SUPREME COURT OF FLORIDA

CASE NO. 95,345

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

Appellants,

DISTRICT COURT OF APPEAL,
FIFTH DISTRICT - NO. 99-74

v.

CIRCUIT COURT
CASE NO. 97-31544-CICI

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

Appellee.

______________________________/

AMENDED ANSWER BRIEF ON BEHALF OF APPELLEE

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PREFACE

For purpose of this answer brief, Appellee Aberdeen of Ormond Beach, L.P. is referred to as "Aberdeen". The designation "B.___" refers to the initial brief of Appellants, "A.___," to the Appendix to this brief, and "R.___" to the record on appeal.

STATEMENT OF FACTS

Aberdeen is being developed as a 537 unit (R. 299) "retirement community for senior citizens providing facilities and services tailored to meet the special needs of senior lifestyles." (R. 323). It is organized to provide housing for persons at least 55 years of age in accordance with the Housing for Older Persons Exemption of the Federal Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. §§3601-19). The terms and conditions of the Housing for Older Persons Exemption are embodied in Aberdeen's rules and regulations, standard lot leases, and recorded 30-year covenants and restrictions on the property. (R.323(¶7), 331). The supplemental declaration of covenants, conditions and restrictions (A. 25; R. 219) provides, in pertinent part:

> 2.2 Prohibition Against Minors. In no event shall any person under the age of eighteen (18) years reside within any dwelling unit on the Property as a permanent resident.
>
> 2.3 Exceptions. While the prohibition against minors contained in Section 2.2 shall not be subject to waiver or exception, the Owner reserves the right to allow persons under the age of 55 years to reside on the Property under limited circumstances, in compliance with the Federal Fair Housing Act and the Community rules.
>
> . . .

> 3.1. Duration. The covenants, conditions and restrictions of this Supplemental Declaration shall run with and bind the Property, and shall inure to the benefit of and be enforceable by the Owner and the Unit Owners, for a period of thirty (30) years from the date this Supplemental Declaration is recorded.
>
> 3.2 Amendments by Declarant. While the prohibition against minors residing in the Community contained in Section 2.2 shall not be subject to revocation or amendment, Declarant specifically reserves for itself, its successors and assigns, the absolute and unconditional right to alter, modify, change, revoke, rescind, or cancel any or all of the other restrictive covenants contained in this Supplemental Declaration, without the necessity of joinder by Unit Owners or any other persons or entities.

(A. 26-27; R. 220-221) (emphasis supplied).

The prohibition against minors is also set forth in the community rules and regulations and standard lot leases. (R. 323, 331).

The "age restrictions are strictly enforced." (R. 300). By the end of July 1998 (the motions for summary judgment were filed in August), Aberdeen had developed 191 lots and had installed 84 manufactured homes at Aberdeen. There were 142 people residing there, 119 of whom were over 60. No children have ever lived there. The youngest resident ever was 42. (R.300).

SUMMARY OF ARGUMENT

Under its first point, Aberdeen shows that the lower court properly applied the dual rational nexus test in concluding that the Volusia County school impact fee constitutes an unlawful tax as applied to Aberdeen. Contrary to Appellants' contention, the dual rational nexus test is not satisfied by showing a rational relationship between overall growth in Volusia County and the need for new schools. The test specifies subdivision-level scrutiny, requiring a reasonable connection between Aberdeen itself and the need for new schools and the benefits accruing from them. Applying the test only at the countywide level would obliterate the distinction between the impact fee and a tax. Indeed, the Aberdeen fee has all the indicia of a tax. Under Aberdeen's deed restrictions and rules, school children cannot live there. Consequently, Aberdeen has no impact on school enrollment growth and concomitant the need for new schools. Fees collected from Aberdeen do not confer any special benefit on its population, distinct from the benefits accruing to those who do not pay the fee. To the contrary, the fees are collected and spent for the benefit of housing elsewhere, where Volusia County school children can and do reside.

The lower court's order does not transform the Volusia County impact fee into a school user fee, in violation of the constitutional guarantee of free public schools. Its ruling only affects Aberdeen, where the students cannot live because of deed restrictions. In St. Johns County v. Northeast Florida Builders Association, 583 So.2d 635 (Fla. 1991), the supreme court has expressly ruled that exempting restricted adult facilities does not conflict with article IX, section I. The order does not suggest that only homes occupied by children should be subject to school impact fees.

Contrary to Appellants' stare decisis claim, neither St. Johns County nor the stipulated final judgment in the Volusia County builders' lawsuit bar Aberdeen's challenge to the impact fee as applied to its development. In St. Johns County, the court ruled that counties are authorized to levy school impact fees, but did not decide the issue of whether such fees are valid as applied to a retirement community, where children are prohibited from living by land use restrictions. The Volusia County builders' lawsuit involved an entirely different issue and simply is not on point.

