CASE NO. 95,345

SUPREME COURT OF FLORIDA

VOLUSIA COUNTY, a political subdivision of the State of Florida, THE SCHOOL BOARD OF VOLUSIA COUNTY,

Appellants,

v.

ABERDEEN AT ORMOND BEACH, L.P., a Florida limited partnership,

Appellee.

INITIAL BRIEF ON BEHALF OF APPELLANTS

Appeal of The Order Denying Defendants' Motion For Summary Judgment and Granting Plaintiff's Motion for Summary Judgment

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A. Statement of the Case.

This is a civil action in which Appellee claims that Volusia County's school impact fees imposed on Appellee by Volusia County Ordinances 92-9 and 97-7 are unconstitutional under the Constitution of the State of Florida. The Appellee seeks declaratory, injunctive, and supplemental relief from the imposition of Volusia County's school impact fee on Aberdeen at Ormond Beach, L.P. ("Aberdeen"). Appellee asked the court: (1) to declare the Ordinances unconstitutional as to Appellee; (2) to enjoin the Appellants from imposing impact fees against Appellee under Ordinance 97-7 in the future; and (3) to order Volusia County to reimburse Appellee for all such fees paid (R. at 11-13).

Appellants filed a Motion for Summary Judgment on the grounds that, as a matter of law, (1) the doctrine of *stare decisis* should be followed in this action and (2) the remedy of exempting retirement communities from paying any school impact fees and imposing school impact fees only on those communities that have school age children would convert Volusia County's school impact fee into a user fee in violation of article IX, section 1 of the Florida Constitution. (R. at 90-92.)

Appellee filed a Motion for Summary Judgment on the grounds that, as a matter of law (1) Ordinances 92-9 was and 97-7 is *ultra vires* and void as to Aberdeen at

Ormond Beach because there is no rational nexus between Aberdeen and the need for new schools; (2) Ordinance 97-7 is *ultra vires* because it charges new development with more than its proportionate share of the cost of new schools; and (3) Ordinance 92-9 was *ultra vires* because it failed to give appropriate credits and, therefore, failed to meet the requirements of the dual rational nexus test. (R. at 194-95.)

The lower court denied Appellants' Motion for Summary Judgment and granted Appellee's Motion for Summary Judgment. The lower court (1) found that the impact fees were unconstitutional as applied to the Appellee; (2) enjoined the Appellants from henceforth assessing and seeking to collect school impact fees against Appellee; and (3) ordered the Appellants to refund to the Appellee the sum of $86,984.70 on account of impact fees paid through July 31, 1998, along with interest at the legal rate. (R. at 448-49.)

The Appellants filed a timely Notice of Appeal (R. at 450-51) and a Suggestion that the Order to be Reviewed Should be Certified by the District Court to the Supreme Court. Appellee filed a Response to Suggestion stating that it did not deny that the issue regarding the validity of school impact fees as applied to a senior citizen retirement community is an issue of public importance and that it would not object to certification to the Supreme Court.

By order of court dated April 14, 1999, the District Court of Appeal of the State of Florida Fifth District certified that the constitutionality of educational impact fees imposed by locally enacted ordinances is an issue of great public importance throughout the state and requested that the Supreme Court of Florida accept jurisdiction pursuant to Florida Rules of Appellate Procedure 9.125. (R. at 456.)

On April 29, 1999, the Supreme Court of Florida issued an Order Accepting Jurisdiction of the question of great public importance in this case that requires immediate resolution by the Supreme Court of Florida.

B. Statement of the Facts.

1. Appellants. Appellant Volusia County is a charter county of the state of Florida and Appellant The School Board of Volusia County is the duly constituted school board for the Volusia County School District. (R. at 2 and 55.)

2. Impact fee ordinances. Pursuant to the Florida Constitution (1968), several chapters of the Florida Statutes, the Volusia County Home Rule Charter (as amended), and the Volusia County Comprehensive Plan (as amended), the County Council of the County of Volusia adopted the Volusia County School Impact Fee Ordinance, Ordinance 92-9 effective October 1, 1992. (R. at 15-23.) The ordinance imposed "a countywide school impact fee on residential land development and building construction for the purpose of providing schools necessitated by such development." (R.

at 15.) In *Florida Home Builders Association, Inc. v. The County of Volusia,* No. 93-10992-CIDL, Div. 01 (Fla. 7th Cir. Nov. 21, 1996),[1] the constitutional validity of this ordinance was challenged based on the methodology used in assessing the fee. (R. at 112.) In *Florida Home Builders Association,* the parties stipulated and agreed to the entry of a Stipulated Final Judgment wherein the parties agreed that the school impact fee should be recalculated and that any new impact fee shall be based on a certain methodological standard.[2] (R. at 124-26.)

Following the entry of order of Stipulated Final Judgment, *nunc pro tunc* September 6, 1996, (R. at 126) the County Council of Volusia, Florida, on May 15, 1997, adopted Ordinance 97-7, known as the "Volusia County Educational Facilities Impact Fee Ordinance." (R. at 141.) The standard agreed to in *Florida Home Builders*

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[1] A copy of the Stipulated Final Judgment (i.e., the "holding") in *Florida Home Builders Association* may be found in the Record at 112-37. Since *Florida Home Builders Association* is an unpublished case, throughout this Brief, page references will be to the Record and not to the pagination in the Stipulated Final Judgment itself.

[2] The standard adopted in *Florida Home Builders Association* is the *Banberry-Lafferty* standard. (R. at 124.) This standard was developed and adopted in two cases, *Banberry Development Corp. v. South Jordan City,* 631 P. 2d 899 (Utah 1981) and *Lafferty v. Payson City,* 642 P. 2d 376 (Utah 1982). The *Banberry-Lafferty* standard is a generally accepted methodology for assessing the constitutional adequacy of proportionate share impact fees under the dual rational nexus test. (R. at 119.)

