IN THE SUPREME COURT OF FLORIDA

ST. JOHNS COUNTY, FLORIDA, a political subdivision of the State of Florida, and DANIEL CASTLE, as County Administrator of St. Johns County, Florida,

Defendants/Petitioners,

v.

CASE NO. 75,986

NORTHEAST FLORIDA BUILDERS ASSOCIATION, INC., a Florida corporation, and LAWSON HOMES, INC., a Florida corporation,

Plaintiffs/Respondents.

BRIEF OF AMICUS CURIAE SCHOOL BOARD OF SEMINOLE COUNTY

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PREFACE

Amicus Curiae Seminole County School Board will be referred to in the brief as the "Seminole County School Board".

The Respondents shall be collectively referred to in this brief as the "Homebuilders".

The Board of County Commissioners of St. Johns County or St. Johns County shall be referred to in this brief as the "County".

The St. Johns County Education Impact Fee Ordinance, Ordinance No. 87-60, will be referred to in this brief as the "St. Johns County Ordinance" or the "Ordinance".

Part II of Chapter 163, Florida Statutes, Section 163.3164 through Section 163.3243, the Local Government Comprehensive Planning and Land Development Regulation Act, will be referred to in this brief as the "Growth Management Act".

"R" refers to the Record on Appeal.

STATEMENT OF THE CASE AND FACTS

The Seminole County School Board adopts the Statement of the Case and Facts as stated by the Petitioners.

The trial court granted a summary judgment in favor of the Homebuilders on the grounds that the St. Johns County Ordinance: violated the constitutional requirement of Article IX, Section 1, Florida Constitution, requiring adequate provision for a uniform system of free public schools; constituted a tax rather than an impact fee; attempted to impose a funding source by ordinance that was preempted by the Legislature; and was an unlawful delegation of legislative authority by the County to the St. Johns County School Board.

The Fifth District Court of Appeal affirmed on the basis that the St. Johns County Ordinance violated the uniform and free public school provisions of Article IX, Section 1. The Fifth District Court in its opinion did not address the other grounds of invalidity raised by the trial court.

The Seminole County School Board is currently drafting jointly with the Board of County Commissioners of Seminole County, Florida, a county ordinance imposing an educational facilities impact fee. The provisions of such ordinance contemplate the imposition of the educational facilities impact fee countywide including all municipal areas with no right for a municipality to opt out of the application of the ordinance. The provisions of such ordinance do

not contemplate the granting of any exemption from impact fee payment based upon the status of the occupants of a structure within a regulated development.

SUMMARY OF ARGUMENT

The St. Johns County Ordinance lawfully imposed impact fees on new residences to pay for the school facilities needed to accommodate the growth in school population caused by the additional homes.

The St. Johns County Ordinance does not violate the uniformity or free public school provisions of the Florida Constitution. An educational facilities impact fee may be lawfully imposed in part of one county of the State. As interpreted by the Court and provided for by the Legislature, a uniform system of education does not require all charges supporting public schools to be uniformly imposed statewide. And students and their parents in their status as taxpayers and homebuyers may lawfully be required to pay fees and taxes which fund schools.

A noncharter county such as St. Johns County has the homerule authority to impose impact fees for funding educational facilities. As authorized by the Constitution and granted by statute, homerule allows counties to legislate on any subject unless such legislation would be inconsistent with general law or special act. Because there is no inconsistent law on the subject, a noncharter county has the authority to impose school impact fees.

Not only does the county have the homerule authority to impose school impact fees, the Legislature encourages counties to use them in meeting their responsibilities to manage growth in the county. The Growth Management Act requires counties to manage growth in such a way as to make sure that the availability of public

facilities, including public schools, keeps pace with the demand. The Legislature directs counties to coordinate public school availability with school boards and expressly authorizes school boards to use county appropriations. Additionally, the Legislature specifically encourages counties to be innovative in managing growth with impact fees.

No legal problem is presented by St. Johns County imposing the fees in only part of the county. St. Johns County had the authority to impose the impact fees countywide, but lawfully chose to impose them in the unincorporated area and only within the incorporated areas for which it had an interlocal agreement providing for the collection of the fees by the municipality. As this Court has made clear, impact fees need not be imposed countywide to be lawful.

The St. Johns County educational facilities impact fee meets the case law established criteria for a valid impact fee. The law allows a developer to be charged a fee commensurate with the impact the development may have on the public school system. The St. Johns County Ordinance establishes a fee schedule which applies to all development, but specifically allows developers to reduce or eliminate the fee as it applies to them by proving that their development will not affect the need for additional school facilities as much as other development. The Ordinance requires all residences to be subject to the fee unless the residence cannot by its nature offer residential space to a student.

The Seminole County School Board and the Board of County Commissioners like many other Florida local governments is in the process of developing an impact fee ordinance to provide revenues for funding additional public school construction needed to accommodate growth. All Florida school boards and counties desiring to adopt a lawful impact fee will be guided by the Court's decision in this case as they have been guided by the Court's other impact fee decisions.

ARGUMENT

POINT I.

THE IMPOSITION OF A LOCAL IMPACT FEE TO FUND A PORTION OF THE COST OF LOCAL EDUCATIONAL FACILITIES DOES NOT VIOLATE SECTION 1, ARTICLE IX, FLORIDA CONSTITUTION.

