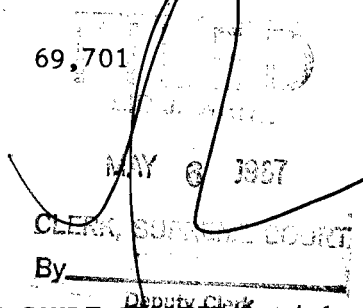
5-29 O/A 9-2-87

(IB501.T-[12,10]-05/04/87-TB)

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 69,701



LOXAHATCHEE RIVER ENVIRONMENTAL CONTROL DISTRICT,

Petitioner,

vs.

THE SCHOOL BOARD OF PALM BEACH COUNTY,

Respondent.

DISTRICT COURT OF APPEAL, 4th DISTRICT - NO. 85-1743

PETITIONER'S INITIAL BRIEF

Appeal from the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.

Petition for Review from the District Court of Appeal of the State of Florida, Fourth District

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TABLE OF CONTENTS

TABLE OF CITATIONS AND OTHER AUTHORITY

STATUTORY AUTHORITY

INTRODUCTION

Petitioner, LOXAHATCHEE RIVER ENVIRONMENTAL CONTROL DISTRICT, was the Defendant in the trial court, the Appellant in the appellate court, and shall be referred to herein as "Petitioner".

The Respondent, THE SCHOOL BOARD OF PALM BEACH COUNTY, was the Plaintiff in the trial court, the Appellee in the appellate court, and shall be referred to herein as "Respondent".

Palm Beach County appeared as Amicus Curiae in the appellate court and shall be referred to herein as the "COUNTY".

The Florida Department of Education appeared as Amicus Curiae in the appellate court and shall be referred to herein as the "DOE".

The applicable page number references to the record on appeal in the appellate court shall be referred to herein as "R-000".

STATEMENT OF CASE AND FACTS

This is an appeal from a decision of the Fourth District Court of Appeal, affirming a certain final judgment entered by the trial court on July 8, 1985. The appellate decision was rendered on October 29, 1986. Mandate issued from the District Court of Appeal on November 14, 1986, and this appeal was timely filed on November 26, 1986. Jurisdiction was accepted by this Court by order entered April 7, 1987.

Petitioner is a special district of the State of Florida, created pursuant to the provisions of Chapter 71-822, Laws of Florida, as amended, whose purpose is to regulate and control sewage disposal, solid waste management, discharge of storm drainage and water supply drainage, and water supply within its geographic boundaries encompassing 72 square miles of lands located in northern Palm Beach County and southern Martin County. [R-24].

Petitioner was created as a separate local agency of government empowered and directed to preserve and protect the resources and environment of the ecologically-sensitive area known as the Loxahatchee River basin and the headwater area of that river. [Section 2, Chapter 71-822, Laws of Florida, as amended.] In furtherance of this purpose, Petitioner has constructed and is operating a regional sewage and wastewater treatment facility, servicing property owners in both Palm Beach and Martin Counties. [R-24].

Respondent is responsible for construction and operation of primary and secondary public schools in only Palm Beach County.

The trial court action was one for injunctive and declaratory relief, commenced on November 19, 1981, by the Respondent requesting exemption from liability for three separate charges for sewer service, pursuant to the

provisions of Section 235.26(1), Fla. Stat. (1981), which included amendments contained in Chapter 81-223, Laws of Florida. The charges at issue consist of the Petitioner's monthly service availability standby charge (SAS charge), regional transmission system line charge (line charge), and plant connection charge, all as described and defined in Chapter 31-10, Fla. Admin. Code. [R-001].

Section 235.26(1), Fla.Stat. (1981), provides, in pertinent part, as follows:

> "UNIFORM BUILDING CODE. -- All educational facilities constructed by a board ... are exempt from all other state, county, district, municipal, or local building codes, interpretations, building permits, and assessments of fees for building permits, ordinances, and impact fees or service availability fees."

In September 1981, Respondent began construction of a public middle school in Jupiter, Florida, known as the Jupiter MAA School, within the area served by the Petitioner's wastewater treatment system. Pursuant to Rule 31-10.10, Fla. Admin. Code, and in accordance with past practice for new schools, Petitioner requested that Respondent execute a standard Developer Agreement [R-4] and pay the SAS and line charges for the new school. Additionally, the execution of the standard Developer Agreement operated to "lock-in" the plant connection charge rate for the new school at the 1981 rate structure, even though the plant connection charge would undoubtedly increase in the future.

Payment of the monthly SAS charges was to be credited towards the ultimate plant connection charge to be paid and would terminate at such time as the plant connection charge had been paid in full. [R-4 to R-8].

Respondent refused to execute the Agreement or to pay any of the charges, asserting that it was now exempt from payment of all three of

these charges as "impact fees or service availability fees", pursuant to the amendment to Section 235.26(1).

Instead, Respondent filed its Complaint for Declaratory and Injunctive Relief on November 19, 1981. [R-1 to R-9]. Petitioner, in response, denied that the charges were "impact fees or service availability fees" under the statute and contended that the statute, as implemented subsequently by the Department of Education in Rule 6A-2.01(45), Fla. Admin. Code, was unconstitutional.

The trial court, following a non-jury trial, entered its Final Judgment upholding the constitutionality of the statute and declaring that Respondent was exempt from payment of all three of the charges at issue. [R-331 to R-333]. Notice of appeal to the Fourth District Court of Appeal was filed by the Petitioner on July 25, 1985, which ultimately resulted in the rendition of the decision of that appellate court in Loxahatchee River Environmental Control District v. School Board of Palm Beach County, 496 So.2d 930 (Fla. 4th DCA 1986), from which this appeal is taken.

