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. John's County, Florida

Appellants,

vs. Case No. 75,986

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

LAWSON HOMES, INC.,
a Florida corporation,

Appellees.

BRIEF OF AMICUS CURIAE

FLORIDA HOME BUILDERS ASSOCIATION IN SUPPORT OF APPELLEES, NORTHEAST FLORIDA BUILDERS ASSOCIATION, INC., and LAWSON HOMES, INC.

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STATEMENT OF THE CASE AND FACTS

On April 17, 1989, the Circuit Court for the Seventh Judicial Circuit, Judge Richard G. Weinberg presiding, declared St. Johns County Ordinance No. 87-60, the self-styled St. Johns County Educational Facilities Impact Fee Ordinance ("School Fee Ordinance") unconstitutional, as, among other things, an invalid exercise of police power and a violation of the mandate in Florida's Constitution, Article IX, section 1, for a uniform system of free public schools ("Free Schools Provision"). The Fifth District Court of Appeal affirmed the trial court's decision invalidating the ordinance and certified the following question as one of great public importance:

> Can the county commissions by enactment of a county ordinance, as was done by St. John's County in this case, impose an impact fee on all new construction to be used for new school facilities?

This court accepted jurisdiction. Fla. R. App. P. 9.030(a)(2)(A)(v); Fla. R. App. P. 9.120(b),(c).

Amicus Florida Home Builders Association ("FHBA") adopts the Statement of the Case and Facts contained in appellee's brief.

INTRODUCTION AND INTEREST OF AMICUS CURIAE

FHBA is a Florida not-for-profit corporation and statewide association of organizations and individuals who build houses, sell houses and provide related services. FHBA strongly supports adequate funding for Florida's infrastructure and services needs and has consistently advocated this position. FHBA also supports fairly apportioned impact fees. However, FHBA opposes exactions

that place an unfair and disproportionate financial burden on certain payors to fund facilities and services that benefit the entire community; this is the effect of the School Fee Ordinance.

It has long been recognized that local government should not be permitted, under the guise of regulatory fees, to exact money from any group of payors to fund facilities and services benefiting an entire community. To guard against this type of police power abuse, the courts of this state and other states have traditionally scrutinized impact fee ordinances under a "dual rational nexus test". St. Johns County asks this court to apply this nexus test in a way that would virtually emasculate the constitutional fairness standard -- the sole check on local government's police power over land development. To justify this approach, Appellants attempt to focus the Court's attention on the difficult financial demands currently placed on Florida's local governments. As such, the County "submits that the real subject matter of this appeal is growth management . . . ." Initial Brief of Petitioners [Appellants' Brief] at 8. It is not. The subject of this appeal is an ordinance which unconstitutionally places disproportionate financial burden for school construction and remodeling[1] on home builders, and unconstitutionally charges new home owners for access to public schools.

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[1] According to Amici Florida Department of Education, Florida School Boards Association, Inc., and Florida Association of School Administrators, school facilities impact fees are needed to meet the needs for "new construction, remodeling and renovation" of public schools. Brief of Amici Curiae at 1.

The demands which this state faces for education and education financing are great. But they cannot justify government's expedient embrace of unconstitutional solutions, as St. Johns County urges. And nothing in Florida's 1985 Local Comprehensive Planning and Land Development Regulation Act ("Growth Management Act") requires or even suggests that the constitutional mandates set forth to protect citizens from overreaching by local government should be bent to meet today's funding needs.

FHBA therefore simply requests that this Court apply the constitutional standards which it has previously set forth, and affirm the decisions of the courts below.

SUMMARY OF ARGUMENT

To be valid, an impact fee for any facility or service can only be levied on a development which creates the need for this facility or service. The fee cannot exceed the payor's proportionate fair share of the cost of the facility, and once collected, must then be used to specially benefit the fee payor. The School Fee Ordinance fails to meet these criteria and is therefore invalid. The ordinance would broadly exact the cost for new schools from many who will never use any County school facility and who have done nothing to increase the need for new schools. This broad exaction by county ordinance is unconstitutional.

Florida's constitution also mandates a uniform system of free public schools. Because of the constitutional requirement that impact fees be tailored as user fees, any school impact fee

ordinance will by definition charge users for the cost of public school facilities. This violates the free schools mandate.

Nothing in the Growth Management Act alters this constitutional analysis or otherwise justifies the County's School Fee Ordinance. Contrary to the County's repeated assertion, the Growth Management Act does not subject schools to mandatory concurrency. Therefore, the County's justification for imposing the school impact fee -- to meet state-mandated concurrency requirements -- has no basis in law. Rather than mandating school concurrency, the Growth Management Act, together with the Education Facilities Act, provides for intergovernmental coordination between local governments and school boards to address school facilities and planning needs.

Furthermore, neither the Growth Management Act nor Chapter 380, Florida Statutes, expand or in any way add to the County's authority to impose impact fees beyond existing statutory and constitutional limitations. The County's school impact fee fails the constitutional dual rational nexus test, and nothing in either statute otherwise validates or authorizes the fee.

