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IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

vs.

CITY OF DUNEDIN, FLORIDA,

Respondent.

CASE NO. 47,662

REPLY BRIEF OF PETITIONERS ON THE MERITS

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I N D E X

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I N D E X
(Continued)

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CITATION OF AUTHORITIES

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CITATION OF AUTHORITIES
(Continued)

STATUTES, BILLS, CONSTITUTIONS, LEGAL ENCYCLOPEDIAS AND DICTIONARIES

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STATUTES, BILLS, CONSTITUTIONS, LEGAL ENCYCLOPEDIAS AND DICTIONARIES
(Continued)

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STATUTES, BILLS, CONSTITUTIONS, LEGAL ENCYCLOPEDIAS AND DICTIONARIES (Continued)

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STATEMENT OF THE CASE AND OF THE FACTS

In this brief, petitioners, Contractors and Builders Association of Pinellas County, Inc., a Florida corporation, Hallmark Development Company, Inc., a Florida corporation licensed to do business in the State of Florida, Kenneth A. Marriott, Vernon M. Miller, and George C. Wagner, who were plaintiffs in the Circuit Court of Pinellas County and appellees in the District Court of Appeal of the State of Florida, Second District, will be referred to as "petitioners." Respondent, City of Dunedin, who was defendant in the Circuit Court of Pinellas County, and appellant in the District Court of Appeal of the State of Florida, Second District, will be referred to as "respondent." The Florida League of Cities, Inc., who has appeared in this case as amicus curiae, will be referred to as the "League of Cities", or "League".

The following symbols will be used:

TR - Transcript of Record

R - Record-on-Appeal

T - Transcript of Trial

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

B - Brief of Respondent, City of Dunedin

BA - Brief of Amicus Curiae, Florida League of Cities, Inc.

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Respondent and the Florida League of Cities have filed briefs on the merits in this case, and petitioners will reply to both briefs in this reply.

Both briefs have brought into question differences of opinion as to what the testimony at trial was and how it affected the decision of the lower court and the District Court and how it should govern this Court's decision. Rebuttal and clarity are both best served by specifically dealing with each point which appears to be contested.

1. Respondent has stated that one of the sequence of ordinances passed by Dunedin "in essence removed the sewer connection fee, left standing the water installation fee, and imposed a new charge against each subsequent connection to the system."[1] It is unknown by petitioners whether repondent is trying to give the impression that the $100 connection fee imposed by Section 25-31 of the Dunedin ordinances was repealed and that the crucial section of the ordinance which is under attack stood alone as a *connection charge*. If this is the case, petitioners disagree with respondent's statement. As finally amended, the Dunedin ordinance imposed a $100 connection fee for each connection to a public sewer under Section 25-31 of the ordinance, water meter fees for inside the City of from $95 to $360 depending on the size of meter under

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1. (B 3)

Section 25-71(a), water meter fees for outside the City of from $105 to $390 depending upon size of meter, and an additional "*assessment to defray the cost of production, distribution, transmission and treatment facilities for water and sewer*" from $425 to $700 per unit.[2]

Thus, the point is that there was a connection fee charge, there was a meter charge, and then on top of all this, an additional assessment which is the subject of controversy. This is why petitioners keep repeating that the assessment in this case is not a connection fee, it is simply an additional charge or TAX paid by the property owner or builder at the time of connection to the system.

2. Two pages of respondent's brief[3] are devoted to statements apparently designed to give the impression that Dunedin arrived at the additional assessment figure by exact mathmatical calculations based upon studies that were done by Briley-Wilde, the City's consulting engineers. Respondent states that the city manager, engineer and finance director and mayor testified that the figures were found to "roughly" correspond to cost of expansion of sewer lines; that the City engineers "later" found the true cost of initial capital to be $988 per living unit.

City Manager Mount testified that $800 was estimated as the cost of *laying* the lines to the Ranchwood-Ravenwood

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2. The financial scheme is made clear when the final ordinance amendment is reviewed (R 1063-1066). See also Footnote 2 in Petitioners' main brief.
3. (B 4-5)

area. This is in no way connected with capital costs of sewer plants as respondent's statement would seem to indicate. Mount stated:[4]

> "Q. Without me asking you each meeting which would take up a lot of time, would you generally tell me all of what you can recollect as to what occurred concerning what each individual said to the other and just how this ordinance evolved?
>
> MR. MATTINGLY: I would like to reinstate my objection, Your Honor.
>
> THE COURT: Same, overruled.
>
> A. I don't think I could give you the complete details. I can give you basic information, I think.
>
> Q. Give me all of the information that you can recollect and can give me, please.
>
> A. Okay. I think when it was determined that something would have to be done in relation to the expanded or need for expanded facilities in the City, water and sewer expanded facilities in the City, there was a time when these persons referred to sat down to determine, you know, what would we do, and using the basis of the 71-7 ordinance, using that as a basis for our conversation as to what we could do, that and some information supplied by the City Engineer in which he estimated for two of the pending projects of State Road 580 -- He estimated that the cost would be approximately $800,000 to extend water and sewer lines to that general area, and this area was immediately east of the Amberly Subdivision, which was also in an area of expansion, so based on the $800,000 estimate which the City Engineer furnished divided by the estimated 1,000 units, which were planned for that area, we arrived at a figure of $800 per unit, which seemed to be

4. (T 93-96) (R 1177-1180) (TR 167-170)

substantiated primarily -- We were charging $700 total for connection charge on water and sewer.

In other words, it fell in the same ball park as the figures which we had been using for smaller water and sewer extension projects.

Q. Do I understand and please correct me if I am wrong because I am trying to understand, but do I understand that the figures in the present ordinance of $325 and I think it is $375 have been reduced?

A. Yes.

Q. To $700 altogether? The basis for the figures was the concern for the cost of connection of sewer lines to these two new development projects?

A. Basically, those two with whatever expansion was in that general area. There were approximately 900 units in those two specific projects.

Q. So really what you were attempting to do was defray the cost of those actual connections?

A. Well, what we were attempting to do was defray the cost of extending the lines to those areas.

Q. Now, since the ordinance didn't have a terminus or time when it would expire or wasn't directed to that particular area, what was to occur with the funds after the connections had been accomplished and paid for? Were they just to continue on?

A. It would continue on for any future extensions or expansions that the City would have to make, and of course the City realized that the demand, if we want to use that word again, was not going to be limited to the Ranchwood-Ravenwood area, that the extension would go on out to County Road 70 at least on both sides of 580, and areas not presently developed in the existing part of the City.

Q. Do I understand that the funds were not directed or ear-marked or thought of as for actual constructuion of new plant facilities, but just for connection?

A. They were for connection and for treatment of the sewer but not for building plants, no.

Q. For treatment of the sewer?

A. Right." (T 93-96)(R 1177-1180)(TR 167-170)

At this time, petitioners would like to cite the verbatim testimony of City Manager Armstrong, who was City Finance Director at the time Mount was City Manager, in which Armstrong specifically stated that he did not know what basis was used in arriving at the figure used in the crucial portion of the ordinance;[5] however, Armstrong's testimony is not available to petitioners at this writing, since his testimony was introduced into evidence in deposition form not included in the transcript of proceedings. Armstrong's testimony is included in the record-on-appeal and the Court is requested to read his testimony on this point.

At trial the opposition attempted to give validity to the arbitrary figure arrived at about two years prior to trial by having Wilde, the City engineering consultant, testify as to the amount he arrived at in his study which attempted to determine unit capital cost. Objection was made by petitioners' counsel that retroactive determination

5. Please see (R 1237).

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of the amount of the figure used in the ordinance could not be legally accomplished.[6] The trial judge agreed stating:

> "THE COURT: As the Court understands the Defendant's position at this point and proof which has been adduced so far, it is not their contention that the current rate was predicated upon any study. He is simply now trying to demonstrate through this witness that the fee is reasonable under the present circumstances, not from what may have occurred previously.
>
> MR. MATTINGLY: That is right." (T 152) (R 1236) (TR 226)

Therefore, it cannot be concluded, as respondent urges, that the amount charged in the assessment had any relationship to or was predicated upon methodical studies by engineering consultants. The rate was arrived at through speculation, guesswork, and a rough idea as to the cost of laying sewer pipe or lines into an unincorporated area outside the City.

3. Respondent cites testimony which purports to state that there was no available sewer capacity at the Dunedin sewer plant at the time and subsequent to the passage of the ordinance.[7] Wilde testified:[8]

> "Q. And further, you conclude on Page 49, Item 10, that at the time you issued this report which was June of 1972 that the existing Dunedin water system is adequate for present need of its present customers, is that true?

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6. (T 150-152) (R 1234-1236) (TR 244-246)
7. (B 4)
8. (T 180-181) (R 1264-1265) (TR 254-255)

A. That is correct.

Q. And you also indicated in that regard on Item 16 that the Dunedin sewerage system will be adequate to serve present customers and recently annexed areas after completion of current construction and construction of phase one of the proposed sewerage program and the expansion of the main line treatment facility of three MGD which means million of gallons a day construction document for the latter or now awaiting the required regulatory agency -- that was your conclusion?

A. That was the conclusion, yes.

Q. And what we are talking about that was that sewage system that presently is going to come on to line in February or March of this year, is that right?

A. This I believe this was talking about the construction of the sewers in downtown Dunedin as well as expansion of the plants that is ongoing, yes.