An Educational Facilities Impact Fee does not Violate the Uniformity Requirement of Section 1 of Article IX

The Fifth District Court held that the educational facilities impact fee imposed under the St. Johns County Ordinance violated the uniformity requirement of Section 1 of Article IX, Florida Constitution, because the fee was not in effect countywide and statewide. Article IX, Section 1 provides that "adequate provision shall be made by law for a uniform system of free public schools . . . ." The Fifth District Court apparently assumed that the uniformity provision requires funding sources supporting public school construction be imposed statewide at uniform rates. This interpretation of the uniformity provision by the Fifth District Court conflicts not only with the Legislature's statutory scheme for providing a uniform system of public school facilities through a combination of State revenues and optional local revenues, but also with cases from this Court construing the constitutional provision.

The Legislature maintains a uniform system of education by providing each student uniform access to schools. The Legislature directs State oversight and control over the availability and

quality of public school facilities.[1] To assure uniform school facilities are equally available throughout the State, the Legislature requires that the need for educational facilities be determined by the Florida Department of Education. Section 235.15, Florida Statutes. No local school board may construct an educational facility unless the facility is on the State's list. Section 235.18, Florida Statutes. Financially, the Legislature provides uniform access to schools through the Public Education Capital Outlay (PECO) program by supplementing local revenues with State revenues to build schools. Section 235.435, Florida Statutes. The Department allocates the PECO monies to the local school districts based on a formula calculated to meet the unfunded need. Id. To assure uniform quality, the Legislature mandates a statewide building code for public educational facilities construction. Section 235.26, Florida Statutes. It is the State's regulation of quantity and quality of public school facilities which provides Florida students with uniform access to school facilities regardless of where they live in the State.

[1]The Legislature provides students uniform access inside the classroom to teachers and programs through an intricate school funding program designed to equalize educational opportunities throughout the State. The Florida Educational Finance Program (FEFP) supplements revenues raised at the local level through mandatory property tax millage with State revenue. The State revenue is distributed in a manner which will allow per pupil spending to be uniform. Sec. 236.081, Fla. Stat. See Dist. School Bd. of Lee Co. v. Askew, 278 So. 2d 272 (Fla. 1973) in which the Court stated that the statutory precursor to the FEFP providing a "uniform expenditure per teaching unit throughout the State regardless of the tax base of the various counties meets the constitutional requirement of a uniform system of free public schools." 278 So. 2d at page 274.

The Legislature does not require that all funding sources for public school facilities be uniformly imposed statewide. Only two sources of revenue are imposed statewide at a uniform rate. One is the gross receipts tax on utilities, which is bonded and used to equalize the availability of public schools through the PECO program. Chapter 203, Florida Statutes. The other is the motor vehicle license tax, which is imposed statewide and a portion of which is returned to the local school boards through a formula established by Article XII, Section (9)(d) of the Florida Constitution. All local revenue sources are optional and the rates may vary. A school board may annually levy an ad valorem tax of up to 2 mills for capital outlay purposes. Section 236.25(2), Florida Statutes. Several school boards do not levy capital outlay millage and some levy less than the authorized 2 mills. With voter approval, local school boards may levy additional ad valorem taxes and pledge the revenue for capital outlay bonds. Section 236.37, Florida Statutes. Local school boards may also receive various other revenue which may not be uniform statewide, including gifts, donations, and appropriations from county commissions. Section 236.24, Florida Statutes. And finally, a local school board may share in the local option sales tax revenue if the voters approve the levy in a referendum and if the governing boards of the affected municipalities and county agree. Section 212.055(2)(c) as amended by Section 1, Chapter 90-282, Laws of Florida. The sales tax rate may be one half or one percent on taxable sales within the County. Section 212.055(2)(a), Florida Statutes.

As the variety of sources suggests, not all of Florida's taxpayers pay uniformly to support public schools. School property tax burdens vary. Some school boards levy the discretionary capital outlay millage, others do not. Some property owners pay no ad valorem tax at all because the value of their property does not exceed the $25,000 homestead exemption. See Article VII, Section 6, Florida Constitution. Other property owners may not qualify for a homestead or other constitutional exemption. Renters do not directly pay property taxes to support public schools. The State's income tax helps support public schools, but individuals in Florida do not pay income taxes, only corporations do. Chapter 220, Florida Statutes; Article VII, Section 5(b), Florida Constitution. The gross receipts tax on utilities which funds PECO is not shared equally by all taxpayers. Rather the amount of utilities tax owed is directly related to consumption which varies with the weather as well as the size and construction of homes and businesses. Chapter 203, Florida Statutes. Not all taxpayers in the State or even in a county contribute uniformly to fund educational facilities.

The Court has interpreted the uniformity provision of the 1885 Constitution as requiring only that public schools be governed by uniform rules.[2] In an appeal of a bond validation proceeding, the Court considered the issue of whether the uniformity provision is

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[2]Article XII, Section 1 of the 1885 Constitution provided: "The Legislature shall provide for a uniform system of public free schools, and shall provide for the liberal maintenance of the same."

violated by the establishment of a special school district within part of a county that could levy ad valorem taxes and pledge them for the retirement of bonds with voter approval. State v. Board of Public Instruction of Pasco County, 176 So.2d 337 (Fla. 1965). The State Attorney argued that the Legislature may authorize ad valorem taxation for schools only by general law. To allow school taxation by special act, he argued, violated the uniformity provision. This Court held that:

> [the special act] only seeks to create a tax area so that bonds can be issued to make improvements to the system of schools in the rapidly growing area. Thus, the act cannot be said to affect the uniformity of the system of schools. The counties and school districts are school governing bodies which provide for the uniform system of public schools. The same system of school government will obtain, although it is hoped more effectively with improved facilities provided for by the statute. 176 So. 2d at 338 (emphasis in the original; citation omitted).

