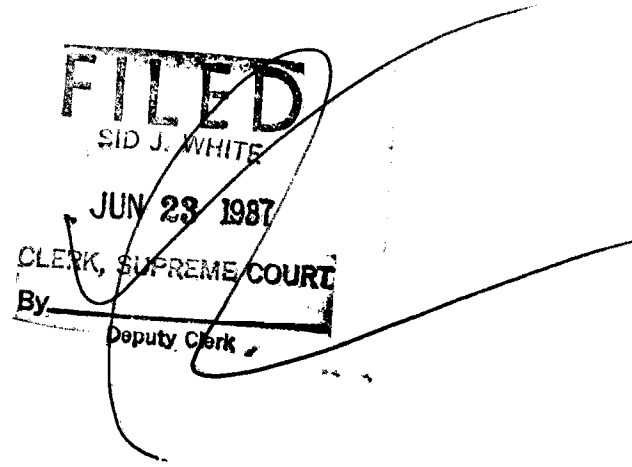
O/A 9-2-87

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 69,701

DCA-4 NO. 85-1743



LOXAHATCHEE RIVER ENVIRONMENTAL CONTROL DISTRICT,

Petitioner,

vs.

THE SCHOOL BOARD OF PALM BEACH COUNTY,

Respondent.

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

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I N D E X

TABLE OF AUTHORITIES

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 Florida Department of Education shall be referred to as "DOE". Florida School Boards Association and Florida Association of School Administrators shall be referred to as "FSBA".

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.

The County has demonstrated to the Court specific errors committed by the Appellate Court. The School Board does not refute these errors.

The County cited § 153.11(1)(b), Fla. Stat. (1986), which prohibits issuance of Fla. Admin. Code Rule 6A-2.01(45). The Appellate Court erred by disregarding this Statute as having been repealed. (See County Brief, pg. 16.) The School Board makes no comment on this error.

The County pointed out that by interpreting Fla. Admin. Code Rule 6A-2.01(45) to expand the application of the Public School Uniform Building Code ("UBC") to regulation of utility rates, the Appellate Court created a direct conflict with the explicit language of the Utility Regulatory Statutes. The Appellate Court erred by dismissing such conflict. It erroneously determined that standard utility capacity charges are not "rates, fees and charges" regulable by publicly owned utilities. (See County Brief, pg. 19.) The School Board makes no comment on this error.

The County next demonstrated that even were one to ignore all the above errors, interpreting the UBC to apply to utility rates imposes an illegal tax on utility customers by forcing them to subsidize public school expenses for utility service. The Appellate Court erred in rejecting this finding, mistakenly believing that the general taxpayers, and not the utility customers, pay for utility service. (See County Brief, pg. 21.) The School Board does not respond to this issue.

The County presented this Court with a step-by-step analysis of the term "impact fees" within the context of the UBC, demonstrating a clear distinction between "building" impact fees and "utility" impact fees. This analysis established a rational interpretation of the UBC which gives effect to the Statute without resort to the errors listed above, without constitutional infirmities, and without the absurd results the interpretation of the Appellate Court will cause. (See County Brief, pgs. 23-26.) The School Board does, finally, address this issue, albeit briefly.

First, the School Board acknowledges a distinction between "building" impact fees and "utility" impact fees:

> In the instant case, provisions exempting school facilities under construction from building-related impact fees, as well as utility-related impact fees address a legitimate goal of the Legislature, relieving the heavy financial burdens on the taxpayers to meet the urgent need for public school construction.

School Board Brief, pg. 17.

The School Board, by acknowledging that the generic term "impact fee" takes on wholly different meaning under different contexts, unwittingly proved two additional points made by the County:

1) At best, the UBC applies only to schools under construction.

The school in question here is admittedly already built. Since it is no longer "under construction," the purported UBC exemption no longer applies.

2) Exempting school facilities from payment of utility impact fees improperly shifts the financial burden of this payment from the general taxpayer to the utility customer.

The Florida Constitution and the Florida Statutes require public school expenses be borne by the general taxpayer through ad valorem taxation. The School Board has no power to tax utility customers. Since the School Board cannot tax utility customers to pay School Board expenses, the UBC cannot apply to utility "impact fees".

Rather than focus on these relevant issues, the School Board spends most of its Argument quibbling with ENCON over the propriety of ENCON's rates and charges. Such a quarrel might properly be the subject of a rate challenge, but has no relevance to the subject matter of this appeal.

Unfortunately, this rate case argument succeeded in distracting the Appellate Court's attention from the issue of utility regulation, focusing instead solely on the UBC and DOE

Rule 6A-2.01(45). This myopic focus solely on the UBC and Rule 6A-2.01(45) (the "trees") forestalled review of this case within the context in which it should have been resolved, i.e., utility regulation (the "forest"). In such isolation, the trees could possibly be misinterpreted as they were by the Appellate Court. Put into the proper context of the overall forest, the trees can only be interpreted as not applying to utility "impact fees".