Under point II, Aberdeen shows that the lower court properly rejected

Appellants' argument that Aberdeen's prohibition against minors should be ignored. The specific provisions of the supplemental declaration of covenants, conditions and restrictions, which expressly provide that the prohibition against minors is not subject to revocation, control over the general language of the unexecuted, unrecorded initial declaration. The Aberdeen age restrictions are bonafide and there is no evidence to suggest that they can or will be revoked.

ARGUMENT

I. THE LOWER COURT CORRECTLY CONCLUDED THAT THE VOLUSIA COUNTY SCHOOL IMPACT FEE DOES NOT MEET THE REQUIREMENTS OF THE DUAL RATIONAL NEXUS TEST AS APPLIED TO ABERDEEN, SINCE CHILDREN ARE PROHIBITED FROM LIVING THERE BY LAND USE RESTRICTIONS AND COMMUNITY RULES. AS SUCH, THE IMPACT FEE CONSTITUTES AN UNAUTHORIZED TAX.

Overview

Under point A(1), Appellants contend that the lower court erroneously concluded that the Volusia County school impact fee constitutes an unauthorized tax on Aberdeen.

The Florida Constitution restricts local government's power to levy taxes. In recent cases, the supreme court has assumed a vigilant stance to prevent local government from circumventing these restrictions through the imposition of fees. The principles developed in these cases support the lower court's conclusion that the Volusia County school impact fee is an unauthorized tax on Aberdeen.

In Collier County v. State, 24 Fla.L.Weekly S206 (Fla. May 6, 1999), the supreme court examined the distinction between unauthorized taxes and valid fees and assessments in the context of Collier County's "interim governmental services fee." The court prefaced its analysis by explaining the constraints imposed by article VII, sections 1(a) and 9(b) on county government's power to levy taxes:

> [T]he constitution mandates that the state pass general laws authorizing local governments to levy ad valorem taxes on real estate and tangible personal property, subject to the millage rate limitations of article VII, section 9(b). All other forms of taxation are preempted to the state, unless authorized by general law. The constitution further allows the Legislature to authorize counties to levy other taxes. Therefore, local governments have no other authority to levy taxes, other than ad valorem taxes, except as provided by general law. [emphasis supplied] The County does, however, possess authority to impose special assessments and user fees.

Id. at § 206 (citations omitted) (emphasis original, except as noted). The court also recognized that counties have authority to impose impact fees. Id. at S208.

The court identified several indicia of taxes that distinguish them from fees. One key indica is the general nature of the purpose and benefits of taxes:

> [T]here is no requirement that taxes provide any specific benefit to the property; instead, they may be levied throughout the particular taxing unit for the general benefit of residents and property. . . .
>
> A tax is an enforced burden of contribution imposed by sovereign right for the support of the government, the administration of the law, to execute the various functions the sovereign is called upon to perform.

Id. at S207 (quoting City of Boca Raton v. State, 595 So.2d 25, 29 (Fla. 1992) and Klemm v. Davenport, 100 Fla. 627, 631-32, 129 So. 904, 907-08 (1930)). On the other hand, special assessments, user fees and impact fees all are concerned with special benefits. They all must confer some special benefit on those who must pay the fee, "in a manner not shared by those not paying the fee." Id. at S208 (emphasis original). Since the Collier County fee did not confer any such special benefits on the feepayers or their property, the court held the fee did not qualify as a valid special assessment, user fee or impact fee, and struck it down as an unlawful tax.

The court also discussed the distinction between taxes and fees in State v. City of Port Orange, 650 So.2d 1 (Fla. 1994). The plaintiffs challenged a municipal "transportation utility fee" as an impermissible tax. The court

cautioned that local government should not be permitted to use fees as a way of expanding its taxing authority:

> This Court has held that taxation by a city must be expressly authorized either by the Florida Constitution or grant of the Florida Legislature. "Doubts as to the powers sought to be exercised must be resolved against the municipality and in favor of the general public." It is our view that the power of a municipality to tax should not be broadened by semantics which would be the effect of labeling what the City is here collecting a fee rather than a tax.

Id. at 3 (citations omitted) (emphasis supplied). (quoting City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1, 3 (Fla. 1972)). The court emphasized the limits on the power of local government to tax were adopted by the people as part of the Florida Constitution and must be respected. They should not be circumvented by "creative" fees:

> [W]e recognize the revenue pressures upon the municipalities and all levels of government in Florida. We understand that this is a creative effort in response to the need for revenue. However, in Florida's Constitution, the voters have placed a limit on ad valorem millage available to municipalities, art. VII § 9, Fla. Const.; made homesteads exempt from taxation up to minimum limits, art. VII § 9, Fla. Const.; and exempted from levy those homesteads specifically delineated in article X, section 4 of the Florida Constitution. These constitutional provisions cannot be circumvented by such creativity.

Id. at 4. Guided by these principles, the court concluded:

> "Funding for the maintenance and improvement of an existing municipal road system, even when limited to capital projects as the circuit court did here, is revenue for exercise of a sovereign function contemplated within this definition of a tax."

Id.. at 3 (referring to the City of Boca Raton definition, quoted above at page 4).