Finally, invalidating St. Johns County's School Fee Ordinance will not leave the County without school funding sources. Unlike many other capital facilities, schools enjoy a range of funding alternatives. Of course even if other fair and constitutional options were not available for the County's use in addressing its school facilities funding problems, the lack of ready alternatives would not justify St. Johns County's unconstitutional ordinance.

For these reasons, St. Johns County's School Fee Ordinance is invalid, and is not otherwise mandated, justified, or supported by law.

ARGUMENT

I. THE SCHOOL FEE ORDINANCE IS AN UNCONSTITUTIONAL EXERCISE OF POLICE POWER BY ST. JOHNS COUNTY

A. The School Fee Ordinance Must Comply with a Dual Rational Nexus Test to Constitute a Valid Exercise of Police Power.

To pass muster as a valid exercise of police power under the United States and Florida constitutions, an impact fee must meet a dual rational nexus test. Contractors and Builders Ass'n. of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), cert. denied, 444 U.S. 867 (1979); Home Builders and Contractors Ass'n of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County, 446 So. 2d 140, 145 (Fla. 4th DCA 1983), petition for rev. denied, 451 So. 2d 848, appeal dismissed, 469 U.S. 976 (1984); see generally, Bosselman, Legal Aspects of Development Exactions, in Development Exactions 70 (J. Frank & R. Rhodes, eds., 1987). First, there must be a rational nexus between the new development and the service or facility being funded. Id. In essence, the County must show that the development created the need for the service or facility funded by the impact fee.[2] Second, the fee and the amount of the fee must bear a

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[2] Thus, for example, the fee cannot be levied to correct current infrastructure deficiencies.

rational nexus to the special benefits conferred upon residents of the new development. Id. This requires, among other things, that use of the revenue generated by the fee be "sufficiently earmarked for the substantial benefit" of those paying the fee. Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611 (Fla. 4th DCA), petition for rev. denied, 440 So. 2d 352 (1983) (emphasis added).

This two-part rational nexus test is crucial to the fairness of Florida's taxing scheme. It assures that general governmental services benefiting the public are paid for the by the public, and not disproportionately by any one citizen class. A fee for services which are not attributable to the activities of the fee payor and do not significantly and specially benefit the fee payor is a tax, and must be specifically authorized by general law. Dunedin, 329 So. 2d at 317; Broward County v. Janis Dev. Corp., 311 So. 2d 371 (Fla. 4th DCA 1975); Art. VII, §1(a), Fla. Const. Counties are powerless to unilaterally levy taxes. Id.

B. The School Fee Ordinance Fails the First Nexus Requirement.

The dual rational nexus test first requires the County to show that the new development will create the need for the service or facility for which it seeks to impose the fee. St. Johns County's School Fee Ordinance cannot meet this requirement since the County's own experts have testified (and it is undisputed) that the majority of new residential housing units in St. Johns County will have no impact on the need for new school facilities in the County.

The County's experts determined that 44 children attended St. Johns County public schools in 1980 for every 100 residential units in St. Johns County. (R. 459, 609).[3] The County therefore concludes that every 100 new residential units built in the County in 1990 will cause 44 new children to be added to the County's school rolls.[4] The County's statistics do not account for the fact that all new residential units will not house new County residents, and will therefore not house school children new to the St. Johns County school system. Additionally, since these 44 children will not be spread out evenly, one per house, the only reasonable conclusion is that substantially less than 44% of the hypothetical new residential units will even house children new to St. Johns County's School system. If the majority of the people charged the fee will have no need for school facilities, the nexus between residential units and school facilities is obviously tenuous, at

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[3] The record filed by the Clerk for the Seventh Judicial Circuit will be cited as "R" followed by the page numbers, i.e.: R. 1.

[4] There is actually no causal relationship between new houses and new schools. However, since the population growth which fuels the needs for new schools also creates a demand for new houses, there will probably always be a measurable correlation between new residential units and new school enrollment. But new school students are not attributable to new houses or apartments like sewer hook-ups and roads, which have been upheld. Residents of a new house will use sewers and roads. Therefore, in a real, tangible and direct way new development is fairly said to create the need for new sewers and roads, and the nexus requirement is met. Since the large majority of new home residents will not use public schools, the need for new school facilities is not even fairly attributable to (much less caused by) construction of a new house.

best -- it does not come close to the "fit" properly required under the first prong of the rational nexus test. Dunedin, 329 So. 2d at 320-21; Hollywood, Inc., 431 So. 2d at 611; see also, Nollan v. California Coastal Comm'n., 483 U.S. 825, 836 n. 4 (1987); Bosselman, supra, at 71-75, 95-103.

