JOHN T. ALLEN, JR.
4508 CENTRAL AVE.,
ST. PETERSBURG, FLORIDA 33711

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

PETITIONERS' BRIEF

ON QUESTION OF JURISDICTION

Case No. 47,662

IMP

JOHN T. ALLEN, JR., P.A.
4508 Central Avenue
St. Petersburg, FL 33711

Attorney for Petitioners

JOHN T. ALLEN, JR.
4508 CENTRAL AVE.,
ST. PETERSBURG, FLORIDA 33711

I N D E X

JOHN T. ALLEN, JR.
4508 CENTRAL AVE.,
ST. PETERSBURG, FLORIDA 33711

CITATION OF AUTHORITIES

RULES, STATUTES AND CONSTITUTION

JOHN T. ALLEN, JR.
4508 CENTRAL AVE.,
ST. PETERSBURG, FLORIDA 33711

STATEMENT OF THE CASE

In this brief, petitioners, 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, who were plaintiffs in the Circuit Court of Pinellas County and appellees in the District Court of Appeal of the State of Florida Second District, will be referred to as the "CBA." Respondent, City of Dunedin, who was the defendant in the Circuit Court of Pinellas County and appellant in the District Court of Appeal of the State of Florida, Second District, will be referred to as "Dunedin". The following symbols will be used:

TR - Transcript of Record

On February 2, 1973, the CBA filed a declaratory judgment action on behalf of its members together with individually affected builders seeking to void Dunedin's impact fee ordinance. (TR 1-12) The material portions of the ordinance which were ruled upon by the Court stated:

"Sec. 25-14. Sewage connection required; notice

"The owner of any house, building or property used for human occupancy, employment, recreation, or other purpose, situated within the city and abutting on any street, alley or right-of-way in which there is now located or may in the future be located a public sanitary or combined sewer of the city, is hereby required at his expense to install

suitable toilet facilities therein, and to connect such facilities directly with the proper public sewer in accordance with the provisions of this chapter, within ninety (90) days after date of official notice to do so, provided that said public sewer is within two hundred (200) feet of the house, building or properties used for human occupancy.

"At the time of connection to the proper public sewer, if a septic tank has been abandoned, the owner is hereby required, at his expense, to have said septic tank pumped dry, filled to the rim with suitable fill material or excavated and disposed of and properly backfilled. * * "

"Sec. 25-31. Same--Classes of permits; contents; inspection fees.

"There shall be two (2) classes of sewer permits: (1) for residential and commercial service, and (2) for service to establishments producing industrial waste. In either case, the owner or his agent shall make application on a special form furnished by the City. The permit application shall be supplemented by any plans, specifications or other information considered pertinent in the judgment of the city sewer superintendent. A permit and connection fee of $100 for each connection to a public sewer installed at city expense shall be paid to the finance director at the time the application for same shall be filed. This fee shall not apply to connections within a collector system installed not at the expense of the city."

"Sec. 25-32. Same--Costs paid by owner.

"All costs and expense incident to the installation, connection and maintenance of the building and collector sewers shall be borne by the owners. The owners shall indemnify the city from any loss or damage that may directly or indirectly be occasioned by the installation of the building sewer. * *"

"Sec. 25-71. Meters--Connection or installation change.

"(a) The connection charge for the installation of a meter inside the city shall be as follows:

5/8"	meter	$ 95.00
1"	meter	170.00
1-1/2"	meter	265.00
2"	meter	360.00

"(b) The connection charge for the installation of a meter outside the city limits shall be as follows:

5/8"	meter	$105.00
1"	meter	180.00
1-1/2"	meter	290.00
2"	meter	390.00

"(c) In addition to the meter installation charges described herein, there shall be paid an assessment to defray the cost of production, distribution, transmission and treatment facilities for water and sewer provided at the expense of the City of Dunedin, as follows:

Each dwelling unit;	for water	$325.00
	for sewer	375.00
Each transient unit;	for water	150.00
	for sewer	275.00
Each business unit;	for water	325.00
	for sewer	375.00

"(d) The assessments as set forth herein shall be payable upon issuance of the building permit for said unit or units in the case of new construction, or in the case of a presently existing structure or structures, such assessments shall be payable when the permits for water or sewer connections are issued. * *"

The complaint alleged that Ordinance 25-71 constituted a special assessment against all property owners who wished to obtain water and sewer connections "to defray the cost of production, distribution, transmission and treatment facilities for water and sewer provided at the expense of the City of Dunedin." (TR 4) *In ADDITION*

to the normal connection charge of $100 and installation charge for a meter which varied in cost as to size and location, whether inside city limits or outside city limits, each property owner was REQUIRED to pay an impact fee for sewer and water of $700 for each dwelling or business unit. Transient units were assessed at $325.