Q. Yes, sir." (T 180-181) (R 1264-1265) (TR 254-255)

So the point is that at the time of the passage of the ordinance, there was plenty of capacity for "newcomers," yet they were charged an "impact fee." City Manager Armstrong candidly and clearly admitted this fact.[9]

4. The illusion is created that since Armstrong as City Manager was of the *opinion* that the funds from the impact tax could not be used for any other purpose that we must accept such an opinion as fact for the purpose of determining this case on the merits.[10] This position is incorrect because:

9. (R 1312)
10. (B 4; 6-8)

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(a) The ordinance in clear words permits the expenditure of the funds for many other purposes than construction of sewer plants;

(b) The District Court in its opinion acknowledged the fact that the funds could be spent for other purposes but left it up to petitioners to police city officials to see that they were complying with the ordinance as written by the District Court rather than the ordinance written by the City Council of Dunedin.[11]

(c) City Manager Mount disagreed with Armstrong and was going to use the funds for extending water and sewer lines and for sewage treatment.[12]

5. Respondent contends that Wilde stated that the hypothetical question asked him and quoted on Page 26 of Petitioners' brief on the merits did not apply to Dunedin.[13] The resolving of this point will have to be left up to the Court. The hypothetical question was asked Wilde as of the time frame of the passage of the ordinance when all agreed that the City had plenty of adequate sewerage capacity.[14] Wilde later contended that his answer would not

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11. District Court's opinion (A 51).

12. (T 81; 94-97; 99-1101; 103-104; 110) (R 1165; 1178-1181; 1183-1184; 1182-1188; 1194) (TR 156; 161-171; 173=184; 177-178; 184)

13. (B 9)

14. (T 164-165) (R 1248-1249) (TR 238-239)

apply to Dunedin at the time of trial since the City of Clearwater had failed to put in its sewer plant which had been counted on by Dunedin which had resulted in a strain on Dunedin's sewer capacity.[15]

This point should not be determined by a witness who is an advocate for Dunedin attempting to defend against cross-examination questions. *At the time of the ordinance and for two years thereafter, those people paying the impact tax got nothing for their money because there was adequate capacity*. Merely because federal aid had not been forthcoming to construct Clearwater's plant which in turn was to take some of Dunedin's affluent is irrelevant to the case. It simply allowed Wilde to state at trial that at that time there was no capacity. Dunedin supposedly had a capacity problem at the time of trial because of the failure of agreements between Clearwater and Dunedin, not because the City was in need of funds to build additional plants. And what about such an issue. If the sewer impact fee was to supply new capacity, where was it? The City had the money. The real truth of this controversy is that Wilde was able to say that the new plant had not quite come on line yet at the time of trial.[16] When it did, there would have been plenty of capacity, and respondent knows

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15. (T 165-169) (R 1249-1253) (TR 239-243)

16. (T 168-169) (R 1249-1253)

it. This new plant was funded not by impact fees but bonds.

6. Respondent in its brief states:[17]

> "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."

Petitioners stand on their statement that Wilde did not recommend raising revenues by impact fees but recommended the City proceed under Chapter 180 Florida Statutes which would have created a drainage district. Respondent confuses or does not discern the difference in the Briley-Wilde report between a list of possible revenue-raising vehicles which included impact fees and Briley-Wilde's recommendations. Wilde did not recommend impact fees:[18]

> "Q. In your report, as a matter of fact on Page 47, the thing that you recommended in the way of financing a future project for these two areas is to do a Chapter 180, isn't it? I am referring to Page 47. Would you like for me to read it to you?

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17. (B 9)

18. (T 179-180) (R 1263-1264) (TR 253-254)

A. I did bring a copy of that report if I can find it.

Q. Top of the page?

A. Yes.

Q. The information of a water, the formation of a water and sewer service district for all of any part of extended service area by following the structure of 180 Florida Statutes would permit assessment against the property benefited by the facilities constructed under the long range plan, right?

A. That is correct.

Q. And you concluded on Page 50 of your report on Item 26 that the use of a special assessment against the benefited properties together with a revised rate schedule would appear to be the most promising method of generating sufficient money from within these areas to support the proposed program, is that correct?

A. Yes, this is what it says." (T 179-180) (R 1263-1264) (TR 253-254)

In Briley-Wilde's report[19] under "Conclusions", it is stated:

"10. The existing Dunedin water system is adequate for the present needs of its present customers."

* * * * * * * * *

"16. The Dunedin sewerage system will be adequate to serve present customers and recently annexed areas after the completion of current construction, the construction of Phase 1 of the proposed sewerage program, and the expansion of the mainland treatment facility to 3 mgd. (Construction documents for the latter are now awaiting the required regulatory agency approvals)."

19. Pages 49 and 50 of report (R 1271)

* * * * * * * *

"26. The use of special assessments against the benefitted properties, together with a revised rate schedule would appear to be the most promising method of generating sufficient monies from within these areas to support the proposed programs."

And, under Recommendations,[20] it is stated:

"3. The City Attorney should be requested to research Chapter 180 of the Florida Statutes to determine the legal requirements of extending service area boundaries, and to investigate other areas of questionable legality raised by this report."

To petitioners, the above quotations prove two things: (1) that Briley-Wilde recommended the City proceed under Chapter 180 rather than through impact fees and that the study was not made to support impact fees or arrive at any unit cost to be assessed as an impact fee; (2) that the fair and equitable way is to proceed under Chapter 180 where only the people benefited and who use the new plant are assessed. This is the marked difference between impact fees and special assessments. Only those who are benefited by special assessments are charged, but under impact fees there is absolutely no relationship between benefit and payment.

It is not understood why the opposition feels it cannot argue this case within the confines of the points argued in petitioners' brief on the merits. An examination of both respondent's brief and League of Cities' brief

20. Page 51 of report (R 1271).

shows that all are arguing the same points. Because of the discrepancy between the two opposing briefs concerning the points argued by each, reply is made difficult on any orderly basis. Petitioners have decided to basically use the points raised by respondent as a format for reply within an attempt to correlate the League's points into respondent's "Points Involved".

POINTS INVOLVED

POINT I

(As raised by Respondent's Point I) WHETHER THE DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THAT 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.

A. HOME RULE

B. STATUTORY POWER

C. PROPRIETARY POWER

D. AUTHORITIES CONTRA TO RESPONDENT'S POSITION

E. EXISTING AND PENDING LEGISLATION

F. THE FEE AS A SPECIAL ASSESSMENT

G. VIOLATION OF EQUAL PROTECTION

H. DENIAL OF DUE PROCESS

POINT II

THE ASSESSMENT CONTAINED IN THE ORDINANCE IS A TAX (As principally raised by League of Cities' Point I)

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POINT III

SHOULD RESPONDENT BE REQUIRED TO REFUND ALL IMPACT FEES TO THE PUBLIC AS WELL AS PETITIONERS? (As raised by Respondent's Point II)

POINT IV

DID THE LOWER COURT ERR IN DENYING PETITIONERS' MOTION TO TAX COSTS AGAINST RESPONDENT FOR THE EXPENSES OF TRANSCRIPTION OF DISK OR RECORD RECORDINGS OF THE DUNEDIN CITY COMMISSION MEETING HELD AT THE TIME OF THE PASSAGE OF THE ORDINANCE UNDER REVIEW? (As raised by Respondent's Point III)

ARGUMENT

POINT I

(As raised by Respondent's Point I) WHETHER THE DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THAT 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.

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F. THE FEE AS A SPECIAL ASSESSMENT

G. VIOLATION OF EQUAL PROTECTION

H. DENIAL OF DUE PROCESS

Both opponents in this case clearly attempt to disregard the testimony in this case and the basic reality

that the impact fee or sewer connection charge is A METHOD OF MUNICIPAL FUND RAISING OR FINANCING. Use of semantics by both sides in this controversy cannot govern the outcome of the case. But the District Court and the opposition want this case to be decided by *ignoring* the fact that: the City Council of Dunedin aimed the ordinance against newcomers[21] and readily admitted by their very language in the motion to adopt the ordinance that it was a "TAX";[22] the "impact fee" or "charge" or "sewer connection fee" was freely admitted to be a method of municipal financing[23](which clearly makes it a tax and requires special enabling legislation even under home rule); the amount of the assessment is politically set rather than levied upon a mathmatical basis;[24] the assessment in the ordinance is a "impact fee".[25] The reason the opposition does not wish to acknowledge the existence of these facts is obvious -- such admission requires reversal of the District Court's opinion and affirmance of the Circuit Judge's final judgment. You will note that none of the above facts are mentioned in the District Court's opinion. The most

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21. (R 418-497)

22. (R 707)

23. (T 137-138) (R 1221-1222) (TR 211-212)

24. (T 144) (R 1228) (TR 218); (R 1235)

25. (R 1319); (T 140-144) (R 1224-1228) (TR 214-218)

incredible part of the opposition's reluctance to admit these facts is that proof of all of the items comes from the City of Dunedin's witnesses or City Council. The only way that petitioners feel that the opposition's refusal to admit the validity of these facts can be clearly exposed is to quote the testimony verbatim which will establish such facts beyond and to the exclusion of every reasonable doubt:

1. THE CITY COUNCIL INTENDED TO PASS A TAX.

Mayor Lindner in moving the adoption of the ordinance stated:

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

2. HARRY WILDE, JR., DUNEDIN MUNICIPAL FINANCE EXPERT, STATED:

(a) THE ASSESSMENT IN THIS CASE IS AN IMPACT FEE;

(b) THE IMPACT FEE WAS THE LATEST MEANS OF MUNICIPAL FINANCING;

(c) THE AMOUNT OF THE IMPACT FEE IS POLITICALLY SET;

(d) THE IMPACT FEE IS AIMED AT NEWCOMERS;

(e) IN ALL OTHER TYPES OF MUNICIPAL FINANCING, THE AMOUNT PAID BY THE PERSON PAYING THE ASSESSMENT IS EQUAL TO ALL OTHERS MAKING PAYMENTS EXCEPT IMPACT FEES WHERE ONLY THE CLASS OF NEWCOMERS PAY FOR THE PRESENT USERS OF THE SYSTEM AS WELL AS THEMSELVES. HERE IS THE TESTIMONY THAT PROVES THESE FACTS:

"Q. Mr. Wilde, in regard to impact fees, you have indicated you had no professional training. Could we first of all define what you mean by an impact fee so we'll understand what we are talking about?

