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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,

v.

CITY OF DUNEDIN, FLORIDA,

Respondent.

CASE NO. 47,662

BRIEF OF PETITIONERS ON THE MERITS

VOLUME I

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I N D E X

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I N D E X
(Continued)

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CITATION OF AUTHORITIES

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CITATION OF AUTHORITIES
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CITATION OF AUTHORITIES
(Continued)

STATUTES, BILLS, CONSTITUTIONS, AND LEGAL ENCYCLOPEDIAS

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STATUTES, BILLS, CONSTITUTIONS, AND LEGAL ENCYCLOPEDIAS
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STATUTES, BILLS, CONSTITUTIONS, AND LEGAL ENCYCLOPEDIAS
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STATEMENT OF THE CASE

In this brief, petitioners, Contractors and Builders Association of Pinellas County, Inc., 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 "petitioners". Respondent, City of Dunedin, who was 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 "respondent."

The following symbols will be used:

TR - Transcript of Record

R - Record-on-Appeal

T - Transcript of Trial

A - Appendix of Petitioners, Contractors and Builders Association of Pinellas County, Hallmark Development Company, Inc., Kenneth A. Marriott, Vernon M. Miller and George C. Wagner

THIS PETITION FOR CERTIORARI INVOLVES THE QUESTION OF THE LEGALITY OF "IMPACT FEES" IN FLORIDA IN WHICH A MUNICIPALITY IMPOSES A CHARGE OR TAX ON THE BUILDING INDUSTRY OR UPON "NEWCOMERS" TO DEFRAY THE ENTIRE COST OF PROVIDING A PARTICULAR MUNICIPAL SERVICE TO THE ENTIRE COMMUNITY.

On February 2, 1973, petitioners filed a declaratory judgment action on behalf of its members together with individually affected builders seeking to void respondent's impact fee ordinance.[1] The material portions of the ordinance which were ruled upon by the Court[2] 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

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1. (R 1-12) (TR 1-12)

2. The ordinance was amended several times but not materially changed from the pertinent sections as plead in the original complaint. See R 1033-1050; 1051; 1052-1053; 1055; 1056-1057; 1058-1059; 1060-1062; 1063-1066; 1073-1074 - for final amendment see R 1063-1066.

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." (R 1064)

"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 charge.

"(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."[3] *In ADDITION to the normal connection charge of $100 and installation charge for a meter which varied in cost as to size and location,*[4] *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

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3. (R 4) (TR 4)

4. Whether inside city limits or outside city limits.

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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." (R 4-5)

The complaint attacked the ordinance upon three basic 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.

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;[5] *it constituted general taxation for facilities enjoyed by all citizens;*[6] 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.

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

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5. If for existing water and sewer plants it required a portion of the citizens to bear the unequal burden for the benefit of all; if for future water and sewer plants it required a portion of the citizens to pay for facilities to be enjoyed by all citizens.

6. A conclusion which the lower court agreed with.

> unreasonable, grossly unequal and confiscatory and devoid of any rationsl 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." (R 10-11)

After denial of respondent's motion to dismiss,[7] respondent filed an answer essentially denying the material allegations of petitioners' complaint.[8] The case went to trial on March 7, 1974. The Honorable B. J. Driver rendered final judgment essentially finding for petitioners on March 29, 1974.[9] 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'.

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7. (R 13-17; 20) (TR 13-17; 20)

8. (R 66-67) (TR 21-22)

9. (R 724-729) (TR 337-342)

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 or 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 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 Sections 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.2d 318; STEWARD vs. CITY OF DELAND, 75 So.2d 584; and STATE vs. CITY OF ST. PETERSBURG, 61 So.2d 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 the 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 Dunedin 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 connectint to its municipal water and sewer systems all within the purview and under the authority of Chapters 167.01 and 167.73, Florida Statutes.

"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."

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Thereafter, respondent filed notice of appeal on April 2, 1974.[10] Petitioners 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.[11]

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. Petitioners filed a petition to review cost judgment on or about June 26, 1974.[12] 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.[13]

The District Court filed an opinion on April 30, 1975, reversing judgment for petitioners.[14] A timely-filed petition for rehearing was denied by the District Court on June 10, 1974.[15] Certification of this case to the Supreme Court of Florida as one of great public interest was filed simultaneously with the District Court's order.[16]

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10. (R 730) (TR 343)
11. (R 1080) (TR 348)
12. (TR 352-356)
13. (TR 363-365)
14. The District Court concluded that petitioners' cost judgment would also have to be reversed since it ruled for respondent in the main appeal.
15. (TR 381-425; 429)
16. (TR 430)

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On July 7, 1975, petition for certiorari invoking the District Court's certification was filed in the Supreme Court. This Court granted petitioners' petition for certiorari by order dated July 16, 1975, directing oral argument be heard in this case October 10, 1975.

STATEMENT OF THE FACTS

The portion of respondent's 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:
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> | | |
> |---|---|
> | 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. * *" (R 1065)

The material facts bearing upon the trial 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,[17] a small general contractor

17. (T 17-25) (R 1162-1169) (TR 93-99)

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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.[18] 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 tax, "their down payment had been increased by 50%." Thus, those who were on the borderline of financing their homes were eliminated from the market.[19]

George Robertson[20] 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 could not afford to purchase a new home because of the addition-

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18. (T 19-21) (R 1103-1105) (TR 94-96)

19. (T 21-22) (R 1105-1106) (TR 96-97)

20. (T 26030) (R 1110-1140) (TR 101-105)

al $800[21] 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 contemplated 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,[22] a brand-new home owner, had to pay the impact fee. He stated his objections 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

21. At the time Robertson was looking for a house, the impact fee was $800.00. The ordinance was later amended and the impact fee reduced to $700.00. See and compare R 1061 and R 1065.

22. (T 31-35) (R 1115-1119) (TR 106-110)

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" (T 32-33)(R 1116-1117) (TR 107-108)

The testimony of George Wagner,[23] 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, had 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 Impact fee or assessment fee by any of our municipalities?

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23. (T 35-39) (R 1119-1123) (TR 110-114)

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?" (T 36-37) (R 1120-1121) (TR 111-112)

Kenneth Marriott,[24] president of Ken Marriott Homes, had a subdivision outside Dunedin. They were accepted into the City in 1958 upon the condition 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 ground." 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*

24, (T 39-44) (R 1123-1128)

> *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 it 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) (T 43-44) (R 1127-1128) (TR 118-119)

John Carr,[25] 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 cost $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

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25. (T 51-70) (R 1135-1154) (TR 96-144)

completely eliminated.[26]

The effect upon multi-family construction has 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 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.[27]

The material testimony given by William V. Mount,[28] who was 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-

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26. (T 56) (R 1140) (TR 131)

27. (T 59-60) (R 1143-1144) (TR 134-135)

28. (T 77-124) (R 1161-1208) (TR 152-198)

Ravenwood area, and County Road 70.[29] 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.[30] Under 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.[31] Mount stated the $100 tap-in fee under the ordinance was used to defray actual costs of connection.[32]

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29. (T 81; 94-97; 99-1101; 103-104; 110) (R 1165; 1178-1181; 1183-1184; 1182-1188; 1194) (TR 156; 169-171; 173-184; 177-178; 184)

30. (T 85-86) (R 1169-1170) (TR 160-161)

31. (T 86-87) (R 1170-1171) (TR 161-162)

32. (T 117-118) (R 1201-1202) (TR 191-192)

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The deposition of City Manager Frank E. Armstrong[33] was introduced into evidence and considered by the lower court.[34] 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.[35]

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.[36]

The City Manager envisions Section 25-71(c) as an "impact fee."[37] He stated there are only two ways of financing capital improvements, either spread the costs to

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33. (R 1273-1330)

34. (T 125-126) (R 1209-1210) (TR 199-200) NOTE: Armstrong's testimoney appears in deposition form and not in the transcript.

35. (R 1312)

36. (R 1316-1317)

37. (R 1319)

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all of the people or charge an impact fee.[38] 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." (R 1235)

Armstrong did not know what basis was used in arriving at the $700 per unit figure stated in the ordinance.[39] Actual costs of anticipated future facilities were unknown at the time of the passage of the ordinance.[40] The assessment had no termination date so that the funds could be kept indefinitely if capital expansion was unneeded.[41]

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;[42]

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38. (R 1293)

39. (R 1237)

40. (R 1237)

41. (R 1318)

42. (T 152) (R 1236) (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."[43] *The purpose of the impact fee and the study done for the City was to expand the corporate limits to County Road 70.*[44] 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.[45] 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.[46] 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 im-

43. (T 144) (R 1228) (TR 218)

44. (T 170-171) (R 1254-1255) (TR 244-245)

45. (T 160; 177-178) (R 1244; 1261-1262) (TR 234; 251-252)

46. (T 157) (R 1241) (TR 231)

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provement 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 of procedure?

A. I believe that is a fair statement, yes." (T 159) (R 1243) (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." (T 177-178) (R 1261-1262) (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 testi-

mony, 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." (T 164-165) (R 1248-1249) (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." (T 172-o72) (R 1256-1257) (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[47] 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 cost to the public, hearings, etc.

47. (T 179-180) (R 1254-1255) (TR 253-254)

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POINTS INVOLVED

POINT I

HAS THE LEGISLATURE OF THE STATE OF FLORIDA GRANTED FLORIDA MUNICIPALITIES POWER TO ENACT IMPACT FEE ORDINANCES?

POINT II

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

POINT III

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

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.

ARGUMENT

AN OVERVIEW OF THE CASE BEFORE THE COURT

The question of the validity of impact fees comes to this Court with much legal conflict. The purpose of this "overview" is to initially bring these legal conflicts and issues into focus and to the attention of this Court, leaving the details of the arguments upon such points to later sections of this brief. Classically, impact fee cases are divided into two basic issues: The so-called "threshold" issue in which the existence of legislative authority for

enactment of the ordinance is examined; the constitutional issues concerning the validity of the ordinances. This case presents such classic issues.

The District Court's opinion validating sewer connection fees as a *means for municipal financing* of sewer and water capital requirements has been rendered in the face of pending but unpassed impact fee legislation in the legislature of Florida[48] and five Florida decisions[49] rendered by District and Circuit Courts which clearly indicate that the District Court rendered an incorrect decision in the case sub judice.

THE PARADOX HERE IS HOW THE DISTRICT COURT RULED THAT THE FLORIDA LEGISLATURE HAD GRANTED MUNICIPALITIES THE RIGHT TO RAISE REVENUES TO FUND ITS SEWER AND WATER SYSTEMS WHEN AT THE VERY TIME THE DECISION WAS FILED, THE FLORIDA LEGISLATURE WAS CONSIDERING THE QUESTION OF WHETHER IT SHOULD GRANT MUNICIPALITIES AUTHORITY TO PASS SUCH ORDINANCES. To assume the Florida Legislature naive together with three circuit judges and two district courts

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48. (TR 397-425)

49. *Venditti-Siravo, Inc. vs. City of Hollywood* (C.C. 17th J.C. 1973) 39 Fla.Supp.121; *Janis Development Corp. vs. City of Sunrise* (C.C. 7th J.C. 1973) 40 Fla.Supp.41; *City of Sunrise vs. Janis Development Corp. vs. City of Sunrise* (not yet reported) Case No. 73-1239 A 74-306 opinion filed April 18, 1975 - 4th D.C.A.; *Pizza Palace of Miami, Inc. vs. City of Hialeah* (Fla. 3rd D.C.A. 1970) 242 So. 2d 203; *Admiral Development Corporation v. City of Maitland* (Fla. 4th D.C.A. 1972) 267 So.2d 860. (Note: for copy of all cases cited see Petitioners' Appendix)

in thinking that there does not exist legislative authority to impose impact fees upon municipal citizens is patently incredible. Obviously, the Florida Legislature knows what authority has and has not been delegated by legislative enactment. The unsoundness of the decision of the District Court is manifested by the opinion's complete failure to point to one specific statute as a basis for its decision.[50] Clear patent error is obviously demonstrated by this fact alone.

