IN THE SUPREME COURT OF THE

STATE OF FLORIDA

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

Defendants/Petitioners,

v.

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

Plaintiffs/Respondents.

SUPREME COURT CASE NO: 75,986

DISTRICT COURT CASE NO: 89-861

LOWER COURT CASE NO: 88-728-CA

APPEAL FROM THE FIFTH DISTRICT COURT OF APPEALS AND THE SEVENTH JUDICIAL CIRCUIT FOR ST. JOHNS COUNTY

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TABLE OF CONTENTS

I.
TABLE OF CITATIONS

CASES

CONSTITUTIONS

STATUTES

Florida Advisory Council on Intergovernmental Relations, Impact Fee Use in Florida: An Update, July, 1989 4

Juergensmeyer and Blake, Impact Fees: An Answer to Local Governments' Capital Funding Dilemma, 9 Fla. St.U.L.Rev. 415 (1981) 2, 9

Mercer and Morgan, The Relative Efficiency and Revenue of Local User Charges: The California Case, 36 Nat'l. Tax. J. 203 (1983) 17

Nicholas, Calculating Proportionate Share Impact Fees Under the Rational Nexus Test, (Chicago: American Planning Assoc. 1988) 2

Nicholas & Nelson, Determining the Appropriate Impact Fees Under the Rational Nexus Test, 54 J. Am. Plan. A. 1 (1988) 2

Nicholas, Impact Exactions: Economic Theory, Practice and Incidence, 50 Law & Contemp. Probs. 85 (1987) 2

Nicholas, The Calculation of Proportionate-Share Impact Fees, PAS Report No. 408, 1989 4

Siemon, The Growth Management Act of 1985: A Bitter Pill But Better Than Growth Management Anarchy, 16 Envtl. & Urb. Issues, Winter, 1989 21

St. Johns County Educational Facilities Impact Fee Ordinance 1, 8, 9, 13, 15, 17, 18, 21, 24, 28, 30, 34, 39, 43

St. Johns County, Florida, Impact Fee Methodology Report 1, 4, 5

St. Johns County Guidelines and Procedures Manual 2, 40, 41, 42

II.
STATEMENT OF THE CASE AND THE FACTS

A.
STATEMENT OF THE CASE

This lawsuit was initiated on June 6, 1988, when Plaintiffs FLORIDA HOME BUILDERS ASSOCIATION, a trade association of residential developers (hereby referred to collectively, along with Lawson, as the "Homebuilders"), and LAWSON HOMES, INC., a private corporation ("Lawson"), filed a six count Complaint in the Circuit Court for St. Johns County. (R. I, p. 1).[1] The Complaint sought a decree that the St. Johns County Educational Facilities Impact Fee Ordinance ("Ordinance") is unconstitutional on a variety of grounds. Defendants, ST. JOHNS COUNTY ("County") and its County Administrator, DANIEL CASTLE, answered on June 27, 1988, denying most of the substantive allegations of the Complaint and alleging several affirmative defenses. (R. I, p. 77)

On January 20, 1989, the County filed a Motion for Summary Judgment (R. I, p. 105) and on February 21, 1989, the Homebuilders filed a Cross-Motion for Summary Judgment. (R. II, p. 218) On February 22, 1989, the Homebuilders abandoned their due process, equal protection, and right to privacy claims as presented in Count VI of their Complaint. The motion and cross-motion for Summary Judgment were heard by the Honorable Richard G. Weinberg on April 6, 1989. (R. II, p. 308)

The summary judgment record was comprised of Ordinance No. 87-60, the St. Johns County Educational Facilities Impact Fee Ordinance, a Methodology Report prepared by Professors James C. Nicholas and Julian C. Juergensmeyer, the County's

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[1] The record filed by the Clerk for the Seventh Judicial Circuit has been cited as "R." followed by the volume and page number, i.e., R. I, pp. 23-26.

impact fee consultants,[2] the St. Johns County General Impact Fees Administrative Guidelines and Procedures Manual ("Procedures Manual"), and an affidavit of Professor Michael Stegman, a nationally recognized planner and expert on impact fees and city and regional planning. The Plaintiffs offered no evidence except for the deposition of one of the County's consultants, Dr. Nicholas. On April 17, 1989, the trial court rendered a decision granting summary judgment in favor of the Homebuilders.[3] A copy of the court's opinion is attached hereto as Appendix 1.

St. Johns County and Castle filed a timely notice of appeal and the following parties were granted leave to intervene on their behalf as amicus curiae: the State of Florida Department of Education, the Florida School Boards Association, Inc., Dade County, the School Board of Broward County, the School Board of Dade County, the School Board of Hernando County, the School Board of Martin County, the School Board of Orange County, the School Board of Osceola County, the School Board of Palm Beach County, the School Board of Seminole County, the School Board of St. Johns County, and the School Board of Volusia County.

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[2] Professors Nicholas and Juergensmeyer are the Co-Directors of the Center For Growth Management Studies at the University of Florida, and are recognized national experts in the field of impact fees and other land economics. Professor Nicholas is the author of several books, monographs and articles on the topic of impact fees and infrastructure finance. See, e.g., Nicholas, Calculating Proportionate Share Impact Fees Under the Rational Nexus Test, (Chicago: American Planning Assoc. 1988); Nicholas & Nelson, Determining the Appropriate Impact Fees Under the Rational Nexus Test, 54 J. Am. Plan. A. 1 (1988); and Nicholas, Impact Exactions: Economic Theory, Practice and Incidence, 50 Law & Contemp. Probs. 85 (1987). Professor Juergensmeyer is the co-author (with Blake) of an article entitled Impact Fees: An Answer to Local Governments' Capital Funding Dilemma, 9 Fla. St.U.L.Rev. 415 (1981), cited with approval in Home Builders and Contractors Ass'n. of Palm Beach County, Inc. v. Bd. of County Comm'rs of Palm Beach County, 446 So.2d 140, 145 (Fla. 4th DCA 1983) ("The home rule powers granted local governments in Florida, the legislative mandate that local governments must plan comprehensively for future growth, and the additional broad powers given them to make those plans work effectively, indicate that properly limited impact fees for educational or recreational purposes should be construed as regulations.")

[3] Although the grounds of invalidity are not clearly enumerated, it appears from the opinion that the trial court accepted the arguments raised by the Homebuilders below. For the purposes of this appeal, the County assumes that the trial court determined that state legislation preempts the County from entering into the field of educational facility financing, that the methodology used by the County to calculate the fee violates the proportionate share requirement of Contractors and Builder Ass'n. of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976), and is therefore a tax, that the ordinance violates the free and uniform public schools provisions of the Florida Constitution, and that the ordinance unlawfully delegated legislative authority to the St. Johns County School Board.

After oral argument, the Fifth District Court of Appeal affirmed the trial court's decision invalidating the constitutionality of the St. Johns County school impact fee ordinance but certified the following question to be of great public importance:

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

Slip op., App. 2 at p. 1. The court of appeal's decision is attached hereto as Appendix 2.

On April 30, 1990, the County timely filed a notice to invoke the discretionary jurisdiction of this Court pursuant to the opinion of the District Court and Fla. R. App. P. 9.120(b) & (c). The County also invokes the discretionary jurisdiction of this Court on the grounds that the appellate court's decision expressly construed a provision of the State Constitution and because the decision expressly and directly conflicts with the decisions of this Court on the issue of uniformity.[4]

B.
STATEMENT OF THE FACTS

St. Johns County is a rapidly growing county (R. IV, p. 587) with an increasing public school child population. (R. III, p. 423) The need for additional capacity in the County's educational facilities is well-documented. (R. IV, pp. 606-610; see also Slip op., App. 2 at p. 3 (Sharp, J. dissenting).) In 1986, the County initiated a comprehensive impact fee program to finance additional infrastructure required to serve new growth and development. (R. II, p. 167; R. II, pp. 320-21) Impact fees are charges imposed by a local government on new development as a condition of development

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[4] See Scavella v. School Bd. of Dade County, 363 So.2d 1095 (Fla. 1978); School Bd. of Escambia County v. State of Florida, 353 So.2d 834 (Fla. 1977). The County did not file a jurisdictional brief in this cause because a fair reading of the procedural rules indicates that a brief is not appropriate under such circumstances and because the bases for these additional jurisdictional grounds are practically self-evident. See, e.g., Schermerhorn v. Retail Clerks Int'l Ass'n, 141 So.2d 269, 272 (Fla. 1962) (constitutional question of first impression); Armstrong v. City of Tampa, 106 So.2d 407, 410 (Fla. 1958) ("construction" of constitution contemplates interpretation of meaning of constitutional language which is doubtful by its own content).

approval for a proportionate share of the cost of public facilities capacity needed to serve new development. (R. III, pp. 382-83) Impact fees are used in Florida to finance the provision of expanded capital facilities, including: potable water, sewers, solid waste, drainage, roads and transportation, fire and emergency medical services, public schools, public libraries, law enforcement and cemeteries.[5]

Several workshops were held in St. Johns County in 1986 on the topic of impact fees and were attended by members of the St. Johns County Board of County Commissioners and the St. Johns County School Board ("School Board"). (R. II, p. 326) At the request of the School Board, the County included educational facilities impact fees within the scope of the County's impact fee program. (R. II, p. 167) In addition to the educational facilities impact fees they prepared for the County, Professors Nicholas and Juergensmeyer also developed impact fees for roads, law enforcement and police protection, parks, fire protection, emergency medical services, and public buildings. (R. IV, p. 589) During 1986 and 1987, members of the County staff, the School Board staff and the County's consultants met several times in regard to the educational facilities impact fees. (R. II, p. 330)

In August of 1987, a report entitled "St. Johns County, Florida, Impact Fee Methodology" ("Methodology Report")(attached hereto as Appendix 3) was submitted by Professor Nicholas to the Board of County Commissioners. (R. I, p. 106) The Report set forth what action St. Johns County must take to maintain an acceptable level of service for public facilities in the County. In addition, the Report indicates that the County would have to provide additional public facilities capacity (such as new roads, parks, schools, public buildings and fire stations) in order to accommodate new growth and development without a decline in level of service and quality of life. (R. IV, p. 588)

