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,

Petitioners

vs.

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

Respondents.

CASE NUMBER 75,986

CERTIORARI REVIEW OF DECISION OF DISTRICT COURT OF APPEAL, FIFTH DISTRICT

ANSWER BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Petitioners' Statement of the Case is accepted as substantially accurate, except in three respects. First, it is incorrectly stated that Florida Home Builders Association is a party to this case. Northeast Florida Builders Association, Inc. and Lawson Homes, Inc. were the Plaintiffs below, and are the Respondents in this proceeding. Second, the Circuit Court decision affirmed by the District Court was based on the entire record and not just the evidentiary items identified by Petitioners. Third, the Court does not have conflict certiorari jurisdiction because no conflict exists with any prior Florida decision. Respondents would also add that the Circuit Court clearly ruled St. Johns County Ordinance 87-60 unconstitutional because it violated the guarantees of a free and uniform system of schools, was preempted by state legislation, amounted to an unconstitutional tax and unlawfully delegated authority.

STATEMENT OF THE FACTS

Respondents accept Petitioners' Statement of Facts, except for the portions which characterize prior court decisions concerning impact fees and the legal nature of impact fees. These passages are in the nature of legal argument. However, their statement is not sufficiently comprehensive to inform the Court of the matters of undisputed fact before the trial court. The following augmented statement of facts is provided to supplement Petitioners' statement.

In 1986, St. Johns County began studying impact fees as a revenue device. The county retained a consultant, Dr. James C. Nicholas, to prepare a methodology and study on which to base a set of impact fees. At the St. Johns County School Board's request, the County broadened

Dr. Nicholas's task to include a school impact fee. (R. 355-56; 388-89.) The cost of the school impact fee study was paid by the school district. (R. 329-30.) In its formal resolution of June 8, 1987, the School Board resolved:

> Now, Therefore, Be It Resolved that the School Board of St. Johns County requests that the Board of County Commissioners implement a Public Educational Impact Fee for the construction and development of school facilities because of the fiscal burden that the public school children from new developments are placing upon the public school system.

(R. at 561; App. Tab 5.)

Dr. Nicholas' goal was to develop an impact fee that would cover the fiscal burden caused by children from new homes going to public school. (R. 391, 453.) To do this, he calculated what it cost per student to build a public school. (R. 396-97.) Dr. Nicholas concluded that 101 square feet of school space was required for each elementary school child, at a cost of $52.53 per square foot. For high school students, it was 125 square feet per student, at $67.63 per square foot. On average, he concluded that it cost $6,589.00 per school child to build the space to be occupied in public schools, including site acquisition costs of $0.11 per square foot. (R. 454-55.)

Dr. Nicholas also found, however, that approximately 40% of St. Johns County's children do not attend public school. (R. 458.) He also found that on average there are 0.44 public school children per single-family home. (He found other ratios for other types of residences.) Applying the single-family home ratio to the per student cost calculations, Dr. Nicholas concluded that it took $2,899.00 per new single-family home to build the school space anticipated to be needed to serve the children who would live in new homes. (R. 459.)

Dr. Nicholas did not, however, develop any correlation between growth in school population and increased construction of new homes. No determination was made as to the extent to which new students entering the school system reside in new residences, as opposed to being the product of natural growth in the size of families residing in preexisting residences. (R. 423-27.) Rather, Dr. Nicholas based his calculations upon extrapolations of 1980 census data. (R. 484.)[1]

He then examined existing school district revenues to determine a "credit" for the school taxes the residents of new homes would pay over the years. (R. 417-22.) Finding that existing taxes and revenue sources would produce $2,451.00 (current value) per single-family home, Dr. Nicholas concluded that for each new single-family home, there was on average $448.00 in costs for building new schools that would not be covered by existing revenue mechanisms.

In August 1987, Dr. Nicholas submitted his report on impact fees to the County. His report included a five-page statement of his school impact fee methodology and calculations. (R. 20-25; App. Tab 3.) In October, 1987, the County enacted Ordinance 87-60, the school impact fee ordinance. (App., Tab 4.) The Ordinance declares that it is intended to create a system by which a person building a residence, or making an improvement to an existing residence, is required to pay a sum of money approximating the capital costs of new schools to the extent the new residence is "expected to place students in the public schools of St. Johns County." The Ordinance establishes a schedule of charges for houses, duplexes, apartments and other types of

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1 Dr. Nicholas testified in deposition that if he were preparing a school impact fee methodology currently, he would "factor forward so that today we could give a 1988 estimate of those ratios, rather than using 1980 figures." (R. 487.)

residences, all according to Dr. Nicholas' calculations as to the average number of children residing in each type of residence.

To the extent a building permit concerns an activity not on the fee schedule adopted by the County Commission, the County Administrator is directed in § 7(A)(5) of the Ordinance to seek a determination by the School Board of the amount that must be paid. The County Administrator must collect that amount.

The monies paid are placed in a segregated fund, which is paid over to the School Board at least monthly, except that the County pays itself an administrative charge of up to 3% of the monies collected. The School Board is to keep the funds in a separate trust fund for use solely in constructing and equipping schools and other capital facilities. Ord. 87-60, §§ 8(C), 10 (App. Tab 4.). If the School Board does not spend the funds within six years, the "then current landowner" may obtain a refund by making application within 180 days of the expiration of the six-year period. Absent a timely refund application by the "then current landowner," there is no right to a refund. Ord. 87-60 § 11(B). (App. Tab 4.)

Several empirical studies have been conducted to determine who bears the economic burden of impact fees.[2] Dr. Nicholas testified that

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2 Although the County argues throughout its Initial Brief that, under various economic theories, "logic" and "common sense," the financial burden of impact fees is not on the home buyer, the record and the County's own expert establish the contrary. On deposition, Dr. Nicholas reaffirmed what he wrote in 1987:

> "According to economic theory, the final burden of regulatory exactions would vary.... The empirical studies, however, indicate that the burden falls solely upon the purchaser, at least in rapidly growing areas."

Nicholas, Impact Exactions: Economic Theory, Practice and Incidence, 50 Law & Contemp. Probs. 85, 98

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every empirical study done to date concludes that in areas experiencing rapid growth, such as St. Johns County, the economic burden falls solely on the purchaser. (R. 440-43.) St. Johns County is a rapidly growing county and will continue to experience rapid growth based upon the projections of the University of Florida Bureau of Economics and Business Research. (R. 444, 449-50.) The County has acknowledged that the burden is borne by the residents of new homes (R. 121-122),[3] and the Ordinance recognizes this by providing in § 11(B) that refunds are to be made to the "then current landowner," rather than whoever initially paid. Impact fees increase the cost of construction and thereby increase the prices of new homes, reducing the affordability of housing. (R. 222.)

There is no procedure by which the School Board must obtain the County's permission before spending the funds. (R. 348.) Once the funds are transferred to the School Board, they are considered the School Board's funds. (R. 350.)

The Ordinance does not apply to all new residences within the County. Municipalities are exempted unless voluntarily electing to impose the school impact fee. Ord. 87-60, § 6. The City of St. Augustine Beach is the only city to do so. The largest city, the City of St. Augustine, does not. (R. 342-43.) Although not paying the

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(1987). (R. 584.) There may be many theories of what might happen, but all empirical studies concur on what does happen. To the extent "common sense," rather than evidence in the record, is relevant, it is submitted that when building costs go up, prices will go up.

3 In the Circuit Court, the County took the position that giving refunds to the "then current landowner" was quite proper because "the homebuilders have <u>already</u> passed the cost of the fee through to the consumer." (Emphasis in original.) (R. 122.) This position was supported by Dr. Nicholas' deposition testimony.

fees, families in new homes in the cities benefit equally. Schools built anywhere in the school district benefit everyone because enrollment zones shift to accommodate the children. (R. 428, 431-36.) Dr. Nicholas expressed concern in public meetings that the Ordinance should apply county-wide in order to avoid the revenues being expended to benefit persons who did not pay the fees. (R. 427-33.) The St. Johns County Commission rejected this recommendation.

The school impact fee can also be avoided in the unincorporated county. Under § 7(B), a person can show the School Board that no charge should be imposed because no students would be placed in public schools. The School Board adjusts the fee "to that deemed to be appropriate", and the County Administrator collects it accordingly. Dr. Nicholas explained:

> Q. How would somebody show that they are going to have a lesser impact?
>
> A. Several ways. The most common is--let's take the hypothetical that somebody is going to develop an adult retirement living facility. They would simply come in and demonstrate that it is an adult congregate facility, and that would be sufficient. If, in fact, it is one. If it's a very flexible unit that could be used for an ACLF or something else, standard multi-family for example.
>
> Q. I'm sorry. UCLF?
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> A. ACLF: adult congregate living facility. If it could be equally used for regular multi-family, then typically the applicant, the developer, is asked to devise some type of assurance that they will not convert it unless and until the fee is paid. So both of the procedures. One of them is you simply look at the development, and if it's obvious that that's what it is, fine, then you accept that. If it's not obvious that it is committed to that particular use, that it could be used for other things, you ask for some assurance that the fee would be paid if and when they convert.
>
> Q. How about someone who came in and showed that all their children are in private school?

