THE SUPREME COURT OF FLORIDA
TALLAHASSEE

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ST. JOHNS COUNTY, FLORIDA, et al.,

Appellants,

vs.

CASE NO. 75,986

NORTHEAST FLORIDA BUILDERS ASSOCIATION, INC., etc., et al.,

Appellees.
_____/

BRIEF OF AMICI CURIAE

DEPARTMENT OF EDUCATION, STATE OF FLORIDA; FLORIDA SCHOOL BOARDS ASSOCIATION, INC. and FLORIDA ASSOCIATION OF SCHOOL ADMINISTRATORS IN SUPPORT OF APPELLANT, ST. JOHNS COUNTY, FLORIDA

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE and the applicable Brief have been furnished by mail to SIEMON, LARSEN, and PURDY, Dearborn Station, 47 West Polk Street, Chicago, Illinois 60605-2030, Attorneys for ST. JOHNS COUNTY, FLORIDA and to MICHAEL P. McMAHON, of AKERMAN, SENTERFITT AND EIDSON, 255 South Orange Avenue, Orlando, Florida 32801, Attorney for Appellees, by U.S. Mail, this 11th day of June, A.D. 1990.

Joseph L. Shields

JOSEPH L. SHIELDS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Amici Curiae incorporate herein by reference the STATEMENT OF THE CASE AND FACTS contained in the Brief of Appellant, ST. JOHN'S COUNTY, FLORIDA.

INTEREST OF AMICI CURIAE

Amicus, FLORIDA SCHOOL BOARDS ASSOCIATION, INC., is a non-profit association which represents all sixty-seven district school boards before governmental bodies. Its membership is comprised totally of all elected school board members throughout the State of Florida. All such board members are members of the Association.

Amicus, FLORIDA ASSOCIATION OF SCHOOL ADMINISTRATORS, is a non-profit association which represents district school superintendents and administrators before governmental bodies.

The members of both associations are vitally interested in this case since an adverse ruling could cost the school districts millions of dollars in impact fees.

It is estimated by the Commissioner of Education and a distinctive Facilities Task Force that over the next 10 years Florida Kindergarten-Grade 12 schools will need $18,000,000,000 for new construction, remodeling and renovation. Of those needs it is estimated that there will be a shortfall of $5,100,000,000. Impact fees will assist in meeting this shortfall of funds.

Several of Florida's school districts receive impact fees as collected by their respective counties. Such fees are vital and

help meet the substantial need for educational facilities. Over the past few years more than $30,000,000 have been collected and expended on Kindergarten - grade 12 school facilities. If this Court found that impact fees per se are not constitutional it is more than conceivable that a devastating financial burden would be placed upon those several school districts if they were required to repay the impact fee monies which they have already expended.

It is therefore important to point out that this Court's ultimate decision will have broad and critical consequences for each of the school districts already receiving impact fees as well as those who are in the process of promulgating such fees.

SUMMARY OF ARGUMENT

Amici Curiae argue that the State Constitution and Statutes permit the imposition of impact fees for the purpose of supplementing other funds allocated for school district capital improvements.

Impact fees for purposes of supplementing the funding of school construction do not contravene Section, 1, Article 14, State Constitution.

THE STATE CONSTITUTION AND STATUTES PERMIT THE IMPOSITION OF IMPACT FEES FOR THE PURPOSE OF SUPPLEMENTING OTHER FUNDS ALLOCATED FOR SCHOOL DISTRICT CAPITAL IMPROVEMENTS.

Section 1, Article IX, Constitution of the State of Florida, states in relevant part:

> "Adequate provision shall be made by law for a uniform system of free public schools..."

Therefore, one must look to legislative enactments and judicial decisions to determine the adequate provision which has been made by law. The legislature has enacted the "Florida school code" consisting of all laws relating to public education. See § 228.001, F.S. Such laws are primarily contained within Chapters 228-246, Florida Statutes. Analysis of the pertinent provisions of these statutes leads to the conclusion that impact fees may be imposed for the purpose of supplementing other funds allocated for school district capital improvements.