The methodology employed by Professor Nicholas calculates the cost of educational facilities needed to provide sufficient school capacity to serve new growth

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[5] See J. Nicholas, The Calculation of Proportionate-Share Impact Fees, PAS Report No. 408, 1989, p.3. See also Florida Advisory Council on Intergovernmental Relations, Impact Fee Use in Florida: An Update, July, 1989.

and development. (R. III, pp. 454-56) The methodology then calculates a pro rata share of that cost by taking the total cost of facilities per educational station (per unit of student capacity) and then allocating that cost to each unit of development. (R. III, pp. 458-60) The allocation is not intended to calculate the amount each dwelling unit will use the St. Johns County school system. Rather, as required by Contractors and Builders Ass'n. of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976), the methodology calculates the proportionate share of the cost of the facilities capacity needed to serve new growth and development. (R. IV, p. 589) On October 20, 1987, the Board of County Commissioners of St. Johns County, after considering the Methodology Report, determined that the Report set forth a reasonable methodology and analysis to determine the impact of new development on the need for and costs of additional school sites and educational facilities in St. Johns County (R. II, p. 226) and accordingly enacted the St. Johns County Educational Facilities Impact Fee Ordinance (attached hereto as Appendix 4). (R. II, p. 240)

Ordinance 87-60 contains a fee schedule (R. II, p. 232) which is based on a formula that calculates each unit of development's pro rata share of the cost of new educational facilities capacity needed to serve new growth and development. (R. III, p. 454-56) The Ordinance also limits the expenditure of impact fee funds to the acquisition, construction, and expansion of educational facilities capacity (R. II, p. 234), requires that fees be expended or encumbered within six years from the date the fees were paid, or provides for the refund of the fees. (R. II, p. 235) Under the provisions of the Ordinance, the funds that are collected must be deposited in an educational facilities impact fee trust fund for use only for the purposes for which they are collected. (R. II, p. 234).

III.
SUMMARY OF ARGUMENT

The core issue in this cause is whether the St. Johns County Educational Facilities Impact Fee violates the constitutional entitlement to free and uniform public

schools in Florida. The County submits that its educational facilities impact fee is a valid land use regulation that does not violate the constitutional imperative for free and uniform schools.

First, the school impact fee ordinance is a regulation, like any other land use regulation, that controls the character, location and magnitude of residential development in the County by imposing a development exaction. A developer who wants to build a new house in St. Johns County will be charged impact fees for parks, emergency medical services, public buildings, law enforcement and police protection, roads and schools. The educational facilities impact fee is no different from these other impact fees since it is a charge on developers for the ability to build in the County and it creates new capacity for the County's public capital facilities. An educational facilities impact fee that meets the rational nexus test affects the "freeness" and "uniformity" of the public school system to the same degree as its sister impact fee ordinances -- to no degree at all.

The Homebuilders' notion that the educational facilities impact fee constitutes a tuition charge because a student's parents must pay the educational facilities impact fee (ostensibly by paying the developer an increase in housing costs) is designed to create the illusion that the child's constitutional rights are being violated. However, it is the developers who are responsible for paying the fee and the Homebuilders have no constitutional right to burden the County's public school system for free. Whether or not the fee is paid has no relevance to the ability of a child who resides in the St. Johns County to attend public school in the County.

The County submits that the proper question before this Court should be whether the amount of the educational facilities impact fee is reasonable and whether the St. Johns County Board of County Commissioners and School Board could have reasonably relied on the recommendations and conclusions of its experts who devised the methodology. The free and uniform provision of the Florida Constitution does not even apply in this query. The County respectfully submits that while the issues presented here do focus on the power of county government to plan for and financially accommodate

new growth and development, this is not a case that in any way infringes on the right of Florida residents to attend a uniform system of free public schools.

Second, Ordinance 87-60 is nothing more than an innovative capital facilities financing device that was specifically endorsed by the Local Government Comprehensive Planning and Land Development Regulation Act, Section 163.3161 et seq., Fla. Stat. (1989) as a means for local governments to finance educational facilities. The County has merely reacted to this legislative authority by charging impact fees in lieu of levying more restrictive regulations that would prohibit development in the absence of adequate facilities (e.g., a growth moratorium).

Third, the constitutionality of impact fees is well-established in Florida. See Contractors and Builders Ass'n. of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976). Not only does Ordinance 87-60 meet the "dual rational nexus" test set forth in Dunedin, but the concept of educational facilities impact fees is in reality no different than sewer impact fees (upheld in Dunedin), road impact fees (sustained in Hollywood Inc. v. Broward County, 431 So.2d 606 (Fla. 4th DCA 1983)) and park impact fees (found valid in Home Builders and Contractors Ass'n. of Palm Beach County, Inc. v. Bd. of County Comm'rs of Palm Beach County, 446 So.2d 140 (Fla. 4th DCA 1983)), or for that matter, from any other type of responsible government regulatory financing program.

The methodology employed by St. Johns County constitutes a reasonable calculation of the educational facilities capacity required to serve a residential unit of development. There can be no question that the fees charged are no more than a "pro rata" share of the cost of facilities needed to serve new growth and development. Nor can there be any question that the fees collected are earmarked to be spent only on educational facilities. The trial court committed manifest error when it substituted its judgment for that of the Board of County Commissioners as to the "best" way to calculate an educational facilities impact fee. The scope of judicial review is narrow when a legislative enactment is at issue, and the trial court should have gone no further than considering whether the methodology reasonably assessed a "pro rata" share of the cost of educational facilities needed to serve new growth and development. Khoury v. Carvel

Homes South, Inc., 403 So.2d 1043, 1045 (Fla. 1981).

Finally, Ordinance 87-60 does not delegate legislative power of the County to the School Board since the School Board does not have the discretion to say what the law is. The legislative mandate states that each unit of development shall pay a pro rata share of the cost of needed facilities, and this mandate cannot be modified by the School Board. The School Board is only tasked with administratively ascertaining what a pro rata share is under particular circumstances -- which does not constitute a delegation of authority to say what the law shall be.

For these and the reasons set forth more fully herein, St. Johns County respectfully submits that the appellate court's decision should be reversed and summary judgment should be entered in favor of the County.

IV.
ARGUMENT

Introduction

The District Court of Appeal, while sympathetic to the purpose of the St. Johns County Educational Facilities Impact Fee Ordinance, held that the ordinance "violates the constitutional mandate for a 'uniform system of free public schools' and is invalid and unenforceable."[6] (Slip op., App. 2 at p. 2). St. Johns County respectfully disagrees and prays that this honorable Court reverse the decision of the District Court of Appeal and render a decision sustaining the validity of educational facilities impact fees in general, and the St. Johns County Educational Facilities Impact Fee Ordinance in particular.

St. Johns County submits that the real subject matter of this appeal is growth management, and that the question of the validity of impact fees -- a key growth management tool -- goes to the very core of growth management in Florida. See

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[6] The District Court of Appeal did not reach a number of questions discussed by the trial court in its somewhat disjunctive opinion. Those other issues are nonetheless addressed here in Sections IV C through E of this Brief.

Contractors and Builders Ass'n. of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976); Hollywood Inc. v. Broward County, 431 So.2d 606 (Fla. 4th DCA 1983); Home Builders and Contractors Ass'n. of Palm Beach County, Inc. v. Bd. of County Comm'rs of Palm Beach County, 446 So.2d 140 (Fla. 4th DCA 1983); and Juergensmeyer and Blake, Impact Fees: An Answer to Local Governments' Capital Funding Dilemma, 9 Fla. St.U.L.Rev. 415 (1981).

In 1985, the Legislature of the State of Florida adopted The Local Government Comprehensive Planning and Land Development Regulation Act of 1985 (the "Growth Management Act"), Section 163.3161 et seq., Fla. Stat. (1989). The Act imposes a statewide standard of "concurrency," that is, a requirement that public facilities be available (in terms of the capacity of existing or funded improvements) to serve new growth and development at the time of development permitting:

> [A] local government shall not issue a development order or permit which results in a reduction of the level of services for the affected public facilities below the level of services provided in the comprehensive plan of the local government.

Section 163.3202(2)(g), Fla. Stat. (1989). Included within the ambit of "public facilities" are educational facilities, the subject matter of the St. Johns County Educational Facilities Impact Fee Ordinance.

> "Public facilities" means major capital improvements, including, but not limited to, transportation, sanitary sewer, solid waste, drainage, potable water, educational, parks and recreational, and health systems and facilities.

Section 163.3164(23), Fla. Stat. (1989)(emphasis added). Also included in the Growth Management Act is a mandate for land development regulations that implement concurrency, and that mandate includes express encouragement for the use of impact fees:

> This section [land development regulations] shall be construed to encourage the use of innovative land development regulations which include provisions such as ... impact fees ...."

Section 163.3202(3), Fla. Stat. (1989) (emphasis added).

Put plainly, the Growth Management Act imposes on local governments like St. Johns County an obligation to ensure that educational facilities demand does not exceed educational facilities capacity. One of the growth management tools that assures the alignment of facilities demand and facilities capacity is the use of impact fees as an innovative land development regulation in lieu of restrictive regulations.

In its decision, sub judice, the District Court of Appeal apparently agreed with the Florida Legislature that impact fees are an equitable growth management tool, but concluded that the constitutional mandate for a uniform system of free public schools precludes the use of impact fees for educational facilities:

> Although we agree with the dissent that it would be more equitable to require new users of school facilities to help pay for them if a constitutional way could be found, we do not believe that St. Johns County has found such a way.

Slip op., App. 2 at p. 2. The principal issues in this appeal, therefore, are whether the imposition of educational facilities impact fees as a condition of development approval violates the "free" and the "uniform" requirements of the Florida Constitution. Article IX, section 1 of the Florida Constitution provides that:

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

The Homebuilders argued below and the Fifth District Court of Appeal held that the imposition of educational facilities impact fees violates Article IX, section 1. The Fifth District, however, recognizing "the ever increasing need for new school facilities caused by the rapid development in this state and the budgetary problems faced by school boards throughout the state," certified the issue to this honorable Court as being of great public importance.[7]

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[7] The primary thrust of the argument below and the Fifth District Court of Appeal's opinion pertains to the "free" public schools issue. However, the Court's observations about the lack of uniformity (because the County's educational facilities impact fee applies only within the area of the County's police power

A.
EDUCATIONAL FACILITIES IMPACT FEES DO NOT VIOLATE THE CONSTITUTIONAL IMPERATIVE FOR FREE PUBLIC SCHOOLS

1.
System Of "Free" Public Schools Means No Tuition

The underlying policy of the free schools imperative is simple, fundamental and easily understood: education is the foundation of an organized society.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.

Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954). In a democracy founded on principles of equality, access to education should not be subject to a person's ability to pay or the ability of that person's parents to pay for access to schools. As this Court once enunciated, the objective of the free public schools mandate is to "advance and maintain proper standards of enlightened citizenship." State v. Henderson, 188 So. 351, 353 (Fla. 1939).

Of course, the nobility of education and the constitutional mandate for free access to public schools can not logically or practically mean that schools are actually "free" in the sense that they are not paid for by the public. Unfortunately, there are only a few decisions in Florida that address the meaning of "free" public schools in the Constitution. See, e.g., Scavella v. School Bd. of Dade County, 363 So.2d 1095 (Fla. 1978) and Penn v. Pensacola-Escambia Governmental Center Auth., 311 So.2d 97 (Fla. 1975). Those few cases that do exist, and a large number of decisions in other states with similar constitutional mandates for free public schools, however, make it clear that

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jurisdiction) places the meaning of the constitutional uniformity requirement at issue in this appeal.

"free schools" means schools where a student's attendance and full participation in school is unrelated to the payment of money or other consideration -- what in a simpler time would have been described as "tuition free."

In cases testing the validity of a wide range of school-related fees for all manner of services or costs, the courts of this state and others have focused on a single, simple proposition: does payment of the fee determine whether the student has access to some part of his or her education? Where the fee was found to relate to an activity that was not a part of the student's education or did not affect access to education, the fees have been sustained.[8] Where the fees have related to a part of a student's education or have directly affected access to education, the fees have been invalidated.[9]

In other words, what the constitution means is that the way in which schools are financed must be separate and independent from the right of a resident student to actually attend public school. The constitutional imperative for free public schools does not mean that the schools must be constructed and operated through some magical sleight of fiscal legerdemain; it means instead that a resident student's access to the classroom can not be contingent on the payment of money. Put more simply, the Florida Constitution requires that the child of a multi-millionaire has no more or no less of a right to attend public school than does a pauper's child who lives in a home with no assessed value.

Article IX, section 1 of the Florida Constitution denotes that a student may not be required to pay tuition as a condition of being admitted into school. However,

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[8] See, e.g., Vandevender v. Cassell, 208 S.E.2d 436 (W. Va. 1974)(upheld fees for gymnasium uniforms, lockers and membership in extracurricular organizations); Parsippany-Troy Hills v. Bd. of Educ., 457 A.2d 15 (N.J. Super A.D. 1983)(upheld driver education fee); Beck v. Bd. of Educ., 344 N.E.2d 440 (Ill. 1976)(upheld fee for materials); and Marshall v. School Dist. Re. #3 Morgan County, 553 P.2d 784 (Col. 1976)(upheld textbook rental fees).

[9] See, e.g., Paulson v. Minodoka County School Dist. Number 331, 93 Idaho 469, 463 P.2d 935 (1970)(struck down textbook fees but upheld extracurricular activity fees); Bond v. Ann Arbor School Dist., 383 Mich. 693, 178 N.W.2d 484 (1970)(struck down fees for textbooks and school supplies); and Granger v. Cascade County School Dist. Number 1, 159 Mont. 516, 499 P.2d 780 (1972)(struck down fees for supplies and equipment but upheld fees for optional or extracurricular courses).

that does not mean that it is unconstitutional if his or her parents are required to pay taxes or other charges that finance schools -- so long as the payment of such taxes or charges do not control or affect the student's access to the public schools. To the contrary, it is settled in Florida that parents may be required to pay for the schooling that is available to their children in the form of taxes and other charges where the incidence of payment is unrelated to actual use of the public schools.[10] For example, property owners pay ad valorem taxes and lessees pay rents that include property taxes (or leases where property taxes are pass-throughs), portions of which pay for schools. However, the incidence of payment of these taxes and rents is unrelated to school attendance, and hence the constitutional imperative for free schools is not violated.

The constitutional imperative for free schools focuses on a single critical point in time: when a student arrives at the school house door. Under Florida law, a resident student's right of admission at the school house door is absolute and unqualified; and nothing in the record in this cause or in the St. Johns County Educational Facilities Impact Fee Ordinance indicates that in any way that entitlement is qualified or abridged in St. Johns County.

2.
Educational Facilities Impact Fees Are Not The Functional Equivalent Of Tuition Charges

In part, the Fifth District Court of Appeal's decision is based on the Court's conclusion that the imposition of an educational facilities impact fees on developers is the functional equivalent of a tuition payment because the fee is:

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[10] The reality is that all property owners pay for schools through property taxes, including those property owners with children in public schools. The constitutional imperative is not abridged, however, because the payment of such taxes is not incident to actual use of the schools since admission to the schools is linked only to residency, not to having paid taxes.

> ultimately assessed only against those households that have children in public school. Whether the money is paid directly to the school board as tuition or to the county commission and delivered to the school board when the family of public school children build or buy a home in the district seems to have little practical distinction."[11]

Slip op., App. 2 at p. 2 (emphasis added). St. Johns County respectfully, but strenuously disagrees.

First, other than the fact that students live in residences and residences are developed, there is no link between school attendance and the payment of educational facilities impact fees. Any school age child who is a resident of the County is entitled, without qualification or condition, to attend public school in the County without regard to whether he or she is a member of a household that lives in a dwelling unit for which an educational facilities impact fee has been paid.

More importantly, notwithstanding the Homebuilders' rhetoric, impact fees are paid by developers.[12] It is a person's status (as the developer of dwelling units that require additional public facilities capacity) that triggers the requirement to pay impact fees in lieu of compliance with regulations that defer development permitting until additional facilities funding commitments are in place. While it is true that in some circumstances the developer may be a member of a household, the incidence of payment of impact fees relates only to that person's status as a developer, and admission to school is not, in any way, related to the payment of the fees under the St. Johns County Educational Facilities Impact Fee.

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[11] The Court's reference to households reveals the misapprehension of the Court. Educational facilities impact fees are imposed on developers, without regard to whether they have children and without regard to whether the dwelling units that are being developed will be occupied by households with children who attend schools. It is ironic that one of the flaws that the Circuit Court judge perceived in the St. Johns County ordinance was that the impact fee is related to facilities demand without regard to whether a particular unit was actually occupied at a particular time by a household with school age children.

[12] Contrary to the Homebuilders' assertion (Answer Brief below, at 4), there is no evidence in the record that shows that the economic burden of impact fees falls on either the original or subsequent purchaser.

Whether impact fees are ultimately passed on in whole or in part to home purchasers is not settled in the record in this cause, and is in fact the subject of some debate in the literature. See, e.g., Delaney & Smith, Development Exactions: Winners and Losers, Land Use Law, Nov. 1989, at 3. However, St. Johns County submits that common sense suggests that if the market will support a price of $75,000 for a 1200 square foot home, that is all the market will support. If the cost of constructing the home goes up because of an increase in interest rates, inclimate weather or the payment of an impact fee, and the market for the 1200 square foot home is $75,000 (that is, the market is not elastic), then the cost of the impact fee is not going to be passed through to the purchaser as a matter of simple economic reality.

In fact, the Homebuilders' assertion that impact fees will result in increased housing costs because the fees will be passed through to the purchaser is counter-intuitive. If in contrast to the situation just described, the market will in fact pay $80,000 for the 1,200 square foot home, is it realistic to assume that a homebuilder is going to sell the home for less, just because there are no impact fees? St. Johns County submits that on the record in this cause, the only persons who pay educational facilities impact fee are developers and that such payments have nothing to do with the constitutional entitlement of resident students to attend public schools for free.[13]

Second, any student who is a resident of St. Johns County is entitled, without any qualification or condition related to the St. Johns Educational Facilities Impact Fee Ordinance, to attend public school. There is nothing about the Ordinance

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[13] The extent to which the market will bear the additional expense needed to pass impact fees through to the purchaser is not clear from the record in this cause. Nevertheless, logic, common sense and practical economics suggest that if impact fees are passed through to anyone by a developer, the likely "pass-throughee" will be the raw land owner who sells property to a developer for development. When a developer acquires a parcel of land for development, the developer determines the amount of money he or she can afford to pay for the land by calculating development costs and product values. If the developer has to pay impact fees, then his or her expenses will be higher and that means that he or she will pay the property owner less money for that land than he or she might otherwise have been willing to pay. Not only is this the likely outcome of a program of impact fees, but it is also an appropriate and equitable result. The value of property for development purposes is based on the public facilities available to serve the property. It is appropriate that the property owner share in the cost of those facilities, and not receive a windfall benefit in the form of developable land values created at the expense of others.

that in any way affects a resident student's entitlement to a free public school education, either directly or indirectly. On the record in this cause, admission to the public schools of St. Johns County, as a matter of law, is determined by a single factor -- whether a student is a resident of the County -- a factor that does not abridge in any way the constitutional obligation to provide a system of free public schools.

The notion that educational facilities impact fees are the functional equivalent of tuition -- charged at the County border instead of the school house door -- is simply not true. Even a cursory analysis of that hypothesis reveals that the asserted equivalency is illusory. It is axiomatic in Florida that persons who are not residents have no right to attend free public schools. See Scavella v. School Bd. of Dade County, 363 So.2d 1095 (Fla. 1978)(non-resident students may be charged tuition fees without offending the constitutional mandate for free public schools). Therefore, if the occupants of new dwelling units are not yet residents of the County at the time the educational facilities impact fee is paid, there is no constitutional entitlement that is implicated. On the other hand, those persons who are existing residents of the County already attend school for free in the County, and whether their household does or does not pay educational facilities impact fees has no effect on those residents' access to a system of free public schools.

