla. 726, 27 So.2d 118. In our view, connection fees such as those involved in this case do not constitute a tax[3] but a charge which may be made for the use of the utility service pursuant to the authority of its charter and Fla.Stat. §180.13 (1971),[4] providing they meet the criteria hereafter set forth. . . ."

This holding of the Second District Court of Appeal is clearly consistent and harmonious with decisions of the Supreme Court of Florida and authorities in other jurisdictions. The following authorities of law clearly demonstrate the correctness of the decision of the Second District Court of Appeal below holding that utility connection charges imposed upon new service connections to provide for a utility system's resultant needed expansion are not taxes. Rather, they are service or user charges imposed to recover the added expenses placed upon the utility system in order to furnish its services to the new customers

being connected into it. A tax, on the other hand, is unrelated to the providing of any particular service in payment therefor, but is levied by government on classes of persons or things or transactions in order to support government in general. In other words, the taxpayer does not have the right to require a government to identify with exact particularity the quid pro quo government service for which any particular tax is paid. Admittedly certain taxing measures are "sold" to the public as being needed to finance the providing of a particular service, but the legal authority to impose that tax, the reasonableness of its classifications, and the reasonableness of its amounts need not bear any relationship to the "promised" service. This sharp distinction between user charges and taxes clearly emerges from the following authorities. First, let us examine the nature of what a tax has been held by the courts to be.

In City of Orlando v. State, 67 So.2d 673 (1953), the Supreme Court of Florida reiterated its definition of a "tax" when it quoted with approval its language in Klemm v. Davenport, 100 Fla. 627, 129 So. 904 (1930), at page 674 of 67 So.2d:

> ". . . 'A "tax" is an enforced burden of contribution imposed by sovereign right for the support of the government, the administration of the law, and to execute the various functions the sovereign is called on to perform' . . . ."

This classic definition is stated in essentially the same

words at 16 McQuillin, Municipal Corporations (3rd Ed., 1972), §44.02, p. 7, together with certain pertinent refinements:

> "Although various definitions have been given from time to time by the courts, the definition which is most commonly approved is that taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs. Municipal taxes are those imposed by a municipality, under constitutional or statutory authority delegated to it, on persons or property within the corporate limits, to support the local government and pay its debts and liabilities, and they are usually its principal source of revenue.
>
> "Taxes embody many forms of contribution exacted, within the limits prescribed by law, by the government. They include general property taxes, poll taxes, and excise taxes. However, a 'tax' does not include, and is to be distinguished from, a minimum wage law, a taking under the power of eminent domain, special assessments, fines and bond forfeitures, fees, tolls, and water or sewer rates, charges or rents. As aptly remarked, what a tax really is, is determined from its nature and not its name." [Emphasis supplied.]

See also: 31 Fla.Jur., Taxation (1974 Rev.), §9, pp. 44-45, and cases cited therein.

That water and sewer connection charges and fees to provide for utility system expansion are not "taxes" clearly emerges from the following authorities.

The Supreme Court of Florida clearly held in State v. City of Miami, 157 Fla. 726, 27 So.2d 118 (1946), at page 124 of 27 So.2d:

> ". . . the imposition of fees for the use of the sewage disposal system is not an exercise of the taxing power, nor is it the levy of a special assessment. . . ."

In Pizza Palace of Miami, Inc. v. City of Hialeah, 242 So.2d 203 (Fla.App., 3rd Dist., 1971), the Third District Court of Appeal "assumed" a sewer connection charge to be a "service charge." The District Court first stated that the sewer connection charge in question was either a charge for services or an assessment. Nowhere in its opinion does the Third District Court of Appeal even hint at the possibility that a sewer connection charge could ever constitute being a "tax." At page 205 of 242 So.2d, that court said:

> "Before exploring the merits, we note that three charges related to the operation of a sewer system must be enumerated to avoid confusion. First, there is the connection charge which is here disputed. Second, there is a monthly sewer charge for the use of the system, which here amounts to three times the Lessee's monthly water. Third, there is the category of special assessments for benefits conferred to the land. See: Ch. 184, 'Municipal Sewer Financing,' Fla.Stat., F.S.A., esp. §184.05(7)(c)(2).
>
> "As to Lessee's first point, that the 'sewer connection charge' assumed to be a service charge is unauthorized under the Charter and Ordinances as to him because of statutory and constitutional provisions, we agree and choose to rest our decision upon this narrower statutory ground, and therefore do not need to consider the constitutional problems raised."