A. I would assume you are talking in terms of impact fees which have been done by municipalities over the last couple of years, to my knowledge.

Q. As a method of financing?

A. As a method of financing, yes.

Q. Well, have you participated in developing these programs and recommended to the cities that they finance their projects through this method?

A. Of the five that I mentioned, we have in most cases put together numbers and recommended development fees for them or impact fees.

Q. When you say recommended the figures, are you talking about a specific recommendation that they charge incoming people or new people the specific load, whatever it is, is that what you refer it?

A. That is correct.

Q. After -- and you have made studies in this regard and recommended to these cities this is the method of financing they should adopt?

A. What these studies have shown trying to go back is that many of the municipalities had additional revenue for funding future expansion of facilities. We gave them in the report a list of many different methods of financing they could use.

Q. Um-hum.

A. The impact fee being one of the various methods.

Q. Well, I understand that and I have read, for instance, your Dunedin report but in all of the reports, don't you make a specific recommendation as to the most feasible way of financing?

A. Our Dunedin report was not written for impact fees.

Q. Right, I understand that but I am saying as far as these other particular matters are concerned in the studies that you did you said that you gave them the alternative as I understood your testimony in these studies, I take it that some of them were bond financing or doing a Chapter 180, right?

A. That is correct.

Q. Or something of that kind and by the way when I say Chapter 180, that is a --

A. That is correct although I believe that chapter is a part of it.

Q. 184 and 180?

A. That is right.

Q. But my question to you is in these other areas, did you recommend that as to the most feasible way of financing in those particular projects?

A. It depends on specifics. The report, for instance, that we gave to Ormond Beach recommended three separate methods all of which we recommended that they were using,

the combination one method being impact fees, another one being a general rate increase and the third being going into a multiple --

Q. Well, you don't choose in your reports to recommend the best method?

A. In that case the combination of the three was decided to be the best method. In other cases we have recommended specifically the impact fee and the dollar amount of that fee." (T 137-140) (R 1221-1224) (TR 211-214)

* * * * * * * * *

"Q. Mr. Wilde, what different methods of financing are normally used when you are going into a sewer expansion program or a water expansion program such as the one in Dunedin?

A. Some municipalities have made use of special assessment type, other municipalities have merely used revenue certificates, general obligation bond issue is sometimes used and also the impact fees.

Q. You have used the term special assessment. Would you please define special assessment as you understand it?

A. Yes, sir, the special assessment that most of the communities in the past have used has been that when a sewer line or perhaps a large project involving sewers for an entire district is used, the cost of that sewer line is split up to the property owners. Usually it is based on front foot assessment and assessed to all the property owners in that district.

Q. What is the theory behind the allocating it according to front foot basis?

A. Basically it is allocated in an accordance with the increase in value of that property.

Q. Now, would you distinguish an impact fee as you understand it in a specific assessment?

A. Basically the impact fee is only placed on a -- in the situation where it actually the user is going to be using two systems so that it would not be placed on all property where there was a house spacing that was tied to the system nor would it be placed on vacant property but it would be only utilized when a structure was built which would utilize that service.

Q. Are there other phrases or words or definitions that are synonymous with an impact fee that are used in the engineering field?

A. I think probably the impact fee, development fee, some time user charge is used. These are all basically.

Q. When you are determining how much this user charge or impact fee should be what factors do you take into consideration in making this analysis?

A. The factors taken into account when we make an analysis are the actual loss to cost that --

MR. ALLEN: If Your Honor please, I am sorry to interrupt unless it can be shown as to the proper predicate that there was a basis as far as the City of Dunedin is concerned, that in an analysis done as far as they are concerned and I don't see the relevancy what he considers in determining or recommending an impact fee. Now, if he wants to say that they took into consideration these factors in coming out with this particular ordinance, I can see that would be proper.

THE COURT: Well, as the Court perceives the line of questioning, the nature of the preliminary ground laying work so we'll let it in.

MR. ALLEN: All right, sir. I thought I was --

MR. MATTINGLY: You may answer the question, Harry, if you remember it.

THE WITNESS: Basically for as an example in the sewer system or when we are together to come up with the number of dollars per unit in our system we were considering the cost of checking the sewerage, not the cost of within the different area within the sub-division but the name or collection system, pump station force minus the cost of treatment and the cost of disposing of that with respect to a water system it would be the well system, raw water transmission, any treatment facilities, storage of water and general distribution system of the water.

BY MR. MATTINGLY:

Q. In your experience as a consulting engineer for the various municipalities that you have listed, is there another factor normally involved in the determination of the final impact fee?

A. Normally the decision as to actual dollar value that is arrived at is normally a very POLITICAL DECISION, we usually give our recommendations to the commission and quote often the number that is chosen is not what we recommend." (Emphasis supplied in capital letters) (T 140-144) (R 1224-1228) (TR 214-218)

* * * * * * * * *

"Q. Thank you. You told His Honor that there were different methods of financing and I would like to go into those for you, if I may. First of all, you indicated that you had done some studies at Ormond Beach and Kissimmee and there was one at Dunedin. Have you ever done any -- did you do the impact fee study in the City of Sunshine, you know, that is over on the east coast? Do you know where that is?

A. No, sir." (T 154-155) (R 1238-1239) (TR 228-229)

* * * * * * * * *

"Q. Now, getting to the point I made at the beginning, you told His Honor, I think, there was a special assessment, revenue certificates, general obligation bonds and then the impact fee or service fee, whatever you want to call it, right?

A. That is correct.

Q. I would like to analyze each one of these now. The special assessment, area of charging the individual is based upon the total dollar amount that that property will be benefited directly to, is that not true?

A. If you want to acquaint the dollar value to be the cost of the system or line, this goes in front of it, then, yes, it would be that.

Q. And characteristically, this type of raising of funds has been to finance the laterals and connections to the particular property, is that true or not?

A. The sewer line that runs in front of the property, yes.

Q. And as far as that special assessment is concerned, the special assessment device has not been used to, and I am excluding drainage districts for a minute, if you would, but other than drainage districts, it has not been used to fund or finance capital improvement or plants, is that true?

A. I recognize that you are excluding the drainage district law which was the list here in Pinellas County quite a bit.

Q. Um-hum.

A. I am not sure I know how to answer it. I am thinking if you're using the general term special assessment, that quite often is used for road improvements, sidewalk improvements, this type thing.

Q. That is something what I am trying to get at, that is something in front of the land that directly benefits that land to whatever X-number of dollars, correct?

A. That is correct.

Q. And when you've got a physical plant or capital improvement plant to serve everybody or general improvement in the city, then the special assessments are not used to finance that general improvement, I am excluding drainage district, we'll get to those.

A. To my knowledge it is not, however, again, let me say I have not been involved personally in a special assessment proceeding since I have been a registered engineer.

Q. Well, but you are, to your knowledge, in the field, it has not?

A. To my knowledge, it has not but that does not mean that it really hasn't.

Q. Now that would really be what is characterized in the field as Chapter 187 type situation in the, under the general special assessment powers of cities?

A. No. In the water and sewer area, it would either be Chapter 180 or Chapter 184.

Q. Yes, sir, I understand that, you don't relate it to Chapter 187?

A. Not to my knowledge.

Q. Okay. Let's take the drainage district situation, the Chapter 180 and 184. That method of financing generally speaking is a method of, in which the capital improvement or amount of it is predetermined, is this true? I am talking about the procedure that you go through in doing a Chapter 180 or 184, is that true?

A. I am as a municipal engineer, I am a little, at a loss right now as you probably

know, Chapters 180 and 184 were involved in this whole rule, at, which was passed by the Legislature last year and as a result, I didn't know what the effect. We as engineers don't yet know what effect the lawyers are going to put to it.

Q. I am not trying to ask you to be a lawyer, I am asking about your experience in doing a drainage district, I assume you have?

A. Basically those were done, set up for Pinellas County, before I became a -- I have not done any.

Q. Do you have personal knowledge in your expertise as to how one of these things are done?

A. I perform them but on the subject, professional level, I was involved in some of the earlier ones in Pinellas County.

Q. I am inquiring of your knowledge?

A. Well --

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

A. I believe that is a fair statement, yes.

Q. Thank you. And so when you do a special assessment as we were talking about before, then just the people who are benefited pay, is that right, which we're talking about a special assessment?

A. That is correct.

Q. And when you do a drainage district or Chapter 180 or 184 just say people who can use the facility are permitted to use the facility and they are the ones who pay the freight, right? That is a fair statement?

A. If you're extending that statement to say that they pay whether they are using it at that time, then, yes, sir, that is correct.