It is also axiomatic that in Florida even persons who are residents must pay indirectly for the public school system. Scavella, 363 So.2d at 1098 ("These schools are funded by governmental sources and nonresidential tuition fees, not by the people utilizing them, except indirectly as taxpayers.")[14] What the constitutional imperative for

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[14] The bottom line is that there is no single way for an educational system to be financed and managed; the Homebuilders' argument that Scavella stands for the proposition that taxes alone are the sole vehicle for accommodating new growth is wrong. (See Answer Brief below, p. 12-13.) When Scavella was written, financing mechanisms such as impact fees or other forms of developer exactions were in their infancy; it is therefore not surprising that they are not mentioned. Moreover, the Florida Constitution and the Florida School Code expressly provide for several different funding sources. See, e.g., Art. VII, sec. 9, Fla. Const., and Section 235.25, Fla. Stat. (1989)(ad valorem taxes); Art. VII, sec. 11, Fla. Const. and Section 236.36, et seq., Fla. Stat. (1989)(proceeds from sale of school bonds); Section 236.02, et seq., Fla. Stat. (1989)(allocation of state funds through the Florida Education Finance Program); Section 236.24(1), Fla. Stat. (1989)(appropriations by county commissioners, any and all other sources for school purposes,

free schools prohibits is a linkage between school access or admission and payment of money. To the extent that required payments (such as property taxes), are not directly or indirectly linked to access or admission to school, they do not trammel the concept of free public schools. Educational facilities impact fees, although linked to public schools in terms of the amount of the development exaction imposed in lieu of restrictive timing and sequencing regulations, are not in any way linked to student access or admission to the system of free public schools.

3.
The St. Johns Educational Facilities Impact Fee Is A Development Exaction And Not A User Fee

The Fifth District Court of Appeal construed the St. Johns Educational Impact Fee as imposing a "user" fee for schools and concluded that such a fee violated the free school imperative. If educational facilities impact fees were in fact user fees, the County would have little difficulty agreeing with the District Court. The trouble is, the development exaction imposed by the St. Johns County Educational Facilities Impact Fee Ordinance is not, with all due respect to the trial court judge and the Fifth District Court of Appeal, a "user" fee.[15]

A user fee is a fee that is charged as an incidence of receiving service. See, e.g., Mercer and Morgan, The Relative Efficiency and Revenue Potential of Local User Charges: The California Case, 36 Nat'l. Tax. J. 203 (1983). If the fee is not paid, there

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and other sources); Section 228.051, Fla. Stat. (1989)(other lawful sources or combinations of sources); and Section 235.4235, Fla. Stat. (1989)(other legally available state funds or grants, donations or matching funds, or by a combination of such funds).

[15] The County submits that the appellate court incorrectly held that the school impact fee was a "user fee." In part, this determination appears to be based on an incorrect interpretation of the independent assessment procedure. (Slip op., App. 2 at p. 2) The impact fee is not charged on the basis of the occupants of a residential unit (e.g., retirees, infertile couples, etc.), but rather on the anticipated impact of a residential unit on the school system. Moreover, the independent assessment procedure was included in the ordinance as a means of complying with the rational nexus test -- to guarantee that a fee payer is not charged more than a pro rata share of the cost of school facilities capacity needed to serve the unit of development -- and has no relevance to the question of whether the fee is or is not a "user fee." Impact fees are not levied on occupants of dwelling units (but rather on those who make it their business to build dwelling units).

will be no service. By contrast, the St. Johns County Educational Facilities Impact Fee Ordinance imposes a development exaction which is a condition of development approval, in lieu of an otherwise valid restrictive regulation, such as denial of the approval until adequate educational facilities are available to serve new growth and development at the planned and programmed level of service. See Section 163.3202(2)(g), Fla. Stat. (1989).

The distinction between "user" fees and "development exactions" is significant not only in terms of when the fees are collected, but also in terms of the extent to which the obligation to pay might intrude upon the constitutional entitlement of a resident to access to a system of free public schools. User fees are linked to actual use, while development exactions are linked to adequate facilities capacity. A user fee assumes that capacity is available and imposes a fee for using the capacity. A development exaction is predicated on the fact that capacity is not available and that development approval should either be withheld until capacity is available (Section 163.3202(2)(g), Fla. Stat. (1989)) or the developer should be given the alternative of financing an increase in facilities capacity.

In concluding that the St. Johns County Educational Facilities Ordinance imposed a user fee which violated the constitutional imperative for free public schools, the Fifth District Court of Appeal construed Section Seven B of the Ordinance such that the Ordinance assesses educational facilities impact fees "only against those households that have children in public school." St. Johns County respectfully submits that the District Court's conclusion is simply wrong. Section Seven B of the Ordinance provides that:

> If a feepayor opts not to have the impact fee determined according to paragraph (A) of this section, then the feepayer shall prepare and submit to the St. Johns County School Board an independent fee calculation study for the land development activity for which a building permit or permit for mobile home installation is sought. The student generation and/or educational impact documentation submitted shall show the basis upon which the independent fee calculation was made. The St. Johns County School Board may adjust the educational facilities impact fee to that deemed to be

> appropriate given the documentation submitted by the feepayor. The County Administrator shall make the appropriate modification upon notice of such adjustment from the School Board.

(R. II, p. 233). St. Johns County submits that a fair reading of Section Seven B is that the alternate fee calculation provides an alternative to the fee schedule in the Ordinance for computing facility capacity and does not provide for the kind of case by case exemption pointed to by the Fifth District. Indeed, the Ordinance is quite clear that it is the dwelling unit which is the measure of facilities need and not the character of the inhabitants. Therefore, it is virtually impossible for the presence or absence of school age children in the first household to occupy a new dwelling to be a criterion for determining whether the dwelling unit has no facilities demand.

In point of fact, because the demand coefficient for educational facilities is the dwelling unit, the payment of the fee has nothing to do with actual use of schools. Whether a particular occupant has "children in public school" is irrelevant to payment of the fee under the St. Johns County Ordinance, since it is the dwelling unit that is the measure of capacity needs and the impact fee. An adjustment is only appropriate when the character of the dwelling unit is such that it cannot (at any point in time) be used in a way that will require educational facilities capacity. It is simply a fact that occupancy is irrelevant to whether a fee is required to be paid -- it does not matter whether the occupants of a new unit have zero, one or ten children in school -- the developer of the dwelling unit in which they live will have paid the same educational facilities impact fee.

As indicated above, St. Johns County disagrees that Section Seven B of the Ordinance has the effect of converting the educational facilities impact fee into a user fee. However, the County submits that if this Court agrees that the presence of Section Seven B makes the Ordinance invalid, then the offending section should be severed from the Ordinance in accordance with the severability clause in Section Fifteen of the Ordinance. Invalidation of the entire Ordinance would be clearly contrary to the

manifest intent of the Board of County Commissioners in the adoption of the Ordinance.

Furthermore, in a user fee situation, if the fee is not paid, then service is denied or withdrawn. On the other hand, if a development exaction is not paid, development approval is not granted. If a development exaction is paid, then development approval is granted without regard to when the required additional facility will be available to serve new growth and development. The St. Johns County ordinance is not a user fee -- the penalty for not paying is not denial of attendance at school, but rather denial of development approval.[16]

Although sometimes difficult to describe, there is a clear, fundamental difference between "tuition" and educational facilities impact fees. Tuition relates to actual attendance at school, while educational facilities impact fees relate to the availability of capacity. In the context of a development exaction, it does not matter whether the first occupant of a dwelling unit actually generates additional students. Rather, what matters is whether there is sufficient capacity available in the event that the dwelling unit is ever occupied by a household with school age children.[17]

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[16] Development exactions for schools have also been considered and upheld in several states (e.g., California, Wisconsin, Illinois, Colorado and New Jersey) that have similar free and uniform constitutional provisions and whose courts have accepted school exactions as a lawful means of subdivision control. In California, for example, the courts have upheld the imposition of school impact fees to be an "undisputed and indisputable instances of economic regulation." Candid Enters., Inc. v. Grossmont Union High School Dist., 39 Cal. 3d 878, 705 P.2d 876, 218 Cal. Rptr. 303, 312 (1985)(emphasis added); Balch Enters., Inc. v. New Haven Unified School Dist., 268 Cal. Rptr. 543, ___ P.2d ___, 219 Cal. App. 3d 783 (March 19, 1990); Fontana Unified School Dist. v. City of Rialto, 219 Cal. Rptr. 254, 173 Cal. App. 3d. 725 (4th Dist. 1985); Laguna Village, Inc. v. Orange Co., 212 Cal. Rptr. 267, 166 Cal. App. 3d. 125 (4th Dist. 1985); and McClain Western #1 v. County of San Diego, 146 Cal. App. 3d 772, 194 Cal. Rptr. 594 (4th Dist. 1983). The Wisconsin and Illinois courts have also upheld as a valid exercise of the police power dedication requirements, or fees in lieu, for off-site educational purposes, even though the states' constitutions mandated that residents have access to free and uniform public schools. See, e.g., Jordan v. Village of Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 442 (1965), appeal dismissed, 385 U.S. 4 (1966); and Krughoff v. City of Naperville, 41 Ill. App. 3d. 334, 354 N.E.2d 489 (2d Dist. 1976), aff'd, 68 Ill. 2d 352, 369 N.E.2d 892 (1977). See also Cal. Const. art. IX, sec. 5; Wis. Const. art. X, sec. 3; Colo. Const. art. IX, sec. 2; N.J. Const. art. VIII, sec. 4, par. 2.

[17] Recall that the overall objective of responsible growth management is the alignment between facilities demand and facilities capacity. Section 163.3177(10)(h), Fla. Stat. (1989).

Development exactions ensure that adequate capacity is available per dwelling unit, regardless of whether a particular dwelling unit actually generates school age children at any particular point in time. A dwelling unit developed by a childless couple still needs a pro rata share of educational facilities capacity because the unit may be occupied by a child-bearing couple at some time in the future. If alignment of facilities demand with facilities capacity makes sense (and it assuredly does, see, e.g., Siemon, The Growth Management Act of 1985: A Bitter Pill But Better Than Growth Management Anarchy, 16 Envtl. & Urb. Issues, Winter 1989), then capacity must be made available to the dwelling unit regardless of the identity and characteristics of its initial residents. Otherwise, the facilities demand will inevitably overwhelm facilities capacity.