McQuillin, the authority on American municipal law discussed sewer connection fees and charges at 11 McQuillin, Municipal Corporations (3rd Ed., 1964), §31.30a., pp. 247-248:

> "The municipality may fix fees, rents, charges, and rates for making connections with and for using its sewers and drains, outside the municipal limits, as well as within, and may, by law, have a lien upon the property therefor. Sewer charges are usually established by ordinances, the validity of which is presumed.

"Sewer charges and fees are not taxes or special assessments (although occasionally they are so regarded), but are in the nature of tolls or rents paid for services furnished or available."

And even the Attorney General of Florida agrees that a sewer connection fee is not a tax. On August 14, 1972, he rendered an opinion (AGO 072-271) on the reasonableness of a sewer connection fee imposed by a county pursuant to Chapter 153, Florida Statutes. The Attorney General cited both State v. City of Miami, supra, and 11 McQuillin, Municipal Corporations, §31.30a, p. 248, and concurred that a sewer connection charge was not a tax. Also mentioned in that Attorney General's Opinion was the oft-cited case of Englewood Hills, Inc. v. Village of Englewood, 14 Ohio App2d195, 237 N.E.2d 621 (1967), wherein a $250 sewer tap charge and a $200 water tap charge were imposed. In that Ohio case the village had proposed [p. 623 of 237 N.E.2d.]:

". . . to pay the cost of future expansion of sewer and water facilities from tap charges or by the issuance of bonds payable from sewer and water revenues including tap charges."

The said Florida Attorney General's Opinion [AGO 072-271] commented on the Englewood case in these words:

". . . In Englewood Hills, Inc. v. Village of Englewood, Ohio App. 1967, 237 N.E. 2d 621, the court, in holding that a municipality may adopt ordinances providing for tap-in charges for sanitary sewer services, stated that the fees established by the ordinances must be fair and reasonable and bear a substantial relationship to the cost involved in providing the service to the landowner. . . ." [Emphasis supplied.]

McQuillin also cited the Englewood case at 12 McQuillin, Municipal Corporations (3rd Ed., 1970), §35.37, at page 480 for this statement of the law:

> "Municipalities may provide for tap-in charges for water subject only to the qualification that the fees established must be fair and reasonable and bear a substantial relationship to the cost involved in providing the service to the landowner. . . ." [Emphasis supplied.]

Analyses of other case-decisions upholding water tap-in or connection charges as being service or user charges, further clearly demonstrate the correctness of the decision of the Second District Court of Appeal below in City of Dunedin v. Contractors & Builders Ass'n, supra. Water connection charges -- based on elements directly related to the costs of providing water services -- are clearly "user charges." They are imposed not like "taxes" to finance the operation of government generally, but to finance the costs to operate, maintain, and to expand a particular water supply system. Two cases from other jurisdictions clearly illustrate necessary basic elements comprising water connection charges.

In Henry B. Byors & Sons, Inc. v. Board of Water Com'rs of Northborough, 358 Mass. 354, 264 N.E.2d 657 (1970), the Massachusetts court upheld a water tap-in or connection charge, called therein a "demand charge," which was required from new customers [p. 660 of 264 N.E.2d.]:

> ". . . to pay a portion of the cost of supplying sufficient water at adequate pressure to meet the increasing demands for water by the cumulative effect of new household units being supplied with water."

At page 661 of 264 N.E.2d, the court held that the evidence in the case:

> ". . . clearly delineates the reasons for the demand charge and for the expenditure of large sums in order that adequate service might be provided to the units already built and those to be built. . . ."

And in Colonial Oaks West, Inc. v. Township of East Brunswick, 61 N.J. 560, 296 A.2d 653 (1972), the New Jersey court upheld a water connection charge consisting of elements constituting service or user charges in their "purest" form which included [p. 656 of 296 A.2d]:

> " . . . the cost of issuing a permit, making the physical connection to a water main and a portion of the cost of increasing the capacity of the township's water supply and system in order to provide the water service. . . ."

