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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 69,701

DCA-4 NO. 85-1743

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LOXAHATCHEE RIVER ENVIRONMENTAL CONTROL DISTRICT,

Appellant

vs.

THE SCHOOL BOARD OF PALM BEACH COUNTY,

Appellee

BRIEF OF AMICI CURIAE, FLORIDA SCHOOL BOARDS ASSOCIATION AND FLORIDA ASSOCIATION OF SCHOOL ADMINISTRATORS IN SUPPORT OF APPELLEE THE SCHOOL BOARD OF PALM BEACH COUNTY

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INTRODUCTION

For the sake of simplicity, we will use the same abbreviated nomenclature as the Appellee School Board, whose position we support.

Loxahatchee River Environmental Control District Appellant, shall be referred to as "ENCON".

The School Board of Palm Beach County, Florida shall be referred to as the "School Board".

Amicus curiae, Palm Beach County, shall be referred to as "Palm Beach County".

Amici curiae, Florida School Boards Association and Florida Association of School Administrators shall be referred to as "FSBA".

Citations to the constitution, statutes, and rules involved, will be to the sections relevant at the time of bringing the suit.

STATEMENT OF THE CASE AND FACTS

Amici Curiae incorporate herein by reference the Statement of the Case and Facts contained in the Brief of Appellee, School Board of Palm Beach County.

INTEREST OF AMICI CURIAE

Amicus, Florida School Boards Association, is a non-profit association which represents all sixty-seven district school boards before governmental bodies. Its membership is comprised totally of all elected school board members throughout the State of Florida.

Amicus, Florida Association of School Administrators, is a non-profit association which represents district school superintendents and administrators before governmental bodies.

The members of both associations are vitally interested in this case since an adverse ruling could cost the school districts millions of dollars in impact fees.

SUMMARY OF ARGUMENT

The appellant's first assignment of error is an assertion that the trial court's ruling was not supported by the evidence and that the trial court did not understand the definition of "impact fees". We firmly believe the trial court's decision was based on competent and substantial evidence, and was not clearly erroneous. Not having participated at the trial level, FSBA will defer to the school board for a detailed explanation of why the trial court was correct. The definitions of impact fee used by the trial. The trial court was well supported in utilizing, at trial, the definition of impact fee contained in the Florida Administrative Code. Appellants arguments do not merit reversal.

ENCON's six constitutional charges also lack merit. ENCON first challenges the title of the enabling act of Section 235.26(1), claiming it to be constitutionally defective. ENCON believes that lack of the word "utilities" failed to give them opportunity to object to passage of the bill. The title, However, does contain words such as "construction", "sanitation", and "planning".

Further, the title of a bill need not be exact, it only needs to reasonably put an ordinary person on notice. The essence of impact fees is that they are levied on construction. The title of the bill was sufficient.

ENCON's third and fourth constitutional attacks are based on equal protection and due process. Governmental entities, however, may not assert constitutional rights because they have none. Even if they could assert equal protection or due process.

The statute in question is rationally related to a legitimate state goal of education; and does not infringe on any due process rights.

ENCON's next argument is that the general act creating Sub-Section 235.26(1) cannot modify a special act. Art. III, Sec. 11 specifically permits general acts to prohibit future special acts in conflict. The rules of statutory construction permit a later specific act (Sub-Section 235.26(1)) to override an earlier broad rule that created ENCON. As such, the Sub-Section in question is covered from both sides, Sub-Section 235.26(1) is a legitimate exercise of power.

ENCON's final constitutional attack is based on comity. This issue was well addressed by the 4th DCA. and we defer to them.

ARGUMENT

I

THE TRIAL COURT'S INTERPRETATION OF FLORIDA STATUTE 235.26(1) AS APPLYING TO SEWER IMPACT FEES WAS CORRECT.