Q. Yes, the people in the district, whether they are hooked up or not, doesn't make any difference?

A. Or future people.

Q. Right. Now we'll talk about revenue certificates. Revenue certificates would be revenue bonds which are issued based upon the revenue, generally, that they are getting from the gallonage charge from the various utilities, whether it be sewer, water or whatever, is that not right?

A. That is correct.

Q. And so that if you have in a general revenue certificates issued in which you have the sewer plant over here and the water plant over here, all the people that use that sewer facility are being charged whatever rate here depending upon the cost and they are contributing to the capital improvement, right?

A. Whether they need any additional service, yes, they are, yes.

Q. Because they are using the facility they are paying it in water rates and those water rates in turn include a certain amount for expenses and cost and treatment and also to retire the obligation of revenue certificates, right?

A. That is correct.

Q. Now, you have the question of what you call a general obligation bond to pay for capital improvements that you mentioned and again that is really city-wide, isn't it?

A. That is correct.

Q. And everybody in the city pays their fair share for that facility or capital improvement through either taxes or general revenue certificates which is based upon the city's power to tax, isn't that generally the case?

A. I am not sure, they generally pay for it in that way but they are certainly legally liable to pay for it that way. In other words, this municipality may pledge the general obligation of municipality to pay it off even though they bought out of revenue.

Q. Right. And general revenue comes from ad valorem taxes and other assessments to the general taxing power of the municipality?

A. That is pledged. Where the monies necessarily come from might be two different things. In the general obligation, the obligation of municipalities to pay it and the fact they will raise taxes to pay it, if necessary. Their pledge to pay off that comes out of operating revenue of the utility.

Q. I understand that. When you mean operating revenue, that is the revenue again at that time people are paying to use the facility?

A. That is correct, as opposed to general revenue.

Q. So that in general obligation bonds, those people, all the people that use that facility are in turn helping pay their fair share, equally, to retire the general obligation bond?

A. Again, with the previous qualifications, yes.

Q. Now, let's talk about what you call an impact fee. IN AN IMPACT FEE, PLEASE TELL ME IF I AM WRONG, BECAUSE I DON'T WANT TO MAKE AN UNFAIR STATEMENT BUT AN IMPACT FEE IS DESIGNED CHARACTERISTICALLY TO CHARGE

THOSE, THAT PARTICULAR SEGMENT OF PEOPLE WHO ARE COMING INTO THE SYSTEM OR WHATEVER IT IS, AS OPPOSED TO SPREADING IT AROUND OVER ALL THE PEOPLE WHO ARE USING THE FACILITY, IS THIS NOT TRUE?

A. If you will allow one slight restatement and that is that I think it would be more generally characteristic by saying that the people, THE NEW PEOPLE ARE GOING TO PAY FOR A FACILITY WHICH IS PLANNED BY THEIR COMING. In other words, the existing resident is not being penalized for an additional service that he is not obtaining, getting.

Q. And this would be opposed to all of the other avenues of approaches?

A. Yes.

Q. In other words, what you are saying, the newcomer pays for capital improvement and the person who is there, he doesn't pay anything?

A. THE NEWCOMER IS PAYING FOR CAPITAL IMPROVEMENT THAT IS REQUIRED FOR THE NEW PERSONS, YES.

Q. Let's take a hypothetical question so His Honor will understand. If you have a sewer system, I assume they don't run at capacity, is that correct?

A. Sometimes they do.

Q. Sometimes they do but most of the time they don't.

A. We try not to have them, however, that has not been the case recently.

Q. Yes, sir, I understand. I didn't really know, I was going to get problems with that generally, they don't run at capacity, right.

A. Normally plants are made to expand them by the time they reach the capacity for which they are built, yes.

Q. If an individual in a city has owned a lot for a number of years, has a water main

> in front of his house to be connected up, under those circumstances, if he is charged an impact fee, then he is paying a fee at that particular point in time for some future capital improvement which really doesn't exist at that point, isn't that true, because there is still capacity in the system in order for him to hook up and for him to be taken care of? Like the rest of the people, that would be true under that hypothetical situation, wouldn't it?
>
> A. If you are saying that the facility has the capability, yes, it would be true, but that is not always the case." (Emphasis supplied in capital letters) (T 155-164) (R1239-1248) (TR 229-238)

3. CITY MANAGER ARMSTRONG ADMITTED THAT THE ASSESSMENT IN THE ORDINANCE WAS AN IMPACT FEE.[26] Unfortunately, his testimony at this writing is unavailable since petitioners' copy of his deposition was admitted into evidence and is in the record-on-appeal.

With the above points established, petitioners will address the argument of the opposition.

A - HOME RULE

Respondent first argues that it had constitutional powers under the 1968 Constitution [Article VIII, Section 2(d)] granting it power to enact the ordinance under review.[27] The League of Cities also makes such a contention.[28] The contentions of both opponents are without

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26. Please see (R 1319).

27. (B 12-14)

28. (BA 17-19)

merit because:

1. The assessment is a tax and requires authorization by general statute. Even the District Court in its opinion acknowledged this fact.[29] Article VII, Section 1, 9 (1968) provides that a municipality cannot impose a tax other than ad valorem taxes unless authorized by general law.

The opposition and the District Court would have this Court believe that impact fees constitute the *only* method of municipal financing which is not required to have approval by specific legislation from the Florida Legislature. Why, then, did the Legislature provide for "municipal borrowing" under Sections 166.101-166.141 F.S.A. 1975 and "municipal finance and taxation" in Section 166.201-166-241 F.S.A. 1975, which is the Home Rule chapter? Even regulatory fees for businesses are authorized under the taxation section of the Home Rule Act.[30]

Clearly, the type of assessment promulgated by the Dunedin ordinance falls within these categories -- taxation -- which requires authorization by general law. The legislative summary of House Bill 86 recognizes the fact that we are dealing with an impact fee or tax:

> "Authorizes local governments to impose as part of the fee for a building permit an amount to cover the cost of the extension of public utility service to the new

29. 312 So.2d 763 at 766; (A 49)
30. F.S. 166.221 F.S.A. 1975.

> structure. Authorizes private utility companies to impose such a 'utility capital impact fee', subject to approval by the body which regulates the company's rates, as a precondition to providing utility service to a new structure. Establishes standards and requirements for the determination and periodic evaluation of the amounts of the fees." (TR 400)

This is why the opposition wishes to ignore the crucial admission of their witnesses, City Council, and even opposing counsel in the circuit court below that we are dealing with an "impact fee".

2. The Home Rule Act was not effective at the time the Dunedin ordinance was enacted. Chapter 166 F.S.A. became effective October 1, 1973. Dunedin's ordinance was first adopted in May of 1972.[31] Thus, we are not talking about Home Rule here. This is why the League of Cities argues with tongue in cheek that the Home Rule statute should be given retroactive effect back to the adoption of the new Florida Constitution in 1968.[32] Clearly there is no legal basis for applying Chapter 166 F.S.A. 1973 retroactively.[33] Home Rule has been entirely eliminated in this controversy.

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31. For last amendment see R 1063-1066)

32. (BA 18)

33. 30 Fla.Jur., Statutes, Sec. 150 and 151 (Prospective or Retrospective Operation) (Generally) pp. 317-320

3. Section 166.021 F.S.A. 1975 expressly granting powers to municipalities under Home Rule grants such powers "except where expressly prohibited by law." Petitioners obviously contend that the ordinance has been enacted contrary to established law. Not only is it a tax which violates the Florida Constitution but it is an illegal special assessment as argued extensively in petitioners' main brief.[34]

4. There was no amendment to Dunedin's charter under F.S. 166.031 F.S.A. 1975 authorizing the enactment of the ordinance.[35] This is fatal to respondent's case in and of itself.

B - STATUTORY POWER

The respondent and League of Cities keep using the word "charges" to distinguish that section of the ordinance under consideration.[36] They keep insisting that it is a connection fee. Petitioners believe that we must call it what the City Council of Dunedin named it in its ordinance -- an "assessment". After using semantics to transfer an assessment to a "charge", the opposition[37] and the District Court[38] point with pride at Florida Statute 180.13 (2) F.S.A. 1975, which states:

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34. See Brief of Petitioners on the Merits, pp. 75-80
35. (R 333-417)
36. (B 14-17) (BA 17-21)
37. (B 14) (BA 19)
38. 312 So.2d 763 at 755; (A 49)

> "(2) The city council, or other legislative body of the municipality, by whatever name known, may establish just and equitable rates or charges to be paid to the municipality for the use of the utility by each person, firm or corporation whose premises are served thereby; and provided further, that if the charges so fixed are not paid when due, such sums may be recovered by the said municipality by suit in a court having jurisdiction of said cause or by discontinuance of service of such utility until delinquent charges for services thereof are paid, including charge covering any reasonable expense for reconnecting such service after such delinquencies are paid, or any other lawful method of enforcement of the payment of such delinquencies."

The Circuit Court held as to F.S. 180.13(2):

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

What was the Circuit Judge saying when he referred to the *City of Hallandale, Stewart,* and *City of St. Petersburg* cases, supra? He was clearly indicating that the impact fee was an illegal special assessment which did not specifically and specially benefit the landowner in the amount paid under the assessment.

