IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO. 69,701

DCA-4 NO. 85-1743

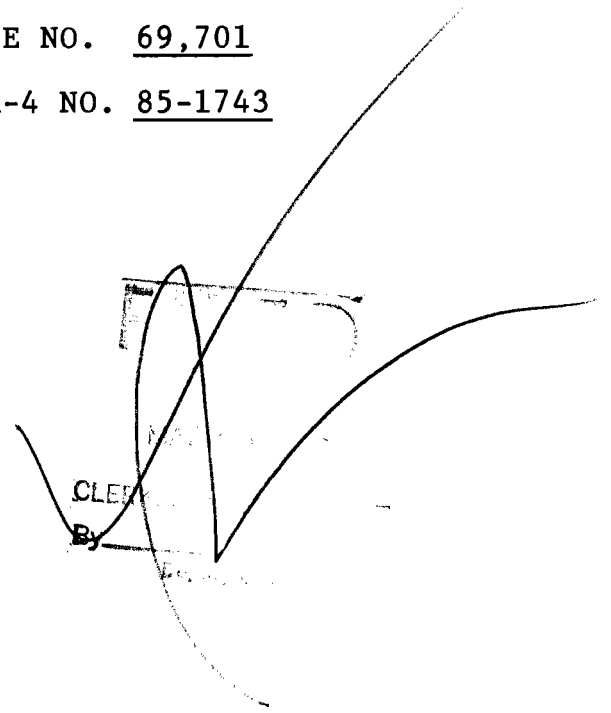
LOXAHATCHEE RIVER ENVIRONMENTAL CONTROL DISTRICT,

Petitioner,

vs.

THE SCHOOL BOARD OF PALM BEACH COUNTY,

Respondent.



RESPONDENT'S REPLY 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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STATUTES AND RULES

The following statutes and administrative rules are referenced throughout the School Board's Brief and are reproduced in an effort to assist the Court in resolution of the issues on appeal:

A. Section 235.26(1), Florida Statutes (1979)

> **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 assessments of fees for building permits, and ordinances...

B. Section 235.26(1), Florida Statutes (1981)

> **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...

C. Section 235.26(9), Florida Statutes (1981)

> **LEGAL EFFECT OF CODE.** --The State Uniform Building Code For Public Education Facilities Construction shall have the force and effect of law and shall supersede any other code adopted by a board or any other building code or ordinance for the construction of educational facilities, whether at the local, county, or state level and whether adopted by rule or legislative enactment. All special acts or general laws of local application are hereby repealed to the extent that they conflict with this section.

D. Section 153.83, Florida Statutes (1959)

> **FREE WATER AND SEWER SERVICES PROHIBITED.** --The same rates, fees and charges shall be fixed and collected from any county, school district or other political subdivision using the services and facilities of the water system or sewer system, or both, as are fixed and collected from other users of such facilities in the same class. No free water or sewer services shall be rendered by the district and no discrimination shall exist in the fees, rates and charges for users of the same class.

E. Section 153.11(1)(b), Florida Statutes (1955)

> **WATER SERVICE CHARGES AND SEWER SERVICE CHARGES; REVENUES.** ...The County Commission shall charge and collect the rates, fees and charges so fixed or revised and such rates, fees and charges shall not be subject to supervision or regulation by any other commission, board, bureau or agency of the county or of the state or any sanitary district or other political subdivision of the state.

F. Section 180.13(2), Florida Statutes (1936 Supp.)

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

G. Rule 6A-2.01(45), Florida Administrative Code.

(45) IMPACT OR SERVICE AVAILABILITY FEES. A fee, tax, user charge or assessment imposed by a municipality or other governmental agency for:

(a) The privilege of connecting to a system for which there is no immediate specific requirement for a capital improvement, expansion or installation at the utility source necessitated by the connection; or

(b) An assessment imposed on board-owned property for the installation of a contiguous utility line except for that length and size of line actually needed to service the educational or ancillary plant on that site; or

(c) For an intangible service which is not clearly established at a cost.

H. Rule 31-10.01(11), Florida Administrative Code.

AVAILABLE SEWER SYSTEM OF THE DISTRICT. For purposes of this rule, a district sewer system shall be considered "available" to an owner whenever a district sub-regional collection line or other point of district sewerage collection shall be 100 feet (100') or less away from owner's property line as measured from said property line to the point of sewerage collection without crossing the private property of another than owner, and upon the declaration of said availability by the governing board of the district.

PREFACE

For purposes of this Brief, the Petitioner, Loxahatchee Environmental Control District and the Respondent, The School Board of Palm Beach County, Florida shall be referred to as "ENCON" and the "School Board", respectively. Palm Beach County shall be referred to as either the "County" or "Amicus". The Fourth District Court of Appeal will hereafter be referred to as the "Fourth District".

References to the Appendix submitted by ENCON consisting solely of the decision of the Fourth District here under review shall be signaled by "(A-__)". The original record on appeal will be signaled by "(R-__)" and the transcript of the trial proceedings will be signaled by "(Tr-__)".

STATEMENT OF THE CASE AND FACTS

The School Board is in substantial agreement with the Statement of the Case and Facts as contained in ENCON'S brief. Several facts relevant to the issue on appeal were, however, left unmentioned. First, although ENCON requested payment for the disputed fees in 1981 no service was then or has now been provided. Instead, the School Board has had to provide for its own sewage needs through the construction and maintenance of its own package treatment plant (Tr. 41). Despite the ongoing lack of service, the School Board has continued to pay the disputed charges as they come due and to invest the money in six month Treasury Bills in accordance with the terms agreed by the parties and approved by the trial court (R-15). Second, the School Board has agreed to pay those charges which reasonably represent ENCON'S actual costs for extending the sewer line to hook up the new middle school when service is finally "available" as that term in defined by ENCON'S own Rule 31-10.01(11), Florida Administrative Code (R-332). The School Board also stipulated that it was obligated to pay ENCON'S monthly service charges that would become due at such time as the middle school was ever actually hooked up to the wastewater system (R-14). Finally, the School Board directs the Court's attention to the fact that the actual costs to the system necessitated by bringing on line the new middle school were not and could not be calculated by ENCON (Tr. 138,146-147).