POINTS ON APPEAL

POINT I

THE APPELLATE COURT ERRED IN AFFIRMING THE TRIAL COURT'S FINDING THAT EACH OF PETITIONER'S THREE (3) CHARGES AT ISSUE ARE IMPACT FEES OR SERVICE AVAILABILITY FEES FROM WHICH SECTION 235.26(1), FLORIDA STATUTES (1981) EXEMPTS RESPONDENT.

POINT II

THE APPELLATE COURT ERRED IN AFFIRMING THE TRIAL COURT'S FINDING THAT SECTION 235.26(1), FLORIDA STATUTES (1981), IS A CONSTITUTIONAL EXERCISE OF THE LEGISLATURE'S POWER.

SUMMARY OF ARGUMENT

For purposes of simplicity and consistency, Petitioner will address the issues raised in this appeal in the order in which the appellate court discussed them in its decision.

First, the appellate court erred in affirming the trial court's finding that all three of Petitioner's charges at issue are impact fees or service availability fees from which Section 235.26(1), Fla. Stat. (1981) exempts Respondent.

The only competent evidence presented at trial and contained in this record demonstrates that the line charges and plant connection charges for the Jupiter MAA School were determined, based upon a total of 75 "equivalent connections" (e.c.'s). The 75 e.c.'s were computed, based upon a formula established by Petitioner's engineering consultants in 1981, which was designed to pass on to Respondent the actual and direct costs of that portion of the regional transmission line facilities and plant treatment facilities needed to serve Respondent's school. [R-269 to R-277]. The SAS charges were to be paid quarterly, in advance, until such time as Respondent had paid in full the $650.00 per e.c. plant connection charge. [R-4].

Thus, Petitioner's charges are not factually "impact or service availability fees" proscribed by the statute in question, but are merely the means by which Petitioner, as a public utility, collects from each user that user's direct and actual prorated cost of the capital improvements necessary to transmit and treat the user's sewage and wastewater discharges.

Second, the appellate court erred in affirming the trial court's finding that Section 235.26(1), Fla. Stat. (1981), as extended and implemented by the Department of Education in Rule 6A-2.01(45), Fla. Admin. Code, is constitutional.

Neither Section 235.26(1), Fla. Stat. (1981), nor the title to that statute or its amendment contained in Chapter 81-223, Laws of Florida, contains the word "utility". The extension of this statute, either by judicial construction or by rules promulgated by the DOE, to exempt state school boards from payment of utility rates and charges as "impact or service availability fees" is unconstitutional and violates Article III, Section 6, Fla. Const. (1968), in that it embraces more than one subject and matter and fails to express the subject in its title. The statute, on its face and in its title, creates a State Uniform Building Code for Public Educational Facilities Construction and does not put a reasonable person on notice that it may contain language governing public utility rates and charges or restricting a public utility's statutory obligation to fix and collect reasonable rates and charges for its services.

Section 235.26(1) is void for vagueness, in that it fails to define its essential, operative terms. The exemption from payment of "impact fees or service availability fees" contained in that section of the "State Uniform Building Code for Public Educational Facilities Construction", would appear to men of common understanding and intelligence to relate to building fees, rather than utility rates and charges. However, the DOE, in Rule 6A-2.01(45), Fla. Admin. Code, has attempted to define that statutory phrase in terms of utility rates and charges. That statute is, therefore, unconstitutionally vague. The constitutionality of the statute can,

however, be upheld if the meaning of the phrase "impact fees or service availability fees" is judicially restricted to building fees, as opposed to utility rates and charges.

Section 235.26(1), as expanded by Rule 6A-2.01(45), denies Petitioner and Petitioner's customers equal protection of the law. The appellate court's interpretation of this statute exempts school boards from the payment of utility rates and charges to publicly owned utilities, but excludes from exemption identical rates and charges charged by privately owned utilities. Thus, utilities in general, although similarly situated, are treated on a disparate basis by the appellate court's construction of this statute, based solely upon whether the utilities are publicly or privately owned. Additionally, this judicial construction requires Petitioner's customers who reside in Martin County to pay the cost of providing the capital improvements necessary to provide utility service to Palm Beach County students.

The appellate court's construction of this statute and rule denies Petitioner and its customers of due process of law, in that utility services must be provided to Respondent without compensation, resulting in a deprivation of Petitioner's and Petitioner's customer's property without notice or just compensation.

Section 235.26(1), as interpreted and construed by the appellate court, constitutes an unconstitutional alteration of a special act by a noncomprehensive general act. Petitioner was created by Chapter 71-822, Laws of Florida, as amended from time to time through 1986, and was given certain specific powers and duties relating to utility rates and charges. The statute in question contains no evidence of any intent to specifically

repeal prior special or general acts relating to utility rates and charges and cannot constitutionally be expanded by judicial construction or administrative rule to do so.

The appellate court construction and interpretation of this statute and rule results in the unwarranted interference by the DOE, as one agency of the government of the State of Florida, in the lawfully mandated affairs, operations, and duties of Petitioner, as a special district of the State of Florida, which is analogous to a violation of the principles of comity.

ARGUMENT

POINT I

THE APPELLATE COURT ERRED IN AFFIRMING THE TRIAL COURT'S FINDING THAT EACH OF PETITIONER'S THREE (3) CHARGES AT ISSUE ARE IMPACT FEES OR SERVICE AVAILABILITY FEES FROM WHICH SECTION 235.26(1), FLORIDA STATUTES (1981) EXEMPTS RESPONDENT.

Prior to June 30, 1981, Section 235.26(1), Fla. Stat. (1979), 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, county, municipal, or local building codes, interpretations, building permits, and assessment of fees for building permits, and ordinances..."