The major reason that F.S. 180.13(2) does not apply is that in order for the City to avail itself of this section, it had to comply with *all* provisions of Chapter 180. This is the Municipal Public Works Act setting up drainage districts. You just can't pull F.S. 180.13(2) out of the chapter unilaterally and apply it to this case. Yet, this is exactly what the District Court and the opposition seek to do. F.S. 180.02(3) settles this question:

> "(3) In the event any municipality desires to avail itself of the provisions or benefits of this chapter, it is lawful for such municipality to create a zone or area by ordinance and *to prescribe reasonable regulations requiring all persons or corporations living or doing business within said area to connect, when available, with any sewerage system constructed, erected and operated under the provisions of this chapter;* provided, however, in the creation of said zone the municipality shall not include any area within the limits of any other incorporated city or village, nor shall such area or zone extend for more than five miles from the corporate limits of said municipality." (Emphasis supplied)

To invoke Chapter 180, a district must be established as well as a board of equalization. So conclusive in demonstrating the error committed by the District Court is examination of the requirements of Chapter 180 that it is mandatory to cite to the Court the specific language of the statutes which demonstrate *what* had to be done to invoke F.S. 180.13(2) and which obviously was not done by the Dunedin ordinance:

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F.S. 180.03 states:

"When it is proposed to exercise the powers granted by this chapter, a resolution or ordinance shall be passed by the city council, or the legislative body of the municipality, by whatever name known, reciting the utility to be constructed or extended and its purpose, the proposed territory to be included, what mortgage revenue certificates or debentures if any are to be issued to finance the project, the cost thereof, and such other provisions as may be deemed necessary.

"Any objections to any of the provisions of said resolution or ordinance shall be in writing and filed with the governing body of the municipality, and hearing thereupon shall be held within thirty days after the passage of the resolution by the legislative body of said municipality."

F.S. 180.04 states:

"If after the passage of said resolution the said city council or other legislative body, by whatever name known, shall determine to proceed toward the construction of said utility, but not earlier than forty days after the passage of said ordinance or resolution, the said city council, or other legislative body, by whatever name known, shall pass an ordinance or resolution authorizing the construction of the utility, or any extension thereof, reciting the purpose, the territory to be included, correcting any errors, remedying any sustained objections, authorizing the issuance of mortgage revenue certificates or debentures to pay for the construction and all other costs of the said utility, and containing all other necessary provisions. All other legislative and administrative functions and proceedings shall be the same as provided for the government of the municipality. The city council, or other legislative body, by whatever name known, of the municipality, may adopt and provide for the enforcement of all resolutions and ordinances that may be required for the accomplishment of the purposes of this chapter and its decision shall be final in determining to

> construct the utility, or any extension thereof as and where proposed, to promote the public health, safety and welfare by the accomplishment of the purposes of this chapter; provided, that where any mortgage revenue certificate, debentures, or other evidences of indebtedness shall come within the purview of §6, art. IX of the constitution of the state, the same shall be issued only after having been approved by the majority of the votes cast in an election in which a majority of the freeholders who are qualified electors residing in such municipality, shall participate, pursuant to the provisions of §§ 100.201-100.221, 100.241-100.351."

Chapter 180 further provides: any utility constructed under this Chapter is a public utility and revenues from existing facilities may be pledged towards payment for the new facilities;[39] revenue certificates or debentures *may* be issued to finance the project;[40] notice to the public must be published once a week for two consecutive weeks in a newspaper of general circulation;[41] mortgage revenue certificates, debentures or other evidence of indebtedness must generally be subjected to a vote of freeholders; a majority of the vote is required for passage;[42] a referendum may be held on the question if the city government desires;[43] the city council may establish rates or charges for the use of the utility as long as they are just and equitable.[44]

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39. F.S. 180.07 F.S.A. 1971.
40. F.S. 180.08 F.S.A. 1971.
41. F.S. 180.09 F.S.A. 1971.
42. F.S. 180.10 F.S.A. 1971.
43. F.S. 180.11 F.S.A. 1971.
44. F.S. 180.13 F.S.A. 1971.

Thus, *after* full compliance with the provisions of Chapter 180, then 180.13(2) could be invoked. *This is the heart of petitioners' contention all along. Establish a drainage district, make everyone pay his fair share, give him notice and an opportunity to be heard, establish a board of equalization and we will be satisfied. The impact fee assessed in this case affords none of these basic requirements.*

Again, the lower court found that the charge was not just and reasonable.[45] The trial judge heard Wilde's testimony and obviously reasoned that the points brought out on cross-examination showed that the rates were arbitrary and unequal.

The language of F.S. 180.13(2) in no way can be construed to authorize the type of assessment under review because:

1. "Rates or charges" grammatically indicate that the word "charges" is descriptive of the word "rate" and does not evision or contemplate a type of assessment different than a rate. The word "or" means "a synonymous or equivalent term."[46] This section grants authority for assessing monthly utility rates or monthly utility charges and nothing more. For the District Court to conclude otherwise is inconsistent with the plain intent and plain reading of the statute.

45. (R 727)

46. The American Heritage Dictionary of the English Language (1973 Ed.) Page 923

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2. *If* the word "charge" is construed to authorize tap-in fees, then the charge would have to reasonably relate to the cost of connection, inspection, administration, etc., and the matter is thrown back into the holding of *City of Sunrise vs. Janis Development Corporation* (Fla.App. 1975) 311 So.2d 371 which holds that a charge in excess of the services rendered is a TAX.. Thus, no matter which way the statute is construed, we come full circle to the conclusion that the ordinance's promulgation was illegal.

Petitioners have argued at length that the District Court and the opposition have misapplied the case of *State vs. City of Miami* (Fla.1946) 27 So.2d 118.[47] This case does not stand for the proposition that sewer connection fees are not taxes.

Petitioners cannot believe that the League has really urged this Court to consider former F.S. 167.73[48] F.S.A. 1973, which pertains to city services other than city water and sewer. Then these charges require distinct relationship between the cost of the service and the charge as required in *Janis Development Corporation,* supra. F.S. 167.73 F.S.A. 1973 patently does not apply here:

> "167.73 Charges for use of services and facilities of municipalities
>
> "(1) Any city, town or village maintaining or operating a service for the collection and disposal of garbage, trash, rubbish

47. Please see Petitioners' main brief pp. 66-68.
48. (BA 20)

or other refuse may provide, by ordinance of its council, or other legislative body, by whatever name known, for the establishment and collection of reasonable charges to be paid to the city, town or village for the use of such service by each person, firm or corporation whose premises are served thereby; and if such charge is not paid when due, the service may be discontinued until such charge is paid, and the amount of any such charge that is delinquent may be recovered by due process of law.

"(2) Each city, town or village owning, maintaining or operating any system of public recreation, any wharf, dock, yacht basin, airport, golf course, hospital, stadium, parking lot, or tourist camp, or any facility designed and intended to render a direct service to the users thereof, may provide, by ordinance of its council or other legislative body, by whatever name known, for the establishment and collection or reasonable fees and charges to be paid to the city, town or village for the use of such facility or service by each person, firm or corporation using the same.

"(3) This law is intended as a supplemental and additional grant of authority to each city, town or village, and shall not impair, abridge or limit any existing powers held by it."

The Circuit Judge stated in his order:

"The Court has endeavored to indulge a presumption of correctness and validity which surrounds a properly enacted ordinance. To this end Sections 167.01 and 167.73 of the Florida Statutes have been scrutinized closely as a possible support for the tax. Counsel for defendant City provided the Court with vigorous and ingenious arguments urging these statutes as a salvation for the 'impact fee'. (R 727)

No further argument is necessary.

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C - PROPRIETARY POWER

Respondent cites a number of cases which supposedly stand for the proposition that a connection charge is not a tax even if amounts are charged which exceed the cost of connection.[49] It is contended that these decisions hold that a connection fee is not a tax but rather a use charge.[50]

From an over-all standpoint, look at the connection charges in these cases. The charges range from $160 to $200. These are connection charges such as the $100 charge made by Dunedin in Section 25-31[51] which is not part of the ordinance under attack. We are concerned here with astronomical figures of people being assessed $25,000 overnight. The figures alone serve to distinguish a sewer charge from the tax imposed.

None of these cases address themselves to the question of whether the cost of connection exceeds the actual cost of the service which is the heart of the matter here.

Petitioners have already advised this Court as to their position concerning a number of the cases cited in respondent's brief.[52] Therefore, only limited additional comment is necessary.

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49. (B 17)

50. (B 21-22)

51. (R 1064)

52. Petitioners' main brief pp. 73-75.

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Brandel vs. Civil City of Lawrenceburg (Ind. 1967) 230 N.E.2d 778 is a drainage district case which clearly states that the connection fee is a TAX.[53] Does respondent really wish to rely on this statement from the *Brandel* case:

> "[1] 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. Therefore we do not think that Martin v. Ben Davis Conservancy District (1958), 238 Ind. 502, 153 N.E.2d 125 is applicable, since that involved a tax for a special benefit and not a use." (Emphasis supplied)

In *Hartman v. Aurora Sanitary District* (Ill.1961) 177 N.E.2d 214, the connection fee was found to reasonably relate to the cost of connection.[54] This case hardly supports respondent's contentions as stated in its brief.

In short, petitioners do not feel that the cases cited by respondent lend credence to its basic conclusion that the sewer tap-in fees discussed in these cases are synonymous with the assessment made in the Dunedin city ordinance.

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53. Petitioners' main brief, Page 73.