A. This one always comes up. Or how about the adult couple? They are all grown.

Q. Right.

A. Theoretically, yes, they could be exempted from it. But what they would have to do is they would have to warrant that if the occupancy of that home ever changed so that people who did not have those same situations came in, that the fee would have to be paid. Conceptually, people can come in and do it. I think the title problems that they create on that unit are unbelievable, and I would be amazed if anybody would ever want to do it. There is nothing to prohibit them from exercising that.

Q. And the childless, infertile couple?

A. Same thing. Again, they would have to warranty. [R. 495-97.]

Thus, a family could obtain an exemption by warranting that their children would attend private schools and that the fee would be paid later if there was a change in use which placed children in public schools.

As soon as Ordinance 87-60 became effective, this suit was filed.

SUMMARY OF ARGUMENT

The St. Johns County School Impact Fee Ordinance violates Florida's constitutional guarantee of a uniform system of free public schools. The goal of the Ordinance, as evidenced by the School Board Resolution requesting enactment and by the terms of the Ordinance itself, is to make the residents of new homes pay for the classrooms needed to serve their children. The Constitution requires that the education system be financed indirectly through taxation, not directly by the families anticipated to send their children to public schools.

Moreover, the Legislature has created a comprehensive system of school funding designed to assure uniformity throughout the state. The Ordinance is outside of this uniform system. The legislative scheme preempts the field of school funding. Tinkering with school funding by counties will skew the allocation of resources per child and is outside the authority of county government. The Growth Management Act does not alter this legislative program.

Ordinance 87-60 fails to meet the dual rational nexus test for distinguishing appropriately assessed impact fees from unconstitutional taxes. The majority of new homes have no impact on the school system, but the Ordinance requires the owners to show that there is no impact. This skewed system amounts to an unconstitutional tax. Further, the funds generated by the fee are not targeted to substantially benefit the feepayer. Because the school district is county-wide, the entire district reaps the benefit derived from payment by a few. This problem is exacerbated by the fact that the Ordinance is not effective county-wide.

The Ordinance unlawfully delegates power to the School Board, and authorizes the unlawful transfer of county funds to the School Board.

ARGUMENT

I. EDUCATIONAL IMPACT FEES, SUCH AS ORDINANCE 87-60, VIOLATE THE FLORIDA CONSTITUTIONAL GUARANTEE OF FREE PUBLIC SCHOOLS.

At the heart of this case is the right of Floridians to free public schools. The parties agree that this right is guaranteed by Article IX, Section 1 of the Florida Constitution. Scavella v. School Board of Dade County, 363 So. 2d 1095 (Fla. 1978). The parties agree that the constitutional guaranty of free public schools is a fundamental right. The parties agree that no tuition can be charged as a condition for attending public schools. The parties agree that everyone may be required to pay school ad valorem taxes, sales taxes and other general taxes used to finance public schools. Between these islands of agreement, however, there is a vast gulf.

The County requests the Court to rule that our Constitution protects only the right of a child not to be charged at the schoolhouse door. It is respectfully submitted that our Constitution is not so weak as to allow by artifice that which cannot be done directly. The Court should hold that our Constitution mandates any school financing scheme to be as blind to school attendance as it must be to race. The Court should hold that St. Johns County cannot fund anticipated shortfalls in school finances by placing the burden on the families who, in the words of the Ordinance, "may reasonably be expected to place students in the public schools of St. Johns County."[4]

The County and Amici plead for the Court to limit the fundamental right to free schools. They say education has great financial needs. They urge the Court to allow "flexibility" and "creativity," to say

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4 St. Johns County Ordinance 87-60, §5(A).

"growth management" overrides constitutional values. The Department of Education pleads that even with careful planning, there can be unmet needs if voters defeat bond issues, or if the Legislature is stingy in its appropriations, or if ad valorem tax revenues are reduced. Undoubtedly, public schools throughout Florida could use more funds. That need, however, provides no excuse for abrogating constitutional rights.

The answer to school funding needs lies not in the truncation of constitutional rights, but in adherence to the constitutional mandate that there be a uniform system of free public schools. The answer is to be found with the Legislature, mandated by our Constitution[5] to provide for that uniform system; with the voters who must approve most school bond issues;[6] and with the willingness of school boards to set millage rates at the appropriate levels,[7] as our Constitution provides.[8] The Constitution would be eviscerated if the Court permitted the County's solution of placing the cost of building new schools on the families who need the schools in order for their children to have adequate school facilities.[9]

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5 Article IX, § 4, Florida Constitution. "Adequate provision shall be made by law for a uniform system of free public schools...."

6 Article VIII, §12, Florida Constitution.

7 Section 230.23(10)(a), Florida Statutes.

8 Article IX, §1, Florida Constitution. "The school board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein."

9 As the California Supreme Court replied to similar pleas for creative flexibility:

> [D]ue to the legal limitations on taxation and spending..., school districts do indeed operate under severe financial constraints. However,

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A. The St. Johns County's School Impact Fee Is A User Fee.

The concept behind impact fees is to require new users of facilities or services to pay for the incremental expansion required by the burden they represent to the system. Contractors and Builders Assoc. v. City of Dunedin, 329 So. 2d 314, 320-21 (Fla. 1976); Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611-12 (Fla. 4th DCA 1983). The Court explained it well in Dunedin:

> The cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent. (329 So.2d at 321.)

The St. Johns County School Impact Fee sets out to accomplish the goal of making new users pay for the additional schools they need. The St. Johns County School Board, faced with inevitable growth in the school population, and recognizing that raising needed revenue through a millage increase was likely to displease many voters, abdicated a portion of its responsibility for funding the St. Johns County public schools at an adequate level. The goal of the School Board is express and unequivocal. In its Resolution, it requested an impact fee "because of the fiscal burden that the children from new developments are placing upon the public school system." The study commissioned by the County at the School Board's request does not equivocate about the goal of impact fees. The study report itself describes impact fees as

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> financial hardship is no defense to a violation of the free school guarantee.... A solution to those financial difficulties must be found elsewhere - for example, through the political process.

Hartzell v. Connell, 679 P.2d 35, 44 (Cal. 1984)(en banc)(holding extra-curricular activities fees unconstitutional).

a means to "shift a part of the cost of providing additional public facilities" from taxpayers to those causing the need.

A child residing in a new home in St. Johns County is not stopped at the classroom door and required to pay the fee in order to get in. The Ordinance is more insidious. The child's family is prohibited from building a new home in St. Johns County unless the family also pays to build the child's pro rata share of the school. The family can avoid this burden only by sending its children to private schools and warranting that the impact fee would be paid later if there was a change which placed children in the public schools. Exemption from payment of the exaction could then be obtained under § 7(B) of the Ordinance. (R. 495-97.) For the bulk of families who purchase new homes with borrowed funds, the fee means a larger mortgage payment every month.[10] The ultimate goal is to allow taxpayers to avoid paying the taxes needed to build new schools, and to shift the burden of building new schools onto the school children and their families.

B. <u>The Scope Of The Right To Free Schools</u>.

The substantive content of the Florida constitutional guarantee of free schools has been twice addressed by the Court. These decisions establish the broad framework of this right. In <u>Scavella v. School Board of Dade County</u>, 363 So. 2d 1095 (Fla. 1978), the Court addressed a statute which capped payments to private schools for the education of handicapped students when appropriate facilities were not available

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10 Every empirical study concludes that impact fees are ultimately paid by the home buyers. (R. 440-43.) <u>See</u>, <u>e.g.</u>, Note, <u>The Legality of California Development Fees</u>, 13 Pepperdine L. Rev. 759, 785 (1986). The Ordinance implicitly acknowledges this result because it mandates that unused revenue be refunded to the "then current landowner," rather than to the persons from whom the charges were originally exacted. St. Johns County Ordinance 87-60, §11(B).

in public schools. The Court recognized that the statute had to be interpreted so as not to interfere with the right to free schools. The Court then construed the statute to require that any cap established could not so reduce the qualitative content of the educational experience as to deprive any student of the right to a free education. So construed, the statute was held constitutional. Noting that no Florida court had previously rendered a clear holding that there is a constitutional right to free public schools, the Court declared that every child in Florida has a constitutional right to attend public schools free of charge. The court explained:

> The Florida Constitution mandates the Legislature to provide for 'a uniform system of free public schools.' Article IX, Section 1, Florida Constitution. In compliance with this provision, the legislature had enacted a system of public schools which provide '13 consecutive years of instruction....' Section 228.051, Florida Statutes (1977). These schools are funded by governmental sources and non-resident tuition fees, not by the people utilizing them, except indirectly as taxpayers. The clear implication is that all Florida residents have the right to attend this public school system for free. (Scavella, 363 So. 2d at 1098 (emphasis added)).

