IN THE

SUPREME COURT OF FLORIDA

CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY, a Florida corporation, HALLMARK DEVELOPMENT COMPANY, INC., a foreign corporation licensed to do business in the State of Florida, KENNETH A. MARRIOTT, VERNON M. MILLER, and GEORGE C. WAGNER, Petitioners, vs. CITY OF DUNEDIN, FLORIDA, Respondent.	CASE NO. 47,662

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

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE

This is a review by certiorari of the decision of the District Court of Appeal, Second District, reported at 312 So. 2d 763, which was certified by that court as a question of great public interest.

Petitioners herein are the Contractors' and Builders' Association of Pinellas County, Inc. and a number of individual members of that body (hereinafter collectively referred to as "Petitioners"). Respondent is the City of Dunedin, Florida.

Petitioners were plaintiffs in a circuit court action for declaratory and injunctive relief against the Respondent. The complaint sought to restrain the Respondent from implementing its Ordinance 72-26 and subsequent amending ordinances establishing higher water and sewer connection charges in a manner most commonly called an "impact fee".

The complaint essentially pleaded that funds collected under the new ordinance were being commingled with general revenue funds; that the City was without statutory or charter authority to enact the ordinance; that the ordinance violated statutory procedures for imposition of special assessments; and that the ordinance constitutes general taxation of an arbitrary class for the benefit of a larger group in violation of the due process and equal protection clauses of the Florida and Federal Constitutions. (R-1-12)

Defendant-Respondent's Motion to Dismiss was overruled, and the case was tried before the Court on March 7 and 8, 1974. From an adverse final judgment, the Respondent timely appealed, and Petitioners cross-appealed. Interlocutory appeal by Petitioners to review costs judgment was consolidated by stipulation.

The heart of the decision of the Circuit Court was its holding that the ordinance constituted an exercise of the power of general taxation and was unauthorized as such. (R-727)

The District Court of Appeal reversed, holding as follows [312 So. 2d at 766]:

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

The above-quoted portion of the decision is the holding which has been certified to this Court as one of great public interest. Respondent cannot stress too strongly that the holding of the District Court bears no resemblance to the "straw-man" question suggested in Petitioners' statement of the case (P. 1, Petitioners' brief): i.e.:

> "The legality of 'impact fees' in which a municipality imposes a charge or tax on the building industry . . . to defray the entire cost of providing a particular municipal service to the entire community."

Though this distortion of the question before the Court was made by Petitioner in its statement of the case, rebuttal will properly be made by Respondent in the Argument section of this brief.

STATEMENT OF THE FACTS

> "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 new connections a total 'impact fee' of approximately $700.00 for dwelling or commercial units."

Thus began the Final Judgment entered in the Circuit Court (R-724).

Prior to May 1, 1972, the City of Dunedin imposed water and sewer connection fees and monthly charges under Chapter 25 of its Code of Ordinances. Water connection charges had been fixed by Ordinance 69-29 in amounts ranging upward from $95.00 for a 5/8" meter installation (R-326). Sewer connection charges were then pegged at $50.00 plus any extraordinary costs, by virtue of Ordinance 67-12 (R-329). These charges were based upon cost of physical installation of the customer's connection to the end of the City's utility system (R-326,329).

On May 1, 1972, pursuant to the procedures prescribed under its charter, the City amended Chapter 25 of its Code of Ordinances by adopting Ordinance 72-26 (R-1060). That ordinance in essence removed the sewer connection fee, left standing the water meter installation fee, and imposed a new charge against each subsequent connector to the system. The stated purpose of the new charge was "to defray the cost of production, distribution, transmission and treatment facilities for water and sewer provided at the expense of the City of Dunedin." The charge was initially fixed at $325.00 per living or business unit for water service, and $475.00 per living or business unit for sewer service.

Lesser amounts were charged for connection of transient or hotel units. Shortly thereafter, Ordinance 72-42 was adopted (R-1063) reducing the sewer charge to $375.00 per unit but reimposing a $100.00 per connection charge for cost of physical installation.

The amounts of $325.00 for water connection and $375.00 for sewer connection were initially established under Ordinance 71-7 (R-1073) which fixed the charges for small line extensions on a per-lot basis. After discussions between the City Manager, Engineer, Finance Director and Mayor over a period of months, the previous ordinance was converted to a charge per living unit connected. (Testimony of City Manager William Mount, (T-29); Deposition of Finance Director Frank Armstrong, filed in evidence, at R-1296 et seq.)

The City Manager testified that the figures from the 1971 ordinance were found to correspond roughly to the cost of a major expansion of water and sewer lines, calculated on a per-living-unit basis, and for that reason the old figures were simply carried over into Ordinance 72-26 (T-94). The City's consulting engineer testified that his later examination established the true cost of initial capital construction of water and sewer expansion at $988.00 per living unit (T-153). The City Finance Director testified that the funds collected under the challenged ordinance were earmarked for water and sewer capital expansion and could not be expended for any other purpose (R-1303 et seq.). He further testified that the utility system of the City was not funded in any way by ad valorem tax revenues, but solely out of revenues from rates and charges for use of the utility system (R-1317 et seq.). The City Engineer testified that the present systems of the City were functioning at capacity so that the dollars generated by the challenged ordinance would be used immediately for

direct contribution to expansion of existing facilities (T-166).

The final judgment of the circuit court found:

> "...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 this 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." (R-725).

The circuit court then proceeded to find that the challenged ordinance was in reality a tax unauthorized by law or charter, rather than a "reasonable charge" permitted by law to be imposed for furnishing of services and facilities by municipalities. The circuit court further found that the City was without any inherent homerule power to adopt the challenged ordinance. The court concluded that by whatever name the impact fee was known, it was "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." (R-727.).

In passing, the trial court noted that the challenged fee was not a special assessment or lien against property, and would have been invalid as such because there was no compliance with general law relative to special assessments (R-726). The court declined to rule on the constitutional questions raised in the complaint (R-727-28).

The decision of the District Court of Appeal reversing the trial court, which is really the only decision now before this Court, is reported at 312 So.2d 763 and need not be set out in full.

The statement of the case and facts contained in Petitioners' brief is at variance with the record in a number of substantial respects.

First of all, Petitioners make the point in italics at Page 21 that "the funds can be used for any municipal purpose." This statement is contrary to the evidence and the findings of both the trial court and the appellate court. The trial court found (R-725):

> "That the proceeds derived from the $700.00 connecting fees are earmarked by the City for capital contributions to the system as a whole."

The District Court found: (312 So.2d at 766):

> "The language of the ordinances does not unequivocally mandate the use of the funds for capital improvements. Yet, the evidence shows that the fees were established for this purpose, and the city has steadfastly handled the funds separately with a view toward expanding the monies only for improvements to the respective systems. In this regard we are assisted by the finding of the court below 'that the proceeds derived from the $700 connecting fees are earmarked by the city for capital improvements to the systems as a whole.' Clearly, the use of such funds must be so limited, and in view of the position taken by the city in this litigation, any use of the funds contrary to these purposes would be subject to appropriate legal sanction."

The second substantial false statement in Petitioners' brief comes at Page 22, where it is suggested:

> "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 again at Page 25:

> "Wild 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 . . ."

Actually, the testimony of Frank Armstrong, the Finance Director of the City, was as follows:

"Q: I would like to know, please whether the present sewer facilities of the City of Dunedin and the water facilities are capable of handling the amounts of tap ins that are presently tapped into the systems.

A: That are presently tapped into the systems?

Q: Yes, sir.

A: I would have to say yes.

Q: What capacity over that do you have at the present time?

A: I can't answer that question.

Q: Does the City government anticipate stopping tap ins in the future?

A: We have had to curtail tap ins from time to time when our existing plant didn't come up to the BIOD removal standards.

Q: At the present time, are you having to restrict them?

A: No."

(R-1312)(Emphasis supplied).

The testimony of Harry Wild similarly contradicts Petitioners' version of it: (T-164 et seq.)

"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 these 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 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?....

A: If you are saying that the facility has the capability, yes, it would be true, but that is not always the case.

* * * *

Q: What I am saying, if he is one part of the town and being serviced by a sewer, he pays a tap-in fee, they construct a new sewer somewhere else, he may never use the sewer in the house that he paid the tap-in fee for?

A: I understand the question but I am not sure the answer is going to be the same as your question.

Q: Do the best you can with it, would you?

A: If we go into a hypothetical case that says there is a tremendous excess capacity in the entire system, then the dollars that this person would be paying would go to, would be put in the bank and be used for financing, future expansion, which would then not cost all the citizens in the way of a revenue bond issue, that is correct.

Q: And it is quite conceivable that the amount of money he paid would never benefit him at all or would at least not benefit his properties to the amounts he paid in?

A: May I take another hypothetical case?

Q: Would you answer my question then we'll let you explain?

A: Under the circumstances of the hypothetical case, you might be, right.

Q: Would you like to explain?

A: The other case which happens to be the case Dunedin is in right now, and many others, is that they happen to be in a position where the existing facilities are up to capacity, that plants that have been prepared for the last three or four or five years or certainly the planning, not necessarily the construction document but plans for needed facilities have not been forthcoming, the facilities have not been forthcoming. As a result, the existing plant is at its capacity so this, under that circumstance, the dollars that somebody to tap in to utilize would be a direct contribution to the expansion, impending expansion of that facility." (emphasis supplied)

Contrary to Petitioners' statements, both the trial and appellate courts found that "The demand for sewer and water connections has strained the capabilities of the sewer and water departments to near the breaking point" (R-724) and "the evidence also supports the fact that the sewer and water systems were running near capacity and the expansion of these systems was imminent". (312 So. 2d at 766).

