IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 69,701

DCA-4 NO. 85-1743

D/A 9-2

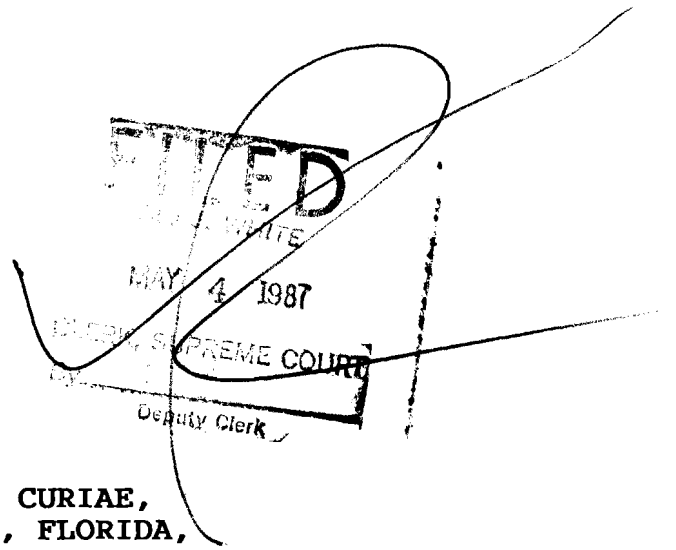
LOXAHATCHEE RIVER ENVIRONMENTAL CONTROL DISTRICT,

Petitioner,

vs.

THE SCHOOL BOARD OF PALM BEACH COUNTY,

Respondent.



BRIEF OF AMICUS CURIAE, PALM BEACH COUNTY, FLORIDA, IN SUPPORT OF PETITIONER, LOXAHATCHEE RIVER ENVIRONMENTAL CONTROL DISTRICT

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P R E F A C E

For purposes of this Brief, Petitioner, Loxahatchee River Environmental Control District, shall be referred to as "ENCON". Respondent, The School Board of Palm Beach County, shall be referred to as the "SCHOOL BOARD". Palm Beach County shall be referred to as the "COUNTY" or as "Amicus". The Appendix shall be referred to as "A - ". The District Court of Appeal of the State of Florida, Fourth District, will be referred to as "Fourth District".

STATEMENT OF THE CASE AND FACTS

This case involves regulation of rates, fees and charges of water and sewer utilities; it affects only an arbitrarily selected area, however, publicly owned utilities. Specifically, the fundamental basis of the entire regulatory system of publicly owned water and sewer utilities throughout the State of Florida is in question. The authority of the statutorily empowered utility rate-making bodies to regulate public utilities has been administratively and judicially abrogated by the Department of Education. This case further involves the question of whether there is a permissible distinction in collection of connection charges between a publicly owned water and sewer utility and a privately owned water and sewer utility which serve the same customer equally, but are here required to make unequal charges for equal service.

The State Legislature granted to Florida's counties and municipalities and to ENCON, the right to own and operate public (water and/or sewer) utilities (public utilities). The State empowered these governmental bodies to set rates, fees and charges to their customers and commanded these rates, fees and charges be applied uniformly and non-discriminatorily to all utility customers. The State forbade giving free service to any of its political subdivisions, including public schools, as all customers using the services of a public utility must be treated equally.

The State imposed these same regulations on private owners of such utilities through the regulatory auspices of the Public Service Commission (PSC).

Entirely apart from the State's legislation concerning public utilities, the State also enacted a building code of state-wide application for public schools. The State advised its county and municipal political subdivisions that their police powers of regulating construction and building within their respective boundaries would be removed in favor of a uniform State code for public school building. Local building codes would not apply to school construction, and neither would building permit fees or building impact or service availability fees.

The present controversy arose when the School Board, a customer in need of utility service, sought to contract with ENCON to secure future utility capacity for a school in Jupiter. ENCON responded, as it does to every customer seeking service, by requiring the School Board to pay ENCON's established utility rates, fees and charges. Included in these rates, fees and charges as authorized by State Statute, ENCON requires standard, normal utility connection charges and guaranteed revenue charges.

The School Board refused to pay these consumer charges. Ignoring State Statutes concerning payment of utility costs, the School Board instead cited the Uniform Building Code

Statute and claimed they were exempt from payment of connection charges and guaranteed revenue charged by public owned utilities, while agreeing to pay these precise charges and fees to private owned utilities. The School Board based this claim on an administrative rule promulgated by the Department of Education (DOE). The DOE, by administrative rule, had taken the State Public School Building Code Statute, and transformed it into a vehicle by which the DOE could regulate public utilities. Despite the fact that the Public School Building Code Statute makes no explicit nor implicit reference to public utilities and despite the fact that the State specifically, by general law, provides for public utilities and forbids regulation by such as the DOE, the DOE attempted to regulate public utilities.

The Fourth District concurred with the DOE. It held that the DOE has the power to interpret § 235.26, Fla. Stat. (1986), (A - 16); that by reason of the DOE's interpretive rule, § 235.26 applied to public utilities (A - 7-11); that the legislative directive in § 153.11(1)(b), Fla. Stat. (1955), prohibiting regulation by the DOE was repealed by § 235.26(9) (A - 16); that no conflict exists with the Chapters 153 and 180, Fla. Stat., which requires governments to enact rates, fees and charges on a uniform and non-discriminatory basis, because utility connection fees and guaranteed revenue charges are not "rates, fees and charges" under the utility statutes

(A - 23,26); and that, since the State had a legitimate purpose in enacting § 235.26(1), it could discriminate between publicly owned and privately owned utilities. (A 18-21)

ENCON appealed this decision to the Supreme Court.