Faced with the overwhelming hurdle of its own statistical evidence, the County attempts to broaden the first nexus requirement to fit the School Fee Ordinance, stating: "The question is whether it is reasonable to apportion the cost of the 43 [sic] student stations to all 100 units on a pro rata share . . . ." Appellants' Brief at 35 (emphasis original). This broad policy question -- whether it is proper to tax, assess, or exact fees from citizens without children in public schools for the costs of educational facilities -- has nothing to do with the analysis under either prong of the rational nexus test.[5] The constitutional test is not "reasonableness" but "rational nexus". Id. Taxes, which must be specifically authorized by the Legislature, are the only "reasonable" and permissible method of apportioning costs throughout society to those who will not specially benefit from expenditure of the revenue collected. Dunedin, 329 So. 2d at 317. Of course, this ordinance only attempts to apportion the cost for

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[5] In fact, the broad policy question, as applied to schools, has already been answered by the people of Florida when they adopted the Free Schools Provision of the Florida Constitution. The Free Schools Provision requires that all citizens pay for public education through a uniform system of taxation so that Florida schools will be open, without charge, to individual school children.

new schools to a small segment of society, most of whom will in no way add to the need for new schools. Impact fees are permissible only to assess a development (in this case, individual residential units),[6] for costs attributable to that development (that residential unit). Id. at 320-21. Whether reasonable or not, since the School Fee Ordinance goes far beyond these constitutional constraints, it is invalid.[7]

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[6] As stated in Wald Corp. v. Metro. Dade County, 338 So. 2d 863, 867 (Fla. 3d DCA 1976), cert. denied, 348 So. 2d 955 (1977), there is "a critical distinction which must be drawn between the ordinary property owner and the subdivider." Therefore, Appellants' reliance on cases upholding subdivision dedication requirements for schools (or other facilities) is misplaced. If an entire subdivision will create the need for a school to serve that subdivision, the first nexus requirement is met and the County can require the subdivider (not individual residents) to contribute to these facilities as a condition of subdivision approval. Id.

[7] Appellants rely on McLain Western #1 v. County of San Diego, 146 Cal. App. 3d 772 (Cal. Ct. App. 1983), to support their contention that its School Fee Ordinance is "reasonable". In that case, California had passed a general law, the School Facilities Act, validating the imposition of certain conditions, including impact fees, on the issuance of building permits where school overcrowding would result from the development. The Act authorized imposition of a fee in such instances to provide funding for interim school facilities to ease the overcrowding. Cal. Gov't Code S. 65970 (West 1979). The County of San Diego passed an ordinance pursuant to the Act, and McLain challenged the reasonableness of the ordinance as applied to them. The court held that the County's ordinance, as applied to McLain, was reasonable under California's School Facilities Act. McLain is readily distinguishable from this case. Florida's Legislature has not enacted any laws validating school facilities impact fees, and the issue here is not whether the county's ordinance is a reasonable exercise of delegated authority under general law, but whether it is a constitutionally valid exercise of police power under the dual rational nexus test.

Next, Appellants attempt to persuade the Court that the relevant issue is "capacity" instead of use. This "some chance" theory is that each new house, though not statistically expected to house school children, may actually house a child in public schools now or at some point in the future. Since there is some chance of this happening, Appellants argue, the County must prepare for that contingency now by charging a fee to provide the "capacity" for the child who may or may not live in the fee payor's house.

This construct would render the rational nexus test meaningless. Under Appellant's approach, the School Fee Ordinance would be valid if 44 school children were expected to be housed in 1000 homes, since any one of the 1000 homes may house school children now or in the future and the County will need the "capacity" to house those children. Impact fees could also be assessed for any kind of county service that any future resident of a new house might need, no matter how attenuated the nexus between the new house and the service to be provided. Local governments cannot be allowed to abrogate constitutional protection by semantic manipulation. The issue is not "capacity", but whether there is a sufficient nexus between a new house and school facilities to warrant imposition of an impact fee. The only rational conclusion, when so few new homes will even house new school children, is that there is not.

FHBA's concern is legitimate and obvious. Were the court to apply the first prong of the rational nexus test as loosely as

would be required to find the School Fee Ordinance valid, there will no longer be any meaningful limitation on local government's police power. Under the guise of regulation, counties would be permitted to tax a small group of its citizens for virtually all general governmental services which are expanded with population growth, so long as experts can calculate a correlation between new houses and the demand for new services. Since the two expand together, of course, they could. The issue, then, is whether this Court is willing to abandon Dunedin and give local governments the carte blanche which St. Johns County wants. FHBA is not raising imagined fears or pointing to some hypothetical "slippery slope." St. Johns County is already considering proposals to charge new home owners, through similar impact fees, with the cost of county facilities to house additional parole officers, county inmates, county data processing personnel, senior citizens programs, county records or surplus property, state attorneys and public defenders. St. Johns County, Florida Impact Fee Methodology Report at pp. 25-28. (R. 611-615). Applying the County's reasoning, these impact fees would withstand constitutional scrutiny, since the county will need the capacity to house additional administrative personnel, inmates, public defenders, etc., and the fee payors may some day need these facilities. It would be just as "rational" under the constitutional standard to exact the imagined pro rata share for these services from new home owners as it would to charge them for schools which most will never use.