The third distortion of the record also arises from Harry Wild's testimony quoted above. Petitioners at Page 26 of their brief quote the answer to a hypothetical question, but notably fail to include the testimony immediately following, stating that the hypothetical does not apply to Dunedin. (T-164 et seq.)

Finally, Petitioners state (Page 27) that the City's consulting engineer did not recommend an impact fee but rather an extraterritorial drainage district under Chapter 180, Florida Statutes, as the vehicle for financing needed expansion. This statement is directly contrary to the record, where the engineering report shows at R-1271, p. 46 et seq. that (1) existing water and sewer revenues would not support needed expansion; (2) there were problems involved in the creation of an extraterritorial district where private utilities were already operating; (3) the planned expansion could be financed by a pledge of the connection charges imposed under Ordinance 72-26.

The issues presented in Petitioners' brief do not adequately frame the question certified by the District Court. Respondent suggests the following:

POINTS INVOLVED

POINT I
(Petitioners' Points I and II)

WHETHER THE DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THAT "WHERE THE GROWTH PATTERNS ARE SUCH THAT AN EXISTING WATER OR SEWER SYSTEM WILL HAVE TO BE EXPANDED IN THE NEAR FUTURE, A MUNICIPALITY MAY PROPERLY CHARGE FOR THE PRIVILEGE OF CONNECTING TO THE SYSTEM A FEE WHICH IS IN EXCESS OF THE PHYSICAL COST OF CONNECTION, IF THIS FEE DOES NOT EXCEED A PROPORTIONATE PART OF THE AMOUNT REASONABLY NECESSARY TO FINANCE THE EXPANSION AND IS EARMARKED FOR THAT PURPOSE."

A. WHETHER A CITY HAS CONSTITUTIONAL, STATUTORY AND PROPRIETARY POWER TO IMPOSE SUCH A FEE.

B. WHETHER THE CHALLENGED FEE CONSTITUTES A SPECIAL ASSESSMENT SO AS TO BE INVALID FOR FAILURE TO MEET STATUTORY PREREQUISITE.

C. WHETHER THE CHALLENGED FEE CONSTITUTES GENERAL TAXATION OF A PARTICULAR CLASS FOR THE BENEFIT OF A LARGER CLASS.

POINT II
(Petitioners' Point III)

IF THE CHALLENGED FEE IS INVALID, DID THE CIRCUIT COURT ERR IN DIRECTING REFUNDS ONLY TO THOSE PARTIES PAYING UNDER PROTEST?

POINT III
(Petitioners' Point IV)

DID THE CIRCUIT 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 PASSAGE OF THE ORDINANCE UNDER REVIEW.

ARGUMENT

POINT I

THE DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THAT "WHERE THE GROWTH PATTERNS ARE SUCH THAT AN EXISTING WATER OR SEWER SYSTEM WILL HAVE TO BE EXPANDED IN THE NEAR FUTURE, A MUNICIPALITY MAY PROPERLY CHARGE FOR THE PRIVILEGE OF CONNECTING TO THE SYSTEM A FEE WHICH IS IN EXCESS OF THE PHYSICAL COST OF CONNECTION, IF THIS FEE DOES NOT EXCEED A PROPORTIONATE PART OF THE AMOUNT REASONABLY NECESSARY TO FINANCE THE EXPANSION AND IS EARMARKED FOR THAT PURPOSE".

Petitioners' brief commences with an assertion that the question before the court is one of much legal conflict. If legal conflict is measured by the pound, this statement is true; but it is significant that Petitioners in their 120 pages have failed to cite a single case contrary to the holding of the District Court.

Each of the cases cited by Petitioners will be disposed of herein; but first, Respondent would agree that the threshold question is one of the legal authority of the City to adopt the challenged ordinance.

A. (1) A CITY HAS CONSTITUTIONAL, STATUTORY AND PROPRIETARY POWER TO IMPOSE SUCH A FEE.

It has been stated innumerable times that an ordinance or other action of a governmental body comes before a court clothed with a presumption of correctness. Yet the Respondent cannot be content to wrap itself in this mantle of propriety arbitrarily and without explanation. It must first be shown that the Respondent has the power to act, before the act itself can be presumed valid. In this case, the action of the Respondent was authorized on three different foundations: Constitutional home rule, express statutory authority, and inherent proprietary power.

a. CONSTITUTIONAL POWER

Since the enactment of the 1968 Constitution, the nature and scope of municipal powers has been the subject of some confusion. The Constitution states simply:

> "Municipalities shall have governmental corporate and proprietary powers to enable them to conduct municipal givernment, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective." Fla. Const. Art. VIII §2(b).

In case there was any doubt about the meaning of the quoted section of the Constitution, the 1973 Legislature clarified the matter. In Chapter 73-129, (Now Ch. 166, Fla. Stats.), the Legislature repealed ten chapters of the Florida Statutes, including statutes dealing with the subject of municipal public works, special assessments and water and sewer financing. In so doing, the legislature stated:

> "It is the legislative intent that the repeal of the foregoing chapters of the Florida Statutes shall not be interpreted to limit or restrict the powers of municipal officials, but shall be interpreted as a recognition of constitutional powers. It is further the legislative intent to recognize residual Constitutional home rule power in municipal government and the legislature finds that this can best be accomplished by the removal of legislative direction from the statutes. It is further the legislative intent that municipalities shall continue to exercise all powers heretofore conferred on municipalities by the Chapters enumerated above, but shall hereafter, exercise those powers at their own discretion, subject only to the terms and conditions which they choose to prescribe." FLA. STAT. §166.042(1).

The legislature thus recognized that since 1968, all duly chartered municipalities have had the full right of local self-government without resort to general or special legislation for

authority. The Court may recall and take notice of the fact that prior to "home rule", the biennial sessions of the legislature were besieged with special acts relating to particular counties and cities, most of which were "rubberstamped" by the whole legislature upon recommendation of the local delegation. According to Mr. D'Alemberte's comments in Florida Statutes Annotated,

> "The provisions in this subsection [Art. VIII §2(b)] were new with the Revision Commission's proposal, but the 1885 Constitution granted the power to the legislature to prescribe the jurisdiction and powers of municipalities by law in Article VIII, Section 8. The apparent difference is that under the new language, all municipalities have governmental, corporate and proprietary powers unless otherwise provided by law, whereas under the 1885 Constitution, municipalities had only those powers expressly granted by law."

In City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972) this Court grappled with the question of the limits of constitutional home rule powers of the cities under the revised Constitution of 1968. The case dealt with the power of a city to impose rent controls, and after quoting the pertinent provisions of the 1885 and 1968 Constitutions, the Court observed:

> "Although this new provision does change the old rule of the 1885 Constitution respecting delegated powers of municipalities (emphasis supplied), it still limits municipal powers to the performance of municipal functions." (Emphasis by the Court).

This Court then divided 4-3 on the question of whether rent control was a municipal function. In any event, the question became moot with the adoption of Chapter 73-129, Laws of Florida. See City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764, (Fla. 1974).

It is thus clear that the Respondent had the power to adopt any ordinance reasonably related to the subject of water and sewer systems, which have been held to be proper subjects of local governmental authority. City of Lakeland v. State ex rel. Harris, 143 Fla. 761, 197 So. 470 (1940).

b. STATUTORY POWER

Assuming for the sake of argument that the Respondent has no home rule powers and must look to an express grant of power in order to uphold its ordinances, there were statutes in existence at the time of adoption of Ordinance 72-26 which authorized cities in general to operate utility systems and to establish rates and charges for such utilities. FLA. STAT. §180.13(2) provides:

> "The City Council, or other legislative body of the municipality, by whatever name known, may establish just and equitable rates or charges to be paid to the municipality for the use of the utility by each person, firm or corporation whose premises are served thereby...."

The foregoing statute was once challenged as an unconstitutional delegation of legislative power to local government without adequate guidelines. This Court recognized that the statute fixed a standard of "just and reasonable" charges, and held that standard to be adequate. The Court further recognized the inherent constitutional power of municipalities to provide services under the 1968 Constitution, and held:

> "Implicit in the power to provide municipal services is the power to construct, maintain and operate the necessary facilities. The fixing of fair and reasonable rates for utilities services provided is an incident of the authority, given by the Constitution

> and statutes to provide and maintain those services..." (Emphasis supplied). Cooksey v. Utilities Commission, 261 So. 2d 129 (Fla. 1972).

It is thus beyond question that the Respondent has the inherent power to impose rates and charges upon those who would avail themselves of its services. The charges are in exchange for a service rendered. Yet the circuit court applied its own peculiar definition. After noting the general law, and also the specific provisions of the Dunedin City Charter which authorized construction and maintenance of public improvements and utilities, the court noted:

> "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 as 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." (R-727).

The circuit court overlooked the fact that neither citizens nor property owners per se are charged under Ordinance 72-26. The ordinance affects only those persons who choose to avail themselves of utility service after the effective date of the ordinance. Those persons may or may not be citizens or property owners, and citizens and property owners might or might not be subject to the ordinance. Applicability of the ordinance is not determined by any action of the Respondent, but by the voluntary connection to the utility system by a customer who has not previously connected.

The Courts have noted that there are three charges related to the operation of a water and sewer system, and the distinctions

in each must be noted to avoid confusion. First, there is a connection charge; next, there is a monthly usage charge; third, there is the possible imposition of special assessments for benefits conferred to land irrespective of usage. Pizza Palace of Miami, Inc. v. City of Hialeah, 242 So. 2d 203 (Fla. 3d D.C.A. 1971).