In Pinellas Apartment Assoc., Inc. v. City of St. Petersburg, 294 So.2d 676 (Fla.App., 2nd Dist., 1974), the Second District Court of Appeal of Florida scrutinized a city's charges for garbage collection and disposal services. The District Court treated such charges as being service or user charges and held at page 678 of 294 So.2d:

> ". . . The establishment of classifications in setting the charges for utility services is permissable so long as the classifications are not arbitrary, unreasonable or discriminatory and apply similarly to all under like conditions . . . .

". . . Needless to say, in establishing the charges the City Council could not be expected to make an exact forecast of the cost of providing a particular type of garbage collection. The setting of utility rates is often a complicated process and mathematical exactitude cannot be required. There does not have to be an exact correlation between the rates charged for various aspects of the service provided by the city. There is nothing inherently wrong with the city making a modest return on its utility operation or certain portions thereof, providing the rate is not unreasonable in light of the service provided. See 12 McQuillin, supra, §35.37c."

The significance of this opinion is that it follows the basic law that charges imposed on customers of a utility must bear a reasonable relationship to the costs incurred in furnishing that utility's services to those customers. New customers entering a utility system place new demands upon that system for which a new classification of charges may be established to meet those additional capacity costs not caused by existing customers of the system. These are the very considerations taken into account by the courts in determining the reasonableness of water and sewer connection charges which have been held time and again to be "service or user charges." The rules of law pertaining to the reasonableness of a tax are otherwise, and have no relationship to the cost of providing particular services to customers or users of a utility system.

This same concept -- that where a particular facility is essential in the operations of a particular system, users of that system may be required to pay the necessary costs needed to maintain that facility -- was the underlying reasoning of

the Supreme Court of Florida in Farabee v. Board of Trustees, Lee County Law Lib., 254 So.2d 1 (Fla.Sup.Ct., 1971). In Farabee the Supreme Court held that a $3.00 excess filing fee for civil actions earmarked for the county law library, was not a tax but was a court cost, or what this Amicus Curiae has termed a "service or user charge." At page 5 of 254 So.2d, the Supreme Court held:

> ". . . In our opinion, the law library fulfills an important and growing need of practitioners, judges, and litigants. It is essential to the administration of justice today, and it is appropriate that its cost be assessed against those who make use of the court systems of our state. Accordingly, we reject appellant's contention that the assessment is an unconstitutional tax disguised as a court cost."

The well-reasoned Farabee decision serves as one guide to municipal government as to the distinction between a tax and a user charge. The significance of such distinction to municipal government was expressly recognized below by the Second District Court of Appeal when it cited and commented upon the landmark decision of the Supreme Court of Florida in City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1 (Fla.Sup.Ct.,1972), in these words at page 766 of 312 So.2d: ". . . a municipality cannot impose a tax, other than ad valorem taxes, unless authorized by general law." City of Dunedin v. Contractors & Builders Ass'n, supra.

This Amicus Curiae respectfully urges that something more than general definitions of the term "tax" is needed to guide local governments in Florida in responding to the fiscal demands being placed upon their service delivery systems. Some service delivery systems--notably police, fire, planning and zoning, etc.--do not lend themselves readily to user charges and must be heavily supported by taxes, whereas others, such as water and sewer systems, depend upon charges imposed on the customers of those systems. As evidenced by the ruling of the trial court below (TR 337-342), the clear-cut distinction between a tax and a user charge has not been firmly implanted in the jurisprudence of Florida. This Amicus Curiae respectfully submits that the following distinction may serve as a helpful guide, and the following rule is respectfully suggested:

If a municipal owner or operator of a utility or enterprise system imposes a fee only on customers or users of that system in order to finance the costs needed by that system in order to provide that system's services to those customers or users, then the fee is a user charge and is not a tax. (Such a fee must, of course, be reasonable, and any classification of customers or users must also be reasonable.) But, if a municipality exacts a fee or charge on persons or things or transactions falling within a particular classification or category, which exaction is unrelated to the furnishing of a service to a class, as a distinct class, of users or customers of a utility or enterprise system owned or operated by

that municipality, then the charge is a tax. For example, if a city passed an ordinance imposing a charge for admission to any city-owned or operated amusement or recreation facility, that would be a user charge. But, if a city imposed a fee on every admission to any amusement or recreation facility located in the city, regardless as to who owned or operated the facility, that would be a tax.