SUMMARY OF ARGUMENT

ENCON attacks first that portion of the Fourth District's opinion finding that service availability standby charges, line charges, and plant connection charges are "impact fees and service availability fees" within the meaning of Section 235.26(1), Florida Statutes (1981). When each such charge is scrutinized in the light of the definition promulgated by the State administrative agency charged with implementing and interpreting the Act, it becomes apparent that all of the fees are of a kind for which the School Board is statutorily exempt.

The School Board's position is bolstered by the fact that since construction began on the new Jupiter Middle School in 1981, ENCON has not seen fit or been able to provide the School Board any actual sewer service. Instead, the School Board has constructed, maintained, and operated a lift station at its own expense. There being no "tangible" benefits provided by ENCON, i.e. no sewer service, the disputed fees fall squarely within the criteria set forth in Rule 2.01(45), Florida Administrative Code. Additionally, ENCON cannot and has not attempted to calculate the actual costs to the system as a result of new schools coming on line. These facts, together with the unrebutted evidence regarding the nature of each fee demanded, requires affirmance of the Fourth District's decision on this, the only non-constitutional argument raised.

ENCON'S constitutional arguments are six in number and may be summarized as follows: (1) violation of Article III, Section 6, of the Florida Constitution; (2) void for vagueness and ambiguity; (3) violation of equal protection and (4) due process of law; (5) alteration of a special act by a non-comprehensive general act and (6) violation of the principals of comity. Each is without merit.

Although the Fourth District thought the Act providing for the amendment to Section 235.26(1), Florida Statutes, was fairly in conformity with the requirements of Article III, Section 6, it disposed of the issue on other grounds. Relying on prior precedent of this Court, the Fourth District ruled that no such challenge could be made inasmuch as the subject provision had been subsequently reenacted as a portion of the Florida Statutes. Either way, ENCON'S argument fails.

As to ENCON'S second argument, a review of the statutory language reveals no confusion as to the plain and ordinary meaning of the operative terms contained therein, even without resort to the definition promulgated by the State Board of Education. In any event, the State Board's interpretation of the Act as it applies to utilities is entitled to great weight and does not constitute an attempt on the part of the State Board to arrogate to itself the power of regulating or supervising utilities.

ENCON'S equal protection and due process arguments are grounded in the notion that the statute as amended impermissibly discriminates between private utility companies and their public counterparts. Applying the rational basis

test, the Fourth District discerned a valid public purpose for the legislation, to wit: facilitating the construction of badly needed public schools through the elimination of impact fees which had the effect of requiring taxpayers' money to pass needlessly from one public agency to another. The Fourth District also correctly dispelled the further notion that by applying the Act to utilities the State Board had exceeded its authority in contravention of the will of the legislature. Any inequities befalling public utilities were of a de minimus nature and of no constitutional import.

The clear interest of the Legislature through adoption of the provision of Section 235.26(9), Florida Statutes, was to alter or repeal the provisions of any contrary special act, including Chapter 71-822, which created ENCON. However, a review of ENCON'S enabling legislation and those other general utility statutes cited by Palm Beach County reveals no conflict with the provisions of Section 235.26(1).

ENCON'S final argument seeks to extend the principles of comity to intrastate governmental agencies. Naturally, even if the doctrine could be so radically applied it would not prevent the Legislature from deciding that new school facilities are exempt from the payment of ENCON'S impact or service availability fees.

ARGUMENT

WHETHER THE FOURTH DISTRICT ERRED IN AFFIRMING THE TRIAL COURT'S FINDING THAT ENCON'S SERVICE AVAILABILITY STANDBY CHARGES, LINE CHARGES, AND PLANT CONNECTION CHARGES ARE "IMPACT FEES OR SERVICE AVAILABILITY FEES" PROSCRIBED BY SECTION 235.26(1), FLORIDA STATUTES (1981).

ENCON decries not only the trial and appellate courts' findings that "the fees at issue were in the nature of impact and service availability fees" (A-9) but also claims "fundamental error" in the alleged manner in which each court treated the issue; namely, examining the costs as a group rather than individually (ENCON at 9). However, examination of both the Final Judgment of the trial court and the decision of the Fourth District belies ENCON'S allegation and reveals that each cost was addressed singularly within the purview of the definitions of "impact and service availability fees" promulgated by the State Board of Education. In any event, ENCON gives not a clue as to how such a treatment of the issues rises to the level of "fundamental error".

As correctly noted by the Fourth District, this issue is not purely one of fact to be determined on the basis of expert testimony but is either a question of law or a mixed question of law and fact. E.g. Devin v. City of Hollywood, 351 So.2d 1022, 1026 (Fla. 4th DCA 1976) (Trial court erred in relying upon expert testimony to determine the meaning of terms which were questions of law to be decided by the trial court). Applying the "obvious meaning" (A-9) of Rule

6A-2.01(45) (hereafter sometimes referred to as the "Rule") together with the uncontroverted facts at trial, the propriety of the Fourth District's affirmance is undeniable.

In examining each cost, the Fourth District recognized "that none of the fees in question are for present services or present use of services" (A-9). In fact, although ENCON has sought since 1982 to divert funds from the School Board's capital outlay budget for payment of the disputed charges, no sewer service has to date been made available to the School Board and the School Board at its own expense has been required to operate a package lift station to handle the sanitary needs of Jupiter Middle School (Tr. 41). Additionally, as early as June 8, 1981, ENCON, through its executive director, Mr. Roger Anderson, stated in a letter to the School Board that the "needs of the District are such that [the system] must be built to serve the undisputed areas of the District, regardless of the outcome of the pending litigation". (Plaintiff's Exhibit No. 1, Tr. 146). The cost would be apportioned among those other utility customers who had or would locate in the same service area (Tr. 144-145). Thus, the capital costs expended in constructing the connector line would be the same whether or not the school was brought on line.

