IN THE SUPREME COURT
STATE OF FLORIDA

GENE BROWN, d/b/a
LEISURE PROPERTIES, LTD.,
and LEISURE PROPERTIES, LTD.,
a Florida limited partnership,

Petitioners,

vs.

CASE NO. 74,531

APALACHEE REGIONAL
PLANNING COUNCIL,

Respondent.

REPLY BRIEF OF PETITIONERS

GENE D. BROWN
3836 Killearn Court
Tallahassee, FL 32308
(904) 668-0440
Fla. Bar I.D. 096262

Attorney for Petitioners

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ARGUMENT

Respondent begins the substance of its argument on page 8 of its brief as follows:

> There was no specific fee authority contained in Chapter 380 of the Florida Statutes at the time of adoption by Respondent of Rule 29L-2.02.

Respondents then proceed with an attempt to explain away this constitutional deficiency by pointing out that the legislature has subsequently amended the law to provide specific authority for the rule. Respondent reasons that this somehow gives retroactive validity to the rule. However, Petitioners would respectfully submit that this latest amendment by the legislature shows just the opposite. It simply shows that the legislature knew that there was no legislative authority for the rule, and the amendment was enacted to cure this constitutional deficiency. This may be sufficient to solve the problem prospectively, but it cannot be applied retroactively so as to breathe life into the rule as of the time that it was applied to Petitioners.

Respondent then proceeds throughout its brief to refer to the prior legislation authorizing "appropriate fees" as being "minor" or "technical" aspects of a complicated, comprehensive regulatory framework that somehow has a life of its own. Respondent reasons that since the courts have repeatedly held that environmental protection is a proper legislative function,

that this somehow authorizes the courts to overlook "minor" or "technical" problems such as the lack of any "specific fee authority." (Respondent's brief page 8.) Respondent then proceeds to argue that the compulsory extraction of money from Petitioners in this case is not technically a "tax" and that somehow establishes a different or lesser standard so that this Court need not be concerned with the fact that the legislative authorization to charge an "appropriate" fee contains no constitutional standards whatsoever. Petitioners have been unable to find any case that holds that there is any waiver of the constitutional nondelegation requirement when dealing with a mandatory payment of money characterized as a "fee" as distinguished from a "tax." Respondent argues that the use of the word "fee" is "in itself" a limitation on Respondent's ability to extract money from Petitioners. However, this unsupported statement, with no citations of authority, is little comfort to Petitioners, since Respondent could still have charged practically any amount of money that it deemed "appropriate" including, but not limited, Respondent's overhead expenses such as "fringe benefits," "legal fees," and certain unamed "indirect costs." Indeed, Respondent could charge all of its overhead expenses to Petitioners if there was only one DRI under review during the same time period. The only limitation in the rule is

that Petitioners would only have to pay for 100% of the cost up to $10,000 and 80% of the cost over $10,000. However, since this includes all of Respondent's overhead expenses, this amount is unlimited for all practical purposes and could have been several hundred thousand dollars in this case, without violating the rule if the rule is determined to be constitutional. In arguing that the rule authorized a "fee" and not a "tax," Respondent overlooks the clear admonition of this Court in Bradford v. Stoutamire, 38 So.2d 684 (Fla. 1948) at 685 which states as follows:

> It is a well known rule that fee statutes are to be strictly construed and none allowed except where clearly provided by law.

In other words, semantic distinctions are not sufficient to avoid the constitutional requirement that any mandatory extraction of money from a citizen must be accompanied by specific legislative standards and guidelines if the rule authorizing such extraction of funds is to be held constitutional.

Respondent argues that Petitioners have somehow stipulated that the fee in this case is reasonable and not excessive. (Respondent's brief, page 26.) Nothing could be further from the truth. Petitioners have steadfastly asserted that the fee is excessive and that it is certainly not reasonable or constitutional. The stipulation in this trial court recognized that if the statute were constitutional, then Petitioners would have no recourse but to pay the fee no matter how excessive or

unreasonable. As noted above, Respondent's power to assess fees under the rule is virtually unlimited, and the next fee charged to Petitioners or some other developer similarly situated could be hundreds of thousands of dollars, all with no recourse to Petitioners.

