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FILED

IN THE SUPREME COURT OF FLORIDA

AUG 11 1975

SID J. WHITE
CLERK SUPREME COURT
By _____
Chief Deputy Clerk

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

BRIEF OF PETITIONERS ON THE MERITS

VOLUME II

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as to preclude the operation of an estoppel or waiver with respect to them.'"

POINT II

ARE IMPACT FEES UNCONSTITUTIONAL UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS?

The District Court devoted but one paragraph to the most important issue before this Court. It said that the ordinance does not discriminate against newcomers since every person who connects to the system would have to pay the impact tax even if he had lived in Dunedin all of his life and his property was in the heart of the City.[114] This superficial treatment failed to address the many other points raised by petitioners as constituting violation of equal protection. The District Court failed to address itself to the question of denial of procedural due process which was clearly raised and argued at all levels of this case.[115] The Florida constitutional law violations were equally ignored. These three areas warrant analysis.

A - DENIAL OF EQUAL PROTECTION.

Petitioners have steadfastly claimed that respondent's ordinances and individual impact fees as a class deny those who must pay the fee or ultimately pay the fee in increased costs, equal protection of the laws. The philosophy of equal protection is ingrained in all of us as

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114. Page 8 or Court's opinion (TR 377) (A 51)

115. Page 10 of petitioners' complaint. (TR 10)

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Americans because equal treatment of all is the cornerstone of democracy. The problem comes not in recognizing the prinicple but in its application. Frankly, after review of countless judicial opinions, petitioners' counsel has come to the realization that judicial recognition of violation of equal protection depends upon the philosophy of the court rendering the decision. Violation of equal protection is like "beauty" and finds its recognition in the eye of the beholder. Petitioners, however, know that they have been singled out and placed into a heretofore unrecognized class. The philosophy that those who are causing growth must pay cannot be made to go away by stating that some old residents might have to pay if they build a new home. The unquestionable fact in this case is that the discussion in Dunedin City Council prior, during and after passage of the ordinance was directed at "newcomers";[116] those who were coming down from the North and causing Dunedin to expand its facilities. No secret of this was made at trial, and the trial court readily began its final judgment recognizing the quest to make newcomers pay. The transcribed discussions of counsel,[117] the defendant's side of the case at trial;[118] and the argument of

116. (R 418-497)

117. (R 418-497)

118. (T 134-185) (R 1142-1193) (TR 208-259)

opposing counsel all acknowledged the fact that newcomers constituted the class to which the ordinance was addressed.[119] The Court is urged to review these areas of the record to determine the validity of petitioners' statement.

For the District Court to conclude in one part of its opinion that "the evidence clearly demonstrates drastic growth within the area logically served by the City systems"[120] and in another part of the opinion proclaim that the ordinance was not aimed at "newcomers", is patently an example of self-contradiction unworthy of the District Court.

Who is a newcomer? If a person from the North buys an existing home from a long-standing resident and then that resident utilizing the proceeds of the sale builds a new home, has not the building of that new home been caused by a "newcomer"? The District Court's definition of a "newcomer" is too narrow and unrealistic. Petitioners rest their argument upon the belief that this fact is obvious to this Court. Because a few people who might not come within the strict definition of a "newcomer" in someone's eyes must pay the impact fee does not mean that the vast and substantial portion of those affected by the ordinance are newcomers and are denied equal protection. Obviously,

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119. (T 51-56) (R 1135-1141) (TR 311-316)

120. Page 7 of Court's opinion (TR 376) (A 50; 53)

the class of people to which the ordinance was directed is "newcomers".