It is obvious that the challenge to the Respondent's ordinance does not rest on monthly use charges. The question of whether a special assessment has been imposed is dealt with in greater detail later in this brief; suffice it to say here that no lien is imposed on real property, and no ascertainable charge is fixed until the property is put to use, after which an initial charge is imposed based on the estimated volume of usage flowing to and from the property.

The question, then, is whether the ordinance imposes a valid connection charge, or an unauthorized tax. The accepted rule in Florida was set forth concisely in State v. City of Miami, 27 So. 2d 118 (Fla. 1946) where this Court upheld a water and sewer revenue bond ordinance against a challenge that the ordinance's rates and fees constituted a tax. The Court stated: [at 124]

> "...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. See City of Harrison v. Braswell, Ark. 194 S.W. 2d 12; Opinion of Justices of the Supreme Court of New Hampshire filed November 8, 1944, reported in 39 A. 2d 765; Hunter's Appeal, 71 Conn. 189, 41 A. 557; Robertson v. Zimmirman, 268 N.Y. 52, 196 N.E. 740; New York State Electric and Gas Corp. v. City of Plattsburg, 281 N.Y. 450,

> 24 N.E. 2d 122; City of Edwardsville v. Jenkins, 376 Ill. 327, 33 N.E. 2d 598, 134 A.L.R. 891; Wolcott v. Village of Lombard, 387 Ill. 621, 57 N.E. 2d 351,355; Grin v. Village of Lewisville, 54 Ohio App. 270, 6 N.E. 2d 98; Anderson v. City of Fargo, 64 N.D. 178, 250 N.W. 794..."

c. PROPRIETARY POWER TO IMPOSE USE CHARGES

In addition to the cases cited above, there is extensive authority throughout the United States for the proposition that a connection charge is not a tax or a special assessment, even when the connection charge is imposed in a higher amount against a class of users who may be considered "latecomers" to the system originally constructed by the existing populace. For example, in the case of Brandel v. Civil City of Lawrenceburg, 230 N.E. 2d 778 (Ind. 1967), there was an existing sewage disposal system constructed around 1940, and thereafter in 1962 a new system was constructed serving the outlying districts of the city and connected to the old system. The ordinance set a connection fee of $200.00 for those connecting to the new section of the system and $62.50 for those connecting to the old system. The court stated:

> "As to the charge that there is discrimination because those making connections in the new area to the new portion of the system are paying more than those the city is charging $62.50 for connection to the old system, we find that there is a basis for such difference. The original cost of the older system was less and therefore the charges for its use would be less than the cost for the new system, and we find no grounds for overturning the court's finding based on the evidence with reference to such charges."

The court further dealt with the question of whether or not the ordinance setting connection fees to the sewage system and requiring

connection of all users within ninety days was in reality a tax levied on an unequal and discriminatory basis. The court responded

> "The tax here involved, it should be noted, is not a benefit tax, but rather a use tax for the services of disposing of sewage from particular property. It is not a benefit tax for the reason that not all property in the area under the ordinance is required to pay the $200.00 fee. It is only such property as has sewage to be disposed of to which the tax is applicable. In other words, it is a tax for the use of disposing of sewage from particular property."

In a similar case, Hartman v. Aurora Sanitary District, 177 N.E. 2d 214 (Ill. 1961), the existing sewer system of the Aurora Sanitary District had been constructed through ad valorem taxation. The bonded indebtedness was fully retired, and the original area of the district was then tripled and the population doubled. The Illinois Supreme Court upheld the validity of an ordinance which imposed a charge of $160.00 for connection to the sewer system for persons within the newly annexed area. The Court noted that the ordinance recited the desirability of further improvements to the system, and that

> "These purposes can best be accomplished by the establishment of a capital improvement fund; that this fund should be acquired in a fair and equitable way from landowners within the area of the District, taking into consideration the fact that the existing capital improvement facilities were constructed at the expense of certain landowners of certain areas within the District."

The Court further stated:

> "We know of no requirement that a municipality, acting pursuant to statute, must affirmatively show the criteria by which they exercised such discretion.
>
> It does not appear from the fact of the ordinance that the connection fee assessed is unreasonable, arbitrary, or oppressive. Rather,

the ordinance established a connection fee pursuant to statutory authority. Such an ordinance is presumptively valid....

The Plaintiff insists that both the statute and the ordinance are unconstitutional in that they impose a special nonuniform tax.... the District contends, however, that both the ordinance and the enabling statute are legitimate and nondiscriminatory exercises of the police power and do not constitute an improper tax.

We feel that the Plaintiff's arguments have been carefully considered in the recent case of Spalding v. City of Granite City, 415 Ill. 274, 113 N.E. 2d 567,569...In answer to the same constitutional attacks as presented here, we said: 'The case at hand involves a situation where a privilege is extended to the property owners of the area to avail themselves of the use of the sewer or not as they see fit, and where the price to be paid for the privilege is tentatively fixed beforehand. Where the use of such privilege is left optional with the property owner, by his election to avail himself of it or not, he contracts with the city to pay the rental fixed by its ordinance, if he elects to use it. It is obvious that Plaintiff will be subject to no charge unless he elects to use the sewer... It is only proper that the property owners of the other areas of Granite City should not pay for a sewerage extension which only the Nameoki area can use. It is also proper that the burden of the extension should be borne by the Nameoki area property owners who elect to have the benefit of use of the existing sewer for which they paid nothing in taxes. It is a reasonable classification to require the property owners and/or residents of the area to pay the cost of the construction of the sewer system by which sewage would be carried from the locality into the existing sewer system..'

"We believe that the reasoning involved in the Granite City case is equally applicable here. It is patent that the rapid expansion of our municipalities has rendered inadequate prior facilities developed for the health and welfare of the community.

> It is only proper that all citizens of the Community should share equally in the cost of maintaining a sanitary plant which benefits the health and welfare of the entire community by the proper disposal of sewage. It would seem equally fair that those property owners who benefit especially, not from the maintenance of the system, but by the extension of the system into an entirely new area, should bear the cost of that extension.
>
> While the actual prorata cost of the extension and needed plant expansion to each new user cannot be determined with mathematical precision, we find nothing in this record to show that the charge set by the District is unreasonable."

In Hayes v. City of Albany, 490 P. 2d 1018 (Ore. 1971), an ordinance virtually identical in intent to the Dunedin ordinance was under attack. The City of Albany's ordinance stated that

> "To establish appropriate provisions for the construction and expansion of the sanitary sewer system of the city, inclusive of the treatment plant, and to provide for the necessary oversizing of the sanitary sewer system, and to be assured that the cost of such construction and expansion is borne by those who receive the benefits thereof, there is hereby established connection charges for all connections made to the sanitary sewer system of the city in accordance with the following amounts...."

Against this ordinance challenges were raised on the ground that the ordinance in reality imposed a tax or a discriminatory connection fee. The Oregon court overruled these challenges and noted that all funds received under the ordinance must be used for a purpose directly related to the activity being regulated. The court concluded:

> "Thus whether viewed as an excise tax as described in Associated Home Builders [Associated Home Builders v. City of Livermore, 56 Cal 2d 847, 17 Cal Rptr 5, 366 P 2d 448 (1961)] or as a contract between the user and the city as described

> in Standfield and Opinion of the Justices [City of Standfield v. City of Burnett, 353 P 2d 242 (Ore 1960); Opinion of the Justices, 39 A. 2d 765 (N.H. 1944)], we conclude that the city had the power to levy a sewer connection charge reasonably commensurate to meet the burden currently imposed or reasonably to be anticipated upon the City's sewerage disposal system, and that ordinance 3472 was a valid exercise of that power."

It has also been held that the right of a city under statute to compel property owners to connect to the sewerage system of the city so as to protect the health of the citizens, combined with the right to charge these citizens a connection or installation charge and usage charge for sewerage treatment and disposal, does not make the charges imposed an exercise of the taxing power. See Murray City v. Board of Education of Murray City School District, 396 P. 2d 628 (Utah 1964), dealing with the issue of whether the charges were use charges which might be imposed against other branches of government, or taxes which could not be imposed upon other governmental bodies. See also Jersey City Sewerage Authority v. Housing Authority of Jersey City, 40 NJ 145, 190 A 2d 870 (1963); Bexar County v. City of San Antonio, 353 S.W. 2d 905 (Civ.App. Tex. 1961) and Harris v. City of Reno, 401 P. 2d 678 (Nev. 1965).

It thus appears that based upon the great weight of authority both within and without the State of Florida, a connection fee is not a tax but rather a use charge, even where all residents are required to connect to the system before putting their properties to use. The portion of the Complaint directed toward the authority of the Respondent to adopt the ordinance did not plead that the connection fee was in any way unsupported by the costs to be anticipated by the City in constructing sewage and water improvements; rather, in paragraph twelve

of the Complaint the Petitioners acknowledged that there is a factual basis for the proration of estimated costs of improvements over the applicants to be expected, and there is no challenge to the validity of the figures used by the Respondent in arriving at its costs.

(2) AUTHORITIES SUPPOSEDLY CONTRA CITED BY PETITIONERS

Having laid the predicate of authority for its ordinance, the Respondent now turns to the specific attacks made by Petitioners in their brief.

a. IN GENERAL

Petitioners assert the Utah case of Weber Basin Home Builders Association v. Roy City, 487 P. 2d 866 (1971) in support of their position. In that case, a flat fee was imposed on every building permit to supply revenue for water and sewer expansion. The ordinance made no pretense of any finding of relationship between the flat fee and the actual cost of providing water and sewer service. Presumably the fee would have fallen equally on every building regardless of its intended use or burden on the utility system. Respondent agrees totally with the holding of the case, and in many respects the case is similar to Janis Development Corp. v. City of Sunrise, 40 Fla. Supp. 41 (7th Cir. 1973), affirmed in Broward County v. Janis Development Corp., 311 So. 2d 371 (Fla. 4th D.C.A. 1975).