The Petitioners' own Florida authorities of so-called "impact fee" cases are consistent with the general rules of law as to what constitutes a tax, and, they even further fortify the eminent correctness of the decision of the Second District Court of Appeal in the case at bar. Those Florida cases cited by the Petitioners clearly have no relevancy to the certiorari proceeding at bar.

The case of Broward County v. Janis Development Corp., 311 So.2d 371 (Fla.App.,4th Dist.,1975), affirming the Circuit Court decision reported as Janis Development Corp. v. City of Sunrise, 40 Fla.Supp. 41 (Cir.Ct.,XVII Cir., 1973), clearly involved the levying of a tax. The building permit surcharge fees in that case were not imposed upon any class of users or customers of any utility or enterprise system to finance the costs needed to expand that system to meet the demands of any class of users. So too, the one percent building permit surcharge fee in Venditti-Siravo, Inc. v. City of Hollywood, 39 Fla. Supp. 121 (Cir.Ct.,XVII Cir.,1973), is irrelevant to the certiorari

proceeding at bar. No utility or enterprise system was involved in either case. And the case of Admiral Development Corp. v. City of Maitland, 267 So.2d 860 (Fla.App.,4th Dist.,1972), not only contains no "tax" question, but was decided prior to the Municipal Home Rule Powers Act, Chapter 73-129, Laws of Florida, and the landmark decision of the Supreme Court of Florida in City of Miami Beach v. Forte Towers, Inc., 305 So.2d 764 (Fla.Sup.Ct.,1975), which upheld the constitutionality of Section 166.021, Fla.Stat., the key provision in that act.

This Amicus Curiae respectfully submits that the Petitioners have presented no authority of Florida Law that would even question the correctness of the decision of the Second District Court of Appeal below. Rather, the Petitioners have seized upon the yet undefinable term of "impact fees" and have attempted to interject that phrase as a smoke screen over the utility connection fees or charges involved in the proceeding at bar. Petitioners place great weight in the fact that legislation has been introduced in the Florida Legislature regarding the so-called "impact fees." But, as the Supreme Court of Florida can take judicial notice, not a single piece of such legislation has passed. The only conclusion that may be drawn from the introduction of a bill in the Florida Legislature is that a bill was introduced. Any one of 160 members of the Florida Legislature can do so. This Amicus Curiae knows of no legal significance that attaches to the introduction of any bill. Perhaps if the Petitioners could define the term "impact

fees", and could suggest some reasonable classifications, and fees for the imposition of same, they could aid certain members of the Florida Legislature interested in fostering such legislation. But, on the other hand, the Petitioners should have avoided dragging that presently undefinable term, and the above-cited Broward County cases involving taxes, into this "utility-system-connection-charge" case clearly involving a type of user charge arising when new customers seek to enter a utility system operating at near capacity, thereby necessitating its resultant expansion.

Upon the above authorities of law, it is respectfully submitted that the Second District Court of Appeal was eminently correct in holding that utility connection charges imposed on new service connections to provide for expansion of that utility system are not taxes, but are user charges.

II

WHETHER THE CITY OF DUNEDIN HAD THE POWER IN 1972, PRIOR TO THE MUNICIPAL HOME RULE POWERS ACT, TO IMPOSE WATER AND SEWER CONNECTION CHARGES ON NEW SERVICE CONNECTIONS INTO ITS RESPECTIVE UTILITY SYSTEMS TO PROVIDE FOR EXPANSIONS OF SUCH SYSTEMS.