The court held that the fee could not be justified as a user fee because it neither was voluntary nor did it confer any special benefit on the feepayers distinct from the benefits accruing to the public at large.

The Lower Court Applied the Correct
Standard for Determining the Validity of the Fee

Appellants contend that the lower court applied an inappropriately specific standard in concluding there is no rational nexus between Aberdeen and the need for and benefits of 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.

(B. 10).

This argument ignores the fact that the lower court applied the dual rational nexus test exactly as it was formulated in Hollywood, Inc. v. Broward County, 431 So.2d 606 (Fla. 4th DCA), review denied 440 So.2d 352 (Fla. 1983) and adopted in St. Johns County:

> In order to satisfy these requirements[1], the local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision. In order to satisfy this latter requirement, the ordinance must specifically earmark the funds collected for use in acquiring capital facilities to benefit the new residents.

St. Johns County, 583 So.2d at 637 (emphasis supplied) (quoting Broward County, 431 So.2d at 611-612).

The lower court duly applied the test and found that Appellants' arguments were insufficient to satisfy its requirements:

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1 The requirements that the fee must "offset needs sufficiently attributable to the subdivision" and that fee revenue must be "sufficiently earmarked for the substantial benefit of the subdivision residents." Broward County, 431 So.2d at 611 (emphasis supplied).

As articulated in St. Johns, the dual rational nexus test requires a reasonable connection between (1) "the need for additional [school] facilities and the growth in population generated by the subdivision" and (2) "the expenditures of the funds collected and the benefits accruing to the subdivision." Id. at 637. Defendants argue that Aberdeen has an impact on the school system because the system provides special education services to certain disabled students between the ages of 19 and 21. . . . Defendants also point out that Aberdeen stands to benefit from construction of school facilities because such facilities are available to its residents as emergency shelters and for certain adult education programs. They also note that Aberdeen residents consume goods and services in the local economy, and thus contribute to the need for workers who, in turn, may have children.

These facts and circumstances do not establish a rational nexus exists between Aberdeen and new Volusia County schools. A "rational" nexus contemplates a "substantial, demonstrably clear" relationship. Hernando County v. Budget Inns of Florida, Inc., 555 So.2d 1319 (Fla. 5th DCA 1990). . . .

The substantial relationship between the need for new schools and new development contemplated by St. Johns and the Volusia County ordinances does not exist in Aberdeen's case. The key ingredient is missing -- children. New schools are needed to serve school-age children, whereas Aberdeen is dedicated to providing housing for people at the opposite end of the demographic spectrum. No one suggests that Volusia County needs to build new schools to serve senior citizens. As Defendants point out, it may be that school facilities are available to Aberdeen's adult residents for various purposes, and it is not beyond the realm of possibility that at some time in the future adult Aberdeen residents could attend school in some capacity. This is also the case with residents of nursing homes, ACLFs and group homes for disabled persons, yet they are exempt from the Volusia County fee. Be that as it

> may, the rational nexus test requires Aberdeen to have more than a possible or an incidental impact on the need for schools. In the final analysis, housing that allows children is the land use that creates the need for new school facilities. The Aberdeen covenants and restrictions flatly prohibit this land use. They negate the need for the County to build schools on account of Aberdeen.
>
> As to the "benefits" prong of the dual rational nexus test, the St. Johns Court found a reasonable connection between the expenditure of impact fee revenue and benefits accruing to new development insofar as the new facilities will be available to serve the new homes located there. This connection is also missing in Aberdeen's case. No children can live at Aberdeen to be served by the schools. Volusia County does not spend impact fee revenues for Aberdeen's benefit. Impact fees collected at Aberdeen will not be spent to provide facilities for children living there, but rather for children who live in other developments, contrary to the Dunedin requirement that they must "be spent to benefit those who have paid the fee," which the Court reaffirmed in St. Johns.

(A. 20-22) (citations to lower court record omitted) (emphasis supplied).

Although the test adopted in St. Johns County expressly requires subdivision-level scrutiny, Appellants insist that it was error for the lower court to have focused on Aberdeen and its impact on the school system (or lack of it). They advocate a generalized test, requiring a rational relationship only at the countywide level, between "total growth" and the "countywide need for and benefit from new schools. . . ." Appellants argue:

> [W]hen 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. . . . 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.

(B. 12-13) (emphasis supplied).