To be sure, the proof of legislative consideration is in the record-on-appeal. The proof and issues were before the Circuit Court[51] and the District Court.[52] Judge Driver in his opinion in this case commented:

> '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

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50. See Page 7 of Court's opinion. (TR 376)

51. (TR 341)

52. (TR 397-425)

> 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'; * *" (R 729) (T 341)

Aside from the obvious conflict between the beliefs of the Florida Legislature and the Second District Court of Appeal, there are other important issues for this Court to consider.

Analysis of impact fee ordinances has led other Florida courts to the conclusion that municipal fund raising via impact fees constitutes a TAX since the amount of the fees charged by the ordinance are in excess of the necessary expenses of regulation emanating from the city's police power.[53] In other words, the impact fee is utilized as a *revenue-producing vehicle* and as such is a tax. This was precisely the ruling of the circuit judge in the case

53. *Janis Development Corp. vs. City of Sunrise* (not yet reported) Case No. 73-1239 and 74-306 - opinion filed April 18, 1975 - 4th D.C.A. (See A 37-43)

at bar. This decisive point is clearly stated in *Weber Basin Home Builders Association vs. Roy City* (Utah 1971) 487 P.2d 866:

> "THE CITY DOES CONTEND THAT THE COLLECTION OF THIS ADDITIONAL MONEY IS NECESSARY TO IMPROVE ITS WATER AND SEWER SYSTEMS BECAUSE OF THE CONSTRUCTION OF NEW HOMES.
>
> "AS A PREFATORY FOUNDATION TO CONSIDERING THE PROBLEM PRESENTED IN THIS CASE IT IS APPROPRIATE TO HAVE IN MIND THAT THERE IS A DISTINCTION BETWEEN THE AUTHORITY OF A CITY TO CHARGE A FEE FOR THE GRANTING OF A LICENSE OR A PERMIT TO CARRY ON BUSINESS THEREIN, AND THE AUTHORITY TO IMPOSE A TAX. HOW SUCH EXACTIONS SHOULD BE CLASSIFIED DEPENDS UPON THEIR PURPOSE. IF THE MONEY COLLECTED IS FOR A LICENSE TO ENGAGE IN A BUSINESS AND THE PROCEEDS THEREFROM ARE PURPOSED MAINLY TO SERVICE, REGULATE AND POLICE SUCH BUSINESS OR ACTIVITY, IT IS REGARDED AS A LICENSE FEE. ON THE OTHER HAND, IF THE FACTORS JUST STATED ARE MINIMAL, AND THE MONEY COLLECTED IS MAINLY FOR RAISING REVENUE FOR GENERAL MUNICIPAL PURPOSES, IT IS PROPERLY REGARDED AS THE IMPOSITION OF A TAX, AND THIS IS SO REGARDLESS OF THE TERMS USED TO DESCRIBE IT. In some states where the power granted cities does not expressly authorize the collection of a license fee for the purpose of raising revenue generally, the courts have held that the charge for such licensing must bear some reasonable relationship to the cost of regulating the business so licensed. It is reasoned that even though license fees sufficient to cover such costs are a necessary concomitant of the police power, fees in excess thereof are in reality a form of taxation, which may not be imposed by the city without express authorization of the legislature."

The absolute key to the proper judicial determination of this case is to recognize precisely what an impact

fee is and how it relates to other classic forms of municipal financing. The opposition in this case has used semantics in an attempt to brand an impact fee as a sewer tap-in fee or user charge and then use and apply statutory and case law which relates to sewer tap-in fees and user charges as legal support for upholding the validity of an impact fee. This is using "a wolf in sheep's clothing" in the truest sense of the word by labeling an impact fee a sewer charge or tap-in fee. Nothing could be further from the truth. The trial judge was not fooled by this attempt at playing upon semantics. He recognized that an impact fee was a tax or an attempt to raise funds for municipal purposes which was totally *unrelated* to reasonable charges for furnishing services and facilities to municipal citizens:

> "* * 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."
>
> * * * * * * * *
>
> "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 afore-

> said statutes, but in effect is an effort to provide assessments for construction of a system in a manner prohibited by law. * *" (R 726-727) (TR 339-340)

THIS COURT IS URGED TO BE EXTREMELY CAREFUL IN UTILIZING LEGAL PRECEDENT WHICH IS DIRECTED NOT TO IMPACT FEES BUT TO TAP-IN FEES AND SEWER CHARGES WHICH MUST BEAR A SUBSTANTIAL RELATONSHIP TO THE COST INVOLVED IN PROVIDING THE SERVICE. A prime example is an analysis of the ordinance under review. The impact fee or tax "assessment" is not a tap-in fee or a charge for installation of meters.

1. Section 25-31 provides for a fee of $100 to be paid as a permit and connection fee. This is a traditional tap-in fee charged by municipalities.and is not under attack here. This fee was raised from $50 to $100[54] at the time of the enactment of the impact fee at the suggestion of City Manager Armstrong to cover the costs of connections.[55]

2. The connection charge for water according to meter size based upon two criteria (inside city and outside city) are provided for in Section 25-71(a) and (b).[56] These are the normal and traditional connection fees which again are not contested but which are referred to in the district court's opinion as examples of cases supporting the dis-

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54. Compare R 1060 to R 1065 - Dunedin Ordinances

55. (R 1277; 1279)

56. (R 1065)

trict court's decision.

3. Thus, connection charges for an average home in the City would be $100 for sewer and $170 for water using a one-inch meter or a total of $270. *The impact fee or assessment is in addition to this amount.* For a single dwelling, the cost of the tap-in fee plus the impact fee would be $970. ($270 plus $700)

Subsection (c) of Ordinance 25-71 which was enjoined from further enforcement by the lower court states:

> "(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 |
>
> (R 1065)

An analysis of this section demonstrates it is a tax and is subject to the abuses of government in not being required to be spent for the benefit of the individual paying the impact fee or for any one single designated purpose.

The key is the word ASSESSMENT used in the ordinance. Assessment is obviously another word for tax -- one assesses a tax -- it is unrelated to any costs of installation or anything else. We must remember that the City of

Dunedin chose the word "assessment" in drafting its ordinance and no one else. Armstrong admitted that he did not know the basis for the $700 figure[57] and that he could use it for sewer lines, plant or any other "capital expenditure."[58] Harry Wilde on direct admitted an impact fee is politically set.[59] Armstrong candidly admitted that it was not politically expedient or proper to raise the cost of water and sewer so that capital expenditures could be borne by all citizens who were going to use the capital assets.[60] *The crowning blow is the uncontradicted evidence that Dunedin wanted the impact fee to expand its corporate limits along County Road 70 and the Ranchwood-Ravenwood area.*[61] Briley-Wilde's survey which precipitated the enactment of the ordinance was directed exclusively to the expansion along County Road 70.[62] Now, what are the "newcomers" really paying for? Is there not really a wolf in sheep's clothing lurking in the impact fee ordinance? It was begrudgingly admitted by Wilde that a payer of an impact fee under the conditions of this ordinance would never see his money used for any capital expenditure which he

57. (R 1237)

58. (R 1316-1317)

59. (R 1228)

60. (R 1235)

61. (T 94-97; 170-171) (R 1178-1181; 1254-1255)

62. (T 170-171) (R 1254-1255)

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would use or need.[63] The City still had capacity to add people to sewer and water at the time of trial. This fact was acknowledged in the Briley-Wilde report and by Armstrong and Wilde.[64] *What were impact fee payers getting for their money under this circumstance??? The answer is an opportunity for their city to expand its corporate limits.*

The fact is that this matter is rotten to the core. It exposes an impact fee for exactly what it is -- a taxation of a few for the enjoyment of many. Impact fees are born not of sound municipal financing but of policital expediency. It is easy to say to a "newcomer" you must pay the whole load even though you may not benefit one iota as the result of the payment. If the newcomer can't afford the cost, he has to move on. This is a good way to have an undeclared moratorium.

All of this injustice stems from the fact that impact fees do not fit into the traditional scheme of municipal financing. Capital improvements have always been paid for by the general public through general obligation bonds, revenue bonds or certificates, or by a portion of the monthly charge to customers for water and sewer being set aside for further capital expansion. When a specific group of users were to be singled out to pay the entire

63. (T 164-165) (R 1248-1249)
64. (T 180) (R 1312; 1264)

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cost, the method employed was either by special assessment[65] or establishment of drainage districts.[66] Both concepts abided by the principles of due process and equal protection in that the persons paying for the capital improvements would *exclusively* use the facilities they were paying for and their property would be benefited equal to the assessment. Both required notice to the property owners, the establishment of a board of equalization, an opportunity of those assessed to be heard and other traditional constitutional safeguards. The impact fee transcends and eliminates these safeguards. Notice, an opportunity to object to the amount to be assessed, and an opportunity to appear before the assessor sitting as a board of equalization are outmoded requirements under impact fee assessment procedures. When a shortcut is resorted to, constitutional guarantees go out the window.

There are many constitutional questions raised by this case. Aside from Florida constitutional questions which are raised in connection with impact fees being judicially proclaimed to be a "tax," fundamental questions of due process and violation of equal protection form substantial issues in this case. The entire thrust here is that new residents are entitled to be treated equally and on the same basis as old residents. This proposition is best

65. See former Chapter 170 F.S.A.

66. See former Chapter 184 F.S.A.

demonstrated by example. In *Weber Basin Home Builders Association v. Roy City* (Utah 1971) 487 P.2d 866, a city ordinance of Roy City increased from $12.00 to $112.00 the flat fee charged for building permits to IMPROVE ITS WATER AND SEWER SYSTEMS BECAUSE OF THE CONSTRUCTION OF NEW HOMES. The Utah court, in striking this ordinance down and holding it unconstitutional, stated:

> "THE CRITICAL QUESTION HERE IS WHETHER THE ORDINANCE IN ITS PRACTICAL OPERATION RESULTS IN AN UNJUST DISCRIMINATION BY IMPOSING A GREATER BURDEN OF THE COST OF CITY GOVERNMENT ON ONE CLASS OF PERSONS AS COMPARED TO ANOTHER, WITHOUT ANY PROPER BASIS FOR SUCH DIFFERENTIATION AND CLASSIFICATION. IT IS NOT TO BE DOUBTED THAT EACH NEW RESIDENCE HAS ITS EFFECT IN INCREASING THE COST OF CITY GOVERNMENT; NOR THAT DUE TO THE STEADILY INCREASING COSTS OF EVERYTHING, INCLUDING THOSE INVOLVED IN RENDERING SUCH SERVICES, THE CITY WOULD HAVE AUTHORITY TO RAISE THE FEES CHARGED FOR SUCH SERVICES FROM TIME TO TIME. NEVERTHELESS, IN THAT CONNECTION, *THE NEW RESIDENTS ARE ENTITLED TO BE TREATED EQUALLY AND ON THE SAME BASIS AS THE OLD RESIDENTS.*" (Emphasis supplied in capital letters and italics)
>
> * * * * * * * * *
>
> "Under the undisputed facts as presented to the trial court: where the basic flat-fee charge for a building permit was increased in one jump from $12 to $112, which increase admittedly had no relationship to increased costs of the service rendered; and more importantly, where the declared purpose was to raise general revenue for the City, IT WAS HIS OPINION THAT THE INCREASE PLACED A DISPROPORTIONATE AND UNFAIR BURDEN ON NEW HOUSEHOLDS IN ROY CITY, AS COMPARED TO THE OLD ONES, IN THE MAINTENANCE OF THE CITY GOVERNMENT; AND THAT CONSEQUENTLY IT WAS DISCRIMINATORY

AND CONSTITUTIONALLY IMPERMISSIBLE. We are not disposed to disagree with that conclusion." (Emphasis supplied in capital letters)

Thus, the legal issues are clearly drawn in this case, and it is up to this Court to determine the validity of impact fees in Florida. Petitioners believe that the ensuing argument will amply demonstrate that the merits of this case lie with petitioners and affirmance of the trial court's decision.