Effective June 30, 1981, Section 27 of Chapter 81-223, Laws of Florida, amended the wording of that statute, which 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, county, district, municipal or local building codes, interpretations, building permits, and assessments of fees for building permits, ordinances, and impact fees or service availability fees..."

In addressing the issue of the applicability of this amended Statute to the three (3) charges questioned by Respondent in the trial court, both the trial court and the appellate court committed the fundamental error of examining the charges as a group, rather than individually. In fact, the appellate court, in its decision in this case, stresses the fact that one of the charges at issue (the service availability stand-by charge) utilizes the phrase "service availability" and must, therefore, obviously fit within the rubric of the statutory exemption. Neither the trial court nor the appellate court held Respondent, who was the Plaintiff in the trial court,

to its burden of proving, whether as a factual question or a mixed question of fact and law, that each of the three charges in question fit within the wording and intent of the statutory exemption.

The appellate court's decision makes reference only to the testimony of Roger Anderson, the then Executive Director of Petitioner, and implies that Mr. Anderson was the main "expert" testifying as to the nature of Petitioner's charges. The record clearly contradicts this position.

Because, by the date of trial the Department of Education had adopted Rule 6A-2.01(45), Fla. Admin. Code, the testimony at trial necessarily involved whether Petitioner's charges fit within the definitions thereby adopted by the DOE. The testimony as to the factual aspects of this issue involved the testimony of Roger Anderson, the Executive Director of Petitioner [R-230 to R-266], Robert Pitchford, the engineering expert proffered by Respondent [R-177 to R-230], and Peter Robinson, the engineering expert proffered by Petitioner, who was also the author of the original March, 1981 rate study upon which the charges in question were based. [R-266 to R-286].

In both the trial court and the appellate court, the unique nature of utility services and the underlying policy considerations of providing adequate sewage and wastewater treatment facilities were overlooked and, in determining that any person of reasonable knowledge could understand the meaning of the phrase "impact fees and service availability fees", both courts relied upon an understanding of that phrase relating to roads, parks, recreational facilities, and other public facilities normally contemplated within the context of building impact fees, rather than in the context of public utilities.

The overriding concern of the legislature, in establishing Petitioner as a special district of the State of Florida was to protect the Loxahatchee River basin area and the watershed areas surrounding that historic river. The uncontrolled expansion and proliferation of septic tanks and "package treatment plants", as a means of treating and disposing of the wastewater and sewage generated by the ever-expanding population in the northern Palm Beach and southern Martin County area was of primary concern to the legislature in 1971. Thus, in Chapter 71-822, Laws of Florida, Petitioner was established specifically for the purpose of coordinating and directing public resources toward the prevention of pollution and contamination of the Loxahatchee River area.

In reviewing the issue of the applicability of Section 235.26(1) to Petitioner's fees and charges, both the trial court and the appellate court were apparently impressed with the public policy concerns of education in Florida, but failed to adequately address the public policy concerns of preservation of Florida's natural resources and fresh water supplies, as involved in the Loxahatchee River area basin.

Roads, parks, and other public recreational facilities provided by governmental agencies and funded through impact fees can all function, even though sometimes overloaded and taxed by usage and flow created by new developments, including schools. The environment and water supply in Florida, including the Loxahatchee River basin area, cannot continue to function if likewise submitted to excessive usage and flows of wastewater and sewage.

Thus, an impact fee relating to a road is totally dissimilar to, for instance, the line charges and plant connection charges of the Petitioner. Petitioner's engineer, Mr. Robinson, testified that, in making his

projections for the size and number of regional transmission line facilities needed within the geographical boundaries of Petitioner, he included in his projections institutional flow rates for schools. As pointed out by Mr. Robinson, schools generate wastewater, which is exceptionally caustic, by its very nature. [R-274 to R-275].

In establishing a factor of .06 in the formula for determining equivalent connections (e.c.'s) for schools such as the proposed Jupiter MAA School, Mr. Robinson's firm took into account the flow, rate of flow, and type of flow which would have to be handled by Petitioner's wastewater treatment facilities in servicing schools, as opposed to houses and residences. [Defendant's Exh. #2; R-281 to R-284a; and Rule 31-10.03, Fla. Admin. Code.] Thus, the argument that the regional transmission line charge is an "impact fee" cannot withstand scrutiny, either as a factual question or as a mixed question of fact and law, because the essence of the testimony at trial was that the application of the equivalent connection factor of .06 to the total projected population of the proposed school of 1250, resulted in a charge only for the actual flow determined to a reasonable engineering certainty to be applicable to the specific school in question, to wit: 75 e.c.'s.

At no time did Petitioner take the position, nor does it now, that Respondent should pay for anything more than what it actually uses. The evidence at the trial court level clearly established that the formula arrived at by Mr. Robinson achieves that very purpose. Thus, there is no question that the regional transmission line charge at issue is nothing more than a charge to Respondent for its fair share of the regional transmission facilities of Petitioner, based upon its actual usage and direct cost.

The unstated but implicit concern of both Respondent and the appellate court is that the Petitioner requested payment of the line charge in advance of actual connection. This concern, however, is remedied not by declaring the regional transmission line charge to be an "impact fee" from which Respondent is exempt by Section 235.26(1), but rather by delaying payment of that charge to the time of actual connection to the regional transmission facilities, rather than in advance.