In an earlier case, the Court stated the uniformity provision required public schools to "be established upon principles that are of uniform operation throughout the State . . . . " with the purpose of advancing and maintaining proper standards of enlightened citizenship throughout the State. State v. Henderson, 188 So. 351, 352-353. (Fla. 1939).

The Court's historical construction of the uniformity provision does not support the conclusion of the Fifth District Court that the uniformity provision prohibits the imposition of educational impact fees. Like the special school district taxes approved in the Pasco County case, impact fees may lawfully be

imposed in only part of a county and not violate the uniformity requirement.[3] And the variety of statutorily authorized local funding options and rates makes it clear that the Legislature does not interpret a "uniform system" of education to require the statewide imposition of every revenue source at a uniform rate. Such an interpretation by this Court would require the Legislature to totally revamp the current method of funding public school capital projects. An educational facilities impact fee like other optional local revenue sources used to fund public school buildings may be imposed in only a portion of the State and within only a part of the county and not violate the uniformity provision of the Constitution. The Fifth District Court erred in concluding otherwise.

An Educational Impact Fee does not Violate the Free Public School Requirements of Section 1 of Article IX

Free public schools are a constitutional right in Florida. Article IX, Section 1, Florida Constitution. The Fifth District Court ruled that the County educational facilities impact fee violated this constitutional mandate. What are free public schools? Free public schools, like free lunches, must be paid for by somebody. In Florida, free public schools are funded by government charges against the public generally, not by direct charges against students in their status as students. However, the

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[3]The Legislature now prohibits special tax districts for school purposes. Sec. 236.014, Fla. Stat.

free public school provision is not violated by requiring students or parents of students to pay government charges which fund schools.

In deciding whether the impact fee infringes upon the right to free public schools, it is important to look at the legal incidence of the fee. The ordinance requires homebuilders, not students, to pay the impact fee.[4] Homebuilders, not students, are subject to the ordinance's penalties if the impact fee is not paid.[5] The ordinance does not affect the legal right of students to attend and participate in public schools. A student may attend public school in the county regardless of whether an impact fee has been paid. However, the ordinance does affect the right of homebuilders to build residences. It imposes a fee on that right. The legal incidence of the fee falls on homebuilders, not students.

It is the economic burden which affects a student's right to attend free public school, the Homebuilders argue, and it is students or their parents not homebuilders who bear the economic burden of the impact fee.[6] But students and their parents may lawfully be required to bear the economic burden of many government charges which fund free public schools. As taxpayers, students pay sales tax on the purchase of pencils and paper needed to attend

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[4]St. Johns Co. Ord. §§ 5A and 6A.

[5]Id. §14.

[6]The commentators disagree as to who bears the economic burden of impact fees. See Delaney and Smith, Development Exactions: Winners and Losers, Real Estate L.J. 195, 198-202 (1989) for a discussion of the various theories.

free public schools. Section 212.05(1)(a)1.a., Florida Statutes (1989). Students pay sales tax on clothes so they can attend free public schools. Id. As homebuyers, parents of students pay a purchase price which includes the homebuilder's sales tax payments for the purchase of lumber and other construction supplies. Id. Sales tax revenues paid by students funds free public schools.[7] The purchase price of a new home may also include the gross receipts tax on utilities used in the homebuilder's construction efforts. Chapter 203, Florida Statutes (1989). The parents of students absorb the utility tax, the revenues of which directly support the construction of free public schools. Section 235.42, Florida Statutes. (1989); Article XII, Section 9(a), Florida Constitution.

The fact that the impact fee is imposed against homes where students may live raised a red flag with the Homebuilders and the courts below. But other taxes are lawfully imposed against homes. School boards annually levy property taxes against every home in the county valued at more than the homestead exemption. The Legislature imposes a documentary stamp tax on the issuance of deeds for residential property. Section 201.02(1), Florida Statutes. The documentary stamp tax revenue funds schools.[8] There is nothing unconstitutional about imposing a charge against homes

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[7] See Zingale and Davis, Why Florida's Tax Revenues Go Boom or Bust, and Why We Can't Afford It Anymore, 9 Fla. State Univ. L. Rev. 433,451 (1986).

[8] Id.

just because students who are entitled to a free public school education may live there. Students and their parents as taxpayers and as homebuyers pay a portion of all charges and fees which fund free public schools. Those charges and fees do not infringe on the legal right to attend free public schools. Neither does the educational facilities impact fee imposed by the County.

POINT II

A NON-CHARTER COUNTY HAS THE POWER OF SELF-GOVERNMENT TO IMPOSE BY ORDINANCE AN IMPACT FEE TO FUND A PORTION OF THE COST OF LOCAL EDUCATIONAL FACILITIES

Florida counties, whether operating under a charter or not, have broad powers of self-government unknown prior to the 1968 revision of the Florida Constitution. In analyzing any legislative scheme for funding local schools, the examination of county home rule ordinances is as essential as a consideration of special or general laws enacted by the Legislature. Absent preemption by the Legislature, a county ordinance possesses the same legislative regulatory force as a special act or general law. To determine the validity of a county-imposed educational impact fee by searching for a permissive general act is to ignore the unique and revolutionary power of self government granted to all counties by the 1968 constitutional framers.