Section 236.24(1), Florida Statutes, provides:

> "(1) The district school fund shall consist of funds derived from the district school tax levy; state appropriations; appropriations by county commissioners; local, state, and federal school food service funds; any and all other sources for school purposes; national forest trust funds and other federal sources; and gifts and other sources." (emphasis supplied)

The legislative intent is clearly to place no restrictions on the sources of revenues that can be included in the district school fund of any school district. Consequently, the proceeds from an impact fee can be deposited in the district school fund as long as such a fee is provided for by law. Furthermore, it is

clear that once such revenues are part of the district school fund, they may pursuant to Rule 6A-2.0200(1)(f), F.A.C., be transferred to the district capital improvement fund established under § 236.35, F.S., which states:

> "The district capital improvement fund shall consist of funds derived from the sale of school district bonds authorized in s. 17, Art. XII of the State Constitution of 1885 as amended, together with any other funds directed to be placed therein by regulations of the State Board of Education, and other similar funds which are to be used for capital outlay purposes within the district."

By virtue of §§ 236.24(1) and 236.35, F.S., the legislature is providing for the possibility of funding sources in addition to those expressly designated by the constitution and statutes such as ad valorem taxes (s. 9, Art. VII, State Constitution; § 235.25, F.S.), proceeds from the sale of school bonds (s. 11, Art. VII, State Constitution; § 236.36, F.S., et seq), and allocations of state funds through the Florida Education Finance Program. (236.02, F.S., et seq.).

Furthermore, the legislature has provided to school districts, by law, the authority to choose impact fees as a source of such funds. Section 230.03(2), Florida Statutes, states:

> "(2) SCHOOL BOARD. -- In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards shall operate, control, and supervise all free public school in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law." (emphasis supplied)

This strong grant of power is consistent with the constitutional status of the district school boards and is commonly referred to as the "home-rule" provision. Both the Florida Attorney General and the appellate courts have recognized the legislative intent that this grant of power should be given the full, literal scope of the language used, ie, any power not expressly prohibited.

In 1983, the State Auditor General requested and received an Attorney General's Opinion on the following question:

> "What is the general operation and effect of Ch. 83-324, Laws of Florida, which amends § 230.03, F.S., not only as to the fixing, prescribing, determining, and otherwise delimiting of the powers, duties, and functions which school boards must or may exercise or carryout, but also upon the method, manner, or means by which their powers, duties, and functions must or may be carried out?" AGO 83-72, October 18, 1983

It was Ch. 83-324, Laws of Florida, which amended § 230.03(2), F.S., into its present home-rule form. Therefore, the above-question in essence, requests a legal analysis of the impact of this grant of power. Indeed the Attorney General provided such an analysis in a thoughtful, comprehensive, well-researched opinion. Id.

At the outset the Attorney General notes that:

> "Prior to this amendment, school districts and their governing boards have historically been treated in the same manner as special districts of the state, that is, having only such power and authority as is granted by the Legislature." Id.

After discussing the plain meaning of the word "expressly" and the applicable principals of statutory construction, the conclusion reached was that:

> "Thus, I am constrained to conclude that unless expressly prohibited by the State Constitution or general law, a district school board may exercise any power for school purposes in the operation, control, and supervision of the free public schools in its district." Id.

In addressing the legal issues arising from this conclusion, the opinion explicitly recognized the "'home-rule' power" granted to district school boards by the enactment and its analogy with the home-rule powers of municipalities. Drawing upon this analogy and the case law construing municipal home-rule powers, the opinion, in para materia, analyzed the home-rule provision in relation to the Florida school code, chs. 228-246, F.S. Id.

The conclusions reached were that the only limitations on a district school board's exercise of the home-rule power are that:

> "...in the case of a direct conflict between a state statute and a rule, policy or other form of legislative action taken by a district school board, the state statute would prevail";
>
> and,
>
> "...such boards have a continuing responsibility to act consistently and in harmony with applicable rules and minimum standards of the state board [of education]," Id (brackets supplied).