Likewise, applying the .06 factor for determining equivalent connections to the proposed population of the Jupiter MAA School and using the resulting e.c. number of 75 to calculate the plant connection fees, results in an identical computation of the Repondent's fair share of the actual cost of the plant facilities required to handle, treat, and dispose of Respondent's wastewater and sewage in an environmentally and ecologically sound and safe manner. What was overlooked both by the trial court and the appellate court is the fact that, under the Developer's Agreement requested to be executed by Respondent, the cost of the plant connection charges was "frozen" at 1981 rates, rather than at the rates (presumably much higher) in existence at the time of actual connection. The SAS charges merely provide a vehicle for collecting the plant connection charges during the period of time between application for service and actual, physical connection. [R-4].

The confusion of the appellate court over the concept of utility rates and charges and building impact fees is further evidenced by the appellate court's decision that "impact and service availability fees need not be considered to be, in the language of the enabling law, fees or charges for services and facilities by Appellant's system" and the Appellate Court's

opinion that impact fees are not fees for actual services and facilities provided. This opinion is contrary to the law and reverses the well settled expression of the law in Florida since 1976, set forth by this Court in Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976)

Respondent, in the trial court and in its Briefs to the appellate court, stressed the fact that no connection had yet been made to the Jupiter MAA site. What is unmentioned is the fact that Respondent chose to construct this school in an uninhabited area of Palm Beach County, based upon its future population projections, in a location approximately one mile in radius from any residential development. [R-164]. Obviously, Petitioner did not have a regional transmission collector facility constructed in the middle of this uninhabited area and the reason and purpose for the Developer's Agreement and the payment of the charges in question was to obtain at least Respondent's pro rata portion of the cost of construction of the southerly regional connector line years in advance of when development of the area surrounding the school site would otherwise warrant it.

In hindsight, what Respondent really sought to achieve under the protection of Section 235.26(1) was the construction of 6,250 feet of gravity and force main sewer pipe, together with an accompanying lift station facility, with no contribution of any share, let alone its fair share, of this cost by Respondent. [R-275]. All of this was sought solely to service a school constructed approximately one mile from any other residential or industrial customer in existence at that time.

When viewed individually, as should properly have been the requirement of the law, the line charges and plant connection charges of Petitioner are clearly not "impact fees or service availability fees". By viewing those charges in conjunction with the monthly service availability standby charges in question in this case, both the trial court and appellate court failed to properly review the applicability of the provisions of Section 235.26(1) to each of the charges at issue, and erroneously simplified the issue to one of merely the "service availability" nomenclature in both the statute and the SAS charge name.

Therefore, at least as to the line charges and plant connection charges, the decision of the appellate court must be reversed as being clearly erroneous and this cause remanded with directions to reverse the trial court's findings as to these two charges and require Respondent's payment of them, as its fair share of the cost of providing wastewater and sewage treatment facilities for the Jupiter MAA school site, either immediately or no later than the time of actual, physical connection to Petitioner's system.

POINT II

THE APPELLATE COURT ERRED IN AFFIRMING THE TRIAL COURT'S FINDING THAT SECTION 235.26(1), FLORIDA STATUTES (1981), IS A CONSTITUTIONAL EXERCISE OF THE LEGISLATURE'S POWER.

The trial court, without further explanation or support, addressed this issue in its Final Judgment, as follows:

> "2. Section 235.26(1), Florida Statutes, is found to be a constitutional exercise of the power of the Florida Legislature." [R-3332].

This finding was made, despite the fact that Petitioner defended this action in the trial court on six (6) separate constitutional grounds.

No issue exists in this case, nor has it ever, that all statutes are subject to the controlling provisions of both the state and federal constitutions, whether so expressed in the act or not. Gray v. Moss, 115 Fla. 701, 156 So. 262 (1934). The burden of proving a statute unconstitutional lies with the party challenging its validity. Brewer v. Gray, 86 So.2d 799 (Fla. 1956).

Respondent, in the trial court and appellate court, likened Petitioner's constitutional challenge to this statute to a "shotgun blast". Petitioner respectfully submits that the question of unconstitutionality of a statute normally involves an analysis of a myriad of issues developed over the course of this State's jurisprudence and that the legislature, in its exercise of power, must be required to conform with all of these constitutional requirements, however numerous or onerous.

A. Violation of Article III, Section 6, Florida Constitution (1968)

Effective June 30, 1981, Chapter 81-223, Laws of Florida, became effective. The title to said legislative act reads as follows:

> "An act relating to educational facilities construction and funding; amending, creating and repealing various sections in chapter 235, Florida Statutes, and Florida

Statutes, 1980 Supplement, expanding the definitions of educational capital outlay terms, renaming the Office of Educational Facilities Construction, and reorganizing certain responsibilities of the office, the State Board of Education, and the Commissioner of Education; modifying certain standards relating to safety, sanitation, sites, coordination of local construction planning, facilities design, construction techniques, new construction, day labor projects, and the State Uniform Building Code; developing a new formula for the allocation of the Public Education Capital Outlay and Debt Service Trust Fund for new construction and for maintenance, renovation, remodeling, and repair; providing for priority lists for postsecondary education; creating a new Special Facility Construction Account; deleting a needs formula at the state level and a priority expenditure list required by the state; creating a new financial reporting procedure for the Public Education Capital Outlay and Debt Service Trust Fund; creating a new budget request system; requiring adherence to the provisions of chapter 216; amending s. 215.61(3), Florida Statutes, relating to capital outlay bonds, to provide that certain estimates shall be used to determine fiscal sufficiency; amending s. 215.65(1), Florida Statutes, relating to the working capital reserve of the Bond Fee Trust Fund; amending s. 215.79, Florida Statutes, relating to the maturity and redemption of refunding bonds; amending s. 240.277, Florida Statutes, relating to the appropriation of student building and capital improvement fees; amending ss. 240.295(1) and (2), 240.327 and 240.531(5), Florida Statutes, and repealing s. 240.297, Florida Statutes, relating to university and community college facilities, to conform; amending s. 240.17 and 240.319(3)(f), Florida Statutes, relating to the approval by the State Board of Education of the exercise of eminent domain by the Board of Regents and the community college board of trustees; providing appropriations for specified capital outlay projects from the Public Educational Capital Outlay and Debt Service Trust Fund, the General Revenue Fund, and the Capital Improvement Fee Trust Fund; amending 243.131(3), Florida Statutes, relating to the pledging of trust funds by the Board of Regents; adding s. 236.25(2)(e), Florida Statutes, relating to the required notice to be published by a district school board with respect to the levy of additional taxes; reviving and readopting certain sections of chapter 235, Florida Statutes, which were repealed by chapter 80-414, Laws of Florida; providing for repeal by legislative review; providing an effective date.