Association was used in Ordinance 97-7 for calculating and assessing the educational facilities or school impact fee. (R. at 142 and 148-49.)

3. Appellee. Appellee is a limited partnership that owns and develops Aberdeen at Ormond Beach, a mobile home park established under the auspices of Chapter 723, Florida Statutes (1995). (R. at 2 and 4.) Pursuant to its Supplemental Declaration of Covenants and Restrictions ("Supplemental Declaration"), the Appellee claims it has an irrevocable age-restriction covenant that makes it an adult-only/student-free community entitled to an exemption from paying school impact fees. (R. at 5-6.) However, pursuant to the provisions of Aberdeen's primary Declaration of Covenants and Restrictions ("Primary Declaration") that is the document supplemented by the Supplemental Declaration, Aberdeen may unilaterally, at will, change any covenant or restriction, including those in the Supplemental Declaration. (R. at 348.) The Primary Declaration is the Declaration that is included in Aberdeen's Prospectus that was filed with the Division of Florida Land Sales, Condominiums and Mobile Homes ("Division") pursuant to the requirements of Chapter 723 of the Florida Statutes (§ 723.011, Fla. Stat. 1995 and 1997)[3]. (*See* R. at 300-301.) Further, Section 723.011 of the Florida Statutes requires Aberdeen to deliver a copy of its approved Prospectus that includes the Primary

[3]Throughout this Brief, the 1995 and 1997 statutes are referenced to indicate that the statutory mandates were the law at all times complained of by the Appellee and remain the law today.

Declaration to every homeowner prior to entering into an enforceable rental agreement. The lower court's basis for disavowing the Primary Declaration is grounded on the fact that Appellee has never filed the Primary Declaration in the Volusia County public records as contemplated by the provisions of Chapter 723 of the Florida Statutes. (R. at 440.) *See* also discussion *infra* at 33-37.

IV. SUMMARY OF ARGUMENT

A. The Volusia County school impact fee as applied to new development throughout the county under Ordinance 97-7, including the development of Aberdeen, meets the requirements of the dual rational nexus test for apportioning school impact fees approved by the Florida Supreme Court in *St. Johns County v. Northeast Florida Builders Association, Inc.*, 583 So. 2d 635 (Fla. 1991). The lower court in the case at bar used an inappropriate water-and sewer-impact-fee standard for determining reasonableness in making its finding that there was not a reasonable connection between the need for new schools and Aberdeen's needs and the benefit accruing to Aberdeen. When an appropriate standard of reasonableness for school impact fees is applied, it is seen that Volusia County's school impact fee as imposed on Aberdeen is not an unlawful tax imposed contrary to article VII, section 9(a) of the Florida Constitution.

Article IX, section 1 of the Florida Constitution, requires that the law shall provide for a system of free public schools. To mandate exemption for adult-

only/student-free communities from paying school impact fees that are calculated and imposed on a countywide basis is to convert such school impact fees into user fees that will be paid only by those households that have children using the schools in violation of the free public school mandate of the Florida Constitution. For this reason, Appellants contend that the dicta in footnote 6 of *St. Johns County,* that states that this Court "would not find objectionable" a provision in a school impact fee ordinance that exempts adult-only/student-free communities (*St. Johns County* at 640), cannot be interpreted, as the lower court has done, to be a mandate for such an exemption.[4] Appellants argue that the dicta in footnote 6 stands for the proposition that equal protection for all citizens of the county does not require that adult facilities be assessed a school impact fee as are other new developments. Footnote 6 does not require, and cannot be interpreted to require, an exemption for adult-only/student-free communities. Such a mandatory exemption converts the school impact fee into an unconstitutional user fee. The lower court erred in turning a permissive exemption into a mandatory exemption.

B. Appellee does not have irrevocable land use restrictions and covenants that qualify it as an adult-only/student-free community eligible for an exemption from paying school impact fees. The original Primary Declaration reserves for the Appellee the

[4] Footnote 6 states: "We would not find objectionable a provision that exempted from the payment of an impact fee permits to build adult facilities in which, because of land use restriction, minors could not reside." *St. Johns County* at 640.

absolute and unconditional right to alter, modify, change, revoke, rescind, or cancel any or all restrictive covenants. (R. at 348.) The Primary Declaration is a part of Aberdeen's offering circular (i.e., Prospectus) that was submitted by Appellee and approved by the Division that governs mobile home park lot tenancies and under the auspices of which Aberdeen operates. (R. at 306-50.) The Primary Declaration is a part of the Prospectus that must be provided to every homeowner prior to entering into an enforceable rental agreement for a mobile home lot. (*See* R. at 306-50 and § 723.011, Fla. Stat. (1995 and 1997).) The Primary Declaration is the document that is supplemented by the Supplemental Declaration upon which Appellee bases its claim of being an adult-only/student-free community. The Primary Declaration is the controlling document as to all covenants and restrictions, including those in the Supplemental Declaration. Therefore, the age-restriction in the Supplemental Declaration is revocable. Aberdeen is <u>not</u> a deed- restricted, adult-only/student-free community eligible for any exemption that may be granted to it, if it were such community. The lower court erred in disregarding the Primary Declaration and finding that Aberdeen is an age-restricted community.

V. ARGUMENT

In support of their position, Appellants present the following arguments in opposition to the lower court's rulings.

A. The rational nexus/reasonable connection between Aberdeen and the need for and benefit from new schools satisfies the dual rational nexus test. Imposing a school impact fee on Aberdeen at Ormond Beach does not constitute an unlawful tax in violation of article VII, section 9(a) of the Florida Constitution. To the contrary, to require an exemption for adult-only/student-free communities from paying school impact fees that are calculated and imposed on a countywide basis is to convert school impact fees into user fees in violation of article IX, section 1 of the Florida Constitution.