Many years prior to Scavella, the Court strongly suggested that any attempt to impose a charge for public schools would be invalid. In State ex rel. Clark v. Henderson, 188 So. 351 (Fla. 1939), a school district argued that its ad valorem tax was an assessment for special benefits provided to lands within the district by construction of school buildings, and that homestead tax exemptions were therefore inapplicable. The Court found this concept anathema to constitutional principles. Explaining that the right to free schools was intended to advance and maintain proper standards of enlightened citizenship, the Court held that special assessments are "imposed upon the theory that

that portion of the community which is [assessed] receives some special or peculiar benefit," but that the school district tax could not be treated as a special assessment. Id. at 354. The Florida Constitution does not contemplate the imposition of any fee, charge or assessment for special benefits to homeowners arising from the existence of public schools. This is because Florida public schools are to be financed by the general citizenry through taxation.

The County argues that the free school guarantee "focuses on a single critical point in time: when a student arrives at the school house door." Petitioners' Initial Brief at 13. This argument should be rejected. Henderson teaches that the Constitution's guarantee goes further and does not allow consideration of the "special benefit" any taxpayer may receive. The decision in Scavella was not limited to the question of tuition paid at the schoolhouse door, but also focused on the qualitative content of the educational experience once in the door. A limited interpretation of the sort urged by the County would open the way to non-tuition charges designed to circumvent the Constitution.

The Constitution establishes a fundamental policy of making the populace as a whole bear the expense of an educational system which directly and primarily benefits the populace as a whole. Henderson, supra. Ordinance 87-60 attempts a circumvention of this mandate. Floridians may not be required to fund public schools "except indirectly as taxpayers." Scavella, at 1098. The courts of other states also have interpreted their "free school" clauses to mean that the cost of education must be borne by society at large through taxation. See, e.g., Midtown Properties, Inc. v. Township of Madison,

172 A.2d 40 (N. J. Super. Ct. 1961); Salazar v. Honig, 246 Cal. Rptr. 837 (Cal. App. 1988).

The Department of Education and affiliated Amici (hereinafter "DOE") echo the County's argument by attempting to distinguish between a free education and a free schoolhouse. They claim that the Constitution "cannot be construed to mean that school buildings must be 'free'", Brief of Amici Curiae at 12, but acknowledge in the same sentence that "the nature and extent of the physical facilities have a relationship to providing an adequate educational opportunity." DOE somehow concludes that the relationship is not sufficient for the right to free schools to mean a right to free schoolhouses. Given the emphasis DOE places on the need for funds to build schools, this conclusion cannot be taken seriously.

"Access to the educational curricula of a public school system," DOE's construction of "free public schools," is not free if that curriculum is only implemented in a physical facility for which the user must pay. Many states have constitutional guarantees of free public schools. Although jurisdictions differ as to the meaning of "free schools" in regard to peripheral questions,[11] there is absolute

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11 In some jurisdictions, incidental fees, such as for field trips and gym clothes, have been expressly upheld; and in other jurisdictions even such incidental charges are held impermissible. Annotation, Validity of Exaction of Fees from Children Attending Elementary or Secondary Schools, 41 A.L.R.3rd 752, 757. See, e.g., Brewer v. Ray, 101 S.E. 667 (Ga. 1919)($1.00 matriculation fee and monthly tuition charge stricken as unconstitutional); Batty v. Board of Education of City of Williston, 269 N.W. 49 (N.D. 1936)(charge levied against students who did not complete high school after four years stricken as unconstitutional); Board of Education of City of Lawrence v. Dick, 78 P. 812 (Kan. 1904)(statute allowing Board of Education to demand tuition fees in certain cities held unconstitutional); Paulson v. Minidoka County School District No. 331, 463 P.2d 935 (Idaho 1980)(textbook charge held invalid, certain extracurricular activity fees held valid); Dowell v. School District No. 1, Boone County, 250 S.W. 2d

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agreement among all jurisdictions that the state must provide the schoolhouse without charge. Universally, well-intentioned efforts to provide schoolhouses through charges imposed upon students or their families have been stricken. State ex rel. Roberts v. Wilson, 297 S.W. 419 (Mo. 1927)(charge to reimburse school board directors for personally arranging financing for new high school held invalid); Young v. Trustees of Fountain Inn Grade School, 41 S.E. 824 (S.C. 1902)(school board permanently enjoined from charging fee intended to be used for expansion of the school). California courts have ruled:

> The Constitution does not merely guarantee the right to a free "education;" it guarantees the right to a free "school." As such, the school and the entire product received from it by the student are to be free.

Salazar v. Honig, 246 Cal. Rptr. at 841. The Supreme Court of Wisconsin has held that the word "free" means "without cost for physical facilities and equipment." Board of Education v. Sinclair, 222 N.W.2d 143, 145 (Wis. 1974). Accord, Sneed v. Greensboro City Board of Education, 264 S.E.2d 106, 112 (N.C. 1980); Bond v. Public Schools of Ann Arbor School District, 178 N.W.2d 484 (Mich. 1970).

Thus, the schoolhouse is the cornerstone of a constitutional guarantee for a system of "free schools." For DOE to argue that "the constitutional provision cannot be construed to mean that school buildings must be 'free'", it must ignore all precedent and the whole

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127 (Ark. 1952)(registration fee for each child attending school held invalid as an indirect attempt to charge for public schools); Salazar v. Honig, 246 Cal. Rptr. 837 (Cal. App. 1988)(state statute authorizing public school districts to charge pupils a fee for transportation held to violate California Constitution mandate for "free schools").

purpose of the constitutional guarantee. That guarantee means much more than a right to attend a class in a vacant lot.

C. St. Johns County Ordinance 87-60 Is Unconstitutional.

The School Board requested enactment of the Ordinance "because of the fiscal burden that the public school children from new developments are placing upon the public school system." (App. Tab 5.) The intent of the Ordinance is made clear by its definition of the term "feepayer" as a person who builds a home "which may reasonably be expected to place students in the public schools of St. Johns County." Ord. 87-60 § 5(A). Indeed, § 7(B) provides that any feepayer can avoid payment if the feepayer can show that the homes being built will not house any public school children.[12] The Ordinance is keenly aimed at school children living in new homes.[13]

Ordinance 87-60 charges some residents of St. Johns County for using the public schools. It does not charge them "indirectly as taxpayers." If Ordinance 87-60 imposed a tax, it would be unconstitutional under Article VII, § 1(a) of the Fla. Const. Contractors and Builders Ass'n. v. City of Dunedin, 329 So. 2d 314 (Fla. 1976); Broward County v. Janis Development Corp., 311 So. 2d 371, 375-76 (Fla 4th DCA 1975). By the terms of the Ordinance itself, it only applies if the new home will house public school children.

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12 As Dr. Nicholas testified, anyone without children attending public schools could meet the exemption provisions of § 7(B) by warranting that the fee would be paid later if there was a change in use which placed children in the public schools. (R. 495-97.)

13 "Each of the types of land development described in Section Seven hereof, will place additional students in the public schools of St. Johns County necessitating the acquisition of school sites, the expansion of existing educational facilities and the construction of new educational facilities." Ord. 87-60, § 1(F).

Instead of addressing the undisputed fact that only those homes which will contain school children are required by the Ordinance to bear the burden of the impact fee, the County argues that those who do not reside in St. Johns County do not have to move in, and those who already live there do not have to build a new home. This simplistic analysis of the effect of the impact fee underscores its unconstitutionality. Unless a family pays the cost of the school space their children will occupy, they are prohibited from having a new home. Such a deprivation by government action cannot reasonably be considered "free." The Constitution offers no guarantee of access to new homes, but charging for access to schools by tying the charge to an unprotected activity cannot strip away the protections of the Constitution.