POINT I

HAS THE LEGISLATURE OF THE STATE OF FLORIDA GRANTED FLORIDA MUNICIPALITIES POWER TO ENACT IMPACT FEE ORDINANCES?

A - THERE IS NO STATUTORY AUTHORITY FOR IMPACT FEE ORDINANCES.

The reason for the necessity of legislative authority to enact impact fee ordinances is that the impact fee is a revenue-raising vehicle. Funds are accumulated to finance certain designated governmental services. Harry Wilde, respondent's expert who testified at trial, candidly admitted this fact.[67] This reality is one which the District Court failed to comprehend.

The Circuit Judge in this case made some rather simple and direct findings of fact and conclusions of law in declaring respondent's impact fee void as unsupported by legislative authority:[68]

67. (T 137-138) (R 1221-1222) (TR 211-212)
68. (R 724-727) (TR 337-342)

1. The $700 per unit cost is "substantially more than the cost of connecting to the system";

2. The proceeds from the fee are earmarked for capital improvement;

3. The fee is not a reasonable charge for the furnishing of the services;

4. The assessment of the fee is through the existence of the power of taxation;

5. A municipality cannot exercise implied powers of taxation;

6. Therefore, there must be direct statutory authority for the levying of the impact fee;

7. An examination of the statutes claimed byrespondent to grant respondent authority to enact impact fee ordinances revealed that no such authority existed;

8. The fact that the Florida Legislature was considering impact fee legislation is "acknowledgement that there is no present authority for the imposition of an impact fee."

The Circuit Judge has meticulously analyzed in his order all statutes proffered by respondent as constituting authority for imposition of the so-called "connection fee". His final judgment has been quoted verbatim in petitioners' Statement of the Case.[69] It would be redundant to argue his findings further at this point.

69. See Pages 7 through 12, this brief.

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Approximately two weeks before the District Court in the case at bar rendered its opinion, the Fourth District filed an opinion in *Janis Development Corp. vs. City of Sunrise*[70] which is completely incompatible with the District Court's decision here. If the Second District had not certified this matter, clear conflict jurisdiction was present anyhow. Essentially, the Fourth District followed verbatim the analysis and ruling of Judge Driver in the case sub judice.[71] The Fourth District directly held that the impact fee was a "tax" and that there was no statutory authority to enact such an ordinance:

> "The portion of the ordinance setting the fee amount determined that units within a higher density of development imposed a greater burden on the community and should pay a greater fee. The fee imposed was to be assessed by the appropriate official at the time of application for a building permit and it was to be collected prior to the issuance of a final certificate of occupancy. The ordinance provided for a trust fund for fees collected, and designated the fees should be used 'solely for the purpose of constructing or improving roads, streets, highways and bridges, including acquisitions of rights of way for such facilities, serving the vicinity of the project in which the charges are collected.' The ordinance provided for credit to be given to any entity that donated funds for improvements and excluded public housing from the burden of the fee.

70. *Janis Development Corp. vs. City of Sunrise* (not yet reported) Case No. 73-1239 and 74-206 - opinion filed April 18, 1975 - 4th D.C.A. (See A 37-43)

71. In the Circuit Court opinion, impact fees were held to be unconstitutional as violative of equal protection - see *Janis Development Corp. v. City of Sunrise* (C.C. 7th J.C. 1973) 40 Fla. Supp. 41 - (A 5-25).

"The attack upon the ordinance consisted of charges that (1) the county did not have the authority to enact the ordinance, because the fee was a tax, and (2) that it was discriminatory and therefore unconstitutional. We do not reach the second contention as we hold the fee is an improper tax. The cases cited by appellee on this point were admitted by the appellant to be the more conservative, though not archaic, line of precedent which prohibits the raising of revenue by a regulatory fee. The only purpose for which a city might impose a fee is for offsetting the necessary expense of regulation, and the regulatory power emanates from the police power. Atkins v. Phillips, 26 Fla. 281, 8 So. 429 (1890). see Tamiami Trail Tours, Inc. v. City of Orlando, 120 So.2d 170 (Fla. 1960).

"It is undisputed that the city expected some Six Million Dollars in anticipated revenue from the first year the ordinance was in effect, and it is impossible that such revenue could approximate any cost of regulation. In Bateman v. City of Winter Park, 160 Fla. 906, 37 So.2d 362 (1948), the Florida Supreme Court spoke to the difference between a tax and a fee:

> 'The difference between a liquor fee and a tax may be thus stated: Where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the police power; but where the fee is exacted solely for revenue purposes, and payment for such fee gives the right to carry on the right to carry on the business without the performance of any other conditions, it is a tax.'
> (Emphasis added.) 1d. at 363.

"Appellant relies solely upon the proposition that the police power invests it with the right to exact an impact fee for the good of the community to provide services for the community. It cites to Jenad, Inc., v.

Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673 (Ct.App.N.Y.1966), in which a city's right to impose a Two Hundred and fifty dollar fee on a developer, in lieu of an allocation of land, was upheld. In Jenad there was an existing ordinance which required land to be set aside for parks and open spaces, the fee was in lieu of such setting aside -- for the benefit of a subdivider who had a relatively small amount of land to develop. That ameliorating circumstance does not apply here, and even the legality of such required pledges is undefined in Florida. Although requiring pledges of land as a condition for subdivision approval has been upheld in some jurisdictions, see Annot. 43 A.L.R.3d 847 (1972), this district has recently stricken a like proposal. Admiral Dev. Corp. v. City of Maitland, 267 So.2d 860 (4th D.C.A. Fla. 1972).

"Further, the amount of the fee in the instant case is not equatable with land allocation. For instance, under the ordinance in question the builder of a multi-family building of some thirty units (fifteen hundred square feet each), if located in a one acre multi-family development, would pay a total fee of Nineteen Thousand Three Hundred and fifty Dollars. The fee here is simply an exaction of money, to be put in trust for roads, which must be paid before developers may build. There are no other requirements. There are no specifics provided in the ordinance as to where and when these monies are to be expended for roads, apparently this was to be left for future commission determination. This fee, therefore, is an exercise of the taxing power. Haugen v. Gleason, 226 Or. 99, 359 P.2d 108 (1960).

"The fee being a tax, then it is improper. Article 7, §1(a), Florida Constitution, (1968), provides:

> '(a) No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law.' (Emphasis supplied.)

> In City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1 (Fla. 1972), the court stated that municipalities could only be granted the power to tax (except for ad valorem taxes) by general law. F.S. 125.01(1)(r) (1973) states also that counties may only levy and collect taxes as provided by general law. There is no general law on this subject permitting such fees for impact to create funds for heightened county costs and it is not otherwise contended.
>
> "Thus, holding as we do that the land use fee in question is a tax -- the enactment of the ordinances is unauthorized because such land use charges are not sanctioned by general law."

The first case to be considered concerning impact fees in Florida was *Venditti-Siravo, Inc. vs. City of Hollywood* (C.C. 17th J.C. 1973) 39 F.Supp.121.[72]

The City of Hollywood passed an ordinance which specified that upon the issuance of any building permit for all building construction within the City except for governmental agencies, there should be added an additional charge to the building permit of one percent of the estimated cost of construction computed on the basis as that used in determining building permit fees. The charge was to be deposited in a special fund to be used exclusively for the acquisition, beautification and development of passive and active recreational parks and the preservation of open space for the use and benefit of the public.

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72. Petitioners have provided a Xerox copy of all Florida cases cited in this section in Petitioners' Appendix. For this entire case see (A 1-4)

Ten builders in a class action attacked the constitutionality of the ordinance. Judge Nance held that the ordinance was unconstitutional, enjoined the City from enforcing it, ordered the City to refund all charges or taxes collected thereunder and to pay the plaintiffs their attorneys' fees from such funds.

The court in ruling that the ordinance violated State and Federal constitutional guarantees of equal protection of laws, discriminating unlawfully against plaintiffs' class, and provisions of Section II of Article 7 of the State Constitution authorizing taxation by municipalities only at a uniform rate, said:

> "However salutary the purpose of the subject ordinances in seeking to improve the environment of the CITY OF HOLLYWOOD by the creation and maintenance of additional parks, the manner in which the CITY has sought to raise the revenues to provide therefor is so unreasonable, arbitrary, unequal and partial in operation as to make said ordinances unconstitutional as a matter of law for that reason alone. The ordinances are further violative of the Florida and United States constitutional guarantees of equal protection of the laws, discriminating unlawfully against the plaintiff class.
>
> "The 'charge' levied under the color of the aforesaid ordinances is not a regulatory measure under the CITY'S police power nor could it be valid and constitutional approached as such. Further, said 'charge' is NOT A LAWFULLY IMPOSED SPECIAL ASSESSMENT as the same is permitted municipalities in the State of Florida, NOR A PROPER EXERCISE OF REVENUE RAISING BY THE LICENSURE TAXATION OF

BUSINESSES, OCCUPATIONS OR PROFESSIONS.

"The Court is further of the opinion that the 'charge' levied by the afore-described ordinances could only be legally described as an attempt at taxation of intangible personal property or property rights, or as an ad valorem tax upon real property. The Court need not determine which said form or rationale of revenue raising the CITY had in mind in the enactment of said ordinances, if indeed it had any, for in either event said ordinances are unconstitutional and unlawful, and further are beyond the authority and jurisdiction of the CITY'S taxing powers.

"The Constitution of the State of Florida expressly prohibits to municipal corporations the right to impose taxes upon intangible personal property or property rights. The subject ordinances can have no validity based upon such an analysis.

"Article VII, §2, of the Constitution of our State authorizes taxation by municipalities on real property only at a uniform rate, a requirement also found in Ch.34, Title XI, §254, of the municipal charter of the CITY. It is the Court's finding that the ordinances are violative of these constitutional and charter provisions as the taxes imposed thereby fall upon real property otherwise subject to ad valorem real estate taxation within the CITY, the totality of which taxation results in a disparate rate within the CITY, and an unconstitutional double taxation of the class property owners.

"The Court further finds that the 'charges' imposed by said ordinances, when added to the already existing ad valorem real estate tax of 6.779 mills imposed by the CITY, may well create a total ad valorem taxation upon the realty subject of improvements taxed thereby in excess of the ten-mill cap established by the Florida Constitution. The ordinances would fall for this reason. HOWEVER, this point raised is not determinative of the case sub judice.

> "Insofar as the taxes imposed by the subject ordinances are considered separate and apart from the otherwise existing ad valorem taxation imposed by the CITY OF HOLLYWOOD, said taxes are not imposed nor do they fall upon 'all property' within the CITY'S jurisdiction. The CITY'S authority to impose taxes on real property, embodied in Florida Statute 167.43, authorizes taxation only upon 'all real property' within its jurisdiction. Nowhere in the Florida Statutes nor in the Charter of the CITY OF HOLLYWOOD is there any authorization for the imposition of ad valorem real estate taxes on less than all of the property within its municipal limits. The instant ordinances are, therefore, unlawful for reason that the CITY lacks the authority to enact such a tax." (Emphasis partially supplied in capital letters)

It is obvious that the *Venditti* case, supra, not only supports the trial court's ruling in the case at bar but completely supports petitioners' contention that Dunedin is without authority to enact the ordinance, the ordinance constitutes an *illegal and improper* special assessment and is unconstitutional. The essence of Judge Nance's decision is:

1. The impact fee is unreasonable, arbitrary, unequal and partial in operation and therefore unconstitutional as a matter of law;

2. The impact fee is violative of Florida and U. S. constitutional guarantees of equal protection;

3. The impact fee is an unlawful special assessment;

4. The impact fee is not a proper exercise of municipal revenue raising;

5. The impact fee is an attempt at taxation of intangible personal property or property rights or as an ad valorem tax upon real property and beyond the City's taxing authority and jurisdiction;

6. The impact fee violates Article VII, Section 2, of the Florida Constitution which authorizes municipal taxation only at a uniform rate;

7. The charges imposed by the impact fee will exceed the ten-mill cap established by the Florida Constitution;

8. The impact fee violates F.S. 167.43 in failing to levy an ad valorem tax on *less than* all the property within municipal limits.

