O/A 9-2-87

(IB502.T-[12,10]-06/22/87-TB)

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 69,701

FILED
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JUN 23 1987
CLERK, SUPREME COURT
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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 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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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".

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

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 §235.26(1), FLORIDA STATUTES (1981) EXEMPTS RESPONDENT.

Although much of Respondent's Reply (sic) Brief involves grand descriptions of Petitioner's actions and positions throughout this case, Petitioner finds it encouraging to note that, after almost six (6) years of protracted litigation in this case against the combined forces of the Respondent, the Department of Education, and now the Florida School Board Association and the Florida Association of School Administrators, Petitioner still has the energy to "decry", "bemoan", "bristle", and "fire salvos", as depicted throughout Respondent's Brief. The issues before this Court, however, are not pejorative, but are legal.

The initial point on appeal continues to be avoided through the rhetoric of Respondent, even at this level of review. The facts, undisputed in the record before the trial court and the appellate court, are, quite simply, as follows:

1. Sewage and wastewater transmission and treatment are tangible services, which have a cost.

2. Petitioner's engineers have established that cost in terms of a mathematical formula consisting of a .06 factor, times the estimated school population.

3. The only "guesstimate" involved in this engineering equation is the Respondent's estimated student population for the specific school in question.

4. The "size" of the school, in a utility context, is the number of equivalent connections attributed to the school, as computed by this engineering equation.

5. Respondent offered no evidence at the trial of this action to contradict or otherwise impugn the integrity of Petitioner's engineers' calculations and formula in this regard.

It must be noted that, in its discussions of the line charges at issue herein, Respondent, at line 12, page 9 of its Brief, conveniently omits two words from its partial quotation from Rule 6A-2.001(45)(c). The exemption being discussed at that point of the Brief actually states:

> "...an assessment imposed on board-owned property for the installation of a contiguous utility line except for that length <u>and</u> <u>size</u> of line actually needed to service the educational or ancillary plant on that site;..." [emphasis added]

The omission of the two words "and size" in Respondent's Brief is most telling, as Respondent's position throughout this case has been that it only has to pay for 100 feet of lateral sewer line if and when Petitioner's main sewer trunk facilities pass by the school location.

The engineering equation discussed above clearly establishes a charge to Respondent for the <u>length and size</u> of the regional transmission line facilities needed to serve the design school population at the subject school. If Respondent had designed a school for 4,000 students, instead of 1,250 students, the equation would have taken that into account in determining the actual cost of capital facilities needed to serve the

larger school, in that the calculation of .06 times 4,000 would have resulted in a charge for 240 equivalent connections, rather than the 75 equivalent connections actually charged for this school. Obviously, the larger the school population, the larger the cost for transmission and treatment of the school's sewage and waste water.

The same analysis applies to the plant connection charges, which are likewise based on this engineering formula to arrive at the 75 equivalent connections charged for the treatment facilities necessary to serve the subject school facility.

POINT II

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

Respondent relies upon the decision in Ison v. Zimmerman, 372 So. 2d 431 (Fla. 1979), in support of its contention that it is sufficient for the title of an act to include utilities in general, rather than specific terms. Respondent's reliance is inappropriate here.

In Ison the issue was whether an act entitled "an act creating civil service for employees of the office of Sheriff" was sufficient to cover regulation of deputy sheriffs. This Court held the phrase "employees of the office" to be sufficient to include deputy sheriffs. However, in the subject case, the title in question never once uses the word "utilities". Certainly, it is not obvious that an act concerning building and construction codes would necessarily include exemptions from payment of utility rates and charges.

Additionally and most significantly, in the Ison case, the statute in question referred to both employees and deputy sheriffs in the body of the Act. The act in question herein never even mentions the word "utility", either in its title or in its body.

Respondent has now adopted the issue first raised by the appellate court, concerning an immunity to challenge under Article III, Section 6 of the Florida Constitution, based upon the subsequent codification of a "law". Respondent relies upon State v. Combs, 388 So.2d 1029 (Fla. 1980), which quotes from Santos v. State, 380 So.2d 1284 (Fla. 1980).

What is overlooked in the Respondent's and the appellate court's analysis on this issue is that this Court, in Santos v. State, made specific note that Article III, Section 6 contains two essential

requirements: That the subject law be briefly expressed in the title in order to provide notice of its contents; and that each law embrace only one subject. This Court held that the constitutional requirement of a single subject does not apply to codified sections of the Florida Statutes. This Court did not hold that the first requirement, concerning the title, is totally inapplicable after codification of the "law".

Indeed, since the decision in Santos v. State, this Court has consistently continued to concern itself with the necessity of adequate titles for laws subsequently codified. [See: Purk v. Federal Press Company, 387 So.2d 354 (Fla. 1980); and Bunnell v. State, 453 So.2d 808 (Fla. 1984).]