In view of these requirements, the complaint concluded:

> "10. According to the ordinance, one unit for water and sewer imposes an $800 special assessment in addition to connection charges as more particularly prescribed in Section 25-71 of the ordinance. The assessments are required to be paid upon issuance of a building permit in the case of new construction or upon issuance of permits for water and sewage connections in cases of pre-existing structures.
>
> "11. The practical effect of the ordinance requires all residents to connect to sewage and water facilities. No permits will be issued for sewer and water unless each property owner pays a special assessment according to the number of water and sewer units placed on the property. As an example, an apartment building comprising twenty apartments at a unit cost of $800 for one water and sewage connection would be assessed the sum of $16,000.
>
> "12. The intent of the ordinance is to provide revenue for additional public improvement facilities to be constructed in the future for water and sewage. The $800 assessment was arrived at strictly on the basis of a general estimate of costs for water and sewage improvements in the sum of $8,000,000. The Dunedin City Council, prior to passage of the ordinance, concluded that they would have approximately 1,000 applications per year for water and sewer connections, and therefore, the funds raised by the ordinance would be funded toward the cost of new water and sewer facilities." (TR 4-5)

JOHN T. ALLEN, JR.
4508 CENTRAL AVE.,
ST. PETERSBURG, FLORIDA 33711

The complaint attacked the ordinance upon three grounds:

1. The ordinance was enacted without legislative authority in that there was no authority to pass the ordinance under the Dunedin charter, Chapter 167, 170, or 180 F.S.A. 1971. (TR 6-8)

2. The ordinance was an invalid special assessment in that: It was indefinite as to whether or not the assessment was being levied for existing or future planned water and sewer plants; *it constituted general taxation for facilities enjoyed by all citizens;* it failed to specifically and peculiarly benefit the property assessed and did not benefit or improve the value of the property assessed equal to the value of the assessment; was exorbitant and prohibitive of building construction; failed to provide for a method of apportionment at any one time; failed to establish definite costs prior to assessment. (TR 8-10)

3. The ordinance was unconstitutional on its face and in application in that:

"33. The ordinance, as hereinabove factually alleged, imposes an assessment which exceeds the benefits conferred on the property assessed, constitutes general taxation of a particular group for the benefit of a larger group, or in this case the entire citizenry of the City of Dunedin. The ordinance further fails to give property owners who would be assessed notice of the assessment and an opportunity to be heard prior to the imposition of the final assessment. Accordingly, the ordinance is invalid and unconstitutional as violating the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Constitution of the State of Florida as revised 1971.

"34. The assessment, as hereinabove factually alleged, and as revealed by the plain reading of the ordinance, is taxation of a particular class for special tax purposes in an area exclusively recognized by law as general taxation, is in application palpably arbitrary and unreasonable, grossly unequal and confiscatory and devoid of any rational basis so as to essentially constitute an arbitrary abuse of power and therefore, void as unconstitutional in violating the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 1, of the Constitution of the State of Florida, as revised 1971." (TR 10-11)

After denial of Dunedin's motion to dismiss (TR Dunedin filed an answer essentially denying the material allegations of the CBA's complaint. (TR 21-22) The case went to trial on March 7, 1974. The Honorable B. J. Driver rendered final judgment essentially finding for the CBA on March 29, 1974. (TR 337-342) The Court's opinion stated:

"The City of Dunedin is enjoying, or suffering, depending upon one's viewpoint, growth problems. The demand for sewer and water connections has strained the capabilities of the sewer and water departments to near the breaking point. Attempting to cope with the demand for sewer and water connections the City adopted Ordinance 72-26, which as amended assessed against new connections a total 'impact fee' of approximately $700.00 for dwelling or commercial units.

"Plaintiffs, CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY, HALLMARK DEVELOPMENT COMPANY, INC., KENNETH A. MARRIOTT, VERNON M. MILLER, and GEORGE C. WAGNER, seek declaratory and injunctive relief in this action against the imposition of the 'impact fee.'