In Sulcer v. McFatter, 497 So.2d 1349 (Fla. 4th DCA 1986), the court also relied upon the plain meaning of the phrase "may exercise any power except as expressly prohibited by the State

Constitution or general law" to conclude that a school board had the discretionary authority "to reimburse employees for attorney's fees and costs in instances deemed appropriate," notwithstanding the absence of a statute authorizing such action. Sulcer at 1350.

The contention of the amici curiae is that district school boards have the power to take actions that will supplement the funds available to them for capital projects. Insofar as general law is concerned there is no express prohibition against a board utilizing an impact fee as the means of so doing. Theoretically, a district school board could impose such fees on its own authority. However, as a practical matter there may be no way of effectively implementing such a fee except by cooperative, and collaborative actions in concert with the county commission. The concept of acting in coordination with the county commission is not only within the home-rule power of the school board it is expressly mandated by statute. See § 235.193, F.S.

The degree of coordination between school boards and local governing bodies required by the statute in planning for construction and opening of public educational facilities is very extensive, to wit:

> 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. Such planning shall include the consideration of allowing students to attend the school located nearest their homes when a new housing development is constructed near a county boundary and it is more feasible to transport the students a short distance to an existing facility in an adjacent county than to construct a new facility or transport students longer distances in their county of residence. Such planning shall also consider the effects of the location of public education facilities, including the feasibility of keeping central city facilities viable, in order to encourage central city redevelopment and the efficient use of infrastructure and to discourage uncontrolled urban sprawl.
>
> (2) A school board, upon the request of a local governing body within its district, shall submit in writing to the local governing body an official statement clearly showing the capability, or lack thereof, of the existing public school facilities in an area being considered for development, redevelopment, or additional development to absorb additional students without overcrowding such facilities.
>
> (3) If there are no public school facilities in existence in the area of proposed development, the school board is required to provide the local governing body with the projected delivery date of such facilities in that area.
>
> (4) The general location of public educational facilities shall also be consistent with the capital improvements plan found in the comprehensive plan of the appropriate local governing body developed pursuant to s. 163.3177(3) and in accordance with s. 163.3194(1).

Given this level of mandated cooperation, it is inconceivable that the Legislature could have intended to proscribe coordinated action for purposes of funding the construction. There is a comprehensive statutory process intended to result in the funding of school district

construction. See § 235.149, 235.15, 235.16, 235.18, 235.41, 235.42, 235.4235, 235.435, 236.24, 236.29, 236.35, F.S.

The process provides funds from a menu of sources such as ad valorem taxes, school bonds, and legislative appropriations. Nonetheless, there occurs with significant frequency, situations, where the funding from these sources is insufficient to enable construction to take place as planned and approved. Such situations can be devastating to planning and growth management in relation to the development of local school systems and the counties in which they operate. This can be greatly exacerbated in times of rapid population growth and redistribution as now exist. Any lawful means of avoiding the derailment of thoughtful planning is clearly consistent with public policy. The court is urged to exercise its judgment in a manner which seeks to sustain, whenever possible, the legality of the means that school districts and local governing bodies devise to avoid the disruption of planned development and growth management.

The legal tests for determining the constitutional and statutory validity of a county impact fee ordinance are addressed elsewhere in this brief. Given that such ordinances can be enacted under those tests, the amici curiae fully support the Appellant's contention that the St. John's County ordinance in question meets these tests. In a broader sense it is contended that in view of the home-rule powers of the school districts and the authority of local governments there remains for resolution

only the issue of whether impact fee enactments can be used for the purpose of supplementing the funding of school construction.

IMPACT FEES FOR PURPOSES OF SUPPLEMENTING THE FUNDING OF SCHOOL CONSTRUCTION DO NOT CONTRAVENE SECTION 1, ARTICLE IX, STATE CONSTITUTION.

Because it is the focal point of the legal analysis of the issues in this case, the pertinent language of § 1, Art. IX, State Constitution bears repeating:

> "Adequate provision shall be made by law for a uniform system of free public schools..."

The preceding section makes the point that the provision which has been made by general law, that is, the Florida school code, chs. 228-246, F.S., provides for a district school board to exercise its home-rule powers, in cooperation with the county commission, for purposes of establishing impact fees to supplement the funding needed for school construction projects. This section makes the point that such collaborative action and the impact fees so established do not violate this constitutional mandate, but rather support it and further its implementation.