In its brief, Respondent cites 33 cases and numerous other statutes and other related authorities. Despite these voluminous citations, however, Respondent repeatedly deals in generalities and judicial truisms without ever really dealing with the facts or case at bar. The most revealing deficiency in Respondent's brief is its total failure to even mention let alone deal with the prior decisions of this Court which are directly on point, to-wit:

Conner v. Joe Hatton, Inc., 216 So.2d 209 (Fla. 1968)
Lewis v. Bank of Pasco County, 346 So.2d 53 (Fla. 1977)

Respondent intentionally fails to mention or deal with these cases because they are indistinguishable from the case at bar. The Conner case deals with a fee authorized to be charged by the Commissioner of Agriculture for the purpose of providing funds to defray the cost of exercising certain duties imposed on the Commissioner of Agriculture. As in the case at bar, the Commissioner of Agriculture was authorized to charge a fee based upon certain "prorata share of the necessary expenses." In

Conner, the statute provided quite specific guidelines and standards, much more than in the case at bar which only refers to a requirement that the fees be "appropriate." Nevertheless, this Court held the statute in Conner to be unconstitutional, despite the specific standards and guidelines. Accordingly, there is simply no way to distinguish Conner from the case at bar, and that is obviously the reason that Respondent elected to totally ignore this binding authority.

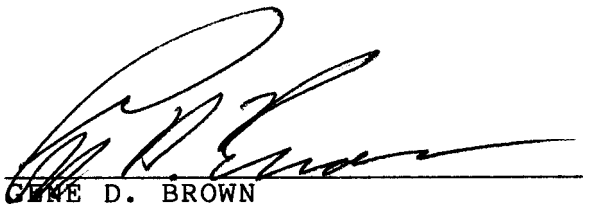
The same is true regarding the Lewis v. Bank of Pasco County. The statute in that case was held unconstitutional, despite its more precise standards and guidelines. Since Respondent could not distinguish this binding authority, Respondent simply elected to ignore the case.

Respondent also elected to ignore the case of Sarasota County v. Barg, 302 So.2d 737 (Fla. 1974). Instead of dealing with this binding authority on the merits, Respondent simply referred to dissenting opinion in that case as authority for its final point that "appropriate" is a legally sufficient standard. No Court has ever so held, and it will cause great confusion and havoc if this Court reverses its prior decision and holds that the legislature of Florida can delegate its authority to extract funds from the citizens of Florida whenever an administrative agency determines that it would be "appropriate" to do so. This

would be expedient, but it would render meaningless the separation of powers doctrine set forth in Article II, SEction 3 of the Florida Constitution which requires that the delegation of legislative authority must be accompanied by specific guidelines and standards. Conner v. Joe Hatton, Inc., 216 So.2d 209 (Fla. 1968); Lewis v. Bank of Pasco County, 346 So.2d 53 (Fla. 1977); Sarasota County v. Barg, 302 So.2d 737 (Fla. 1974). If the specific guidelines and standards set forth in Conner, Lewis and Barg were not sufficient as previously held by this Court, there is simply no way that the one word reference to fees being "appropriate" can be held constitutional under the law of Florida.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in Petitioners' main brief, the decision of the First District Court of Appeal below should be reversed.



GENE D. BROWN
3836 Killearn Court
Tallahassee, FL 32308
(904)668-0440

Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Linda Loomis Shelley and Tommy E. Roberts, Jr., Post Office Box 12808, Tallahassee, FL 32317; and Arthur C. Wallberg, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, FL 32399-1050, by U.S. Mail this 23rd day of October, 1989.

GENE D. BROWN