The Appellants' contention that the dual rational nexus test applies only at the countywide level is belied by the language of the test itself. As formulated in Broward County and adopted in St. Johns County, the test expressly requires a reasonable connection between the need for new schools and "the growth in population generated by the subdivision" and "the benefits accruing to the subdivision." St. Johns County, 583 So.2d at 637 (emphasis supplied). It is also contrary to the underlying principle that impact fees must "offset needs sufficiently attributable to the subdivision" and must be "sufficiently earmarked for the substantial benefit of the subdivision residents." Broward County, 431 So.2d at 611 (emphasis supplied). Indeed, construing the test to apply only at the

countywide level would defeat its purpose. Applied at the subdivision level, the test serves to reasonably assure that impact fees are collected and spent for the benefit of those who pay them, in accordance with the principles introduced in Contractors & Builders Association v. City of Dunedin, 329 So.2d 314 (Fla. 1976) and reaffirmed in St. Johns County and Collier County. See City of Dunedin, 329 So.2d at 318, 320 (local government may shift to the new homeowner "expenses incurred on his account" [emphasis original]; users "who benefit especially . . . by the extension of the [sewer] system . . . should bear the cost of that extension." [emphasis supplied] [quoting Hartman v. Aurora Sanitary Dist., 23 Ill. 2d 109, 177 N.E. 2d 214, 218 (1961)]). In this case, however, Appellants seek to collect impact fees from Aberdeen for the benefit of housing elsewhere. It is student-generating housing, not Aberdeen, that is responsible for Volusia County's enrollment growth. It is such other housing, not Aberdeen, that directly benefits from the collection of impact fees from Aberdeen.

Appellant's contention that the subdivision-oriented Broward County test applies only to water and sewer impact fees is unfounded. To the contrary, the fee involved in Broward County itself was for parks. The court applied the test

to evaluate the impact of a particular subdivision in terms of the needs and benefits of parks. In formulating the test, the Broward County court relied upon Jordan v. Village of Menomee Falls, 28 Wis. 2d 608, 137 N.W. 2d 442 (1965), appeal dismissed, 385 U.S. 4, 87 S.Ct 36, 17 L.Ed. 2d 3 (1966), where the court espoused essentially the same test, which likewise focused on the nexus between the subdivision and the needs and benefits of a fee for school and park sites. The Broward County park fee has more in common with school impact fees than water and sewer fees. Indeed, in St. Johns County, the supreme court analogized schools to parks, noting that as with schools, "not all of the new residents will use the parks. . ., yet the county will have to provide additional facilities so as to be in a position to serve each dwelling unit." 583 So.2d at 638.

Conceptually, there is no reason why school impact fees should come under any less rigorous scrutiny than water and sewer fees. To the contrary, the connection between a new subdivision and the needs and benefits of the sewer system is tangible, literally consisting of pipes in the ground. The connection between the subdivision and the needs and benefits of new schools may not be any less real, but it is intangible. If anything, the appropriate level of scrutiny for

school impact fees should be higher, because the connection is much more difficult to verify because of its intangible nature. In the final analysis, however, imposing school impact fees in the absence of <u>impact</u> is no less objectionable than charging user fees in the absence of <u>use</u>. The rational nexus test does not allow either result.

In any event, <u>St. Johns County</u> does not support the proposition that the dual rational nexus test applies <u>only</u> at the countywide level. Appellants contend that the court "recognized the inappropriateness of using the specific-need and special-benefits standard" (B. 13) in its analysis of the builders' argument that the fee was an unlawful tax as far as homes without children were concerned. Rejecting this argument as "too simplistic," the court said:

> 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. <u>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</u>. 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 of the rational nexus test.

583 So.2d at 638-639 (emphasis supplied).

Appellants construe the court's observation that children may not live in "some units" that pay impact fees to sanction the assessment of fees against the entire 537-unit Aberdeen development, where children do not and cannot live. Since the subdivision-oriented Broward County test would not permit such an application, the Appellants argue that the court must have liberalized the test to reach this result.

St. Johns County cannot reasonably be construed to do away with the subdivision-level scrutiny required by the Broward County test. It is respectfully suggested that it would have been incongruous for the court to fundamentally modify the requirements of the test by implication in the same case where it expressly adopted them. Admittedly, the court did not apply the test to a particular subdivision, but it was not concerned with any particular subdivision. Rather, it was concerned with issues of more general import -- the validity of school impact fees in Florida and the constitutionality of the St. Johns County

ordinance as applied to the county at large. The supreme court found that with the excision of its overbroad exemption provision and extension to municipalities, the ordinance would meet the requirements of the dual rational nexus test, despite the fact that some of the new homes that would pay the fee would not contain children. The court did not massage the test to reach this conclusion. Rather, the court recognized that in general, new homes have the requisite impact on the school system simply by virtue of the fact that children can live in them, regardless of whether they actually do at any particular time.

As the supreme court recognized, the rational nexus test does not require that every home covered by the fee ordinance must contain a child in school. The nexus does not depend on children actually living in any particular homes within the subdivision, but rather is a function of the potential for children to live there -- to "come and go." Schools are built to serve the children who may live in the subdivision. See Drago depo. 27. As the lower court recognized:

> [I]t is clear that absent restrictions prohibiting children, a rational nexus exists between new dwelling units and the need for new schools. Children will "come and go" from such units, although some units may not actually house children. Collectively, such units generate the new students for whom the county will need to provide additional school capacity. Such unrestricted housing is

> thus the land use that creates the need for new schools. It is the land use that produces the impact on the school system that justifies the collection of the impact fee.

(A. 19) (emphasis original).