The ordinances in question imposing water and sewer connection charges were adopted by the City Commission of Dunedin in 1972 (TR 2, 21, 337 & 338), and preceded the 1973 Municipal Home Rule Powers Act, Chapter 73-129, Laws of Florida. In City of Miami Beach v. Forte Towers, Inc., 305 So.2d 764 (Fla.Sup.Ct.,1975), the Supreme Court of Florida

upheld the constitutionality of Section 166.021, Fla.Stat., the key municipal home rule provision of that act. This Amicus Curiae respectfully submits that Subsection (3) of that Section 166.021--dealing with constitutional construction--has retroactive effect back to the January, 1969, effective date of the 1968 Constitution of Florida. Subsection (3) of Section 166.021, Fla.Stat., clearly provides:

> "(3) The legislature recognizes that pursuant to the grant of power set forth in §2(b), Art. VIII of the state constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state legislature may act, except:"

Therefore, what clearly appears in Subsection (3) of Section 166.021, Fla.Stat., is a legislative "recognition" of a constitutional grant of power, which constitutional grant of power originated in January, 1969--the effective date of the 1968 Constitution. And this legislative construction of the Constitution should be honored by the courts. Greater Loretta Improvement Ass'n, v. State ex rel. Boone, 234 So.2d 665 (Fla.Sup.Ct.,1970). In the Greater Loretta case, supra, the Supreme Court of Florida declared at page 670 of 234 So.2d:

> "When the Legislature has once construed the Constitution, for the courts then to place a different construction upon it means that they must declare void the action of the Legislature. It is no small matter for one branch of the government to annul the formal exercise by another of power committed to the latter. The courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the Constitution. This is elementary."

The City Commission of Dunedin, therefore, pursuant to Article VIII, Section 2(b), of the 1968 Constitution of Florida, and Section 166.021, Fla.Stat., as created by Chapter 73-129, Laws of Florida, had the requisite power in 1972 to enact the ordinances in question imposing the water and sewer connection charges. But, assuming for the sake of argument that such Constitutional power was absent, ample statutory authority for the enactment of such ordinances existed, as clearly recognized by the Second District Court of Appeal below at pages 766 and 767 of 312 So.2d.

Chapter 180, Fla.Stat., has for many years authorized municipalities to own and operate, inter alia, water supply and sewage collection and disposal systems. [Section 180.06, Fla.Stat.]. Section 180.13, Fla.Stat., specifically states:

> "(2) The city council, or other legislative body of the municipality, by whatever name known, 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 . . . ." [Emphasis supplied.]

In addition, the decision of the Supreme Court of Florida in State v. City of St. Petersburg, 61 So.2d 416 (1952), has a bearing on this point. The opinion of the Supreme Court is silent as to the specific types of sewer charges imposed in that case, but the Supreme Court had no difficulty holding that the city was authorized to impose such sewer service charges based upon Section 167.73, Fla.Stat., and upon the following provision, amongst others, in the St. Petersburg City Charter: [p. 418 of 61 So.2d.]

"'To establish, impose and enforce water rates and rates and charges for gas, electricity and all other public utilities or other service or conveniences operated, rendered or furnished by the City* * * .'"

The key provisions of Section 167.73, Fla.Stat., 1971, were:

"(2) Each city, town or village owning, maintaining or operating . . . any facility designed and intended to render a direct service to the users thereof, may provide, by ordinance of its council or other legislative body, by whatever name known, for the establishment and collection of reasonable fees and charges to be paid to the city, town or village for the use of such facility or service by each person, firm or corporation using the same."

This section of law, together with many others, was repealed in Section 5 of Chapter 73-129, Laws of Florida, as being unnecessary inasmuch as the Florida Legislature expressly recognized that municipalities already possessed the powers enumerated therein under the Constitution of 1968. But, in any event, this law was on the books in 1972 when the City Commission of Dunedin adopted the water and sewer connection charge ordinances in question. Also in the statutes in 1972 was Section 167.005, Fla.Stat., 1971, which should remove any doubt whatsoever as to the power of the Dunedin City Commission in 1972 to impose the utility connection charges in question.

The Petitioners' Brief incorrectly states on both pages 62 and 64 that Chapter 180, Florida Statutes, has been repealed. This is not so. A cursory glance through statutory tracing tables will rapidly disclose that Chapter 180, Florida Statutes, has never been repealed.