1. Rational nexus/ reasonable connection. The lower court found that there was no rational nexus/reasonable connection between Aberdeen itself and (1) the need for new schools caused by growth in Volusia County and (2) the benefit that will be derived from the new schools. Appellants contend that in looking for a reasonable connection between Aberdeen and the need for new schools and the benefits derived from the construction of new schools, the lower court used an inappropriate standard of reasonableness. The lower court erroneously applied a specific-need/special-benefit standard that has been used for impact fees for water and sewer lines (R. at 434-38). Using the sewer and water impact fee standard of reasonableness, the lower court concluded that Aberdeen's purported age-restriction negated "any need for the County to build schools on its account or for its benefit" (emphasis added) (R. at 439) and, therefore, was an unconstitutional tax.[5] (R. at 448.)

[5] Although a new school may not be built solely on Aberdeen's account or because of its specific need for a new school, this does not mean that the residents of Aberdeen may not or will not use and benefit from a new school that may be built because of

countywide growth. Volusia County School District provides many services that may used by the "adult" residents of Aberdeen. If Aberdeen residents become victims of a disaster (e.g., hurricane, firestorm, etc.) and are evacuated from their homes, pursuant to the mandate of Section 252.38(1)(d) of the Florida Statutes (1995 and 1997), the School Board of Volusia County will provide (and did so provide during the firestorm of 1998) its facilities and personnel to assist the residents of Aberdeen. Volusia County School District also may provide vocational, adult, and community education for adult individuals who may reside in Aberdeen. *See* Chapter 239, Fla. Stat. (1995 and 1997). In addition, under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1412 (1990), and pursuant to Volusia County School Board Policy # 304 (1992), the Volusia County School District is required to provide a free, appropriate public education to all children with disabilities up to

The Florida Constitution, as amended by the electorate in November 1998, has a heightened constitutional mandate that the law shall provide "for a uniform, efficient, safe, secure, and high quality system of free public schools."[6] Art. IX, § 1, Fla. Const., as amended 1998. The Florida Legislature, implementing this free-public school-constitutional mandate, directs the Volusia County School District to provide a countywide system of schools. *See* § 230.01, Fla. Stat. (1995 and 1997). The School Board of Volusia County is charged with the responsibility of maintaining an equal level of service within the Volusia County School District. *See* § 230.23, Fla. Stat. (1995 and 1997).

This Court has recognized that school impact fees are a way of achieving the mandated uniform system of free public schools:

> In fact, it could be argued that educational facilities impact fees are themselves a vehicle for achieving a uniform system of free public schools because in rapidly growing counties ordinary funding sources may not be sufficient to

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the age of 21 who reside in the district - including residents of Aberdeen who are between the ages of 18 and 21.

[6] Appellants contend that this recent mandate from the electorate is strong evidence of the overall importance of schools to <u>all</u> residents of this state, including residents in adult-only/student-free communities. To fulfill this constitutional mandate, Volusia County must provide new schools to satisfy the need generated by the total growth in the county.

> meet the demand for new facilities. We further note that the legislature must contemplate that the uniform system of free public schools may be funded by a variety of sources. . . . *St. Johns County* at 641.

Appellants argue that this constitutional mandate and the laws implementing the mandate establish a "need" that must be met by all Volusia County residents and acknowledges a correlative "benefit" that accrues to the entire citizenry of Volusia County, regardless of family status. Accordingly, when assessing the "reasonable connection" of Volusia County's school impact fee to the need and benefit as related to the Appellee, the lower court should have looked to a reasonable connection to the countywide need for and benefit from new schools caused by the total growth in the Volusia County School District instead of looking for a specific need of and special benefit to Aberdeen. While the specific-need and special-benefit standard for determining a reasonable connection that was used by the lower court may be appropriate for determining the appropriateness of water and sewer impact fees, such a reasonableness standard is inappropriate for school impact fees. School impact fees are imposed because of a countywide need generated by total growth in the countywide school district. The obligation to provide a system of free public schools is a countywide obligation; the benefits of providing a free public school system accrue to all citizens of the county. The need and benefit standard applicable to reasonable

connection to school impact fees should be a countywide standard not an individualized standard as for water and sewer impact fees.

The court in *St. Johns County* recognized the inappropriateness of using the specific-need and special-benefit standard. In rejecting the argument that if a resident did not have school children residing in a unit the school impact fee was nothing more than a tax, the *St. Johns County* court noted that such an argument was too simplistic and stated:

> The same argument could be made with respect to many other facilities that governmental entities are expected to provide. Not all of the new residents will use the parks or call for fire protection, yet the county will have to provide additional facilities so as to be in a position to serve each dwelling unit. During the useful life of the new dwelling units, school-age children will come and go. It may be that some of the units will never house children. However, the county has determined that for every one hundred units that are built, forty-four new students will require an education at a public school. The St. Johns County impact fee is designed to provide the capacity to serve the educational needs of all one hundred dwelling units. We conclude that the ordinance meets the first prong (the "need" test) of the rational nexus test. *St. Johns County* at 638-39.