C. The School Fee Ordinance Fails the Second Nexus Requirement.

The second prong of the dual rational nexus test is even more problematic for the County. Under the second prong, the County must demonstrate a rational nexus between the fee paid and the benefit conferred upon the payor: expenditure of the fee must specially and substantially benefit the fee payor and the payor cannot be required to pay an inordinate share of the burden for new facilities that will also benefit others. Dunedin, 329 So. 2d at 321; accord, Hollywood, Inc., 431 So. 2d at 611. "The cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent." Dunedin, 329 So. 2d at 321.

Again, the record in this case clearly shows that for every 100 people taxed, more than 56 will not be benefited by expenditure of the funds. Fifty-six percent of the people paying the tax will be shouldering the burden for new school facilities to be enjoyed by others throughout the county, and which the payors will not use at all. The "substantial benefit" requirement is not measured by some general societal benefit or "public good". The fee payer must substantially benefit from use of the service or facility. Id. In this case, most will not.

Furthermore, the record in this case shows that funds collected pursuant to the School Fee Ordinance will be spent county-wide -- there are no restrictions to guarantee that the money collected in a neighborhood will be spent to provide school

facilities in that neighborhood. This also violates the second nexus requirement. For example, in Home Builders and Contractors Ass'n of Palm Beach County. v. Board of County Commissioners of Palm Beach County, 446 So. 2d 140 (Fla. 4th DCA 1983), petition for rev. denied, 451 So. 2d 848, appeal dismissed, 469 U.S. 967 (1984), the Fourth District Court of Appeal upheld an impact fee for road expansion because the ordinance established 40 zones within the county and mandated that the money collected in each zone be spent for new roads in that zone. The mandate assured that money collected from development would be spend to specifically benefit that development. Id. The School Fee Ordinance contains no such mandate.

Additionally, the School Fee Ordinance allows municipalities to opt out of the fee portion of the ordinance (so that developments within the municipality will not pay the fee), while still permitting city residents to benefit from the funds collected. This clearly violates the second prong of the rational nexus test. Fee payors who live outside of a non-participating municipality (most of whom will never benefit from expenditure of the funds anyway) cannot be forced to pay for new facilities to benefit city residents exempt from paying the fee. As stated by the United States Supreme Court in Nollan v. California Coastal Comm'n., 483 U.S. 825 (1987), local government cannot "'forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Id. at 836 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

Finally, the School Fee Ordinance does not credit fee payors for ad valorem taxes assessed on the undeveloped lot prior to construction, taxes which have already been paid to improve, upgrade and maintain the public school system. The owner of a newly constructed home is therefore taxed twice, and thereby forced to shoulder even more of an unfair burden for facilities to be used by others. See Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981).[8]

II. THE SCHOOL FEE ORDINANCE VIOLATES THE UNIFORM AND FREE SCHOOL PROVISION OF THE FLORIDA CONSTITUTION.[9]

Article IX, section 1, of the Florida Constitution mandates a "uniform" and "free" system of public schools. Scavella v. School Bd. of Dade County, 363 So. 2d 1095 (Fla. 1978). Given the constitutional limitations on impact fees in general, it does not appear that school impact fees could ever withstand challenge under the Free Schools Provision.

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[8] Although Florida courts have not yet addressed whether impact fee ordinances must credit payors for past and future taxes, the Utah Supreme Court in Banberry expressly ruled that in determining the fair share of capital costs which may be charged as impact fees a municipality must credit the payor for the relative burden "previously borne and yet to be borne by those properties." Id. at 903.

[9] Appellees Northeast Florida Builders Association, Inc. and Lawson Homes, Inc. address the specific infirmities in St. Johns County's School Fee Ordinance under the Free Schools Provision. FHBA will therefore focus on the question posed by the trial court and certified to this Court: Whether any school facilities impact fee can be valid in Florida given the constraints of the Free Schools Provision.

St. Johns County argues that its School Fee Ordinance meets the dual rational nexus test because it charges a fee only to those "'reasonably to be expected' to place students in the County's public schools." Appellants' Brief at 38. This statement is simply not true. As already demonstrated, more than 56% of the fee payors will not place children in public schools. However, this is the position which Appellants, or any other county, would have to take in attempting to justify any school impact fee ordinance under the constitutional standards governing the use of police power. The dual rational nexus test requires that the fee be paid by those who can reasonably be determined to have created the need for new schools and that the money collected from the fee payers be spent to substantially benefit the fee payers. Dunedin, 329 So. 2d at 318, 321. The very goal of the nexus test is to assure that impact fees are fairly tailored as user fees. Id. In this case, that means charging uses for the school system. If an ordinance which attempts to assess a finite group of citizens for public school facilities because they are expected to use those facilities does not violate the Free Schools Provision, the constitutional requirement is meaningless. Appellants implicitly concede this point.