ENCON's first assignment of error is that the trial court erred in defining ENCON's three types of connection charges to be "impact fees" under Fla. Stat. 235.26(1)(1981). The trial court relied on the exhibits and testimony, presented to it in defining ENCON's assessed fees as being "impact fees". The 4th DCA characterized the decision as being a mixed question of law and fact. As a general rule, mixed questions of law and fact are reviewed as if they were a purely factual determination. 5A C.J.S. Appeal and Error, Section 1642 d. Factual determinations by the trial court may not be overturned on appeal unless totally unsupported by competent substantial evidence. Chakford v. Strum, 87 So.2d 419 (Fla. 1956); Clegg v. Chipola Aviation, 458 So.2d 1186 (Fla. 1st DCA 1984).

ENCON and amicus,Palm Beach County assign error to the trial court's use of the definition of "impact fees" from Fla. Admin. Code Annot. r. 6A-2.01(45) (now r. 6A-2.001(48), numbering changed effective Feb. 13, 1986, 12 Fla. Admin. Law Weekly 511, Jan. 31, 1986). Admittedly, the rule was not promulgated at the time suit was filed. The rule, however, is intended merely as an explanation of present law, not as substantive new regulations. The courts should look to the administrative agency in charge of administering a statute when looking to it's enforcement and will not depart from such construction unless it is clearly erroneous.

State ex. rel. Volusia Jai-Alai, Inc. v. Ring, 122 So.2d 4 (Fla. 1960).

Even if the Department of Education's definition of impact fees is not accepted, there is still adequate authority for the trial court's decision. That there can be a difference between charges for fixed costs and variable operation costs was recognized by this Court over ten years ago. Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976)(Permitting municipalities to charge new construction for fixed costs of sewer expansion, provided certain conditions met). That the drafters of r. 31.10, F.A.C., would avoid the term "impact fee" is understandable, considering that it was promulgated a year and a half after the 4th District had declared "impact fees" to be an unconstitutional tax. Broward County v. Janis Development Corp., 311 So.2d 371 (Fla. 4th DCA 1975); Fla. Admin. Code Annot. r. 31-10 which defines and sets the charges and fees in question, was promulgated on Dec. 9, 1976. For a further definition of impact fees published about the time the amended Florida Statute 235.26(1) effective date, see, Juergensmeyer, Impact Fees: An Answer to Local Governments' Capital Funding Dilemma, 9 F.S.U. L.Rev. 415 (1981) (Summer edition). Contrary to ENCON's assertions, there were ample definitions of "impact fees" for the trial court to utilize. ENCON's distinction between their fee terms and the term "impact fees" is analogous to the old saying "its six of one, and a half-dozen of the other".

ENCON cites to a number of public policy reasons why they

feel the loss of this revenue will detrimentally affect the environment and water supply of their district; however, these types of concern are properly addressed by the legislature. ENCON's eloquent jury argument is misplaced in an appellate brief.

If we are to argue public policy, a much more effective argument is that ENCON is attempting to pay for its expenses upon the backs of the children of this state.

II

APPELLANT'S CONSTITUTIONAL ARGUMENTS DO NOT WARRANT REVERSAL OF THE TRIAL COURT OR APPELLATE COURT DECISIONS

Section II of ENCON's brief is a broad attack on the constitutionality of Florida Statute 235.26(1)(1981), Florida Statutes. We will address in turn the arguments raised by ENCON and Palm Beach County. We will at this juncture briefly mention the very heavy burden that must be shown in order to rule an act of legislature unconstitutional. We intend to show this Court that ENCON and Palm Beach County have failed to meet this burden.