FACTUAL FINDINGS:

"The cause having been tried to the Court sitting without jury, the parties having submitted evidence, stipulations, and other proofs, the Court finds the ultimate facts to be: that the City on May 1, 1972, adopted Ordinance 72-26; that on June 19, 1972, Ordinance 72-26 was amended by Ordinance 72-42; that as amended, Ordinance 72-26 imposes an 'assessment' of $375.00 to connect to the sewer system of Dunedin, and an 'assessment' of $325.00 for water connections; that the 'assessment' is against each individual dwelling unit and business unit; that the aggregate cost to a dwelling or business unit to connect with the Dunedin sewer and water system is $700.00; that a fee of $700.00 for connections is substantially in excess of the cost of connecting to the systems; that payment of the fee is a condition precedent to the water or sewer connection, is payable but once and does not constitute a charge against real property; that the proceeds derived from the $700.00 connecting fees are earmarked by the City for capital improvements to the system as a whole; the Court further finds

that plaintiffs have standing to bring this action and that each plaintiff is adversely affected; finally, that payment of the 'impact fee' is limited to new connections to the water and sewer system and is not payable to any degree by the existing users of the sewer and water system. The salutory purpose of Ordinance 72-26 strikes a sympathetic chord with the Court. Implicit in the ordinance is the philosophy that those who are creating the inordinate demand for services ought to bear the prime cost of the same. This approach is laudable, but unfortunately it has resulted in a solution not authorized by the Charter of the City of Dunedin, nor by General Statute.

"This is so for the reason that the power to tax can never be inferred or implied but must be expressly conferred to a municipality. Statutes purporting to grant a power of taxation are strictly construed against the town or city purporting to act under them.

"The City claims as authority to impose the 'impact fee' the following provisions of its Charter and general legislative acts:

CHARTER, Article XII Section 70

Article II Section 7 (23)

Fla. STAT. Secs. 167.01, 167.73,

168.14 and 180.13

And all other applicable provisions of Charter of general law.

"Section 70 of the Charter, supra, is a grant of authority to the City to provide, construct, and maintain public improvements, including sewer and water systems, and further provides for the method of paying for such improvements. The method of payment provided for in Section 70 is by 'direct' taxation or by special assessment against the property benefitted by such 'improvements.'

"It needs no discussion to point out that the 'impact fee' under attack is not 'direct taxation' and could not be sustained as such.

"Can the 'impact fee' be sustained as a 'special assessment against the property benefitted by such improvements'? Again, the answer must be no. In the first place, the 'impact fee' is not a 'special assessment against property benefitted by such improvements', but even more important, Section 70 directs that in case of special assessment, it shall be done in accordance with the general law for paying for public improvements and declining to catalog these requirements it is sufficient to say that there has been no compliance with the requirements of the general law.

"Article II, Section 7 (23), supra, does nothing but grant the City implied powers in carrying out specific grants of power or authority. Power to tax cannot be implied, nor inferred, but must be clearly and unequivocally conferred by Charter or Statute. The 'impact fee' is sometimes designated a 'capital contribution charge', 'assessment', 'connection charge', or 'impact fee'. By whatever name, it is money taken by the municipality from the citizens and property owners for a public purpose and as such, under the law, can only be considered an exercise of the power of taxation.

"If the City is without express power to levy the tax, then it cannot be upheld under 'implied power'.

"In summary, as to the authority of the City under its Charter, the Court finds that the fee sought to be levied under Ordinances 72-26 and 72-42 is not 'general taxation' nor is it 'a special assessment against the lands to be benefitted'. The fee, therefore, cannot be sustained under the Charter.

"The Court has endeavored to indulge a presumption of correctness and validity which surrounds a properly enacted ordinance. To this end Section 167.01 and 167.73 of the Florida Statutes have been scrutinized closely as a possible support for the tax. Counsel for defendant City provided the Court with vigorous and ingenious arguments urging these statutes as a salvation for the 'impact fee.'

"These sections of the statutes constitute general grants of power to Florida municipalities to make improvements and authorize 'reasonable charges' for the furnishing of services and facilities by municipalities. Unfortunately, the fee under attack is not a 'reasonable charge' as contemplated by the aforesaid statutes, but in effect is an effort to provide assessments for construction of a system in a manner prohibited by law. CITY OF HALLENDALE vs. MEEKINS, Fla. 4th DCA) 273 So.2nd 318; STEWARD vs. CITY OF DELAND, 75 So.2nd 584; and STATE vs. CITY OF ST. PETERSBURG, 61 So.2nd 416.

"Plaintiffs have posed certain constitutional issues; however, having determined that the City is without Charter or statutory authority to levy the fee under Ordinances 72-26 and 72-42, it is not necessary to consider the constitutional issues. It is fundamental that a Court should not resolve a matter through constitutional consideration except when absolutely necessary.