In reviewing the "need" prong in the case at bar, the lower court found that since "all" of the units in Aberdeen theoretically would not house children for 30 years the *St. Johns County's* reasoning was not applicable. (R. at 443.) Appellants

contend this is a misinterpretation of the *St. Johns County* holding. Just as in the case at bar, the challenged ordinance in *St. Johns County* was a countywide ordinance and was calculated on the needs of the entire county. *St. Johns County* at 639. Thus, the reasonableness standard used in *St. Johns County* was applied countywide and the holding was that the "need" test is met even if some of the new units in the county that contribute to the growth will never house children. *Id.* The lower court in the case at bar erred in failing to recognize that "all" of the units in Aberdeen are simply a part of "some" of the units in the county that may never house children. Instead of looking at the impact fee on a countywide basis, the court isolated the needs of Aberdeen and applied the test without regard to the total need generated by the total countywide growth. The Constitution of the State of Florida prohibits individualizing needs (i.e., determining use) to determine a reasonable connection between the need for new schools and the growth generating the need. As this Court in *St. Johns County* said, if the impact fee is designed to provide the needs for all the new units in the county, the "need" test is met. *Id* at 638-39.

The responsibility for educating the youth of Volusia County and absorbing the cost of such expansion is a countywide obligation. Appellee and the lower court acknowledge that Aberdeen is obligated to contribute to the cost of providing free public education to the children of Volusia County through taxes (R. at 426). However, contrary

to the finding of this Court in *St. Johns County,* the lower court in the case at bar refused to recognize that this countywide obligation extends to the construction of new schools necessitated by countywide growth.

As discussed at length in Appellants' Memorandum in Support of Defendants' Motion for Summary Judgment (R. at 99-102), as a new residential subdivision, Aberdeen increases the countywide housing stock and, thereby imposes a cost on the county through its obligation to maintain the countywide level of service for all housing. For example, if the total countywide housing stock is 50,000 units, after the construction of a new house, that total countywide housing stock is increased by one to 50,001. This increase in the countywide housing stock requires the school board to expend monies on capital expansion in order to maintain the countywide level of service. *See* Nicholas, Nelson, Juergensmeyer, *A Practitioner's Guide to Development Impact Fees* 11 (1991).

The student generation rate, determined by dividing the number of children in the county by the number of dwelling units in the county, drives the decision as to how many new schools will be needed to accommodate the growth in the school-age population throughout the county. This student generation rate is used in calculating the school impact fee. (*See* R. at 15-43, 380-81, and 429; Drago Dep. at 16.) The student generation rate captures overall ratios for the entire county. An individualized student generation rate is not calculated for each separate residential area. Such an individualized calculation

would result in the student generation rate being a student user generation rate. School impact fees are not and, under article IX, section 1 of the Florida Constitution, cannot be based on "use."

In addition, as also was pointed out to the lower court in Appellants' Memorandum in Support of Defendants' Motion for Summary Judgment, segregating the residents within the county (i.e., having adult-only communities) does not lessen the countywide need for new school facilities attributable to countywide growth. (R. at 100-102.) *See A Practitioner's Guide to Development Impact Fees* 11 (1991). Nor, does segregating the residents by age minimize the countywide obligation to provide free public schools throughout the countywide school district. *See* § 230.23, Fla. Stat. (1995 and 1997). Nonetheless, the age composition of all the occupants of new housing, including segregated adult-only/student-free communities, does influence the need for new schools and the correlative school impact fee. That is, the basic mathematics used in calculating the student generation rate that in turn drives the school impact fee calculation mandates that if the number of housing units occupied by persons without children increases, the student generation rate will decrease and, likewise, the school impact fee will decrease. Accordingly, while the impact fee is not individualized for each community based on the specific need of and benefit to that community in isolation, as the Appellee would have it be and the lower court found it must be, each community,

including an adult-only/student-free community, does affect what the school impact fee will be.[7] In fact, this Court specifically noted that a countywide school impact fee designed to meet construction needs throughout the county would meet the second prong of the two-part test. *St. Johns County* at 640.

Volusia County's school impact fee ordinance is rationally based on a student generation rate that includes in its calculation all residential dwellings in Volusia County. Volusia County's school impact fee is formulated to meet the construction needs throughout the county. Under the ruling in *St. Johns County,* there is a reasonable connection between the expenditure of the funds collected and the benefits accruing to Aberdeen. Volusia County's school impact fee meets the dual rational nexus test as approved in *St. Johns County*.

Using a response by the Executive Director of Facilities Services for Volusia County School District, Pat Drago, taken out of the context of her deposition, Appellee claimed that "Aberdeen at Ormond Beach has not, in fact, had any impact on the County's

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[7]The statement in the Order that "[a]dults are not a factor in the student generation rate and simply do not enter into the calculation of the impact fee" (R. at 21) is an inaccurate, misleading conclusive statement. While the number of adults may not be a numerical factor in the student generation rate calculation, the number of adult-only/student-free household units is a numerical factor. Thus, as explained herein, basic mathematics demonstrates that "adults" who live in adult-only/student-free household units are a factor in the student generation rate calculation and, thereby, do impact the calculation of the school impact fee.

new school planning." (R. at 211.) Appellee failed to explain that this statement was made in explanation of the School Board's use of a countywide planning system rather than an individualized planning system. That is, Aberdeen was not considered independently in the planning process. (*See* Drago Dep. at 22-27.) The School Board has a countywide responsibility to provide adequate school facilities and, therefore, applies a countywide school impact fee. The county does not look at individual housing units in making new school plans and when determining impact fees. Instead, the School Board captures overall ratios through the application of a countywide student generation rate, as discussed above. An individualized application of a school impact fee, as adopted by the lower court, is exactly what this Court disclaimed in *St. Johns County*. *St. Johns County* at 638-39.

There is a reasonable connection between the countywide need for new schools attributable to countywide growth of which Aberdeen is a part and the imposition of a school impact fee on Aberdeen. There is a reasonable connection between the countywide benefit of providing a free public education as mandated by the Florida Constitution and the imposition of a school impact fee on Aberdeen. The dual rational nexus test approved in *St. Johns County* is met by the Volusia County school impact fee as applied to Aberdeen. The Volusia County school impact fee charged to Aberdeen is not an unlawful tax in violation of article VII, section 9(a) of the Florida Constitution.