A

FLA. STAT. 235.26(1)(1981) IS NOT DEFECTIVE FOR LACK OF PROPER TITLE

ENCON's first constitutional attack is a title challenge, pursuant to Art. III, Sec. 6, Fla. Const.. This section requires that every bill only cover one subject and that the subject be briefly expressed in the title. The need for, and scope of this section was aptly described as follows:

> The purpose of the constitutional prohibition against a plurality of subjects in a single legislative act is to prevent a single enactment from becoming a "cloak" for dissimilar legislation having no necessary or appropriate connection with the subject matter. This constitutional provision, however, is not designed to deter or impede legislation by requiring laws to be unnecessarily restrictive in their scope and operation. This Court has consistently held that wide latitude must be accorded the legislature in the enactment of laws, and this Court will strike down a statute only when there is a plain violation of the constitutional requirement that each enactment be limited to a single subject which is briefly expressed in the title.
>
> The subject of law is that which is expressed in the title and it may be as broad as the legislature chooses

> provided the matters included in the law have a natural and logical connection.
>
> State v. Lee, 356 So.2d 276, 282 (1978)(citations omitted)

The purpose of this section is to prevent "dissimilar" legislation Id., yet how can ENCON claim that impact fees and construction are dissimilar? By it's very nature an impact fee requires new construction because an impact fee is essentially a fee for new construction. ENCON was well aware of the fact that new construction would occur in it's control area, as evidenced by the fact that ENCON made provisions to deal with developers in rule 31-10.010, F.A.C. the section here in question. ENCON and amicus, Palm Beach County next shift their focus to the words "utilities" and "utility rates", alleging that the failure to include such words in the title is constitutionally fatal. This seems rather strong considering that the word "utilities" was also not mentioned in the title to either of ENCON's enabling acts,
Ch. 71-822, Laws of Fla., Ch. 76-429 Laws of Fla.; or in the body of either act, Id.; or in the relevant sections of it's administrative code promulgated by ENCON, Fla. Admin. Code Rule 31.

B

FLA. STAT. 235.26(1)(1981) IS SUFFICIENTLY UNDERSTANDABLE SO AS TO BE ENFORCED

ENCON's second challenge to the statute is a claim that the statute is void for vagueness. ENCON and amicus, Palm Beach

County, attempt to cloud the issue by redefining the impact fees at issue as utility rates, then asserting that because their self-imposed term "utilities" is not included in the statute that the statute is vague. FSBA sees a distinction between ordinary utility rates and installation charges that cover overhead, which we now call impact fees. Compare, Ch. 76-429, Sec. 1, Sub-Sections 6(9)(a) and 6(9)(b), Laws of Fla. (distinguishing periodic fees and charges from initial installation charges). ENCON also claims that omission of the word "utility" makes the statute vague. We have already addressed this argument in section II.A, supra.

The vagueness doctrine was developed to assure compliance with the due process clause of the United States Constitution. Southeastern Fisheries Assoc., Inc. v. Department of Natural Resources, 453 So.2d 1351 (Fla. 1984).

> A vague statute is one that fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement. In determining whether a statute is vague, common understanding and reasons must be used. Where a statute does not specifically define words of common usage, such words must be given their plain and ordinary meaning. Further, courts cannot require the legislature to draft laws with such specificity that the intent and purpose of the law may be easily avoided. Courts must determine whether or not the party to whom the law applies has fair notice of what is prohibited and whether the law can be applied uniformly.
>
> Id. at 1353-54 (citations omitted).

Note that this is from a test of a penal statute, whereas the statute in question merely deals with allocation of expenses among governmental entities. The statute in question here should have to meet an even lesser standard, because penal statutes are

held to "a higher test of specificity". State v. Wershow, 343 So.2d 605, 610 n.1 (Fla. 1977).

That at the time of passage of the bill there were sufficient definitions of the term "impact fees" was addressed in section I, supra.

The prohibitions of Sub-Section 235.26(1) are also clear from the history of it's passage. In 1977, the Osceola School Board tried to avoid having to pay an impact fee based on Fla. Stat. 236.34(1977), which exempts school boards from special assessments. Section 235.34 was held to not exempt school boards from paying impact fees. 1976 Op. Att'y Gen. Fla. 076-137 (June 17, 1976). The Pinellas County School Board lost a judicial challenge to impact fees based on the previous working of Sub-Section 235.26(1). School Board of Pinellas County v. Pinellas County Commission, 404 So.2d 1178 (Fla. 2d DCA 1981). Fearing the adverse judgment to come, the FSBA appealed to the legislature for relief; and was rewarded with the amended Sub-Section 235.26(1) that included the term "impact fees". This change in law was specifically noted by the Florida Attorney General's Office, who advised the city of St. Cloud that they could not collect impact fees from the local school board. 1984 Op. Att'y Gen. Fla. 084-011 (Jan. 26, 1984).