The methodology used in St. Johns County measures facilities demand in terms of educational facilities required per dwelling unit (all dwelling units). Therefore, the imposition of an educational facilities impact fee that is linked to per unit demand, and not to actual occupant use, does not violate the free school provision. For example, consider a student who currently resides in the County and attends the free public schools in the County. The student's family proposes to construct a new home in the County. Whether that student's family does or does not pay the educational facilities impact fee (not paying presumes that the new home is not constructed) has no effect on the student's access to the free public school system.

While failure to comply with the requirements of the Educational Facilities Impact Fee Ordinance may result in civil or criminal sanctions against the developer of a dwelling unit who does not pay the fee, (R. II, p. 240) any students who reside in that dwelling unit (assuming the house is built in violation of the law) will be admitted to school without regard to whether such payment has been made. The parent may be in the "pokey" but the child will be in school at no charge. In other words, the educational facilities impact fee pays for schools, just like ad valorem property taxes pay for schools, but does not violate the free school imperative because the incidence of payment is unrelated to admission to the free public schools.

To the extent that the ability to pay development exactions deprives a student of access to public schools, it makes no difference whether the exaction is for roads, libraries, parks, potable water, sanitary sewer or schools. No one, not even the Homebuilders, would suggest that a road impact fee ordinance violates the free school imperative because those who can not afford the fees are excluded.

More importantly, the hypothesis of deprivation is insupportable as a matter of fact. There are two classes of candidate feepayors -- those who are currently residents of the County and those who are not. Those who are already residents of the County already have access to free public schools in the County. Those who are not residents have no right to attend schools for free in the County. The fact remains, when all of the Homebuilders' pious rhetoric is separated from the substantive issues presented in this cause, that an educational facilities impact fee does not constitute the kind of direct admission charge that brooks the constitutional imperative for free public schools.

4.
Requirements That Might Otherwise Be Invalid If Imposed By Themselves Are Valid If Imposed As Development Exactions In Lieu Of Valid Restrictive Regulations

Fundamental to this case is an understanding of the nature of development exactions -- conditions of development approval which are imposed to mitigate the otherwise negative impacts of development. As noted, the Growth Management Act imposes on St. Johns County and every other local government in Florida an obligation to withhold development approval unless adequate public facilities are available to serve the proposed development. Section 163.3202(2)(g), Fla. Stat. (1989). The Growth Management Act's objective is to achieve and maintain alignment between public facilities demand and public facilities capacity. Section 163.3177(10)(h), Fla. Stat. (1989).

Under the Act, a local government has two choices -- either limit growth and development to that which can be served by existing and funded improvements, or in lieu of such restrictive regulation, impose development exactions which can be used to increase educational facilities capacity to accommodate additional development. St.

Johns County chose the pro-active approach and imposed development exactions to accelerate the increase in educational facilities capacity in lieu of restrictions on timing of development.[18]

This principle of development exactions (payments or dedications of property in lieu of restrictive regulations) was recently sustained by the Supreme Court of the United States in Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987). In Nollan, the Supreme Court considered the constitutionality of development exactions in a case where the California Coastal Commission conditioned the issuance of a building permit for a single family home on the dedication of an easement of access to and fro on the dry sand in front of an oceanfront lot. The property owner argued that the exaction was unconstitutional in violation of the takings clause of the Fifth Amendment. The Court responded:

> The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house--for example, a height limitation, a width restriction, or a ban on fences--so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional.

Nollan, 107 S.Ct. at 3148 (emphasis added).

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[18] There are no cases in Florida regarding school exactions, but this Court can take judicial notice that requiring dedication of land for school improvements or fees in lieu is common practice throughout the State. See Brief submitted by Amicus Curiae. Section 380.06(15)(e), Fla. Stat. (1989) authorizes a local government to enact an ordinance which requires development not subject to development of regional impact conditions to contribute "its proportionate share of funds, land or public facilities necessary to accommodate any impacts having a rational nexus to the proposed development...." Emphasis added. In addition, Section 163.270(2)(a), Fla. Stat. (1972) provided authority for counties and incorporated municipalities to exercise powers relating to the subdivision of land and the provision of adequate public facilities. This section was repealed when the Legislature enacted the Growth Management Act which granted units of local government even broader authority to control the development of land.

St. Johns County submits that the principle which underlies the Supreme Court's holding in Nollan sustains the St. Johns County Educational Facilities Impact Fee Ordinance. Indeed, St. Johns County asks this honorable Court to consider the cogency of the above quoted passage from the Supreme Court's opinion in Nollan if school impact fees and the constitutional mandate for free public schools are substituted for the easement and takings clause which were at issue in Nollan.

> ... [St. Johns County] argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a ... [violation of the free schools imperative] if the refusal to issue the permit would not constitute a ... [violation]. We agree. Thus, if the ... [County] attached to the permit some condition that would have ... [ensured that adequate educational facilities were available to serve] the new house--for example, ... [a timing condition that deferred development until adequate educational facilities were available]--so long as the County could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether [at this particular time], imposition of the condition would also be constitutional.

St. Johns County respectfully submits that the County could have imposed restrictive regulations on development limiting the amount and timing of residential development to the capacity of existing and funded educational improvements, and that such restrictions are not only authorized by law but are indeed mandated by the concurrency provisions of the Growth Management Act. And, St. Johns County submits, such restrictions would not implicate, in any way, the free school imperative of Article IX, section 1 of the Florida Constitution. In summarizing the Supreme Court's view of exactions, Justice Scalia noted:

> If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather ..., it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.

Nollan, 107 S.Ct. at 3148 (emphasis added). St. Johns County submits that it would be

equally strange in this cause to conclude that while the County could have lawfully restricted residential development to that amount that could be served by existing and funded improvements without offending the constitutional imperative for a uniform system of free public schools, the County can not provide developers with an alternative to that regulation "which accomplishes the same purpose."

In the final analysis, St. Johns County submits that nothing in the history, language or construction of the free school mandate supports a prohibition on educational facilities impact fees so long as actual admission to the public school system is not related to the payment of such fees, and the County urges this Court to so hold. As Judge Sharp noted below, Florida is confronted by a serious growth management problem, and if impact fees for educational facilities, one of this State's most pressing problems and needs, are violative of the clear mandate of the Constitution -- to provide adequate schools -- the future of our quality of life may well be seriously diminished:

> If impact fees for schools are unconstitutional, this state faces potential fiscal and social catastrophe caused by the enormous and unprecedented growth our state is experiencing. Florida is being inundated with new residents from beyond this state's borders, and all predictions are that this growth will continue.

Slip op., App. 2 at p. 3 (Sharp, J., dissenting).

B.
DEVELOPMENT EXACTIONS, INCLUDING EDUCATIONAL FACILITIES IMPACT FEES, DO NOT DEPRIVE STUDENTS OF ACCESS TO A UNIFORM SYSTEM OF FREE PUBLIC SCHOOLS

The District Court of Appeal held that the St. Johns County educational facilities fee ordinance "violates the uniform provision in that the impact fee does not apply to all of St. Johns County much less the State of Florida." Slip op., App. 2 at p. 2. The County respectfully disagrees and submits to this Honorable Court that whatever the outer limits of the meaning of the "uniformity provision" of Article IX, section 1, the Constitution does not require that [either the State be limited to a constrained set of funding sources or that] every County must necessarily use the same sources of funding

at identical levels. The uniformity requirement of Article IX requires a uniform system of public schools and has nothing to do with identicalness or equality of funding for schools.

In School Bd. of Escambia County v. State, 353 So.2d 834 (Fla. 1977), this Court considered the meaning of the uniformity requirement of Article IX, section 1, and rejected a claim that uniformity required identicalness or equality in physical plant or curriculum from county to county. To the contrary, this Court concluded that:

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

Id. at 836.[19] The imposition of educational facilities impact fees only in the unincorporated areas of a county, or even in only one county, has nothing to do with the uniformity of schools as defined by this Court. Under this Court's decision in School Bd. of Escambia County, if the system operates according to a common plan or serves a common purpose, then uniformity is achieved without regard to how the system is funded.

Indeed, the existence of educational facilities impact fees in one jurisdiction, but not in another, does not presumptively have anything to do with the constitutional mandate for uniformity because it is the result of the funding, not the source or amount that defines uniformity. For example, St. Johns County has not chosen to limit development to that amount that can be served by existing and committed school

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[19] The Court also acknowledged that there is a "dearth of authority" construing the significance of the phrase "uniform system of free public schools" and that none of the cases which have construed this phrase "are particularly instructive as to which variations would run afoul of the constitutional directive." 353 So.2d at 837. See, e.g., State v. Holbrook, 129 Fla. 241, 176 So. 99 (Fla. 1937)(statute providing tenure for public school teachers does not violate uniformity provision); State v. Henderson, 137 Fla. 666, 188 So. 351 (Fla. 1939)(school district taxes supplement school revenues to make uniform system more efficient); State v. Bd. of Public Instruction of Pasco County, 176 So.2d 337 (Fla. 1965) (establishment of special tax district does not violate uniformity provision); and Dist. School Bd. of Lee County v. Askew, 278 So.2d 272 (Fla. 1973)(program determining allocation of money to school districts meets uniformity provisions). See also Kane v. Robbins, 556 So.2d 1381 (Fla. 1989)(statute allowing nonpartisan school board elections was held unconstitutional on other grounds, but the court held that its decision is in harmony with the uniformity requirement).

improvements; instead, the County allows developers the alternative of paying educational facilities impact fees. Other local governments are free to decide otherwise and may impose restrictive regulations. In either situation, a uniform system of public schools exists because either alternative achieves the alignment between educational facilities demand and educational facilities capacity mandated by the Growth Management Act.