SUMMARY OF ARGUMENT

The Fourth District erred in interpreting § 235.26 to apply to public utilities. The Fourth District again erred in holding § 235.26 a constitutional act not violative of the Equal Protection clause.

The Fourth District's specific errors are as follows:

1. It wrongly permitted the DOE to regulate public owned utilities, in direct conflict with § 153.11(1)(b) and erroneously repealed the provisions of § 153.11(1)(b).

3. It erroneously held that connection charges and guaranteed revenue charges are not authorized utility rates, fees and charges.

4. It impermissably required utility customers to subsidize school district expenses, imposing on them an unfair burden and illegal tax.

5. It erroneously distinguished between charges for the same utility service between public owned and private owned utilities, but failed to set forth any distinction which rationally relates to some legitimate State purpose in separately classifying them.

6. It erroneously carved out public owned utilities as a subclass, which it ruled is different in providing exactly the same water and sewer as private owned utilities, and decided that no equal protection issue arises merely because all publicly owned utilities are treated alike.

Had any one of the above errors been correctly ruled upon, ENCON would have prevailed. The Fourth District should have interpreted § 235.26 in conjunction with the utility statutes and determined § 235.26, on its face, did not apply to utilities. It should have overturned the DOE's attempt at regulating utilities. It should have required the School Board to pay the same rates, fees and charges as all other public utility customers. It should have required the School Board to pay publicly owned utilities the same rates, fees and charges it pays privately owned utilities for the very same service.

It should not have required customers of publicly owned utilities to subsidize school taxpayers by paying higher rates due to the School Board's failure to pay its share of the cost to provide utility service to public schools. It should not have allowed the school district to unconstitution- ally tax utility customers.

If it concluded that § 235.26 was intended to allow the School Board to avoid its share of the cost to provide utility service from only publicly owned utilities, then, at the very least, it should have declared § 235.26 unconstitutional as it applied to publicly owned utilities.

ARGUMENT

I.

SECTION 235.26(1), THE PUBLIC SCHOOL UNIFORM BUILDING CODE STATUTE, DOES NOT EXEMPT APPELLEE SCHOOL BOARD FROM PAYMENT OF PUBLIC UTILITY CHARGES AUTHORIZED PURSUANT TO CHAPTER 153 AND CHAPTER 180, FLA. STAT., AND CHAPTER 71-822, FLA. PUBLIC LAWS.

I.

This case involves water and sewer utility regulation. Such utility regulation arises by act of the Legislature. The Legislature enacted three general utility regulatory statutes to govern water and sewer (w/s) utility services; Chapter 367, Chapter 153 and Chapter 180, Fla. Stat., and numerous Special Act utility regulatory statutes, including ENCON's enabling legislation, Chapter 71-822, as amended by Chapter 75-475, Florida laws.[1]

Chapter 367 grants to the Public Service Commission regulatory jurisdiction over all water and sewer utilities. The State established the PSC as its administrative agency to interpret and carry out the regulation of w/s utilities under Chapter 367. While the PSC has sole statewide administrative jurisdiction over w/s utilities, the Legislature expressly

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[1]While these independent water and sewer districts are created by Special Act of the Legislature, such Special Acts are deemed general laws. See St. Johns River Water, etc. v. Desert Ranches, 421 So.2d 1067 (Fla. 1982).

removed from the PSC, authority to regulate w/s utilities owned and operated by Florida's counties, municipalities and w/s districts. Section 367.022, Fla. Stat. (1981). In its place, the Legislature expressly enacted Chapter 153 and Chapter 180, granting counties and cities sole regulatory authority over w/s utilities owned by them. To avoid any confusion as to its intent, the Legislature specifically forbade the other administrative agencies of the State from regulating or supervising these publicly-owned utilities.

> The County Commission shall charge and collect the rates, fees and charges so fixed or revised and such rates, fees and charges shall not be subject to supervision or regulation by any other commission, board, bureau or agency of the county or of the state or any sanitary district or other political subdivision of the state. (emphasis added)

Section 153.11(1)(b).

This statute remains in full force and effect and is neither amended nor repealed by Section 235.26.

The public owners of w/s utilities have sole plenary power to regulate the rates, fees and charges fixed and collected from the customers of the w/s utility. Section 153.83, Fla. Stat. (1959), § 153.11(1)(b), § 180.13(2), Fla. Stat. (1936 Supp.).

While counties and cities have sole statutory right to regulate their w/s utilities, they do so only within the parameters consistently set forth by the Legislature: the rates, fees and charges fixed and collected must be uniform,

non-discriminatory, just and equitable to all customers of the w/s utility. Section 153.83, § 153.11(1)(b), § 180.13(2). That the rates, fees and charges must apply uniformly to all users of the utility services was underscored by the Legislature in § 153.83 where it directly required the political subdivisions of the State to pay the same rates, fees and charges as any other user of utility service.

> 153.83 Free Water and Sewer Services Prohibited.
>
> The same rates, fees and charges shall be fixed and collected from any county, **school district** or other political subdivision using the services and facilities of the water system or sewer system, or both, as are fixed and collected from other users of such facilities in the same class. **No free water or sewer services** shall be rendered by the district **and no discrimination** shall exist in the fees, rates and charges for users of the same class. (emphasis added)

Id.

Expressely included within this requirement to pay are school districts. The Legislature further made it a direct violation to provide free w/s service to any user.

The same rate restrictions placed on counties and municipalities is also placed on privately owned w/s utilities. The rates, fees and charges as set by the PSC must also be uniform, non-discriminatory, just and reasonable. Section 367.081(2), Fla. Stat. (1985).