Petitioners' answer to the District Court's narrow interpretation of the term "newcomer" is the opinion written by Judge Nance in *Janis Development Corp. v. City of Sunrise* (C.C. 7th J.C. 1973) 40 F.Supp.41 in which building permit applicants were required to pay an additional impact fee which was in turn to be used to upgrade the city's road system. Judge Nance found that the ordinance violated equal protection clauses of the United States and Florida Constitutions. A new home builder in Sunrise is in the identical position as those who have had to pay impact fees in Dunedin. Some may have been residents of long standing or owned a lot in the heart of the City, yet Judge Nance held the ordinance discriminatory against "newcomers". This Judge's entire opinion is commended to the Court and represents petitioners' position exactly.[121] Certain portions of the opinion must be brought to the Court's attention:

> "How free is man's freedom as against the government's authority to restrict that freedom by tax or otherwise in the exercise of its police powers used ostensibly for the common good?
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> "We have many unequal laws, written and unwritten, that we live with and endure. Perhaps the most notorious is the labyrinth of

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121. (A 5-25)

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our income tax law and its shelters of payment geared to a very few. The intricacies of a tax shelter mean nothing to the average citizen. Even if he understood it, he could not afford to buy it.

"In theory, we are all born free and subject to the same equality of law, but in practice we are not. There are unwritten laws that curtail a person's freedom. Can a woman be president? She is free enough to run for it but is she free enough to win it?

"People work to support others who do not -- some cannot work, some will not.

"The point is, laws whether written or unwritten which produce inequality must be eliminated, first by education, then by legislation and, if all else fails, finally by court decree.

"Laws infringe upon some aspect of our liberty, yet laws are necessary to protect those who are or would be taken advantage of by others. Some people want more freedom than they are entitled to and would deny others the minimum.

"We do not need any more laws that tend to make part of the people unequal to others no matter the good intention or motive. It still erodes.

"Government ought to search and reach for laws that make us all equal to start and all equal in our business with government and each other.

"The 14th Amendment was first passed to insure equal protection to minorities but the courts have expanded it to cover and include every discrimination that needs redress.

"It is a long and arduous process. Each case must run the full gamut of court action and acted upon piecemeal by the judicial system.

"The people thought the 14th Amendment so important that it was passed even though the 5th Amendment guarantees due process and the 9th and 10th Amendments reserved all other rights and powers not enumerated in the Constitution to the people.

"The dictates, then, of the 14th Amendment are compelling."

* * * * * * * * *

"Common sense dictates that new construction has a tremendous impact on roads, all services and on the environment. But it is an aggravated impact, THE ORIGIN ALREADY THERE. IT IS A TOTAL COMMUNITY PROBLEM, NOT A SEGREGATED ILL PRODUCED BY ONE INDUSTRY.

"If we could wall our county and stop growth from outside, how do we stop it inside?" (Emphasis supplied in capital letters)

* * * * * * * * *

"The problem really is not new dwellings per se, but new people. New people have <u>all</u> rights and obligations or resident people -- no more, no less, in this America. They are citizens of the United States and they are all equal -- no charge, no premium -- equal! HOW LONG WERE WE NEW PEOPLE?

"There cannot be different grades of people, certainly not in the life sytle afforded by the purchase of dwellings. Our different social grades are apparent in our prejudices." (Emphasis supplied in capital letters)

* * * * * * * * *

"The power to tax should not need the art of sophistry of interpretation. The power to tax should be strictly construed and then absolutely specific and commanding.

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"It is solely a people and legislative function, not one for the courts to carve out of ambiguous language. IF GOVERNMENT WERE ALLOWED TO TAX IN THIS INSTANCE WITHOUT A DIRECT AUTHORITY FROM THE CONSTITUTION OR THE LEGISLATURE, IT WOULD BE A PRECEDENT TO TAX ANY GROUP OR INDUSTRY THAT CONTRIBUTED TO ANY TOTAL PROBLEM, WHETHER IT BE ROADS, WATER, FIRE OR POLICE PROTECTION OR ANY SERVICE RENDERED BY GOVERNMENT. For example, if one industry generates mountains and tons of debris after use by the public should this industry be taxed for its removal by sanitation collectors?

"This fee or tax does not fall within the purview of the police power authority of local government. Our country is based on law and not men. The ends should not justify illegal or unconstitutional means. No matter how good the ends are, they cannot be constitutional if the means of arriving at the ends are not constitutional.