When dealing with the issues raised by the Free Schools Provision, Appellants attempt to cast the County's School Fee Ordinance as a broad-based revenue raising mechanism not sufficiently linked to use of school facilities to constitute a user fee. At one point, while discussing the Free Schools

Provision, the County even states that its school impact fee operates "just like ad valorem property taxes [to] pay for schools." Appellants' Brief at 21. However, as already discussed, absent legislative authority, county governments are not constitutionally authorized to levy taxes by ordinance. A county-imposed broad-based tax, by definition, would violate the rational nexus test. The problem, again, is not simply that the County has drafted its School Fee Ordinance improperly. A fee applied broadly enough not to constitute a public school user fee will fail the dual rational nexus test. An ordinance tailored to meet the rational nexus test will violate the Free Schools Provision. Appellants attempt to balance on an imaginary line between the two requirements, and fail to satisfy either.

Appellants also argue that the United States Supreme Court's decision in Nollan v. California Coastal Comm'n., 483 U.S. 825 (1987), somehow validates the County's ordinance under the Free Schools Provision. In the portion of Nollan quoted by Appellants, the Supreme Court states that if a land use prohibition would be upheld as constitutional under the Takings Clause of the United States Constitution, an alternative exaction would also constitute a lawful exercise of police power so long as the exaction accomplishes the same purpose as the prohibition. Id. at 836-37. The County takes this language, which has nothing to do with this case, and: (1) concludes that it can prohibit people from building on their land altogether to solve its projected school funding problems; and (2) further concludes that this language from Nollan

means that nothing can prohibit the County from requiring a school impact fee in exchange for lifting the more restrictive ban on construction.

First, St. Johns County cannot ban construction to eliminate its potential school crowding problem. Even if the Legislature could authorize such a ban,[10] it has not done so. (See pp. 21-25, infra). Moreover, a moratorium under these circumstances, even if otherwise permissible, could not pass any constitutional reasonableness test. It would be completely arbitrary and irrational to ban all construction as a solution to the County's school funding problem when at least 56% of the residential units constructed would not even house school children.

Second, Nollan expressly rejects this kind of "leveraging" of police power to justify an exaction as an "exchange" for lifting the more restrictive (leveraged) regulation: "But the right to build on one's own property -- even though its exercise can be subjected to legitimate permitting requirements -- cannot remotely be described as a 'governmental benefit.' And thus the

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[10] The Florida Constitution imposes on government an affirmative duty to provide schools for Florida citizens. Art. IX, §1, Fla. Const. ("Adequate provision shall be made by law for a uniform system of free public schools."). It is therefore unlikely that a county could even attempt to solve a school funding problem by limiting the number of new school children entering the county. Additionally, a moratorium on the construction of all residential units as a means of eliminating a potential school crowding problem would not pass the more stringent analysis under the Takings Clause. U.S. Const., amends. V, XIV. A land use regulation which fails to "substantially advanc[e] legitimate state interests" or which "den[ies] an owner economically viable use of his land" violates the Takings Clause. Nollan, 483 U.S. at 834 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980).

announcement that the application for (or granting of) the permit will entail the yielding of property interest cannot be regarded as establishing the voluntary 'exchange' . . .." Id. at 833. This "kind of leveraging of the police power" is not allowed. Id. at 837 n. 5.

Although the Court in Nollan only addressed the Takings Clause issue, Nollan is significant for two reasons. The Supreme Court recognized the potential for extreme abuses of local government police power under the guise of "land use regulation". As a result, it stated that it is "inclined to be particularly careful" in applying the tests which measure the constitutionality of local government's actions in the land use area. Id. at 841.

Also, Nollan stresses that local government cannot exercise its police power in a way that singles out any one citizen to bear the burden of problems to which he or she has contributed no more than others. Id. at 841. (Government's goal may "well be . . . a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization.") In short, Nollan seems to suggest that to protect individual rights the dual rational nexus test should be applied even more stringently than it has been in the past. Nollan does not change the obvious conclusion that a school impact fee, which must be tailored to meet the rational nexus test, will charge payors for use of the school system and therefore violate the Free Schools Provision.

The County's final attempt to avoid this inevitable result deserves little mention. According to the County, as long as the penalty for failure to pay the impact fee is not denial of access to public schools, schools are "free". Since the penalty for failure to pay is that the parents will be jailed, and not that the children will be denied access to the classroom, says the County, the fee is not "tuition" or a "user fee" and therefore not a charge for schools. Appellants' Brief at 20-21. Again, constitutional mandates cannot be avoided by labels. Nollan, 483 U.S. at 838 ("Rewriting the argument to eliminate the play on words makes clear that there is nothing to it."). Regardless of the term which the County chooses for its ordinance, in substance the ordinance is only valid if charged to "new users to the extent [their] new use requires new facilities, but only to that extent." Dunedin, 329 So. 2d at 321 (emphasis added). How the County plans to enforce the School Fee is of no constitutional significance. Whether you refuse to give someone something until after they pay for it, or give it to them first and then jail them until they pay, you have required payment either way. Regardless of the penalty for failure to pay, the "something" (in this case, schools) is not free.