The County also argues that its Ordinance does not impose a "user fee" because it is a "development exaction."[14] The County states that a "user fee" is imposed for using existing capacity and would be improper in the case of schools; but that a "development exaction" is imposed to create capacity and, as such, is constitutionally acceptable in the case of schools. It is submitted that the distinction the County seeks to draw has no significance. It is merely a different label. The impact fee is imposed not to build schools that will sit empty. It is imposed to build school space

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14 To the extent the County intends to argue that "growth management" concerns regarding "concurrency" override constitutional values regarding free public schools, the County is simply wrong. The Legislature had no power to authorize a violation of the constitutional guarantee of free schools, even if that was the intent of growth management legislation, which it was not. The County's arguments concerning Florida's Growth Management Act are addressed infra in connection with the preemption issue, where there is at least a constitutional possibility of relevance.

which will be used. The fee is calculated not merely according to the cost of school construction, but according to the number of public school children who will live in the new home.[15] The Ordinance itself focuses on "any change in use of any structure that will result in additional students in the public schools of St. Johns County. Ord. 87-60, § 5(D). The Ordinance imposes its exaction only when an activity "may reasonably be expected to place additional students in the public schools of St. Johns County." Ord. 87-60, § 6(A). The Ordinance provides that "At the option of the feepayer," the amount paid can be either according to Dr. Nicholas' schedule of average charges, which are "discounted" to encourage use of the schedule, or according to "independent fee calculation studies." Ord. 87-60, §7(A). Such individualized calculations of "impact" focus on "student generation and/or educational impact documentation." Ord. 87-60, § 7(B). That is, the whole Ordinance is concerned with how many public school children there will be, and how much has to be paid to build the "instructional stations" those children will use.

The County acknowledges that it would be wrong to charge school children's families for the "use" of "instructional stations" after they are built, but says it should be acceptable to make the children's families pay to build the "instructional stations" before the children use them. It is respectfully submitted that no amount of sophistry can change the fact, whether the families pay in advance or at the door, they are being required to pay. They are required to pay based on "reasonably...expected" use of public schools. This is wrong. Schools are to be free.

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15 Dr. Nicholas did his best to exclude from his calculations those children who would attend private schools. (R. 458)

The County suggests that other jurisdictions with constitutions protecting the right to free public schools have upheld school impact fees as economic regulation. However, not one of those cases concerned the constitutional guarantee of free schools. The leading California case, Candid Enterprises v. Grossmont Union High School District, 705 P.2d 876 (Cal. 1985), addressed constitutional challenges brought under the Fourteenth Amendment of the U. S. Constitution. It provides no enlightenment as to California's constitutional mandate of free public schools.[16] The other California cases are likewise inapposite.[17] Similarly, the challenge in the Illinois case, Krughoff v. City of Naperville, 369 N.E.2d 892 (Ill. 1977), was raised under the Fourteenth Amendment. The Wisconsin case, Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1966), involved a discussion of the use of police powers under

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16 In 1977, the California Legislature passed the School Facilities Act which specifically authorizes counties to impose school impact fees in certain situations. Cal. Government Code § 65,970 (West 1977). It appears this legislation has not been challenged as a violation of the state constitutional provision requiring "free schools." However, recent California cases suggest this legislation may not pass constitutional muster. See, e.g., Salazar v. Honig, 246 Cal. Rptr. 837 (Cal. App. 1988)(holding state statute enabling public school districts to charge pupils a fee for transportation violates the California Constitution mandate for "free schools").

17 In Balch Enterprises, Inc. v. New Haven Unified School District, __P.2d ___, 268 Cal. Rptr. 543, (Cal. App. 1990), a school impact fee imposed on commercial and industrial structures was struck down because there was no clear showing that there was an impact on public school populations. No issue concerning free schools was raised, nor was it an issue in Fontana Unified School District v. City of Rialto, 219 Cal. Rptr. 254 (Cal. App. 1985); Laguna Village, Inc. v. Orange County, 212 Cal. Rptr. 267 (Cal. App. 1985); or McLain Western No. 1 v. San Diego County, 194 Cal Rptr. 594, (Cal. 1983).

municipal home rule. These cases provde no assistance in relating an impact fee to Florida's assurance of free public schools.[18]

The County further argues that the reasoning of the decision in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), excuses charging for schools. The County wholly misapprehends the Nollan decision and seeks to apply it so as to contravene the very holding of the case. Nollan was concerned with whether there had been a taking of private property when a landowner was required to dedicate a public easement in order to obtain a building permit. The Court assumed that a building permit could have been denied altogether, but nonetheless ruled that there had been an unconstitutional taking without compensation. The U.S. Supreme Court ruled that while California could prohibit inappropriate development, it could not use that power to justify an unconstitutional taking of property. The Nollan court made clear that while the power to prohibit generally includes the power to impose less restrictive conditions, that power cannot be so used as to create "'an out-and-out plan of extortion.'" 483 U.S. at 837. Nollan stands for the proposition that the power to regulate does not give the power to deny constitutional rights.

Assuming St. Johns County could impose a building moratorium if existing schools were inadequate, it surely does not have the power to barter constitutional rights. This concept was soundly rejected in Nollan:

> "...even though, in a sense, requiring a $100 tax contribution in order to shout fire [in a crowded theatre] is a lesser restriction on speech than an outright ban, it would not pass constitutional muster." Id.

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18 Wisconsin has held that its constitutional rights to free schools means "without cost for physical facilities and equipment." Board of Education v. Sinclair, 222 N.W. 2d 143, 145 (Wis. 1974).

If a family desiring to build a new home meets all legitimate zoning, environmental and construction code requirements, but refuses to surrender their constitutional right to free schools, government should not be allowed to deny the family a home. That family cannot be validly subjected to the extortion of having to surrender their constitutional right to free schools in order to have the home they otherwise are perfectly entitled to have.

The County's presumption that it could impose a moratorium if schools are inadequate should be rejected. Our Constitution mandates "Adequate provision shall be made by law for a uniform system of free public schools...." The guarantee of free schools is quite different from most constitutional rights. The guarantee does not simply prohibit undesired government conduct. It affirmatively requires government action to assure adequate provision for our schools. Scavella made this clear over a decade ago. See also, Buse v. Smith, 247 N.W.2d 141 (Wis. 1976)(discussing mandate for "uniformty").

The force of such guarantees has been made astoundingly clear in other jurisdictions. The courts of many states have ordered that either remedial legislative action provide adequate funding for public schools within specifically prescribed time periods, or the courts would take such action as was needed to assure adequate funding for public schools as mandated by their respective state constitutions. For examples, see, Abbott v. Burke, ___ A.2d ___, 1990 Westlaw 73058 (N.J., Slip Op. June 5, 1990); Helena Elementary School District No. 1 v. Montana, 784 P.2d 412 (Mont. 1990)(modifying opinion at 769 P.2d 684 (1989); Edgewood Independent School District v. Kirby, 777 S.W.2d 391

(Tex. 1989); and Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979). While these decisions have primarily dealt with the plight of poverty-stricken communities, the focus has not been on equal protection analysis. The focus, as in Scavella, has been on the adequacy of the educational opportunity made available to school-age children.

Whether inadequacies in education funding arise from the low tax base of a particular area, or because of slowness in building the schools needed to provide adequate educational opportunity, the duty to make "adequate provision" is a constitutionally mandated duty. If the Legislature, or a local school board, or DOE, fails to perform that constitutionally mandated duty, the solution will not be to deprive the people of Florida of their right to free schools. The solution will be for the courts to make government do that which our Constitution commands it to do -- make adequate provision for free schools for all of Florida's children.

Ordinance 87-60 imposes a system of educational finance which is at the opposite extreme of a system of free public schools. It does more than simply block a child at the schoolhouse door. It compels the child's family to build the schoolhouse. If they do not, they are deprived of the right to build a new home and they could be prosecuted as criminals.[19] It is not an

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19 Ordinance 87-60 § 14, provides:

> A violation of this Ordinance shall be prosecuted in the same manner as misdemeanors are prosecuted and upon conviction the violator shall be punishable according to law....

acceptable answer for the County to reply: "The parent may be in the 'pokey' but the child will be in school at no charge."[20] The imprisonment of a parent is a price no child should have to pay.

So long as the Constitution guarantees "free public schools," the solution to the financial difficulties of school districts cannot be based on the wallets of those who "impact" the schools by sending their children to public school.

II. THE ST. JOHNS COUNTY SCHOOL IMPACT FEE ORDINANCE VIOLATES THE CONSTITUTIONAL MANDATE FOR A UNIFORM SYSTEM OF PUBLIC EDUCATION.

The Court addressed the constitutional requirement of uniformity in Brown v. City of Lakeland, 54 So. 716 (Fla. 1911). The City of Lakeland proposed a tax to build schoolhouses. The Court held:

> [I]t is clear that the Constitution intends that all taxation for the support and maintenance of a system of public free schools shall be in accordance with the 'uniform system' provided for in the Constitution, and that the power given the Legislature to prescribe the 'powers' of municipalities and to authorize cities and towns to assess and impose taxes for 'municipal purposes' does not permit the giving to municipalities as such authority to issue bonds and to levy a municipal tax to pay the bonds when the proceeds are to be used 'for the purposes of erecting schoolhouses and maintaining a system of public education in the municipality'; such purpose being . . . supplemental to and part of such 'system of public free schools' that is by the Constitution required to be 'uniform'. (54 So. at 718).