'It is the purpose of this law to better enable the several counties and municipalities of this state to provide public services and construct public facilities to accommodate the orderly growth and development within their jurisdictions. To this end it is the intent of the Florida legislature that the costs of these services be more fairly borne by the owners of new construction and development which make these additional costs necessary rather

than placing a burden of these costs on owners of existing construction. It is the further purpose of this law to eliminate the need for development and construction moratoriums by insuring that counties and municipalities can provide services and facilities necessary to accommodate orderly growth.'

"The language quoted above is from a legislative Act presently pending before the State legislature. This Act, if passed, will be known as the 'Florida Impact Fee Law'.

"It is to the ultimate passage of this Act that the defendant City must look for authority to collect fees provided for under Ordinances 72-26 and 72-42, absent, of course, an amendment to the City Charter.

"The existence of the proposed legislation was brought to the Court by defendant's counsel and notwithstanding that in doing so counsel urged that its purpose was to provide for a 'uniform method' of 'impact fee' assessments, it is persuasive of an acknowledgement that there is no present authority for the imposition of an 'impact fee'; wherefore, it is

ORDERED, ADJUDGED AND DECLARED:

"a. That the City of Dunedein was without authority to enact those provisions of Ordinances 72-26 and 72-42 which levied the $375.00 and $325.00 fees respectively for connecting to the water and sewer lines.

"b. That the City of Dunedin is enjoined and restrained from enforcing collection of the fees as now provided for under Ordinances 72-26 and 72-42, PROVIDED that the City may by appropriate ordinance charge and collect a 'reasonable fee' for connecting to its municipal water and sewer systems, all within the purview and under the authority of Chapters 167.01 and 167.73, Florida Statutes.

JOHN T. ALLEN, JR.
4508 CENTRAL AVE.,
ST. PETERSBURG, FLORIDA 33711

> "c. That the City refund to the individual plaintiffs to this cause or to any member of plaintiff, CONTRACTOR AND BUILDERS ASSOCIATION OF PINELLAS COUNTY, any fees paid and collected under Ordinances 72-26 and 72-42 if said fees were paid by the payor under protest. It is the explicit intent of the Court that to make the effect of this Judgment retroactive in toto is impractical and the ends of justice do not require subjecting the defendant City to the expense and difficulties of accounting for all fees heretofore collected.
>
> "IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs have their costs from defendant and same shall be taxed upon appropriate Motion therefor.
>
> "IT IS SO ORDERED AND ADJUDGED in Chambers in Clearwater, Florida, this 26th day of March, 1974." (TR 337-342)

Thereafter, Dunedin filed notice of appeal on April 2, 1974. (TR 343) The CBA timely filed cross assignments of error, seeking reversal of that portion of the judgment that failed to require the repayment of all impact fees collected. (TR 348)

In taxing costs, the lower court failed to award costs of transcribing the City Council's recording of the proceedings of City Council at the time of the enactment of the ordinances under attack. The CBA filed a petition to review cost judgment on or about June 26, 1974. (TR 352-356) The District Court of Appeal entered its order permitting review to proceed as an interlocutory appeal and later granted stipulation of counsel that the appeals be consolidated.

JOHN T. ALLEN, JR.
4508 CENTRAL AVE.,
ST. PETERSBURG, FLORIDA 33711

STATEMENT OF THE FACTS

The portion of the Dunedin ordinance [25-71(c)] struck down by the lower court and held VOID states as follows:

> "(c) In addition to the meter installation charges described herein, there shall be paid an assessment to defray the cost of production, distribution, transmission and treatment facilities for water and sewer provided at the expense of the City of Dunedin, as follows:
>
> | | |
> |---|---|
> | Each dwelling unit; for water-------$ | 325.00 |
> | for sewer---------- | 375.00 |
> | Each transient unit; for water------ | 150.00 |
> | for sewer---------- | 275.00 |
> | Each business unit; for water------- | 325.00 |
> | for sewer---------- | 375.00 |
>
> "(d) The assessments as set forth herein shall be payable upon issuance of the building permit for said unit or units in the case of new construction, or in the case of a presently existing structure or structures, such assessments shall be payable when the permits for water or sewer connections are issued. * *"

The material facts bearing upon the court's decision are stated below.