The Legislature has thus established a comprehensive and intelligent scheme for w/s utilities regulation. The Legislature considered the complexity and the need for uniformity and non-discrimination in utility regulation and specifically legislated accordingly.

Totally divorced from this explicit utility regulation, the Legislature separately enacted a Public School Building Code Statute. The Statute is clear on its face, with no apparent ambiguities or conflicts. It creates a Uniform Building Code (the "UBC"), the purpose of which is to create a code, "flexible enough to cover all phases of [school] construction which will afford reasonable protection for public safety, health and general welfare." Section 235.26.

Section 235.26 contains ten subsections. Each subsection deals with one subject and only one subject, the construction of public schools. Section 235.26(1) requires all public school construction to incorporate the UBC, and exempts such construction from the application of any other local building code or local construction regulations and related fees. Section 235.26(2) requires school boards to approve construction plans only if in conformity with the UBC. Section 235.26(3) orders school boards to enforce and supervise construction pursuant to the UBC. Section 235.26(4) provides enforcement rules to ensure compliance with the UBC. Section 235.26(5) sets forth the building plan approval process under

the UBC. Section 235.26(6) appoints the State Board of Education as arbitrator of all disputes under the UBC. Section 235.26(7) provides for biennial review of the UBC. Section 235.26(8) deals with construction of fallout shelters. Section 235.26(9) establishes the legal effect of the UBC created under § 235.26(1). Section 235.26(10) prohibits amendment of the UBC by special act or general law of local application.

Section 235.26 creates a school building code and nothing more! It does not refer to regulation of public utilities anywhere. The section headings say Building Code. Each and every word of the statute relates to building codes and the words "public utility" are not mentioned. The enabling language of § 235.26(9) unequivocally limits the scope of the statute to school construction:

> "The State Uniform Building Code for Public Educational Facilities Construction shall have the force and effect of law and shall supersede any other **code** adopted by a board or any other **building code or ordinance for the construction of educational facilities**, whether at the local, county, or state level, and whether adopted by rule or legislative enactment. All special acts or general laws of local application are hereby appealed to the extent they conflict with this section." (emphasis added)

Id.

The statute neither applies to, nor does it purport to apply to, publicly owned water and sewer utilities or to any subject other than the construction of school facilities.

While the statute on its face applies only to building codes, Respondent and the Fourth District Court would have this Court apply § 235.26 not to school construction, but to the operation and rate-making authority of publicly owned utilities. While all parties will concede that § 235.26 does not once use the word "utilities", nor make a single reference to utilities, Respondent contends that § 235.26 nonetheless legislatively amends the rate-making authority of publicly owned utilities.

The Fourth District agreed with Respondent. That conclusion is reversible error.

To understand the Court's error, one must review the 1981 amendment to the UBC. Prior to June 30, 1981, § 235.26(1) read as follows:

> "235.26(1) Uniform Building Code. All educational facilities constructed by a board shall incorporate the State Uniform Building Code for Public Educational Facilities Construction; and they are exempt from all other state, country, municipal, or local building codes, interpretations, building permits, and assessment of fees for building permits, and ordinances . . ."

Section 235.26(1), Fla. Stat. (1979)

Effective June 30, 1981, the Legislature enacted § 27 of Chapter 81-223, laws of Florida, which amended § 235.26(1), adding thereto the words, "and impact fees or service availability fees." Section 235.26(1) now reads:

> "235.26(1) Uniform Building Code. All educational facilities constructed by a board shall incorporate the State Uniform

> Building Code for Public Educational Facilities Construction; and they are exempt from all other state, country, municipal, or local building codes, interpretations, building permits, and assessment of fees for building permits, ordinances, and impact fees or service availability fees . . ."

Section 235.26(1), Fla. Stat. (1986).

What does this amendment mean? Does the addition of the words "impact fees and service availability fees" fundamentally alter the former scope of the UBC or do they simply refine and clarify the legislative intent of the originally enacted language.

ENCON suggested the latter interpretation of the amendment. The Fourth District Court erroneously arrived at the former, accepting Respondent's argument to fundamentally expand the scope of the UBC beyond building codes and into the realm of utility rate regulation.

The exact errors committed by the Fourth District will be separately addressed below. Each error singly warrants reversal; together they demand reversal.

A.

> THE UNIFORM REGULATORY SYSTEM ESTABLISHED BY CHAPTERS 153, 180 AND 367, FLA. STAT., AND CHAPTER 71-822, FLORIDA LAWS, IS DISMANTLED BY THE 1981 AMENDMENT TO THE UBC.

No one questions that prior to June 30, 1981, the UBC dealt with Building Codes and the Utility Statutes dealt with utility rate regulation. No one questions that the June 30,

1981, amendment to the UBC neither directly or indirectly mentioned, refers to or otherwise indicates an intention to change the scope of the UBC to regulate w/s utility rates.

The title to the Act makes no reference to utility rates and the body of the statute makes no reference to utility rates. The Fourth District even concedes that it had no legislative history before it applying the UBC to utility rate regulation:

> Appellee provides us with no authority respecting the exemption's legislative history.

(A - 15)

Why, then, did the Court apply this Statute to utility rate regulation? The sole argument relied on by the Court concerns an administrative rule promulgated by the DOE under § 235.26(1); Fla. Admin. Code, Rule 6A-2.01(45). As noted by the Court, the DOE by this rule defines the term "impact or service availability fees." (A - 7)

Here, for the first time, does the word "utility" appear. The Court claims that by this definition under Rule 6A-2.01(45), the DOE can administratively interpret § 235.26(1) of the UBC to permit regulation of utility rates, which interpretation the Court must follow. In this the Court erred.