"LAWS THAT COMMAND ONE GROUP OF PEOPLE TO PAY FOR A BENEFIT INURING TO ALL THE PEOPLE MUST BE REJECTED. Every incidence that encroaches on our individual liberty or right must be struck down. If not, the pyramid of oppressive steps would finally reach that last step and irrevocably damage those organic ideals that our forefathers thought best for the future of our people expressed so eloquently in our historic, once-upon-a mankind Constitution.

"THE NOMENCLATURE OF THE MONIES ATTEMPTED TO BE COLLECTED IS 'FEE'. IN REALITY, IT IS A TAX. EACH CONSUMER WOULD BE CHARGED DIFFERING AMOUNTS AS SCHEDULED IN THE ORDINANCE ALTHOUGH EACH CONSUMER'S IMPACT UPON THE COMMUNITY IS APPROXIMATELY THE SAME. A PERSON ADDING TO HIS HOME DOES NOT AFFECT POPULATION IMPACT, BUT HE MUST PAY. THIS SCHEDULE ALONE IS REPUGNANT TO THE 14TH AMENDMENT OF EQUAL PROTECTION UNDER THE LAW, BECAUSE OF ITS DISPARITY OF PAYMENT.

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"The fee must have a reasonable relation to the services and, conversely, there must be a reasonable relation to the type and degree of service received to the amount of fee imposed.

"The fee must be paid by the people who receive the services. If all receive it, all must pay.

"A PORTION OF THE PEOPLE CANNOT BE SINGLED OUT TO DO THAT WHICH SHOULD BE DONE BY ALL." (Emphasis supplied in capital letters)

* * * * * * * * *

"Therefore, when magnified through the eye of the 14th Amendment of the U.S. Constitution, Article VII, Sections 1 and 9, Article III, Section 2, of the Florida Constitution, Florida Statute 125 and case law, it is apparent that the subject ordinance does violate the basic concepts of constitutional safeguards.

"THE COUNTY DOES NOT HAVE THE AUTHORITY TO LEVY THE FEE OR TAX AS CONTEMPLATED BY THEIR ORDINANCE, EITHER BY CONSTITUTION OR STATUTE. A TAX MUST BE EXPLICIT AND AUTHORIZED BY THE CONSTITUTION OR GENERAL LAW. THE TAX UNDER THIS ORDINANCE IS NOT AUTHORIZED. A fee must have a direct relationship to the services provided or the ills to be remedied. Even if this were a fee, it does not." (Emphasis supplied in capital letters

The District Court failed to speak to all of the reasons denial of equal protection were claimed. These are:

1. The ordinance singles out newcomers as an improper class;

2. An improper class is created since those who connected to the system prior to the date of passage of the ordinance are treated entirely different than those after passage;

3. The building industry is singled out and attacked by the ordinance -- as Judge Nance said, who will be next, "the garbage industry";

4. Existing structures or homes are placed in a category different from those yet to be built;

5. The funds taken from petitioners were not to be used for petitioners' benefit at all.

All of the above reasons for holding impact fees violative of equal protection have direct support in case law. Other jurisdictions have held that new residents are entitled to be treated equally on the same basis as old residents; such an ordinance places a "disproportionate" and inequitable burden on new homes compared to old ones and is discriminatory.[122] *There is denial of equal protection because existing structures yet to be built are alike regarding the future use of the sewer facility.*[123] There is clear denial of equal protection when funds are used for *other sewer improvements* than those utilized by the person assessed.[124]

The testimony at trial supports the above contentions.

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122. *Weber Basin Home Builders Association v. Roy City* (Utah 1971) 487 P.2d 866.

123. *Metro Homes, Inc. v. City of Warren* (Mich. 1969) 173 N.W.2d 230.

124. *Zehman Construction Co. v. Cith of Eastlake* (Ohio 1962) 195 N.E. 2d 361.