As St. Johns County's footnote 6 suggests, the deed restrictions prohibiting children distinguish deed-restricted adult facilities such as Aberdeen from the unrestricted, student- generating housing the court was referring to in its discussion of the rational nexus issues in St. Johns County. Due to the deed restrictions, children do not "come and go" from Aberdeen. The restrictions negate Aberdeen's potential to generate students. They negate any need for the county to provide schools to serve Aberdeen. In short, they negate the nexus. As the lower court explained:

> The [St. Johns County] Court's analysis of the nexus between the need for new schools and new development does not apply to adult retirement facilities, where land use restrictions do not allow children to live. It cannot be said that children will come and go from such facilities. The restrictions prohibit the land use that creates the need for new schools - housing for families with children. Such facilities thus do not fit within the feepaying class defined by the Court.

(A. 19).

In Collier County, the court revisited St. Johns County and school impact fees. The views expressed in Collier County leave no room for Appellants to argue that St. Johns County did away with the "special-benefit standard" as applied to school impact fees (B. 12). The court explained that in St. Johns County:

> We found the fee to be invalid because it was imposed only on those outside a municipality, with limited exceptions. Those residing in a municipality were not required to pay the fee. However, there was nothing in the ordinance restricting the use of the funds to build schools that would only benefit those outside municipalities, who were the ones paying the fee. Thus, like the invalid fee in City of Port Orange, the fee in St. Johns County was invalid because it did not provide a unique [emphasis added] benefit to those paying the fee. See also Contractors & Builders Ass'n v. City of Dunedin, 329 So.2d 314, 320 (Fla. 1976)("Users who benefit especially . . .by the extension of [sewer] system . . . should bear the cost of that extension.") (ellipses in original).

24 Fla.L.Weekly at S208 (citations to St. Johns County omitted) (emphasis original, except as noted).

The supreme court thus expressly reaffirmed the special benefit principles introduced in City of Dunedin and applied in St. Johns County, refuting Appellants' claim that those principles are not relevant to school impact fees.

Moreover, Collier County's analysis of the special-benefit issue in St. Johns County bolsters the lower court's conclusion that charging Aberdeen with fees does not meet the benefits prong of rational nexus test. The lower court found that the Volusia County impact fee is invalid as applied to Aberdeen for the same reason the St. Johns County fee was invalid as applied to feepayers in unincorporated areas:

> Volusia County does not spend impact fee revenue for Aberdeen's benefit. Impact fees collected at Aberdeen will not be spent to provide facilities for children living there, but rather for children who live in other developments, contrary to the Dunedin requirement that they must "be spent to benefit those who have paid the fee," which the Court reaffirmed in St. Johns.

(A. 22). Indeed, the Volusia County fee is even more objectionable as applied to Aberdeen. The St. Johns County subdivisions that were subject to the fee derived some benefit (although not a "unique" or "special" one) from payment of the fees, for children who could potentially live in them would benefit from new facilities financed by the fee. In Aberdeen's case, new schools provide no particular benefit to the development since members of the student population served by the schools are not allowed to live there.

In Collier County, the court rejected the notion that special assessments, user fees and impact fees can be assessed on the basis of general, countywide benefits. Seeking to justify its service fee as a special assessment, Collier County argued that the special benefit standard should be relaxed to require only a rational relationship at the countywide level, between the assessment and the increased need for county services. The court dismissed this argument:

> "Contrary to the County's contention, the first prong of the test is not satisfied by establishing that the assessment is rationally related to an increased demand for county services. If that were the test, the distinction between taxes and special assessments would be forever obliterated."

Id. at S208 (emphasis supplied).

The Appellants are making much the same argument in this case. It is untenable for the same reason. The distinction between school impact fees and taxes likewise would be obliterated if the rational nexus test only required the county to demonstrate "a reasonable connection to the countywide need for and benefit from new schools caused by the total growth in the Volusia County School District . . .," as Appellants advocate. (B. 12). Deleting the requirement of a nexus between the subdivision and new schools would allow counties to levy

impact fees without regard to whether the subdivision paying them actually contributes to the need for new schools or benefits from their construction, in any manner different from the public at large. This would take the impact requirement out of school impact fees. The result would be a tax.

Taxes "may be levied throughout the particular taxing unit for the general benefit of residents and property." Collier County, 24 Fla.L.Weekly at S207 (emphasis supplied) (quoting City of Boca Raton and Klemm). Indeed, the absence of any specific benefit to the taxpayers is one of the classic indicia of a tax:

> Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
>
> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government.

Dressel v. Dade County, 219 So.2 716, 719 (Fla. 3d DCA 1969) (quoting Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 521 57 S.Ct. 868, 81 L.Ed 1245 (1937)) (emphasis supplied). Unlike fees, taxes are imposed on the

basis of the general obligation to support public education. As the supreme court has explained:

> The burden of education, as provided in the free schools of the state should fall alike on all taxpayers. Every citizen has a direct interest in the education of the youth of the community, in that education upbuilds and promotes good citizenship, and, although a taxpayer may not have contributed a child, or children, to the citizenship of the community, he must contribute to the cause of education which will make for the betterment of the citizenship. This contribution is one to his country and not to the individual who derives some direct and personal benefit from it.