To the contrary, to mandate exemption for Aberdeen as an adult-only/student-free community from paying school impact fees that are imposed to fulfill a countywide obligation converts school impact fees into user fees in violation of article IX, section 1 of the Florida Constitution.

2. Conversion to user fee. The lower court's order in this case, in effect, converts the permissive exemption in footnote 6 of *St. Johns County* into a mandatory exemption and, thereby, raises a constitutional question:

> Whether, if adult-only/student-free residential communities are required to be excused from paying school impact fees pursuant to an exemption provision like the one described in dicta in footnote 6 of *St. Johns County v. Northeast Florida Builders Association, Inc.*, 583 So. 2d 635 (Fla. 1991), the basic school impact fee would be turned into a user fee in violation of article IX, section 1, of the Florida Constitution*?*

Appellants contend that the answer to this issue is yes. A mandate that an adult-only/student-free residential community be exempt from paying a school impact fee converts the school impact fee into a user fee. A required exemption for those who do not use the schools would mean that only those who do use the schools would pay the fee. By definition, then, the school impact fee becomes a user fee. This Court defined "user fee" as follows:

> User fees are charges based upon the proprietary right of the governing body permitting the use of the instrumentality involved. Such fees share common traits that distinguish

> them from taxes: they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society . . . (citations omitted); and they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge. *State v. City of Port Orange,* 650 So. 2d 1, 3 (Fla. 1994).

In certifying to this Court the issue in the case at bar that is of great public importance, the Fifth District Court of Appeals for the State of Florida, agreeing with Appellants' contention that the lower court's ruling converts a permissive exemption into a mandatory user-fee exemption stated: "the lower court's ruling in effect mandates that impact fees, in order to be constitutional, must be user fees." (R. at 456.)

In making its ruling in *St. Johns County,* this Court recognized the constitutional prohibition against allowing school impact fees to be user fees and made its ruling accordingly. *See St. Johns County* at 639-641. If, however, the dicta in footnote 6 of *St. Johns County* is interpreted to mean that an exemption must be granted to adult-only/student-free residential communities, the school impact fee fits squarely into the definition of a user fee as defined by this Court in *City of Port Orange*, 650 So. 2d 1, 3 (Fla. 1994). The effect, then, of applying the dicta in footnote 6 of *St. Johns County* as a mandate is that the exception swallows the rule; the exception in the footnote overrules the holding of the case.

The lower court's ruling in the case at bar illustrates how, if the exception in footnote 6 is required, the basic holding of *St. Johns County* is contradicted. The lower court ruled that granting an exemption to an adult-only/student-free residential community is mandatory, not just unobjectionable, as stated in the dicta in footnote 6 of *St. Johns County*. In making its finding that such an exemption is compulsory, the lower court used the rationale for user fees set forth in several water and sewer impact fee cases. Following the water/sewer-case rationale, the lower court found that, since an adult-only/student-free community itself may have no specific need for and may derive no special benefit from school expansion (i.e., will not "use" the new schools), the dual rational nexus test (i.e., reasonable connection to need and benefit) approved in the *St. Johns County* holding cannot be met. (*See* R. at 434-38.) That is, the lower court used the same "reasonableness" standard that has been used for water and sewer impact fees and found that the *St. Johns County*-approved dual rational nexus test could not be met when the formula for assessing school impact fees does not result in a zero charge to adult-only/student-free residential communities. Thus, the lower court found that Volusia County's school impact fee was an unlawfully levied tax. Contrary to the holding in *St. Johns County* that under the Florida Constitution a school impact fee cannot be a "user" fee, the lower court found that a school impact fee, just like water and sewer impact fees, must be a "user" fee, otherwise the "fee" is an unlawful tax and not a fee.

Appellants contend that the lower court's reasoning is faulty. As discussed in Part V(A)(1) above, Appellants argue that the reasonable connection for the dual rational nexus test used by the Court in *St. Johns County* can be met even if the formula used for the calculation of school impact fees results in a proportionate share of the fee being charged to adult-only/student-free residential communities. Appellants rely on the holding in *St. Johns County* and contend that a school impact fee is not an unlawful tax simply because it does not meet the same standard of "reasonableness" as has been established for water and sewer impact fees which are user-driven, user fees. Appellants further contend that the exemption described in footnote 6 of *St. Johns County*, if required, converts school impact fees into user fees, in direct conflict with the holding in *St. Johns County* and in violation of the Constitution of the State of Florida. The lower court's ruling is based on a faulty interpretation of the exemption described in footnote 6 of *St. Johns County* and should not be upheld.

3. *Stare decisis*. Appellants contend that the doctrine of *stare decisis* is applicable in this case. "*Stare decisis* provides stability to the law and to the society governed by that law." *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995). Appellants contend that stability to the law is important to the governance of society at all jurisdictional levels. The court in *Florida Home Builders Association* recognized the value and importance of such stability at the circuit court level. In his Conclusion and

Order, the judge ordered Volusia County and the Volusia School District to pay a sum to the Plaintiffs for "partial reimbursement of consulting and expert witness fees and related costs in the analysis of the Volusia School Impact Fee and the analysis of related issues during mediation" based on the following acknowledgment:

> The parties acknowledge that the analyses, reports and recommendations of experts retained and compensated by Plaintiffs during these proceedings may also be useful and may be relied on by the County during its consideration of any amendments to Ordinance 92-9, and that there is a public benefit in relying upon such reports without further public expenditures. (Emphasis added.) (R. at 125.)

In the interest of stability to the law, Volusia County and the Volusia County School Board should not have to litigate with every homebuilder or mobile park lot owner about the appropriateness of the calculation of the County school impact fee. The doctrine of *stare decisis* is applicable. *Florida Home Builders Association* and *St. Johns County* are controlling precedents.