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The Court has read the testimony of small home builders, a newcomer trying to relocate his home from Tallahassee to Dunedin, a subdivision developer, etc. Clearly, there has been an attack on the building industry by the Dunedin impact fee. A myriad of people were caught in a classification which bottomed its philosophy upon the theory of requiring newcomers to pay for all future capital improvements in Dunedin. *Wilde admitted that under the ordinance a citizen who was assessed would not receive one cent worth of benefit.* Dunedin was trying to finance extending its corporate limits.[125] Members of council admitted this fact before passing the ordinance.[126] The citizens within the corporate limits of Dunedin who had to pay the impact fee were financing the city's growth in other areas.

B - DENIAL OF DUE PROCESS.

Little argument concerning this point is required. We are talking about the amount of thousands of dollars worth of fees and figures approaching one million dollars which Dunedin has in its coffers. The ordinance was passed in one reading without notice or an opportunity to be heard by anyone. The fact that overnight property owners were "assessed" an impact fee without notice or an opportunity to be heard is a patent example of denial of

125. (T 94-97; 170-171) (R 1178-1181; 1254-1255) (TR 168-169; 244-245)
126. (R 426)

of due process of law. Every assessment statute which was passed by our Legislature permitting municipalities to assess property owners for municipal capital improvements provided for notice to the owner[127] and an opportunity to appear before the assessors.[128] Dunedin's ordinance provided for none of these safeguards.

C - VIOLATION OF FLORIDA CONSTITUTION.

The Florida decisions in *Janis* and *Venditti-Siravo*, Supra, raise questions of violation of other sections of the Florida Constitution which must be dealt with here. *Janis* raised the prohibition of grant of tax power except by general law under Article VII, Section 1(a) of the Florida Constitution. *Venditti* held that a municipality could not tax property except on an even rate under Article VII, Section 2 of the Florida Constitution and that the impact fee was in excess of the ten-mill cap provided for in the Florida Constitution. All of these sections equally apply here and each require affirmance upon the three separate grounds raised in the above Florida decisions.

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127. F.S. 170.03, 170.04; F.S. 180.09; F.S. 184.05(3)

128. F.S. 170.08, 170.09; F.S. 180.10; F.S. 184.05(5)

POINT III

SHOULD RESPONDENT BE REQUIRED TO REFUND ALL IMPACT FEES TO THE PUBLIC AS WELL AS PETITIONERS?

By cross-appeal, petitioners sought reversal of the lower court's ruling that except for petitioners, respondent could keep its impact fees it had collected. The lower court in its final judgment stated:

> "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 and collected 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."

The lower court's refusal to require respondent to pay back all of its illgotten gains is not consistent with law and was apparently based upon a lack of information which was in the record but not forcefully brought to the Court's attention. Respondent immediately filed notice of appeal after entry of final judgment in this case in order to get an automatic supersedeas and, therefore, there was not sufficient time to file a petition for rehearing on this point as the lower court had lost jurisdiction.

It is submitted that from a factual standpoint, the lower court did not realize that *when petitioners threat-*

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ened respondent with a suit at the immediate outset of the passage of the ordinance, Dunedin, upon advice of its counsel, escrowed in a bank account all of the funds that it has ever collected under the impact ordinance. Respondent has made a careful list of all the names and addresses of each person who has paid the impact fee and the amount which was paid.[129] Therefore, it will be easy and very practical for respondent to return the money. It is for this major reason that petitioners believe that the lower court was unaware of the escrow procedure when it rendered final judgment because the lower court said such a return would be "impractical." Mr. Armstrond testified:

> "Q. Well, it is a very good job. Apparently, the first fellow who paid on the 5th of May of 1972 was Mr. Lambros, but do I understand that these funds that he paid beginning at that date were then placed in an escrow fund?
>
> A. Yes.
>
> Q. You are positive of this?
>
> A. Absolutely positive.
>
> Q. What could you tell me to look to to establish this fact? What proof do you have?
>
> A. All the way back to a time contract that I have with the banks where this money is deposited and is earning interest..
>
> Q. You had a time contract with banks.
>
> A. That's right..