In *Pizza Palace of Miami, Inc. v. City of Hialeah* (Fla. 3rd D.C.A. 1970) 242 So.2d 203,[73] Pizza Palace as lessee appealed a final judgment from the Circuit Court, contending that the Circuit Court erred in determining that a sewer connection charge was a service charge and properly added to the plaintiff's monthly water bill. The Court stated that the question was whether or not in reality it was a charge for services or an assessment.

Dunedin in the case at bar contends that the sewer tap-in fee is not a special assessment. One of petitioners' contentions is that it is an illegal special assessment. Important in the Court's ruling which follows is

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73. (A 26-28)

the distinction between a connection charge, a monthly sewer charge, and a special assessment. In reversing the Circuit Court and holding the sewer connection charge to be improper and illegal, the Third District stated:

> "* * Lessee contended that the sewer charge was, in reality, an assessment against the land properly chargeable to the property owner, especially because the connection charge was computed on the basis of $16.00 per front foot and was not a continuing charge. The appellees asserted it was a regular charge for sewer services properly added to the monthly water bill.
>
> "There are several problems involving the nature of this charge denominated a 'sewer connection charge'. Appellant speaks in terms of dilemmas, and his argument is more easily visualized when set out in outline form:
>
> I. Either the 'sewer connection charge' is a service charge under the Charter of the City of Hialeah, or it is a special assessment.
>
> A. If the 'sewer connection charge' is a service charge under the Charter, it is unauthorized as to Appellant-Lessee upon statutory and constitutional grounds because: (a) it is not continuing in nature, (b) its computation is unreasonably based upon front footage of the entire tract and not just the leasehold, and (c) is properly chargeable to the fee owner and not the lessee under a tenancy from year to year.

B. If the 'sewer connection charge' is a special assessment it is not payable by the Appellant-Lessee, upon statutory and constitutional grounds, but such assessment is properly payable by the fee owner and not a lessee under a tenancy from year to year; MOREOVER, THE APPELLEES CANNOT DISGUISE A SPECIAL ASSESSMENT UNDER THE NAME OF A 'SEWER CONNECTION CHARGE.'

"To prove the first assertion, that the connection charge is a service charge, Lessee merely states that this is the position of the appellees, and he will accept such characterization for the purpose of argument. To prove the second assertion, that the connection charge, no matter what it is called, is a special assessment Lessee argues that any other classification is unreasonable (especially because the charge is computed by multiplying $16.00 by the front footage of the entire tract and not just the leasehold) and that the inherent nature of the charge is to confer added value to the land (and in comparison to the benefit to the remainder interest, no such value is added to his tenancy from year to year).

"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.
>
> "The power to make a 'service' charge is vested in the semi-autonomous Department of Water and Sewers of the City of Hialeah. City Charter of the City of Hialeah, Article VI(K), § 174(j), (originally enacted in Ch. 30807, Art. VI(K), § 1, Laws of Florida, 1955, [Special Acts]). § 31-2 of the Ordinances of the City of Hialeah (formerly § 25.2 of the 1952 Code of the City of Hialeah) PROVIDES THAT THE OWNER IS CHARGED WITH THE MANDATORY RESPONSIBILITY OF CONNECTING THE SEWER LINE. But according to Ch. 1-2 of the Ordinances of the City of Hialeah, a tenant for a term for years, such as Lessee here, is not an 'owner,' under the express terms of the ordinance and under the rules of construction known as ejusdem generis and expressio unius exclusio alterius. See generally, as to sewer cahrges. * *"
> (Emphasis supplied in capital letters.)

The Third District has agreed with Judge Driver. A "so-called" sewer connection charge "which is assessed on a footage basis is not authorized by Florida statutes or the Florida Constitution. What more need be said?

In *Admiral Development Corporation v. City of Maitland* (Fla. 4th D.C.A. 1972) 267 So.2d 860,[74] action by developers was brought, challenging the constitutionality of an ordinance requiring a subdivider to dedicate lands to the City for park and recreational purposes based upon five percent of the gross area of the lands. The Circuit Court of Orange County upheld the validity of the ordinance and

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74. (A 29-33)

Admiral Development Corporation appealed. The contentions of the plaintiff as to the grounds for declaring the ordinance invalid were stated by the court as:

> "The plaintiff urges the unconstitutionality of Section 13-8 on basically the following grounds: (1) that the enactment of Section 13-8 is beyond the scope of the City's authority under its charter; (2) that the provisions of Section 13-8 are vague, indefinite and overbroad; (3) that in applying Section 13-8 the City exceeded the terms of its own ordinance; and (4) that to require a subdivider to subdivide land or provide money for park or recreational purposes as a condition for approval of a subdivision plat amounts to a taking of property without due process of law."

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

> "The powers of a municipality are to be interpreted and construed in reference to the purposes of the municipality and if reasonable doubt should arise as to whether the municipality possesses a specific power, *such doubt will be resolved against the City.* Liberis v. Harper (1925) 89 Fla. 477, 104 So. 853. 'Municipal corporations are established for purposes of local government, and, *in the absence of specific delegation of power, cannot engage in any undertakings not directed immediately to the accomplishment of those purposes.*' (Emphasis ours)
>
> * * * * * * * * *
>
> "Our conclusion that the ordinance in question is beyond the scope of the City's authority comports with several recent decisions of our sister state courts which had occasion to construe ordinances *similar in purpose* to Section 13-8."
>
> * * * * * * * * *

"Even if the present charter provisions were sufficiently susceptible to an interpretation authorizing the adoption of Section 13-8, it would be our view that the language of said section is so overbroad as to render the section invalid. An ordinance containing a similar requirement, i.e., that developers shall deed 'at least 7%' of the platted land area for recreational purposes, was declared 'arbitrary on its face', Frank Ansuini, Inc. v. City of Cranston, R.I. 1970, 264 A.2d 910. It is interesting to note in the *Cranston* case that although the Supreme Court of Rhode Island found that the city *possessed* the implied authority to adopt rules and regulations requiring voluntary donations of land by developers, the court could not justify the requirement of 'at least 7%'. The Rhode Island court was proceeding upon the premise that 'the involuntary dedication of land is the valid exercise of police power *only to the extent that the need for the land required to be donated results from the specific and unique activity attributable to the developer.*' The court could not reconcile the 'at least 7%' requirement with the aforementioned principle and observed:

> ' . . . It seems obvious to us that a fixed percentage requirement will inevitably create inequities, which will be less likely to arise under the specifically and uniquely attributable formula.' (at p. 193)

"See also Carlann Shores Inc. v. City of Gulf Breeze, Santa Rose, Cir. 1966, 26 Fla. Supp. 94.

"We are keenly aware of the need for planned land development with particular emphasis upon provisions for and the preservation of park and recreational areas. It is noteworthy and commendable that the City of Maitland has sought to act in furtherance of this need and concern with the enactment of Section 13-8. However, municipalities must adhere to certain basic and fundamental requirements for

> the adoption of such ordinances which include the need for legislative authorization as well as the avoidance of language which would permit the exercise of unbridled discretion. In Smith v. Portante, Fla. 1968, 212 So.2d 298, Justice Ervin speaking for the Supreme Court of Florida, stated, inter alia, at p. 299:
>
> > ' . . . No matter how laudable a piece of legislation may be in the minds of its sponsors, objective guidelines and standards should appear expressly in the act or be within the realm of reasonable inference from the language of the act where a delegation of power is involved.'"

In light of the decisions in *Janis Development Corp., Venditti-Siravo, Inc., Pizza Palace of Miamia, Inc.,* and *Admiral Development Corporation,* supra, it is difficult if not impossible to understand why the District Court rendered its decision reversing the Circuit Judge in this case. Any professional lawyer, when comparing such precedent, would at a minimum have to concede that these decisions directly collide with the rationale of the Second District's opinion.

The "acknowledgement" of lack of authority to pass impact fee ordinances becomes absolute when House Bill 86,[75] which was pending at the time of the District Court's decision, is examined. The pertinent portions of this Bill state:

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75. (TR 397-401)

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"A bill to be entitled

An act relating to private and public utility construction; providing intent and purpose; providing definitions; authorizing local governments which provide public utility service to collect a fee from a person applying for a building permit to cover the cost of the extension of utility service to the new structure; authorizing a private utility company, with the approval of the body regulating its rates, to impose such fee as a precondition to delivering service to a new structure; requiring govermental units and private utility companies to conduct studies to determine proper utility capital impact fees for classifications of structures at specified intervals and prior to the imposition of or amendment to such fees; requiring uniformity of fees within each classification of structure; providing exemptions from and limitations upon application of the fee; providing an effective date.

"Be It Enacted by the Legislature of the State of Florida:

"Section 1. Intent and purpose.--It is the purpose of this act to enable the private and public utilities of this state to maintain an adequate level of public utility services and construct the necessary capital facilities to accommodate the orderly growth and development of this state. To this end, it is the intent of the 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 the burden of these additional costs on owners of existing facilities. It is further the purpose of this act to eliminate the need for development and construction moratoriums, and to help hold down utility rates by ensuring that the private and public utilities can provide the services and facilities necessary to accommodate orderly growth."

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* * * * * * * * *

"Section 3. Utility capital impact fees.--

"(1) The governing body of a local government, pursuant to the power granted it under the provisions of part II of chapter 163 and Chapter 166, Florida Statutes, may impose as part of the fee for the issuance of a permit an amount commensurate with the cost to the governmental unit of the additional public capital attributable to the extension of public utility service to the new structure. The local government official charged with issuance of the permit shall collect the fee and remit the collections monthly to the appropriate governmental unit. A private utility company may, subject to the approval of the body which regulates the private company's rates, impose a utility capital impact fee as a precondition to delivery of utility services to a new construction. The utility capital impact fee, when established as provided by this section, is declared to be a necessary and proper exercise of the state and local police power for the promotion and protection of the health, safety, and general welfare of the community through the allocation of public capital costs of the facility for the extension of public utility services causing the costs.

"(2) The utility capital impact fee may be based on any one, or a combination of, the several physical characteristics of the structure reasonably related to the additional public utility capital costs of the services to be rendered to the structure by the governmental unit imposing the fee.

"(3) At least once every 5 years, and prior to imposition of or amendment to the utility capital impact fee, the governmental unit or private utility shall conduct a study to determine the relevant physical characteristics of various classes or structures, and the public utility capital costs allocable to each class and characteristic on which the fee will be charged. The fee charged to a structure shall be a reasonable approximation of the result of the study. In

amending the fee with respect to a single public utility capital cost, the study need only include the particular public utility capital costs relevant to the amendment.

"(4) The utility capital impact fee shall be based on reasonable classifications and the fee shall be uniformly applied to all members of a class. The fee shall not be imposed for any public capital cost for which the governmental unit or private utility is reimbursed by a governmental unit, or for which it imposed any other levies or fees, or for which the cost of the capital assets installed is provided by the builder or owner, such as sewer treatment facilities that become the property of the governmental unit or the private utility.

"(5) The funds from the utility capital impact fee shall only be expended on public capital improvements related to the public services for which the charge is imposed."

Petitioners must ask this Court how it is possible for the Legislature to be debating the substance of a bill granting municipalities power to impose sewer and water impact fees at the very time the District Court is ruling that municipalities already have such authority???? Respectfully as possible and in the interest of petitioners in an adversary proceeding, this fact is incomprehensible to petitioners. Clearly, the Second District has legislated impact fees into existence in violation of the separation of powers doctrine. The above bill and ones before the Circuit Court clearly demonstrate the legal impropriety of the District Court's decision, and it must be quashed.