Petitioners failed to mention that in a subsequent decision, the same Utah Supreme Court which decided Roy City, supra, upheld an ordinance similar to Respondent's. In Home Builders' Association of Greater Salt Lake v. Provo City, 503 P. 2d 451 (Utah 1972), the court sustained the validity of a $100 sewer connection fee. The

City, prior to adopting the ordinance, had obtained detailed engineering studies that recommended the service connection fee. The figure of $100.00 was derived by dividing the number of sewer connections into the net value of the system. The monies from the connection fees, together with the monthly sewer service fee and federal grants, were deposited into a sewer disposal operating fund. The fund was utilized to pay for new collector trunk lines, replacement of existing sewer lines, enlargement of the sewerage treatment plant, retirement of certain bond indebtedness on the sewers, and general operating expenses. The court recited various language from Airwick Industries, Inc. v. Carlstadt Sewerage Authority, 57 N.J. 107, 270 A 2d 18 (1970) as part of its reasons for sustaining the validity of the equity approach and the court found that the record sustained the connection fee and that the fee was reasonable and non-discriminatory.

b. FLORIDA CASES

Petitioners assert that the decision of the Fourth District in affirming Janis Development Corp. v. City of Sunrise, supra, 40 Fla. Supp. 41 (reported as Broward County v. Janis Development Corp., 311 So. 2d 371 (Fla. 4th D.C.A. 1975) is in conflict with the decision of the Second District in the case at bar. The two Utah decisions demonstrate that this is not so. In the Janis cases, there was a surcharge on building permits based on gross floor area, earmarked for construction of roads and bridges, The Fourth District properly struck the ordinance because there was no relationship between the area of a building and the cost of a road. It is significant that none of the unsuccessful parties in the Fourth District chose to apply to this

Court for certiorari, based on conflict with the decision of the Second District issued twelve days later. The reason is clear; this case involves a charge which is directly and measurably proportionate to the use of the municipal service for which it is exacted.

The Petitioners next cite the Circuit Court case of Venditti-Siravo, Inc. v. City of Hollywood, (C.C. 17th Jud. Cir., 1973) 39 Fla. Supp. 121. In that case, the City imposed a surcharge of one per cent of value on all building permits, for the purpose of acquiring and developing parks and open spaces. Of course the charge was struck down as a tax because it was completely unrelated to the subject of building regulation. But if, for example, the surcharge had been reasonably related to the cost of inspection of buildings, the question becomes different. The analogy would become even clearer if the building inspector needed a new car and the fees were calculated to amortize the cost of the car over its useful life. By analogy, the Associations' argument would be that its members are responsible only for the gasoline consumed by the car on inspection trips, and the car must be paid for by the entire populace of the town through general taxation. The rationale of Judge Nance shows that his decision was based on the lack of relationship between the class taxed and the purpose for which the proceeds were to be spent. Had the charge been necessary to buy new cars for the inspectors, the fee would have been a valid user charge.

The case of Pizza Palace of Miami v. City of Hialeah, 242 So. 2d 203 (Fla. 3d D.C.A. 1972) has already been discussed briefly. The issue between the parties was whether a connection charge which was

based upon front-footage of a larger parcel, and then assessed as a part of the monthly water bill of a lessee of a portion of the parcel, was in reality a special assessment. Of course it was! But petitioners suggest no reason why the case is applicable here. Here, the Respondent's ordinance is calculated not on front footage or other measure of benefit to the land, but rather on the use to which the property will be put and the corresponding burden on the system. If two identical parcels are utilized, one for a single-family home and one for an apartment building, a special assessment by the foot for value conferred on the land would be the same in each case. But the burden placed on the utility system is different, and so is the connection charge.

The Pizza Palace case should be compared to City of Los Angeles v. Offner, 358 P. 2d 926 (Cal. 1961) where the City improperly included elements of the central system in calculating the benefits to land to be included in a special assessment. In Pizza Palace, the opposite was true and the City was attempting to assess the benefit to the land as a use charge imposed on the lessee rather than the lessor. In both cases, the Court was correct, and the correct rule is that the portion of the cost of the system which is a direct benefit to the value of the land (i.e. local collector lines and laterals) may be imposed as a special assessment but the remainder of the cost of the system must be paid by its users, and may be apportioned between initial connection charges and monthly service charges in whatever manner the local governmental body may find to be "just and reasonable". Cf. Homebuilders of Greater East Bay, Inc. v. City of Livermore, 17 Cal. Rptr. 5, 366 P. 2d 448 (1961) where the latter course was followed and the evils of Offner, supra, were avoided.

The Petitioners also cite Admiral Development Corp. v. City of Maitland, 267 So. 2d 860 (Fla. 4th D.C.A. 1972) in which an ordinance requiring involuntary dedication of a portion of a subdivider's land for parks was stricken as being unauthorized. The Fourth District quoted from the decision of this Court in City of Miami Beach v. Fleetwood Towers, supra, 261 So. 2d 801, which cited Liberis v. Harper, 89 Fla. 477, 104 So. 853 (1925) as expressing the limited and delegated nature of municipal powers.

On this question it is a distortion of the decision of this Court and the Fourth District to utilize them as new precedent for the pre-1968 view of municipalities as having delegated powers only. In City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972) this Court held

> "...This new provision [1968 Constitution, Art. VIII §2(b)] does change the old rule of the 1885 Constitution respecting delegated powers of municipalities". (emphasis supplied).

c. EXISTING AND "PENDING" LEGISLATION

Petitioners' next broadside stems from the supposition that since there were impact fee bills pending in the legislature at the time of the District Court's decision, the legislature itself was dubious about the authority of the City to enact ordinances.

It is respectfully submitted that a pending bill in the Florida legislature does not constitute an acknowledgment of anything. Nevertheless Petitioners have quoted extensively from HB 86 (pp. 56-58 of Petitioners' brief). They should have read Section 3, which begins:

> "(1) The governing body of a local government, pursuant to the power granted it under the provisions of Part II of Chapter 163 [enacted in 1969] and Chapter 166 [The Municipal Home Rule

> Powers Act, implementing the 1968 Constitution] may impose as part of the fee for 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." (emphasis supplied).

The bill then proposes a brand-new grant of similar powers to private utilities. But if the legislature acknowledged anything, it acknowledged pre-existing municipal power to impose such fees and then attempted to regulate the use of that power.

Petitioners next profess their astonishment over the Second District's failure to recognize the repeal of FLA. STAT. §180.13. Petitioners have gotten their facts backwards again; Chapter 180 has not been repealed. Respondent's counsel will take some of the blame for Petitioners' misstep, since Respondent's brief below inadvertently listed Chapter 180, Fla. Stat. as one of the chapters repealed by Chapter 73-129, Laws of Florida. The error was initially continued by the District Court in a footnote. On discovery, Respondent advised the Clerk of the District Court and Petitioners, and the error was corrected by the District Court. (TR-379,380; Cf. TR-376) but not by Petitioners (Petitioners' brief, p. 64). Chapter 180 remains in effect because it contains the grant of authority to municipalities to extend their utilities beyond their limits.

d. ATTACKS ON THE SUPPOSED EXPANSION OF MUNICIPAL BOUNDARIES

The extension of utilities beyond municipal limits gives rise to one more attack from Petitioners, directed toward the supposed fact that the only purpose for the connection charge was to finance the expansion of municipal boundaries.

The District Court of Appeal answered this attack by finding evidence of dramatic growth within "the area logically served by the city systems." 312 So. 2d at 766. (emphasis supplied). The record amply supports this finding. The situation which existed at the time of the ordinance was summarized by the report of the Respondent's engineers (R-1271), which proposed the ultimate annexation of contiguous areas and presented the long-range plans for serving both the existing city and the surrounding area. The Petitioners have protested that such regional ambitions are improper; the Petitioners thus ignore the mandate of the U. S. Environmental Protection Agency, and the goals of the Florida Department of Pollution Control, and the Southwest Florida Water Management District. The EPA acquires its authority through 33 U.S.C. §466 et seq., and its regulations at 18 CFR §601.32 et seq. establish the requirement that municipal sewer improvements and expansions be included in a basin plan and a metropolitan/regional plan. The 1969 Master Plan for Pinellas County includes within the Respondent's service responsibility the adjacent areas which were included in the report of the Respondent's engineers, and these adjacent areas were also so designated by the Interim Plan, Water Quality Management and Pollution Abatement for the Tampa Bay Basin System. (Defendant's Exhibit 1, R-1271, pp. 8, 40).

The legitimate municipal purposes behind the long-range plan of the Respondent was best expressed by the engineers:

> "Unregulated development to the east and north of Dunedin could have many adverse effects on essential services provided by the City, particularly its water system." (R-1271, p. 7)

* * * *

> "It is also evident the implementation of a long-range plan depends on one basic premise and leads to the first question mentioned in the scope of the study (i.e. how can the City of Dunedin Commission provide the leadership to assure the orderly growth of these service areas prior to the receipt of annexation requests?)." (page 9)

Of course, the Petitioners had the burden of proof in the circuit court, and nowhere is there the slightest evidentiary suggestion that the cost of providing water and sewer service to residents inside the city is less than the $700.00 per unit imposed by the ordinance. The uncontradicted testimony of Harry Wild is that the average capital cost per living unit is $988.00 (T-153). The City chose a lower figure, and was presumably influenced in part by political considerations in balancing the potentiality of higher monthly rates to service a bond issue, against the immediate pain of a "front-end" impact fee. (T-144). It is undisputed that a cost and an impact are involved even when a resident of the central city finally connects to a sewer which has run in front of his house for years. (T-172).

e. ATTEMPTED DISTINCTION OF CASES CITED BY THE DISTRICT COURT

Petitioners have attempted to distinguish the out-of-state precedent cited by the District Court, but without success. A brief explanation is in order.