4. Controlling case law. The lower court dismissed Appellants' argument that under the doctrine of *stare decisis* both *St. Johns County* and the Final Stipulated Judgment in *Florida Home Builders Association* serve as controlling precedents in the case at bar. One of the lower court's reasons for rejecting Appellants' position is that the Appellee "was not a party" in *Florida Home Builders Association.* (R. at 432.) This reasoning is unfounded. The doctrine of *stare decisis* does not require that the same

parties be involved in both cases in order for the doctrine to be applicable. The doctrine of *stare decisis* is grounded on the concept that similarly situated individuals should be treated alike. *Perez v. State,* 620 So. 2d 1256 (Fla. 1993). Apparently, the lower court confused the elements of the doctrine of *stare decisis* with those of the doctrines of *res judicata* and collateral estoppel both of which do require that the same parties be present to trigger application. (*See* R. at 432.)

The parties in the case at bar are similarly situated to those in *St. Johns County* and in *Florida Home Builders Association*. The doctrine of *stare decisis* is applicable.

In rejecting Appellants' *stare decisis* argument, the lower court also found that the same questions of law were not involved in the case at bar as were involved in the cases relied on by the Appellants. (R. at 431.) Appellants contend that the issues involved in the cases do involve the same questions of law. The school impact fee in *St. Johns County* was found to be deficient because the entire county was not subject to the ordinance. *St. Johns* at 639. In the case at bar, the Appellee challenges the Volusia County ordinance because the entire county is included! The Appellee seeks to have a portion of the county (i.e., Aberdeen) excluded from the ordinance. Although the Appellee seeks an opposite result in the case at bar, the issue is the same as that in *St. Johns County*. The challenge in *Florida Home Builders Association* involved a question of the methodology used in determining what was the proportionate share of

school impact fees that should be charged to the builders. (R. at 112-14.) Likewise, the fundamental question in the case at bar involves a question as to what is Aberdeen's proportionate share of Volusia County's school impact fee. Appellee asserts that the formula (i.e., the "methodology") should result in Aberdeen's proportionate share being zero (i.e., the "application" should result in a total exemption for Aberdeen). The issue in the case at bar is the same as in *Florida Home Builders Association.*

The underlying issue in the case at bar is the same as the issues in *St. Johns County* and in *Florida Home Builders Association.* Accordingly, since the parties in both cases are similarly situated and the issues are the same, the doctrine of *stare decisis* should be applied. *St. Johns County* and *Florida Home Builders Association* are controlling precedents.

5. Cases relied on by lower court. The lower court relied on Appellee's assertion that it is only challenging the "application" and is not challenging the *St. Johns County*-approved "methodology" used in Ordinance 97-7. (*See* R. at 431.) An analysis of Appellee's claim that the question in the case at bar is addressed only to the "application" as to Aberdeen and not to the "methodology" reveals that this assertion is simply a semantic cliche and not a substantive distinction. Furthermore, Appellee's assertion is contrary to the record. The record reveals that the Appellee is challenging the methodology used in Volusia County Ordinance 97-7. The Appellee complains that

commercial enterprises such as nursing homes and ACLF's are excluded from the definition of what constitutes a residential unit but that adult-only/student-free housing units are not excluded. (R. at 442).

A review of the cases relied on by the lower court in support of its acceptance of Appellee's assertion illustrates that Appellee's claimed distinction is a distinction without a difference. Application and method are inextricably intertwined; they are not independent issues. It is impossible to challenge one side of the equation (i.e., the result/application) without likewise challenging the other (i.e., the formula/methodology).

The case of *Westwood Lake, Inc. v. Dade County,* 264 So. 2d 7 (Fla. 1972), involves a question regarding the use of the "prudent investment theory" in the calculation of a fair utility rate. Although the court in *Westwood Lake* referred to an "unconstitutional application," the underlying rationale was that the method that was used in defining what was an investment to which the theory should be applied was arbitrary. *Westwood Lake* at 9-11. The application of the investment theory was found to be inappropriate because the underlying method for determining an investment was arbitrary (e.g., consideration was not given to crediting contributed equipment or costs). *Id.* In the case at bar, the Appellee challenges the amount of the charge to Aberdeen (i.e., the application) because the formula for calculating the charge (i.e., the methodology) is not based on use (i.e., specific need and special benefit). In *Westwood Lake*, as in the case

at bar, the charge of "unconstitutional application" is inextricably intertwined with the methodology. A challenge to the application is also a challenge to the methodology.

City of Miami v. Stegemann, 158 So. 2d 583 (Fla. 3d DCA 1963), involves a denial of an application for a variance to a zoning ordinance. Based on its interpretation that a prior case had found the underlying ordinance to be unconstitutional, the lower court in *City of Miami* invalidated the underlying ordinance. *City of Miami* at 584. The Third District Court of Appeal disagreed with the lower court's interpretation of the prior case and found that in neither the prior case nor in the *City of Miami* case was the underlying ordinance itself being challenged. What was sought in each case was a variance from the ordinance. *Id.* The appellate court in *City of Miami* went on to note that in seeking a variance "the validity of the ordinance is generally admitted." *Id*. Studied in context, however, this statement in *City of Miami* does not support Appellee's assertion that Appellee is not attacking the basic methodology of Volusia County's school impact fee ordinance.