In the Absence of an Inconsistent Law, a Non-charter County has the Power of Self-Government to Impose by Ordinance Educational Facilities Impact Fees

While a charter county derives its authority from its charter and the Florida Constitution, a non-charter county has "such power of self-government as is provided by general or special law".[9] St. Johns County is a non-charter county.

There could not be a broader grant of the power of self-government to non-charter counties than that granted in Section 125.01, Florida Statutes. Section 125.01(1) provides:

> (1) The Legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to: ....

Following this provision is an enumeration of specific powers.

Section 125.01(3) reiterates that the grant of power is not restricted to those enumerated powers and that the Legislature intended Section 125.01 to implement all the powers of self government authorized by the Constitution. Section 125.01(3) provides:

> (3)(a) The enumeration of powers herein shall not be deemed exclusive or restrictive, but shall be deemed to incorporate all implied

[9]Charter counties have all powers of local self-government not inconsistent with general law or special law approved by the electors. The charter provides which shall prevail in the event of conflict between county and municipal ordinances. Article VIII, Section 1(g), Florida Constitution. A county not operating under a charter has such powers as provided by general or special law and a county ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict. Article VIII, Section 1(f), Florida Constitution.

> powers necessary or incident to carrying out such powers enumerated, including, specifically, authority to employ personnel, expend funds, enter into contractual obligations, and purchase or lease and sell or exchange real or personal property.
>
> (b) The provisions of this section shall be liberally construed in order to effectively carry out the purpose of this section and to secure for the counties the broad exercise of home rule powers authorized by the State Constitution.[10]

The authority of a non-charter county to proceed under its home rule powers is well established. This Court has explored the scope of home rule authority in three leading opinions: State of Florida v. Orange County, 281 So.2d 310 (Fla. 1973); Speer v. Olson, 367 So.2d 207 (Fla. 1979); and Taylor v. Lee County, 498 So.2d 424 (Fla. 1986). In all three opinions, this Court

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[10] Except for the potential of county charter preemption of municipal authority to adopt an inconsistent ordinance, the quantum of home rule power of a charter and a non-charter power is the same. That this constitutional consequence was clearly contemplated is supported by the following from the Commentary to F.S.A. Const. Article VIII, Section 1, Subsection (g).

> "Counties operating under a charter are presumptively considered to have the broad power of self government (with the exception of precedence over municipal ordinances which must be provided in the charter) unless provided otherwise by general law or by special law adopting the charter. Thus, charter counties and non-charter counties apparently start from different poles in their relationships with legislative enactments. Both could, conceivably, be the same depending on the legislation adopted.

In fact, a charter county may have less home rule power in the event its charter has restrictions not inconsistent with general law or special law approved by the voters. See Sarasota County v. State of Florida, 549 So.2d 659 (Fla. 1989) where a charter provision required elector approval of bonds not required in non-charter counties.

recognized the expansive home rule powers conferred by Article VIII, Section 1(f), Florida Constitution, and Section 125.01, Florida Statutes, and concluded that non-charter counties need no specific statutory authority to enact ordinances. Non-charter counties have the home rule authority to enact ordinances for any public purpose, this Court has held, as long as the ordinances are not inconsistent with general or special law.

As the three cases illustrate, the quantum of home rule power possessed by non-charter counties is expansive and complete within the implemented parameters of the 1968 Florida Constitution. The powers enumerated in Section 125.01 are not exhaustive. In determining the home rule power of a county to act for a public purpose, the search is no longer for specific legislative authorization. The search is for a general or special law that is inconsistent with the subject matter of the proposed ordinance. Absent an inconsistent law, a county has the complete power to legislate by ordinance for any public purpose.[11]

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[11]The source and quantum of home rule power for municipalities is similar to that of non-charter counties. Article VIII, Section 2, Florida Constitution, provides that municipalities may be established by general and special act and shall have such governmental, corporate and proprietary powers except as otherwise provided by law. Section 166.021 is the legislative implementation of Article VIII, Section 2(b) and provides that municipalities may exercise any power for municipal purposes except when expressly prohibited by law.

Pre-1968 cases on the power of county government such as Amos v. Mathews, 126 So. 308 (Fla. 1930), cited by the Homebuilders to the Fifth District Court, are no longer relevant.[12]

The power of self-government concept envisioned in Article VIII of the 1968 Florida Constitution and unleashed to counties by the implementing provisions of Section 125.01 is a fundamental change that abolishes the precedential value of prior county power cases. Absent an inconsistent general law or special act, a board of county commissioners can legislate by ordinance on any issue that serves a public purpose.

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[12]The Homebuilders in their brief filed with the Fifth District Court argued that the County lacked the power to "transfer funds" to the school board, citing several cases and the ad valorem millage limitation of Article VII, Section 9, Florida Constitution. Such cases as Okaloosa County Water and Sewer District v. Hilburn, 160 So.2d 43 (Fla. 1964), which stand for the proposition that taxes imposed by one governmental unit for one purpose cannot be transferred to another governmental unit and expended for a different purpose, are simply inapplicable. The educational facilities impact fee imposed by the Ordinance was a county land development regulation, the proceeds of which were transferred to the school board for use in providing the contemplated facilities. Such use of impact fee proceeds was that contemplated in the Ordinance when the impact fee was enacted. Likewise, the reference to Article VII, Section 9 is misplaced. Such millage restrictions are constitutional limitations on the rate of ad valorem taxes and are not limitations on the levy of any other tax or the imposition of any fee. See also Gallant v. Stephens, 358 So.2d 536 (Fla. 1978) which upheld the levy by a county in the unincorporated area of an additional ten mills within the constitutional limits provided for municipal purposes.