129, (R 107-112; 200)

Q. That is in the possession of the City of Dunedin?

A. Yes.

Q. And that time contract was set up when?

A. It was set up in May of 1972, probably June of 1972. You see, what we do is we set up a special account in our books for water capital expansion and sewer capital expansion, and every amount of money that was collected of that $325.00 and $375.00 is pinpointed specifically to that account.

Q. Do you have that contract where you could look at it at this time?

A. Well, I have a contract in existence right now that expires, I think, October 2nd. October 2nd we will have put more money into the account.

Q. I am interested in the first one. What I asked you is, do you have that where you could put your hands on it?

A. No, because these time contracts are only good for ninety days. At the end of ninety days, you have got a new one.

Q. Has it been the same bank?

A. Yes.

Q. What bank is that, please?

A. I will have to check. It is Southeast National Bank. They have had it since the very beginning.

Q. You don't have anything there to show me?

A. Let me see. September 26, 1972 was the first date that we put this in a time contract.

Q. Did you receive instructions to do this, or was this something you did as a finance director?

A. It was recommended by the attorney that this would be the best thing to do, to hold these moneys in escrow.

Q. Now, do you know as a fact that we had discussed or I had personally discussed with the City of Dunedin lawyers the problem that the contractors and builders were having and the complaint that we had concerning the ordinance and that this is the reason those funds were escrowed?

A. That's right.

Q. That is true?

A. Yes.

Q. And I think they consulted you to find out whether or not they were being escrowed, and you indicated when they initially inquired that they weren't, and then later on or simultaneously or whatever, it was recommended that they be escrowed. Is that the truth of the thing?

A. No. That is not the truth of the thing. The truth of the thing, as I told you, is when we adopted this ordinance, we immediately set up a special account, our utility account and water capital expansion account so any money we took in was immediately credited into these accounts.

Q. Was anybody paid out of those accounts?

A. Never. The only money ever paid out of those accounts was the refunds that we gave to the various developers who contended that in essence they had a contract by approval of a sight plan, which had been signed prior to May 1st, and as a result, we did refund quite a bit of money, and this in the books there.

Q. The truth of the thing is that the thing was escrowed at the suggestion of your coun-

sel, but that you had two accounts that you were putting the money into?

A. That's right." (R 1300-1303)

Interrogatory No. 14 in evidence with attached exhibits[130] shows that a total of $220,625.00 was collected through February 5, 1974. At trial and at present, respondent is holding over three-quarters of a million dollars which it has collected under the impact fee ordinance. It would be unconscionable for Dunedin to retain such amounts extracted from newcomers through the vehicle of an ordinance which was VOID. If the ordinance was voidable in that its right to passage was not questioned but its legality was improper for some other reason, a different result might be warranted. In McQuillin on Municipal Corporations 3rd Ed., Validity of Ordinances, Sec. 20.01, p. 3, it is stated:

> "It is a general rule that an ordinance is void where it is passed without authority therefor, or without compliance with statutory requirements, which must be at least substantial compliance and, according to some authorities, a strict compliance."

The Court in *Venditti-Siravo, Inc., v. City of Hollywood,*[131] 39 Fla. Supp. 121, required repayment:

> "The defendants are ordered to file with this Court and with the plaintiffs counsel, within thirty days from the date hereof, a full and complete accounting of

130. (R 107-112; 200)
131. (A 1-4)

> all funds, revenues and charges raised or collected by defendants in the enforcement of said ordinances, together with a listing of the respective names and last known addresses of each person or entry from whom said charges or revenues were received, and the date or dates of each said transaction. Following the accounting of the revenues raised by the City and the determination of the persons or entries from whom said funds have been raised, the Court shall enter a judgment and order of restitution against the defendants and in favor of those persons, and further proceedings shall be held herein to determine an award of an appropriate attorneys fee to be paid to the plaintiffs' counsel from and as a result of the funds recovered by the judgment of restitution to be hereinafter made."