At trial, Petitioner urged that the proper interpretation of Section 235.26(1), as amended by Chapter 81-223, Laws of Florida, related only to building related fees and not to utility rates and charges. Thus, the constitutionality of the statute could have been upheld through that construction. However, if the building code statute were to be interpreted to legislate utility rates and charges, then such an interpretation would render the statute void, as a violation of Article III, Section 6, Florida Constitution, the equal protection clause of the United States and Florida Constitutions, and other constitutional provisions.

Respondent, on the other hand, urged the trial and appellate courts to interpret the statute in such a manner that the word "utility" would be implied before the statutory phrase "impact fee or service availability fee", thus applying the local building code fee exemptions to utility rates and charges.

Section 235.26 applies to the construction of public school facilities and creates a Uniform Building Code, within its ten subsections. It specifically exempts public school construction from the application of any other local building code or local construction regulations and related fees. The statute creates a school building code and nothing more, it neither applies to, nor may be interpreted to apply to, any subject other than the construction of school facilities. The interpretation of section 235.26(1), adopted by the trial court and appellate court, expands the application of this statute beyond building codes, to include the operation and rate making authority of publicly owned utilities. Yet, nowhere in Section 235.26(1), or in Section 27 of Chapter 81-223, Laws of Florida, is the word "utilities" even mentioned!

The title of an act is not part of the basic act, but does have the distinct function of defining the scope of the act. Finn v. Finn, 312 So.2d 726, 730 (Fla. 1975). The title must be sufficiently informative to obviate surprise or fraud that might spring from hidden provisions not indicated in the title. Knight & Wall Company v. Bryant, 178 So.2d 5, 7 (Fla. 1965), cert.den. 383 US 958, 86 S.Ct. 1223, 16 L.Ed. 2d 301 (1966). The test for adequacy of a statute's title is whether the provisions appear to be "incidentally related and properly connected to primary subjects expressed in the title and fairly and naturally germane thereto." Rianhard v. Port of Palm Beach District, in and for Palm Beach County, Florida, 186 So.2d 503, 506 (Fla. 1966).

In Purk v. Federal Press Company, 387 So.2d 354 (Fla. 1980), this Court considered a challenge to a statute which limited the time in which to bring an action for products liability. On appeal of a summary judgment for the defendant, the plaintiff argued, inter alia, that the statute was void because its title did not put a reasonable person on notice of the contents of the act. This Court affirmed the summary judgment, stating:

> "Article III, section 6 does not require that the title contain a detailed explanation of every provision, but only that all matters dealt with in the body of the law be fairly related to the subject described in the title... (citations omitted). The title is adequate if it is not misleading and is sufficiently detailed to put interested persons on notice reasonably leading to inquiry as to the contents of the act..." (citations omitted).
>
> 387 So.2d at 358.

As can be seen from the title quoted hereinabove, the legislature, in Chapter 81-223, Laws of Florida, went to great lengths to describe the matters intended by it to be contained within the body of the act. Not one

word in the almost four hundred word title refers to utilities or utility rates and charges. Not one word even mentions impact fees or service availability fees. Thus, a reasonable person (including public utility companies and special districts such as Petitioner) would not be put on notice that their authority to set rates and charges, granted by Chapters 153, 184 and 180, Florida Statutes and Chapter 71-822, Laws of Florida, was being restricted in any fashion. Utility rates and charges have no relationship or rational connection to State Uniform Building Code Standards, either incidentally or otherwise.

Had the legislature desired to address public utility rates and charges, it could have and would have made some reference in the title of the Act to utilities. Since no mention in that regard appears, and since no mention appears in the body of the Act, the Act must either not apply to utility rates and charges or, if it does apply, it must be an unconstitutional violation of Article III, Section 6 of the Florida Constitution. The appellate court, in its opinion herein, states that it thinks, but does not say, that:

> "...inclusion of section 27 as part of Chapter 81-223, Laws of 1981, was fairly in conformity with the requirements of article III, section 6, of the Florida Constitution. However, we need not consider that question. Article III, section 6 applied only so long as the subject statutory provision remained a 'law'. Once the provision was reenacted as a portion of the Florida Statutes, it was not subject to challenge under Article III, section 6. State v. Combs, 388 So.2d 1029, 1030 (Fla. 1980); Santos v. State, 380 So.2d 1284, 1285 (Fla. 1980)."
>
> [496 So.2d at 936].

This ruling by the appellate court is directly in conflict with and contradicted by this Court's decision in Bunnell v. State of Florida, 453 So.2d 808 (Fla. 1984). The appellate court's construction of the

constitutional requirements of Article III, Section 6, would effectively render the constitutional requirement meaningless and ineffective. By determining that the constitutional requirement applies only for the brief period during which a legislative act remains a "law", the appellate court has effectively ruled that no statute will ever be subject to review under this constitutional provision, merely due to the time requirements necessary to file an action for declaratory relief in a trial court, pursue that action through final judgment, prosecute an appeal therefrom, and finally address the issue of constitutionality before this Court. Obviously, as was the case during the five (5) year period during which this case was pending, what was originally a "law" promulgated in Chapter 81-223, Laws of Florida, became codified as Section 235.26(1), Fla. Stat. (1981).