The past and present lack of service is significant in the context of Rule 6A-2.01(45) which exempts school boards from payment of those charges which are "an intangible service for which there is no clearly established cost". Naturally, the only "tangible" service received by the School Board from

a sewer utility company, whether private or public, is the removal and treatment of waste sewage. By ENCON'S own admission, service availability standby charges are a vehicle for "collecting the plant connection charges during the period of time between the application for service and actual, physical connection" (ENCON at 13). Once again, it appears that ENCON has described the charges in a manner that puts it in the category of Rule 6A-2.01(45), even though that was not its intention. No amount of formulas or engineering "guesstimates" (A-20) can disguise the fact that through the payment of these service availability standby charges the School Board receives no more than an amorphous "commitment" for service to be supplied in advance when and if ENCON should choose to construct the necessary Southerly Connector line.

On the same point, it should also be emphasized that the formula used to assess the School Board for reserved capacity at a rate equal to 68 percent of the normal charge is in no way an indicator of a "clearly established cost" as required by the Rule. Rather, the formula was itself computed in 1977 well before the Jupiter Middle School was designed or constructed (Tr. 119). When asked whether any actual itemizations were made relative to identifying the costs to the system necessitated by bringing on line the new Jupiter Middle School, Mr. Anderson was forced to admit that such figures were not available and could not be computed (Tr. 147). It is not surprising, therefore, that the Fourth District found it "astonishing" that ENCON would dispute that its service availability standby charges are not service availability fees within the meaning of the Rule.

Equally obvious is that regional transmission line charges are also in the nature of impact or service availability fees. By all accounts, this is a fee for the proposed Southerly Connector, a contiguous utility line designed to meet the needs of other customers in the service area based upon anticipated growth irrespective of the School Board's decision to build the new middle school (R. 331; Tr. 142-143, 146). The line charges seem to fall squarely within the definition of an impact fee as contained within Rule 6A-2.01(45)(c) which exempts school boards from "an assessment on board-owned property for the installation of a contiguous utility line except for that length of line actually needed to service the educational or ancillary plant on that site".

Line charges are doubly flawed in that they too are a charge for an intangible service not clearly established as a cost. The School Board reiterates that no evidence was proffered establishing that the Southerly Connector would, in any way, have to be increased in size or length to accommodate any demands placed upon it by the Jupiter Middle School. Actual effects were instead limited to the timetable for delivery and construction of the line but not to the need or costs of the line itself (Tr. 141). Only when <u>other</u> developments are built and in need of service may the School Board expect completion of the Southerly Connector and eventual sewer service (Tr. 143).

In accordance with the Rule, the School Board shall share in the line charges for the cost and size of the line <u>actually</u> needed to connect the middle school to the Southerly

Connector. The finding of the Fourth District that "[T]here is no need for any specific capital expenditure by the Environmental Control District to accommodate the schools' needs" is amply supported by the record and not clearly erroneous (A-10).

The remaining charge denominated by ENCON as a plant connection fee is admittedly similar to line charges in that it is a fee based upon apportionment of capital costs according to the number of equivalent connections. The trial court ruled the fee to be a charge for connection into the ENCON system for which there is necessitated no immediate specific requirement for a capital improvement, expansion or installation at the utility source (R-332). In affirming the trial court's finding, the Fourth District took note of ENCON'S admission that the plant connection fees paid for the right to tie into the system (A-8). Once again, ENCON succeeded only in proving the School Board's point, i.e. that the plant connection fee falls wholly within the provisions of Rule 6A-2.01(45)(a).

Only when service is "available" is the School Board required to connect into the system. By ENCON'S own rule, Chapter 31-10.01(11), Florida Administrative Code, district sewer service shall be considered available when brought to within 100 feet or less from the School Board's property. At that point in time the only specific capital improvement at the utility source necessitated by the School Board's connection would be the cost for the extension of the utility line from the middle school to the Southerly Connector. Such

a charge is premature inasmuch as it is still unknown when ENCON will extend service to the School Board and what length of line will actually be needed.

The School Board notes that throughout Petitioner's argument, ENCON continues to persist in the erroneous notion that the School Board is seeking a "free ride" under the protection afforded it by Section 235.26(1) for the delivery of sewer service to the new middle school. In actuality, the School Board has already absorbed the costs of constructing and maintaining its own lift station to fill the void created by ENCON'S on-going failure to service the School Board's property. Likewise, the School Board has obligated itself to pay those charges which reasonably represent ENCON'S cost of manpower and material for extending the sewer line to hook up the new middle school or, in the alternative, to install at its own expense the necessary lines and equipment to connect to the ENCON system at such time as service is available or within 100 feet of the Jupiter Middle School. Finally, the School Board has stipulated that it was not challenging the monthly service charge that would become due at such a time as the middle school is actually hooked up to the water system. The School Board seeks exemption only for those impact fees and service availability fees deemed by the Legislature to be better spent for the construction of new schools and educational facilities.

The School Board is further compelled to comment on ENCON'S argument, raised for the first time on appeal, that the trial and appellate courts erred by failing to

recognize what ENCON perceives as "the unique nature of utility services and the underlying policy considerations of providing adequate sewage and wastewater treatment facilities". (ENCON at 10). Apparently, ENCON suggests that the Legislature erred in emphasizing the public policy arguments of school boards over those of special districts such as ENCON. Such an argument serves no purpose except to question the legislative wisdom in adopting and subsequently reenacting the Statute. It is gainsaid that courts are prohibited from inquiring into the wisdom or fairness of legislative policy underlying a statute. Orange City Water Company v. Mason, 166 So.2d 449 (Fla. 1960) (Wisdom or policy of statutes regulating jurisdiction over water companies was beyond concern of the court) and Neal v. Bryant, 149 So.2d 529 (Fla. 1963) (It is not the province of the court to weigh wisdom of enactment of the legislature). If ENCON is of the belief that Section 235.26(1) fails to adequately address or consider their role as protectors of the environment, then it should take up the matter with the Legislature and not this Court.