Although it is well established in Florida that an administrative agency has a certain amount of freedom to establish policies in pursuit of its statutory goals [Guerra v. State, Department of Labor & Employment Security, 427 So.2d 1098 (Fla. 3rd DCA 1983)], an administrative agency cannot adopt a rule which is contrary to or enlarges the provisions of a Florida Statute. [Seitz v. DuVal County School Board, 366 So. 2d 119 (Fla. 1st DCA 1979).]

By assuming that the Department of Education had the authority to expand the subject statute to include utility fees and charges, Respondent and appellate court ignored the long-standing rule that, while the legislature may expressly authorize designated officials, within limitations, to provide rules and regulations for the operation and enforcement of the law, the legislature may not delegate the power to enact a law or to declare what the law shall be. [Rosslow v. State, 401 So.2d 1107 (Fla. 1981).]

Although there is no doubt that the Department of Education is the policy-making and coordinating body regulating public education in Florida, its authority to promulgate rules and regulations stops far short of being able to say what the law should be. Rule 6A-2.001(45) [now known as Rule 6A-2001(48)] is an attempt by the Department of Education to add to or enlarge the subject statute, rather than to merely define terms within an existing statute.

Respondent, for the first time in this case, raises an issue that the "sunsetting" of the act on July 1, 1985, with the repromulgation of that act in Chapter 85-116, Laws of Florida, constitutes an expression of satisfaction by the legislature with the positions taken by the Department of Education in this matter. However, it is equally as likely that the legislature was aware of the positions taken and rules and regulations promulgated by Petitioner and intended to adopt and express its satisfaction with the position of Petitioner, by reason of the recent amendments to Petitioner's enabling legislation, without any restriction on fees and charges to be charged to Respondent. [Chapters 86-429 and 86-430, Laws of Florida]. The constitutional issues before this Court are not so easily disposed of.

Respondent, in its Brief, again suggests that the legislature was aware of the proceedings in the case of School Board of Pinellas County v. Pinellas County Commission, 404 So.2d 1179 (Fla. 2d DCA 1981), at the time of amendment of this act in 1981. Assuming, arguendo, that such was the case, Respondent's position is illogical. It would appear that, if the legislature was truly concerned about the payment of utility fees and charges by Respondent, it would certainly have used the word "utility"

somewhere within the title or body of the statutory language proposed. The omission of that word in the amendment to the statute, assuming the legislature's knowledge of the Pinellas County case, would appear to be dispositive in this regard.

Once again in its Brief, as it has done throughout these proceedings, Respondent attempts to portray Petitioner as somehow uncaring for the plight of school children in the State of Florida. Petitioner finds these attempts distasteful, to say the least.

Petitioner has always advanced the position that the interests of the Respondent and the school children which Respondent is supposed to serve are of great importance in this case. Likewise, however, the interests of Petitioner's constituents are also important. The constitutionally permissible result is one of securing and protecting the interests of all interested parties, within a constitutional framework. This can best be accomplished by harmonizing the various statutory provisions and administrative rules, rather than juxtaposing them.

Respondent now raises, apparently on cue from the decision of the appellate court, the issue of standing for the first time in this case. Although it is inappropriate to raise this issue for the first time on appeal [Dober v. Worrell, 401 So.2d 1322 (Fla. 1981)], the question, having been raised herein, cannot go without response.

The issue of standing is not so much one of constitutional mandate, but rather a judicial rule of self restraint, justified by a concern that rights are most effectively asserted by those owning them. [Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328 (5th CIR. 1981)] This concern is sufficiently eased to allow surrogate standing, where there

are circumstantial assurances of a litigant's effective advocacy of third party rights. Such assurances are provided where the relationship between the state-enforced measure, the injury to the litigant, and the purpose and effect of the measure naturally compels the litigant to fully and aggressively assert the constitutional claims of the third persons. [Deefield Medical Center, supra.] The controlling question is whether the appellant "has sustained or is immediately in danger of sustaining some direct injury as a result of the statute's enforcement". [Cramp v. Board of Public Instruction of Orange County, 368 U.S. 278(1961).]

In the landmark case of Craig v. Boren, 429 U.S. 190(1976), the United States Supreme Court held that a vendor of 3.2% beer had standing to assert the equal protection claims of males between the ages of 18 to 21, in challenging a statute that allowed the sale of 3.2% beer to 18 year old women, but not to men under 21 years of age. The Court, in that case, was concerned with injury in fact, sufficient to guarantee concrete adverseness to the statute under constitutional attack.

In the instant case the statute, purportedly exempting Respondent from payment of utility fees and charges, directly affects Petitioner's customers and bondholders. Petitioner has the same options that were available to the vendor in Craig, to either heed the statutory requirement, thereby incurring a direct economic injury, or to disobey the statutory command. If Respondent is exempted from payment of the costs encompassed within Petitioner's fees and charges, Petitioner will in turn absorb those costs and be required to pass them on to its constituents. Those constituents will, in turn, be unconstitutionally deprived of property

without notice or just compensation and Petitioner will, in effect, be forced to implement an unconstitutional statute. Clearly, Petitioner has standing to raise the constitutional issues submitted in this appeal.