Thus, all revenue for the support and maintenance of schools must be derived in accordance with the uniform system required by the Constitution. Accord, Munroe v. Reeves, 71 So. 922 (Fla. 1916)(invalidating bond issue intended to supplement school finances). See also, State ex rel. Bours v. L'Engle, 24 So. 539, 541 (Fla.

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20 Petitioner's Initial Brief at 21.

1898)("It is apparent that Article 12 has devised a complete scheme for the support and maintenance of public free schools in the various counties of the state." (emphasis added)). The Legislature was found to have no power to give municipalities authority to raise revenue for school purposes because such authority would necessarily conflict with the constitutionally mandated uniform scheme. In accordance with the Court's interpretation of the uniformity clause set forth in Brown, Munroe and Bours, all revenue for the support and maintenance of schools must be derived from the uniform system required by the Florida Constitution. The St. Johns County school impact fee is outside the uniform system.

The Legislature has carefully crafted a comprehensive scheme intended to assure uniform financing for public schools. It has promulgated a uniform mechanism for determining the millage each district should assess. § 236.081(4), Fla. Stat. The millage rate determined by the Commissioner of Education equitably apportions the revenue burden among the districts. The Legislature has also provided a formula to equalize the amount of required local effort so that districts with high taxable property values are not favored over districts with a low tax base. § 236.081(4)(b), Fla. Stat. Additionally, each school district receives a standard state allocation per student. § 236.081(1)(b), Fla. Stat. Thus, the Legislature's uniform system seeks to assure that all school districts operate on similar funding per student.

The Legislature has gone even further to assure uniformity in funding. In § 236.25, Fla. Stat., the Legislature mandates local school boards, as a condition for receiving state funds, to levy "a millage rate not to exceed the amount certified by the commissioner as

the minimum millage rate necessary to provide the required local effort...." School boards are thereby required to begin at identical funding levels. The statute goes on to provide that "each school board may levy a nonvoted current operating discretionary millage," but that the "Legislature shall prescribe annually in the appropriations act the maximum millage a district may levy," which rate "shall not exceed the lesser of 1.6 mills or 25 percent of the millage" certified by the commissioner. It is also provided that "each school board may levy not more than 2 mills" for new school construction and other specified capital costs. The Legislature has thus mandated that virtually no school board can use its full constitutional power to tax, or it loses state funding.[21] The purpose is clear. No school board is allowed to make its school district too much better than other school districts.

This legislative scheme promotes uniform levels of funding while allowing a minimal degree of deviation based on local conditions. It is a method of maintaining uniformity often referred to as "leveling down."[22] It has the dual effect of preventing some school districts

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21 According to the most recent issue of the Florida Statistical Abstract, no school district has used its full constitutionally authorized millage rate. Bureau of Economic and Business Research, College of Business Administration, University of Florida, 1989 Florida Statistical Abstract at 610-611.

22 DOE apparently disagrees with the Legislature's policy, and implicitly questions its constitutionality. "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." Brief of Amici Curiae at 17. The New Jersey Supreme Court has recently criticized the potential use of "leveling down" under that state's Constitution, but did not go so far as to rule such a device for obtaining equality of educational opportunity to be improper. Abbott v. Burke, ___ A.2d ___ (N.J., Slip Op. June 5, 1990). The wisdom of the Legislature's decision may be debatable, but the constitutional validity of the leveling down device has not previously been questioned in this case. It

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from being the best they can be, while increasing the likelihood that inadequacies in education will command a statewide constituency for increased funding, rather than constituencies being divided along the lines of wealth of districts. Even the voters of the wealthiest districts must support statewide improvements since they are prohibited from using their wealth to make their school districts substantially better than the norm.

The Legislature has also specifically addressed what sources are to be used to build schools. Section 235.4235(1), Fla. Stat., provides:

> Capital projects are to be financed in accordance with s. 9(a)(2), Art. XII of the state Constitution[23] as amended, or from legally available state funds, or grants, donations, or matching funds, or by a combination of such funds.

Section 236.35, Fla. Stat., supplements § 235.4235, and provides:

> 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.

Section 235.435, Fla. Stat., sets forth specific formulae for allocating capital outlay funds. There is a formula for

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would seem, however, that such a device would be valid as long as it did not have the effect of denying "adequate educational opportunities for all children." Scavella at 1098-1099.

23 Article XII, § 9(a)(2), Fla. Const., established the "public education capital outlay and debt service trust fund," and specifies the precise sources from which the fund is derived. Impact fees are not specified.

allocating capital funds for renovation. § 235.435(1), Fla. Stat. There are specific formulae and criteria for allocating

> necessary construction funds to school districts which have urgent construction needs but which lack sufficient resources at present, and cannot reasonably anticipate sufficient resources within the period of the next 3 years, for these purposes from currently authorized sources of capital outlay revenue. (§ 235.435(2), Fla. Stat.)

There is a specific formula for allocating general capital outlay funds according to "full-time equivalent student" calculations, § 235.435(3)(a), Fla. Stat., and these funds must be expended only as authorized by state need surveys. § 235.435(3)(b), Fla. Stat.

The Legislature has also limited the ability of school districts to issue bonds:

> It shall be the duty of the school boards of the several districts of Florida to plan the school financial program of the district so that, insofar as practicable, needed capital outlay expenditures can be made without the necessity of issuing bonds. (§ 236.36, Fla. Stat.)

Further, if a school board nonetheless determines that a bond issue is "essential for the school program of the district," § 236.37(1), Fla. Stat., it still cannot issue the bonds unless DOE concludes that both the amount of the bonds and the plan for expending bond proceeds are necessary. § 236.37(3), Fla. Stat.

The Legislature has thus placed strict control on the millage rates assessed for capital facilities, the state funds received for capital facilities, and the extent to which bonds can be issued for capital purposes. These statutes are but a small part of the uniform comprehensive statutory scheme (Title XVI, Chapters 228-246, Florida Statutes) enacted by the Legislature to

provide for the financing of a free public school system. By interjecting St. Johns County into the public school financing scheme, Ordinance 87-60 has unconstitutionally imbalanced the uniform system of school financing devised by the Legislature.

The County and DOE rely on provisions of the School Finance and Taxation Act which refer to "other funds" in an effort to controvert the clear message of the Legislature. Section 236.24(1), Fla. Stat., is purely definitional:

> 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.

Clearly, the Legislature wanted to include any money which came into the school coffers within the definition. However, this inclusion is not, itself, authorization for exacting any funds. As a point of historical interest, the language, "appropriations by county commissioners," dates from 1939, a time during which county commissioners were constitutionally mandated to assess and collect school taxes. Ch. 19355, § 1024, Laws of Florida (1939). Constitutional revision has since created separate school boards. The other provisions relied upon by the County, §§ 235.4235 and 236.35, Fla. Stat., are similarly definitional. If the Legislature had intended these provisions to allow far-ranging localized efforts to supplement funding, it surely would not have barred school boards from exercising their full constitutional taxing powers and bond issuance powers as a condition for receiving any state money.

Similarly, § 236.012, Fla. Stat., must be stretched beyond recognition to yield support to the County's proffered construction. Subsection (4), quoted more fully, states the Legislature's intent:

> [t]o encourage innovations in educational facilities design, construction techniques, and financing mechanisms for the purpose of reducing costs and creating a more satisfactory environment for learning, and to direct the department [of education] to continue the study of developments...in construction methods....

Even accepting the novel proposition that an impact fee is a "financing mechanism for the purpose of reducing costs" (as opposed to avoiding taxation), this statutory provision is directed not to the counties, but to DOE. In fact, subsections (1) and (3), immediately preceding the provision quoted above, underscore the fact that the Legislature was contemplating a statewide solution to a statewide problem.

Notably, the County does not argue that its impact fee is part of the Legislature's "systematic plan." Rather, it argues that the Legislature intended counties to address their individual needs, without recourse to the state system. This is the opposite of the Legislature's expressed intent.