The DOE has no authority to regulate or supervise utility rates. Section 153.11(1)(b) directly and specifically

prohibits the DOE from interfering with utility rate regulation:

> The County Commission shall charge and collect the rates, fees and charges so fixed or revised and such rates, fees and charges shall not be subject to supervision or regulation by any other commission, board, bureau or agency of the county or of the state or any sanitary district or other political subdivision of the state. (emphasis added)

Id.

When confronted with this express legislative directive contrary to the Court's holding, the Court dismissed § 153.11(1)(b) as having been repealed:

> [I]t should be noted that Section 235.26(11)[2] states in terms that "[a]ll special acts or general laws of local application are hereby repealed to the extent that they are in conflict with this section. Appellee points out a similar statutory provision was found to have conferred valid regulatory authority on the State Public Service Commission when a pre-existing statute restricted such regulatory authority to the Board of County Commissioners only. See Deltona Corporation v. Florida Public Service Commission, 220 So.2d 905 (Fla. 1969).

(A- 16)

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[2]While the Court cites § 235.26(11), we presume § 235.26(9) was intended.

Section 153.11(1)(b) is a general law. It is neither a local law, nor a general law of local application. (See Shelton v. Reeder, 121 So.2d 145 (Fla. 1960) for a definition of general law). The language cited by the court certainly did not and cannot repeal § 153.11(1)(b). The Fourth District's reliance on § 235.26(9) to confer regulatory authority on the DOE is error, as is its recitation of this Court's decision in Deltona Corp., 220 So.2d 905, for support.

Deltona Corp. involved interpretation of the repeal affect of the following statutory language:

> Section 2. That all laws and part of laws in conflict herewith be and the same are hereby repealed. (emphasis added).

Id., at 907.

"All laws" includes general laws of general application, the one necessary category of law missing from § 235.26(9). The absence of Deltona Corp. language destroys the Fourth District's entire interpretation foundation: The DOE has no regulatory authority to issue Rule 6A-2.01(45).

Without Rule 6A-2.01(45), § 235.26(1) does not apply to utility rate regulation.

The DOE could not issue Rule 6A-2.01(45) without a specific legislative directive contrary to the express terms of § 153.11(1)(b). No such directive appears in the language of § 235.26 or in any other education statute. The DOE attempts to create its own jurisdiction by administratively changing § 235.26(1) to apply to utility rate regulation. Having so administratively amended § 235.26(1), the DOE cites its own

amendment of the Statute as its authority to reform the statute. Inasmuch as the DOE derives its authority to issue Rule 6A-2.01(45) from its issuance of Rule 6A-2.01(45), it has attempted to bootstrap its authority to regulate utility rates.

Even if one could possibly conceive of a scenario by which a building code statute could be interpreted to grant the DOE authority to issue an administrative rule applying to utility rate regulation, one would still be confronted with § 153.11(1)(b) which states that counties are not subject to any such regulation. If counties are not subject to such regulation, it must follow that cities and ENCON are also not subject to regulation since all are public owned utilities. When a specific statute conflicts with a general statute, the conflict must be resolved by giving effect to the specific statute. See State Ex. Rel. Johnson v. Vizzini, 227 So.2d 205 (Fla. 1969). Here we do not even have a general statute; only an administrative rule. Absent the administrative rule, we have no conflict at all.

B.

UTILITY IMPACT CHARGES AND SERVICE AVAILABILITY FEES ARE "RATES, FEES AND CHARGES" UNDER THE UTILITY STATUTES.

While the Fourth District erroneously repealed § 153.11(1)(b) to the extent it conferred jurisdiction on the DOE to issue Rule 6A-2.01(45), it concedes that § 235.26(9) has

no effect on §§ 153.83, 180.13(2) and 153.11(1)(b) to the extent these statutes give counties and municipalities the plenary power to fix and collect utility rates, fees and charges (A - 24). Instead of again applying its repeal argument, the Court evades the issue by ruling these specific utility directives not in conflict with § 235.26(1) as interpreted by the Court:

> Thus we do not think § 153.83 in any way conflicts with the subject amendment to § 235.26(1) . . . Obviously, as already indicated the subject amendment does not conflict with [153.11(1)(b)] . . . We do not understand in what way it is contended that the subject amendment conflicts with [180.13(2)].

(A - 26)

These findings are error. The Court bases this erroneous decision on even more fundamental error.

The Fourth District, as a finding of fact, determined that utility guaranteed revenue charges and connection charges[3] are not "rates, fees and charges" as intended by §§ 153.64(2) and 153.83[4].

(A - 26)

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[3]While ENCON labels their utility charges Service Availability Standby (SAS) Charges and Line Charges, as defined by ENCON's Roger Anderson and quoted by the Court (A - 9), substantively these charges are the same as and are otherwise referred to in utility circles as guaranteed revenues, capacity charges and main extension charges. See Fla. Admin. Code Rules 2D-30.515(9)(12)(19).

[4]Presumably, the court intended this finding applicable to rates, fees and charges under § 151.11(1)(b), § 180.13(2) and Chapter 71-822, as well.

This finding directly contradicts the decision of this Court, and the Fourth District's sister courts, concerning the long-standing accepted practices in the field of public utilities.

In Contractors & Builders Ass'n. v. City of Dunedin, 329 So.2d 314 (Fla. 1976), this Court expressly found utility connection charges proper rates under § 180.13(2):

> Raising expansion capital by setting connection charges, which do not exceed a pro rata share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, if use of the money collected is limited to meeting costs of expansion.