Also, at page 53 of their Brief, amidst excerpts from Admiral Development Corp. v. City of Maitland, supra, Petitioners aver:

"The Fourth District in reversing and holding that the City lacked the power to enact the ordinance stated:"

What Petitioners then quote in the next paragraph is not any statement by that District Court in the Admiral Development case, but, rather, a quotation by that Court at 267 So.2d 862 from the Florida Supreme Court opinion in City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla.Sup.Ct.,1972), which is no longer the law. In City of Miami Beach v. Forte Towers, Inc., supra, the Florida Supreme Court said at 305 So.2d 766:

> "First, therefore, we must consider whether the municipality now has the power to enact such an ordinance; that is, whether the enactment of Ch. 73-129 after our decision in Fleetwood Hotel necessitates a change in the result there reached. I believe that it does, and that municipalities now are empowered to enact such ordinances by virtue of new Ch. 73-129.
>
> "Ch. 73-129 is a broad grant of power to municipalities in recognition and implementation of the provisions of Art. VIII § 2(b), Fla.Const.[1] It should be so construed as to effectuate that purpose where possible.[2] It provides, in new F.S. § 166. 021(1), that municipalities shall have the governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services; it further enables them to exercise any power for municipal services, except when expressly prohibited by law." [Emphasis supplied.]

Upon the above authorities of law, it is respectfully submitted that the Respondent City of Dunedin had the Constitutional and/or statutory powers in 1972 to impose the utility connection charges in question, and the decision below of the Second District Court of Appeal should, therefore, be affirmed.

CONCLUSION

The issues involved in this certiorari proceeding are of crucial concern to all municipalities in Florida--and to all other local governments in this state as well. The role of government in Florida--both State and local--in our every day lives is increasing exponentially. As demands for governmental services increase, the ways and means to finance such services must be found. Where susceptible to such approach, user charge fees may oftentimes be the most equitable and reasonable method of financing such services. Those benefiting pay for the services provided. And in aid of such approach, clear-cut rules as to what constitutes a user charge, and what is a tax would be of great assistance to local governments--such as those involved in the cases in Broward County discussed on pages 15 and 16 of this Amicus Curiae Brief.

The fundamental position of the Petitioners in the case at bar is quite simple. The crux of the Petitioners' argument is that new customers coming into a utility system should not have to pay for the added expansion costs they cause upon the system to receive its services, but, rather, the Petitioners would have all customers and users of the system share in paying for those expansion costs caused by the new customers. The patent inequity

of such a proposition is obvious. Utility connection charges imposed to finance the expansion of the system to meet the demands for services of those new customers, clearly are not any enforced burdens of contribution for the general support of any government. But, such connection charges are necessary fees imposed upon a particular class of customers or users to meet the added system capacity demands and needs which that very class of customers or users is responsible in causing and creating. It is because those new customers are coming into the utility system that added sums are needed to finance the system's expansion. The imposition of a reasonable fee on that new classification to make it pay its own way is nothing more than a common, garden variety user charge.

It is respectfully submitted that the decision of the Second District Court of Appeal in City of Dunedin v. Contractors & Builders Ass'n, 312 So.2d 763 (Fla.App.,2nd Dist., 1975), was eminently correct, and that it should, therefore, be affirmed.

RESPECTFULLY SUBMITTED,

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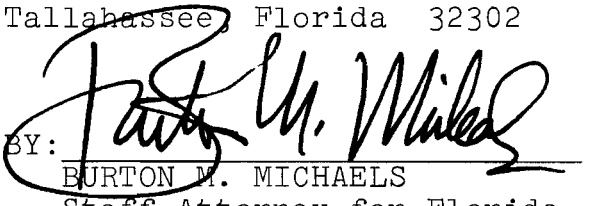
BY: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Amicus Curiae Brief on Behalf of Florida League of Cities, Inc., On The Merits, have been served by mail this 25th day of August, 1975, upon the following: John T. Allen, Jr., Esquire, 4508 Central Avenue, St. Petersburg, Florida 33711, Attorney for Petitioners; Fogle & Watts, P.A., P. O. Box 817, 109 West Rich Avenue, DeLand, Florida 32720, Attorneys for Respondent; John G. Hubbard, Esquire, 1960 Bayshore Boulevard, Dunedin, Florida 33528; and Thomas G. Pelham, Esquire, P. O. Box 1833, Tallahassee, Florida 32302.

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