As was the case in Bunnell, supra, the legislature's re-enactment and codification of the subject law, prior to this Court's review, cannot preclude this Court from reviewing the constitutionality of the original enactment by the legislature. For the law to be otherwise would render Article III, Section 6 of the Florida Constitution meaningless and ineffective.

B. Void for Vagueness and Ambiguity.

There has never been an issue in the trial court or the appellate court, as to whether a statute that does not seek to impose significant sanctions is subjected to a lesser degree of scrutiny than a prohibitory or criminal statute. Department of Legal Affairs v. Rogers, 329 So.2d 257 (Fla. 1976). However, it has likewise never been questioned that every law must still satisfy minimal constitutional standards for definiteness [D'Alemberte v.

Anderson, 349 So.2d 164, 168 (Fla. 1977)], and that a court will give preference to a construction of a statute which gives effect to that statute over another construction which would defeat it, when such a construction is reasonably possible and where it is consistent with the legislative intent [McKibben v. Mallory, 293 So.2d 48, 51 (Fla. 1974)].

As discussed hereinabove, Section 235.26(1), when read and construed in a manner necessary to uphold its constitutionality and give it effect, rather than defeat it, applies only to impact fees or service availability fees imposed pursuant to local building codes and regulations. These building impact fees have no connection whatsoever to utility rates and charges and, specifically, the charges of Petitioner at issue herein.

Perhaps it was the vagueness of the language used by the legislature in the specific wording of Chapter 81-223, Laws of Florida, or perhaps it was merely an unreasonable extension of the statute through administrative action, but the fact remains that the definition of impact or service availability fees adopted by the DOE in Rule 6A-2.01(45), Fla. Admin. Code, constitutes an unreasonable construction and expansion of the statutory phrase "impact fee or service availability fee", to include not only building regulations and ordinances, but also utility rates and charges.

A reasonable construction of the statute, which creates a harmony favored in statutory interpretation [Headley v. Bethune, 166 So.2d 479 (Fla. 3rd DCA 1964)], is that Section 235.26(1) applies to building impact fees, while Chapters 153, 180 and 184, Florida Statutes, and Chapter 71-822, Laws of Florida, apply to utility rates and charges. It must be noted that the first inclusion of the word "utility" in any of the legislative enactments or pronouncements surrounding Section 235.26(1),

occurred in the definition promulgated by the DOE in Rule 6A-2.01(45). At no point has the legislature used this word. Thus, if the statute was designed to encompass utility rates and charges, it is void for vagueness. If it was not, the DOE has, without authority, taken it upon itself to unlawfully regulate utility rates and charges.

Even the DOE, in its Amicus Brief filed in the appellate court, felt compelled to remark that, "perhaps the statute should have been specific in defining an impact fee or service availability fee. Nevertheless, Rule 6A-2.01(45), F.A.C. did attempt to define the meaning of the statute." [Brief of DOE at page 10]. However, the constitutional problem created by the DOE's attempt at definition, is that the definition exceeded the bounds of the statutory authority.

Finally, in order to cure the apparent vagueness of the statutory language, Respondent urged, both at the trial and appellate court levels, the adoption of an "evident legislative intent" argument, based upon the fact that Chapter 81-223, Laws of Florida, was enacted shortly after the decision in School Board of Pinellas County v. Pinellas County Commission, 404 So.2d 1179 (Fla. 2d DCA 1981), a one paragraph opinion which merely held that the previous language of Section 235.26(1), Fla. Stat. (1979) did not exempt a school board from paying water or sewage impact or connection fees.

However, the legislature would have had to be psychic to have "intended" such a result, as the statutory revision at issue herein had already traversed its legislative route and been signed into law four (4) months prior to the Second District Court of Appeal's decision in Pinellas

County. As noted by the appellate court, Respondent provided the trial court with no authority whatsoever respecting the exemption's legislative history.

C. Denial of Equal Protection of the Law.

Section 235.26(1) Fla.Stat. (1981) as implemented by Rule 6A-2.01(45), Fla. Admin. Code, is violative of equal protection requirements of the Florida Constitution, because it attempts to exempt Respondent and other school boards from paying impact fees and service availability fees assessed by publicly-owned utilities such as Petitioner, while privately-owned utilities are not required to grant such exemptions. The Constitution guarantees equal protection to those similarly situated. Battaglia v. Adams, 164 So.2d 195, 198 (Fla. 1964). To comply with the requirements of equal protection, statutory classifications must be reasonable and not arbitrary and all persons in the same class must be treated alike. Lasky v. State Farm Insurance Company, 296 So.2d 15 (Fla. 1974).

Privately-owned utility companies are similarly situated as governmentally-owned utilities, because both entities provide valuable and necessary utility services to the public. Yet it is only the latter that the statute purports to bar from collecting its rates and charges.

In a case similar to the facts of the case at bar, this court held that a statute imposing liability upon railroads for the killing of animals on unfenced rights-of-way without proof of negligence, where competitive motor carriers were not subject to the same liability, was unconstitutional on the ground that it denied equal protection of the law to persons in the same class. Atlantic Coastline R. Co. v. Ivey, 148 Fla. 680, 5 So.2d 244 (1941).