A number of builders, homeowners, and prospective home buyers testified as to the impact of the ordinance upon them. Artie J. Spitzer (TR 93-100), a small general contractor and builder, testified that the imposition of the additional $700 charge "killed" the market for building homes in Dunedin. People had rather build in the County where they had no impact fee. He was a "build-on-your-lot" contractor, and the ordinance

completely reduced the availability of buildable lots by eliminating Dunedin city lots because of the payment of the impact fee. People who were caught by the ordinance had to go through with building, but people who hadn't been caught stopped building and simply gave up the idea. The imposition of the impact fee drastically affected the "young market' where a young family needed 90 to 95% financing. The family would have to come up with 5% down payment plus 3% closing costs, or 8% of the building costs. By adding an additional 4 or 5% to the cost of the home through the impact fee, "their down payment had been increased by 50%." Thus, those who were on the borderline of financing their homes were eliminated from the market. (TR 95-95)

George Robertson (TR 100-104) wanted to live in Dunedin because his family's relatives had lived there for 25 years. When looking for a place to move to from Tallahassee, he couldn't afford to purchase a new home because of the additional $800 impact fee, closing costs, etc., He was forced to consider an older home which was inadequate in that it had only one bath for his family of five. He comtemplated adding another bath unit, but that would have cost him an impact fee of $800 which he could not afford. *Thus, a family who would have used the same amount of water and contributed the*

same amount of sewage to the system whether they had one bath or two were prohibited from settling in Dunedin.

Mr. Robertson had to purchase a home outside of the city.

Fred Schroeder (TR 105-109), a brand-new home owner, had to pay the impact fee. He stated his objection to the impact fee this way:

> "It has affected me to the extent it cost me $700 and I wondered what I was getting for the $700 and at the time I discussed it with Mr. Spitzer, he referred to it as an inspection fee, inspection for what and then later I was given a sheet of paper at the City Hall which defined the fee as an assessment and in looking further I wondered what kind of an assessment and whether or not it was an assessment that was spread over the whole population or just on those who are building a new home and I found on reading the form that it was an assessment and in my interpretation of the form intended to become a fund for further water or sewer development capital expenses I believe it said and again I wondered why only a new home builder was being charged the fee and I asked Mr. Spitzer and he gave me the explanation we are not going to build, we are not going to get a permit unless we do this so we'll pay it under protest so I paid it and now I've been given an opportunity to express my feelings on it and I appreciate it." (TR 106-107)

The testimony of George Wagner (TR 109-113) president of Southern Homes, graphically illustrates what happens when you pass an impact fee on all three readings overnight:

> "Q. Would you tell His Honor what effect the ordinance has had on your particular business?

A. Well, the ordinance caught me unaware, there wasn't any notice of it. The only thing I knew about it is what I read in the papers and I hadn't made any preparation for it therefore I have about forty lots on hand. I am out of competition with the other builders due to the Impact fee, and absolutely no information of the Impact fee at all except when I read it in the paper and went to get a building permit.

Q. I see. And concerning your business, as a whole and your construction on these lots, what effect, if any, has that had?

A. Well, it cost me approximately $21,000 to hook onto the sewer and I can't compete with the rest of the builders in the County and other cities.

Q. Um-hum. How long did you say you were a builder in Florida?

A. Fourteen years and I have been a builder in Dunedin for twelve years.

Q. Have you ever had any knowledge of any type of an Impact fee or assessment fee by any of our municipalities?

A. They went up a little but they haven't, they went up some of them say that their water meters they had to raise it 75 or a hundred dollars but nothing like $800, that is in addition to the other.

Q. I am referring to an Impact fee?

A. No, I know of no Impact fee.

Q. At least in this particular area of municipalities surrounding Pinellas County?" (TR 110-111)

Kenneth Marriott, (TR 113-118), president of Ken Marriott Homes, had a subdivision outside Dunedin. They were accepted into the City in 1958 upon the con-

dition of furnishing streets and water and sewer lines. He was distressed over the fact that after putting in the water and sewer lines, Dunedin hit him with an impact fee. Marriott had a lot of building sales agreements outstanding at the time of the passage of the ordinance and had to absorb the loss. He could not build in his subdivision anymore because after the imposition of the impact fee, he had to come up with $3,000 before he could "even stick a shovel in the grounds." Marriott stated he had not been able to build on his lots because of the impact fee:

> "Q. What effect, if any, has it had on the building and selling homes inside the City of Dunedin as opposed to outside?
>
> A. Well, you are always going to get some people well, that is seven, eight hundred dollars, and that was the question. Well, seven, eight hundred dollars *to somebody wealthy don't mean much but you are talking about young people or retired people, that means something to them.* A lot of times those people talk to you and you learn later that they went on to another community or somewhere else and got a home.
>
> Actually is was a hardship to me and I lost some sales and I don't build or sell houses any place else so I had the lots. I have had them there since 1958 and there wasn't anything I could do." (Emphasis supplied) (TR 117-118)