Petitioners say Brandel v. Civil City of Lawrenceburg, 230 N.E. 2d 778 (Ind. 1967) is not an impact fee case and that there were no users who did not pay an equal connection fee. This statement is false. The case is quoted extensively at page 17 of this brief. In essence, the court upheld a differential in connection fees, where the charge for connecting to the expanded system was

three times higher than the charge for connections to the original system, owing to the higher construction costs of the expansion.

The Petitioners dismiss without explanation the case of Hartman v. Aurora Sanitary District, supra, 177 N.E. 2d 214, because "drainage district cases" are supposedly inapplicable. Again by some mysterious process, the Petitioners seek to avoid cases which they deem to be decided under statutes such as FLA. STAT. Ch. 180.

There is no explanation of Chapter 180 by the Petitioners. The reason is that the Chapter imposes no limits on the setting of rates and charges for in-city utility customers other than the common-law standard of "just and reasonable". (F.S. §180.13). The Chapter further provides for extraterritorial extension of municipal utilities into surrounding areas, with power to require mandatory hook-ups of customers within these areas. The quid pro quo for this extraterritorial power to compel hook-ups is the requirement of a hearing in some instances for the setting of rates and charges for customers outside the city. (F.S. §180.191).

In the first place, the Respondent did not choose to exercise its power under Chapter 180 to require compulsory hookup outside the corporate limits. Connection to the city systems outside the city remains voluntary, and the so-called "drainage-district" cases are otherwise completely applicable. The same rule may be true even where connection is mandatory under the health code; cf. Murray City v. Board of Education of Murray City School District, 396 P. 2d 628 (Utah 1964).

In the second place, a hearing is required for customers outside the city if and only if a differential of more than 25% in

rates is set for non-city customers. If rates are the same or within 25%, no hearing is required.

The next case Petitioners attempt to distinguish is Hayes v. City of Albany, 490 P. 2d 1018 (Ore. 1971). The basis for distinction is that the ordinance there required a sinking fund, and the fee was neither arbitrary nor unreasonable but directly related to out-of-pocket costs. Petitioners ignore the finding of the circuit court and the district court in the case at bar that the funds collected under the challenged ordinance were "earmarked" in the manner of a sinking fund. The District Court has further advised the parties that any other diversion of the funds would be subject to "appropriate legal sanction". It matters not whether there is an interpretation of the ordinance which would render it invalid, if the interpretation being used renders it valid.

Petitioners seem unable to comprehend that the ordinance under attack is related to out-of-pocket costs. The essence of their protest is that too many out-of-pocket costs were included. Dollars spent for lift stations and treatment plants are just as real as dollars spent for local mains and laterals. Petitioners complain that the District Court failed to give due credence to the circuit judge's "factual findings" that the challenged fee exceeded the cost of connection. But the District Court properly recognized that the only evidence as to cost was the testimony of Harry Wild, who stated that the true cost was $988 per living unit. Without any factual support, the circuit judge's "finding" was properly viewed as a legal conclusion that costs beyond the physical connection or tap were unrecoverable.

Such a conclusion was found by the District Court to be contrary to the great weight of authority.

The last case which Petitioners attempt to distinguish is Homebuilders of Greater Salt Lake v. Provo City, supra, 503 P. 2d 451. This is the case which shows the distinction between the type of impact fee which is invalid as a tax (Cf. Weber Basin Home Builders' Assn. v. Roy City, supra, 487 P. 2d 866, and Broward County v. Janis Development Corp., supra, 311 So. 2d 371) and the type of impact fee which is valid as a legitimate user charge.

The only suggested basis for distinction is Petitioners' assertion that in this case "we are talking about millions of dollars... and exorbitant amounts of money and literally thousands of dollars. In no way is this case the same." The Court will note that this attempted "distinction" is nonsense born of economic, not legal pain.

f. PETITIONERS' OUT-OF-STATE CASES

Petitioners have cited a number of out-of-state decisions which supposedly support their position. Actually, most of these jurisdictions support the Respondent and the rest are distinguishable. The cases will be addressed in order.

1. The Petitioners cite Daniels v. Borough of Point Pleasant, 129 A. 2d 265 (N.J. 1957) as a "landmark case" on impact fees. Factually the case is similar to Janis Development Corp. v. City of Sunrise, supra, 40 Fla. Supp. 41, and is distinguishable on the same basis. The imposition of a building permit surcharge based on floor area bore no relationship to the cost of inspection but was a general revenue device which was properly struck down as a discriminatory tax.

2. Weber Basin Home Builders Association v. Roy City, supra, 487 P. 2d 866 (Utah 1971) is similar in that a flat fee was imposed on every building permit to supply revenue for water and sewer expansion. There is apparently no pretense in the ordinance of making any findings of relationship between the flat fee and the cost of water and sewer service, and presumably the fee would fall equally on every building regardless of its intended use or burden on the utility systems. The City has no quarrel with the holding. The case should be compared to the later decision of the same court, Home Builders Association of Greater Salt Lake v. Provo City, supra, 503 P. 2d 451 (Utah 1972). In that case the Supreme Court of Utah sustained the validity of a $100.00 sewer connection fee. The City, prior to adopting the ordinance, had obtained detailed engineering studies that recommended the service connection fee. The figure of $100.00 was derived by dividing the number of sewer connections into the net value of the system. The monies from the connection fees, together with the monthly sewer service fee and federal grants, were deposited into a sewer disposal operating fund. The fund was utilized to pay for new collector trunk lines, replacement of existing sewer lines, enlargement of the sewerage treatment plant, retirement of certain bond indebtedness on the sewers, and general operating expenses. The court recited various language from Airwick Industries, Inc. v. Carlstadt Sewerage Authority, 57 N.J. 107, 270 A. 2d 18 (1970) as part of its reasons for sustaining the validity of the equity approach and the court found that the record sustained the connection fee and that the fee was reasonable and non-discriminatory.

3. Lloyd E. Clarke, Inc. v. City of Bettendorf, 158 N.W. 2d 126 (Iowa 1968) appears to be directly on point factually. It is legally distinguishable in that the Iowa court held the statutory methods of financing (i.e. special assessments or general obligation bonds) to be the exclusive limits of the City's power. In Florida, the City of Dunedin may exercise any power for municipal purposes, without legislative delegation, unless there is express legislative prohibition. City of Miami Beach v. Fleetwood Hotel, Inc., supra, 261 So. 2d 801.

4. The Petitioners next cite the case of Zehman Construction Co. v. City of Eastlake, 195 N.E. 2d 361 (Ohio 1962). In that case, the developer had already paid for the entire sewer system serving the subdivision, including the central disposal plant. He protested successfully when he was charged an additional fee for tapping into the system which he had dedicated to the City. The purpose of the fee was to provide funds for further expansion elsewhere in the city. The court properly held that he had already paid his full share of the cost of the improvements and that the charge assessed by the city exceeded its additional expenses for inspection of the physical hook-up.

If the Petitioners had read the Zehman case a little more closely, the case might not have been cited as authority for their position. The converse of the rule expressed in Zehman is that if the evidence had shown no contribution by the developer to the cost of the system, it would have been proper to include his pro rata share in the form of a connection fee. The developer did not challenge the connection fee ordinance on its face, but only as it applied to him.

The philosophy of the Zehman case is identical to the philosophy of the ordinance here under attack. It is unfair to impose the cost of expansion of a sewer system upon persons who have already paid their fair share. This is why the City of Dunedin imposed those costs upon the people who have not paid their share in the form of monthly amortization of previous bond issues.

5. Metro Homes, Inc. v. City of Warren, 173 N.W. 2d 230 (Mich. 1969) is cited briefly by the Petitioners, but without explanation. In that case, the city had initially adopted a connection fee ordinance which exempted existing buildings. The Michigan court had previously held that existing but unconnected structures and structures yet to be built are alike regarding the future use of sewage facilities. Beauty Build Construction Corp. v. City of Warren, 134 N.W. 2d 214 (Mich. 1965). The Metro Homes case involved an attempt by the City to amend the ordinance retroactively in an effort to retain the fees collected during the pendency of the Beauty Build litigation.

The case does not deal with the question of whether the charges are permissible where there is no discrimination between existing unconnected buildings and new buildings. The charge was later held permissible by the Michigan courts in R & C Robertson, Inc. v. Township of Avon, 194 N.W. 2d 261 (C.A. Mich. 1971). It is worthy of note that the Petitioners have complained about the fact that the Dunedin ordinance did not except existing buildings; the Metro Homes case shows only there could be no such classification.

6. The Petitioners next cite "Headnote 2" of Norwich v. Village of Winfield, 225 N.E. 2d 30 (Ill. 1967) for the proposition that no charges could be made for the purpose of construction of

improvements and extensions to the sewer at an undetermined time. The headnote would appear to be at variance with the decision of the Illinois Supreme Court in Hartman v. Aurora Sanitary District, 177 N.E. 2d 214 (1961). In that case the court had no objection to the "tentative" fixing of the pro rata cost of an expanded system by means of a connection fee. The court did not expressly deal with the question of whether total cost must be absolutely fixed in advance; on the contrary, the court stated "past cost and distance from the plant and other factors cannot be said to be illegitimate criteria in arriving at such a charge."