Educational facilities impact fees are land development regulations aimed at ensuring that adequate capital facilities (not free, cheap, expensive or equal) facilities are available to accommodate new growth and development. "Adequate provision," however, does not mean that school systems must only be "adequately provided." An "adequate" funding program is one which provides enough money to satisfy that which is legally required.[20] Construed together with the Growth Management Act, the phrase means that the County is obligated to ensure (i.e., condition development approvals on availability) that facilities which meet a certain level of service are provided concurrent with the need demanded by the residents of the County. Sec. 163.3202(2)(g), Fla. Stat. (1989).[21]

In point of fact, it may well be that educational facilities impact fees are themselves a vehicle for achieving a uniform system of free public schools. In rapidly growing communities like St. Johns County, ordinary funding sources are not sufficient to maintain the alignment between facilities demand and facilities capacity. (R. IV, pp. 588-89) In contrast, in slow growing or slow growth communities, ordinary funding sources are sufficient to achieve and maintain alignment. Educational facilities impact fees serve to allow rapidly growing communities the option of achieving the same alignment of demand and capacity (and not establishing growth moratoriums) that is

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[20] The Florida Constitution states that "adequate provision shall be made by law for a uniform system of free public schools ... that the needs of the people may require." Art. IX, sec. 1, Fla. Const. The framers recognized that the needs of the people will differ, and that wherever people are located, and at whatever time period, "adequate provision" must be made for a uniform system of free public schools.

[21] "Public facilities" are defined in the Growth Management Act to include "educational facilities." Section 163.3164(23), Fla. Stat. (1989).

achieved through ordinary funding sources in slow growing or slow growth communities.

The Florida Constitution only requires that a system be provided which gives every student an equal chance to achieve basic educational goals prescribed by the Legislature. The constitutional mandate is not that every school district in the State must receive **equal** funding or that each educational program must be **equivalent**. In fact, the Florida Constitution allows the amount of money spent on a child's education to vary, depending directly on the location of the student's residence and the revenues generated from property and sales taxes. Art. VII, secs. 1 and 9, Fla. Const. Inherent inequities, such as varying revenues because of higher or lower property values, will always favor or disfavor some districts.[22]

The County submits that this Court should not presume that the result of collecting educational facilities impact fees in one or more counties renders the State's system of public schools non-uniform. The Florida Legislature has created a system of financing that allows school districts to provide an equal chance for all children to obtain an education.[23] The Florida School Code expressly provides for a varied system of public school funding[24] and the State has the ability to convert these non-identical revenues into a state-wide uniform system of public schools.[25] The St. Johns County Educational Facilities Impact Fee Ordinance no more disturbs the ability of the State to "supervise"[26]

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[22] Funding disparities will not be "cured" by educational facilities impact fees. However, the methodology used to derive the fees does treat students equally to the extent that the quality of education in the County will not depend upon the location of a student's residence.

[23] The intent of the Legislature is to provide each student an educational environmental which is "substantially equal" to that available to similar students. See, e.g., Sections 235.002(i); 236.012, Fla. Stat. (1989).

[24] See, e.g., Sections 235.4235 and 236.24(1), Fla. Stat. (1989).

[25] The Code expressly gives school boards the power to ensure that adequate educational facilities are provided through a uniform system of schools for all students in a district, and states that these facilities are to be provided "with due regard for the needs of the children on the one hand and to the economy on the other." Sec. 230.23, Fla. Stat. (1989).

[26] The Florida Constitution provides for the State Board of Education to have "supervision of the system of public education as is provided by law." Art. IX, sec. 2, Fla. Const.

its uniform system of schools than does its receipt of unequal revenue generated from other valid funding sources, including sales taxes, the state lottery, ad valorem taxes, or private donations. An educational facilities impact fee does not create a lack of uniformity in the State-wide system, unless the State itself uses those funds in an unlawful manner -- a proposition that cannot be assumed from the facts in the record.

The appellate court appears to assume that different sources of funding will automatically lead to a non-uniform system of public schools. However, the problem with the District Court's equality reading of the uniformity requirement is that such a construction would require the invalidation of Section 235.4235, Fla. Stat. (1989) which provides that capital projects can be financed with "grants, donations or matching funds."[27] If uniformity is construed to require equality, then a statute allowing grants or gifts would have to be invalid because of the possibility that grants or gifts would not be equally available in all jurisdictions.

Moreover, the District Court's construction directly conflicts with many other sections of the Florida School Code which distinctly contemplate that the "uniform system" of free public schools would be generated by a variety of funding sources:

> 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.

Section 236.24(1), Fla. Stat. (1989)(emphasis added).[28] Other sections of the Education Finance and Taxation Act (Chapter 236) are to the same effect. For example, the

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[27] Section 235.4235, Fla. Stat. (1989) provides that: "Capital projects are to be financed in accordance with s. 9(a)(2), Art. XII of the State Constitution, as amended, or from other legally available state funds or grants, donations or matching funds, or by a combination of such funds." (emphasis added.)

[28] Other sections of the Florida School Code also refer to additional lawful sources of funding. See, e.g., Section 228.051, Fla. Stat. (1989): "... The funds for the support and maintenance of such [public] schools shall be derived from state, district, federal or other lawful sources or combinations of sources and shall include any tuition fees charged nonresidents as provided by law." (emphasis added.)

preamble to Chapter 236 provides in pertinent part that the intent of the Legislature is:

> To 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....

Section 236.012(4), Fla. Stat. (1989)(emphasis added). The Act then goes on to provide that the Legislature's intention in adopting the Act was to broaden the source of educational funding:

> The district capital improvement funds 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 any other similar funds which are to be used for capital outlay purposes within the district.

Section 236.35, Fla. Stat. (1989)(emphasis added). The County submits that there is no indication in the statutes that the Legislature has constrained financing alternatives available to individual school districts or counties.

The District Court of Appeal was also concerned about the fact that the St. Johns County Educational Facilities Impact Fee Ordinance does not operate on a county-wide basis, and noted that two of the County's three municipalities have not opted into the ordinance. (Slip op., App. 2 at p. 2) The County submits that its educational facilities impact fee ordinance does not violate the uniformity mandate since the ordinance expressly states that: "This ordinance shall apply in the unincorporated area of St. Johns County and in the incorporated areas of St. Johns County." (R. II, p. 226)[29]

St. Augustine and Hastings do not presently participate in the County's educational facilities impact fee program. However, this does not affect the County's ability to adequately provide a uniform system of public schools. This system is required

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[29] As the District Court acknowledged, before the fees are effective within the boundaries of a municipality, the municipality must enter into an interlocal agreement with the County to collect the fees. (R. II, p. 229-30)

by the Constitution to be uniform (Art. IX, sec. 1, Fla. Const.), and there is no evidence in the record that the County and its School Board have compromised that uniformity, despite the sources of its funding. Moreover, again, this Court should not presume that the County will act in an unconstitutional manner and spend the impact fee funds in a manner that will violate the law. Cooper v. Sinclair, 66 So.2d 702 (Fla.), cert. denied, 74 S.Ct. 107, 346 U.S. 867 (1953). If the Court finds that uniformity is compromised or could be compromised solely because of the ordinance's opt-in provision, then the County urges the Court to hold only that provision unconstitutional and uphold the validity of school exactions. Lysaught v. City of New Smyrna Beach, 159 So.2d 869 (Fla. 1964).

C.
STATE LEGISLATION DOES NOT PREEMPT THE COUNTY FROM ENTERING INTO THE FIELD OF EDUCATIONAL FACILITY FINANCING

In this cause, the Homebuilders have argued that the Legislature has preempted educational facilities impact fees by the adoption of Chapter 236, the Education Finance and Taxation Act. In its decision, the trial court noted: "[i]n creating the 'free and public' school system in Florida, the legislature may have effectively precluded any 'tinkering' with the financial mechanism that runs the system." (R. II, p. 296) The District Court did not reach the issue of preemption. To the extent that the trial court's musing constitutes a determination that the Legislature has preempted the field of educational facilities, the County respectfully submits that the court committed manifest error.

1.
Chapter 236 Does Not Preempt County Participation In Educational Facilities Funding

First and foremost, Section 236.24(1), Fla. Stat. (1989), a part of Chapter 236, the Education Finance and Taxation Act, makes it clear that the Legislature contemplated county involvement in educational funding and that the Legislature did not intend to preempt county participation in educational facilities financing:

> 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 added). It is difficult to understand how the Legislature could have been clearer that it did not intend to preempt county participation in educational funding.

Moreover, there are other parts of Chapter 236 that demonstrate that the Legislature did not intend by that Act to preempt other sources of funding and that in fact the Legislature contemplated active involvement in educational financing.[30] The County submits that the plain language of Chapter 236 makes it apparent that the Legislature did not intend to preempt county involvement in educational facilities financing.

2.

The Growth Management Act Illustrates That The Legislature Did Not Intend To Preempt County Participation In Educational Facilities Financing

More significantly, as noted above, even a cursory review of the Growth Management Act makes it clear that educational facilities are intended to be a subject of county attention and concern. As a matter of law, the Act imposes a "concurrency" requirement on local governments that mandates that counties like St. Johns adopt land development regulations that ensure that adequate public facilities are available when

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[30] See, e.g., Section 236.012(4), Fla. Stat. (1989) which states that the Legislature intended "to encourage innovations in educational facilities design, construction techniques, and financing mechanisms for the purpose of reducing costs and creating a more satisfactory learning environment...." (emphasis added.) See also Section 236.35, Fla. Stat. (1989) which states that "the district capital improvement funds 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 any other similar funds which are to be used for capital outlay purposes within the district." (emphasis added.)

needed to serve new growth and development. Section 163.3202(2)(g), Fla. Stat. (1989). "Public facilities" are defined in the Act to include "educational facilities." Section 163.3164(23), Fla. Stat. (1989). The County respectfully submits that it is simply impossible to read the Growth Management Act and the School Finance and Taxation Act in pari materia and conclude that the Legislature intended that the County be preempted from the field of educational facilities and educational facilities financing.

Indeed, section 163.3202 of the Act makes it clear that not only is the adequacy of available educational facilities a proper subject of county regulation, but that impact fees are a recommended method of dealing with facilities deficiencies:

> (3) This section shall be construed to encourage the use of innovative land development regulations which include provisions such as ... impact fees ...."