Id., at 320.

The Second District ruled likewise with respect to a Water District similarly created as ENCON in Englewood Water District v. McHalstead, 432 So.2d 172 (Fla. 2nd DCA 1983):

> The phrase "rates, fees and other charges" is broad enough to include impact fees. Moreover, the statute is prospective in the sense that it contemplates future charges, and the imposition of an impact fee is consistent with the statutory purpose of authorizing charges sufficient to insure the maintenance of an adequate water system.

Id., at 173.

This Court has additionally found service availability charges proper utility rates, fees and charges with respect to

privately owned utilities. See H. Miller & Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979); Christian & Missionary Foundation, Inc. v. Florida Cities Water Company, 386 So.2d 543 (Fla. 1980). Again, such direct conflict must be resolved in favor of the specific utility statutes.

C.

IF PUBLIC SCHOOLS DO NOT PAY UTILITY IMPACT CHARGES, THE REMAINING UTILITY CUSTOMERS ARE FORCED TO SUBSIDIZE PUBLIC SCHOOL UTILITY SERVICE, IMPOSING ON THEM AN UNFAIR BURDEN AND ILLEGAL SCHOOL TAX CONTRARY TO CONSTITUTIONAL PROTECTION.

The purpose behind utility impact charges and service availability charges is to insure that existing customers of a utility do not have to subsidize utility service to new customers of the utility. This Court has consistently upheld this basic principle of utility regulation:

> Users who benefit expecially [sic] not from the maintenance of the system, but by the extension of the system . . . should bear the cost of that extension.

City of Dunedin, 329 So.2d, at 320.

Stating the same principle from the point of view of the existing utility customer, this Court stated:

> The enhanced costs of construction and continuing responsibility for fixed costs of unused plant capacity are facts which undoubtedly affect not only future rates, **but also future service availability charges, which are designed to prevent existing customers from subsidizing new customers**. . . . .Just as rates offset the cost of service and are determined by past costs so do service availability

> charges offset the cost of preserving plant capacity and are determined by past costs. (emphasis added)

H. Miller & Sons, Inc., 373 So.2d at 915,916.

Contrary to these directions, the Fourth District's interpretation of § 235.26(1) would exempt Respondent from paying its pro rata share of the cost of extension of ENCON's utility system to serve Respondent. If the utility is unable to charge school districts utility impact charges for new service, the financial burden is then improperly shifted to the other customers of the utility. See Christian & Missionary Foundation, 386 So.2d at 545.

By law, school district expenses are funded by ad valorem taxes imposed on the general taxpayers. The Fourth District's interpretation would shift this tax burden from the taxpayers to the publicly owned utility customer, forcing such customer to subsidize school district expenses. Effectively, the utility customer has been taxed by the school district. Such a tax is not only patently unfair, but is unconstitutional, in violation of Act VII, § 9, Fla. Const., which prohibits a school district from levying a tax without authority of general law:

> Counties, school districts and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this Constitution.

Act. VII, § 9(a).

No such taxing authority is granted by § 235.26(1). Since the application of the Fourth District's interpretation of § 235.26(1) would result in a violation of the Florida Constitution, that interpretation must be struck down. Reversal is particularly warranted where a reasonable construction of § 235.26(1) is not to apply it to utility rates, which creates no constitutional infirmities and no statutory conflicts.

As set forth above, § 235.26(1) refers solely to impact fees or service availability fees which relate to building codes and construction of new school facilities. These "building" impact fees have no connection to the "utility" impact fees authorized under the utility statutes and established case law. Publicly owned utilities charge impact fees only when a customer requires utility service. Utility impact fees do not attach by reason of construction or development of land. Members of the public and School Boards can and do build and use their own private water wells and septic tanks! Further, while a consumer often requires utility service in conjunction with a <u>new</u> building, many utility customers occupy <u>existing</u> buildings and later convert from septic tanks and wells to utility service. There is no requirement to pay a "utility" impact fee, unless and until a consumer requires utility service.

In the context of utility service, impact fees relate to the financing of utility expansion by the new users for whom the expansion is required. City of Dunedin, 329 So.2d 314. The power to assess utility "impact fees" derives not from the planning and regulatory authority of local government, but from specific statutory authority granted to publicly-owned utilities by the State Legislature. The government entity which imposes the impact fee, exercises its corporate proprietorship authority, not its governmental authority. City of Dunedin, 329 So.2d 314.

"Building" impact fees, on the other hand, arise solely by reason of new construction or development, regardless of want, need or use of public services. "Building" impact fees are a financing tool recently developed by local governments to support expansion of traditional public works necessitated by Florida's rapid population growth. Municipal and county governments have determined that the development of new properties negatively impact on public roads, public parks, storm sewers (as opposed to sanitary sewers), public drainage and similar publicly provided facilities. The power to assess these impact fees arises from the general planning and regulatory authority of local governments under their inherent police powers. Home Builders v. Board of Palm Beach County Commissioners, 446 So.2d 140 (Fla. 4th DCA 1983). Rather than make the taxpayers pay the costs for expansion of these public

facilities necessitated by the development of these new properties, the local governments require the new users to bear the cost of needed capital improvements. Unlike utility impact fees, though, these fees attach not only if requested by a customer for service, but attach automatically upon the construction and development of new properties. Home Builders, 446 So.2d 140.

The public improvements paid for by these "building" impact fees represent traditional governmental functions. Governments provide public roads, parks, etc. The public, as taxpayer, pays for these services and the public uses these services. Developers of new properties have no ability to choose not to use the public roads and parks. Utility service, to the contrary, represents a traditional proprietary function, not the exclusive domain of government. Utility service may be obtained from private utilities or public utilities, or from a customer's own utility plant or septic tank system. The general taxpayer does not pay for utility service. Only those custmers who want and use the service pay for the service.