Although the County did not succeed in convincing either the trial court or the district court that its ordinance is constitutional, the County seems to have been fairly successful in convincing the district court panel that there is something bad (though not legally incorrect) about this result -- that finding its ordinance unconstitutional means that counties will no longer

be able to adequately fund schools. This is simply not true. There are fair and constitutionally sound funding mechanisms available to counties to address school infrastructure needs.[11] Appellants also imply that Florida's entire growth management scheme is at stake in this case. Of course, it is not. In fact, the St. Johns County School Fee Ordinance is completely divorced from the plan-based growth management process set forth by the Legislature. Appellants' growth management myths are dispelled below.

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[11] Schools have a unique funding entity in constitutionally-created school districts, authorized by Florida Constitution Article VII, section 9(b) to levy up to 10 mills ad valorem tax for school purposes. In addition, school districts are constitutionally authorized by Florida Constitution Article VII, Section 12, to issue local bonds for capital projects, and enjoy the benefit of a comprehensive state funding scheme per Chapter 236, Florida Statutes, and annual appropriations from the Florida Legislature for capital outlay, operating, and other expenses. Schools also receive funds from a variety of federal sources, including the U.S. Department of Education. And, of course, local school boards are vested with the authority to levy ad valorem taxes up to a legislatively-set cap. Thus, St. Johns County's school funding solution lies not in levying school impact fees that run afoul of the constitutional mandate for free and uniform schools, but in making the political decisions necessary to ensure adequate school funding, such as raising discretionary millage rates, seeking voter approval to raise ad valorem taxes to the constitutionally authorized cap, pursuing legislative action to authorize the maximum constitutional ad valorem levy, or even seeking constitutional revision to raise the 10 mill cap. All of these funding avenues are available to local government, and none of them violate citizens' constitutional rights.

III. THE GROWTH MANAGEMENT ACT DOES NOT MANDATE EDUCATIONAL FACILITIES CONCURRENCY, BUT INSTEAD CONTEMPLATES INTERGOVERNMENTAL COORDINATION TO MEET SCHOOL FACILITY AND PLANNING NEEDS.

A. The Growth Management Act Does Not Subject Schools To State-Mandated Concurrency.

Throughout its brief, St. Johns County repeatedly attempts to justify school impact fee imposition on the premise that school facilities are one of the public facilities and services subject to state-mandated concurrency under the 1985 Growth Management Act.[12] This position mischaracterizes the Growth Management Act's concurrency requirement and is incorrect.

Sections 163.3177(10)(h) and 163.3202(2)(g), Florida Statutes, embody the Growth Management Act's concurrency requirement. Section 163.3177(10)(h) provides "[i]t is the intent of the Legislature that public facilities and services needed to support development shall be available concurrent with the impacts of such development." Section 163.3202(2)(g) directs local governments to adopt land development regulations providing that public services and facilities are available when needed for development, and prohibits local governments from issuing development orders or permits which would result in reduction in levels of service for

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[12] For example, the County states "St. Johns County respectfully submits that the County could have imposed restrictive regulations on development limiting the amount and timing of residential development to the capacity of existing and funded educational improvements, and that such restrictions are not only authorized by law but indeed are mandated by the concurrency provisions of the Growth Management Act." Appellants' Brief at 24 (emphasis added).

affected public facilities below that set in the local government's comprehensive plan. Together, these provisions require that for certain public services and facilities, capacity must be available when needed to accommodate the impacts of development without reducing established levels of service -- that is, when development impacts actually occur.[13] Fla. Admin. Code Rule 9J-5.003(19)(1989).

To assist local governments in implementing the requirements of the Growth Management Act, including the concurrency mandate, the Legislature directed the Florida Department of Community Affairs (DCA) to adopt Chapter 9J-5, Florida Administrative Code, establishing minimum local comprehensive plan compliance review and determination criteria. §163.3177(9), Fla. Stat. (1989). In 1986, the Legislature ratified Chapter 9J-5, as amended, giving it full force and effect of law. §163.3177(10)(j), Fla. Stat. (1989).

Chapter 9J-5, Florida Administrative Code, draws a clear distinction between general "public facilities," and "public facilities and services" to which the concurrency mandate applies. Section 9J-5.003(76), defining "public facilities," reiterates the general public facilities "laundry list" in Section 163.3164(23), Florida Statutes. Schools are expressly included in the definition of "public facilities." However, for purposes of meeting the

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[13] The Act does not, as the County claims, require that "public facilities be available . . . to serve new growth and development at the time of development permitting." Appellants' Brief at 9 (emphasis added). Fla. Admin. Code Rule 9J-5.003(19)(1989).