54. Petitioners' main brief, Page 74.

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D - AUTHORITIES CONTRA TO RESPONDENT'S POSITION

Respondent[55] and the League of Cities[56] attempt to distinguish the main Florida[57] and out-of-state cases cited by petitioners on impact fees. In reality, they, like the District Court, claim that the Florida cases do not deal with sewer connections and therefore should be disregarded. In the ultimate analysis, the Supreme Court is amply able to determine their applicability without any further rhetoric from the parties.

The value of these cases seems apparent to petitioners. They are impact fee cases which hold that impact fees are illegal in Florida because of lack of legislative authority to enact such ordinances or because they violate constitutional guarantees of equal protection.

On the one hand, the opposition claims that we are dealing with a service charge or tap-in fee which is in excess of the cost to the City of Dunedin[58] for making such a connection, and on the other hand, the opposition disavows as inapplicable *City of Sunrise vs. Janis Development Corp.* (Fla.App.1975) 311 So.2d 371 which speaks directly to such a situation. *Sunrise* simply holds that if

55. (B 22-26)
56. (BA 15-17)
57. *Janis Development Corp. vs. City of Sunrise* (C.C. 7th J.C. 1973) 40 Fla.Supp.41, affirmed *City of Sunrise v. Janis Development Corp.* (Fla.App.1975) 311 So.2d 371; *Venditti-Siravo, Inc. v. City of Hollywood* (C.C. 17th J.C. 1973) 39 Fla.Supp. 121; *Pizza Palace of Miami, Inc. vs. City of Hialeah* (Fla.App.1970) 242 So.2d 203; *Admiral Development Corporation v. City of Maitland* (Fla.App. 1972) 267 So.2d 860.
58. (B 17)

the cost of service is exceeded, there is exercise of municipal taxing power. This is the identical ruling of the trial judge in the case at bar. In this case, we are talking about $700 or 100% of the assessment being over and above the cost to the city for the connection. In reality, it is not a sewer connection fee at all but an additional TAX levied for the privilege of using the city's sewer and water systems. Truly, it is hard to believe that respondent is correct and that this Court with ignore the *Janis Development* case or other Florida impact fee cases.

All must remember that the official position of respondent and the League here is that we are not dealing with an impact fee. They apparently wish this Court to ignore the testimony of the City's own finance director and its City Manager[59] and rate experts to the contrary.[60]

E - EXISTING AND PENDING LEGISLATION

The respondent[61] and the League[62] devote little rebuttal to the obvious detrimental effect of the sewer, water and impact fee legislation that the League has been trying to pass for the last two years in the Florida Legislature. The truth is that now that the League has been given a legislative gift from the Second District, it has hopped on the band wagon in an attempt to hold on to the judicial legislation in this case.

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59. (R 1319)
60. (T 137-140) (R 1221-1224) (TR 211-214)
61. (B 26-27)
62. (BA 16-17)

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Well, what can the opposition say in all fairness. It is too obvious and evident to try to argue around. The Florida Legislature obviously considers impact fees as a tax which has been the uniform holding of all Florida Courts up until this case. The Florida Legislature knowing it is a tax realizes that under the Florida Constitution and Home Rule Statute, enabling legislation must be passed. Again, the obvious error of the District Court in holding that legislative authority exists cannot stand even minimal inspection.

What does the opposition say? The League and respondent[63] state that the bills showing impact fee legislation pending in the Florida Legislature prove nothing. Just that the bills have been filed. Yet the respondent introduced the pending legislation in the trial court and urged the circuit judge to consider it. He did and ruled against respondent:

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

63. (B 26) (BA 16)

> is the further purpose of this law to eliminate the need for development and construction moratoriums by insuring that counties and municipalities can provide services and facilities necessary to accommodate orderly growth.'
>
> "The language quoted above is from a legislative Act presently pending before the State legislature. This Act, if passed, will be known as the 'Florida Impact Fee Law'.
>
> "It is to the ultimate passage of this Act that the defendant City must look for authority to collect the fees provided for under Ordinances 72-26 and 72-42, absent, of course, an amendment to the City Charter.
>
> "The existence of the proposed legislation was brought to the Court by defendant's counsel and notwithstanding that in doing so counsel urged that its purpose was to provide for a 'uniform method' of 'impact fee' assessments, it is persuasive of an acknowledgement that there is no present authority for the imposition of an 'impact fee'; * *" (TR 728)

Whether the League and respondent think it irrelevant or not is not the question here. The activity of the Florida Legislature was properly raised and considered by the trial court. *Respondent obviously thought it relevant at the trial level.* The District Court completely ignored the evidence of pending legislation before it. This is why its error is so obvious.

The League claims that petitioners are using a smoke screen by calling a sewer connection fee an impact fee. The League is apparently not familiar with the record in this case where even opposing counsel for the City placed into evidence the fact that the assessment in this case

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was an impact fee.[64]

Respondent takes another tact. It points to House Bill 86 and the language contained in Section 3 to the effect that a local government pursuant to the power granted it under Home Rule may impose as part of a fee for issuance of a permit an amount covering its capital costs.[65] How this does anything but dismantle respondent's Home Rule argument is unknown. A fair reading of the Bill sets up guidelines for municipal ordinances and permits such municipalities to assess impact fees within such guidelines. The Act is saying that municipal home rule is EXTENDED to impact fees and the municipalities may thus, pursuant to home rule, enact whatever legislation the municipalities want consistent with the guidelines set forth in the Bill. Thus, proof positive that home rule at present is not extended to impact taxation.

Petitioners' position concerning the questions of expansion of municipal boundaries,[66] and the cases cited by the District Court in its opinion[67] are already argued in petitioners' main brief. Respondent's brief on these points is incorrect and no further comment is warranted.

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64. (T 137-140) (R 1221-1224) (TR 211-214)

65. (B 26-27)

66. (B 27-29) See Petitioners' main brief, Pages 20-21; 24; 36-37.

67. (B 29-37) See Petitioners' main brief, Pages 73-75; 80-94.

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F - THE FEE AS A SPECIAL ASSESSMENT

Petitioners have contended from the outset that the ordinance is an illegal special assessment. The opposition feels that this position is the undoing of petitioners' entire legal argument on the subject.[68] Up to this point, petitioners' position has not been understood because no one really has tried. But the position is simple.

Capital improvements such as sewer plants (general improvements) have traditionally and uniformly been financed through special assessments. Because of the existence of constitutional guarantees, certain rules govern such assessments such as there must be a particular benefit to the property and enhancement in value to the extent of the assessment, it must be equally levied, it must involve a specific sum for capital improvement with costs ascertained before the assessment is levied.

Now respondent wishes to finance its sewer plants. It enacts an ordinance which does not benefit the landowner to the extent of the assessment, is uncertain in amount as to what is required to construct the improvement, is not equally levied in the class of those who will use the system and the costs are not ascertained before the assessment is made. What has respondent done? It completely circumvented special assessment requirements under the guise

68. (B 37-43)

of an impact fee or sewer connection fee or some similar descriptive language.

Show petitioners one thing that respondent has accomplished by levying the assessment in the ordinance that does not fit exactly the aims and purposes of a special assessment. The answer is obvious -- none. The goals are the same, just the principles and procedures differ. Every case cited in petitioners' brief upon the subject of an illegal special assessment deals with the question of whether these goals or principles and procedures have been violated. When such principles are violated, the ordinance is declared to be an illegal special assessment. This is what petitioners claim here. Every principal rule or requirement for maintaining a valid special assessment is violated by respondent's ordinance. It is an illegal special assessment.

What respondent has done here is to admit that those who are assessed the impact fee are not benefited proportionately. How could they.. Armstrong admitted the figures were picked out of the air.[69]

This Court is told that the case of *Opinion of Justices* (N.H.1944) 39 A.2d 765 deals with the problem under discussion.[70] This is a pure example of distortion in its truest sense. A specific New Hampshire law

69. (R 1237)

70. (B 39-41)

provided for "sewer rents" to be paid or the amount charged would become a lien on real property. These "sewer rates" are nothing more than monthly charges for metered consumption of water. The opinion states:

> "It should be noted at the outset that although the funds raised by authority of the statute may be used only for defraying the cost of construction, maintenance, operation, etc., of sewer systems, such funds are not to be obtained by levying a specific exaction but by establishing a 'scale of rates' based in general 'upon the metered consumption of water on the premises connected with the sewer system.' The rates established by the ordinance here involved are generally so based, and the ordinance sufficiently conforms in all other respects to the statutory requirements."

Obviously the New Hampshire court found sewer rents or rates are not special assessments. Petitioners would never argue that they were. Here is an example of the use of semantics to clearly label a water rate a connection fee. Nothing could be further from the truth. The court in this case noted that the charge was often spoken of as "tax". Also, special legislation permitting such assessment of water rates against the government of New Hampshire had been passed.

Obviously, as respondent states, the challenged ordinance does not meet the definition of a special assessment.[71] This is why it is an illegal special assessment.

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71. (B 43)

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G - VIOLATION OF EQUAL PROTECTION

The opposition ignores the claim by petitioners that the ordinance is aimed at "newcomers" and that "newcomers" constitute an inappropriate class for assessment purposes.[72] The District Court escaped this claim by stating in its opinion that the ordinance was not directed at those who the Dunedin City Council spoke of at the time of the ordinance's enactment[73] and which was acknowledged by City Manager Armstrong as being aimed at "newcomers".[74] The Circuit Court began its opinion acknowledging the fact that the assessment was aimed at newcomers.[75]

Respondent states that some people paid their fair share earlier through "amortization" which supposedly means through payment of monthly water and sewer rates.[76] This philosophy is self-defeating since it requires determination of some point in time when the newcomer is not allowed to acquire his equity through amortization but must pay unequally in one lump sum. The disparity is obvious. What should have been done in this case it to raise water and sewer rates a few cents and let everyone pay

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72. (B 44-49)

73. (R 418-497)

74. (R 1319; 1293)

75. (R 725)

76. (B 44)

equally. Armstrong stated that it was not politically wise to get the electorate mad at you for raising monthly charges, so why not assess the new people.[77] This constitutes unequal treatment since it is just left to chance and to the whim and caprice of city council as to when those who are presently residing in the City will be cared for for the rest of their life and not have to pay any more capital costs.