The general taxpayer does, however, pay for public schools. Shifting the school district's expense for "building" impact fees from the school to the general taxpayers creates no inequity and no unconstitutional taxation. Exempting school districts from "building" impact fees does not increase the taxpayers' tax burden an iota. The exemption simply adjusts

the relative weight of the internal cost components of the tax bill, lowering the school component while raising the municipality or county component by an equal amount.

This "building" impact fee interpretation of § 235.26(1) makes sense.

> [i]t is logical for the legislature to decide not to require money needlessly to pass from one agency to the other in the form of impact fees.

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This reasonable construction that § 235.26(1) does not pertain to the utility statutes creates a harmony rather than a clash of terms, a harmony favored in statutory interpretation. See Headley v. Bethune, 166 So.2d 479 (Fla. 3rd DCA 1964). If, however, one adopts the construction created by the Fourth District, then disharmony occurs since the general terms of § 235.26(1) conflicts with the specific terms of §§ 153.83, 153.11, 180.13 and Chapter 367. These utility statutes deal specifically with utility impact fees, thus they control over § 235.26(1) which deals at best inferentially with utilities. When a specific statute conflicts with a general statute, the conflict must be resolved by giving effect to the specific statute. See In re Adams Guardianship, 99 So.2d 703 (Fla. 2nd DCA 1958).

The Fourth District never reached this necessary statutory construction analysis because of its erroneous findings on repeal and conflict. Had they properly reached

this point, they would have rejected Respondent's attempted application of § 235.26(1) to publicly owned utilities.

To construe § 235.26(1) otherwise creates an absurd and undesirable consequence for Respondent. Publicly owned utilities have no statutory duty to provide utility service to public schools. Public utilities do have a statutory duty to charge and collect uniform and non-discriminatory rates and charges. Publicly owned utilities have a contractual duty to charge and collect the same rates and charges from all users of its utility services. This contractual duty arises from the nature of the financing which public owners utilize to construct capital improvements. Public utilities are financed by governments utilizing utility revenue bonds and not ad valorem bond financing.[5] The government, as owner, pledges only the revenue of the utility system for repayment, rather than pledge the full faith and credit of the governmental entity to repay the bonds. Since the bond holders look only to the revenue of the system for repayment, they impose strict contractual duties on the utilities to charge and collect the same fees, rates and charges from all users of the utility system, and prohibit the utility from providing free service.

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[5]Ad valorem bonds are used to finance capital projects like public roads, parks and drainage, the projects for which building impact fees are imposed.

If the Utility cannot legally collect impact fees from the School Board, then the Utility cannot and should not provide utility service to schools. By statute and by bond contract, they cannot give free service to the School Board.

If the government Utility cannot or will not provide utility service to the School Board, then the School Board would have to obtain such service from another source. It would have to connect to a private utility or build a well and septic tank system, or build its own package utility plant. If it connects to a private utility, it pays the exact same impact fees and service availability fees to the private owner as it would have paid to the public owner, absent a judicially imposed § 235.26(1), exemption. If the School Board had to construct its own package utility plant, it would again incur the same capital expense as an impact fee in direct construction costs as it would have paid in connection fees and service availability fees to the public utility. The cost to build a package plant, however, would even probably exceed the cost of paying the public owner impact and service availability fees.

Since the public owner, statutorily and contractually, cannot provide the School Board with free utility service, and since the School Board would incur the exact same or greater costs if it built its own plant or connected to a private utility, interpreting § 235.26(1) to exempt the School Board from payment of public utility impact fees produces an absurd result.

The absurdity of the result is magnified when one takes into account the narrow application of § 235.26. Section 235.26 applies solely to construction of new school facilities. The school at the heart of this particular lawsuit at bar has now been constructed. Section 235.26(1) grants no exemptions for existing school facilities, only for new construction. Any existing school desiring utility service would be subject to payment of the utility impact fees if it desired to connect to the utility.

Since Petitioner must pay utility impact fees for existing facilities and must pay impact fees to private utilities for both new and existing facilities, and since Respondent would incur the same capital costs if it built its own utility plant, this is another reason why it makes no sense to construe § 235.26(1) to apply to utility impact charges when such a construction would have a severely limited application and would not accomplish any savings for Petitioner. This Court has ample authority to avoid such a result. See State Department of Public Welfare v. Bland, 66 So.2d 59 (Fla. 1953); McGeary v. Dade County, 342 So.2d 549 (Fla. 3rd DCA 1977). The Court may particularly avoid such an unreasonable result when an alternative construction of the statute would have a reasonable consequence. City of St. Petersburg v. Siebold, 48 So.2d 291 (Fla. 1950). The courts will not ascribe to the Legislature an intent to create absurd or harsh consquences, and so an interpretation avoiding absurdity is always preferred. Section 235.26(1) does not apply to public utilities.

II.

IF THE FOURTH DISTRICT CORRECTLY APPLIED § 235.26(1) TO UTILITY RATES AND CHARGES, IT INCORRECTLY FOUND § 235.26(1) NOT VIOLATIVE OF THE EQUAL PROTECTION GUARANTEES OF ARTICLE I, SECTION 2, FLA. CONST. AND THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION.

If § 235.26(1) applies to utility rates, fees and charges, then the Fourth District erroneously failed to apply the Equal Protection challenge analysis to the classification created by § 235.26(1). The applicable analysis requires the Court to examine:

> Whether the difference between those included in the class and those excluded from it bears a substantial relationship to the legislative purpose.