The circuit court in *Janis Development Corp. v. City of Sunrise,*[132] 40 Fla. Supp. 41, also required full restitution because the city lacked authority to promulgate the ordinance and it was void:

> "The defendant county and defendant municipalities, and any other municipalities purporting to have previously acted under authority of Broward County Ordinance 73-2, or municipal adoption of said ordinance, shall forthwith refund in full any and all amounts of 'impact fees' or taxes collected under authority of same, said refund in full to be completed not more than thirty days after the date of this final judgment."

It must be emphasized that petitioners specifically made a request for the return of all of the funds to the citizens of Dunedin in its class action complaint.[133]

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132. (A 5-25)

133. See complaint and prayer for relief, para. "B" (R. 11) (TR 12)

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There can be no discretion in the remedy or result of a suit which finds that an ordinance is void and enacted without authority. Equality under law is mandatory. If the plaintiffs in the *Venditti* and *Janis* cases, supra, are entitled to a complete refund, so must the petitioners be awarded such right. The whole reason for petitioners' bringing of this action was to relieve the citizens of Dunedin from the monetary oppression of the ordinance. At this point, petitioners have been denied the main fruit of their labor in the legal vineyard. The rule of law applicable to this situation requires a complete refund.

POINT IV

DID THE LOWER COURT ERR IN DENYING PETITIONERS' MOTION TO TAX COSTS AGAINST RESPONDENT FOR THE EXPENSES OF TRANSCRIPTION OF DISK OR RECORD RECORDINGS OF THE DUNEDIN CITY COMMISSION MEETING HELD AT THE TIME OF THE PASSAGE OF THE ORDINANCE UNDER REVIEW?

The meetings of the Dunedin City Council in which the ordinance was passed were machine recorded. These recordings were obviously linked to other portions of the meeting which did not deal with the passage of the ordinance. In order to properly present and prove "legislative intent" to pass a "tax", to assess "newcomers" and failure to give notice to the public under the issue of failure to accord procedural due process, these tapes were transcribed by a court reporter who certified as to their accuracy. The

transcript was offered and admitted into evidence at trial.[134]

On May 28, 1974, petitioners filed motion to tax costs which included the court reporter's charge for transcribing the material portion of the Dunedin City Council's deliberations on May 1, 1973, and May 10, 1973.[135] The total cost was $448 which is a lot of money to a nonprofit corporation such as petitioners. Amazingly, the lower court refused to assess the cost of these transcripts.[136] An interlocutory appeal was perfected seeking reversal and consolidated with the appeal in the District Court.

Florida Statute 57.041 makes it *mandatory* for a court to award legal costs and charges to the prevailing party. The statute uses the word *shall* in its direction:

> "(1) The party recovering judgment *shall* recover all his legal costs and charges which shall be included in the judgment; but this section does not apply to executors or administrators in actions when they are not liable for costs." (Emphasis supplied)

It would appear that the case of *White v. Means* (Fla. App.1973) 280 So.2d 20, although construing another cost statute, stands for the proposition that the use of the word "shall" in a statute places a mandatory obligation upon the trial court to assess costs. To be sure, case law holds assessment of costs to be discretionary, but the dis-

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134. (T 73-74) (R 1157-1158) (TR 148-149)
135. (A 29-30)
136. (A 30-31)

cretion permitted is confined to determination of such things as whether depositions were necessary and served a useful purpose at trial.[137] In other words, whether the criteria set forth in the statute has been met. In this case, the transcript of council meetings are similar to depositions in scope. There is no question that they were used at trial and served a useful purpose. Having eliminated these two criteria as a matter of law, the discretionary elements were eliminated and the transcript costs became legal costs within the meaning and provisions of the definition of F.S. 45.041 F.S.A. 1974. The court had no discretion under these circumstances and, since the petitioners were the prevailing parties, was required to assess the costs of the transcripts against Dunedin.