The trial court, and the appellate court by affirmation, engaged in substantial discussion of this constitutional mandate, but left unclear the relationship between the discussion and the decision. What is clear is that the learned lower court judges misapprehended the matter at the conceptual level and thus, metaphorically, had the cart pulling the horse, in their reasoning. The simple matter of putting the horse before the

cart leads to a simple, more straightforward analysis, which favors the constitutionality of the impact fees.

The primary referent of the term "public schools" is the educational opportunity that is available, not the school buildings. While the nature and extent of the physical facilities have a relationship to providing an adequate educational opportunity, the constitutional provision cannot be construed to mean that school buildings must be "free." It is access to the educational curricula of a public school system which must be free.

The Florida Supreme Court recognized this meaning in Scavella v. School Board of Dade County, 363 So.2d 1095 (Fla. 1978). This case upheld the constitutionality of a statute relating to adequate educational programs for disabled students. The Court continually referred to § 1, Art. IX, State Constitution, as providing a "right to a free education," that makes the state "responsible for providing adequate educational opportunities for all children." Scavella at 1098-1099. (emphasis supplied).

The term "free public schools" means that every Florida resident can enroll his or her child in a school without having to pay a tuition fee, or other direct charge, to do so. The Scavella court recognized this as well, stating:

> "These schools are funded by governmental sources and nonresidential tuition fees, not by the people utilizing them, except indirectly as taxpayers." Scavella at 1098. (emphasis supplied).

The emphasis in the Court's statement must be placed on the term "governmental sources," because the court could not have intended to say that taxes are the sole governmental source of funding. School bonds, for example, are a commonly used governmental source of school funding. There was no need for the court to mention other sources of governmental funding because the case before it involved a programmatic issue not a facilities issue to which school bonds would relate.

The pertinent distinction is between indirect funding through governmental sources and direct funding through tuition, registration, or matriculation fees. "Free public schools" means that the cost of providing an adequate educational opportunity to all children is to be funded by governmental sources not tuition charges. Impact fees are an indirect governmental source not a direct tuition charge and do not violate § 1, Art. IX.

The trial court, and appellant court by affirmation, misapprehended this distinction and were consequently led into a false trail of reasoning. Given the distinction, the conclusion is inescapable. The Constitution creates the county school district as the basis unit of the state system. See § 4, Art. IX, State Constitution. Therefore, the resident of any county can enroll his child in that county school district without paying a tuition charge. This is unaffected by whether there is an impact fee in that county. The constitutional right to enroll one's child in the school system is unaffected by whether or not

there has been an indirect governmental source of funding through an impact fee.

An impact fee by its very nature relates to the burdens and stresses placed on existing public facilities by population growth. It is the public facility infrastructure whose cost is partially defrayed through impact fees.

In a county which experiences stressful population growth but has no school impact fee, a newly resident family can enroll its children in the district school system and those children will receive the full range of educational opportunity which the school system provides. In due course, the children will be assigned to attend in the appropriate grade level in this or that particular building. The same is true in a county which experiences stressful population growth and has an impact fee.

The differences have to do with such things as crowded classrooms, time and distance of transportation, and supporting amenities. The free public schools remain free in the constitutional sense. Incurring an impact fee is a function of where a family chooses to relocate its residence. It is not a function of whether the children can be enrolled in the local school system.

The courts below made a parallel conceptual misapprehension on the matter of the "uniformity" requirement in § 1, Art. IX. Uniformity does not have as its primary referent, the sources of funding of a district school system. Uniformity primarily refers to having substantially similar educational opportunities

throughout the state. In School Board of Escambia County v. State, 353 So.2d 834 (Fla. 1977), the Florida Supreme Court found that:

> "By definition, then, a uniform system results when the constituent parts...operate subject to a common plan or serve a common purpose." Escambia at 838.