Metropolitan Dade County v. Golden Nugget Group, 448 So.2d 515 (Fla. 3rd DCA 1984), at 521, citing; Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974).

If §235.26 is extended to cover only government owned utility "impact fees", then the Statute necessarily establishes a class consisting of utility owners which impose "impact fees". The Statute then includes within the affected class only all government-owned utilities, while excluding all privately-owned utilities.

The rational basis test requires the Court answer three questions:

1. What differences exist between publicly-owned utilities and privately-owned utilities?

2. What is the legislative purpose of § 235.26(1)?

3. Do the answer(s) to question 1 bear a substantial relationship to the answer(s) to question 2?

The Fourth District answers Question 2 first.

Their answer: Public school construction is often urgently needed, but puts a heavy financial burden on the taxpayers of the locality and the state, in part because special attention must be given the protection of children's health and safety. It is a legitimate goal to keep such construction costs within reasonable bounds.

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No quarrel can be had with this stated legislative purpose.

The Fourth District answers Question 1 last.

Their answer: To the extent publicly owned utilities are naturally in the same class as privately owned ones, but have been separately classified here for the purpose of the impact fee exemption, the legislature may have reasoned that although privately owned utilities frequently perform the same services as publicly owned ones, the former are franchised and serve areas different from those served by the publicly owned ones. (emphasis added)

(A - 8)

The only differences cited by the Fourth District are the areas served and the franchise. The Court adds some language about competition, or lack thereof, but this is not a difference between publicly owned and privately owned utilities, this is a difference among all utilities. The distinction cited by the Court, the franchise, is a distinction without meaning which requires no argument. The distinction of serving different areas is true for all utilities, but pertains to differences between different public owned utilities equally with differences between public and private owned utilities.

The Fourth District's answer to the third question constitutes its fundamental error. It does not answer the third question. Instead, it states:

> Exempting school facilities under construction from impact fees imposed by public agencies can help limit these construction costs.

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This may be true, but it is equally true of privately owned utility impact fees. It has nothing to do with any enumerated difference between publicly and privately owned utilities!

The Fourth District next states:

> Inasmuch as both school districts and sewer districts are creatures of the people and regulable by the legislature, it is logical for the legislature to decide not to require money needlessly to pass from one agency to the other in the form of impact fees.

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This again has nothing to do with a difference between publicly and privately owned utilities; both charge impact fees. If it is logical to exempt schools from payment of impact fees, that logic applies equally to both utilities. The test is not whether the Legislature's objective is legitimate or logical; but whether the classification substantially relates to that objective.

What the Fourth District may have attempted to express are the two arguments championed by Respondent and the DOE below:

1. Private utilities earn a profit from their operation, whereas publicly owned utilities earn no profit from operations; which distinction justifies disparate treatment under § 235.26(1).

The Respondent's argument fails on two accounts: 1) profit making ability does not distinguish publicly owned and privately owned utilities; and 2) that the profit of a privately owned utility does not depend on receipt of utility "impact fees". First, publicly owned utilities, like privately owned utilities, are entitled to make a reasonable profit from their utilities operations. City of Pompano Beach v. Oltman, 389 So.2d 283 (Fla. 4th DCA 1980). The second argument is also incorrect, and incorrectly defines the profit basis of privately owned utilities. Collection of "impact fees" has no relation to or affect on profit of a utility. To the contrary, "impact fees" are specifically excluded by statute from the rate base of privately owned utilities. Section 367.081(2), Fla. Stat. (1985).

The profit of a privately owned utility is based on a fair rate of return on the investment of the utility in property used and useful in providing service. Rates are set which cover the expenses of the utility plus a fair rate of return to the utility investors. Section 367.081(2). Impact fees, which are contributions in aid of construction, are not part of the rates of the utility and statutorily cannot be used to calculate this fair rate of return.

Contrary to the required Equal Protection finding, impact fees imposed by privately owned utilities have the same purpose and effect as those imposed by publicly owned utilities to transfer to new users of a water or sewer system a fair share of the costs new use of the system involves. City of Dunedin, 329 So.2d at 319. The amount of the impact fee is determined by calculating the cost to expand service to new customers, and then distributing that cost among the new users of the system. As repeated above, insofar as "impact fees" are concerned, no difference exists between publicly-owned and privately-owned utilities.

2. Impact fees collected by publicly owned utilities are "public monies", equivalent to the public tax receipts which fund public schools.

This argument fails for two reasons, and demonstrates a fundamental misunderstanding of public utilities. Publicly owned utilities do not operate on public tax sources. Utility funding comes from the utility customers. All expenses of the utility are paid by the customer through utility rates and charges.

Utilities impose impact fees as a method of financing expansion of the utility system. Utility impact fees serve two purposes: 1) they permit utilities to finance expansion without resort to deficit financing, and 2) they shift to the new user the expenses of expansion which new use of the system requires. City of Dunedin, 329 So.2d at 318,319.

Utility impact fees are not unrestricted monies freely available for public spending. In truth, they are not even available for unrestricted use within the utility system. This Court, in City of Dunedin, 329 So.2d 314, strictly limited the use of impact fees to utility facility expansion only. The limitation is so severe that in the event the facilities for which the Utility collected the impact fee were not built, the Utility would have to return the monies collected to those customers who paid it. These fees do not and cannot go into the general public coffers.

Secondly, publicly owned utilities derive their revenue from customers and not from taxpayers of their utility service, while public schools derive their revenue from the general taxpayers of the school district whether they use the schools or not.