Petitioner services approximately 72 square miles of property within Martin County and Palm Beach County, which constitutes the watershed and basin area for the environmentally protected Loxahatchee River. [R-103]. When school taxes are assessed against the taxpayers, they are assessed against the whole of Palm Beach County. [R-60]. The Jupiter MAA School in question was constructed in Palm Beach County. [R-164]. No Martin County children or taxpayers attend the school in question. [R-103]. The taxpayers deriving benefit from the existence of the school are solely those living in Palm Beach County and attending the school in Palm Beach County. Clearly, the customers of Petitioner residing in Martin County derive no benefit whatsoever from the school being built and used in Palm Beach County, yet, based upon the decisions of the trial court and appellate court, they will have to pay for the cost of the sewer system to service the school.

Petitioner's sewer system is a network of pipes, lines, lift stations, and treatment facilities. Much like any other utility, the addition of a new consumer to the system does not cause the need for an immediate upgrade or enlargement of the system. However, every user of the system must be required to pay its proportionate share of the cost of the underlying system, even though its use has only a fractional effect on the overall requisite size of the system itself.

As discussed above, Petitioner has established a formula for computation of actual costs of the regional transmission line and plant facilities necessitated by an industrial use such as Respondent and the charges sought to be collected by Petitioner reflect only those actual

costs. By exempting Respondent from payment of the actual costs of its utility services, all other users of the utility system must necessarily absorb that cost.

The appellate court's misunderstanding of the factual nature of the rates and charges at issue herein is clearly set forth in its decision on this point in the appeal below:

> "Finally, appellee correctly points out that under subject statute school boards are not exempted from charges for actual capital outlay made by the utility in order to provide a school with service, or charges for the service itself. Thus other customers will not be picking up the direct actual costs of service provided here to the Jupiter middle school - if and when the Environmental Control Board actually provides such service to that educational facility." [496 So.2d at 939].

The effect of the trial court's final judgment in this case is that, when development in the uninhabited area surrounding the present school site finally warrants extension of Petitioner's southerly regional connector line past the school site itself, the Respondent will be required to pay only for the 100 feet or less of lateral sewerline necessary to connect to that regional transmission line. Clearly, the cost of that 100 feet or less of lateral line does not constitute the "direct actual costs of service provided to the Jupiter Middle School", as hypothesized by the appellate court.

Without the regional transmission line and lift station facilities necessary to pump Respondent's wastewater and sewage from the school site to the treatment plant and without the treatment plant necessary to turn the wastewater and sewage into an environmentally and ecologically disposable product, the wastewater and sewage leaving the Jupiter MAA school site would be fed directly into the surrounding soils and aquifer

approximately 100 feet from the school site. The "actual capital outlay" made by Petitioner to service the Jupiter MAA school site obviously includes the proportionate share of the cost of Petitioner's regional transmission line and plant treatment facilities, as computed by the formula for determination of "equivalent connections" attributable to the school.

Unless Respondent is required to pay its fair share of these costs, the customers of Petitioner and all other public utilities will necessarily have to bear the burden of carrying the capital costs of utility service to schools, while private utilities and their customers may continue to collect their rates and charges for school sites unabated. Clearly, such a classification is arbitrary and fails to provide equal protection to those similarly situated.

D. Denial of Due Process of Law.

As discussed above, the effect of the statute in question is to deny Petitioner and its customers due process of law, in that they are deprived of their property (the cost of providing wastewater collection and treatment facilities for Respondent), without notice of such deprivation and without just compensation therefor.

The appellate court's reference to Petitioner's charges herein as "guesstimates" is not supported by the record or the evidence presented to the trial court. Although the appellate court has determined that the time of substantive due process is long gone [496 So.2d at 939], it also recognizes the constitutional concept that a legislative enactment which bears no reasonable relationship to a permissible legislative object and is arbitrary and unreasonable or oppressive as it adversely affects those

property rights, is unconstitutional as a deprivation of property without due process of law. See Johns v. May, 402 So.2d 1166 (Fla. 1981); Heller v. Abess, 134 Fla. 610, 184 So. 122 (1938).

In point of fact, the appellate court and trial court, by allowing Respondent to make connection to and use the regional transmission line facilities and plant treatment facilities of Petitioner, without any obligation to pay any portion of the capital costs associated with those facilities, have sanctioned the deprivation of Petitioner and its customers of their property rights, without due process required under the law.

E. Alteration of a Special Act by a Noncomprehensive General Act.

Before a general act may be held or interpreted to repeal or modify a prior special act, it must be shown that the general act is a complete revision of the whole subject contemplated by the special act, or that the acts are so irreconcilable as to clearly demonstrate a legislative intention to repeal. Jackson v. Consolidated Government of the City of Jacksonville, 225 So.2d 497, 501 (Fla. 1969). In the case at bar, the general act (Section 235.26(1)) deals with uniform state building codes, but does not deal with or regulate utility rates and charges. Chapter 71-822, Laws of Florida, as amended, is the special act establishing Petitioner as a Special District of the State of Florida and has been reviewed and amended by the legislature as recently as 1986, without reference or amendment by the legislature to an exemption for Respondent or other school boards from payment of rates and charges adopted and promulgated by Petitioner. [Chapters 86-429 and 86-430, Laws of Florida].

It is correct, as pointed out by the appellate court, that Section 235.26(9), Fla.Stat. (1981), states that "all special acts or general laws of local application are hereby repealed to the extent that they conflict

with this section" however, the controversy herein was not generated by the enactment of Section 235.26, so much as it was created by the attempt of the DOE to expand the statute, by definition in the Florida Administrative Code, from one governing and regulating the applicability of local building codes and ordinances, to one regulating and rescinding the authority and obligation of public utilities to charge uniform rates and charges under the law.