The School Board did cite the Court one matter which should be addressed: 1984 Op. Att'y Gen. Fla., 84-11 (January 26, 1984). That Opinion referred to a prior Opinion, 1976 Op. Att'y Gen. Fla., 76-137 (June 17, 1976). In AGO 76-173, the Attorney General opined about utility "impact fees". Citing this Court's decision in Contractors & Builders Association of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976), he noted such so-called "impact fees" are more properly referred to as "user charges":

> The Supreme Court rejected the contention that the so-called "impact fees" constituted taxes and held they were user charges analogous to fees collected by privately owned utilities for services rendered.

1976 Op. Att'y Gen. Fla. 76-137 (January 17, 1976).

When asked whether such user charges involved capital outlay or were simply operating expenses of the School Board, the Attorney General answered operating expense:

> However, in view of the nature of the "impact fee" or user charge, being no more than a user charge for the privilege of connecting to the city's water and sewer system, it is presumed that the user charge would be paid as a normal operating expense, such as other utility charges, and not out of capital outlay.

Id.

Contrast this Opinion with the School Board's complaint that ENCON's utility "impact fees" require onerous capital outlay by the School Board. (See School Board Brief, pg. 7.)

The School Board cited AGO 84-11 as exempting public schools from utility "impact fees". Far from stating that school districts are exempt from payment of utility user charges, it reaffirms its holding that school boards must pay such user charges:

> You inquire as to the effect, if any, § 235.26(1), F.S., as amended, has on AGO 76-137. This 1981 amendment exempts all educational facilities constructed by district school boards from state and local governmental impact fees or service availability fees. To the extent of any inconsistency in AGO 76-137, that opinion is hereby modified or superseded. For a discussion of the distinctions among special assessments, taxes and user charges, see AGO 76-137 which retains continued validity on these points.

1984 Op. Att'y Gen. Fla. 84-11 (January 26, 1984) (emphasis added).

The Attorney General makes the same distinction as suggested by the County between state and local "governmental

impact charges" and utility "user charges", finding its opinion on "user charges" still viable. While the Attorney General did state AGO 76-137 was modified to the extent of any inconsistency with § 235.26(1), Fla. Stat., he did not set forth nor did he suggest any such inconsistency with respect to utility user charges.

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.

The County demonstrated to the Court the applicable analysis required in an Equal Protection inquiry:

> 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 Nuggent Group, 448 So.2d 515 (Fla. 3rd DCA 1984).

The School Board does not dispute this.

The County set forth the "differences between publicly owned and privately owned utilities cited by the Appellate Court. The School Board does not refute this.

The County demonstrated that of the "differences" cited, one is not a difference at all, and the other has no relationship, substantial or otherwise, to any possible legislative purpose. The School Board does not respond to

either of these points, but merely parrots the Appellate Court's statement that "private utilities are franchised and serve different areas from those served by publicly owned utilities." (See School Board Brief, pg. 25.) The County does not disagree with this statement, except as to its relevance.

The School Board and the Appellate Court seem to misunderstand the nature of an Equal Protection classification challenge:

> "Classification" is the grouping of things because they agree with one another in certain particulars and differ from other things in those particulars . . . Statutory classifications must be based upon some difference bearing a reasonable relationship to the subject matter regulated.

Cesary v. Second National Bank of North Miami, 369 So.2d 920 (Fla. 1979).

How does "servicing different areas" state a difference between publicly owned and privately owned utilities? All utilities serve different areas! Utility service is a natural monopoly. No water and sewer utilities compete with each other, public or private. Service area does not distinguish utilities. How does being "franchised" relate to keeping school construction costs "within reasonable bounds"? A "franchise" simply permits privately owned utilities to operate. What is inherent in an operating permit that justifies discrimination?

Rather than address the merit of these issues, the School Board argues against the County for having raised these issues in the first instance, somehow taking offense with the County's position in Home Builders and Contractors Assoc. of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County, 446 So.2d 140 (Fla. 4th DCA 1983). Contrary to the School Board's contention, the County's position was then and is now the same; everyone should pay his fair share of expenses attributable to his use of services. The impact fee ordinance in the Home Builders action applied uniformly throughout the County. It was not the County, but the Legislature, who specifically granted municipalities the right to opt out of the County's Ordinance. The equal protection issue there, unlike the case at bar, involved a question of territorial uniformity, not improper classification.

The School Board does raise an issue alluded to by the Appellate Court which merits rebuttal; ENCON's and the COUNTY's standing to raise an Equal Protection challenge in this matter.[1]

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[1]The County would remind the School Board that it acts only as a friend of the Court and not a party to this action. It raises the constitutional infirmities present in the Appellate Court's interpretation of the UBC for the Court's information, and to demonstrate that to avoid these constitutional challenges to the UBC, it should be interpreted not to apply to utility rates, fees and charges.

The School Board cites two cases to the Court challenging ENCON's standing to raise the rights of its customers in this action. Neither of these cases supports the School Board's argument. One challenges the School Board's right to contest this action!