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There are altogether certified copies of four impact fee bills[76] in the record before the Court, including House Bill 86, supra. This Court is fervently urged to examine the record and read these bills. In petitioners' judgment, this proof offers compelling if not conclusive proof that the District Court's opinion in this case must be quashed.

B - THE DISTRICT COURT'S DECISION IS WITHOUT LEGAL MERIT AND SHOULD BE QUASHED.

It is imperative that this Court scrutinize the Second District's decision as to its legal soundness and factual basis.

The over-all conclusion that the raising of funds for capital improvement is not a "tax" obtained through the use of governmental taxing power is the cornerstone of the District Court's decision.[77] The District Court admitted that if the assessment was a "tax", the lower court must be affirmed. The District Court's legal chain of reasoning utilized to arrive at such a conclusion is stated by the Court to be:[78]

1. Florida Statute 180.13 (1971) was construed in *Cooksey v. Utilities Commission* (Fla.1972) 261 So.2d 129 as permitting the fixing of fair and reasonable rates for utilities.

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76. (TR 397-425)
77. (Page 6 of Court's opinion (TR 375) (A
78. Pages 6 and 7 of Court's opinion (TR 375-376) (A 49-50;53)

2. The case of *State v. City of Miami* (Fla. 1946) 27 So.2d 118 held that the imposition of a fee for the use of a municipal utility system is not an exercise of taxing power.

3. Connection fees are not taxes.

4. Authority for enactment of connection fee ordinances is 180.13 (1971) -- even though repealed at the time of the issuance of the Court's decision.

The District Court's analysis is wrong on all counts because of the following reasons:

1. We are not talking about connection fees. It is a name given to the assessment because it is levied at the time the connection to the sewer system is made. The language of the ordinance has been clearly ignored. Where below is there a statement that it is a connection fee:

> "(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

The District Court failed to follow the cardinal rule of construction concerning all ordinances and statutes which require determining intent primarily from the lan-

guage of the ordinance.[79]

The intent of the ordinance is to tax. A tax is defined in 31 Fla.Jur. Taxation, Section 9 ("Tax" Defined) p. 44-46 at p. 45 to be:

> "* * A tax is essentially a burden or charge on persons or property to raise money for public purposes, or the payment of public expenses in support of government activities. * *"

Is not the raising of funds "to defray cost of production, distribution, transmission and treatment facilities for water and sewer" of a municipality taking funds for a public purpose? Are these not public expenses as the lower court found? The key here is that a charge is made for construction of public capital improvements which is not reasonable. Service charges or tap-in fees are not taxes. No one said they were. But an impact fee is not a service charge related to the service rendered but a charge wholly separate from such charges. Here is the attempt at the game of semantics which was alluded to in the first section of this brief. Here is the wolf in sheep's clothing. As the lower court held -- no matter what you call it -- it is a tax -- it is not a reasonable service charge connected to the service rendered. Respondent called it an "assessment" but the City Commission duly

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79. 23 Fla.Jur. Municipal Corporations Sec. 105 (In General) p. 126; 30 Fla.Jur. Statutes Sec. 80 (Adherence to or departure from statute as enacted) p. 232-233.

acknowledged that it was a tax immediately before the original ordinance was enacted. In proposing and moving that the impact fee ordinance be adopted, Mayor Lindner said:

> "I'm recommending that a constribution for providing new facilities be accomplished by adopting a fixed schedule of water and sewer initial connection charge -- initial assessment charges for each unit constructed, regardless of location; that the water assessments be in addition to the present meter installation charges; that the sewer assessments shall include the *sewer tax fee;* and that these charges shall be payable upon issuance of the building permit." (R 707) (Emphasis supplied)

It is fundamental that the determination of the intent of an enacting body is usually persuasive in determining whether a tax was intended. City Council did not know they were going to be challenged when they candidly discussed and acknowledged that the impact fee that they were about to enact as a municipal ordinance was a tax.

3. Reference to F.S. 180.13(2) demonstrates the legal unsoundness of the opinion. Chapter 180 is the municipal works chapter which was repealed. Petitioners have been arguing all along that if you set up a drainage district and charge only those in the district for the improvements, you can assess appropriate costs for capital financing and you don't even have to use impact fees as a vehicle. Wilde testified that he recommended the City utilize Chap-

ter 180 instead of an impact fee.[80] If they were different in respondent's expert's own mind, how can they be synonymous in the District Court's mind?

You have to examine Chapter 180 in its entirety to see that 180.13(2) does not authorize impact fees. If you are going to use F.S. 180.13(2), you must follow the dictates of the entire Chapter. A city under the statute or chapter had to: create a zone or area for the project and require all persons in the zone to connect to the newly constructed facility;[81] pass a resolution which contained the particulars of the amount of expenditure, the type of funding involved, etc.;[82] notice to the public must be published;[83] mortgage debentures or other indebtedness to be assumed must be subjected to a freeholder vote.[84] Respondent never followed this procedure required by the act because *everyone would have had to pay equally in the zone.*[85] They could not establish a zone because it was not geographically feasible. Wilde recommended funding under Chapter 180 Florida Statutes.[86] But you can't

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80. (T 179-180) (R 1263-1164) (TR 253-254)
81. Sec. 180.02 F.S.A.
82. Sec. 180.04 F.S.A.
83. Sec. 180.09 F.S.A.
84. Sec. 180.10 F.S.A.
85. See Petitioners' Memorandum of Law (R 526-529)
86. (T 179-180) (R 1263-1264)

solely tax newcomers under this Chapter's provisions, so it wasn't used. The requirements of this act graphically demonstrate the requirements of due process and equal protection in connection with sewer assessments and rates and further demonstrate the fact that since the procedure was not followed with notice and an opportunity to be heard by the public, constitutional guarantees were violated in the passage of the impact fee ordinance.

4. Chapter 180 was repealed when the District Court first wrote its opinion. Opposing counsel wrote to the Court and brought this point to the Court's attention. The Court on its own motion merely changed its opinion as if nothing further of consequence occurred. This change is dramatically demonstrated in the Transcript of Record.[87]

5. The language of Chapter 180.13(2) authorizes assessment of rates, not connection charges. When this section was enacted, impact fees weren't even known as a tool in municipal financing.[87A] The District Court permitted taxing power through inference rather than construing the clear language of the Statute together with all other sections of the chapter. The specific language of Section 180.13(2) states:

> "(2) The city council, or other legislative body of the municipality, by whatever name known, may establish just and

87. (TR 379-380)

87A. The municipal public works act has existed since 1935 and section 180.13(2) apparently in the same form since that date.

> 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; and provided further, that if the charges so fixed are not paid when due, such sums may be recovered by the said municipality by suit in a court having jurisdiction of said cause or by discontinuance of service of such utility until delinquent charges for services thereof are paid, including charge covering any reasonable expense for reconnecting such service after such delinquencies are paid, or any other lawful method of enforcement of the payment of such delinquencies."

The above-quoted statute does not refer to connection charges and even if it were so construed, it would not dissolve the rule of law which requires that charges not be made in excess of the cost for which the charge is levied. This again would bring us full circle into the utilization of municipal taxing power.

Cooksey v. Utilities Commission, supra, does not authorize impact fees but merely regular monthly charges or utility rates charged by public works. A monthly utility charge or rate has nothing to do with assessment of connection fees or impact fees. Obviously, the imposition of fees for the use of a municipal water system is not an exercise of taxing power. This decision is completely cited out of context by the District Court. *Petitioners know that this Court on its own will read and examine this decision and make up its own mind.* It cannot be justifiably used as precedent for the fact that the charging of a connection fee is not

exercise of the taxing power of a municipality.

In *State v. City of Miami*,[88] the legislature enacted a sewer financing statute conferring on Dade County powers to construct and maintain a sewer system. The water and sewer board was authorized to establish rates, charges and fees. The project was financed by ordinance requiring issuance of SEWER REVENUE BONDS.

One of the questions before the court when validation proceedings were taken was whether the issuance of revenue bonds payable solely from revenues was a pledge of the taxing power of the municipality. The Supreme Court held that it was not:

> "The appellant presents five questions, as follows:
>
> "'1. Will the issuance of $10,600,000 sewer revenue bonds of The City of Miami in the form and manner provided by Ordinance No. 3053, without the approval of a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors residing in said city shall have participated, violate the provisions of an amended Section 6 of Article IX of the Constitution of Florida?"
>
> * * * * * * * * *
>
> "The first question was answered by the Court below in the negative. We have repeatedly held that amended Section 6 of Article IX of the Constitution of Florida is not violated by the issuance without an election of revenue bonds or revenue certificates of a municipality which are

88. (Fla. 1946) 27 So.2d 118

> payable solely from the revenues of the utility or facility to be enlarged, acquiring or constructed from the proceeds of such bond certificates and in which there was no pledging of the taxing power of the municipality and in which bonds or certificates it was specifically provided that no taxing power of the municipality should ever be resorted to for their payment, and which bonds or certificates are not secured either directly or indirectly by mortgage or lien of any kind on the utility or facility to be enlarged, acquired or constructed. * * *
>
> "The revenue bonds or certificates here under consideration meet each and every of those tests and, therefore, on authority of the opinions and judgments in the cases, supra, we hold that the provisions of Section 6 of Article IX of the Florida Constitution are not violated by the issuance of these certificates. *This is true because 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.* A sewer system is complementary to a water system. A sewer system would be of no value without a water system and a water system would be entirely incomplete without a sewer system. So the principles of law which would apply to one system must likewise apply to the other. * *" (Emphasis supplied)

The financing involved in this case consisted of sewer rates established to retire revenue certificates. How the above quotation can be applied to this case is unknown, much less serve as the pivotal legal cornerstone of the District Court's opinion.

It is evident that the District Court's rationale that the impact fee is not a tax is wholly without merit. It is bottomed upon misconception of a municipal works

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statute and misconception of legal precedent clearly unsupportive of the Court's conclusions.

The decision of the District Court also has many other flaws. Cardinal in this respect is the Court's misconstruction of the inapplicability of the *Venditti-Siravo* and *Janis Development Corp.* decisions.[89] Petitioners have already made their argument that such decisions do apply, and there is no need to repeat it here.

Upon the merits, the Supreme Court must decide whether the trial judge as trier of fact is to be accorded the right to weigh the testimony and come to binding factual conclusions. The District Court failed to accord the trial judge such a prerogative and, in fact, made its own evaluation of the evidence:[90]

> "The evidence clearly demonstrates dramatic growth within the area logically served by the city systems. The evidence also supports the fact that the sewer and water systems were running near capacity and the expansion of these systems was imminent. The only expert witness at the trial testified that the average charge per connection necessary to finance the expansion within the area to be reasonably served was $357 for water and $631 for sewer, both of which were in excess of the fees established by the ordinance. Hence, the amount of the fee appears reasonable for the purpose for which it is imposed. The trial judge found the fees to be unreasonable charges, but this was premised upon his view that the cost of prospective capital improvements could not be considered in setting the amount of the connection charges."

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89. See Footnote 49, Page 29, supra.
90. Court's opinion, Page 7 (TR 376) (A 50; 53)

The District Court violated one of the cardinal rules of appellate review. Findings and judgments of a trial judge sitting as trier of the facts are entitled to the same weight as a jury verdict before an appellate court and will not be disturbed unless it is shown that there is a total lack of substantive evidence to support the trial judge's conclusions.[91] The cases supporting this proposition are so numerous that citation of all of them is prohibitive.[92]

Sewer and water systems were not running near capacity at the time of the enactment of the ordinance.[93] City Manager Armstrong testified that at the time of the passage of the ordinance, there was adequate capacity to handle all new connections.[94] Wilde acknowledged that.[95] Wilde specifically admitted that under the very ordinance before this Court, a contributor to the assessment would get no direct benefit from his contribution.[96]

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91. *Krohne v. Orlando Farming Corp.* (Fla.App.1958) 102 So.2d 399.