Malounek v. Highfill, 100 Fla. 1428, 131 So. 313, 314 (1930) (citations omitted).

Appellants invoke these principles of public school taxation in an attempt to justify charging Aberdeen with school impact fees. They seek to collect fees from Aberdeen to meet the "countywide need for new schools," in the name of "the countywide benefits of providing a free public education." (B. 18-19). They cite the principle that 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." (B. 12). However, revenue collected to meet general needs, for the general benefit of all county citizens, in order to fulfill a "countywide obligation," is a tax. See City of Port Orange, 650

So.2d at 3 (a tax is an "enforced burden imposed by sovereign right for . . . the exercise of various functions the sovereign is called upon to perform.")

Volusia County impact fees are certainly spent like taxes. While the ordinance incorporates the requirement that revenues must be used to provide schools for the benefit of new development (§ 70-179(c), R.248), the fees, in fact, are spent for the general purpose of providing additional facilities to accommodate enrollment growth from all causes, not just new development. School officials acknowledge that new development is not the only reason new schools are needed. There was a substantial deficit in capacity that existed when the impact fees were enacted in 1992. (Drago depo. 36-37). School officials acknowledge that the increase in the birthrate that occurred in 1976 and 1990 as the baby boomer generation passed through the childbearing years contributed to school enrollment growth in the 1990's -- "contributed to a whole lot." (McLelland depo. 28-29; Drago depo. 13; Erikson depo. 42-44). Development that took place in the 1980's, before the enactment of the ordinance, is also a factor. (McLelland depo. 33). However, Volusia County has not conducted any studies and does not have any way of differentiating between enrollment growth

attributable to new development and growth attributable to other causes. (McLelland depo. 29; R. 165). Absent that capability, there is no way to insure that impact fees are spent to accommodate enrollment growth from new development, as opposed to other causes. As Patricia Drago, the school district's Executive Director of Facilities Services, testified:

> Q. [A] new school certainly can serve to reduce the deficit that existed in 1991; correct?
>
> A. Yes.
>
> Q. As we've previously discussed, a new school can also serve enrollment growth stemming from that increase in the birth rate in the existing population that occurred in the 1980's; correct?
>
> A. A new school would house all students eligible to be zoned there, from whatever source it came.
>
> Q. And then, thirdly, the new school would serve growth in student populations on account of construction of new dwelling units.
>
> A. Yes.
>
> Q. Are there any other sources or causes of enrollment growth that is served or could be served by new facilities?
>
> A. All right. Birth; existing students; new students moving in -- I think that's got it.

Q. Okay. Well, <u>is there any way you can differentiate among those</u>?

A. <u>We would not</u>.

Q. So, <u>basically, isn't the bottom line here, that if it adds net capacity to the system as far as you all are concerned, it is permissible to utilize impact fee revenues</u>?

A. <u>Yes</u>.

(Drago depo. 38-39).

Appellants cannot transform what amounts to a tax on Aberdeen into a valid fee by deeming Aberdeen "part" of the countywide growth which is responsible for the need for new schools. (B. 18). As the lower court emphasized, the land use that creates the need for the schools is residential development that can be used to house children (A. 19). This is the land use that generates students. For purpose of school impact fees, Aberdeen is an entirely different land use. It does not generate students, any more than commercial or industrial uses. Labeling Aberdeen part of "countywide growth" is semantics. It does not change the fact that Aberdeen simply does not generate students and contribute in any way to the need for new schools. Under the rational nexus test, a subdivision's <u>impact</u> determines its membership in the feepaying class.

Appellants would have it the other way around, defining the growth "generating the need" (B. 14) to include Aberdeen, then arguing that Aberdeen has the requisite impact solely because it is covered by their definition. This circular reasoning is no substitute for the impact required by the rational nexus test.

In any event, Appellants should not be heard to say that Aberdeen should be included in the class of new development subject to impact fees. Under its ordinances, "land development activity" is subject to the impact fee (R. 279, §§ 70 - 177, 178). "Land development activity" is defined as follows:

> [A]ny change in land use or any construction or installation of a dwelling unit, or any change in the use of any structure that will result in additional students in the public schools of the District.

(§ 70 - 171 (aa)) (emphasis supplied).[2]

Aberdeen Does Not Affect the Student

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2 It is clear that the final clause "that will result in additional students in the public schools of the District" modifies each of the development activities listed ("any change in land use," "any construction or installation of a dwelling unit" or "any change in the use of any structure"). If the clause is read only to modify "any change in the use of any structure," then "any change in land use" would require payment of a school impact fee.