Under the circumstances, discretion cannot mean the whim or caprice of the trial judge. The rule of law is clear that in the absence of any reason or justification as to why costs were not awarded the prevailing party in the record, there is an abuse of discretion. In *Blynn v. Hirsch* (Fla.App.1962) 136 So.2d 666, the Third District said:

> "The chancellor's failure to award costs we conclude was error. The appellant, who was plaintiff below, prevailed on the cause

137. *Rutkin v. State Farm Mutual Automobile Insurance Company* (Fla. App.1967) 195 So.2d 221; affirmed *State Farm Mutual Automobile Insurance Company v. Rutkin* (Fla.App.1967) 199 So.2d 705; *Simpson v. Merrill* (Fla. 1970) 234 So.2d 350.

> of action alleged in his complaint and was awarded a decree representing one-half of the profits received by the appellee from the sale of real property which was the subject matter of the partnership agreement. In the absence of anything in the record to the contrary, or any reason or justification why costs should not have been awarded the prevailing party, we conclude that it was an abuse of discretion for the chancellor to have failed to award to the appellant taxable costs incurred in the prosecution of the action. As the Supreme Court of Florida observed in Spencer v. Young, Fla.1953, 63 So.2d 334, when commenting on the assessment of costs in a chancery action:
>
> > '* * * the Chancellor has a discretion in the matter of assessing costs, but this is a sound judicial discretion and, in view of the issues presented and the final result of the action, it was an abuse of discretion * * * in the case at bar. Costs should have been assessed against the losing party.'"

There is no reason stated in the record and no legal reason for failure of the lower court to tax justifiable costs. Reversal is requested upon this point.

CONCLUSION

On May 1, 1973, the City of Dunedin passed an impact fee requiring all landowners who applied for a building permit (later amended to certificate of occupancy) to pay $700 for the privilege of being permitted to hook up to water and sewer. The ordinance assessed the normal $100 tap-in fee and an additional charge for water meter and "hook-up" to the water system in addition to the impact fee. The ordinance stated that *in addition* to other as-

sessments, an assessment to defray the costs of "production, distribution, transmission, and treatment facilities for water and sewer" was to be paid as an impact fee according to a designated schedule.

Petitioners filed suit seeking to have the ordinance declared void and all of the funds, which now amount to more than three quarters of a million dollars, returned to the citizens and other persons which were required to pay the assessment. Petitioners' complaint charged that respondent had no authority to enact the ordinance, the ordinance was an improper and illegal special assessment, and was unconstitutional in that it violated equal protection and due process guarantees of both state and federal constitutions.

The lower court held that the impact fee was a "tax" and that respondent had no legislative authority to pass such a taxing ordinance and enjoined respondent from further charging the impact fee, ordered return to CBA members of part of the impact fee but declined to require respondent to repay all funds collected under the ordinance. After entry of judgment the court refused to assess costs of $448 against respondent for transcription of two city council meetings in which the ordinance was passed.

Respondent appealed the final judgment, and petitioners cross-assigned as error the trial judge's failure to require repayment of all funds collected under the

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ordinance and failure of the lower court to assess costs for the transcription of the city council's meetings.

The Second District Court of Appeal reversed the trial court's ruling holding that respondent had legislative authority to pass its impact fee ordinance. Although the District Court denied petitioners' petition for rehearing, it certified its opinion to the Supreme Court as one of great public interest.

Petitioners seek affirmance of the trial court's ruling and judgment that respondent was without legislative authority to pass its impact fee ordinance on the following grounds:

1. The imposition of an assessment to defray the cost of production, distribution, transmission and treatment facilities for water and sewer constitutes the collection of funds over and above the out-of-pocket costs of respondent's costs of actual connection expenses, and as such, by law, constitutes revenue raising through the use of municipal taxing power. The fee charged is thus a tax.

2. The Florida Constitution and laws of Florida require specific legislation authorizing municipal taxation before such a tax can be imposed.