In comparing Appellee's claim with the claim in *City of Miami* and considering Appellee's claim as a request for a variance from a valid ordinance, Appellee's reason for the request for a "variance" must be analyzed. Appellee in the case at bar seeks a variance because Appellee claims that Volusia County's ordinance uses an inappropriate method of determining what school impact fee should be assessed on Aberdeen, even

though the county used the methodology that it was required to use under the terms of the Stipulated Final Judgment in *Florida Home Builders Association* and that was approved in *St. John*s *County.* Appellee is attacking the underlying ordinance from which the variance is sought because the method for determining the school impact fee does not employ a user-determinative formula. Unlike the general statement set forth in the *City of Miami* and contrary to Appellee's assertions, the Appellee in the case at bar is not admitting the validity of the ordinance but, rather, is challenging the basic assumptions incorporated in the methodology employed by Volusia County to determine Aberdeen's proportionate share of school impact fees.

In further support of its ruling that the school impact fee was unconstitutional "only as it applies to Aberdeen" (R. at 433) and was an unconstitutional tax, the lower court relied on several other water- and sewer-impact fee cases. Once again, a careful review of these cases demonstrate that the "method" of either determining the fee or the use to which the fee collections were applied caused the "application" to be unjust.

The court in *Contractors and Builders Association of Pinellas County v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976), found that the challenged ordinance did not have appropriate restrictions on the use of the revenues generated by the water and sewer impact fee. *City of Dunedin* at 331. That is, the provisions of the challenged ordinance did not require that the money collected from the water and sewer fees be spent only for

the expansion caused by the users and those who would derive special benefit from the expanded water and sewer system. Under the City of Dunedin's ordinance, the fees could have been used for maintenance and repair of the existing system that would benefit customers other that those being charged the user fee. The court in *City of Dunedin* held that unless a water and sewer impact fee is limited to recover the costs attributable solely to the expansion of the system and is charged only to those who will use the system and derive a special benefit, the charge is an unconstitutional tax and not an impact fee.

Applying this reasoning to the case at bar, the lower court held that a charge for expansion of the district school system, likewise, can only be charged to those who will have a specific use for the school system and who, thereby, will derive a special benefit. Since the Volusia County formula for determining school impact fees is based on countywide use and benefit and, since the formula does not exempt those who may not have a specific use for the expansion of the school system or derive a special benefit from the expansion,[8] the lower court held that the formula did not work (i.e., that there was no reasonable connection as is required under the dual rational nexus test). Thus, the lower court held that the school impact fee is an unconstitutional tax on Aberdeen.

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[8] *See* footnote 5, *supra*, for a discussion of the many ways the residents of Aberdeen may use and receive a benefit from the public schools in Volusia County.

The appellate court in *Florida Keys Aqueduct Authority v. Pier House Joint Venture,* 601 So. 2d 1270 (Fla. 3d DCA 1992), agreed with the trial court that the Aqueduct Authority's use of a "unit system" (i.e., the method) was not just and equitable as applied to the Pier House Joint Venture. *Florida Keys Aqueduct Authority* at 1271-73. The "root cause" of the problem was that the formula (i.e., the method) did not have an appropriate industrial use classification, *id.* at 1272; therefore, the method resulted in an unjust and inequitable application. Once again, an attack on the application was an attack on the method.

In the case of *City of Tarpon Springs v. Tarpon Springs Arcade Limited,* 585 So. 2d 324 (Fla. 2d DCA 1991), the method used in calculating the water and sewer impact fee was challenged. The problem with the challenged ordinance was that the ordinance did not specify a method or manner in which credits were to be applied in the calculation of the fee. *City of Tarpon Springs* at 326-27. The court found that the city had the fundamental authority to impose the fee but that the method chosen by the individual officer who applied the fee was arbitrary and capricious. *Id.* at 325-26. Once again the distinction between the method and application was meaningless. The arbitrary and capricious "method" selected for calculating the fee resulted in an unjust application.

As in *Florida Keys Aqueduct Authority* and in *City of Tarpon Springs*, the Appellee in the case at bar is challenging the formula (i.e., the "methodology"). Because

the use of the formula results in a charge to Aberdeen, the Appellee claims the charge is unjust. Because the formula is not user determinative, Appellee claims and the lower court held that the Volusia County school impact fee is an unconstitutional tax.

In the cases cited by the lower court, both sides of the equation, methodology and application, were reviewed together. Even though some of the language in these cases, when taken out of context, appears to indicate that "methodology" and "application" are independent of one another and theoretically could be challenged separately, a thorough review of the cases shows that "methodology" and "application" are a part of the same equation. They are inextricably intertwined and cannot be independently challenged. Appellee's attack on the application is an attack on the methodology.

The cases relied on by the lower court do not support Appellee's attempt to distinguish the issue in the case at bar from the issues in *St. Johns County* and *Florida Home Builders Association.* The cases relied on do not discredit the value of *St. Johns County* and *Florida Home Builders Association* as controlling cases under the doctrine of *stare decisis.*

B. Appellee does not have irrevocable land use restrictions and covenants that qualify it as an adult-only/student-free community eligible for any exemption that may be found to be required for any such communities.

In compliance with § 723.011, Fla. Stat. (1995), Aberdeen submitted to the Division of Florida Land Sales, Condominiums and Mobile Homes its Prospectus

containing the Primary Declaration as an incorporated exhibit. In further compliance with § 723.011, Fla. Stat. (1995), the Division approved the Prospectus (R. at 301) for distribution to every lessee prior to execution of a lease. No citation is necessary for the Court to recognize that the law contemplates that a prospectus that is submitted to and approved by the Division shall contain valid information and that all documents submitted with the prospectus that are to be executed and recorded subsequent to approval by the Division will be so executed and recorded. That is, the statute contemplates that Aberdeen would have executed the Primary Declaration and would have recorded the document in the public records of Volusia County. Indeed, the Appellee acknowledged that it should have recorded the Primary Declaration and that its failure to record the Primary Declaration was inadvertent. (R. at 301.)