Growth Management Act's concurrency mandate, "public facilities and services" are limited in Section 9J-5.003(77) only to roads, sanitary sewer, solid waste, drainage, potable water, parks and recreation, and mass transit, if applicable. Schools are conspicuously absent from this list, and the import of this omission is unmistakable: while schools are generally considered "public facilities" for planning and intergovernmental coordination purposes under the Growth Management Act, they specifically are not subject to the Act's mandatory concurrency requirement.

DCA's recently-adopted concurrency management systems rule, designed to assist local government concurrency implementation, expressly provides that for concurrency purposes, the only public facilities for which level of service standards must be adopted are roads, sanitary sewers, solid waste, drainage, potable water, parks and recreation, and mass transit, if applicable. Fla. Admin. Code Rule 9J-5.0055(1)(a)(1990). Again, schools are excluded from the list of public facilities and services to which mandatory concurrency applies -- another indication that concurrency is not required for school facilities. As the agency charged with interpreting the Growth Management Act, DCA's interpretation of the Act's concurrency requirement is entitled to great weight. PW Ventures, Inc. v. Nichols, 533 So. 2d 281 (Fla. 1988).

Additionally, DCA has issued numerous policy statements to guide local government implementation of the Growth Management Act's concurrency requirement. These policy statements have never included educational facilities in the public facilities and

services considered "essential for development" and therefore within ambit of state-mandated concurrency. See Florida Department of Community Affairs, Technical Memo, Vol. 4, Nos. 2, 3 (1989).[14]

This conclusion is supported by recent legislative activity. In the 1990 Regular Session of the Florida Legislature, legislation was introduced, but did not pass, to make educational facilities a required comprehensive plan element subject to the concurrency requirement.[15] This legislation would not have been introduced or needed, if schools presently are subject to mandatory concurrency. The Legislature's refusal to enact this legislation clearly evinces legislative intent that schools not be included in the public facilities and services subject to state-mandated concurrency.

When the Legislature adopted the Growth Management Act in 1985, it made a basic policy decision not to subject schools to state-mandated concurrency. The reason for that decision is clear:

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[14] In DCA's first policy statement on the concurrency requirement, DCA Secretary Thomas Pelham stated:

> Local governments are required to adopt [level of service] standards only for those facilities covered by mandatory plan elements under Section 163.3177, F.S.: sanitary sewer, solid waste, drainage, potable water, recreation, and traffic circulation facilities . . .. [Level of service] standards that are binding on development can be limited to public facilities addressed in required elements on the grounds that they are essential for development . . ..

Letter from Secretary Thomas G. Pelham to Senator Gwen Margolis (March 7, 1988) (emphasis added).

DCA has consistently maintained this position in its interpretation of the concurrency requirement.

[15] Fla. HB 2213 (1990) (died in committee); Fla. SB 2358 (1990) (died in committee).

Florida's continued growth and economic vitality should not be dictated by single-service-oriented school boards thrust in the position of becoming land use regulators by the concurrency doctrine. Instead, the Legislature directed school boards and local governments to plan cooperatively and coordinate their respective activities.

B. Both the Growth Management Act and the Educational Facilities Act Contemplate Intergovernmental Coordination Between Local Governments and School Boards In Lieu of Mandatory School Concurrency.

The fact that schools are not subject to state-mandated concurrency does not, as the County claims, leave local government without a process for addressing school planning and facility needs. Both the Growth Management Act and the Educational Facilities Act, Chapter 235, Florida Statutes, contemplate coordinated school board - local government planning to meet local school facility needs.

The Growth Management Act specifically requires cities and counties to include in their comprehensive plans an intergovernmental coordination element establishing processes to coordinate the local plan with the plans of school boards and other units of local government providing services but not having regulatory authority over the use of land. §163.3177(6)(h), Fla. Stat. (1989); Fla. Admin. Code Rule 9J-5.015 (1989). In addition, the Act authorizes an optional public buildings and related

facilities plan element addressing public schools.[16] This element "should show particularly how it is proposed to effect coordination with governmental units, such as school boards . . . having public development and service responsibilities, capabilities, and potential but not having land development regulatory authority." §163.3177(7)(e), Fla. Stat. (1989)(emphasis added). These sections provide a coordinated planning system through which school board plans are keyed to local government future population projections, future land use plans, capital improvements provisions, and other local plan elements to ensure an integrated, efficient, and consistent local government service delivery system. The Educational Facilities Act also mandates local government coordination with school boards. Section 235.193, Florida Statutes (1989), requires coordinated local government - school board planning to ensure school facilities provision coincides with, and is adequate to serve, planned local residential development. Under this section, school location must be keyed to the local plan capital improvements element, which, in turn, is based on local land use plans and projected future population and facilities demand. Together, the Growth Management Act and the Educational Facilities Act contemplate a comprehensive, coordinated local

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[16] Section 163.3177(7), Florida Statutes, lists optional elements a local government may include in its comprehensive plan, one of which includes public schools. Local governments may, but are not required, to set level of service standards for these optional elements. "[W]hether concurrency applies to facilities in optional plan elements is discretionary with the local government." Letter from Secretary Thomas G. Pelham to Senator Gwen Margolis (March 7, 1988).

government - school board planning system that obviates the need for mandatory school concurrency.