92. Please see Florida Digest, Appeal & Error, Key No. 1008, and cases cited therein.

93. See: (R 1313); (T 180) (R 1264) (TR 254).

94. (R 1313)

95. (T 180) (R 1264) (TR 254)

96. (T 164-165) (R 1248-1249) (TR 239-239)

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The District Court alluded to a charge per connection of $357 for water and $631.00 for sewer, "both of which were in excess of the fees established by the ordinance." But the truth is that these calculations were made long AFTER the passage of the ordinance and formed no basis whatsoever in determining the amount arrived at by City Council at the time the ordinance was passed.[97] Armstrong knew of no basis upon which the figures were arrived at.[98] The trial judge heard this type of testimony and made a determination that the assessment bore no relationship to the cost of connection and was "*unreasonable*". The District Court had absolutely no right or basis to conclude that Judge Driver found the assessment "unreasonable" because he was of the view that the cost of prospective capital improvements could not be considered. Nowhere in the record does the Judge state such to be a fact. The District Court should not be allowed to attribute to the trial judge statements which he did not make to justify its decision.

Here is an opportunity to demonstrate that impact fees are "open ended" and discriminatory. You can never know precisely what one's fair share is because it keeps shifting all the time. This is one big reason the rule announced by the District Court won't work. You never know

97. (T 149-152) (R 1233-1236) (TR 223-226)

98. (R 1237)

what an individual's proportionate share is because you don't know how many individuals are going to connect to the system and, as new plans are made for expansion or the total amount of debt is reduced, the total amount of capital debt required continuously fluctuates. This is one big point petitioners were able to make with the trial judge but not at all with the District Court. Thus, the point here is simply that if the trial judge's findings of fact are to stand, the decision of the District Court must be quashed for, even under the theory established by the District Court, the rates were found by a trier of fact to be unreasonable and not set in proportionate share to those making the contributions.

The trial judge applied the identical test to the charging of fees as the Fourth District in the *Janis Development* case.[99] The amount of the fee may only affect the expense involved. Hence, the cost of connecting the sewer was infinitesimal compared to the fee charged. In fact, it was in excess of the cost of 100% because another portion of the ordinance imposed a fee for the cost of connection. When the amount of expense connected with a fee is surpassed, the excess amount collected for revenue purposes constitutes taxation. This is what the trier of fact found, and it should not be disturbed upon appeal.

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99. *Janis Development Corp. v. City of Sunrise* (not yet reported) Case No. 73-1239 and 74-306 - Opinion filed April 18, 1975 - 4th D.C.A. (See A 37-43)

The District Court expressed its "greatest concern" that the fees collected be used for capital improvement.[100] Instead of striking the ordinance down as it should have, since its very language permits funds to be used for other expenditures, the District Court bypassed petitioners' rights and held valid an obvious invalid statute even under its own legal pronouncement. Supposedly, petitoners must act as a watchdog on a daily basis to see that city officials are following the ordinance the District Court has written instead of the clear permissive language of the ordinace. The District Court ignored City Manager Mount's statement that he was going to use the funds for expanding sewer lines and treatment of sewage.[101] *Not one case which has held impact fees valid in the entire United States has failed to specifically require a sinking fund and that the funds be unalterably designated in the ordinance to be for capital improvement.*[102] The law demands an ordinance be construed as to its plain and clear language.[103]

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100. Page 8 of Court's opinion (TR 377) (A 51)

101. (T 81; 94-97; 99-101; 103-104; 110) (R 1165; 1178-1181; 1183-1184; 1182-1188; 1194) (TR 156; 169-171; 173-184; 177-178; 184)

102. See two decisions cited in District Court's own opinion - *Hayes v. City of Albany* (Ore.1971) 490 P.2d 1018; *Home Builders Association of Greater Salt Lake v. Proud City* (Utah 1972) 503 P.2d 451.

103. 23 Fla.Jur. Municipal Corporations Sec. 105 (In General) p. 126; 30 Fla.Jur. Statutes Sec. 80 (Adherence to or departure from statute as enacted) p. 232-233.

The fees or taxes may be used to defray "the cost of production, distribution, transmission and treatment facilities." Even if petitioners lose all of their points on the merits in this case, this ordinance cannot be sanctioned.

C - THE PRECEDENCE FROM OTHER JURISDICTIONS CITED BY THE DISTRICT COURT ARE NOT APPLICABLE TO THE LEGAL ISSUES HERE.

The District Court cited four cases from other jurisdictions in support of its decision.[104] All have one "failing grace" in that each municipality had clear statutory authority for enacting the impact fee. How, then, can these cases support the lower court in its quest for legislative authority?

In analyzing these cases, we must apply Florida law and be cautious to distinguish and not apply drainage district cases or connection fee cases which are not truly impact fee cases to the case at bar. They don't fit.

Brandel v. The Civil City of Lawrenceburg (Ind. 1967) 230 N.E.2d 778, is a drainage district case. *All people* in a drainage district were required to hook up to the system. The cost was equally shared by all who were to use the facilities. This is far different than the case at bar where only a portion of those using the system monetarily maintain it (replacement costs, etc.) for the benefit of the vast majority.

104. Pages 4 and 5 of Court's opinion - (TR 373-374) (A 47-48)

Drainage district cases such as former Florida Statutes 180, 184, and 170 encompassed, do not apply since costs are predetermined, everybody pays his fair share, the cost is equally and precisely and mathmatically spread among all users. This is not the case here, as the Court well knows.

Hartman v. Aurora Sanitary District (Ill. 1961) 1775 N.E.2d 214 is another drainage district case. The Illinois court found the drainage district statute unoffensive because it was not mandatory that residents hook up to the system. How, then, is this case helpful here. Petitioners had to connect and pay.

Hayes v. City of Albany (Ore. 1971) 490 P.2d 1018 can be characterized as one of the cases contra to the position of petitioners except in respect to the fact that there was a clear charter amendment authorizing the amount of a fee, a sinking fund was required, the fee involved was not attacked as being arbitrary or unreasonable, and precise costs were required to be established prior to the assessment. This case fails to follow the legal principle established in Florida law that where a fee is in excess of the out-of-pocket costs, it becomes a tax.

Home Builders Association of Greater Salt Lake v. Provo City (Utah 1972) 503 P.2d 451 involved a connection fee of $100. The fee was found to reasonably relate to the cost of connection involved. The fee was held not to

be a revenue measure. In the case at bar, we are talking about millions of dollars and an overnight assessment of petitioners of exorbitant amounts of money and literally thousands of dollars as shown by petitioners' testimony. In no way is this case the same as in *Home Builders,* supra.

D - THE IMPACT FEE CONSTITUTES AN ILLEGAL SPECIAL ASSESSMENT.

Prior to impact fee cases, illegal taxation was attempted via the vehicle of the special assessment. It is in this vein of law that we find clear prohibition of financing capital improvements through the vehicle attempted to be used by respondent.

Petitioners contend that the impact fee ordinance is an improper special assessment or tax against the property of petitioners and therefore void. The memorandum of the petitioners filed with the lower court explores petitioners' position in detail and the Court is urged to examine its contents in consideration of this point.[105]

In summary, respondent has attempted to levy a special assessment for the construction of general capital improvements which fails to directly benefit or appreciate the property in a sum equal to the value of the assessment. *It cannot be overemphasized that respondent used the word "assessment" in this ordinance. Their counsel drew it and it is certainly recognized in law that where a legal term is used, its legal meaning will be given full recognition*

105. (R 539-563)

in the construction of the statute or ordinance.[106] Municipalities have attempted to levy special assessments against property for capital improvement which would benefit the public generally. Such ordinances have been declared invalid. The findings of the lower court and the ordinance itself clearly indicate that each applicant was assessed before he could acquire a certificate of occupancy to utilize his land. The funds were to be used for the purpose of construction of general capital improvement such as a sewer plant. Respondent has attempted to use a drainage district concept such as is found in Chapters 180 and 184, Florida Statutes, without defining a zone or district and following required legal and due process procedures. Legal authority conclusively holds that such an assessment is invalid:

In 63 C.J.S. Municipal Corporations § 1319 (b. Sewer Equipment and Appliances) at 1061:

> "*Sewage disposal plant.* It has been held that a sewage disposal plant is a *general improvement,* the cost of which may not be levied on real estate by special assessments for benefits, and this is especially true where it is expressly provided that the cost of such construction shall be paid for by general taxation. A statute empowering cities to order the construction of sewers and providing for payment of the cost has been held not to confer authority to assess

106. "Where legal terms are used in a statute, unless a plainly contrary intention is shown they must receive their technical meaning." 30 Fla. Jur., Statutes.

against abutting property the cost of constructing a sewage disposal plant as part of the sewer system" (Emphasis supplied)

And, in 63 C.J.S. Municipal Corporations § 1320, Waterworks, Mains, and Pipes, p. 1062:

> *"While a general system of waterworks designed for the benefit of all the inhabitants of a municipal corporation is not a local improvement for the cost of which special assessments may be levied,* unless the entire municipality is laid off into a single improvement district, it has been held, almost uniformly, that water pipes laid along a street for the distribution of water for the use of the residents are local improvements for which a local assessment may be levied under proper statutory authorization, although incidentally the whole municipality may be benefited by preventing a destruction of valuable taxable property, improving general conditions, and, perhaps, preventing a general conflagration. * *" (Emphasis supplied)

In McQuillin on Municipal Corporations (Special Taxation and Local Assessments) § 38:27 (Waterworks; Water Pipes) at p. 103:

> *"On the theory that it is a general, as distinguished from a local improvement, under power to charge property for local improvements only, special assessments cannot be levied for the construction of a plant to supply water to the municipal corporation and its inhabitants; nor usually for the laying of water pipes, constituting a part of the general system. In brief, as treated in a prior chapter, waterworks, considered as a whole, do not constitute a local improvement for which special assessments may be imposed, unless the municipal legislature has exercised its authority to create an assessment district, or unless there is special statutory authorization."* (Emphasis supplied)

It is clear in Florida that a special assessment may not be levied against a segment of the population for general improvements used by the entire public.[107] Further, the weight of authority in the United States supports the rule adopted in Florida. In 63 C.J.S. Municipal Corporations § 1302 (Basis for Determining) pp. 1045-1047 at 1046:

> "*Local character of improvement.* The term 'local improvements,' as employed in provisions relating to the power of municipalities to make such improvements by special assessment is by common usage employed to signify improvements made in a particular locality by which real property adjoining such locality is specially benefited. *Since special taxation for objects that are general and public is illegal,* in order to authorize a local assessment, the improvement must be local in its nature so that the property assessed shall receive a special benefit from the improvement different from, and in excess of, the benefit resulting to the general public from the improvement. However, if the improvement possesses this attribute, its local character is not destroyed by the fact that the entire municipality and the general public are incidentally benefited by the improvement, since substantially every improvement is of some benefit to all the property of the municipality; but, if the primary purpose and effect are to benefit the public, it is not a local improvement, although it may incidentally benefit property in a particular locality." (Emphasis supplied)
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> * * * * * * * * *
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> "* * where an improvement is in fact of a general character, it is a fraud on property

107. *Stockman v. City of Trenton* (1938) 132 Fla. 406, 181 So. 383-cited in 63 C.J.S. §1302; *City of Elmhurst v. Rohmeyer* (Ill. 1921) 130 N.E. 761; *Hard v. Sanitary Sewer Dist. No. 1 of Harvard* (Neb. 1922) 191 N.W. 438; *George v. City of Raceland* (Ken. 1939) 130 S.W.2d 825.

owners to call it a local improvement and assess them for its construction."