The Florida school code, chs. 228-246, F.S., is the common plan which serves the common purpose of enabling all Florida families to give their children the opportunity for an adequate education. The code addresses all of the constituent parts of the system. The uniformity depends upon curriculum frameworks and requirements, grading and graduation standards, qualified instructional and administrative personnel and a host of other factors in addition to physical facilities.

What preserves the uniformity is planning. It is planning that relates the number of teachers by subject and grade level to the number of children to be educated. It is planning that ensures that the above-relationships mesh properly with curriculum content and organization. It is planning that results in the facilities within which the educational objectives are pursued.

Planning is driven to a large extent by population. Particularly, this is the case in periods of rapid population growth and shifts. Hence, as part of making adequate provision for a uniform system of free public schools, the legislature has mandated coordination between county commissions and district school boards to address the need for school facilities in

relation to the growth and development of the county. See § 235.193, F.S. Likewise, planning and coordination are inherent in the systematic process of capital outlay budgeting.

Nonetheless, there can often be a shortfall in the funding needed to carryout this planning. State revenues can be less than anticipated. School bonds can be defeated in a referendum. Property values and hence ad valorem taxes can be reduced by shifting populations. When short falls occur planned growth can be severely disrupted and the required uniformity can be threatened. The granting of home rule powers to school districts and other local governments enables the establishment of impact fees and serves to protect the required uniformity.

In this regard, the use of impact fees through local legislation is no different than the creation of a special school taxing district within a county through a special school act of the legislature. The constitutionality of such a special act was upheld by the Florida Supreme Court in relation to the forerunner of § 1, Art. IX, with the court saying:

> "Chapter 63-1766 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 same system of school government will obtain, although it is hoped more effectively with improved facilities provided for by the statute. (citation omitted)" State v. Board of Public Instruction of Pasco County, 176 So.2d 337, 338 (Fla. 1965)(court's emphasis)

The fact that some counties may have school impact fees while others do not no more contravenes the uniformity

requirement than the establishment of the fee violates the free schools requirement. In both respects one can equally share the court's hope that improved facilities will yield more effective education.

The trial court's, error, and that of the appellate court was in conceiving that each school district having the same funding sources is the horse that pulls the uniformity cart. To the contrary, the safeguard of uniformity is not restricting otherwise lawful sources of funding. Rather, the safeguard is the system of planning and approval. The uniform and free nature of the public schools is obtained by enabling lagging districts to catch-up not by forcing advancing districts to slow down or wait.

The opportunity to exercise local legislative powers through school board resolutions and county commission ordinances is what the general law provides as another means to ensure that it has made adequate provision for a uniform system of free public schools. Provided that other constitutional requirements are met, an impact fee not only conforms to the constitutional mandate for a free and uniform statewide school system, it furthers the implementation of the mandate.

The court is urged in the strongest possible terms to recognize that the Constitution and laws provide a legal pathway to the goal of a valid impact fee for school purposes. To stay on the pathway, the enactments embodying the impact fee need only avoid the pitfalls on either side. On the one side, the

enactment cannot be a disguised tax. It must have the proper national nexus and it must target the payment burden appropriately. See City of Dunnedin, supra. On the other side, the enactment cannot be a disguised tuition fee or a direct payment for enrolling a child in the school system. An impact fee enactment which stays on the pathway is a proper governmental source of funds to supplement the financing of school construction.

The amici curiae fully support the position of the Appellants in regard to St. John's County Ordinance 87-60. Its exaction on newcomers to the county is clearly equitable in relation to existing residents who have been carrying the ad valorem tax burden of the school system and other government costs. New development has an impact on the local infrastructure, including schools as well as roads, sewers, drainage, utilities and other public facilities. The St. Johns County ordinance meets all of the legal tests and should be upheld.

The St. John's County ordinance is not the only effort that has been made to enact local school impact fees. From the perspective of the amici curiae, the critical and paramount importance of this case is the recognition that the legal pathway to a valid enactment exists. Other counties which have or are considering impact fees are in need of the court's instruction and guidance. The welfare of the people of this state can only be enhanced by judicial validation of proper school impact fees

and judicial guidance in achieving them. The amici curiae entreat the court to provide this recognition and guidance.

RESPECTFULLY SUBMITTED,

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