The County and DOE argue that uniformity requires no more than "a common plan...without regard to how the system is funded,"[24] but the

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24 Petitioners' Initial Brief at 26. See also, Brief of Amici Curiae at 15. The precedents upon which the County relies are either inapposite or contrary to its position. In State v. Board of Public Instruction, 176 So. 2d 337 (Fla. 1965), the Court held that the Legislature could by special act create more than one special school district within a county without violating the uniformity requirement. However, the Constitution at that time authorized division of a single county into multiple school districts. The court was asked to consider whether the educational program in the county had to be unified, rather than uniform. State ex rel. Glover v. Holbrook, 176 So. 99 (Fla. 1937), determined that the Legislature by special act could establish

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Legislature has obviously seen it differently. It has imposed strict controls on how every aspect of the system is funded, even to the point of adopting the policy of "leveling down." This legislative control has been hailed by the Court as implementing the Constitution's promise of uniformity because it provides "for a uniform expenditure per teaching unit throughout the State regardless of the tax base of the various counties." School Bd. of Lee County v. Askew, 278 So.2d 272, 274 (Fla. 1973). Accord, School Bd. of Escambia County v. State, 353 So.2d 834, 838 (Fla. 1977).

It is also argued that school impact fees must be allowable or the Legislature would have to be acting improperly in allowing "grants, donations or matching funds" to fund capital facilities pursuant to § 235.4235, Fla. Stat., since such grants might not be equal in all districts. This argument is a non-sequitur based on a misconstruction that the District Court of Appeal held all school funding had to be "equal." The District Court of Appeal did not hold that all school funding had to be "equal." It held that it had to be "uniform." The Legislature has authorized statewide use of grants, donations and matching funds.[25] It has not authorized local betterment impact fees.

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tenure for teachers in Orange County. School Board of Escambia County v. State, 353 So. 2d 834 (Fla. 1977), states that "equal pupil funding treatment" is "essential" to uniformity. State ex rel Clark v. Henderson, 188 So. 351 (1939), teaches that only ad valorem taxes are constitutionally contemplated to be imposed by school boards. Kane v. Robbins, 556 So.2d 1381 (Fla. 1989), held the Legislature could not by special act authorize non-partisan school board elections.

25 The Legislature cannot allow consideration of federal grants, matching funds or other federal school aid in setting funding for schools. "No State shall take into consideration payments under [20 U.S.C. §§ 2701 et seq] in determining the eligibility of any local educational agency in that State for State aid or the amount of State aid with respect to free public education of children." 20 U.S.C. §2854.

School impact fees are not part of the Legislature's uniform funding system. They supplement the legislatively mandated funding formulae on a localized basis, not as part of a uniform statewide system. This is the very error which led to the striking of the financing schemes in Brown v. City of Lakeland, State ex rel. Bours v. L'Engle, and Munroe v. Reeves. The constitutional values upon which those decisions are founded are the same values our Constitution guarantees today. The people of Florida are in the same boat. No county is allowed to jump ship holding its own flotation ring. Either all may go uniformly, or none can go. The Constitution's teaching is that together, all will swim; apart, some will sink.

III. ST. JOHNS COUNTY IS PREEMPTED FROM IMPOSING A SCHOOL IMPACT FEE.

St. Johns County is a non-charter county. Under Art. VIII, § 1(f), Fla. Const., and § 125.01, Fla. Stat., its home rule powers do not extend to any area preempted by the Legislature. See generally, Speer v. Olson, 367 So. 2d 207, 210-11 (Fla. 1979). The Court addressed the doctrine of preemption in Tribune Co. v. Cannella, 458 So. 2d 1075, 1077 (Fla. 1984), stating:

> Under [the preemption] doctrine a subject is pre-empted by a senior legislative body from the action by a junior legislative body if the senior legislative body's scheme of regulation of the subject is pervasive and if further regulation of the subject by the junior legislative body would present a danger of conflict with the pervasive statutory scheme....

St. Johns County Ordinance 87-60 presents a danger of, and does in fact, conflict with the state statutory scheme. It interjects St. Johns County into an area where the School Board has been given exclusive authority by the state. As just one example, when funds

under the Legislature's mandated formulae are insufficient, a school board is supposed to obtain DOE and voter approval for a bond issue. §§ 236.36, 236.37, Fla. Stat. Using county impact fee revenue evades the legislatively mandated controls.

A. Preemption By The Constitution.

St. Johns County lacks authority to enact Ordinance 87-60 because it is inconsistent with both the Florida Constitution and general law. The Constitution clearly evinces the intent that county and school governmental units should be financially independent. Article IX, § 4(b), Fla. Const., provides:

> The School Board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein....

Thus, the Constitution establishes a system of local school districts entirely independent from the county governments established under Art. VIII, § 1 of the Constitution. School districts have their own elected governing bodies and taxing powers. They are responsible for the operation of free public schools within their district. Indeed, the constitutional provisions regarding counties and school districts require that they be fiscally independent governmental units.

It has been long established in Florida that the appropriation or transfer of funds between governmental units is constitutionally prohibited. See, e.g., Okaloosa County Water and Sewer District v. Hilburn, 160 So. 2d 43 (Fla. 1964); Amos v. Mathews, 126 So. 2d 308 (Fla. 1930). Public funds must be expended for the purposes for which they were raised. Dickinson v. Stone, 251 So. 2d 268, 273 (Fla. 1971); Taylor v. Williams, 196 So. 214, 217 (Fla. 1940). Transferring

County money to a school board violates these principles. County money must be used for a "county purpose" under the Constitution, not a "school purpose." Art. VII, § 9 of the Constitution limits county and school district taxing powers to their "respective purposes." It thereby establishes that county and school district purposes are mutually exclusive, and that the revenues generated by each unit may be used only for that unit's purposes.

In Brown v. City of Lakeland, supra, the City of Lakeland sought to impose a tax to build schoolhouses. The Court noted that the Florida Constitution provided that counties and municipalities were permitted "to assess and impose taxes for county and municipal purposes, and for no other purpose." 54 So. at 717. The Court held that the Legislature lacked authority to empower the municipality to intrude into the area of school funding. Lakeland's tax failed because the area of school financing was constitutionally outside of its purview. On the same basis, the Court has ruled that a city may not issue bonds to finance schoolhouse construction. Munroe v. Reeves, 71 So. 922 (Fla. 1916). Under the Munroe and Lakeland decisions, the County has exceed its constitutional authority.

B. Preemption By General Laws.

St. Johns County Ordinance 87-60 is preempted by general law because it intrudes upon the management, control, operation, administration and supervision of the public schools of St. Johns County in contravention of the Florida School Code. Section 230.23, Fla. Stat., grants the School Board of St. Johns County the exclusive authority to determine matters of school system financing consistent

with and pursuant to Chapters 236, 237 and § 230.23(10), Fla. Stat.

Section 230.23, Fla. Stat., provides in pertinent part:

> The School Board, acting as a board, shall exercise all powers and perform all duties listed below: * * *
>
> (10) FINANCE. Take steps to assure children adequate educational facilities through the financial procedure authorized in Chapters 236 and 237 and as prescribed below:
>
> (a)...determine district school funds necessary in addition to state funds to operate all schools for such minimum term; arrange for the levying of district school taxes necessary to provide the amount needed from district sources. * * *
>
> (c) Tax Levies. Adopt and spread on its minutes a resolution fixing the district school tax levy, provided for under s. 9, Art. VII of the Constitution, necessary to carry on the school program adopted for the district for the next ensuing fiscal year as required by law.... (emphasis added)

Section 230.23 requires local school boards to do "all" that is necessary to secure adequate financing for public schools through levying school taxes to meet district needs, consistent with the uniform state system. Thus, the duty to secure adequate public school financing through appropriate channels has been placed exclusively upon the school boards.[26]

The County cannot intrude into the School Board's sphere; nor can its intrusion be forgiven because the School Board requested it to do so. The School Board cannot abdicate its constitutional duty to impose the millage rates necessary to provide the revenue "needed from district sources," nor its concomitant duty to seek recourse within

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26 The Florida Attorney General has opined, "it is abundantly clear that a county government has nothing whatsoever to do with the administration of the free public school system in this state, as provided for by Art. IX of the 1968 State Constitution, Ch. 230, F.S., and other applicable provisions of law." Attorney General Opinion 071-109, May 12, 1971.

the Legislature's uniform system of financing if millage revenue is insufficient.

As discussed above in regard to the uniformity requirement of the Constitution, the Legislature has placed a tight rein on all aspects of school financing. DOE acknowledges that legislative control is pervasive. Brief of Amici Curiae at 9-10. The Legislature has also expressed its clear intent to have the "Educational Facilities Act", Chapter 235, Fla. Stat., provide a comprehensive scheme for construction of schools. Section 235.002(3), Fla. Stat., declares the Legislature's intent to:

> provide a systematic mechanism whereby educational facilities construction plans can meet the current and projected needs of the public education system population as quickly as possible by building uniform, sound education environments and to provide a sound base for planning educational facility needs.