As a special assessment, the Dunedin ordinance violates every substantive requirement of a valid and enforceable special assessment. The property has not been specifically and peculiarly benefited by the improvement and enhanced in value to the extent of the assessment.[108] The benefit cannot be general in kind such as capital improvements enjoyed by the population as a whole, but must be a special benefit different from the benefit that the general public enjoys.[109] The assessment must be equally levied or spread among all the property that will use the facility.[110] (This requirement is obviously not met because only "newcomers" are taxed.) A special assessment cannot finance *future*[111] water or sewer capital improvement and a definite cost for the assessment must be ascertained and established before the assessment is levied.[112] Respond-

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108. 63 C.J.S. Municipal Corporations Sec. 1291 (Basis of Imposing) p. 1031; 29 Fla.Jur. Special Assessments Sec. 20 (Necessity for Enhancement in Value of Property p. 516; 14 McQuillin on Municipal Corporations, 3rd Ed. Sec. 38.31 (Necessity of Benefit to Property by Improvement) pp. 109-110; *Ocean Beach Hotel Co. v. Town of Atlantic Beach* (Fla. 1941) 2 So.2d 878.

109. 14 McQuillin on Municipal Corporations Sec. 38:32 (General and Special Benefits) pp. 121-122.

110. 29A Fla.Jur. Special Assessments (B. Apportionment) Sec. 28 (In General) pp. 1134-1137.

111. 63 C.J.S. Municipal Corporations Sec. 1373 (Particular Benefits Considered) pp. 1134-1137.

112. 63 C.J.S. Municipal Corporations Sec. 1398 (Proceedings for Assessment In General) p. 1168.

ent's ordinance violates each one of these principles and is therefore an illegal and invalid special assessment.

E - FAVORABLE OUT-OF-STATE CASES.

Here without explanation are *some* of the cases from other jurisdictions holding impact fees to be invalid either because of lack of legislative authority or on constitutional grounds. It is noted that these cases far exceed the scant two cases cited in Footnote 1 of the District Court's opinion.[113]

1. *Daniels v. Borough of Point Pleasant* (N.J. 1957) 129 A.2d 265 - Landmark case concerning impact fees - The Borough of Point Pleasant amended its ordinance increasing the fees to be charged for the issuance of building permits. Prior to the amendment of the ordinance, a $2.00 fee was charged for the value of a building at $500, and a $4.00 fee for a total evaluation in excess of $500. An additional fee of $2.00 for each thousand dollars or fraction thereof of total value was then charged. The amendment changed the method of calculating fees from the valuation of the building to the square foot contents of the

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113. The District Court cited only *Lloyd E. Clark, Inc. v. City of Betterdorf* (Iowa 1968) 158 N.W.2d 125 and *Norwick v. City of Winfield* (Ill.App.1967) 225 N.E.2d 30 instead of the nine cases cited to it as well as this Court. Of note is the District Court's failure to cite the recognized landmark case against impact fees of *Daniels v. Borough of Point Pleasant* (N.J. 1957) 129 A.2d 265.

new construction. For business or manufacturing construction, the charge made was 5 cents a square foot of floor area; for additions to existing dwellings the fee was 10 cents a square foot of floor area; and for new dwellings, the fee was 25 cents a square foot of floor area but with a $200 minimum in the last category.

Prior to the adoption of the amendment, plaintiff's house would have cost him a permit fee of $18.00. The new fee would be $262.00. The plaintiff's houses sell for $12,000.00 and he testified that the total average cost is $11,108.00, leaving him a net profit of $892.00 a house under the old building permit fee. His gross earnings for 1945 were $8,875.00, half of which went to the building inspector as compensation for his work in inspecting the buildings. The Court, in striking down this ordinance, stated:

> "The power to levy license fees for revenue purposes is not inherent in municipal corporations. The power of taxation is vested in the Legislature. Municipalities, being merely creatures of the State, have no power of taxation unless it is plainly delegated to them by the Legislature. * *"
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> * * * * * * * * *
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> "In the latter case the Pennsylvania Supreme Court appropriately said:
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> "'In the broad sense every ordinance which requires the payment of money is a revenue producing measure, but the primary purpose of ordinances such

as this under consideration is the reimbursement of the city for providing special services to the licensees. * * *" (167 A. 891, 892)"

"What the Borough of Point Pleasant is attempting to do here is to defray the general cost of government under the guise of reimbursement for the special services required by the regulation and control of new buildings.

"Here, the difference between the cost to the borough of regulating and controlling new construction bears no reasonable relation to the amount of revenue raised by the new amendatory ordinance. The record indicates that approximately the same services will now be rendered as were rendered in the prior years by the building inspector, and that the fees raised by the new ordinance exceed by more than 700% the cost of inspecting the buildings and regulating the construction. Admittedly, the purpose of the ordinance was to raise revenue to defray the increased cost of school and other government services. THE PHILOSOPHY OF THIS ORDINANCE IS THAT THE TAX RATE OF THE BOROUGH SHOULD REMAIN THE SAME AND THE NEW PEOPLE COMING INTO THE MUNICIPALITY SHOULD BEAR THE BURDEN OF THE INCREASED COSTS OF THEIR PRESENCE. THIS IS SO TOTALLY CONTRARY TO TAX PHILOSOPHY AS TO REQUIRE IT TO BE STRICKEN DOWN; see Gilbert v. Town of Irvington, 20 N.J. 432, 120 A.2d 114 (1956). Admittedly, these fiscal problems confronting many of our rapidly growing municipalities are grave ones and would seem to call for legislative action; the remedy must come not from the municipalities nor from the courts but from the Legislature." (Emphasis supplied in capital letters)

2. *Weber Basin Home Builders Association v. Roy City* (Utah 1971) 487 P.2d 866 - Here a city ordinance of Roy City increased from $12.00 to $112.00 to the flat fee

charged for building permits to IMPROVE ITS WATER AND SEWER SYSTEMS BECAUSE OF THE CONSTRUCTION OF NEW HOMES. The Utah court, in striking this ordinance down and holding it unconstitutional, stated:

> "The City has made no claim either in the district court or here that a major purpose of the increase was to bring the permit fee in line with the costs of regulating building construction. On the contrary, it is conceded that the purpose was to obtain additional money for the City's general fund; and that the money so collected was placed therein prior to the bringing of this suit. THE CITY DOES CONTEND THAT THE COLLECTION OF THIS ADDITIONAL MONEY IS NECESSARY TO IMPROVE ITS WATER AND SEWER SYSTEMS BECAUSE OF THE CONSTRUCTION OF NEW HOMES.
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> "AS A PREFATORY FOUNDATION TO CONSIDERING THE PROBLEM PRESENTED IN THIS CASE IT IS APPROPRIATE TO HAVE IN MIND THAT THERE IS A DISTINCTION BETWEEN THE AUTHORITY OF A CITY TO CHARGE A FEE FOR THE GRANTING OF A LICENSE OR A PERMIT TO CARRY ON BUSINESS THEREIN, AND THE AUTHORITY TO IMPOSE A TAX. HOW SUCH EXACTIONS SHOULD BE CLASSIFIED DEPENDS UPON THEIR PURPOSE. IF THE MONEY COLLECTED IS FOR A LICENSE TO ENGAGE IN A BUSINESS AND THE PROCEEDS THEREFROM ARE PURPOSED MAINLY TO SERVICE, REGULATE AND POLICE SUCH BUSINESS OR ACTIVITY, IT IS REGARDED AS A LICENSE FEE. ON THE OTHER HAND, IF THE FACTORS JUST STATED ARE MINIMAL, AND THE MONEY COLLECTED IS MAINLY FOR RAISING REVENUE FOR GENERAL MUNICIPAL PURPOSES, IT IS PROPERLY REGARDED AS THE IMPOSITION OF A TAX, AND THIS IS SO REGARDLESS OF THE TERMS USED TO DESCRIBE IT. In some states where the power granted cities does not expressly authorize the collection of a license fee for the purpose of raising revenue generally, the courts have held that the charge for such licensing must bear some reasonable relationship to the cost of regulating the business

so licensed. It is reasoned that even though license fees sufficient to cover such costs are a necessary comcomitant of the police power, fees in excess thereof are in reality a form of taxation, which may not be imposed by the city without express authorization of the legislature.

"It is to be recognized that there are situations where the ordinance is neither completely fish nor fowl, as coming within either of the above mentioned classifications, but is a hybrid in that it partakes of both. That appears to be the situation found in the ordinance here in question. It is justified under our Utah law, due to the particular wording of our statute, and previous decisions based thereon.

"Sec. 10-8-80, U.C.A.1953, provides:

> *License fees and taxes. They* (cities) *may raise revenue* by levying and collecting a license fee or tax on any business within the limits of the city, and regulate the same by ordinance; * * *. All such license fees and taxes shall be uniform in respect to the class upon which they are imposed." (Emphasis supplied in Capital Letters)

* * * * * * * * *

"As will be seen from the language of Sec. 10-8-80 hereinabove quoted, and the decisions thereon just mentioned, it is not now open to questions that in our state a city may impose and collect a license fee on business operated therein, both for the purpose of regulation and of raising revenue for general municipal purposes. However, whether it be regarded as a license fee, or as a tax, or as a mixture of the two, it cannot be imposed in any such manner as to violate constitutional principles, which include equal and nondiscriminatory treatment and protection under the law.

"THE CRITICAL QUESTION HERE IS WHETHER THE ORDINANCE IN ITS PRACTICAL OPERATION RESULTS IN AN UNJUST DISCRIMINATION BY IMPOSING A GREATER BURDEN OF THE COST OF CITY GOVERNMENT ON ONE CLASS OF PERSONS AS COMPARED TO ANOTHER, WITHOUT ANY PROPER BASIS FOR SUCH DIFFERENTIATION AND CLASSIFICATION. IT IS NOT TO BE DOUBTED THAT EACH NEW RESIDENCE HAS ITS EFFECT IN INCREASING THE COST OF CITY GOVERNMENT; NOR THAT DUE TO THE STEADILY INCREASING COSTS OF EVERYTHING, INCLUDING THOSE INVOLVED IN RENDERING SUCH SERVICES, THE CITY WOULD HAVE AUTHORITY TO RAISE THE FEES CHARGED FOR SUCH SERVICES FROM TIME TO TIME. NEVERTHELESS, IN THAT CONNECTION, *THE NEW RESIDENTS ARE ENTITLED TO BE TREATED EQUALLY AND ON THE SAME BASIS AS THE OLD RESIDENTS*." (Emphasis supplied in capital letters and italics)

* * * * * * * * *

"Under the undisputed facts as presented to the trial court: where the basic flat-fee charge for a building permit was increased in one jump from $12 to $112, which increase admittedly had no relationship to increased costs of the service rendered; and more importantly, where the declared purpose was to raise general revenue for the City, IT WAS HIS OPINION THAT THE INCREASE PLACED A DISPORPORTIONATE AND UNFAIR BURDEN ON NEW HOUSEHOLDS IN ROY CITY, AS COMPARED TO THE OLD ONES, IN THE MAINTENANCE OF THE CITY GOVERNMENT; AND THAT CONSEQUENTLY IT WAS DISCRIMINATORY AND CONSTITUTIONALLY IMPERMISSIBLE. We are not disposed to disagree with that conclusion." (Emphasis supplied in capital letters)

3. *Lloyd E. Clarke, Inc. v. City of Bettendorf* (Iowa 1968) 158 N.W.2d 125. Here, the court's statement as to the facts and its holdings are so compelling that it must be quoted for the Court verbatim:

"Plaintiffs are corporate real estate subdividers and developers. Prior to April 12, 1966, the date the ordinance in question was adopted, plaintiffs requested the city extend sanitary trunk sewers to their respective subdivisions. The developers and the city held meetings to discuss financing new sewer extensions through large underdeveloped areas to reach plaintiffs' land and the necessary enlargement of present equipment occasioned by such developments.