Before leaving this issue, the School Board notes that ENCON seeks to justify its continued failure to provide service to the School Board and to avoid the clear legislative mandate embodied in Section 235.26(1), Florida Statutes, by shifting the blame to the School Board for its decision to build and locate a school in a relatively unpopulated area. Not only does ENCON lack the administrative expertise or legislative authority to second guess the School Board on a matter for which the School Board alone is responsible,

but the issue of citing is wholly and totally irrelevant to the issue of whether or not the charges in question are impact or service availability fees as defined by the Legislature.

ENCON bemoans the "simplified" approach of the trial and appellate courts in reviewing the applicability of the provisions of Section 235.26(1) to each of the charges at issue (ENCON at 15). Yet, resolution of this issue is simple, requiring only a straight forward analysis of the testimony, "together with the obvious meaning of the rule definition of impact or service availability fees" (A-9). However euphemistically ENCON seeks to denominate the charges, there is no escaping the conclusion that they neatly fit within the Legislative parameters contained within the Statute and Rules of the State Board of Education. The decision of the Fourth District should be affirmed.

II.

WHETHER THE FOURTH DISTRICT 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.

Although ENCON bristles at the School Board's characterization of its constitutional challenges as a "shotgun blast", the School Board stands by the same inasmuch as ENCON raises no fewer than six separate constitutional infirmities, running the gamut from equal protection to comity. Nevertheless, the School Board shall once again address each argument in the order raised by ENCON.

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

The first of ENCON'S constitutional salvos is directed to the title of Chapter 81-223, Laws of Florida (the "Act") which included the words "an act relating to educational facilities construction and funding; amending, creating and repealing various sections in Chapter 235, Florida Statutes... modifying certain standards relating to safety, sanitation, sites, coordination of local construction planning, facilities design, construction techniques, new construction, daily labor projects and the State Uniform Building Code... revising and readopting certain sections of Chapter 235, Florida Statutes...". ENCON believes it worthy of an exclamation point to indicate that nowhere in the title or in Section 235.26(1) is the word "utility" mentioned (ENCON at 18). Joined by Palm Beach County, it than makes the quantum leap that by exempting the School Board from payment of utility impact or service availability fees the authority to set utility rates and charges has been extended to district school boards or the State Board of Education.

As noted in the preamble to Section 235.26, Florida Statutes, "[T]he code shall be flexible enough to cover all phases of construction which will afford reasonable protection for public safety, health, and general welfare". (emphasis supplied). The notion that a new school may be built and constructed without making provisions for the delivery of sewer and wastewater services to the school site is preposterous. Utilities are not only a normal and required phase of construction but a key element in any building project,

especially one as large as a new school. To exempt utilities from application of the Act merely because the legislature chose to include them in general rather than specific terms would be to recede from the oft-cited maxim that a title need not be an index to its contents. Williams v. State, 370 So.2d 1143 (Fla. 1979) and King Kole v. Bryant, 178 So.2d 2 (Fla. 1965).

A similar argument was unsuccessfully raised in Ison v. Zimmerman, 372 So.2d 431 (Fla. 1979) wherein this Court held that the title of Chapter 47-1149, Laws of Florida, was not defective even though the act was applied to deputy sheriffs without any mention of them in the title. Just as this Court interpreted that title's wording as a generalized but sufficient reference to both employees and officers, so should it now interpret this Act's title as a generalized but sufficient reference to both building and utility impact fees or charges. Such would be in keeping with the basic principle that a title's validity is to be measured by the common meaning of its wording. Id at 436.

Nothing in the Act or the statute suggests that the Legislature intended to carve out an exception for utility imposed impact fees apart from road, park, or any other impact fee. Indeed, for the reasons which follow, it would appear that the amendment to Section 231.26(1) was a deliberate attempt to include utility impact and service availability fees within the protection afforded school boards under the Act. See, also Smith v. City of St. Petersburg, 302 So.2d 756, 758 (Fla. 1974) ("...where by reasonable intent the title can be determined to be sufficiently broad as to include a provision

that can be deemed to reasonably connect it with the subject of the enactment, then it should not be declared inoperative or unconstitutional").

As to the argument that by applying the fee language of the Act to utility impact and service availability fees, a different subject has been introduced contrary to the strictures of Article III, Section 6 of the Florida Constitution, the School Board refers the Court to its recent decision in Smith v. Department of Insurance, 12 FLW 189 (Fla. April 23, 1987). In Smith the court grappled with whether the multitude of issues addressed in Chapter 86-160, Laws of Florida (the "Tort Reform and Insurance Act of 1986"), violated Florida's single subject requirement. The Court reiterated and affirmed the proposition that "the subject of an act 'may be as broad as the Legislature chooses as long as the matters included in the act have a natural or logical connection'". Id at 190 (quoting from Board of Public Instruction v. Doran, 224 So. 2d 693, 699 (Fla. 1969)). Accordingly, it was found that each of the challenged sections addressed one primary goal: the availability of affordable liability insurance. Thus, two seemingly different matters such as tort reform and insurance reform were found to have been properly embraced within the act in complete compliance with the single subject requirement. See also Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981) (malpractice tort reform and insurance reform in one act was constitutional) and State v. Lee, 356 So.2d 276 (Fla. 1978) (tort law and insurance law were properly included in the same act).

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. In fact, the logical connection between the two types of impact fees in this case is more readily apparent than the more diverse and facially unrelated issues of tort reform and insurance reform upheld in Smith.