Whether State Mandated or Voluntarily Enacted, a County has the Legislative Power to Impose Educational Facilities Impact Fees to Ensure the Availability of Adequate Public Facilities to Accommodate Anticipated Growth

Before the Growth Management Act was a gleam in the eyes of its drafters, county ordinances were a cornucopia of growth management initiatives. As is the nature of home rule, the degree and type of regulation and planning varied by county. However, regulation of the use of land and public facility capital planning was the subject matter of numerous ordinances in all counties with varying degrees of sophistication. As recognized in Section 163.3161(8):

> (8) It is the intent of the Legislature that the repeal of sections 163.160 through 163.315 by section 19 of chapter 85-55, Laws of Florida, shall not be interpreted to limit or restrict the powers of municipal or county officials, but shall be interpreted as a recognition of their broad statutory and constitutional powers to plan for and regulate the use of land. ***

The shining homegrown growth management regulation tool is impact fees. No specific statutory authority was present or

needed.[13] As recognized in Home Builders v. Board of Palm Beach County Commissioners, 446 So.2d 140 (Fla. 4th DCA 1983):

> We know of no general or special act which purports to limit the grant of authority contained in the foregoing constitutional and statutory enactments nor is the ordinance inconsistent with any general or special law. Art. VIII, sec. 1(f), Fla. Const. Accordingly, we hold that Palm Beach County had the power and authority to enact the fee impact ordinance in question, assuming the ordinance involves a regulatory fee rather than a tax.

The Court in Home Builders v. Board of Palm Beach County Commissioners upheld the imposition by a non-charter county by ordinance of an impact fee to fund growth necessitated transportation improvements. Like the St. Johns County Ordinance, each municipality had the power to opt out and thirty-three of the thirty-seven municipalities within Palm Beach County chose not to subject areas within their boundaries to the county imposed impact fee.

The Growth Management Act is not a grant of power to counties. To the extent it requires a uniform and comprehensive planning process and dictates inclusion of comprehensive plan elements and concurrency requirements, it is a legislative mandate that

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[13]In stark contrast to the broad regulatory powers of self-government established in the 1968 Florida Constitution is the limited power of counties to tax granted in the 1968 revision. Sections 1 and 9, Article VII, 1968 Florida Constitution, reserve all forms of taxation other than the ad valorem tax to the state except as otherwise provided by general law. The judicial focus on an impact fee imposed by ordinance is whether it meets the Florida case law criteria for its imposition. If not, it is a tax and cannot be imposed by ordinance unless there is general law authorization.

restricts local county choice and requires uniformity. Conversely, to the extent the Growth Management Act and other laws provide mechanisms for inter-governmental solutions in the comprehensive planning process, county home rule is strengthened. Regardless of the quantum of home rule power given a county, inter-governmental conflicts and jurisdictional disputes require resolution by the Legislature.[14]

In fusing joint responsibility for the otherwise independent planning duties of counties and school boards, Section 163.3177(3)(a)2 requires the following as a required element of a county comprehensive plan.

> (3)(a) The comprehensive plan shall contain a capital improvements element designed to consider the need for and the location of public facilities in order to encourage the efficient utilization of such facilities and set forth:
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> * * *
>
> 2. Estimated public facility costs, including a delineation of when facilities will be needed, the general location of the facilities, and projected revenue sources to fund the facilities.
>
> * * *

Section 163.3164(23) defines "public facilities" to mean:

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[14]Voluntary intergovernmental cooperation and the exercise of joint powers by public agencies is provided for in Part I of Chapter 163, Florida Statutes, the Florida Interlocal Cooperation Act of 1969. Such statutory provisions enable any public agency to exercise jointly with any other public agency any power, privilege, or authority which such agencies share in common and which each might exercise separately. Both school boards and counties are included in the definition of public agency under the act.

> ... major capital improvements, including, but not limited to, transportation, sanitary sewer, solid waste, drainage, potable water, educational, parks and recreational, and health systems and facilities. (emphasis added)

Section 163.3202(2)(g) provides for the adoption of "land development regulations" that ensure a "concurrency requirement":

> (2) Local land development regulations shall contain specific and detailed provisions necessary or desirable to implement the adopted comprehensive plan and shall as a minimum:
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> * * *
>
> (g) Provide that public facilities and services meet or exceed the standards established in the capital improvements element required by s. 163.3177 and are available when needed for the development, or that development orders and permits are conditioned on the availability of these public facilities and services necessary to serve the proposed development. Not later than 1 year after its due date established by the state land planning agency's rule for submission of local comprehensive plans pursuant to s. 163.3617(2), a local government shall not issue a development order or permit which results in a reduction in the level of services for the affected public facilities below the level of services provided in the comprehensive plan of the local government.