"On February 9, the parties orally agreed the city at its initial expense would extend the sewers as requested to serve plaintiffs' properties. This would include necessary additions to the existing system. The improvements were to be financed by the city's issuing general obligation bonds to be retired partially by a connection charge of $125 for each house connection in the subdivision. An ordinance to that effect was contemplated. Without such an agreement the city would not construct the sewer.

"The city went ahead with the planned extensions and concurrently passed the ordinance in question regulating connection methods and providing in pertinent part as follows:

"'(1) The basic connection fee for each connection made to the sanitary sewer system of the City of Bettendorf, Iowa, shall be as hereinafter stated and shall be based upon the following three classes of building sewer permits:

"'(I) Residential properties-connection fee shall be One Hundred Twenty-Five Dollars ($125.00).

"'(II) Commercial or business properties-connection fee shall be Two Hundred Dollars ($200.00).

"'(III) Establishments producing industrial wastes-connection fee shall be Three Hundred Dollars ($300.00).'

"Plaintiffs made application to connect their various new houses to the sewer. They tendered a $5 inspection fee and $1 digging fee but refused to pay the $125 connection fee. The city denied the application for failure to pay the latter sum. Plaintiffs paid the full fee under protest and started this action seeking to have the pertinent parts of the ordinance declared illegal and void. They allege the city intends to continue to collect the fees in question under what they contend is an illegal ordinance.

"The trial court held the city had no statutory or other authority to levy the connection fees provided in the new ordinance and could not gain that authority by estoppel. We agree.

"(2) I. Code of Iowa, 1966, sections 368.26 and 391.11 authorize a city to construct, repair and regulate connections. THE FIRST ISSUE HERE IS WHETHER THE CITY CAN FINANCE SUCH CONSTRUCTION IN WHOLE OR IN PART BY CHARGING CONNECTION CHARGES IN EXCESS OF THE NORMAL AND NOMINAL INSPECTION FEE; the excess to be used to finance initial construction.

"Section 391.13 empowers the city to finance the construction of any main sewer or system of main sewers by assessing the cost to the respective lots as adjacent property. Section 391.18 to 391.91 regulates the powers and procedures of the city in levying such assessments. These regulations are specific and detailed. This assessment power is one method of financing sewer construction.

"A second method of financing construction, reconstruction or repair of main sewers and sewage purifying plants is by issuance of general obligation bonds as provided in section 396.2 and section 404.9. The latter section also allows for use of a combination of the first and second methods.

"II. No other provision is provided for payment for sewer construction unless section 391.8 is broad enough to allow for

connection fees or hook-on charges to be used as a method of financing. Section 391.8 provides: 'Gas, water, and other connections. They shall have power to require the connections from gas, water, and steamheating pipes, sewers, and underground electric construction, to the curb line of adjacent property, to be made before the permanent improvement of the street and, if such improvements have already been made, to regulate the making of such connections, fix the charges therefor, and make all needful rules in relation thereto, and the use thereof.'

"The trial court carefully analyzed section 391.8 and properly concluded it authorizes charges by the city for the cost of administration of the hook-up regulations; such as issuance of permit, inspection fees and cost of keeping records. IT CONCLUDED THE SECTION DID NOT AUTHORIZE HOOK-UP OR CONNECTION FEES TO BE USED AS A METHOD OF FINANCING TO RETIRE THE COST OF CONSTRUCTION.

"We need not extend this opinion by a long analysis of the section or an extended set of definitions of the words employed by the legislature. WE THINK A FAIR READING OF THE STATUTE IMPELS THE CONCLUSION THE SECTION DEALS ONLY WITH COSTS AND REGULATIONS INCIDENT TO A LINE RUNNING FROM THE MIDDLE OF THE STREET TO THE CURB LINE SO THAT A NEWLY LAID STREET WILL NOT BE UNNECESSARILY DISTURBED, AND IF IT IS DISTURBED, SO THAT IT WILL BE PROPERLY REPAIRED. IT HAS NOTHING TO DO WITH AND CANNOT BE USED AS A BASIS FOR FINANCING THE OVERALL PROJECT." (Emphasis supplied in capital letters)

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"Both sentences five and six require the result reached by the trial court. They do not necessarily reinvoke the former rules of construction prevalent before adoption of the amendment. THEY PROVIDE THEIR OWN RULES OF CONSTRUCTION WHICH FOR THE AREAS MENTIONED REQUIRE NARROWER INTERPRETATION THAN THAT MANDATED BY THE FIRST THREE SEN-

TENCES OF THE AMENDMENT.

"Here two methods of financing are supplied. They must be held to be exclusive. Here a fee, charge or other exaction is being levied without express authorization. Under either sentence five or six the levy is illegal." (Emphasis supplied in capital letters)

* * * * * * * * *

"Here the ordinance clearly exceeds the city's statutory authority. Whatever may be its rights against plaintiffs based on contracted theories it cannot sustain its ordinances by estoppel."

4. *Zehman Construction Co. v. City of Eastlake* (Ohio 1962) 195 N.E.2d 361: Here a developer who had put in all of the sanitary sewer improvements was held not to be required to pay a tap-in charge:

"The undisputed facts are that all of the improvements, including the sanitary sewers and the sewage disposal plant, as provided by the contract, were installed and completely paid for by the developer before such system, as well as all other street improvements, were accepted and the City assumed responsibility for its (the disposal plant and sewer system) operation and maintenance. The inescapable deduction from such fact is that the cost of such development was included in the sales price of the lots in the Eastlake Gardens Subdivision. This being so, the plaintiff paid its share of such costs as a part of the amount paid for its thirty lots. The City did not expend any of its funds for such improvements. IT IS ALSO CLEAR THAT BY THE PROVISONS OF THE ORDINANCE, THE COST OF OPERATING AND MAINTAINING THE SEWERS IN THE ALLOTMENT AND THE DISPOSAL PLANT IS PROVIDED FOR BY A TAX LEVY. LIKEWISE, THE CHARGE FOR THE TAP-IN, IF PAID BY THE PLAINTIFF AS ASSESSED AGAINST ITS UNDEVELOPED LOTS, IS TO BE USED NOT FOR THE

COST OF SUPERVISING THE TAP-IN CONSTRUCTION BUT IS TO BE APPROPRIATED BY COUNCILMANIC ACTION FOR OTHER SEWER IMPROVEMENTS OF THE CITY." (Emphasis supplied in capital letters)

* * * * * * * * *

"We come, therefore, to the question of whether or not a tap-in charge of three hundred fifty dollars in a case where the property owner has contributed his full share of the cost of the improvement and the charge is far in excess of the nominal cost of issuing the permit and of satisfying the Service Director of the competency of the person who will do the work and in seeing to it that code regulations are followed and where all of the revenue from such tap-in charge is directed by the ordinance to be expended for the purposes completely foreign to and without conferring a benefit on the property involved is a proper exercise of legislative authority. To state the proposition clearly to negate the right to levy such tax against the property of the relator.

"We conclude, therefore, that as to the relator's property, the ordinance is unconstitutional and void. * *"

5. *Metro Homes, Inc. v. City of Warren* (Mich. 1969) 173 N.W.2d 230: Here the court stated:

"On January 13, 1959, the Warren city council created by resolution a 'sewer tap charge' applicable to all subsequently built structures connected to the city's sewage system. Existing structures were exempted from the charge, however, and certain builders therefore challenged the resolution's constitutionality, seeking recovery of the fees they had paid under it. This litigation culminated in the decision titled Beauty Build Construction Corporation v. City of Warren (1965), 375 Mich. 229, 134 N.W.2d 214, where the Supreme Court concluded that existing but unconnected structures

and structures yet to be built are alike regarding the future use of the sewage facilities, and therefore held that the 1959 resolution by exempting the former structures from the charge, denied those persons building after January 13, 1959, equal protection of law.

6. *Norwich v. Village of Winfield* (Ill. 1967) 225 N.E.2d 30 - Headnote 2 of this opinion states:

"Under statute, municipality could not impose sewer property charge and treatment plant charge in addition to regular fee for making connection to sewer mains where additional charges were to be used for purpose of constructing improvements and extensions to sanitary system at an undetermined time."

7. *Boe v. City of Seattle* (Wash. 1965) 401 P.2d 648 - The synopsis of the case states:

"Action wherein the Superior Court, King County, F.A. Walterskirchen, J., declared void an ordinance under which a city had made a sewer connection charge and also declared void a contract entered into thereunder and directed repayment of money paid thereon. The city appealed. The Supreme Court, Hill, J., held that under a statute authorizing a city or town to make a charge for connecting to a water or sewerage system so that property owners would bear an equitable share of costs of the system, a share which was based upon present-day cost of reconstruction of a sewer constructed in 1937 was unreasonable and void, and the property owner was entitled to have the contract entered into thereunder declared void and to recover money paid thereunder.

"Affirmed."

8. *Aurora Sanitary District vs. Randwest Corporation* (Ill. 1970) 258 N.E.2d 817 - The court stated in

holding that the sanitary district had no authority to charge for connecting fees:

> "We cannot agree with plaintiff's argument that Section 319.7 of Chapter 42, supra, (which was passed in 1941) authorized the passage of Ordinance 204 in 1958. Prior to the 1959 amendment of Section 306 which specifically gave the sanitary districts power to enact ordinances imposing connection fees to its sewers, the statute merely provided for collection of charges and rates for the use of the sanitary district sewage system, as such system was defined in the statute. Section 319.7 cannot be said to have authorized by implication the imposition of non-uniform and unequal connection charges for a connection to a sewer which was not even operated by the Sanitary District. In fact, the legislation providing a method for obtaining control of the operation of tributary municipal sewers, other than by purchase or contract, was not enacted until 1963. (Ill. Rev. Stat. 1973, Ch. 42, Sec. 306.2)"

9. *Parente v. Day* (Ohio 1968) 241 N.E.2d 280 dealt with the question of whether or not a tap-in fee was void or voidable and could possibly be the subject of waiver. The court, in holding that such a promulgation of such an ordinance could not be waived and was void and therefore *required reimbursement to all persons who had paid the tap-in fee*, stated:

> "Since the waiver agreement is supported by consideration and is legally sufficient, the answer to the first question is in the affirmative; the waiver agreement, in itself, is valid. The second question, however, which asks whether the signed waiver-form estops the plaintiffs from contesting the assessment in this case, must be answered in the negative. The fact that

the sewer assessment was completely illegal and void makes this waiver ineffective. 14 McQuillin, Municipal Corporations, Section 31.213 (3rd Ed. 1965). The rule is stated by the author of the annotation in 9 A.L.R. 627 (1914) at 636:

"'If any underlying principle can be said to govern the waiver, or the loss by estoppel, of the right to object to an assessment for a street or sewer improvement, it is that a property owner cannot ordinarily waive or become estopped to urge the invalidity of an assessment which is void by reason of an inherent defect, either by jurisdiction or of procedure. This principle, however, is not universally recognized by the courts, the decisions in many cases being made to depend on entirely different principles or considerations. Nor is the principle similarly applied when recognized, the courts being apparently not altogether agreed as to when an assessment may be said to be absolutely void rather than merely voidable. * * *'

"This general rule is also found in 48 American Jurisprudence 783, Special or Local Assessments, Section 296:

"'The general rule is that objections to a special or local assessment relating to original want of jurisdiction in a body conducting the proceedings leading to an assessment, or to jurisdictional defects and irregularities in such proceedings, or other matters voiding the assessment, are not subject to the operation of an estoppel of or waiver * * *. However, although it is fundamental that statutes relating to special or local assessments are to be strictly construed against assessing authorities, and that they must be strictly followed in order to render the assessment valid, the cases are not harmonious as to particular defects which are jurisdictional and will void proceedings leading to the formation of an improvement district, construction of a local improvement, or the making of a special or local assessment, so