C

SUB-SECTION 235.26(1) IS NOT A VIOLATION OF THE EQUAL PROTECTION CLAUSE

ENCON's third challenge to the statute is based on the

allegation that the statute denies them equal protection of the laws, because school boards are only exempt from paying impact fees to governmental agencies, not to private utility systems. ENCON and amicus, Palm Beach County, assert that utility customers are being unfairly burdened with the cost of expanding sewer facilities for the School Board's benefit. We will address these separate arguments in turn.

1

THE APPELLATE COURT NEED NOT HAVE DECIDED ENCON'S EQUAL PROTECTION RIGHTS

ENCON first asserts that its own right to equal protection is denied because similarly situated private utility companies are not asked to waive impact fees. ENCON is an agency of the state, created by special law solely to benefit a certain part of the state known as the Loxahatchee River Basin. Ch. 71-822, Laws of Fla., Sec. 2. Simply put, an agency of the state may not claim a right to equal protection from the state. Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 77 L.Ed. 1015, 53 S.Ct. 431 (1933). Amicus, Palm Beach County, asserts that the statute in question is in violation of the equal protection clause of Fla. Const. Art. I. Sec. 2. This claim must also fail. Id. Cf., Neu v. Miami Herald Publishing Co., 462 So.2d 821 (Fla. 1985).

2

THE EQUAL PROTECTION RIGHTS OF THE CONSTITUENTS OF THE AREA.

ENCON and amicus, Palm Beach County then argue that exempting school boards from impact fees violates the equal protection rights of the other utility customers of the area. We first question whether ENCON and Palm Beach County have standing to assert the rights of the citizens of their jurisdictions, Williams v. Mayor and City Council of Baltimore, supra. especially against the school board that also serves the same community. The requirements of standing are injury and nexus between the state action and the injury. Valley Forge Christian College v. Americans United Separation of Church and State, 454 U.S. 464, 70 L.Ed.2d 700, 102 S.Ct. 752 (1982). Assuming, arguendo, that one or both of the petitioners may have standing to challenge the statute on equal protection grounds, on behalf of their constituents, we will address the argument.

FSBA will readily admit that sanitary facilities must be built, that they are extremely expensive, and that those who utilize the facilities must pay for their construction and upkeep. Amicus, Palm Beach County, correctly points out that the purpose of impact fees is to keep existing customers from bearing the burden of the new facilities being built for new construction. The constitutionality and validity of such statutes is often upheld. Home Builders and Contractors Association of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County, 446 So.2d 140 (Fla. 4th DCA 1984) (upholding amicus, Palm Beach County's, impact fee for road development). ENCON and Palm Beach County's complaint lies in the proposition that the fees not paid by the school board will

have to be passed on to all the other customers. This is the assumption on which their argument is based, yet it is not the correct assumption to make. This Court has often stated the maxim that a statute should be interpreted in the light most favorable to constitutionality and should resolve all doubts in favor of constitutionality. See generally, State v. Aiuppa, 298 So.2d 391 (Fla. 1974). Contrary to the lengthy arguments of ENCON and amicus, Palm Beach County, nowhere in Sub-Section 235.26(1) is ENCON required to cover the lost revenue from it's general revenue account. Indeed, the logical action for ENCON to take at this point is to utilize it's rate-making authority to adjust it's impact fees to cover the minuscule percentage of revenue lost by exempting school boards. This simple solution would follow the statute's stated goals of preserving school resources, plus, further shift the burden of new school construction to the development that has necessitated the school construction. New schools, like new roads and sewers, are necessitated by the rapid growth characteristic of our state. School boards are funded by ad valorem tax dollars, and it seems a logical extension of the legislature's power to exempt ad valorem tax dollars from being paid to another governmental entity as impact fees. We do not mean to assert that ENCON must adjust it's impact fee schedule to cover this lost revenue. Contrary to ENCON and Palm Beach assertions, Sub-Section 236.26(1) does not in any way force any particular rate change on ENCON, it only forces one small exemption. Rather than raising impact fees, ENCON is free to cover the lost revenue by reducing