7. Boe v. City of Seattle, 401 P. 2d 648 (Wash. 1965) is cited for the proposition that new customers may not be charged a pro-rata share of the replacement cost of the existing system at present-day construction costs, where the existing system was constructed in 1938. With that proposition the Respondent would agree. Conversely, those persons who paid for an adequate existing system at 1938 prices ought not to be required to pay for an expansion of that system at current construction costs. But the case does not appear to prevent the charging of present-day customers for expansion of the system to serve them at present-day construction costs.

8. Aurora Sanitary District v. Randwest Corp., 258 N.E. 2d 817 (Ill. 1970) appears to deal with the sequence of a number of statutes as they affect the right of the district to impose connection fees. The underlying question on the philosophy of the connection fees was answered favorably to the District in Hartman v. Aurora Sanitary District, supra.

9. In citing Parente v. Day, 241 N.E. 2d 280 (Ohio 1968), the Petitioners cite extensive language from the decision on the question of waiver and estoppel and void or voidable ordinances. The Petitioners overlook the fact that the underlying ordinance was invalidated only because it provided for assessment against customers retroactive to the actual connection and irrespective of whether the customer may not have been the original connector, or perhaps may have purchased the property subsequently and paid a higher price because of the existing connection. Cf. Zehman Construction Co. v. City of Eastlake, supra, 195 N.E. 2d 361, from the same court.

B. THE CHALLENGED FEE DOES NOT CONSTITUTE A SPECIAL ASSESSMENT AND THEREFORE IS NOT INVALID FOR FAILURE TO MEET ANY STATUTORY PREREQUISITES FOR SPECIAL ASSESSMENTS.

Petitioners cite a large body of law beginning at Page 75 of their brief, in an attempt to show that the challenged ordinance constitutes a special assessment. The District Court properly recognized that

> "The imposition of fees for the use of a municipal utility system is not an exercise of the taxing power nor is it the levy of a special assessment. (312 So. 2d 766. Emphasis supplied).

The circuit court also found that

> "The 'impact fee' is not a 'special assessment against the property benefitted by such improvements'." (R-726; TR-339)

The suggestion that the ordinance imposes an invalid special assessment is made in the second broad attack (¶¶24-32) of Petitioners' original complaint (R-1 et seq.). The attack presupposes that the

ordinance imposes a special assessment at all. Having jumped to a legal conclusion, the Petitioners make a number of unwarranted subsidiary conclusions that the challenged ordinance does not especially and particularly benefit the real property assessed to the exclusion of other properties, and fails to provide for a method of apportionment at a particular time based upon a particular cost.

The Complaint does an excellent job of sticking an apple label on a box of oranges and then complaining that the contents do not look like apples. The challenged ordinance does not meet the criteria for a special assessment because it is not a special assessment. A special assessment is a lien imposed against real property in an amount directly proportionate to the financial benefit to the property by reason of local public works construction. It is fixed in an ascertainable amount based on the cost of an ascertainable project, and is payable when imposed or as otherwise provided in the enacting ordinance, irrespective of whether the particular property charged with the lien ever utilizes the particular public works project. The distinction between a special assessment and the charge imposed by the challenged ordinance is clear. The challenged ordinance imposes a fee which is not proportional to the benefits to the property, but rather is proportional to the burden which the use of the property places on the utility system as a whole. It might be said that two identical one hundred foot lots on the same street would be benefited equally by the construction of a sewer main in the street. However, if a single family residence is constructed on one lot and a triplex is constructed on the other lot, it is clear that three times as much of the capacity of lift stations, collector mains, and the central processing plant will need to be devoted to handling the sewage of the triplex.

Accordingly, under the challenged ordinance the triplex would pay three times the connection fee of the single family dwelling. Neither the triplex nor the single family dwelling would be obligated to pay any fee to the City until a certificate of occupancy for a particular usage of the property was requested. There would be no lien on the property, but there would be no service provided until the connection fee was determined and paid.

In the case of Opinion of the Justices, 39 A 2d 765 (N.H. 1944), the court dealt with the problem of special assessments as opposed to connection charges. In that case, the City of Concord, New Hampshire, had charged the State of New Hampshire for the ordinary rates and charges for consumption of water by the state capitol. The State Comptroller refused to approve the payments, and the Opinion of the Supreme Court of New Hampshire was requested. The Attorney-General represented the interests of the State. The Court noted:

> "The case of State v. Hartford, 50 Conn. 89, 47 Am.Rep. 622, is typical of the cases on which the Attorney General relies. In this case, the City of Hartford laid a sewer along the street upon which certain real property belonging to the State of Connecticut was situated and assessed the State; with other holders of real estate upon the street, for the special benefit conferred by the sewer upon their property.' The court, finding nothing in the provisions of the charter under which the city was acting, which expressly or by necessary implication included the state as a party on whom assessments might be made, held that the state was not subject to the assessment in question.
>
> Since a special assessment for a local improvement is in the nature of a tax upon property levied according to benefits conferred (citations omitted) the Attorney-General is correct in his contention that the principle of law which exempts the property of the state from taxation under general

statutory provisions also precludes the imposition of a special assessment for improvements upon such property 'unless there is positive legislative authority therefor.' 4 Dillon Mun. Corp. 5th Ed. §1446.

But the difficulty with this contention as here applied, lies in the fact that the price which the city charges for sewer service is in no sense a special assessment.

A number of cases exist which present facts very much like those of the regular local assessment, but which differ from the local assessment in one essential fact. This essential difference is that in these cases it is optional with the party so charged to incur the liability by acceptance of the benefit for which the charge is made, or to abstain from such benefit and thus to be free from liability...Such a statute does not impose an assessment in the proper sense of the term, though the charge is often spoken of as a tax. The transaction really amounts to an offer by the municipal corporation and an acceptance by the party who takes the water, thus forming a contract. The transaction then is substantially a contract of sale... Another form of a charge which is in substance a contract is to be found where a municipality, under authority conferred by statute, imposes a charge upon property owners who connect their land with a sewer system constructed by the city, the owner being free to avoid liability by refraining from making such connection. Such charge may be a fixed sum for the privilege of making the connection, or it may be a charge based upon the amount of sewage discharged from the premises into the sewer. Such a charge is not ordinarily regarded as a local assessment.' Page and Jones, Taxation by Assessment §6.

Nor is this general rule here inapplicable merely because the city of Concord now makes a charge for a service formerly furnished free of charge. The City by maintaining its sewers through taxation did not impliedly bind itself never to establish compensatory rates...."

A pair of California cases further illustrate the distinction between a special assessment improperly imposed for the cost of the central system, and a connection charge properly imposed to help meet that cost. The first of these cases is City of Los Angeles v. Offner, 358 P. 2d 926 (1961). In that case, the challenged ordinance of the City of Los Angeles established a sewer district for the construction of a sanitary sewer system. The ordinance supposedly imposed the costs and expenses of the project in proportion to the estimated benefits arising therefrom, against each particular parcel in the district. But the ordinance also provided that in addition to the usual incidental expenses of work, a charge would be assessed for outlet facilities in an amount equal to $400.00 per acre as a condition to providing of sewer service to properties. The latter charge was attacked and was narrowly overturned by the California Supreme Court. The Court stated:

> "It thus appears from this argument that the city is of the mistaken view that the properties in the assessment district can be required, by including the sewer connection charges in the assessment, to bear the costs of an improvement in an amount which substantially exceeds the special benefit to those properties from the proposed construction. This is contrary to the basic theory that 'the compensating benefit to the property owner is the warrant, and the sole warrant, for the legislature to impose the burden of a special assessment. (Citation omitted)'"

The second California case, from the same Court, is Homebuilders of the Greater East Bay, Inc. v. City of Livermore, 17 Cal. Rptr. 5, 366 P. 2d 448 (1961). In that case, the City of Livermore had adopted an ordinance imposing a connection charge of $150.00 per dwelling unit for all connections thereafter made to the Livermore

sewer system. These charges were deposited into a special fund to be used for "the purpose of expanding the sewer system of the City of Livermore and/or the servicing of any bonded indebtedness of the City of Livermore hereinafter incurred for sanitary sewer purposes." The inferior court in California had found that the ordinances were revenue measures rather than police power enactments, and that the City of Livermore was without statutory or constitutional authority to enact such ordinances under its taxing power. The City of Livermore appealed, and successfully asserted its position that it had the inherent power to impose a connection charge. The California Supreme Court carefully distinguished between the connection charge and the special assessment which it had struck down in Offner, supra:

> "The manifest purpose of §5471 [authorizing cities to construct water and sewer systems and impose charges for use thereof] is to provide revenues for the construction and maintenance of local water or sewer systems (other than 'local street sewers or laterals'). The subject ordinances declare that their purpose is to establish appropriate provisions for the construction and expansion of the sanitary sewer system of the City of Livermore...' the charges which they impose to achieve this end are denominated 'connection charges for the privilege of connecting to' defendants sewer system. As noted above, the funds thus raised are dedicated to 'expanding the sanitary sewer system' of defendant city and 'the servicing of any bonded indebtedness' of defendant incurred for sewer purposes. Such charges fall within the stated scope of §5471 and are authorized by it as fees....or other charges for services and facilities furnished by defendant city..in connection with its sanitation or sewerage systems. In any given case the charge prescribed by the subject ordinances is measured by the use to which the property (and consequently the city's sewer system will be put) including the number and type of plumbing fixtures to be

> installed. Accordingly, it does not constitute an assessment on the value of the property such as we considered in City of Los Angeles v. Offner (supra) but rather is in the nature of an excise tax imposed on all persons thereafter applying for building permits for the privilege of connection thereto (and is reasonably commensurate with the burden to be imposed upon) the facilities of defendant's sewer system."