Not every taxpayer is a customer of a publicly owned utility. Some taxpayers are customers of privately owned utilities. Other taxpayers have no utility service at all, owning vacant land or using instead septic tanks and well water. On another hand, many public utility customers are not taxpayers (e.g., renters, churches, charities, federal and state agencies, local governments, other tax exempt organizations and persons). If the School Board pays impact charges for utility expansion, then 100 percent of the general taxpayers would bear the burden of the School Board's impact

fee payments. If, as determined by the Fourth District, the School Board need not pay these impact fees, then the burden of the School Board's exempted payment falls not on the taxpayers, but on the limited range of customers of the publicly owned utility.

Section 235.26(1) would then shift a School Board expense from the taxpayers to a limited segment of all utility customers, i.e., customers of government owned utilities, but not customers of private owned utilities. Such a shift effectually imposes a tax on customers of publicly owned utilities to pay for public school construction.

This tax is itself a constitutional violation separate and apart from the Equal Protection violation.

The question at bar is not whether the State could decide that as between the school district and the publicly owned utility, the school district deserves to retain impact fee monies.[6] The proper Equal Protection question is whether any perceptible difference between publicly owned and privately

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[6] Such a finding, while improper for Equal Protection analysis, also violates this Court decision in City of Dunedin, supra, by permitting impact fee monies to be spent not for utility expansion, but instead for school construction.

owned utilities rationally relate to the State purpose. The end does not justify the means; under the Equal Protection guarantee, the means must rationally relate to the end.

Neither the Fourth District, nor Respondent, nor the DOE could demonstrate a difference between publicly owned and privately owned utilities which would justify discrimination against customers of the former. The County can likewise find no pattern of facts which would save § 235.26(1) as interpreted by the Fourth District from constitutional rejection.

As a final effort to save its Equal Protection argument, the Fourth District evokes an argument long rejected in discrimination cases; if all persons within the discriminated class are treated equally, then no discrimination exists. As stated by the Fourth District:

> Here, publicly owned utilities are affected by the exemption in the same way, and the relation to a legitimate state interest has already been shown.

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This argument by the Court begs the question. The Court must first have properly determined if the separate classification of publicly owned and privately owned utilities comports with the Equal Protection requirements; if a challenge is then made that the numbers of the properly constituted class are not treated equally, the Court's test would apply. The Fourth District started at the wrong end of the analysis. Equal treatment within a class does not legitimize

discrimination against that class. For example, equal treatment of all people within the class of Blacks does not legitimize discrimination against Blacks. The classification analysis comes first. Not having met the rational relationship test, the Court's Equal Protection ruling fails.

CONCLUSION

This Court should reverse the Fourth District. The Fourth District should have interpreted § 235.26 in conjunction with the utility statutes and determined § 235.26, on its face, did not apply to utilities. It should have overturned the DOE's attempt at regulating utilities. It should have required the School Board to pay the same rates, fees and charges as all other public utility customers. It should have required the School Board to pay publicly owned utilities the same rates, fees and charges it pays privately owned utilities for the very same service.

It should not have required customers of publicly owned utilities to subsidize school taxpayers by paying higher rates due to the School Board's failure to pay its share of the cost to provide utility service to public schools. It should not have allowed the school district to unconstitution- ally tax utility customers.

If it concluded that § 235.26 was intended to allow the School Board to avoid its share of the cost to provide utility service from only publicly owned utilities, then, at the very least, it should have declared § 235.26 unconstitutional as it applied to publicly owned utilities.

The Fourth District should be directed to enter judgment for ENCON finding § 235.26(1) not applicable to the rates, fees and charges fixed and collected by publicly owned

w/s utilities, or, if applicable, unconstitutional as so applied.

Respectfully submitted,

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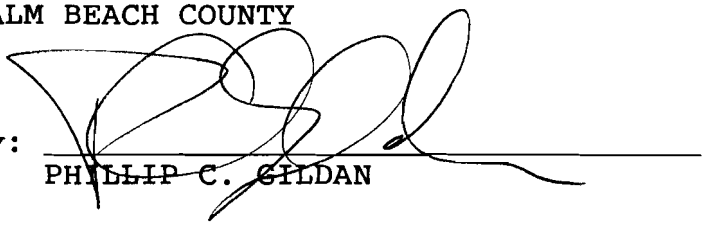
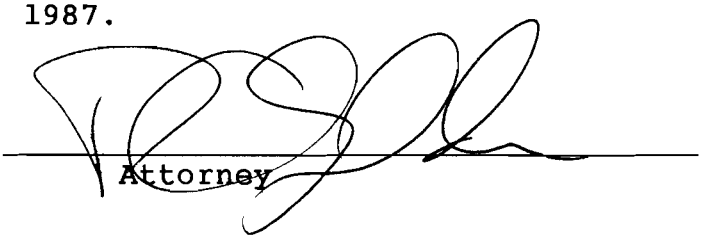


By: _____
PHILLIP C. GILDAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing instrument has been furnished by mail to W. JAY HUNSTON, JR., ESQUIRE, of the Law Firm of DeSANTIS, COOK, GASKILL & SILVERMAN, Attorneys for Petitioner, 11891 U. S. Highway 1, North Palm Beach, Florida 33408; to RICHARD L. OFTEDAL, ESQUIRE, Attorney for Respondent, School Board of Palm Beach County, 3323 Belvedere Road, West Palm Beach, Florida 33402, and to HERBERT D. SIKES, Attorney for the Florida Department of Education, Knott Building, Tallahassee, Florida 32301, this 2nd day of May, 1987.



Attorney

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