expenses, seeking contribution from the legislature, or raising monthly fees.

The statute we ask this Court to uphold is simply designed to protect the meager resources of school boards by exempting them from local impact fees. By shifting these elsewhere, the legislature has slightly shifted the taxing structure of that area. That the legislature has such power is undisputed. That this classification can pass federal equal protection scrutiny is well supported:

> A state tax law is not arbitrary although it "discriminate(s) in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy," not in conflict with the Federal Constitution. This principle has weathered nearly a century of Supreme Court adjudication.
>
> Kahn v. Shevin, 416 U.S. 351, 355, 40 L.Ed.2d 189, 193, 94 S.Ct. 1734 (1974)
>
> The dissents argue that the Florida Legislature could have drafted the statute differently, so that its purpose would have been accomplished more precisely. But the issue, of course, is not whether the statute could have been drafted more wisely, but whether the lines chosen by the Florida Legislature are within constitutional limitations. The dissents would use the Equal Protection Clause as a vehicle for reinstating notions of substantive due process that have been repudiated.
>
> Id. 416 U.S. at 355 n.10

The Florida Legislature has recognized that forcing school districts to pay impact fees is detrimental to the development of needed new schools. To this end, it has taken the first step toward elimination of the perceived problem by exempting school boards from transferring money to other governmental entities. A statute is not violative of equal protection merely because it does not completely solve the perceived problem, but is a step in

the proper direction. In re Greenburgh, 389 So.2d 40 (Fla. 1980) appeal dismissed, 450 U.S. 961, 67 L.Ed.2d 610, 101 S.Ct. 1475 (1981); Dandridge v. Williams, 397 U.S. 471, 25 L.Ed.2d 491, 90 S.Ct. 1153 (1970).

ENCON and amicus,Palm Beach County have also raised the point that, in their case, the waiver will unfairly tax the citizens of one county for the schools of the other. However, no factual determination of such was made at the trial court level, and their failure to raise it there forecloses the issues on appeal. Patterson v. Neathers, 476 So.2d 1294 (Fla. 5th DCA 1985). FSBA believes that a trial court with all the facts in front of it would find that the amounts waived in each county would cancel each other out. ENCON would also be hard pressed to prove that it's overall budget is exactly, evenly, and fairly apportioned between the two counties. The Equal Protection Clause does not require "precise, scientific uniformity". Kahn v. Shevin, 416 U.S. 351, 356 n. 10, 40 L.Ed.2d 189, 94 S.Ct. 1734 (1974).

D

SUB-SECTION 235.26(1) IS NOT VIOLATIVE OF THE DUE PROCESS CLAUSE

This Court has already flatly denied that an agency of the State has any right to due process. Neu v. Miami Herald Publishing co., 462 So.2d 821 (Fla. 1985). The same holding applies to federal constitutional law. Williams. ENCON may not assert due process on it's own behalf.

It seems fairly common to throw on a due process argument

onto an equal protection argument. The clause prevents the taking of property without due process of law. Apparently, appellants argue that the school board is taking property from it's customers without due process. First, FSBA again questions ENCON's standing to assert the purported claims of it's constituents. See, supra section II C. As the 4th DCA pointed out, it is virtually impossible to determine any adverse effect on the property rights of ENCON's customers. (Appendix p. A-21). The time of substantive due process is long gone. Kahn v. Shevin, supra.