Brandel vs. Civil City of Lawrenceburg (Ind. 1967) 230 N.E.2d 788 is cited as opposing petitioners' position on equal protection.[78] But here, all those using the old sewer system were charged $62.50 and those using the new system were charged $200. Petitioners have no quarrel with this. Each class was treated alike. But in the case at bar, newcomers were being charged for the old system which still had capacity. In *Brandel,* the users of the old sewer system could not use the new system. In Dunedin the old users were allowed to use the new system. In the case sub judice, there is no distinction between old and new. No drainage district was set up to accomplish this purpose as it was in *Brandel*. This case proves petitioners' point, not respondents.

Hayes vs. City of Albany (Ore. 1971) 490 P.2d 1018 did not deal with the question of denial of equal pro-

77. (R 1293)
78. (B 45-46)

tection.[79] This is a drainage district case.

The case of *Airwick Industries, Inc. vs. Carlstadt Sewerage Authority* (N.J.1970) 270 A.2d 18[80] is a drainage district case such as would be constructed according to the dictates of former Chapters 170 and 180 F.S.A. 1973 and current Chapter 180 F.S.A. 1975. Equal protection is always present when drainage districts are created in that all who use the system from the outset pay the same amount. Ad nauseam, this is not the case here.

There is no contest here about different classes of users being discriminatory, i.e., commercial versus residential. The case of *Rutherford vs. City of Omaha* (Neb. 1968) 160 N.W.2d 273 is of no help to either party.[81]

H - DENIAL OF DUE PROCESS

Respondent's argument that there is no basis for denial of due process is worth quoting.[82] As long as this case has been litigated, petitioners have been trying to get the opposition to admit and the judiciary to see the true facts concerning the impact fee and its inherent inequity. It is an open-end slush fund without fixed costs or predetermined capital requirements, with the charges steadily shifting from time to time up and down (usually up) depending upon the amount some city council guesses they need at the present time. The exactness and equality

79. (B 46-47)
80. (B 47-48)
81. (B 48)
82. (B 49-50)

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written into and inherent in bond financing, special assessments, and drainage districts are negated. The inequality and unequal nature at long last is admitted by respondent:

> "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." (B 49) (Emphasis supplied)
>
> * * * * * * * *
>
> "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." (Emphasis supplied) (B 50)

Petitioners believe the above comments should win this case for them. Here is an admission of haphazard taxation at its worst. In our case we had plaintiffs who

are petitioners here financially wiped out overnight by assessment of thousands of dollars. They say to this Court here and now that if the law is so structured that city council can do this to their financial livelihoods overnight, then the law should be changed. Have they been granted due process of law? If there had been a special assessment, as respondent admits,[83] they would have had notice and an opportunity to be heard. If they were assessed under former Chapter 170[84] and 184,[85] they would have been notified and if assessed under Section 180,[86] they would have had an opportunity to be heard and object. They would have even had an opportunity under Chapter 180 to have voted on it, and if the majority did not like the assessment, to vote it down.

I - VIOLATION OF STATE CONSTITUTIONAL PROVISIONS

Respondent rests its defense of petitioners' claim of violation of Florida constitutional provisions upon the

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83. Respondent states in its brief "The due process argument is disposed of by the recognition that the ordinance does not impose a special assessment against particular property." (B 49)

84. Former F.S. 170.07 F.S.A. 1973 requires upon completion of the assessment rate, the municipality must publish and fix a time and place at which property owners' objections can be heard.

85. Former F.S. 180.05(3) F.S.A. 1973 requires notification of persons on the assessment roles and the setting of a hearing for objections.

86. F.S. 180.09 F.S.A. 1975 provides for publication of notice to public and F.S. 180.10 F.S.A. 1975 requires approval by majority vote at referendum.

basis that the ordinance does not impose a "tax,"[87] It insists that the connections were voluntary. Little does it remember the circuit judge's finding "that part of the fee is a condition precedent to the water and sewer connection".[88] During closing argument, the circuit judge clearly indicated that the claim that the ordinance was voluntary was "an option without a choice":

> "BY MR. WATTS:
>
> "The Court said the difficulty with this contention is -- in the fashion that it provides the charge for sewerage, there is no -- a special assessment. It differs from the local assessment in an essential fact, it's optional. Mr. Allen has made much of the fact that the charge here or the connection here as required, but as a matter of law, I think that the cases will show that make it no less optional, it may be required from a health and sanitation standpoint that you connect your building or business to a sewer but your land still has value and bears no charge if it sits idle. The charge which is imposed by the challenged ordinance and the charge which is the opinion of the justice case recognizes is a charge not for the benefit but for use.
>
> "It depends on whether they are going to be one unit or twenty units sitting on a particular piece of land. There is no way that you can predict in advance by looking at vacant land what the eventual sewer connection fees are going to be. You can look at a piece of land and you can say that land could be used for a warehouse with one toilet in it and it would pay a one unit connection fee or it could be used for a one hundred

87. (B 51-53)

88. (R 725)

unit apartment complex. In that case, it would pay one hundred times seven hundred for the connection fee. In that sense, it is optional because the landowner can do with his land as he wishes. The charge for connection to the sewer system becomes fixed only when he connects and only what, when he decides what he wants to do. His use is optional and its decision as to his use --

"THE COURT: Really, in all candor, it is an option without a choice, isn't it?

MR. ALLEN: No, sir, I don't believe, I think from a police power standpoint, the city or town, city or anyone, and I think in many cases the health code requires you to connect with the sewer --

THE COURT: What I am referring to, you say he has the option, his land isn't charged with the charge, whatever it is unless he uses the land so he has an option not using the land or --

MR. ALLEN: He also has an option, various uses of land, warehouse, apartment complex, in that sense, he determines what question --
THE COURT: He doesn't, he's still got the code of the city zoning, he doesn't have the option what he could do with it, does he? Pardon the interruption.

MR. WATTS: No, I appreciate the interruption.

THE COURT: No, it was just nothing very --

MR. WATTS: I think that most of the brunt of attack here from the Contractors Association has the high fee in relationship to multi-family connections and I did want to point out and this was my reason for getting into this really, it depended upon whether you are going to use the land for multi-family or whether you are going to use it for single-family, the land may be more valuable in a multi-family category, maybe a lot more valuable to put an apartment on it.

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> "By the same token, it puts a lot greater burden on the city sewer so if you are going to take the chance of putting single-family units on it, you are going to have to bear the cost that you are imposing on the system.
>
> "I would concede that because of the health code, the option is a limited one but I think the option still exists, the amount of the fee which is going to be imposed depends on the owner and what he decides to do with the property and he can submit to a $700 fee or $700,000 fee, it is all his choice and I think that points up the fact that it is not a special assessment. It is based on the use and special assessments are not based on use." (T 57-61 of Volume II) (TR 317-321)

To say that a typographical error appears in the record to avoid the obvious words of Mayor Lindner that he was passing a "sewer tap fee" instead of what the record shows as "sewer tax fee" is incredible.[89] We must take the record as we find it. There exists appropriate procedures for correcting the record if respondent believes it to be incorrect.[90]

POINT II

THE ASSESSMENT CONTAINED IN THE ORDINANCE IS A TAX (As principally raised by League of Cities' Point I)

Respondent barely touches[91] on the question of whether the assessment is a tax or "charge which may be made for the use of the utility service" pursuant to Florida

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89. (B 51)

90. Florida Appellate Rule 6.9(d)

91. (B 14-16)

Statute 180.13(2) 1971 as found by the District Court.[92] The League of Cities devotes an entire point to this question which warrants reply, although petitioners have made their position clear in their main brief.[93]

Rebuttal to the League's position is best stated by the circuit judge's opinion:

> "* * The 'impact fee' is sometimes designated a 'capital contribution charge', 'assessment', 'connection charge', or 'impact fee'. By whatever name, it is money taken by the municipality from the citizens and property owners for a public purpose and as such, under the law, can only be considered an exercise of the power of taxation." (R 726-727)
>
> * * * * * * * * *
>
> "These sections of the statutes constitute general grants of power to Florida municipalities to make improvements and authorize 'reasonable charges' for the furnishing of services and facilities by municipalities. Unfortunately, the fee under attack is not a 'reasonable charge' as contemplated by the aforesaid statutes, but in effect is an effort to provide assessments for construction of a system in a manner prohibited by law. CITY OF HALLANDALE vs. MEEKINS, (Fla. 4th DCA) 273 So.2nd 318; STEWART vs. CITY OF DELAND, 75 So.2nd 584; and STATE vs. CITY OF ST. PETERSBURG, 61 So.2nd 416." (R 727)

The League's citations are laced with semantics involving sewer rates, sewer charges, sewer fees, service charges, user charges, service or user charges, demand charges, etc. The lower court was not fooled by semantics.