Even though the Appellee's Prospectus, including the Primary Declaration, was approved by the Division pursuant to Chapter 723 of the Florida Statutes, and the Appellee recognizes that the Primary Declaration should have been recorded, Appellee and the lower court disavow the importance and value of the original Primary Declaration because it was never executed or recorded. (R. at 440.) Appellants contend that to ignore the Primary Declaration of Covenants is to violate the intent and purpose of Chapter 723 of the Florida Statutes that govern Mobile Home Park Lot Tenancies. The express purpose of the provisions of Chapter 723 is to protect the rights of mobile home

owners. § 723.004, Fla. Stat. (1995 and 1997). If, to serve its own purposes (in this case to try to establish an irrevocable age restriction to entitle it to an exemption from paying school impact fees [9]) a mobile home park owner is allowed, as the lower court has allowed in this case, to discount and ignore selected parts of an officially approved prospectus, Appellant contends that the statutory protection for homeowners is meaningless. The homeowner is not afforded any protection and the purpose of the statute is violated.

Appellee offered no evidence and, accordingly, the lower court made no finding that Aberdeen's alleged age-restriction could not be changed at a moment's notice at the whim of Aberdeen pursuant to section 7.2 of the Primary Declaration contained in the

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[9] By disregarding section 7.2 of the Declaration of Covenants contained in the Prospectus, the false impression is given that the Appellee has established a 30-year-irrevocable-18-years-of-age-or-older restriction for its community. Section 7.2 negates any such contention; section 7.2 reserves for the Appellee: "[T]he absolute and unconditional right to alter, modify, change, revoke, rescind, or cancel any or all restrictive covenants contained in this Declaration or hereinafter included in any subsequent Declaration. Further, Declarant shall have the right, without the necessity of joinder by Unit Owners or any other persons or entities, to make modifications to this Declaration." (Emphasis added.)(R. at 348.) Pursuant to this section of the Declaration of Covenants contained in Appellee's Prospectus, Aberdeen could at any time unilaterally "alter, modify, change, revoke, rescind, or cancel" the age restriction sections of the Supplemental Declarations on which Appellee relies for its contention that Aberdeen is an age-restricted community. In other words, the Appellee could take any of said negating actions in regards to the Supplemental Declarations and delete the words that the age restriction "shall not be subject to revocation or amendment." Thus, there is no 30-year-irrevocable-18-years-of-age-or-older restriction on the property as Appellee contends.

Appellees's Prospectus. Instead, the lower court made a speculative ruling on an imaginary case that theoretically could be brought by someone in the future who might choose to challenge Aberdeen, if Aberdeen were to exercise its right reserved in the Primary Declaration to expunge the age-restriction covenant found in the Supplemental Declaration. (*See* R. at 440-41.) Appellants contend that there is no basis in law to require Volusia County and the Volusia County School Board, when determining the validity of Aberdeen's age-restriction covenant, to disregard a provision in Aberdeen's Primary Declaration that is a part of its approved Prospectus and that Aberdeen is required by law to distribute to every homeowner-lessee. Simply because a theoretical argument can be made in favor of someone who might challenge any attempt by Aberdeen to follow the provisions in the Primary Declaration and to negate the provisions in the Supplemental Declaration does not mean that the Primary Declaration should be discounted as a matter of law as was done by lower court.

Aberdeen is <u>not</u> a community subject to a 30-year irrevocable age restriction as Appellee claims. Thus, Aberdeen would not be entitled to any relief even if Aberdeen's contentions that adult-only/student-free communities must be exempt from paying school impact fees and that assessing such a fee is an *ultra vires* act of the County were deemed to be true. The lower court erred in granting relief to Aberdeen and ordering that Aberdeen recover monies on account of impact fees.

VI. CONCLUSION

There is a reasonable connection between the countywide need for new schools attributable to countywide growth to which adult-only/student-free residential communities contribute and the imposition of a school impact fee on such communities. There is a reasonable connection between the countywide benefit of providing a free public education as mandated by the Florida Constitution and the imposition of a school impact fee on adult-only/student-free residential communities. The dual rational nexus test approved in *St. Johns County* is met by the Volusia County ordinance that imposes a school impact fee on adult-only/student-free communities.

The Volusia County school impact fee charged to Aberdeen is not an unlawful tax in violation of article VII, section 9(a) of the Florida Constitution. To the contrary, to require an exemption for Aberdeen as an adult-only/student-free community from paying the Volusia County school impact fee that is imposed to fulfill a countywide obligation converts the school impact fee into a user fee in violation of article IX, section 1 of the Florida Constitution. Accordingly, the lower court's ruling that requires that an exemption be provided for adult-only/student-free communities in Volusia County's school impact fee ordinance should not be upheld.

Aberdeen does not have irrevocable land use restrictions that qualify it as an adult-only/student-free community that would be eligible for any exemption that may be

required for such a community. The lower court's order that Aberdeen should recover monies from Appellants on account of school impact fees should not be upheld.

The Order Denying Defendants' Motion for Summary Judgment and Granting Plaintiff's Motion for Summary Judgment should be reversed.

Respectfully submitted this _____ day of May, 1999.

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of May, 1999, a true and correct copy of the foregoing **INITIAL BRIEF ON BEHALF OF APPELLANTS** was mailed by depositing same in the U.S. Mail, postage prepaid, addressed as follows: Frank D. Upchurch, III, UPCHURCH, BAILEY AND UPCHURCH, P.A., P.O. Drawer 3007, Saint Augustine, FL 32085-3007.

Richard S. Graham

CERTIFICATE OF COMPLIANCE

I certify that this Initial Brief on Behalf of Appellants is printed with a proportionately-spaced Times New Roman typeface of 14 points; is double spaced; and the word count by WordPerfect 8.0 for Windows is 9,582, excluding the caption, cover page, and certificate of compliance.

Richard S. Graham