John Carr (TR 125-144), Executive Vice President of the CBA who represents contractors and builders, savings and loan associations, commercial banks, title companies, and persons directly or indirectly related to

the construction business, testified at length about the effect of the impact ordinance upon the industry. In the past five years, $2,500 had been added to the cost of a unit through various fee charges by municipalities before the imposition of impact fees. The impact fee had the effect of "causing people to be priced out of the market." The builder has also been affected in having to overnight come up with additional funds to pay the tax which equaled more than fifty percent of his anticipated profits in multi-family construction projects. Profit on a single family dwelling on a home which costs $20,000 is approximately ten percent. With inflation eliminating one percent of the profit plus the impact fee, the single home builder had his profit completely eliminated. (TR 130)

The effect upon multi-family construction had been serious and caused an "impasse" on people trying to provide this type of shelter. Multi-family rental or condominiums were aimed solely at lower-to-moderate income purchasers. Thus, land costs had to be reduced to about $1,000 per unit. Months of planning and a long time lag to completion date of construction is characteristic of multi-family construction. Many multi-family contractors were suddenly faced with having to come up with "$70,000 overnight" on a 100-unit development. This type of impact made the project unprofitable and meant the project would

JOHN T. ALLEN, JR.
4508 CENTRAL AVE.,
ST. PETERSBURG, FLORIDA 33711

have to be built at a loss. Also, the $700 per unit tax almost approximates the land costs which in turn seriously prevented retired people from obtaining shelter. (TR 133-134)

The material testimony given by William V. Mount (TR 151-198), who was the City Manager at the time of the passage of the ordinance, centered around the purpose of raising the funds through the impact fee. Mount said that the funds were not to be used for capital improvements but were to be used to partially cover the cost of extending water and sewer lines outside the city along State Road 580, the Ranchwood-Ravenwood area, and County Road 70. (TR 155; 168-171; 173-174; 177-178; 184) The only other use of the funds was to defray the current costs of treatment of sewage. This testimony was in direct conflict with that given by the present City Manager at the time of trial, Frank E. Armstrong. *It demonstrates the point that under impact fees, the funds can be used for any municipal purpose. The only thing necessary to accomplish any purpose desired is that the city official who is in charge at the time designate or earmark the funds according to his wishes.*

During Mount's administration, the capital improvement for sewer and water was financed through revenue bonds which were sufficient to defray the cost expenditures and debt requirements. (TR 159-160) Under this

this type of financing, all users pay their fair share for capital improvements. At the time of the enactment of the ordinance, a three million dollar sewer plant funded by revenue bonds was under construction with a completion date of 1974 to take care of anticipated future needs. (TR 160-161) Mount stated the $100 tap-in fee under the ordinance was used to defray actual costs of connection. (TR 191-192)

The deposition of City Manager Frank E. Armstrong was introduced into evidence and considered by the lower court. Of substantial significance is Armstrong's testimony that at the time of the passage of the ordinance, the sewage plants had enough capacity to handle all the new "tap-ins" and that the sewage plant was presently operating within the state solid removal standards. This means that the present impact fee money was earmarked not for the needed expansion of the people paying the impact fee but for some future undetermined user. The sewage plant which had already been financed through bonds was adding a capacity of 1,000 gallons daily at the time of the deposition.

Armstrong envisioned using the money received from the impact tax for a variety of uses including new sewer lines, extending water lines in any area, ground storage tanks, new plants, etc.

Armstrong envisioned using the money received from the impact tax for a variety of uses including new sewer lines, extending water lines in any area, ground storage tanks, new plants, etc.

The City Manager envisions Section 25-71(c) as an "impact fee." He stated there are only two ways of financing capital improvements, either spread the costs to all of the people or charge an impact fee. Raising rates was not politically popular:

> "Well, I am a resident of Dunedin, and I would be perfectly honest in telling you that I would hate like the devil to have the City come along and say that I am going to have to pay yea number of dollars for more sewage and water service in order to put in additional systems to take care of people coming in when I am already sitting here paying off bonds."

Armstrong did not know what basis was used in arriving at the $700 per unit figure stated in the ordinance. Actual costs of anticipated future facilities were unknown at the time of the passage of the ordinance. The assessment had no termination date so that the funds could be kept indefinitely if capital expansion was unneeded.