There is nothing in the Record of this case to suggest the School Fee Ordinance was developed pursuant to any of the coordination processes contemplated in the Growth Management Act or Chapter 235. The fee was based only on a ten-year-old census, and is not keyed to projected County population figures or projected school facilities demand. Summary Final Judgment Order at 7. Nor does the fee appear to be in any way linked to the County's future land use or capital improvements plans. Id. It is simply an ad hoc fee -- having little relationship to County growth management planning and no specific direction as to how, where, and when the fee is to be used. Rather than urging a construction of the concurrency doctrine that clearly contravenes Legislative intent, the County would do well to employ growth management techniques specifically endorsed by the Legislature and already available under the Growth Management Act: development of a comprehensive, coordinated local government - school board planning system to address school facilities and planning issues.

IV. NOTHING IN THE GROWTH MANAGEMENT ACT OR CHAPTER 380, FLORIDA STATUTES, EXPANDS LOCAL GOVERNMENT AUTHORITY TO IMPOSE IMPACT FEES THAT DO NOT OTHERWISE COMPORT WITH STATUTORY OR COMMON LAW IMPACT FEE REQUIREMENTS.

The County claims its School Fee Ordinance is statutorily authorized by the Growth Management Act and Section 380.06(15)(e), Florida Statutes. Appellants' Brief at 23, n. 18. This is

incorrect. Neither Chapter 163, Florida Statutes, nor Chapter 380, Florida Statutes, provide expanded substantive authority for local governments to impose impact fees that do not otherwise comport with established constitutional standards.

Section 163.3202, Florida Statutes, requires local governments to adopt land development regulations to implement their comprehensive plans and establishes minimum regulatory requirements. Section 163.3202(3) then encourages "the innovative use of land development regulations which include provisions such as transfer of development rights, incentive and inclusionary zoning, planned-unit development, impact fees, and performance zoning." The County contends this provision "specifically authorizes the County to adopt innovative financing mechanisms, such as impact fees, for educational facilities", Appellants' Brief at 33, n. 32, and claims that impact fees are a statutorily authorized "equitable growth management tool." Appellants' Brief at 10. Both of these statements are incorrect.

Section 163.3202(3) is a "laundry list" of methods generally available to local governments in implementing their comprehensive plans. The statute does not authorize or make appropriate the use of every regulatory mechanism listed to meet every local government planning or facilities need. Furthermore, although Chapter 163 authorizes local government to adopt an optional school element in its local plan and electively subject the element to concurrency, the statute does not specifically authorize school impact fees, nor does it describe such fees as "equitable." Section 163.3202(3) does

not expand school impact fees beyond existing statutory or common law authority, and certainly does not constitute authorization for local governments to levy impact fees that otherwise violate established constitutional principles.

Similarly, nothing in Chapter 380, Florida Statutes, expands local government authority to levy impact fees. Section 380.06, Florida Statutes, enacted in 1972, establishes a comprehensive regulatory framework for state, regional, and local review of large-scale developments known as developments of regional impact (DRIs). Pursuant to this scheme, local governments issue DRI development orders establishing development conditions and imposing exactions necessary to mitigate individual project impacts. In 1985, Section 380.06, Florida Statutes, was amended to include subsection 380.06(15)(e)1, which provides:

> [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.

§380.06(15)(e)1, Fla. Stat. (1989).

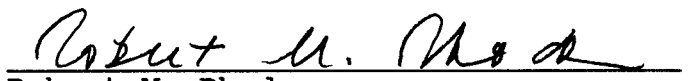
This language was enacted in response to widespread criticism that local governments used the DRI program as a convenient mechanism for obtaining needed capital improvements through DRI exactions, from which non-DRIs were exempt. Environmental Land Management

Study Committee, Final Report, 39-41 (February 1984). In adding this provision to the DRI statute, the Legislature intended only to level the development playing field between heavily-exacted DRIs and non-DRI development, not to open the door for local governments to impose any and all types of impact fees on non-DRI development, as the County suggests. Indeed, Section 380.06(15)(e)1 expressly requires impact fees or other exactions imposed under the section to meet the classic legal requirements for impact fee validity: the exactions must have a rational nexus to the proposed development, and the need for public facilities construction must be reasonably attributable to the proposed development. As previously discussed, St. Johns County's school impact fee meets neither of these requirements, and nothing in Section 380.06(15)(e)1, Florida Statutes, otherwise validates the fee.

CONCLUSION

For the reasons set forth above, Amicus Curiae Florida Homebuilders Association respectfully requests this Honorable Court to answer the certified question in the negative and affirm the opinion of the Fifth District Court of Appeal holding that St. Johns County Ordinance 87-60 violates the constitutional mandate for a uniform system of free public schools and is therefore invalid and unenforceable.

Respectfully submitted,



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