See Rule 9J-5.016(4)(b) which establishes the minimum criteria for the capital improvements element. Simply stated, this "concurrency" provision requires, upon adoption of the comprehensive plan, that all capital facilities keep pace with development. No development order or permit can be issued by a county if the contemplated construction will reduce the level of

service for public facilities below that established in the capital improvement element of the comprehensive plan.

This Section 163.3202 concurrency requirement is enforced by "land development regulations" required to be adopted by each local government. Section 163.3164(22) defines land development regulation to mean:

> ... ordinances enacted by governing bodies for the regulation of <u>any aspect of development</u> and includes any local government zoning, rezoning, subdivision, building construction, or sign regulations <u>or any other regulations controlling the development of land</u> ... (emphasis added)

In the same section imposing the concurrency requirement, the Legislature encourages the use of specific types of innovative land development regulations:

> (3) This section shall be construed to encourage the use of innovative land development regulations which include provisions such as transfer of development rights, incentive and inclusionary zoning, planned-unit development, <u>impact fees</u>, and performance zoning. * * * Section 113.3202(3), Florida Statutes (emphasis added)

Section 236.24(1) and Section 235.193 are additional general law enactments that recognize and authorize inter-governmental coordination between counties and school boards. Section 236.24(1) is clear legislative approval that a portion of the school fund may come from "appropriations by county commissioners". Section 235.193 is an additional legislative mandate for planning coordination for school facilities between counties and school boards.

> 235.193 Coordination of planning with local governing bodies.-
>
> (1) It is hereby declared to be the policy of this state to require the coordination of planning between the school boards and local governing bodies to ensure that plans for the construction and opening of public educational facilities are coordinated in time and place with plans for residential development, concurrently with other necessary services.
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> * * *

Within the framework of the county constitutional power of self government and the comprehensive planning initiatives of the Growth Management Act and other laws, any conclusion that a county does not have the power to impose an educational facilities impact fee is inconceivable. Whether such legislative county action is inconsistent with general law is not an issue - the Growth Management Act encourages such local development regulations.[15] Every county is required to plan for the availability of needed educational facilities to accommodate anticipated growth on a concurrent basis. Such educational facilities are not only required by the school board in fulfilling its constitutional and statutory duty to educate, but are essential if a county is to remain a competitive and vibrant community. One innovative land development regulation choice that a county is encouraged to select

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[15] An ordinance is inconsistent with a law if the mutual legislative provisions cannot coexist. Board of County Commissioners of Dade County v. Wilson, 386 So.2d 556 (Fla. 1980). If both a statute and an ordinance regulate an activity, the two are not inconsistent unless compliance with one requires violation of the other. Jordan Chapel Freewill Baptist Church v. Dade County, 334 So.2d 661 (Fla. 3rd DCA 1976).

are impact fees. Such fees ensure that growth pays its fair share of the cost of the physical facilities that will be needed to accommodate its projected land use. The selection of impact fees as a mechanism to ensure the availability of educational facilities when needed to accommodate growth is a clear choice that a county can make in the exercise of its power of self government.

POINT III

THE FLORIDA CASE LAW CRITERIA FOR THE IMPOSITION OF IMPACT FEES IS CLEAR

Impact fees are unique products of the home rule power of counties and municipalities enacted to regulate land use in compliance with their statutory responsibility to adopt and enforce comprehensive planning. The characteristics and limitations of impact fees in Florida are found in case law not statute.

The Florida case law criteria for the imposition of impact fees are (1) the impact fee proceeds can only be used to provide capital facilities; (2) there must be a rational nexus of benefit between the need for the capital facilities and the new development and a rational nexus between the expenditure of the funds for the capital facilities and the benefit to or burden caused by the new development; and (3) the impact fee proceeds must be segregated to ensure that they are utilized to provide the capital facilities for which they were imposed. See Broward County v. Janis Development Corporation, 311 So.2d 371 (Fla. 4th DCA 1975); Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976) and Home Builders and Contractors Association

of Palm Beach County v. Board of County Commissioners of Palm Beach County, 446 So.2d 140 (Fla. 4th DCA 1983).

Impact fees are calculated based upon the land use encompassed within the development not the actual occupants of any structure. The projected cost of the growth necessitated capital facilities is apportioned among various land uses based upon the potential demand or impact each land use classification may make on the need for the additional facilities. An impact fee is not calculated based upon actual use at a point in time but the potential use of a classification of structures or land uses over time. The statutory mandate on the county is to have available concurrently as needed the anticipated capital facilities to accommodate growth based upon the projected land use. The degree of activity or burden on the capital facilities may vary over time, but the potential impact drives the requirement for capital facilities to be in place concurrent with development approval.

For example, water and sewer impact fees allocate the costs of capital facilities to provide treatment among potential users based upon an assumed capacity demand. The fact that a particular occupant of a residential structure may demand less treatment capacity than allocated to the structure is immaterial. The next occupant of the same residential structure may demand more. It is the potential need for treatment capacity represented by a particular land use or structure that determines its fair share of the costs of the provided treatment facilities. It is much easier to allocate the capacity of "closed loop" capital facilities such

as water and sewer treatment facilities since all users are physically connected. As a consequence, the potential required capacity can be easily calculated even though all connections are users of varying degrees.

In planning capital facilities whose use is random such as parks, emergency medical services, libraries and educational facilities, it cannot be demonstrated that at any given time each individual development will use the capital facility capacity provided. However, the inherent characteristic of such capital facilities does not eliminate the impact of the presence of the new development on the need for additional capacity. No one can predict the degree of use by an individual structure of such random use capital facilities. However, under common methodology and current knowledge the use of such capital facilities in the aggregate by a predictable growth of land uses can be determined with reasonable certainty.