92. 312 So.2d 763 at 766; (A 49-50)

93. (BA 5-17)

He said the effect of the ordinance is to take money from the citizens for a public purpose. Must we not use the language of the ordinance? It is an "assessment" and none of the descriptive phrases used by the League, or the authority cited by the League, or the language used by the District Court in its opinion can change this controlling fact.

The holding of the circuit court was simply that the assessment was not a reasonable charge for financing the services and facilities of the municipality and was thus a tax. This was the exact holding of *City of Sunrise vs. Janis Development Corp.* (Fla.App.1975) 311 So.2d 371.

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

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

Is not the raising of funds "to defray cost of production, distribution, transmission and treatment facilities for water and sewer" of a municipality taking funds for a public purpose? Are these not public expenses as the lower court found? The key here is that a charge is made for construction of public capital improvements which is not reasonable. Service charges or tap-in fees are not taxes. No one said they were. But an impact fee is not a service charge related to the service rendered but a

charge wholly separate from such charges. Here is the attempt at the game of semantics which was alluded to in the first Section of this brief. Here is the wolf in sheep's clothing. As the lower court held -- no matter what you call it -- it is a tax -- it is not a reasonable service charge connected to the service rendered.

The League's citation of authority all have to do with either monthly sewer rent charges based upon the number of gallons of water used or connection fees which because of their amount directly relate to the cost of providing the connection. Where the League falters is in establishing a case where the connection charge exceeds the cost of providing the connection. The Court is urged to *scrutinize* each citation for this disinction. Such scrutiny will show that the authority cited is inapplicable or the authority is dealing with a drainage district case such as required in Chapter 180 F.S.A. 1975. Has the opposition cited a case to the Court involving a charge of $700 per unit in excess of the cost of providing the service? This is the big point in this case. Thousands of dollars were assessed against petitioners overnight -- not the small tap-in fees illustrated in respondent's and the League's cases.

Finally, the District Court's statement that F.S. 180.13(2) may be utilized as authority for the proposition that there exists legislative authority for the charge

cannot go unanswered. If you are going to use F.S. 180.13(2), you must follow the dictates of the entire Chapter. A city under the statute or chapter had to: create a zone or area for the project and require all persons in the zone to connect to the newly constructed facility;[94] pass a resolution which contained the particulars of the amount of expenditure, the type of funding involved, etc.;[95] notice to the public must be published;[96] mortgage debentures or other indebtedness to be assumed must be subjected to a freeholder vote.[97] Dunedin never followed this procedure required by the act because *everyone would have had to pay equally in the zone.*[98] They could not establish a zone because it was not geographically feasible. Wilde recommended funding under Chapter 180 Florida Statutes.[99] But you can't solely tax newcomers under this Chapter's provisions, so it wasn't used. The requirements of this act graphically demonstrate the requirements of due process and equal protection in connection with sewer assessments and rates and further

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94. Sec. 180.02 F.S.A.

95. Sec. 180.04 F.S.A.

96. Sec. 180.09 F.S.A.

97. Sec. 180.10 F.S.A.

98. See CBA Memorandum of Law (R 526-529)

99. (T 179-180) (R 1263-1264)

demonstrate the fact that since the procedure was not followed with notice and an opportunity to be heard by the public, constitutional guarantees were violated in the passage of the impact fee ordinance.

POINT III

SHOULD RESPONDENT BE REQUIRED TO REFUND ALL IMPACT FEES TO THE PUBLIC AS WELL AS PETITIONERS? (As raised by Respondent's Point II)

Respondent still unilaterally contends that petitioners agreed to expenditure of funds for their Dyna-Flow plant. This is not true, and respondent knows it. Such a claim was also made in the District Court, and petitioners in an affidavit filed by John Carr, Executive Director of the Contractors & Builders Association of Pinellas County, Inc., emphatically denied such an agreement.[100] Respondent is attempting to utilize unilateral action in claiming it spent the money to get this Court to allow it to keep its ill-gotten gains.[101]

Knowing that its impact fee ordinance was to be challenged by class action to get the people's money back that had been taxed away from them, Dunedin placed the money in escrow. This is why petitioners never sought injunctive relief.

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100. Citation to the place in the District Court record as to where Mr. Carr's affidavit is filed is not available; please see record for proper citation.

101. (B 53-54)

Petitioners do believe that this Court will affirm the circuit judge in his findings that the assessment is illegal. Uniformly, impact fees have been required to be repaid in Florida to date. There is no other just result possible. To rule otherwise would enable municipalities to illegally take money from unsuspecting citizens and keep it even if later challenged.

This Court is urged to follow the precedent in *Venditti-Siravo, Inc. vs. City of Hollywood* (39 Fla.Supp. 121) and *Janis Development Corp. vs. City of Sunrise* 40 Fla.Supp. 41, affirmed *City of Sunrise v. Janis Development Corp.* (Fla.App.1975) 311 So.2d 371 which required repayment whether the funds were paid under protest or not. Equal justice under law would seem to require such a result.

POINT IV

DID THE LOWER COURT ERR IN DENYING PETITIONERS' MOTION TO TAX COSTS AGAINST RESPONDENT FOR THE EXPENSES OF TRANSCRIPTION OF DISK OR RECORD RECORDINGS OF THE DUNEDIN CITY COMMISSION MEETING HELD AT THE TIME OF THE PASSAGE OF THE ORDINANCE UNDER REVIEW? (As raised by Respondent's Point III)

The transcripts of City Council meeting show that the Council intended to pass a "Tax",[102] aimed the ordinance at newcomers,[103] and even discussed the question of notice

102. (R 707)
103. (R 418-497)

to the citizens[104] (due process) during the enactment process. Petitioners would be surprised if the Supreme Court would not wish to thoroughly review the proceedings before City Council before rendering a decision in this case. How respondent can claim that the tapes were not necessary in light of what they reveal is not understood.[105] The transcripts have served a valuable purpose to petitioners in this petition and throughout the litigation. Petitioners will rest their case on this proposition.

CONCLUSION

Respondent and the League have responded to the many legal problems posed by this case. Of principal inquiry is the question of whether the ordinance imposes a tax or is a permissible charge attributable to Florida Statute 180.13(2) as held by the District Court.

The opposition's position in this regard fails because the assessment in the ordinance is 100% in excess of the cost of connection for which a separate charge of $100 is levied in another section of the Dunedin ordinance. Since the cost of connection is exceeded by the assessment, the funds derived constitute a tax through the imposition of municipal taxing power. Thus, the circuit judge's opinion should be affirmed upon authority of *City of Sunrise vs. Janis Development Corp.* (Fla.App.1975) 311 So.2d 371.

104. (R 418-497) 105. (B 54-56)

The glaring cardinal error in the District Court's opinion is its reliance on F.S. 180.13(2) F.S.A. 1975 as legislative authority for passage of the Dunedin ordinance. The District Court apparently failed to heed petitioners' argument that this was a drainage district statute (Municipal Public Works Act) and that F.S. 180.13(2) could not be used *independent* of the rest of the sections contained in Chapter 180 F.S.A. 1975. F.S. 180.02 requires compliance with each section in the Act in order for any municipality "to avail itself of the provisions or benefits of this chapter." This means that for respondent to invoke F.S. 180.13(2), it would have had to establish a "zone" for the public works construction, establish fixed costs for utility construction, give notice to the public and *subject the project to referendum whereby a majority of the freeholders must vote passage*. These are but a few of the requirements of this Chapter with which respondent would have had to comply to invoke the language of F.S. 180.13(2) F.S.A. 1975. Even a cursory examination of this chapter will reveal to this Court that use of F.S. 180.13 (2) is a legal impossibility. Respondent's ordinance does not purport to comply with the requirements required in Chapter 180 F.S.A. 1975.

Lest petitioners' position be misunderstood, the provision of F.S. 180.13(2) F.S.A. 1975 does not grant

legislative authority for the passage of the assessment under review. The language in the statute exclusively refers to establishment of monthly rates as the word "charges" in the statute which authorizes "rates or charges" must be interpreted as being synonymous and descriptive of the word "rates". This statute was passed by the Florida Legislature long before impact fees or the use of such vehicle was ever conceived by municipalities to fund their capital improvements. Thus, how can the intent of the statute be utilized to arrive at the result reached by the District Court in its opinion in this case.

Accordingly, petitioners request this Court to grant a petition for writ of certiorari, entering an order quashing the decision of the District Court sought to be reviewed, holding that impact fees are illegal in the State of Florida, both upon the grounds that municipalities lack legislative authority for impact fee passage and that impact fees are violative of equal protection and due process clauses of the United States and Florida Constitutions, thereby restoring and affirming the circuit court's decision in this cause and requiring all funds collected by the City of Dunedin to be refunded and petitioners' cost expended for transcription of Dunedin City Council meetings be assessed against respondent.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioners on the Merits has been furnished by mail to C. ALLEN WATTS, ESQUIRE, of Fogle and Watts, P. O. Box 817, Deland, Florida 32720, attorney for respondent; JOHN G. HUBBARD, ESQUIRE, 1960 Bayshore Boulevard, Dunedin, Florida; BURTON M. MICHAELS, ESQUIRE, P. O. Box 1757, Tallahassee, Florida; RALPH A. MARSICANO, ESQUIRE, P. O. Box 4115, Tampa, Florida; and THOMAS G. PELHAM, ESQUIRE, P. O. Box 1833, Tallahassee, Florida, this 5th day of September, 1975.

JOHN T. ALLEN, JR., ATTORNEY