In view of the above it is not surprising that the Fourth District thought that the amendment to the Act "was fairly in conformity with the requirements of Article III, Section 6 of the Florida Constitution (A-12). Nevertheless, the court did not need to consider the question; holding that:

> 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). (A-12)

Although ENCON begrudgingly admits that the Fourth District's ruling was "facially supported by the cited case law" (ENCON Jur. Brief at 6) it seeks to manufacture a conflict where none exists. In Bunnell v. State, 453 So. 2d 808 (Fla. 1985) this Court never appeared to directly address the issue of whether subsequent codification of a law rendered the subject provision immune to challenge under Article III, Section 6. Compare that decision to Combs where the Court ruled in unequivocal and unambiguous fashion that:

> ...'Article III, Section 6, does not require sections of the Florida Statutes to conform to the single subject requirement. The requirement applies to 'law' in the sense of acts of the legislature'... . Once re-enacted as a portion of the Florida Statutes it was not subject to challenge under Article III, Section 6.

State v. Combs at 1030 (quoting Santos v. State at 1285).

It would seem that if the Supreme Court were going to expressly overrule or recede from its earlier decisions in any way, then it would have stated as much. As before, the "policy" arguments advanced by ENCON would better be directed to the Legislature or the framers and revisers of Florida's Constitution.

Even assuming, arguendo, that the court were to find that the Act was subject to challenge under Article III, Section 6, the judicial inquiry would not end. Instead, in accordance with the thinking of the Fourth District and for the reasons discussed previously, the Act does, in fact, substantially comport with State constitutional requirements. Either way, ENCON'S attack must fail.

B. Vagueness and Ambiguity

Although ENCON pays lip-service to the well established rule of statutory construction that a less stringent examination is required in scrutinizing statutes which are non-criminal in nature and which do not seek to impose significant sanctions, Legal Affairs v. Rogers, 329 So.2d 257 (Fla. 1976), it proceeds nonetheless to require the court to adhere to the more onerous standard widely reserved for penal provisions of the law.

By failing to define "impact or service availability" fees within the Act, ENCON claims the Act is void for vagueness, at least insofar as those terms were intended to be applied to ENCON. Even though the terms are defined by the State Department of Education in Rule 6A-2.01(45), ENCON and Palm Beach County claim the Department exceeded its legislative authority by extending the statutory exemption from the imposition of such fees to public utilities. Stating the obvious, the Fourth District answered:

> It appears to us that agencies like the Environmental Control District here know very well what the subject language refers to, even without administrative definitions. The developers agreement proposed to the School Board in this case by appellant itself employs such language as "service availability standby charges". The appellant knows what is meant by the terms it attacks, even without reference to the definition in the administrative rules; and its attack on the lack of definition for certain terms used in the administrative rules definitions appears to be hypercritical and disingenuous. [A-13].

The opinion of the Fourth District appears to be in keeping with prior decisions of this Court which hold that in the absence of a statutory definitions, resort may be had of case law or related statutory provisions which define the terms, and where a statute does not define words, such words are construed in their ordinary sense. State v. Hogan, 387 So.2d 943, 945 (Fla. 1980). For, were such not the case:

> ...if we demand precise definition of every statutory word to shield against the void for vagueness doctrine our codified laws would fill endless shelves and the result would be obfuscation rather than clarification of our organic law.

State v. Buckner, 472 So.2d 1228, 1229 (Fla. 2d DCA 1985) (upholding constitutionality of compulsory education law notwithstanding the legislative failure to define operative terms such as "school" and "home". Also, State v. Brown, 412 So.2d 426 (Fla. 4th DCA 1982) (statute using term "nonconsumable" not unconstitutionally vague even though term left undefined).

As to whether or not the State Board of Education took it upon itself to regulate public utilities by promulgating the regulatory definition in dispute, the Fourth District correctly noted that it "is clearly the agency charged with administration of the Florida School Code, of which Chapter 235 is a part" (A-15). 1/ Section 229.041, Florida Statutes, provides that:

> All rules and regulations... adopted or prescribed by the state board [of education] in carrying out the provisions of the school code shall, if not in conflict therewith, have the full force and effect of law. (emphasis supplied).

1/ Although both the parties and the courts have occasionally referred to the Department of Education as the author of Rule 6A-2.01(45), the Rule was actually promulgated by the State Board of Education which, under the School Code, is the chief policy-making and coordinating body of public education in Florida with the power to determine, adopt or prescribe such policies, rules, regulations or standards as are required by law or as it may find necessary. Section 229.053(1), Florida Statutes. The Department of Education, on the other hand, is required to act as an administrative and supervisory agency under the auspices of the State Board of Education. Section 229.75, Florida Statutes.

A construction placed on a statute by the state administrative office or body charged with the responsibility for its enforcement is persuasive. State ex rel. Szabo Food Services v. Dickinson, 286 So.2d 529 (Fla. 1973) (administrative rules interpreting the sales and use tax statutes, although made by extra judicial body, should be accorded considerable persuasive force before any court called upon to interpret the statute) and Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815,820 (Fla. 1983) ("...the administrative construction of a statute by the agency charged with its administration is entitled to great weight").

That the Legislature intended the Act to apply to utilities, thereby justifying the State Department's inclusion of utilities within the framework of the Rule, is also readily discernable. Although the case of School Board of Pinellas County v. Pinellas County Commission, 404 So.2d 1179 (Fla. 2d DCA 1981) was rendered four months after the Act was signed into law, it is not entirely inapposite. Pinellas County held that the previous language of Section 235.26(1), Florida Statutes (1979) did not exempt a district school board from paying water or sewage impact or connection fees and affirmed a prior circuit court decision to that effect. The Fourth District acknowledged that the legislature "may have been aware of the proceedings". In fact, the legislature is presumed to know the existing law when it enacts a statute. E.g. Peninsular Supply Company v. C.B. Day Realty of Fla. Inc., 423 So.2d 500 (Fla. 3d DCA 1982). It seems entirely logical

that the amendment to Section 235.26(1) was a direct response by the Legislature to the judicial construction placed upon the original law as determined by the trial court.