The argument that a particular single family house has no impact on the need for educational facilities if the initial occupant is childless misses the point. Next year such house may be the home of a family with five school age children. When such occupancy occurs, sound planning requires the necessary educational facilities to be in place. It is the potential need of the house that creates the demand. Impact fees apportion a portion of the burden of known educational facilities costs among all new residential structures to meet predictable demand. Without a growth in residential units the predictable impact would not occur.

If all developments were large, impact fees would not be necessary since the degree of capital facility impact caused by a large development can be more easily determined and a capital contribution can be required as a condition of the development order.[16] An impact fee ordinance allocates the cost of growth necessitated improvements among all developments, large and small. By law, an impact fee ordinance is required to be in place if contributions or exactions are required of developments of regional impact. Section 380.06(15)(e)1. requires:

> (e)1. Effective July 1, 1986, a local government shall not include, as a development order condition for a development of regional impact, any requirement that a developer contribute or pay for land acquisition or construction or expansion of public facilities or portions thereof unless the local government has enacted a local ordinance which requires other development not subject to this section to contribute its proportionate share of the funds, land, or public facilities necessary to accommodate any impacts having a rational nexus to the proposed development, and the need to construct new facilities or add to the present system of public facilities must be reasonably attributable to the proposed development.

This legislative direction is a recognition of a fundamental fairness in capital facility funding: Why should developments of regional impact be required to contribute to the costs of required capital facilities when developments smaller in size do not? The

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[16]Section 380.06(16), Florida Statutes, requires local governments to establish and implement in any impact fee or development exaction ordinance a procedure for the granting of credits to developments of regional impact for land or public facility contributions required as a condition of a developer order.

underpinning of impact fees is another concept of fundamental fairness: Why should existing taxpayers pay the costs of capital facilities required by new development?

The Fifth District Court in concluding that the St. Johns County Ordinance violated the constitutional guarantee of adequate provision for free public schools was troubled with two provisions in the Ordinance. First, Section Six of the Ordinance provides that it is effective in a municipality only if the municipality enters into an agreement with the County to collect the fees. As a consequence, in the words of the Fifth District Court:

> We find it violates the uniform provisions in that the impact fee does not apply to all of St. Johns County much less the State of Florida.

Second, because of the alternative fee calculation provisions of Section Seven of the Ordinance, the Fifth District Court concluded that the fee "... is ultimately assessed only against those households that have children in public school." Each of these sections of the Ordinance will be addressed separately.

<u>non-countywide application of the educational facilities impact fee</u>

Although not in the context of a uniform free public school argument, the Court in <u>Home Builders v. Board of Palm Beach County Commissioners</u> rejected a challenge to a transportation impact fee on the basis that it was limited to the unincorporated area. The Court observed at page 144:

> The Florida Constitution itself provides that county ordinances of non-charter counties

> shall not be effective in a municipality if it conflicts with a municipal ordinance. Surely that in itself should not render all non-charter county regulatory fees ineffective or impact fees could only be allowed in charter counties. Furthermore, the fact that an impact fee is payable on land located in the county whereas it would not be payable on nearby land in a municipality which has opted out does not offend equal protection. Unequal or different charges or fees assessed in incorporated and unincorporated areas, like different hours for retail liquor sales and other areas of regulation which may lack uniformity, are not improper where such legislation is otherwise a valid exercise of governmental power.

On this issue, the Court further concluded at page 144:

> In addition, we would observe that for aught we know any of these municipalities which have opted out may themselves one day enact impact fees, which will tend to lessen the ostensible unequal treatment of land development in different areas.

Subsequent to the decision in Home Builders v. Board of Palm Beach County Commissioners and prior to the adoption of the St. Johns County Ordinance the following cases were decided: Seminole County v. City of Casselberry, 541 So.2d 666 (Fla. 5th DCA 1989); and City of Ormond Beach v. County of Volusia, 535 So.2d 302 (Fla. 5th DCA 1988). These decisions upheld the power of both a charter and non-charter county to impose by ordinance an impact fee countywide to fund the growth portion of those roads that constitute a countywide road system. Both decisions conclude that there is no municipal purpose served by the adoption of an inconsistent municipal ordinance interfering with the county

funding by impact fees the countywide roads for which it has been given legislative authority to provide and maintain.

The intergovernmental funding theory of the Seminole County and the County of Volusia decisions is equally applicable to the St. Johns County Ordinance. Although, as argued previously, the uniformity provision of Section 1 of Article IX does not require countywide imposition of an educational impact fee, the St. Johns County Ordinance could be amended to provide for countywide application under the Seminole County and County of Volusia rationale. What municipal purpose is served by a municipality interfering with a county requiring growth to pay its fair share of the cost of educational facilities required by the presence of new development. Under such circumstances, opting out by a municipality interjects a city protectionist attitude into fundamental planning choices demanded by the State of counties and stands the regulatory plan envisioned in the innovative Growth Management Act on its head.

the alternative calculation provisions

Under Section Seven of the Ordinance, a fee payer has the option of submitting an independent fee calculation in lieu of the formula utilized in the impact fee calculation incorporated in the Ordinance. Such right to submit an alternative calculation is customary in impact fee ordinances in recognition that developments may be uniquely designed and thus not provide the impact envisioned in the standard formulas. This custom and practice of fairness was

recognized in the <u>Home Builders v. Board of Palm Beach County Commissioners</u> decision at page 145:

> The formula for calculating the amount of the fee is not rigid and inflexible, but rather allows the person improving the land to determine his fair share by furnishing his own independent study of traffic and economic data in order to demonstrate that his share is less than the amount under the formula set forth in the ordinance.