The Complaint of Petitioners characterized the challenged ordinance of the City as exorbitant, unequalled, unparalleled, prohibitive, comparatively arbitrary, grossly unequal, unreasonable, confiscatory, irrational, unsound and illegal. In the midst of all of these characterizations, the Complaint made a simple statement in paragraph twenty-seven: "Accordingly, such assessment is not in reality or by legal construction a valid, special assessment...". Here, hidden within the depths of the Complaint about the failure of the Respondent to comply with special assessment procedures, is Petitioners' admission that the ordinance is not really a special assessment. Once that confession is made, the entire attack upon the challenged ordinance as an improperly imposed special assessment fades away. As the cases show, a special assessment is a charge assessed against the property of some particular locality because that property derives some special benefit from an expenditure of money collected by the assessment in addition to the general benefit accruing to all property or citizens 29A. FLA. JUR., Special Assessments, §2; Atlantic Coastline R. Company v. City of Gainesville, 83 Fla. 275, 91 So. 118, 29 ALR 668. The challenged ordinance does not meet the definition, and accordingly must stand or fail on its own as a connection fee without regard to the requirements of the special assessment statutes, if any of said statutes remain in effect.

of construction came from monthly rates as opposed to tap-in charges. But when there is a rearrangement of the rates and charges to reverse the proportions, Petitioners protest that by some alchemy, what was once a use charge has become a tax. There is no explanation by Petitioners as to why such a distinction should be made.

In its essence, Petitioners' argument is that the ordinance imposes a tax on a particular class for the benefit of a larger class. This argument has been raised and rejected overwhelmingly as a matter of law in the cases across the country which have considered the question of new and higher connection fees for newcomers to a utility system.

In Brandel v. Civil City of Lawrenceburg, supra, 230 N.E. 2d 778, the city constructed an extension of its existing twenty-eight year old system, and charged $200.00 for those connecting to the new section of the system while requiring only $62.50 for those connected to the old system. The Court stated:

> "As to the charge that there is discrimination because those making connections in the new area to the new portion of the sewage system are paying more than those the city is charging $62.50 for connections to the old system, we find that there is a basis for such difference. The original cost of the older system was less and therefore the charges for its use would be less than the cost for the new system, and we find no grounds for overturning the court's finding based on the evidence with reference to such charges."

It will be recalled that in this case the pleadings themselves set forth the evidentiary basis for the connection charge, which was an estimated $8,000,000.00 expansion program prorated over the estimated number of units to be served by the expansion. Since the plaintiffs thus conceded the evidentiary basis for the ordinance, the sole question was whether the classification was proper as a matter of law.

In a situation similar to Brandel, supra. the Illinois court dealt with the discrimination question in Hartman v. Aurora Sanitary District, supra, 177 N.E. 2d 214. There the court noted:

> "Plaintiff insists that both the statute and the ordinance are unconstitutional in that they impose a special nonuniform tax.... the district contends, however, that both the ordinance and the enabling statute are legitimate and nondiscriminatory exercises of the police power and do not constitute an improper tax.....it is patent that the rapid expansion of our municipalities has rendered inadequate prior facilities developed for the health and welfare of the community. It is only proper that all citizens of the community should share equally in the cost of maintaining a sanitary plant which benefits the health and welfare of the entire community by the proper disposal of sewage. It would seem equally fair that those property owners who benefit especially, not from the maintenance of the system, but by the extension of the system into an entirely new area should bear the cost of that extension...new additions to the community, however, create new problems of public health which must be met either by an extension of the present system or by installation of private septic systems. The statute merely permits the district to offer to residents of a new area a convenient and economical way of handling the sanitation problem they have created."

In Hayes v. City of Albany, supra, 490 P. 2d 1018, the Oregon court was faced with a challenge to the validity of an ordinance which expressed a purpose "to establish appropriate provisions for the construction and expansion of the sanitary sewer system of the city, inclusive of the treatment plant, and to provide for the necessary oversizing of the sanitary sewer system, and to be assured that the cost of such construction and expansion is borne by those who receive the benefits thereof.." The Court stated:

> "We conclude that the city had the power to levy a sewer connection charge reasonably commensurate to meet the burden currently imposed or reasonably to be anticipated upon the city's sewage disposal system, and that ordinance 3472 was a valid exercise of that power."

In Airwick Industries, Inc. v. Carlstadt Sewerage Authority, 57 N.J. 107, 270 A 2d 18 (1970), the New Jersey Supreme Court was confronted with an existing sewage district which had constructed a sewage plant prior to 1941. The cost of operating the district was borne by the three participating municipalities, and was indirectly passed on to the citizens by general taxation.

Later, rapid industrial and commercial growth placed a demand on undeveloped areas of the city of Carlstadt. A second district was established to service this particular area of heavy usage at a higher cost. Airwick Industries and others attacked the ordinance on equal protection grounds, contending that payment of the cost of the earlier system out of general taxation was in part absorbed by them by payment of their annual municipal taxes, and that accordingly the actual users of the older system would obtain the benefits of that payment while Airwick Industries was simultaneously required individually to pay for its own sewer system more recently constructed. The Court rejected the equal protection challenge, and stated:

> "So here, there exists a logical, reasonable basis for placing plaintiff's land in a separate class or category from those other Carlstadt lands being presently serviced by the joint meeting. Plaintiff's lands are used largely for commercial and industrial purposes--the joint meeting services a section used largely for residential purposes. The section of the municipality here involved has within the past decade been converted from a desolate area to a highly developed industrial area. The lands within the authority district are meadow and marsh land requiring a much more expensive

> sewerage installation and an increased disposal cost...absent the type of sewage disposal provided by the authority, both the idle and the improved land would become non-usable because of the prohibitive cost of individually complying with the requirements of the State Department of Health. The availability of the authority sewage system will result in a special benefit to and will enhance the value of lands to be serviced by the authority beyond any increment which may thereby be enjoyed by the balance of Carlstadt."
>
> "Thus the classification of Plaintiff's lands rest on real and not feigned differences and the action of the municipality in making a special charge for sewage disposal is constitutional."

In the case of Rutherford v. City of Omaha, 160 N.W. 2d 223 (Neb. 1968), the Supreme Court of Nebraska was confronted with a challenge to the ordinance of the City of Omaha establishing sewer rates and charges. The challenge was that the charges were unjustly discriminatory and preferred commercial and industrial users in comparison with residential users. The court summarized the applicable law:

> "The requirement that rates and charges be equitable is declaratory of the common law which prohibits unjust discrimination by a public utility. A difference in utility rates under substantially similar conditions of service may constitute unjust discrimination. On the other hand, rate differences fairly proportionate to differences in cost or difficulty of service are valid. [citations omitted]....in effect, the structure failed to achieve perfect equality, but perfection is not the standard of municipal duty. The city might reasonably consider (1) the cost of construction and operation of the treatment facilities in connection with the City's inability to process all industrial waste; (2) the substantial cost of construction, improvement and maintenance of sewers for the principal beneficiary, the residential class; and (3) situations in which the degree of correlation between water consumption and sewer use was low... (emphasis supplied)

A cogent analysis of the legal basis for a connection or impact fee is contained in the Florida Municipal Record of January 1974, beginning at page 8. Among many other authorities, the writer cites the Attorney General of the State of Florida, who, in Opinion 72-271 stated:

> "A sewer connection fee must be reasonable, not arbitrary, and uniform, non-discriminatory, and should bear a substantial relationship to the cost involved in providing the service to the landowner." (emphasis supplied)

In summary, the Complaint pleads only that the City has raised its connection charges for water and sewer service, and concludes that the hike in rates is arbitrary and discriminatory. There are no allegations of ultimate facts sufficient to show any denial of equal protection except as may appear from the fact of the ordinance, and it is clear from the authorities cited herein that on its face the ordinance is not arbitrary or discriminatory.

2. THERE IS NO DEFECT IN PROCEDURAL ADOPTION OF THE ORDINANCE

The due process challenge to the Dunedin ordinance under the Fourteenth Amendment of the U. S. Constitution and Article I, §9 of the Florida Constitution, deals with the narrow ground that the ordinance 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.

The due process argument is disposed of by the recognition that the ordinance does not impose a special assessment against particular property. At the time of the passage of Ordinance 72-26, the class of people who might eventually become subject to its charges

was open-ended. The ordinance does not contemplate a single specific public works project for a fixed cost, to be constructed according to prepared plans in a given area where properties are owned by ascertainable individuals who can be given written notice of the exact amount of the prospective lien against their property. Rather, the ordinance imposes a connection charge against persons who now reside in the City of Dunedin and are unconnected to the water and sewer system, and persons who might move into the City or occupy new construction in years to come and be faced with the burden of the charges imposed by the challenged ordinance. No cases have ever been cited by the Petitioners, nor has counsel for the Respondent ever seen any cases holding that a city must give notice to all persons who might ever connect with its water and sewer system before it can raise or lower its connection charges.

Not only are the persons who will eventually pay the charges unascertainable, but the amounts of the charges themselves are undetermined. There is of course no way to predict whether a particular parcel of vacant land may eventually be developed as single family homes or as highrise condominiums. The amount of the charges would necessarily be much higher in the latter case, but the precise amount could not be ascertained until the building permit is applied for. It can thus be seen that it is impossible to give notice to any particular group. The ordinance is merely a legislative enactment, and there is no allegation that it was adopted otherwise than according to the charter of the City of Dunedin at a regular public meeting. No more notice than that is required of the United States Congress.