Generation Rate and the Amount of the Impact Fees

Unable to show that Aberdeen increases the need for new schools in Volusia County, Appellants argue that such a community nevertheless "does influence the need for new schools and correlative school impact fee." (B. 16) (emphasis supplied). They contend that the student generation rate "drives the decision as to how many new schools will be needed to accommodate the growth in school-age population throughout the county" (B. 15). They disparage as "inaccurate" and "misleading" the lower court's finding that "adults are not a factor in the student generation rate and simply do not enter into the calculation of the impact fee,"[3] insisting that "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." (B. 17).

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3 Despite their having admitted in response to requests for admissions that in the Henderson, Young Study, "the number of adults per household was not a factor in the calculation of the Impact Fee." (R. 65, 458 (¶s 13, 20 and 24)). See also Drago depo. 16; Nicholas, Nelson Study(R. 297).

The Appellants have confused the issue presented by the dual rational nexus test. The issue is whether this particular subdivision increases the need for new schools, not whether it influences the student generation rate and the amount of the impact fee. If Appellants' description of how the ordinance works were accurate (which it is not), it still would not change the fact that Aberdeen does not generate students and is not responsible for any need for new schools in Volusia County.

Appellants' argument that "adult-only/student free" communities "influence the need for new schools" is, at best, semantics. Whatever Appellants may mean by "influence," it is clear that such communities do not add to the need for new schools. New schools are needed because of growth in the student population. By definition, "student-free" housing does not increase the student population.

Appellants attempt to work adults into school needs "mathematics" via the student generation rate. They contend 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." (B. 16-17). Its

argument on this issue is beside the point, since their ultimate contention is that the more adults there are, the lower the student generation rate and the lower the fee. (B. 17). This is hardly justification for charging Aberdeen with impact fees. However, the argument paints an inaccurate and confusing picture of the relationship between the student generation rate and the need for schools and the amount of the impact fee. For that reason, a response is in order.

The student generation rate utilized to calculate the impact fee does not determine "how many schools will be needed. . . ." Ultimately, the need is a function of school enrollment versus capacity. That is to say, new schools are needed to the extent projected enrollment exceeds capacity. The process of assessing the need for new schools is driven by the statutory educational plant survey. (Ex. 6, McLelland depo.). According to school district officials, the survey certifies "how many new schools will be needed based on the cohort projection that we get from the Department of Education. . ." and recommends what new facilities should be constructed and where they should be located. (McLelland depo. 4 - 7) (§ 235.15, Fla.Stat. (1997)). New construction must conform with the recommendations of the survey. (McLelland depo. 6 - 7) (§

235.15(2)(a), Fla.Stat.(1997)). The survey recommendations for construction of new schools are based upon the Florida Department of Education ("DOE") student enrollment projections for grades K-12. (McLelland depo. 4-7) (survey at 47, Ex. 6 to McLelland depo.). Those projections do not include adult education enrollment (survey at 49).

The student generation rate utilized in calculating the impact fee has nothing to do with the DOE enrollment projections or the educational plant survey. It is used solely to calculate the impact fee. The student generation rate of .254 students per household was calculated by dividing the public school enrollment by the total number of households in Volusia County, using data from the 1980 census[4]. (Drago depo. 10-11, 16). Appellants suggest that an increase in the number of adult households will result in a decrease in the student generation rate and the impact fee. They are mistaken. The student generation rate has been fixed since the impact fee was enacted in 1992. (R. 65, 458 (¶24)).

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4 Appellants have not conducted any studies to determine the actual student generation rate associated with new development (as distinguished from the average number of students per household based on all households, new and old). (Drago depo. 11-12).

It is not subject to adjustment to account for changes in county demographics, but rather, only to "reflect any inflation or deflation in school construction costs." (R. 248, §70-175(d)). While Volusia County's demographics have changed since 1980, Appellants have not seen fit to adjust the student generation rate used in calculating the fee. (R. 283-285; Drago depo. 15-17).

Even if the student generation rate used in calculating the fee were adjusted to reflect the actual rate for new development, it would not change the fact that Aberdeen does not generate any students.

The Trial Court's Ruling Does Not Turn the Volusia County Impact Fee into an Unconstitutional User Fee

Under point A(2), Appellants contend that the trial court's ruling that Aberdeen is not subject to impact fees converts the fee into a user fee, in violation of article IX, section 1 of the Florida Constitution, which guarantees a uniform system of free public schools. (B. 19).

In St. Johns County, the court held that article IX, section 1 prohibits counties from imposing school user fees on new development. This issue came

up in connection with a provision of the St. Johns County ordinance which would have allowed exemptions not only for adult retirement facilities, but also for virtually any household that was not occupied children in public school. The court held that such exemptions went too far:

> [I]n a very real way the alternative mechanism of determining the impact fee under section 7(B) permits households that do not contain public school children to avoid paying the fee. This means that the impact fees have the potential of being user fees that will be paid primarily by those households that do contain public school children, thereby colliding with the constitutional requirement of free public schools.

583 So.2d at 640. However, in footnote 6, the court made it clear that a school impact fee will not be deemed a prohibited user fee simply because adult-only facilities are exempt:

> "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 restrictions, minors could not reside."