Section 163.3202(3), Fla. Stat. (1989)(emphasis added). The Growth Management Act also specifically states that "Through the process of comprehensive planning, it is intended that units of local government can ... facilitate the adequate and efficient provision of ... schools. Section 163.3161(3), Fla. Stat. (1989)(emphasis added.)[31] Ordinance 87-60 is a direct response to the mandate of the Growth Management Act that comprehensive planning result in adequate and efficient provision of schools through the use of impact fees.[32] Simply put, the trial court's decision, to the extent it can be construed as holding that the County was preempted from adopting educational impact fees by the Legislature, constitutes manifest error.

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[31] Furthermore, the intent of the Legislature was for the Growth Management Act to be broadly interpreted: "The provisions of this act in their interpretation and application are declared to be the minimum requirements necessary to accomplish the stated intent, purposes, and objectives of this act; to protect human ..., social and economic resources." Section 163.3161(7), Fla. Stat. (1989). The Act also states explicitly that it shall be interpreted as a recognition of the broad statutory and constitutional powers of municipal and county officials to plan for and regulate the use of land. Sections 163.3161(8); 163.3194(4)(b), Fla. Stat. (1989).

[32] Appellants do not understand how the trial court could state that "there may be some authority to impose a school impact fee," yet ignore the plain language of the Growth Management Act which specifically authorizes the County to adopt innovative financing mechanisms, such as impact fees, for educational facilities. (R. II, p. 300)

D.
THE ST. JOHNS COUNTY EDUCATIONAL FACILITIES IMPACT FEE ORDINANCE MEETS THE DUAL RATIONAL NEXUS TEST

The District Court of Appeal did not address the question of whether the methodology used to support the St. Johns County Educational Facilities Impact Fee Ordinance meets the rational nexus test established in Contractors and Builders Ass'n. of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976), cert. denied, 444 U.S. 867. However, because the trial court was concerned about the integrity of the methodology, the County can only assume that it was a factor in the court's decision.

The County submits that Ordinance 87-60 should be upheld as a valid land use regulation because the methodology employed by its consultants complies with each prong of the rational nexus test:

1. There is a reasonable connection between the need for additional educational facilities and the growth resulting from new development in the County; and

2. There is a reasonable connection between the expenditure of fees collected and the facilities capacity provided thereby.

The County submits that its methodology is reasonable in that it apportions a cost of student stations to new residential development on a pro rata basis. While there is no guarantee that any given dwelling unit will actually contain public school children at any one particular time, it is the County's obligation under the dictates of the Growth Management Act to ensure that adequate capacity is available when needed to serve each unit of development.

1.
The Ordinance Meets The First Prong Of The Rational Nexus Test

Ordinance 87-60 satisfies the first prong of the rational nexus test and the trial court erred to the extent it found no "reasonable relationship" between the construction of a new home and the need for new schools. (R. II, p. 299) The record

indicates that St. Johns County must expand its educational facilities in order to maintain current levels of service if new residential growth and development is to be accommodated without decreasing current levels of service. (R. II, p. 225) Further, the evidence in the record is uncontroverted and demonstrates that the need for the increase in the capacity of the County's educational facilities is linked to new residential growth and development. (R. IV, pp. 606-10) Moreover, the Homebuilders have admitted that St. Johns County is a rapidly growing county, and that based on projections of the University of Florida Bureau of Economics and Business Research, it will continue to experience rapid growth. (R. II, p. 170)

The record in this cause is simple and factually uncontested. The County started with census data to determine the per population demand for school facilities. A discrete set of mathematical calculations converted population to household unit size which, when multiplied by educational facilities demand, yielded the pro rata share of the cost of educational facilities per household unit. The County's methodology indicates that each 100 dwelling units will generate a demand for 43 educational stations; however, it is impossible to predict which of the dwelling units will actually contain school children at any particular time. Indeed, it is likely that the units which will contain children will vary over time depending upon the nature of the household that occupies a particular dwelling at a particular time.

The question is whether it is reasonable to apportion the cost of the 43 student stations to all 100 units on a pro rata share because while not all units will have children in the school system at one time, the 43 seats will be available to serve the educational needs of all 100 dwelling units. The County respectfully submits that the answer to this question is "yes" and that the methodology that the County selected is eminently fair and that it meets the spirit and letter of the requirements of Dunedin.

The Homebuilders have argued that the County's methodology for calculating the per dwelling unit impact fee violated the proportionate share requirement

of Dunedin because a majority of new homes in the County would have no children.[33] As a matter of mathematics, of course, the Homebuilders' assertion is correct -- on a statistical basis school age children will not actually reside in more than 50% of the homes that will be built in St. Johns County at one time -- but that does not mean that the County's calculation of the educational impact fee violates the Dunedin proportionate share requirement.[34] That is so because educational facilities are available to serve all children in all residential units and because the impact fees are generally based and have been sustained on the basis of capacity, not on actual use. Home Builders and Contractors Ass'n. of Palm Beach County, Inc. v. Bd. of County Comm'rs of Palm Beach County, 446 So.2d 140, 143 (Fla. 4th DCA 1983).[35]

In McLain Western #1 v. County of San Diego, 146 Cal. App. 3d 772, 194 Cal. Rptr. 594 (4th Dist. 1983), the court addressed the issue of whether it is fair to charge developers of retirement homes for school impact fees. In McLain, developers of a luxury condominium complex marketed to attract weekend and retirement home purchasers requested an exemption from a school impact fee ordinance on the grounds

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[33] The basis of the Homebuilders' argument was the fact that the projected number of school children is less than .5 per dwelling unit, which means, as a matter of statistics, that more than 50% of the units will have no children (for example, 43 units with one child and 57 units with no children equals a .43 per unit on average).

[34] Dunedin does not, contrary to the assertions of the Homebuilders, restrict impact fees to actual benefit received by a particular fee payor. Dunedin validated a charge that was assessed on a pro rata share basis, that is each unit bore a share that was its proportionate share of total capacity demand (capacity cost/number of units). The court in Dunedin makes no mention whatsoever that sewer demand varies according to the particular users of a particular dwelling unit, and held that a regulation that assessed a fee on a pro rata share of facility cost per dwelling unit was constitutional.

[35] The underlying theory of impact fees is that each unit of development pays a fair share of the cost of the facilities capacity needed to serve the unit of development. The law does not require that the dwelling units actually use the capacity, it is enough if the capacity is made available to the unit on a pro rata share, which the St. Johns Ordinance most certainly does. Home Builders and Contractors Ass'n. of Palm Beach County, Inc., 446 So.2d. at 143. The Homebuilders do not contest that the capacity needed to serve an average unit of residential development in St. Johns County is 43 student seats per 100 dwelling units or .43 seats per dwelling unit. Rather, they content themselves with a sleight of hand that makes it appear that some units are paying for capacity they will not use when the reality is that the capacity must be available or the development can not be permitted under the Growth Management Act, even if the shortfall in facilities is a "fraction."

that by its nature, the development would not impact the school system. The developers applied for a refund from the fee because the entire development produced a total of 3 pupils who attended the district schools, far less than the pupil yield factor of .586 pupils per unit that was used as an average in determining the fee. The court denied the exemption, and noted that it is the over-all development of land within the school district which mandated the need for schools, and that it was not unreasonable to consider the growth of the area, present and future, in determining the need for schools caused by land development. Id. at 596-97. The court stated that:

> The fact that hindsight has shown Pala Mesa's Phase II's pupil yield factor to be far less than the .586 student per unit projected as an average for multi-family developments by Fallbrook's formula does not make the County's assessment unreasonable in relation to the students Pala Mesa's Phase II may have generated during the five-year period had residence been taken by families with children.

Id. at 597. The court also noted that leasing of units was allowed, and that there were no covenants, conditions or restrictions barring residence by schoolage children. Id. at 595.

The trial court had a problem understanding the methodology used in Ordinance 87-60 and considered its own "guesswork" was as good as the County's and its consultants when it comes to assessing each fee payer's pro rata share of the cost of new educational facilities.[36] (R. II, p.295) Indeed, guessing has never been the standard used by courts in judging the validity of an ordinance, and where one guess is as good as another, the courts are obligated to defer to the judgment of the legislative body. City of New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513, 2517 (1976). It is not the court's function to determine whether the legislation achieves its goal in the best manner

[36] The court's statement that "one guess is as good as another," in support of its own perception of how the fees should be calculated, is incredible in the face of well established law that the courts do not sit as super-legislative bodies to second guess the wisdom and policy of co-equal branches of government. See Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 101 S.Ct. 715, 726 (1981); Barnes v. B.K. Credit Servs., Inc., 461 So.2d 217, 219 (Fla. 1st DCA 1984); Rose v. D'Alessandro, 380 So.2d 419 (Fla. 1980).

possible. Mourning v. Family Publication Servs., Inc., 411 U.S. 356, 93 S.Ct. 1652, 1665 (1973); Khoury v. Carvel Homes South, Inc., 403 So.2d 1043, 1045 (Fla. 1st DCA 1981). Rather, the court must only determine whether the goal is legitimate and the means to achieve it are rationally related to that goal. Loxahatchee River Envtl. Control Dist. v. School Bd. of Palm Beach County, 496 So.2d 930, 938 (Fla. 4th DCA 1986); Fraternal Order of Police, Metro. Dade County, Lodge No. 6 v. Dep't. of State, 392 So.2d 1296, 1302 (Fla. 1980). To the extent that the trial court invalidated the ordinance based on the methodology employed by the County, the trial court committed manifest error.[37]

"Feepayers" by definition are persons commencing development of residential dwellings which may "reasonably be expected" to place students in the County's public schools, (R. II, p. 288) and as the Homebuilders have pointed out, no one expects, nor do the courts require, mathematical perfection. (R. II, p. 198) See, e.g., Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153 (1970); City of Dallas v. Stanglin, ___ U.S. ___, 109 S.Ct. 1591, 1596 (1989). In In re Greenberg, 390 So.2d 40, 42 (Fla. 1980), appeal dismissed, 450 U.S. 961 (1981), this Court noted:

> The rational basis or minimum scrutiny test generally employed in equal protection analysis requires only that a statute bear some reasonable relationship to a legitimate state purpose. That the statute may result incidentally in some inequality or that it is not drawn with mathematical precision will not result in its invalidity.