3. THE ORDINANCE IS NOT VIOLATIVE OF STATE CONSTITUTIONAL PROVISIONS

The Petitioners' final Constitutional argument deals with state constitutional limits on the power of taxation. It is argued that the taxing power of cities is limited to that granted by constitution or general law.

Petitioners' argument on the question of the City's authority presupposes that the connection fee is a tax. This assumption is in turn based on the legal conclusion of the court below that any money exacted from a citizen for a municipal purpose is a tax. Such a conclusion is contrary to the law of this state. State v. City of Miami, 27 So. 2d 118 (Fla. 1946). The Petitioners' entire argument on this point is immaterial. Even if it be said that the imposition of an impact fee in general is a tax where it is levied for purposes of schools, parks, streets or other public facilities of indirect usage, such a rule does not apply with equal force to the imposition of utility connection fees where the usage of the facility is direct and measurable and voluntary.

In their frantic efforts to nail the ordinance into a neat little box labelled "tax", Petitioners quote the Mayor at page 62 of their brief, where he supposedly referred to a "sewer tax fee". The Respondent respectfully calls Petitioners' attention to the probability of a typographical error and to the likelihood that the phrase used was "sewer tap fee". The statement refers to the adoption of a $475.00 per unit connection fee for sewerage, which was to include the existing $100.00 tap fee carried over from Ordinance No. 284 (R-1058). Upon reflection, the charge was reduced to $375.00 per

unit, and the $100.00 per tap charge was reinstated. See Ordinance 72-42 (R-1063).

The distinction between tax and use charge can further be clarified by using the example which Judge Franza proposed in Janis, supra:

> "If one industry generates mountains and tons of debris after use by the public, should this industry be taxed for its removal by sanitation collectors?"

The answer to the question is by no means clear, because legislatures in Oregon and New Hampshire have essentially done what Judge Franza suggests cannot be done, imposing a mandatory deposit on all beverage containers, to be administered by the industry.

But assuming that a factory cannot be taxed for the cost of collecting its waste product after public usage, would Petitioners then argue that the factory can escape trash collection charges for municipal disposal of wastes collected at the factory? Of course not! The trash bill is a use charge, not a tax. To carry the analogy one step further, if the volume of trash from the factory was such that it became necessary for the City to employ one truck full-time to service the factory, would Petitioners argue that the City cannot include the cost of the truck in calculating its rates and charges? Again, the answer is no. When, then, may the City collect these costs? May it amortize them over five years? Four? One? Should payments be made annually? Quarterly? Monthly? At what magic point does the use charge become a "tax". The answer is that it never does.

The suggestion by Petitioners that the connection charge constitutes a violation of the ten-mill cap on ad valorem taxes is preposterous. The charge is not based on the value of property but on the use of

property. It is imposed only on property being put to use. If the ten-mill cap is violated in this manner, it would also be violated by requiring a property owner to pay a clerk's filing fee to record a deed or commence a suit in any county already at the ten-mill level.

POINT II

THE CIRCUIT COURT DID NOT ERR IN DIRECTING REFUNDS ONLY TO THOSE PARTIES PAYING UNDER PROTEST.

Respondent does not believe this Court will quash the decision of the District Court; but if Respondent is mistaken, the question raised by Petitioners' Cross-Appeal below becomes relevant.

There is dispute between the parties as to whether there was an agreement to release a portion of the collected monies to construct necessary projects. The agreement does not appear of record, but was discussed in closing argument in the circuit court (T-66; TR-325).

Prior to the supposed agreement, the City's capital funds were frozen voluntarily. In reliance on the agreement the City has transferred $196,000.00 from the escrow account into construction accounts, so that the City's purchase of the Dynaflow private system might be consummated and other desperately-needed extensions might be made. Whether or not the agreement existed, the fact remains that the Petitioners never requested and the Circuit Court never granted a temporary injunction as prayed by the Complaint. A portion of the money has been spent. Certainly there is no evidence that it has not been spent, other than the deposition of Frank Armstrong taken months before the trial. The record will not support the Cross-Appeal. The expenditure of part of the money creates staggering problems of

apportionment and redetermination of the relationships between the payers and the costs of their respective connections.

The circuit court took all of these factors into consideration, and its ruling is identical to that of this Court in City of Tampa v. Birdsong Motors, Inc., 261 So. 2d 1 (1972). There, the Court held that a license tax based on gross sales was void, but also held:

> "This decision is prospective only, is not retroactive and affords no remedy for taxes previously paid by persons not making an attack on the ordinance."

Naturally Respondent feels that the return of any funds will be rendered moot by this Court's resolution of the merits of the Petition. Nevertheless should the Court be persuaded otherwise, Respondent believes that on the foregoing authority the equitable discretion of the circuit court should not be interfered with.

POINT III

THE CIRCUIT COURT DID NOT 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 PASSAGE OF THE ORDINANCE UNDER REVIEW.

Again, Respondent feels the determination on the merits of the challenged ordinance will render moot the interlocutory appeal on the question of recovery of certain items on Petitioners' motion to tax costs. The disputed items are the stenographic reporter's fees for transcribing the original tapes of the Commission meetings where the challenged ordinance was discussed and adopted.

The circuit court was dubious about the relevance of the transcripts insofar as they were introduced to establish motives of any particular Commissioners. Objection was properly made to the relevance of the transcripts, and the Court responded: (T-73)

> "Well, the Court is unaware of what the record will show but the objection is overruled although the Court is inclined to agree with you again, Mr. Mattingly. The ordinance is valid even though it may have been improperly motivated."

The minutes of these same meetings had already been furnished by Respondent. (R-68 et seq.) There was no suggestion or argument that the transcripts in any way contradicted the minutes. Accordingly the transcripts served no useful purpose at trial which would not have been served by the minutes themselves, or at most by the playing of the original recordings. Further inquiry into the motives and debates of the commissioners was unnecessary. Mailman Development Corp. v. City of Hollywood, 286 So. 2d 614 (Fla. D.C.A. 1973); City of Opa Locka v. State ex rel. Tepper, 257 So. 2d 100 (Fla. 3d D.C.A. 1972). The purpose of the tapes was to prove "legislative intent" and the foregoing authority demonstrates that the tapes were neither necessary nor admissible for that purpose.

The Petitioners complain that the lower court had a duty to award "legal costs" to the prevailing party under F.S. §57.041. But legal costs were awarded. The interlocutory appeal dealt with the right to collect costs incurred unnecessarily. In an equity case, the decision as to taxation of such costs rest with the sound discretion of the chancellor as the justice of the case demands. Sullivan

v. Rank, 132 So. 2d 37 (Fla. 2d D.C.A. 1961). It is clear from the final judgment that despite the final ruling, the city's good-faith efforts to deal with a serious problem struck a "sympathetic chord" with the chancellor, and his discretion ought not to be disturbed.

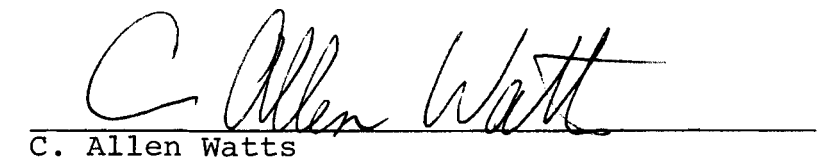
SUMMARY AND CONCLUSION

The Respondent heretofore presented all the law known to it on the central issue of whether a water and sewer connection fee may properly include a portion of the capital cost of the entire system, and whether that charge may properly be imposed on a class which includes all customers connecting to the system after the effective date of the ordinance. In this brief, the Respondent has also examined every case cited by the Petitioners which is purported to be adverse. All of the Petitioners' cases are factually distinguishable on the basis that they either allow or do not prohibit a water and sewer connection charge directly related to the use of the system, including the capital cost of the system. The Petitioners' cases deal with building permit surcharges or special equities of particular users or statutory limits but none of these cases supports the statutory and constitutional arguments argued by the Petitioners. The universal rule is that absent some particular statutory restriction, the city may properly include a capital charge as a part of its connection fee. The argument herein also demonstrates that the "statutory restrictions" urged by the Petitioners do not apply to this case, even if the city is not operating under Constitutional home rule powers.

If the Court should rule against the Respondent on the merits, Respondent nevertheless feels that the equitable discretion of the chancellor on the retrospective nature of his order and on the taxation of cost is soundly based in law, and should not be tampered with.

The decision of the District Court of Appeal should be affirmed on the merits of the challenge to the ordinance and the writ discharged; but if not so discharged, the final judgment of the Circuit Court should be affirmed in its entirety and the costs judgment should also be affirmed.

Respectfully submitted,



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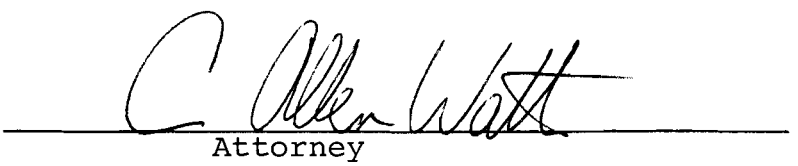
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to JOHN T. ALLEN, JR., ESQUIRE, 4508 Central Avenue, St. Petersburg, Florida 33711; JOHN G. HUBBARD, ESQUIRE, 1960 Bayshore Boulevard, Dunedin, Florida 33528; BURTON MICHAELS, ESQUIRE, P.O. Box 1757, Tallahassee, Florida 32302; and RALPH A. MARSICANO, ESQUIRE, P. O. Box 4115, Tampa, Florida 33607, this 27th day of August, A. D. 1975.



Attorney