Finally, Respondent boldly asserts that the burden placed on Petitioner's constituents, as a result of this statute, is so "minimal", that it fails to rise to a level warranting constitutional protection. [Respondent's Brief P. 28]

Petitioner submits that the rights of all members of all economic classes are worthy of constitutional protection, regardless of whether absorbing the cost of capital facilities necessary to serve all of the schools proposed to be built by Respondent within Petitioner's jurisdiction results in an extra capital cost of 50 cents per equivalent connection or an extra $200.00 per e.c., to Petitioner's constituents. The extra cost may appear <u>de minimis</u> to Respondent, but it may in fact be insurmountable for some of Petitioner's less well-to-do constituents.

Both Respondent and the appellate court focus on the question of whether Petitioner deigns to consider itself above regulation by the legislature, when it is a creature of that legislature. This is not, however, the issue in this case.

Petitioner has always asserted that it was not the legislature that saw fit to exempt Respondent from fees and charges collected by <u>public</u> utilities and not by private utilities; it was the Department of Education that created the exemption - an agency which is likewise a creature of statute.

Petitioner's interpretation of the statute in question would not result in a need to declare any portion of Petitioner's enabling legislation

repealed, altered, or amended, but would permit all statutory provisions to be read in harmony with each other. It is only Respondent's position which necessitates the raising of the constitutional issues herein.

Although the question of "comity" has been addressed as "real or fancied" and "creative", by the appellate court and Respondent, it is interesting to note that a relationship known as "intracourt comity" has been discussed in the federal court system in United States v. Anaya, 509 F.Supp. 289 (S.D. Fla. 1980), and United States v. Zayas-Morales, 685 F. 2d 1272 (11th Cir. 1982). The intracourt comity discussed in those cases certainly is not what the appellate court herein envisioned as the traditional theory of comity, stemming from the compact achieved among sovereign states in the United States Constitution. In fact the concept is one of analogy only, grounded in an attempt to promote uniformity among judges of coordinate jurisdiction.

Petitioner submits that the interests of uniformity and simplicity would likewise be promoted if each agency within the State attempted to promulgate rules and regulations which would not impose on other State agencies, and created rules which were not in contradiction to the rules or statutes governing other State agencies. The "Pandora's Box" contemplated by Respondent in its Brief is best prevented by an "intrastate administrative comity" similar to the "intracourt comity" discussed in the Federal decisions.

Finally, the Florida School Boards Association and Florida Association of School Administrators, in their Brief as amici curiae, raise a brand new Point III on appeal, which has never been raised, addressed, or briefed by any party in the past six years of litigation in this case.

Amici cite to the rule of exclusio unius, which is more appropriately contained within the Latin phrase "expressio unius est alterius". While this Rule may be applicable to this case, it is not applicable in the manner suggested for the first time by amici in their Brief.

Rather, it is applicable because, if the legislature had intended to include utility fees and charges in the exemptions set forth in Chapter 81-223, Laws of Florida, it would have expressly said so. [Wanda Marine Corporation v. State, Department of Revenue, 305 So.2d 65 (Fla. 1st DCA 1975).] Certainly, when a statute is as detailed as this one, it must ordinarily be construed as excluding from its operation all those items not expressly mentioned, such as public utility fees and charges.

CONCLUSION

Whether viewed as an issue of fact or a mixed issue of fact and law, the record is clear that Petitioner's fees and charges, which have been overturned by the appellate court herein, are not costs from which Respondent is exempt, either under Section 235.26(1), Fla. Stat. (1981), or under Rule 6A-2.001(45), Fla. Admin. Code. Thus, the appellate court's decision must be reversed and this cause remanded with instructions to enter judgment in favor of Petitioner, declaring that Respondent is not exempt from payment of Petitioner's fees and charges.

However, if it is determined that Petitioner's fees and charges are subject to the provisions of the statute, as expanded by the definitional rule promulgated by the Department of Education, the decision of the appellate court must still be reversed and this cause remanded, with

instructions to enter judgment in favor of Petitioner and declaring Section 235.26(1), Fla. Stat. (1981), as interpreted by Respondent, to be unconstitutional.

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, Florida, P.O. Box 24690, West Palm Beach, Florida 33416, Attorneys for Respondent; JOSEPH L. SHIELDS, ESQUIRE, Florida School Boards Association, 203 South Monroe Street, Tallahassee, Florida 32301, Attorneys for Amici Curiae, Florida School Boards Association and Florida Association of School Administrators; GENE T. SELLERS, ESQUIRE, State Board of Education, Knott Building, Tallahassee, Florida 32399, Attorneys for Amicus Curiae, Florida Department of Education; PHILIP C. GILDAN, ESQUIRE, Nason, Gildan, Yeager & Gerson, P.A., P.O. Box 3704, West Palm Beach, Florida 33409, Attorneys for Amicus Curiae, Palm Beach County, this 22nd day of June, 1987.

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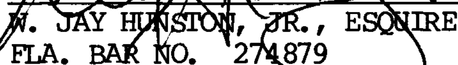
By: 
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