More persuasive, however, is the fact that following adoption by the State Board of Education of Rule 6A-2.01(45), the entire Act "sunsetted" on July 1, 1985, and was repromulgated without substantial change or amendment. Chapter 85-116 (1985), Laws of Florida. Even if the legislature was unaware of the lower court proceedings in the Pinellas County case it was most certainly aware of the administrative rules adopted by the State Board defining impact and service availability fees. This Court has long held that when the Legislature reenacts a statute it is presumed to know and adopt the construction placed thereon by administrative agencies charged with its enforcement and interpretation. State ex rel. Szabo Food Services, Inc. supra at 531. Had the Legislature been dissatisfied with the interpretation placed upon its prior enactment as interpreted by the State Board it would undoubtedly have remedied the defect through subsequent amendment or clarification. 2/ In the absence of any such amendment, the Legislature is presumed to have agreed and accepted the language adopted by the State Board. Id.

2/ Presumably the Legislature was also aware of an Attorney General's Opinion rendered in 1984, AGO 84-11, which answered in the affirmative the question of "whether the 1981 Legislative Amendment of Section 235.26(1), Florida Statutes, exempts district school boards from liability for the payment of impact fees for municipal water and sewer facilities."

C. **Equal Protection**

ENCON and Palm Beach County seek to overturn the Act on the grounds that it deprives utility rate payers of public utilities equal protection and due process under the law in violation of Article I, Section II of the Florida Constitution. They say the provision is discriminatory because the exemption does not extend to privately owned utility companies.

The Fourth District properly began its inquiry by determining the appropriate level of scrutiny to be applied to ENCON'S equal protection argument. Recognizing that the Act does not deal with a "suspect" classification such as race, nationality, or alienage, the court was compelled to adopt the "rational basis" standard of review rather than the more harsh and onerous "strict scrutiny" analysis. E.g. In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980), appeal dismissed sub nom Pincus v. Estate of Greenberg, 450 U.S. 961, 101 S.Ct. 1475 (1981). The burden on the challenging party is exceedingly heavy, requiring it to demonstrate "no conceivable factual predicate which would rationally support the classification under attack". Florida High School Activities Association v. Thomas, 434 So.2d 306, 308 (Fla. 1983).

Inherent in any application of the rational basis test is the recognition that the equal protection and due process clauses are not violated merely because a classification results in some inequality or is not drawn with mathematical precision:

> Where utilizing the rationality test, the equal protection clause is not violated merely because a classification made by the laws is not perfect. Equal protection does not require a state to choose between attacking every aspect of the problem or not attacking it at all, and a statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it.

In Re Greenberg, 390 So.2d at 46. Also, Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974). This point seems particularly lost on appellant and the Amicus.

Not surprisingly, the Fourth District had little trouble in applying the rational basis test to the case at hand, finding that:

> It is not hard to find a legitimate goal for the subject provision and a rational relation of the present classification as a means toward achieving that goal. Public school construction is often urgently needed, but puts a heavy financial burden on the taxpayers of the locality and state, in part because special attention must be given the protection of children's health and safety. It is a legitimate legislative goal to keep such construction costs within reasonable bounds. Exempting school facilities under construction from impact fees imposed by other public agencies can help limit these construction costs. (A-17)

The Fourth District has merely reaffirmed that the State's interest in public education is of paramount importance. It is, in fact, "perhaps the most important function of state and local government...". Brown v. Board of Education, 347 U.S. 483, 493; 74 S.Ct. 686, 691 (1954).

Proceeding further, the court went on to state:

> In as much as both school districts and sewer districts are creatures of the people and regulable by the Legislature, it is logical for the Legislature to decide not to require money needlessly to pass from one agency to the other in the form of impact fees (A-17).

At this point the inquiry may cease as the requirements imposed by the rational basis test have been fully satisfied.

ENCON and more particularly, Palm Beach County, would go beyond that required under the rational basis analysis. They argue that the Legislature still has not justified any basis for separately classifying public owned utilities from privately owned ones, thereby ignoring or giving short-shrift to the fact that private utilities are franchised and serve different areas from those served by publicly owned utilities. No competitive advantages is conferred upon private utilities by the fact that they may collect impact fees from new public schools whereas publicly owned utilities may not. Even this is not enough says Palm Beach County, who then proceeds for several pages in their brief to attack the manner and means by which the Legislature has attempted to relieve school districts from the burden of additional drains on their capital outlay monies.

It appears, in fact, that Palm Beach County speaks out of both sides of its mouth on this issue. On the one hand, it attacks as arbitrary a legislative act which allows only privately owned utilities to collect school board generated impact fees, but on the other hand, vigorously defends an ordinance requiring that an impact fee be payable on land

located in the County but not payable in a municipality which has "opted out" of the County ordinance. See, 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 1983). (Fact that municipalities could "opt out" of county impact fee ordinance did not deny equal protection to those subject to the ordinance). As between this Act and the ordinance in Home Builders, it seems that a distinction made solely on the basis of whether a landowner happens to reside within the unincorporated area of the county is arguably much more arbitrary than a classification based upon the public or private form of ownership of a utility. It is apparently a question of whose legislative ox is being gored.

The School Board again analogizes to Home Builders in regards to ENCON'S argument that only Palm Beach County taxpayers derive the benefit from the construction of the new Jupiter Middle School to the exclusion of ENCON'S Martin County customers. The Fourth District correctly recognized that territorial uniformity is not a blanket constitutional requirement. Recognizing that different fees, like different hours for retail sales and other areas of regulation which may lack uniformity, are not improper where such legislation is a valid exercise of governmental power, the court refused to find Palm Beach County's road impact fee ordinance violative of the equal protection clause notwithstanding the fact that 33 of the 37 municipalities "opted out" of the ordinance (A-19). Home Builders, supra at 144.