Section 235.435, Fla. Stat., provides for "funds for comprehensive educational plant needs." Section 236.012(3), Fla. Stat., declares legislative intent to:

> "assume a greater share of the responsibility for state funding of educational plant construction by providing a systematic plan whereby each district will be able to meet the increasing needs for satisfactory educational plant construction for all students; to maximize the ability of satisfactory student stations to meet the current and projected needs of the districts." (emphasis added).

This clearly shows the Legislature intended to promulgate a comprehensive plan to meet the need for schools in all districts. Section 236.014, Fla. Stat., even forbids special laws or general laws of local application which may affect the Florida Education Finance Program. The Legislature has thus made abhorrent even

its own legislation which might interfere with its uniform plan for school financing.

When considering the issue of preemption, the language of the statutes should be read as a whole. See, e.g., City of Miami Beach v. Rocio Corp., 404 So. 2d 1066, 1069 (Fla. 3d DCA 1981)(citing Florida Jai Alai, Inc. v. Lake Howell Water and Reclamation District, 274 So. 2d 522 (Fla. 1973)). When read as a whole, the pervasive nature of the state's legislation is striking. The Legislature has provided a statutory scheme for the financing, construction, management, control, operation and supervision of the public school system. St. Johns County is preempted from becoming involved in school finance.

C. Growth Management Laws Provide No Exception To Preemption.

The County nonetheless argues that Florida's Growth Management Act (GMA), formally known as the Local Government Comprehensive Planning and Land Development Regulation Act, § 163.3161, et seq., Fla. Stat., authorizes school impact fees. The County is simply wrong.

The County states that the GMA imposes a "concurrency" requirement for "public facilities" to be available at the time growth occurs, and that schools are "public facilities" under the Act. This statement may give the impression that the County is legislatively mandated to assure that schools are available concurrent with development. Any such impression is false. The Legislature has made no such law. Section 163.3202, Fla. Stat., requires the concurrent availability of only those public facilities listed in § 163.3177(6). Schools are not among the facilities for which concurrency is required. The Legislature has declined to mandate concurrency for schools,

undoubtedly in recognition of the historic lag time involved in building schools, and the inability of county government to have any control over school construction. If concurrency was mandated for schools, the refusal of local school boards to certify that schools were adequate would have the effect of forcing construction moratoria. In most areas of the state, moratoria would be economically devastating. The Legislature did not give school boards the power to veto local economic development. Economic development is left to the counties' attention.

The GMA encourages county governments to coordinate with all other local governments, including school boards, in developing comprehensive plans. Also, § 163.3177(6)(h) requires the comprehensive plan to include guidelines regarding coordination "of the adopted comprehensive 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." Additionally, the GMA provides that a county's comprehensive plan may include a public buildings element showing locations of public schools. § 163.3177(7)(e), Fla. Stat. These provisions show the Legislature's view that there should be coordination so that school board plans and county development plans are not at cross-purposes. In so doing, the Legislature has recognized the continuing independence of school districts and counties as governmental entities having their own spheres of interest.

The County cites two provisions of the GMA from which it infers legislative approval of school impact fees. Schools are included in the definition of "public facilities" in § 163.3164(23), and § 163.3202(2)(g), provides that public facilities should meet standards

set forth in the GMA. The County then relies on § 163.3202(3) to argue that the Legislature approved school impact fees. That subsection, quoted more fully, states:

> 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, impact fees and performance zoning.

While impact fees are an appropriate method of addressing many of the needs included in the term "public facilities," the County goes too far in asserting that every regulatory mechanism listed is therefore authorized for or appropriate to every type of public facility. It is ludicrous to take a general definition of "public facilities" and a general policy statement, juxtapose terms of each, and derive from that juxtaposition an intent to override a specific legislative plan for school funding designed to maintain uniformity throughout the system. It is to be noted that, as a fundamental tenet of statutory construction, enactments specifically addressing a subject control over generalized statements of law and policy. Rowe v. Pinellas Sports Authority, 461 So. 2d 72 (Fla. 1984). The GMA cannot be read to dilute the Legislature's specific provisions for school funding.

The Legislature has enacted a comprehensive and uniform scheme for financing public schools. The state has preempted the field of public school financing. The ordinance in question is invalid.

IV. ORDINANCE 87-60 IS NOT A VALID IMPACT FEE.

Even assuming the Ordinance could otherwise pass constitutional muster, Ordinance 87-60 is fatally flawed. It cannot pass the dual rational nexus test.

A. Ordinance 87-60 Is An Unconstitutional Tax.

The parties disagree on how the dual rational nexus test is to be phrased, and what it means. The County seeks to have it mean that as long as the cost of needed new capital facilities are "pro rated," and the payors receive a benefit equal to that given the public at large, an impact fee passes muster and is not an unconstitutional tax. It is submitted that the County's position would be a radical change in the law of Florida established in Contractors and Builders Ass'n v. City of Dunedin, 329 So.2d 314 (Fla. 1976)(ordinance held invalid due to absence of restrictions on spending funds to assure expenditures would be for new capital facilities needed by "new users.")

It is respectfully submitted that the correct reading of Dunedin establishes a two-part test for determining whether an impact fee is actually an unconstitutional tax:

> (1) the fees are designed to offset, and do not exceed, the financial impact of providing the new capital facilities needed to serve the new users; and
>
> (2) the funds are expended for the substantial benefit of the new users, rather than the public generally.

See also, Hollywood, Inc. v. Broward County, 431 So.2d 606 (Fla. 4th DCA 1983). While total precision is not possible, an impact fee must be carefully crafted to reasonably accomplish both parts of the dual rational nexus test. The purpose of these tests is to assure that those who will use a new facility pay for it, and get the benefit of using it. To protect against imposition of an impact fee when there is no impact on the capital facility involved, there must be an opportunity to obtain an

individualized assessment of actual impact. The Florida Association of Counties, as Amicus, correctly considers individualized assessments a requirement any impact fee must meet,[27] and the County agreed when it was before the trial court.[28]

The importance of individualized assessments goes to the heart of the nature of impact fees. In Dunedin, the Court noted that the sewer charges imposed were only paid by those who connected to the system:

> "The fees in controversy here...are charges for use of water and sewer facilities; the property owner who does not use the facilities does not pay the fee." 329 So.2d at 319.

The importance of independent impact studies was emphasized in 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):

> "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."

A sewerage treatment impact fee charged to residents who use septic tanks, or a road impact fee which charged a single home the same fee as an adjoining apartment complex housing hundreds of families, would be clearly a tax.[29] There must be an impact

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27 Brief of Amicus Curiae at 8.

28 Defendants' Motion For Summary Judgment. (R. 105 at 115.)

29 See generally, Broward County v. Janis, 311 So.ed 371 (Fla. 4th DCA 1975); Admiral Development Corp. v. City of Maitland, 267 So.2d 860 (Fla. 4th DCA 1972); Bateman v. City of Winter Park, 160 Fla. 906, 37 So.2d 362 (1948).

on the capital facility before an impact fee can be imposed and the fee should be proportional to the impact.

The St. Johns County school impact fee should be held to fail this test. Dr. Nicholas' study establishes, and the County acknowledges, that most new residences have no impact on the public school system. Has the impact fee been reasonably limited to those whose new use causes the need for new facilities? It is submitted that when the study upon which an impact fee is based shows that a majority of the people charged have no impact whatsoever, it is not a reasonable approximation of the impact. Ordinance 87-60 suffers from more than a lack of precision. It wraps itself in a cloak of statistics, but in reality leaves the majority to bear the burden of obtaining an exemption or paying a charge that should not be imposed upon them.

The Ordinance also fails to assure that the substantial benefit of the expenditures is enjoyed by the feepayers. The school district is county-wide and the funds must be expended county-wide, or the school board would be in violation of the Florida Education Code. New homes built within some municipalities are not subject to the fee, although these residents use the same school system. In Dunedin, the Court found it impermissible for impact funds to be used to build replacement facilities, stating:

> When new facilities must be built in any event, looking only to new users for necessary capital gives old users a windfall at the expense of new users. 329 So. 2d at 321.

Ordinance 87-60 gives the same windfall to new users who reside in St. Augustine, which has refused to charge the fees.

The County seeks to save the Ordinance by claiming that some day the new house might be the home of school children. Respectfully, if the best that can be said is that there may be an impact some time in the next millenium, the burden of preparing individualized assessments of impact should be on the County, not the person being assessed.

Impact fees are most appropriate for sanitary sewer expansion. When a sanitary sewer system is built or expanded (and paid for) based on the capacity needs of new developments, utilization is nonetheless direct. The residents of new homes either do or do not generate sewage equal to the capacity built into the system, but it is a natural fact that all of the residents will generate sewage. With school impact fees it is not simply a matter of the degree of use that occurs. The fact established by the County's study is that most will not place children in the public schools.