3. The lower court's analysis of Florida statutory law which shows a complete absence of statutory authorization by the legislature of the State of Florida for municipalities to pass impact fee ordinances is legally correct

and should be reinstated.

4. THE FACT THAT THE FLORIDA LEGISLATURE HAS BEEN CONSIDERING BUT HAS NOT PASSED IMPACT FEE LEGISLATION CONCLUSIVELY SHOWS THAT THE DISTRICT COURT'S OPINION IS ERRONEOUS.

5. The District Court's determination that a municipality may pass a revenue producing ordinance to fund capital improvements of its sewer and water system and such an ordinance does not constitute the utilization of the taxing power of municipalities is totally incorrect in that:

(a) The rationale is not founded upon proper interpretation of the statutes and case law cited in the District Court's opinion as supportive of its position;

(b) The District Court cannot cite to one specific statute authorizing such impact fees.

6. The cases of *Janis Development Corp. v. City of Sunrise, Venditti-Siravo, Inc. v. City of Hollywood, Pizza Palace of Miami, Inc. v. City of Hialeah* and *Admiral Development Corporation v. City of Maitland*, supra, are clearly supportive of petitioners' position here and should be approved as the controlling law in this case.

7. The case of *Janis Development Corp. v. City of Sunrise,* recently decided by the Fourth District, conflicts with the opinion of the District Court under review and the Fourth District's opinion should be applied to the

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case at bar and approved as the law of Florida.

8. The ordinance in reality constitutes an illegal special assessment.

9. The ordinance is violative of equal protection clauses of the United States and Florida Constitutions in that:

(a) Its purpose and intent is to penalize "newcomers" as a class;

(b) An improper class is created since those who connected to the system prior to the date of passage are treated entirely different than those after passage;

(c) The building industry is singled out and attacked by the ordinance;

(d) Existing structures or homes are placed in a classification different from those yet to be built;

(e) The funds taken from petitioners were not to be used for petitioners' benefit at all.

10. The ordinance violates procedural due process provisions of the United States and Florida Constitutions in that petitioners were assessed literally thousands of dollars at one single meeting of the City Council of Dunedin and were not accorded notice of the ordinance or an opportunity to object or be heard.

Florida precedent on impact fees has uniformly held that since the ordinance implementing the fee is void and enacted without authority, the enacting municipality must

return all of the tax monies collected. The lower court's order is contra to this established law. The record reveals that respondent has escrowed the impact fee funds and has a complete list of all those who have paid the impact tax. Respondent cannot be allowed to gain three quarters of a million dollars by its illegal action. This would be unconscionable. The people of this state and Dunedin are entitled to a return of their dollars which have been exacted from them by the ominous taxing power of government.

Should petitioners prevail here, they must be accorded their legitimate costs of transcribing the council meeting in which the ordinance under attack was passed. The lower court only had discretion to determine whether the transcripts were admitted into evidence and used at trial. The record clearly shows that these two criteria were met and, accordingly, the area of discretion accorded the trial judge was removed.

Petitioners request this Court to grant a petition for writ of certiorari entering an order quashing the decision of the District Court sought to be reviewed, holding that impact fees are illegal in the State of Florida, both upon the grounds that municipalities lack legislative authority for impact fee passage and that impact fees are violative of equal protection and due process clauses of the United States and Florida Constitutions, thereby

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restoring and affirming the Circuit Court's decision in this cause and requiring all funds collected by the City of Dunedin to be refunded and petitioners' costs expended for transcription of Dunedin City Council meetings be assessed against respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Petitioners on the Merits has been furnished by mail 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; BURTOM M. MICHAELS, ESQUIRE, P. O. Box 2744, Tallahassee, Florida; RALPH A. MARSICANO, ESQUIRE, P. O. Box 4115, Tampa, Florida; and THOMAS G. PELHAM, ESQUIRE, P. O. Box 1833, Tallahassee, Florida, this 10th day of August, 1975.

JOHN T. ALLEN, JR., P.A.