To the extent, therefore, that "public" customers may be treated differently than their "private" counterparts, such inequities are incidental and minor when compared to the State purpose in facilitating the construction of new schools. The classification being state wide in application and affecting all public utilities in the same way is therefore constitutional and not violative of State equal protection requirements. LeBlanc v. State, 382 So.2d 299 (Fla. 1980). While the Act may not be perfect in the sense that school boards are not relieved entirely from the burden of impact and service availability fees, it does represent a reasonable attempt to deal with a serious problem of state-wide concern.

D. Due Process

Applying essentially the same test used in disposing of ENCON'S equal protection argument, the Fourth District found no due process violations resulting from the legislative enactment exempting school boards from the payment of impact or service availability fees. Reiterating the valid legislative objective of reducing the capital outlay for school construction, the court correctly determined that "the effect on other system users of the present statutory amendment cannot be seen as arbitrary, unreasonable or oppressive" (A-20).

ENCON takes issue with the court's finding that impact or service availability fees are more nearly "guesstimates" of cost effects on needed future capacity than reflective of actual costs. Yet, as was previously discussed,

no attempt to calculate the actual costs to the system as a result of the new middle school was or could be made. Rather, the "formula" for assessing costs was based upon estimates and other factors without regard to the design or construction of the Jupiter Middle School (Tr. 119,138,146-147). Moreover, the exemption applies only to fees that are charged for other than direct or actual facilities. The Fourth District properly discerned the fact that future capital costs incurred by ENCON to physically connect the middle school to the works of the system as well as fees for actual wastewater service would be paid for by the School Board (A-20). Any burden thus placed on ENCON'S other customers as a result of the statutory amendment is either incapable of accurate assessment or is so minimal that it fails to rise to a level warranting constitutional protection. Folsom v. Bank of Greenwood, 97 Fla. 426, 120 So. 317 (Fla. 1929).

Notwithstanding the above, the ability of ENCON and Palm Beach County to make any such constitutional argument on behalf of its customers or bondholders is at best "doubtful". (A-18). In a similar case, the Public Service Commission contended that the rates charged by the City of Ormond Beach to two private utility companies were excessive and that the City's establishment of the rate differential between in-city and out-of-city purchases of water amounts to an arbitrary and unconstitutional classification. In response to the Commission's assertion that it had standing on its own behalf and on behalf of utility customers to bring the action, the court ruled that:

> Our meticulous examination of the record and careful consideration of the pertinent statutory and case law has led us to the conclusion that the Public Service Commission is not the proper party to maintain the action. Appellant Mayo and the other appellants constituting the Public Service Commission have no role of advocacy and, therefore, cannot take the position that they fairly and adequately represent a class of consumers.

City of Ormond Beach v. Mayo, 330 So.2d 524, 525 (Fla. 1st DCA 1976), cert. denied 341 So.2d 1083 (Fla. 1976).

More recently, this Court had an opportunity to again address the issue of whether a litigant may within the permissible scope of a statute argue that the regulation is so broad that the constitutionally protected rights of its customers not before the court are impermissibly restricted. "Quite simply", said this Court, "respondents lack such standing" to challenge any burden the ordinance may have on customers. City of Daytona Beach v. Del Percio, 476 So.2d 197, 202 (Fla. 1985). Just as simply, neither Palm Beach County nor ENCON have standing to argue constitutional or other issues on behalf of a class of customers, ratepayers, or bondholders. 3/

3/ Palm Beach County seems especially inclined to carry the banner for those customers and bondholders it perceives as affected by the Act. (Palm Beach County at 21 through 29). As already mentioned, any such arguments are fatally flawed from the outset as the County has no standing to challenge any burden the statute may have on others not properly before this Court.

E. Amendment of Special Act by Noncomprehensive General Act

The 38 lines devoted to this issue in ENCON'S brief address only the narrow issue of whether the Legislature intended to repeal or modify through adoption of Section 235.26(1) any conflicting laws governing assessments by publicly owned utilities. Specifically, ENCON argues that Chapter 71-822, Laws of Florida, which is the special act [4/] establishing ENCON as a special district, is not subject to the repeals provision contained in Section 235.26(9):

> LEGAL EFFECT OF CODE - The State Uniform Building Code For Public Education Facilities shall have the force and effect of law and shall supercede any other code adopted by a board or any other building code or ordinance for the construction of educational facilities, whether at the local, county or state level and whether adopted by rule or legislative enactment. All special acts or general laws of local application are hereby repealed to the extent that they conflict with this section.

Even a cursory review of Section 235.26(9) evinces "the clear intent to repeal" found by the Fourth District (A-21). Thus, the Act need not, as ENCON maintains, specify those conflicting provisions it repeals. See, Deltona Corp. v. Florida Public Service Commission, 220 So.2d 905 (Fla. 1969).

4/ ENCON refers to Chapter 71-822 as a "special act" [ENCON at 28] and the School Board treats it as such notwithstanding Palm Beach County's assertion that it may be deemed a general law. Even if properly classified as a general law, it would appear to be a general law of local application and thus still within the purview of Section 235.26(9), Florida Statutes.

In order to escape from the legislative clutches of the Act, ENCON again argues that Section 235.26(1) was never intended to apply to public utilities and that the State Board of Education exceeded its authority in drafting Rule 6A-2.01(45) to include utilities. So as not to unnecessarily repeat itself, the School Board refers the Court to its previous argument on this issue establishing that the Rule was a manifestation of the clear legislative intent to exempt school boards from imposition of the fees and charges in question. It is worthy of repetition, however, that neither ENCON nor Palm Beach County have attempted to explain the subsequent re-adoption of the Act in 1985 without any relevant change or modification as would have been expected had the Legislature been dissatisfied with the administrative interpretation placed upon the statute by the State Board of Education.