Dunedin's sole witness, Harry Wilde, Jr., an engineer from Briley-Wilde and Associates, who had consulted with Dunedin concerning its water and sewer needs, gave a detailed explanation of the effect of an impact fee as

compared to other traditional methods of raising revenue. Dunedin called the witness to testify that the impact fee of $700 was insufficient to meet the needs of the City (TR 226); but what these needs were, where the impact fees were to actually go, and the role Briley-Wilde and Associates played in the assessment of the impact fee soon proved to surpass the original purpose for which the witness was called. The witness stated that the value or amount of impact fees is usually arrived at "POLITICALLY." (TR 218) *The purpose of the impact fee and the study done for the City was to expand the corporate limits to County Road 70.* (TR 244-245) Wilde admitted that the traditional means of revenue raising such as general obligation bonds, revenue bonds or certificates spread the cost of capital improvement equally across the entire community. (TR 234; 251-252) Special assessments and drainage district assessments are spread equally among all of the users of the facility. In the case of the special assessment, the property is benefited and appreciated in the amount of the assessment. Special assessments are not used to fund capital expenditures. (TR 231) Drainage districts equalize the cost throughout all the users in the district to the exclusion of the rest of the population who do not get to use the capital improvements:

"Q. Well, isn't it true that when you do a Chapter 180 or 184 on a drainage district, that the price of capital improvement is determined that notification to the people are given, that the municipality or governing board, whatever it is then sits as the board of equalization, people have an opportunity to come in and be heard and that the facility which is constructed is then only used by those people in a drainage district, isn't that a fair statement or procedure?

A. I believe that is a fair statement, yes." (TR 233)

* * * * * * * * *

"Q. Well, there are these other avenues of approach, are there not, of special assessment revenue certificates, general obligation that is or was an alternative way of the City of Dunedin to finance this particular expansion as you wish to phrase it, right?

A. That is an alternative to any municipality, yes.

Q. And under those, the general population would pay for it, isn't that true?

A. That is correct.

Q. And under the impact fee only a certain segment does?

A. On the segment which again would make the expansion required, yes." (TR 251-252)

Wilde admitted that his report to Dunedin had found that the water system was adequate and that the "sewage system will be adequate to serve present customers and recently annexed areas after completion of the three million gallon sewage disposal plant. Prior testimony had confirmed that this plant had been completed at the

time of trial and was financed by revenue bonds. In his testimony, Wilde stated:

> "Q. If an individual in a city has owned a lot for a number of years, has a water main in front of his house to be connected up, under those circumstances, if he is charged an impact fee, then he is paying a fee at that particular point in time for some future capital improvement which really doesn't exist at that point, isn't that true, because there is still capacity in the system in order for him to hook up and for him to be taken care of? Like the rest of the people, that would be true under that hypothetical situation, wouldn't it?
>
> A. If you are saying that the facility has the capability, yes, it would be true, but that is not always the case.
>
> Q. But the purpose of that would be under the situation, would be the financing of some future capital improvement opposed to using the present capital improvement, wouldn't it?
>
> A. That is correct." (TR 238-239)
>
> * * * * * * * *
>
> "Q. Well, let's boil it down to this, isn't it true that an impact fee on a particular individual can or cannot be used for his benefit or someone else's benefit or for any measure under a capital improvement found in which it is placed in the hand of the City government's discretion to expend for whatever it is in the way of sewer and savings that they want, wouldn't that be a true statement?
>
> A. It depends on the particular ordinance. We had had ordinances set up in some municipalities that would not necessarily make that correct.
>
> Q. You have never seen this one, the ordinance?

A. Are you referring to the specific ordinance in Dunedin. No, I have not.

Q. It says, if you please, I am not trying to read this so you can't see it, the section of the ordinance that is pertinent I think is that made to the meter installation charge described here, there shall be paid an assessment to defray the cost of production, distribution, transmission and treatment facilities for water and sewer provided at the expense of the City of Dunedin and it goes on and assessment unit costs --

A. It would be true assuming that this is the ordinance." (TR 246-247)

To culminate this resume of Wilde's testimony, it is significant that he did not recommend an impact fee as the means of raising revenues but had suggested the City proceed under Chapter 180, Florida Statutes (TR 253-254), which requires the creation of an area or zone, the giving of notice to the public, ascertainment of the capital costs and notice of such costs to the public, hearings, etc.

The District Court of Appeal of the State of Florida, Second District, rendered an opinion on April 30, 1975, reversing judgment for petitioners, holding that impact fees in the State of Florida could be levied by municipalities. (TR 370-378)

Petitioners filed a timely petition for rehearing which was denied June 10, 1975. (TR 381-425; 429)

JOHN T. ALLEN, JR.
4508 CENTRAL AVE.,
ST. PETERSBURG, FLORIDA 33711

The District Court filed a certificate to the Supreme Court of the State of Florida certifying that its decision in this cause "passes upon a question of great public interest." (TR 430)

JOHN T. ALLEN, JR.
4508 CENTRAL AVE.,
ST. PETERSBURG, FLORIDA 33711

POINT INVOLVED

DOES THE SUPREME COURT OF THE STATE OF FLORIDA HAVE JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT?