See also State v. C.H., 421 So.2d 62, 64-65 (Fla. 4th DCA 1982); Sasso v. Ram Property Management, 431 So.2d 204, 216 (Fla. 1st DCA 1983); Dunedin, 314 So.2d at 320, n. 10. Dr. Nicholas' testimony establishes that in his professional judgment, his methodology was rational (R. III, pp. 488-89) and the trial court should have sustained

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[37] The court's deviation from well-settled principles in regard to the role of the courts is illustrated by the court's suggestion that "perhaps a prior Court test might have expedited the matter before enacting a final Ordinance." (R. II, p. 302) This is a suggestion that flies directly in the face of the constitutional and judicial limitations on advisory opinions. Dept. of Revenue, State of Florida v. Markham, 396 So.2d 1120, 1121 (Fla. 1981).

the County's Ordinance. See also Affidavit of M. Stegman, para. 7a. (R. I, p. 127)

2.
The Ordinance Meets The Second Prong
Of The Rational Nexus Test

The St. Johns County Educational Facilities Impact Fee Ordinance satisfies the second prong of the rational nexus test since the ordinance assures that the fee payers will enjoy a substantial "benefit" from the impact fee expenditures. See Hollywood Inc. v. Broward County, 431 So.2d 606, 611 (Fla. 4th DCA 1983). While the benefit of public capital facilities such as public schools and parks cannot be attributed to individual developments, the general community will always be benefitted by the adequate provision of public schools and parks. See Home Builders and Contractors Ass'n. of Palm Beach County v. Bd. of County Comm'rs of Palm Beach County, 446 So.2d 140, 143 (Fla. 4th DCA 1984)(The court rejected an exclusive benefit test for a road impact fee, noting that "It is difficult to envision any capital improvement for parks, sewers, drainage, roads, or whatever, which would not in some measure benefit members of the community who do not reside in or utilize the new development.")(emphasis added).

The Homebuilders posited below that feepayers do not receive substantial benefit from the expenditure of impact fee funds because the fees must be expended county-wide, while the Ordinance applies to only one of the three municipalities located within the County. The problem with this position is that the discussion ignores the fact that the fee payer receives nothing more and nothing less than the educational facilities expressly needed to serve a dwelling unit in lieu of a limitation on the number of units that can be served by existing facilities. Moreover, as Appellees have pointed out, "several impact fee cases hold that the failure to include municipalities is not a fatal defect." (Answer Brief at 41) See, e.g., Home Builders and Contractors Ass'n. of Palm Beach County, 446 So.2d 140 (Fla. 4th DCA 1983).

Appellees contend that "the people who live in new houses do not necessarily generate students." (Answer Brief at 43) While this is true, this statement goes nowhere because it can be applied to any type of impact fee. It is capacity that is

the criteria for development approval under the Growth Management Act, and it is capacity by which the in lieu fee here at issue is apportioned. Cf. Nollan v. Cal. Coastal Comm'n, 107 S.Ct. 3141 (1987). The people who live in new houses do not necessarily generate park users, library users, emergency medical service users, fire protection users, etc., but the County must still provide capacity for each dwelling unit.

E.
THE ST. JOHNS COUNTY EDUCATIONAL FACILITIES IMPACT FEE ORDINANCE DOES NOT UNLAWFULLY DELEGATE AUTHORITY TO THE SCHOOL BOARD

The trial court concluded that the provisions of Ordinance 87-60 which assign the administrative responsibility for evaluating individual assessments to the school board constituted an unlawful delegation of legislative power. The County respectfully submits that the trial court erred and that no legislative power to say "what the law should be" was delegated to the school board and that the standards for individual assessments are sufficiently definite to fetter the administrative discretion of the school board.

Indeed, Ordinance 87-60 gives neither the School Board nor the County complete autonomy since the impact fee program is set up in such a manner that neither entity operates in a vacuum. The County collects the fee and remits it on a monthly basis to the School Board. (R. III, p. 234) The funds collected are then transmitted to a separate trust fund established by the School Board. (R. II, p. 234) Because the School Board's administrative affairs are kept independent from County control, the School Board has the discretion of where to place its new schools or expand its existing facilities. However, the School Board is not given unbridled discretion in this regard because Ordinance 87-60, the intergovernmental agreement entered into by the County and the School Board, and the St. Johns County Guidelines and Procedures Manual limit the use of the impact fee funds. (R. II, pp. 234-35; R. II, p. 250; R. II, pp. 266-67)

In addition, the School Board must account annually to the County and municipalities for the expenditure or refund of all the impact fee monies remitted by the

County to the School Board. (R. II, p. 250) Because the School Board has the expertise in school affairs, it is given the discretion to determine how, within those guidelines set out by the County, the funds should be spent.[38] As the County Administrator testified at his deposition, if the School Board were to misuse the monies, it would be the responsibility of the School Board, not the County, to make the trust fund whole. (R. II, pp. 349-50)

The Ordinance also provides that both the School Board and the County must review the fee schedules contained in the Ordinance. (See Ord. sec. 13.) (R. II, p. 240) Hence, the fact that the County has ultimate appeal authority over the fees (see Guidelines and Procedures Manual, p. 28)(R. II, p. 281) in no way interferes with the School Board's operation, control and supervision of the schools.

The delegation doctrine relates to policy-making power and the power to say what the law will be. See Cross Keys Waterway v. Askew, 351 So.2d 1062, 1067-68 (Fla. 1st DCA 1977); and Jones v. Dep't. of Revenue, 523 So.2d 1211, 1214 (Fla 1st DCA 1988)("Unlawful delegation refers to the power to make a law rather than the authority as to its execution"). The School Board is authorized to do nothing more than implement the County's policy and there is no unlawful delegation. Ordinance 87-60 does not allow the School Board to say what the law shall be since the County (and case law) has already decided that each feepayer shall only be charged his or her proportionate share; the School Board can do nothing more than administer the County's policy. There has been no unlawful delegation of power because both the County and the School Board's discretion are limited and there are sufficient standards to guide the official acts of all personnel involved. See Apalachee Regional Planning Council v. Brown, 546 So.2d 451, 452-3 (Fla. 1st DCA 1989)(in determining whether an unlawful delegation has occurred, courts should apply a "standard of reasonableness" to regulations

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[38] The School Board obviously has the expertise in determining how to equitably spend non-impact fee funds (i.e., all the funds it presently has at its disposal to use for school board purposes). Nonetheless, for some unexplained (and inexplicable) reason, the trial court believed that it will be more difficult for the School Board to equitably spend impact fee funds. (R. II, p. 298)

that aim to protect the general health, safety and welfare and that serve as a control on the "privilege of land development.")[39]

The record in this cause amply demonstrates that, like the review process at issue in Apalachee Regional Planning Council, the provisions for administering the school impact fee program are reasonable since the County's and the School Board's discretion are limited by the standards, guidelines and procedures set out in the Ordinance, the Intergovernmental Agreement, and the Guidelines and Procedures Manual. In addition, any power granted to the School Board by the terms of the Ordinance does not serve to expand the School Board's powers to include any type of authority that it would not otherwise already have[40] -- the School Board remains responsible for the supervision and control of the public education system, as directed by Article IX, sec. 4 of the Florida Constitution and Section 230.03 of the Florida Statutes.

V.
CONCLUSION

Because Florida is such a desirable place to live and work, the state has experienced a 26.6% increase in population between 1980 and 1988. (Slip op., App. 2 at p. 3 (Sharp, J., dissenting)) Moreover, as Justice Sharp noted in her dissent, "Florida is being inundated with new residents from beyond this state's borders, and all predictions are that this growth will continue." Id. The real estate development industry has welcomed this population explosion, while local government has been burdened with increased demand for public facilities, including educational services:

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[39] According to the Apalachee Regional Planning Council court, the specificity of standards and guidelines will depend on the subject matter of the regulation: ["S]tatutes are not unlawful delegations of legislative power when the power sought to be exercised under their auspices is simply a "technical issue of implementation and not a fundamental policy decision." 546 So.2d at 453, citing Dept. of Ins. v. Southeast Volusia Hosp. Dist., 438 So.2d 815, 820 (Fla. 1983).

[40] The School Board already has the authority (and expertise) to spend funds, plan for, and supervise educational facilities.

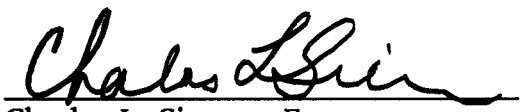
> Every new arrival in Florida who is a child of school age, as well as children born to immigrants after their arrival, will enjoy the state's constitutional right to "free" schools. Art. IX, sec. 1, Fla. Const. However, it is becoming onerous, unfair, and impractical for those who are already residents of Florida to bear the entire cost of new schools which must be built for the anticipated migration of multitudes. A way must be found to constitutionally require those who wish to expand Florida's residential facilities [developers] to shoulder a fair share of the resulting increase in costs of schools. Taxation through general tax increases or bond issues puts the full burden on existing residents. Impact fees could partially shift this burden.

Id. Emphasis added. While the Homebuilders wish that the County would continue to allow development to occur without attention to the facilities capacity needed to serve new growth and development, logic and the law compel a different course.

St. Johns County is endeavoring to plan for the future capital educational facilities needs of the County. The St. Johns County Educational Facilities Impact Fee Ordinance is a reasonable land development regulation which affects neither the uniformity nor the freeness of the County's public school system. Ordinance 87-60 charges developers no more than their pro rata share of the cost of adequate school facilities and meets each prong of the rational nexus test. Moreover, the St. Johns County ordinance is a direct response to the mandates of the Growth Management Act and the trial and appellate court's decisions holding the educational facilities impact fees unconstitutional undermine the Act's express language and its concurrency requirements.

The County prays that this Honorable Court reverse the judgment of the appellate court and uphold the validity of the Ordinance.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioners has been furnished by United States mail, postage pre-paid, to Michael P. McMahon, Akerman, Senterfitt & Eidson, 255 South Orange Avenue, 10th Floor, Firstate Tower, Orlando, Florida 32802-6610, this 11th day of June, 1990.

Michelle Zimet
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