In any event, no conflict exists between the amendment to Section 235.26(1) and the enabling law provision that ENCON shall not be subject to state or local agency supervision or regulation. The Fourth District correctly concluded that the legislative exemption from impact fees did not vest in either the State Department of Education or the School Board the power of regulation or supervision. To the extent any regulation occurred it was at the hands of the Legislature and not by any governmental agency or subdivision of the State. ENCON and Palm Beach County both persist, however, in the erroneous notion that they are either not subject to the authority of the Legislature or that the statute has somehow conferred upon the School Board or the State Board of Education

regulatory authority previously reserved only unto themselves. For the reasons stated, neither assertion is correct.

In a separate but related argument, Palm Beach County argues that Sections 153.83, 153.11(1)(b) and 180.13(2), being general laws of general application, are unaffected by the repeals provision of Section 235.26(9). The Fourth District agreed with the County on this point but went on to find that there is no conflict between Section 235.26(1) as amended and the statutory trilogy posed by the County.

Although the Fourth District discussed in detail the reasons why it does not consider the "rates, fees and charges" referred to in the utility statutes to be synonymous with the fees here in question, the court noted that this issue may be more easily disposed of on other grounds. Section 153.83 prohibits county sewer districts from rendering free sewer service or from discriminating among "users of the same class" in the rates, fees, and charges. The statute thus prohibits discrimination in fees charged to users in the same class. The class, in this instance, is composed of each of the 67 school boards all of whom are identically treated under the Act. In fact, Section 153.83 denominates school boards as a separate class of users. Therefore, even if Section 153.83 were applicable it would not be violated by the exemption of a school board's new facilities from payment of impact or service availability fees.

Section 153.11(b) was likewise determined by the Fourth District to be in harmony with Section 235.26(1) for

two reasons. First, Section 153.11(b) provides only that the rates, fees and charges of county water and sewer districts are fixed by the county commission and are not subject to supervision or regulation by any other state or county agency. It has already been established that the exemption from impact fees was imposed by the Legislature and not as otherwise contended by the County. Second, Section 235.26(1) merely exempts school districts from the payment of impact fees, it in no manner or degree confers upon the school board any supervisory or regulatory powers.

As to the remaining provision, Section 180.13(2), which authorizes the fixing and collecting of municipal utility rates and charges, the Fourth District was rightly nonplussed as to how it could be reasonably contended that the subject amendment conflicts with this statute. The County's brief sheds no new light on this issue and urges only the Court accept its ipse dixit rationale for finding conflict.

F. Comity

In ENCON'S final and most creative constitutional challenge to the Act, it asks this Court to break new legal ground by applying for the first time in this or any other jurisdiction the principle of comity between intrastate governmental entities at any level. Not surprisingly, ENCON'S brief contains not a single citation in support of its proposition that the doctrine should be so misapplied.

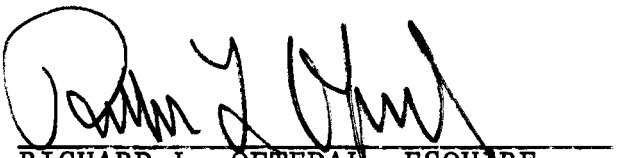
The Fourth District quickly perceived the folly of such an argument, requiring as it must that the Legislature

"defer[red] to the public utility agency it created!" (A-26). The Legislature being "free to legislate within the limits set by the people in the Florida Constitution" is surely "not prevented by any real or fancied comity between the Palm Beach County School Board and the Loxahatchee Environmental Control District from deciding that new public school facilities are exempt from the later's impact or service availability fees" (A-26). ENCON concedes as much but continues nonetheless to insist that through promulgation of Rule 6A2-01(45) the State Board of Education and the School Board have assumed regulatory supremacy over special water and sewer districts. For the reasons more fully stated elsewhere in other subdivisions, ENCON'S contention is wholly without merit.

Finally, the School Board raises the question posed by the Fourth District: "[I]f the principles of comity did indeed apply as between school boards and sewer districts, would not comity just as reasonably justify exemption of school boards from sewer district impact fees?" (A-26). Indeed, to so extend the principles of comity would undoubtedly open a Pandora's Box as the multitude of state agencies, municipalities, counties, special districts and school boards would engage in a struggle for intra-agency supremacy that would evolve into endless turmoil and litigation. This Court should join the Fourth District in declining ENCON'S invitation to so needlessly extend the principles of comity to the case at hand.

CONCLUSION

The Fourth District applied the correct legal analysis in arriving at the conclusion that each of the fees in question was within the purview of Rule 6A-2.01(45) defining "impact fees and service availability fees". To the extent such findings involved issues of fact, both the trial court and the Fourth District properly weighed and considered the evidence on the record. Their findings on this issue can not be said to be clearly erroneous. Likewise, none of the constitutional issues raised by ENCON has any merit. The Act is sufficiently clear in form and substance and advances a valid legislative purpose by facilitating new school construction through the elimination of senseless impact and service availability fees to other public bodies. Any inequities imposed upon ENCON or those others not before the Court are so incidental and minor that they do not justify setting aside this important Legislative enactment to the Florida School Code. Accordingly, the decision and opinion of the Fourth District Court of Appeals should in all material respects be affirmed.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has on this 28th day of May, 1987, been furnished by United States first class mail to **W. Jay Hunston**, Esquire, Post Office Drawer 14127, 11891 U.S. Highway One, North Palm Beach, Florida 33408, **Phillip C. Gildan**, Esquire, 1645 Palm Beach Lakes Boulevard, Suite 650, West Palm Beach, Florida 33409 and to **Gene Sellers**, Esquire, Office of General Counsel, Department of Education, Knott Building, Tallahassee, Florida 32301.

RICHARD L. OFTEDAL, ESQUIRE