E

ENCON's fifth constitutional attack is the assertion that Florida Statute 235.26(1) is an alteration of a special act by a non-comprehensive general act. Specifically, ENCON asserts that the special laws which created it take precedence over the general statute 235.26(1). This assertion, however, is contrary to the express provisions of Fla. Const. Art. III, Sec. 11(a)(21) and Fla. Stat. 235.26 (9) and (10). Article III, Section 11 (a)(21) provides that the legislature, by three-fifths vote, may prohibit special laws on named subjects. Fla. Stat. 235.26(9), passed with the amendment to Sub-Section 235.26(1) specifically stated that the act repealed all previous special acts in conflict. Fla. Stat. 235.26(10), also passed at the same time, prohibits any future modification by special act, pursuant to the authority of Art. III, Sec. 11(a)(21).

FSBA agrees that the general rule of statutory interpretation

is that a general law will not supersede a previous special law. The law has long held the exception, however, that the general act will supersede the special act when there is a clear intent to "repeal or modify" the "subject-matter of the former" American Bakeries Co. v. Haines City, 180 So 524, 131 Fla 790 (1938). Where a prior general statute covers a broad subject, and the latter only deals with a particular part of the same subject, the latter particular rule will control over the earlier. Id. 180 So. at 528. In the instant case, the latter general act only dealt with a particular issue; namely, impact fees paid by school boards. The earlier special acts creating ENCON covered a wide range of subjects, including impact fees. By the clear wording of chapter 235 F.S., and the rules of statutory intent, the legislature had every intent of avoiding conflict with the numerous special acts dealing with Florida counties. By broadly stating a repeal of past inconsistent acts, and exemption from future special acts, the legislature accomplished it's stated purpose. That the legislature did not see fit to specifically name ENCON should not be fatal.

F

ENCON's final constitutional attack is based on the doctrine of comity. Black's Law Dictionary, Fifth Edition, defines comity as:

> Comity. Courtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will. Recognition that one sovereignty allows within its territory to the legislative, executive, or judicial act of another sovereignty, having due regard to rights of its own

> citizens. In general, principal of "comity" is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect. See also full faith and credit clause.

Frankly, comity is only intended for use between jurisdictions, not within them; and we cannot reply to their argument of comity except to defer totally to the opinion of the Appellate Court.

III

In our position as amici, we are primarily interested in upholding the constitutionality of a needed statute. However, we would point out for the benefit of the Appellee School Board that, by the Appellant's own regulations, Appellee is not required to execute the "Standard Developer Agreement". Fla. Admin. Code Annot. r. 31-3.007 (1981 Harrison) required "[a]ll persons, firms, corporations, agencies and organizations" to pay monthly service charges for sewer service. Fla. Admin. Code 31-10.010 (1981 Harrison) only required that "[a]ll persons, firms, and corporations" that desire sewer service sign a developer agreement, and pay the required fees being litigated here. According to the rule of exclusio unius, the exclusion of agencies and organization, the category most suited to school boards, from Appellant's own regulations forecloses Appellant from claiming or collecting the fees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing instrument has been furnished by mail to PHILLIP C. GILDAN, ESQUIRE, Post Office Box 3704, West Palm Beach, Florida, 33409, Attorney for amicus curiae, Palm Beach County; W. JAY HUNSTON, JR., ESQUIRE, of the Law Firm of DeSANTIS, COOK, GASKILL AND SILVERMAN, Attorneys for Appellant, 11891 U.S. Highway 1, North Palm Beach, Florida 33408; to RICHARD L. OFTEDAL, ESQUIRE, Attorney for Appellee, School Board of Palm Beach County, 3323 Belvedere Road, West Palm Beach, Florida 33402, and to GENE T. SELLERS, ESQUIRE, Attorney for the Florida Department of Education, Knott Building, Tallahassee, Florida 32399, This 29th day of May, 1987.

Joseph L. Shields
Attorney