JOHN T. ALLEN, JR.
4508 CENTRAL AVE.,
ST. PETERSBURG, FLORIDA 33711

ARGUMENT

POINT I

DOES THE SUPREME COURT OF THE STATE OF FLORIDA HAVE JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT?

Rule 4.5 of the Florida Appellate Rules requires that petitioners show that the Supreme Court of Florida has jurisdiction to issue a writ of certiorari to the District Court of Appeal of the State of Florida, Second District, as an initial step in seeking a review of the District Court's opinion. Unfortunately, petitioners are not permitted to argue the merits of the certified question and the opinion of the District Court until the question of jurisdcition is determined.

The question of jurisdiction being vested in the Supreme Court is academic. Case law in Florida from the inception of the amendment to Article V of the Florida Constitution permitting the Supreme Court to review decisions certified by a district court as being one of great public interest uniformly holds that when a district court certifies an opinion as one of great public interest, jurisdiction is automatically vested in the Supreme Court. Respondent cannot contest the question of the vesting of jurisdiction in this Court.

For example, in the landmark case of *Susco Car Rental System of Florida v. Leonard* (Fla. 1959) 112 So.2d 832, the Third District Court of Appeals of Florida certified a question to the Supreme Court of Florida as one of great public interest. This Court in its opinion stated that when certification has been made by a district court, no review or redetermination of the point is proper:

> "Whatever merit this argument might have had before the District Court in opposition to issuance of the certificate, the language of Article V does not, on its face, leave the point open to contest in this forum. Our jurisdiction in this class of cases is that we '*may* review by certiorari any decision of a district court of appeal * * * that passes upon *a question certified by the district court of appeal to be of great public interest.*' (Emphasis supplied.) Certification is plainly a condition precedent to any review hereupon this ground. A negative decision by the district court in the exercise of its discretion in a given case would certainly present no basis for review under the quoted language. *Similarly, where a decision involves a question which has, incontrovertibly, been 'certified by the district court of appeal to be of great public interest,' then the specified condition has been fully met. No review or redetermination of the point is necessary or even proper unless by some stretch of reasoning the exercise of the power of certification could be found reviewable under related clauses defining other areas of appellate jurisdiction of this Court.*" (Emphasis supplied)

Further, in *Little vs. Sullivan* (Fla. 1965) 173 So. 2d 135, this Court stated:

> "The certificate of the District Court makes it unnecessary for us to explore jurisdictional facets of the problem presented. We proceed directly to the merits. Susco Car Rentals v. Leonard, Fla., 112 So.2d 832."

Further recitation of facts, argument, or authorities can add little to the CONCLUSIVE fact that this Court has jurisdiction to consider and determine the certified question and accompanying decision of the District Court. The District Court has issued a certification of great public interest which automatically vests jurisdiction in the Supreme Court. Please see also *Miami Beach First Nat. Bank v. Edgerly* (Fla. 1960) 121 So.2d 417; *City of Miami v. Simpson* (Fla. 1965) 172 So.2d 435; *Duggan v. Tomlinson* (Fla. 1965) 174 So.2d 393; *McLeod v. W. S. Merrell Co., Division of Richardson-Merrell, Inc.* (Fla. 1965) 174 So.2d 736; *Boulevard National Bank of Miami v. Air Metal Industries, Inc.* (Fla. 1965) 176 So.2d 94; *Jordan v. City of Coral Gables* (Fla. 1966) 191 So.2d 38; *Novack vs. Novack* (Fla. 1967) 195 So.2d 199.

JOHN T. ALLEN, JR.
4508 CENTRAL AVE.,
ST. PETERSBURG, FLORIDA 33711

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioners' Brief on the Question of Jurisdiction has been furnished by mail to The Honorable William H. Haddad, Clerk, District Court of Appela, Second District, P. O. Box 327, Lakeland, FL 33802; and that a copy of the said Brief and Transcript of record has been furnished to C. ALLEN WATTS, ESQUIRE, of Fogle and Watts, P. O. Box 817, Deland, Florida 32720, attorney for respondent; JOHN G. HUBBARD, ESQUIRE, 1960 Bayshore Boulevard, Dunedin, Florida; BURTON M. MICHAELS, ESQUIRE, P. O. Box 2744, Tallahassee, Florida; RALPH A. MARSICANO, ESQUIRE, P. O. Box 4115, Tampa, Floridan; and THOMAS G. PELHAM, ESQUIRE, P. O. Box 1833, Tallahassee, Florida, this 5th day of July, 1975.

JOHN T. ALLEN, JR., ATTORNEY