The first case, City of Ormond Beach v. Mayo, 330 So.2d 524 (Fla. 1st DCA 1976), cert. denied, 341 So.2d 1083 (Fla. 1976), involved a challenge by the Public Service Commision ("PSC") to the propriety of water rates charged by a municipally owned utility to two privately owned utilities. The First District held that the PSC had no standing to challenge the rates set by a utility not subject to the regulatory jurisdiction of the PSC:

> ". . . The problem here results from a hiatus in the law whereby appellants are subject to the jurisdiction of the Florida Public Service Commission as to their rates and charges to their customers, while the City of Ormond Beach is not subject to the regulatory jurisdiction of said Commission as to the rates it charges to appellants. While it might be desirable from the standpoint of appellants and appellants' water customers that the City also be subject to the regulatory jurisdiction of said Commission, the legislature has not seen fit to vest such jurisdiction in the Commission . . ."

Id., at Page 525 (citing Southern Gulf Utilities v. Mayo, 299 So.2d 156,157 (Fla. App. 1st Dist. 1974)).

While the Legislature did not grant the PSC jurisdiction over the rates of a municipally owned utility, the

Legislature did grant ENCON sole regulatory jurisdiction over its rates. Unlike the PSC, it charges its own customers. ENCON does have the legislative mandate of consumer advocate over the rates it charges to its customers. Ironically, the School Board stands in the shoes of the PSC in challenging ENCON's rates and charges, except that the School Board has no regulatory authority over the rates charged ENCON to its customers. If any party lacks standing to bring an action upon ENCON's rates and charges, that party is the School Board.

The second case, City of Daytona Beach v. Del Percio, 476 So.2d 197 (Fla. 1985), involved a bar owner arrested for violating a topless dancer ordinance. The bar owner asserted a First Amendment argument that the ordinance was so broad that the constitutional rights of its customers were impermissibly restricted. This Court rejected the bar owner's standing to raise this particular overbreadth claim because that claim involved weighing the liberty interest of each particular customer versus the city's regulatory interest. Such liberty claims by their nature may be raised only by the individual customers.

The case at bar does not involve the First Amendment, does not involve a question of liberty interests, and does not involve the overbreadth doctrine. It involves the Equal Protection guarantees of the Florida Constitution. The School

Board cites no cases which would deny standing to ENCON in an Equal Protection challenge.[2]

ENCON is not simply championing the Equal Protection rights of its customers. ENCON raises the Equal Protection challenge because it is being forced by the School Board to actively participate in the unconstitutional violation of its customers' Equal Protection rights. The Appellate Court's interpretation of the UBC forces ENCON to become the instrument of discrimination. Surely, ENCON has standing to object to being forced to violate the Florida Constitution. If ENCON cannot raise the Equal Protection issue, it will be subjected to a multitude of suits by its customers for violation of their Equal Protection and statutory rights. Such an onerous outcome can and should be avoided by this Court.[3]

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[2]While this Court denied the bar owner's standing to raise the liberty interests of its customers, it did acknowledge the bar owner's standing to raise a claim that the ordinance chilled its customers' First Amendment right to engage in expressive conduct. Nonetheless, it ruled the ordinance valid; "[h]owever, the ordinance doesn't chill such behavior, it prohibits it." Id. at page 203.

[3]The County acknowledges that ENCON, on its own behalf, may not raise a Federal Equal Protection challenge to the UBC as it lacks such standing under Williams v. Mayer & City of Baltimore, 289 U.S. 36 (1933). The Williams case does not, however, bar ENCON from challenging the UBC under the State Constitution: "State law determines who has standing to challenge the constitutionality of a state statute on the ground that it violates a state constitution." City of Moore, Oklahoma v. Atchison, Topeka and Santa Fe Railway, 699 F.2d 507 (10th Cir. 1983) (citing Williams, 289 U.S. at 48). No case has been cited to this Court which denies ENCON such standing. FSBA erroneously cites Neu v. Miami Herold Publishing Co., 462 So.2d 821 (Fla. 1985) as prohibiting such standing. This case involved a due process challenge under the 14th Amendment to the U.S. Constitution, not a challenge under the Florida Constitution.

Moreover, it is axiomatic that statutes are to be construed in favor of constitutionality. Chatlos v. Overstreet, 124 So.2d 1 (Fla. 1960). By raising the probable constitutional infirmities of the statute which will inevitably result from the Appellate Court's decision below, ENCON seeks not to invalidate § 235.26(1), but rather to urge that the Statute be construed in favor of constitutionality. Such a construction leads to the inescapable conclusion that the Appellate Court erred in construing § 235.26(1) as it did. Thus, this Court must reverse the Appellate Court's holding.

CONCLUSION

The Legislature did not intend the UBC to apply to utility rates, fees and charges. If the Legislature had intended to restructure the intricately crafted utility regulatory system, it would have done so directly, not obliquely through the UBC. Even if the Legislature did indeed intend to use the vehicle of the UBC to alter long-accepted utility regulatory practices, it failed to properly accomplish such goal. If the Legislature wishes now to do so, it has ample opportunity to correct the infirmities of the UBC by appropriate legislation. The demise of the Utility Regulatory System cannot, however, be legislated by the School Board, the State Board of Education or the Department of Education.

The Order of the Appellate Court should be reversed.

Respectfully submitted,

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