An example of a unique residential development which might qualify for an adjustment under Section Seven of the Ordinance based on an independent fee calculation would be "housing for older persons" under the exemption from the Federal Fair Housing Amendments Act of 1988 in 42 U.S.C. § 3607(b)(2). Another example might be a residential development where all units consisted of one bedroom.

The testimony of Dr. Nicholas in his deposition that "theoretically" residential homes with children in private schools or owned by childless or infertile couples could be entitled to submit an alternative fee calculation is at best unfortunate. His solution that in the event of an adjustment, the fee payer could "warrant" that the impact fee would be paid if occupancy of the residential structure changed is an option not present under the provisions of the St. Johns County Ordinance. A more reasonable construction of Section Seven of the Ordinance consistent with impact fee theory is that an adjustment is granted only if the independent fee calculation study demonstrates that the residential structure regardless of occupancy has an impact at variance from that assumed under the Ordinance formula. Again, impact fees are

based upon the need for additional educational facilities resulting from anticipated growth of a classification of land uses not on the occupants of a particular structure at a particular point in time. The theoretical interpretation of Dr. Nicholas of the impact fee calculation adjustment potential of Section Seven of the Ordinance should be ignored.

<u>the City of Dunedin precedent for judicial guidance</u>

This Court in <u>City of Dunedin</u> held at page 321 that the water and sewer impact fee ordinance was defective for failure to provide restrictions on the use of the impact fees collected. However, in obvious recognition of the far reaching impact of its landmark decision, this Court instructed the bar and development community as well as the City of Dunedin on amendments that would remove the objectionable provisions from the impact fee ordinance. See footnote 12 on page 321 and the discussion of the ordinance on page 322 of the opinion.

The continuing validity of educational impact fees is as vital an interest to counties and school boards in 1990 as water and sewer impact fees were in 1976. As discussed in Report 89-8, Impact Fees in Florida: An Update, published by the Florida Advisory Council on Intergovernmental Relations, in July 1989, seven counties reported having imposed educational facilities impact fees: Broward County; Citrus County; Hernando County; Hillsborough County; Martin County; St. Johns County and St. Lucie County. Of these counties, five imposed the impact fee countywide

thus avoiding one of the concerns of the Fifth District Court with the St. Johns County Ordinance. Since July 1989, numerous other counties have imposed or are considering imposing educational facilities impact fees as evidenced by the filing of this brief by the Seminole County School Board and the joinder in the Amici Curiae brief by the Florida Department of Education by the School Boards of Orange, Volusia, Palm Beach and Osceola Counties.

Should this Court agree with the Fifth District Court that certain provisions of the St. Johns County Ordinance are objectionable, the Seminole County School Board urges this Court to rely on the City of Dunedin precedent and inform Florida school boards and counties on appropriate ordinance safeguards. The Seminole County and Volusia County cases are precedents for countywide imposition of educational impact fees. The independent fee calculation right could be stricken in the case of an educational impact fee since the impact on capital facilities by residential property is substantially uniform. In the alternative, the independent fee calculation could be found to only apply if the residential structure has an impact less than that assumed in the standard formula because of a unique and permanent structural characteristic or limited use. The challenge to local governments is to ensure that needed public facilities are available concurrent with future development. The availability of educational impact fees as a local choice in meeting such challenge is vital.

CONCLUSION

Counties have the home rule power to impose educational facilities impact fees on behalf of school boards. Such regulatory activity is a planning choice within the discretion of a county in implementing its local comprehensive plan. This Court should reverse the decision of the lower courts and uphold the validity of the St. Johns County Ordinance. In the alternative, this Court should clarify the necessary remedial steps to cure any objectionable provisions in the Ordinance.

Respectfully submitted,

Sarah M Bleakley for
Robert L. Nabors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amicus Curiae Seminole County School Board has been furnished by U.S. Mail to JAMES G. SISCO, County Attorney for St. Johns County, 4020 Louis Speedway, St. Augustine, Florida 32084, CHARLES L. SIEMON, Siemon, Larsen & Purdy, Dearborn Station, 47 West Polk Street, Chicago, Illinois 60605-2030, MICHAEL P. McMAHON, WILLIAM E. SADOWSKI, VIRGINIA B. TOWNES and GREGORY J. KELLY, Akerman, Senterfitt & Eidson, Suite 1700, Firstate Tower, 255 S. Orange Avenue, Post Office Box 231, Orlando, Florida 32802, WILLIAM J. ROBERTS, Roberts & Egan, P.A., 217 South Adams Street, P. O. Box 1386, Tallahassee, Florida 32302, SYDNEY H. McKENZIE, General Counsel, State of Florida Department of Education, Capitol Building, Tallahassee, Florida 32301, and JOSEPH L. SHIELDS, Florida School Boards Association, Inc., 203 South Monroe Street, Tallahassee, Florida 32301 this 9th day of July, 1990.

ROBERT L. NABORS