It is clear that a repeal, by implication, of a prior special act by a subsequent general act is not favored and must be based upon a positive repugnancy between the two or a clear intent to repeal. [In Re: Wade, 150 Fla. 440, 7 So.2d 797 (1942)]. Additionally, the rule is clear that the subsequent general act will be presumed to have made an exception of the prior special act, unless the contrary clearly appears. [Id.]

The appellate court based its decision in this regard on a finding that a "clear intent to repeal" is apparent in this case. [496 So.2d at 940]. However, this "clear intent" cannot be garnered from the face of the legislative enactment itself, but only when read in light of the expanded definitions adopted by the DOE, which mention "utilities" for the first and only time.

Thus, in the absence of a clear intent by the legislature to amend, repeal or rescind the utility rate-making provisions of Chapter 71-822, Laws of Florida, no such intent may be implied by the adoption of Chapter 81-223, as a noncomprehensive general act.

F. Comity.

As has continually been pointed out by Petitioner in the trial court and appellate court, this issue has never involved a strict application of

the full faith and credit concepts embodied within the federal origins of the principle of comity, but has been raised in this case only by analogy.

The appellate court incorrectly decided this issue, based upon the question of whether the legislature must defer to Petitioner, as a public utility agency it created. This is not, nor has it ever been, the issue before the trial court or the appellate court!

Petitioner's position in this regard has always been clear and concise, to wit: the legislature did not, in its amendment to Section 235.26(1), mention utility rates and charges of any kind; Chapter 81-223, Laws of Florida, did not mention the word "utility". The Department of Education, as a separate administrative agency of the State of Florida, adopted and published in the Florida Administrative Code, the definition that brings utility rates and charges within the purview of Section 235.26(1).

Petitioner, as a special district of the State of Florida, likewise promulgates and publishes its rules and regulations in Chapter 31 of the Florida Administrative Code and has set forth therein the rates and charges applicable within its district boundaries. Chapter 71-822, Laws of Florida, as amended, specifically states as follows:

> "[Petitioner shall have the power to] ... set and collect reasonable fees and other charges for the services and facilities furnished by any system owned or operated by [Petitioner], and for making connections and use of same ..." and
>
> "... [Petitioner shall] ... charge and collect the rates, fees, and charges so fixed ... and such rates, fees, and charges shall not be subject to supervision or regulation by any commission, board, bureau, or agency of the county or of the state or any sanitary district." [Section 6(9), Chapter 71-822, Laws of Florida, as amended]

Clearly, the special act establishing Petitioner as a special district of the State of Florida specifically prohibits the DOE or any other commission or agency from regulating rates and charges of the Petitioner, by rule, definition, or in any other fashion.

As pointed out by the Amicus brief of the COUNTY, filed in the appellate court, public utilities do have statutory and contractual duties to charge and collect the same rates and charges from all users of its utility services, without discrimination. The statutory requirements are contained in Chapters 153, 180, and 184 of the Florida Statutes and the provisions of Chapter 71-822, Laws of Florida. The contractual duties arise from the bond financing which public utilities utilize to construct capital improvements. Because public utilities utilize revenue bond and not ad valorem bond financing, they do not pledge the full faith and credit of the governmental entity to repay the bonds, but pledge only the revenue of the utility system for repayment. Since 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.

If Section 235.26(1) exempts Respondent from payment of utility impact fees, no school board could obtain utility service from public utilities, without causing a breach of the statutory and contractual prohibitions against free service. Thus, the practical effect of such a reading of the statute would be to insure that every new school built in the State of Florida, which does not have access to a private utility source (where it

would have to pay impact and service availability fees) will have to construct and maintain its own well and septic or package treatment plant system.

By connecting to the private utility, the impact and service availability fees would necessarily be a cost to the school board and, likewise, by constructing its own wastewater and sewage treatment facilities on site, the school board would have to incur the same types of capital expenses in direct construction costs as they would have paid in their prorated costs of regional transmission and treatment of wastewater.

Requiring the DOE and Petitioner to work in harmony in an effort to serve both of the public policies of providing education and preserving the environment within the State of Florida, is analogous to the principle of comity.

It has never been Petitioner's position, as suggested by the appellate court, that the legislature is somehow "prevented by any real or fancied comity between the Palm Beach County School Board and the Loxahatchee Environmental Control District [sic] from deciding that new public school facilities are exempt from the latter's impact or service availability fees". [496 So.2d at 942]. Rather, the Petitioner has consistently suggested that the DOE's extension of the exemptions provided in Section 235.26(1), from building fees and codes to utility rates and charges is unwarranted, unreasonable, and unconstitutional.

The principle of comity, that courts of one jurisdiction should give effect to laws and judicial decisions of other states and jurisdictions out of deference and mutual respect is perfectly analogous to the deference and mutual respect that should be required between separate agencies and districts within the State of Florida, in order to avoid unwarranted interference by one agency in the affairs and obligations of the other.

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that this Court should reverse the decision of the Fourth District Court of Appeal and direct remand of this cause to the trial court with instructions to enter judgment in favor of Petitioner, declaring that Respondent is not exempt from payment of Petitioner's rates and charges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been furnished by regular U.S. Mail to RICHARD L. OFTEDAL, ESQUIRE, School Board of Palm Beach County, 3323 Belvedere Road, Building 503, Room 232, West Palm Beach, Florida 33402; and PHILLIP C. GILDAN, ESQUIRE, P.O. Box 3704, West Palm Beach, Florida, 33409; and GENE SELLERS, ESQUIRE, Department of Education, Knott Building, Tallahassee, Florida 32301, this 4th day of May, 1987.

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