The trial court did not substitute its judgment for that of the County Commission. It merely observed the fact that Dr. Nicholas' statistics are not the measure of an impact; but merely the statistical probability of a residence having any impact on the educational system. That is, a mere guess. The concept of "impact" requires analysis of the actual and direct effect a unit will have. The County suggests that the trial court was critiquing the methodology justifying the amount of the fees. To the contrary, the trial court was actually wrestling with the legal validity of the major premise which was not analyzed in Dr. Nicholas' methodology. The court specifically noted that Dr. Nicholas and the County understood the basic premise of impact fee analysis in general (App. Tab 1 at 2), but the Court went on to question whether the decision to apply that methodology was supportable on the facts at hand:

> In the case of the impact fee assessed for sewerage treatment, this is fairly easy to accomplish. All living units require disposal of waste. Unfortunately, in the environment of the school age child, not every resident has children of school age.

Dr. Nicholas strove mightily to meet the dual rational nexus test, and even urged the County to include all municipalities in the Ordinance. However, the facts are that residents of a majority of new homes have absolutely no impact on public schools, and the funds equally benefit new users in the exempted municipalities. This is not sufficient. This is too arbitrary a system. Ordinance 87-60 constitutes a tax on new homes in unincorporated St. Johns County. Since it is not authorized by statute, it is unconstitutional under Article VII, Section 1(a), of the Florida Constitution.

B. Severance Cannot Save The Ordinance.

Finally, the County seeks to save its Ordinance by asking the Court to sever the provisions allowing independent impact assessments, and exempting municipalities. This request should be rejected. No amount of severance can save this Ordinance.

The Ordinance at issue contains a severability clause. However, the existence of a severability clause is not determinative of severability. Barndollar v. Sunset Realty Corp., 379 So. 2d 1278, 1280 (Fla. 1979). The Court has inherent authority to determine severability in the absence of a severability clause and the test for that determination does not change. State ex rel. Boyd v. Green, 355 So. 2d 789, 795 (Fla. 1978). The test for severability has been stated numerous ways by the Court,[30] but the touchstone is

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30 (1) Whether the unaffected portions would produce a result not contemplated by the legislature; (2) whether the invalid

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the intent of the legislature. State v. Newell, 85 So. 2d 124, 128 (Fla. 1956)(En Banc); State v. Lee, 356 So. 2d 276, 284 (Fla. 1978)(England, J., concurring in part).

It is clear the County decided not to mandate a county-wide impact fee. The record indicates that in the County Commission Workshop Forum Dr. Nicholas urged adoption of a county-wide impact fee. (R. at 427-33) The County refused to do so. This is strong evidence of legislative intent. The County did not wish to force the school impact fee upon municipalities. The County may have decided that those municipalities seeking to restrain growth could elect to opt-in; and those seeking to promote economic expansion could decide not to do so. The County may have determined that because municipalities control building permits and development policies within their own boundaries, the County did not wish to establish entirely new administrative systems for collecting an impact fee within the cities. The language of § 6(A) strongly suggests that this was a major factor. Of course, the opt-in provision facilitated enactment by eliminating the pressures non-participating municipalities would have brought to bear against the Ordinance. Moreover, severing § 6A would enormously expand the scope of the Ordinance beyond its terms. This is a serious consideration. State ex rel. Fraser v.

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provision was an inducement to the passage of the legislation at issue; and (3) whether the legislation would have been enacted without the invalid provision. State ex rel. James v. Gerrell, 188 So. 812, 815 (1939); Hayes v. Walker, 44 So. 747, 749 (1907); State ex rel. West v. Hilburn, 69 So. 784, 786 (Fla. 1915); Kass v. Lewin, 104 So. 2d 572, 577 (Fla. 1958); Greenblatt v. Goldin, 94 So. 2d 355, 359 (Fla. 1957).

Gay, 28 So. 2d 901, 903 (Fla. 1947)(En Banc). See also, State ex rel. West v. Hilburn, 69 So. 784, 786 (Fla. 1915); Holley v. Adams, 238 So. 2d 401, 404 (Fla. 1970). Therefore, § 6A should not be severed.

The County also argues that § 7B could be severed. The obvious purpose of § 7B is to afford the opportunity for an individualized evaluation of impact and thereby safeguard against arbitrary and unwarranted imposition of an impact fee. In City of Auburndale v. Adams Packing Ass'n, Inc., 171 So. 2d 161 (Fla. 1965), the Court declined to sever a similar safeguard when "leaving the remainder of the statute standing would defeat the legislative purpose, which seems to have been to afford some safeguard...against arbitrary and unwarranted annexation." Id. at 166. See also, Barndollar v. Sunset Realty Corp., 379 So. 2d 1278 (Fla. 1980)(provision adopted out of considerations of fairness should not be severed).

Furthermore, as explained above, impact fees have been upheld by the courts of this State if, inter alia, "the impact fee formula allows for independent assessment and is not rigid or inflexible...."[31] Absent § 7B, the whole Ordinance fails. Severance would accomplish no purpose.

V. THE ST. JOHNS COUNTY SCHOOL IMPACT FEE ORDINANCE CONSTITUTES AN UNLAWFUL DELEGATION OF POWER.

A further fundamental flaw in Ordinance 87-60 is that it constitutes an unlawful delegation of county legislative power. The Ordinance delegates to the School Board the County's responsibility to

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31 Brief of Amicus Curiae at 8.

spend county funds and to determine the effect of the Ordinance in situations not covered by the County's enactment.

A legislative body such as a Board of County Commissioners, may not delegate its legislative function. Amara v. Daytona, 181 So. 2d 722 (Fla. 1st DCA 1966). See also, State ex rel Ware v. Miami, 107 So. 2d 387 (Fla. 3d DCA 1958)(delegation of legislative authority to another governmental entity prohibited). This is precisely the effect of Ordinance 87-60.

Counties have some discretion in spending impact fees. A county often must choose among proposed projects, authorizing one, rejecting others. However, that discretion must be exercised within established guidelines. Any impact fee ordinance lacking sufficient standards for the exercise of legislative discretion is fatally defective.[32] St. Johns County retains no authority to control the expediture of funds generated by the Ordinance. These functions are delegated to the sole discretion of the School Board. The only guidance the Ordinance offers is to require the School Board to spend the impact fee revenues "to acquire, construct, expand and equip the educational sites and educational facilities necessitated by new development." This language is too vague to cure the improper delegation. The Court has held that the term "need" is susceptible to so many conflicting interpretations that it alone cannot function as a proper guideline. Florida Home Builders Association v. Department of Labor, 367 So. 2d 219 (Fla. 1979).

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32 See, Hollywood, Inc. v. Broward County, supra. Explaining the rational of Broward County v. Janis Development Corp., the court stated, "In particular, we considered the requirement that the money be used to construct or improve roads in the vicinity of the development to be an insufficient and nebulous limitation on the county's discretion in spending the funds."

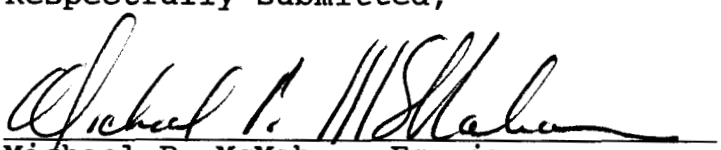
The Ordinance goes further. It authorizes the School Board to actually set the amount of the fee under certain circumstances! Ord. 87-60, §§ 7(A)(5), 7(B). The School Board may also, in its unfettered discretion, grant credits for dedications of land or donations. The School Board alone has the power to determine the type and extent of proof required when a refund is sought. Ord. 87-60, §§ 11(a), 12(A)(8). This is blatant, indefensible delegation of the County's legislative function. City of Miami Beach v. Fleetwood, 261 So. 2d 801 (Fla. 1972); Smith v. Portante, 212 So. 2d 298 (Fla. 1968); Robbins v. Webb's Cut-Rate Drugs Co., 16 So. 2d 121, 122 (Fla. 1944); Early Mobile Homes, Inc. v. City of Port Orange, 299 So. 2d 56, 57 (Fla. 1st DCA 1974).

This unconstitutional delegation of legislative power is not curable. Under Article IX of the Constitution, the County cannot insinuate itself into the decision-making authority of the School Board. See, Tomasello v. Board of Public Instruction, 45 So. 886 (Fla. 1908)(county has no authority over School Board's power to set millage rate).

CONCLUSION

For the reasons set forth above, the Court is respectfully requested to affirm the decision of the District Court of Appeal.

Respectfully submitted,



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