Id. at 640.

It is respectfully submitted that for purpose of the user fee issue, it is not material whether the adult-only community is exempted by the county or ordered by the court. In either case, the result is the same. The remaining feepaying

class is identical. The footnote establishes that the remaining feepaying class is broad enough to avoid conflict with article IX, section 1. It simply does not matter how the exemption comes about.

Contrary to the Appellants' interpretation, the lower court's order does not imply that school impact fees should be assessed on the basis of "use," against only those new homeowners who have children who attend the schools. Rather, the lower court emphasized that its ruling is confined to the Aberdeen subdivision, which has land use restrictions, rules and lot leases that <u>categorically prohibit</u> children. (A. 1-2, 8). As discussed above, the court expressly acknowledged that <u>absent such community-wide restrictions</u>, new residential developments are subject to impact fees because of their <u>potential</u> to generate students. (A. 19). It is this impact, <u>not use</u>, upon which school impact fees are based. It is this impact, <u>not use</u>, that determines impact fee liability under the lower court's analysis. <u>The order in no way suggests that such homes should be exempt merely because their residents do not use the schools</u>. It is disingenuous for Appellants to say otherwise.

Stare Decisis

Under points A(3) and (4), Appellants argue that St. Johns County and the stipulated final judgment in Florida Home Builders Association, Inc. v. The County of Volusia bar Aberdeen's challenge to the impact fee ordinances on grounds of stare decisis.

A decision is not stare decisis as to points of law which were not litigated by the parties and decided by the court. 13 Fla.Jur. 2d Courts and Judges § 179. The issues Aberdeen is raising in this case simply were not decided in either case on which Appellants rely.

As discussed above, St. John's County did not reach the issue of the validity of school impact fees as they apply to a development that is closed to children. While the court upheld the validity of the St. Johns County ordinance (with certain revisions), such holding does not bar Aberdeen's as-applied challenge. An ordinance may be valid on its face but unconstitutional as applied to a particular plaintiff. Westwood Lake, Inc. v. Dade County, 264 So.2d 7 (Fla. 1972); City of Miami v. Stegemann, 158 So.2d 583 (Fla. 3d DCA 1963). St.

Johns County simply does not stand for the proposition that it is acceptable to assess a subdivision with impact fees when it has no impact on the school system. To the contrary, the principles developed in the case ultimately support Aberdeen's position, as explained above.

Appellants contend that the stipulated final judgment in Florida Homes Builders v. The County of Volusia also bars Aberdeen's action. However, that lawsuit was not concerned with the issues Aberdeen is raising in this case. The builders claimed the fee was defective because it did not give proper school credits for taxes and other funding (the Banberry-Lafferty credits). (R. 389-407). Moreover, there is no evidence in the record to suggest that the plaintiffs' interests were compatible with Aberdeen's. It should be noted that unless the builder plaintiffs were in the business of developing all-adult communities, their interest would be adverse to Aberdeen's on this issue (since their projects would be subject to fees whereas Aberdeen contends it is not).

Application v. Methodology Issue

Under Point A(5), Appellants go to great length to establish that the impact fee cannot be challenged as to Aberdeen without challenging the overall methodology of the fee itself. (B. 26-33).

As the cases cited by the lower court all demonstrate, an ordinance may be valid on its face and in its general operation but unconstitutional in some aspect of its operation or as applied to a particular plaintiff. Westwood Lake, Inc. v. Dade County, supra; City of Miami v. Stegemann, supra.; Town of Longboat Key v. Land's End, Ltd., 433 So.2d 574 (Fla. 2d DCA 1983); City of Tarpon Springs v. Tarpon Springs Arcade Limited, 585 So.2d 324 (Fla. 2d DCA 1991). It may be that the impact fee cannot be said to be invalid as applied to Aberdeen without its methodology being invalid insofar as it permits such an invalid application. This is not a significant distinction. The important points are (1) St. Johns County did not decide the issues Aberdeen is raising in this case and does not bar Aberdeen's challenge and (2) the lower court held the fee is invalid only as it relates to Aberdeen.

II. THE TRIAL COURT DID NOT COMMIT ERROR IN RULING THAT THE DEED RESTRICTION PROHIBITING MINORS IS IRREVOCABLE, AS PROVIDED BY THE EXPRESS TERMS OF THE SUPPLEMENTAL DECLARATION. MOREOVER, REGARDLESS OF ANY LEGAL POSSIBILITY THAT THE RESTRICTION COULD BE REVOKED, THE TRIAL COURT CORRECTLY CONCLUDED THAT ABERDEEN DOES NOT HAVE ANY SUBSTANTIAL IMPACT ON VOLUSIA COUNTY SCHOOLS.

Under point B, Appellants contend that the trial court committed error in finding that the prohibition against minors imposed by Aberdeen's supplemental declaration of covenants, conditions and restrictions is irrevocable for thirty years in accordance with the express terms of the instrument. (B. 33).

The lower court rejected the argument that Aberdeen's age restrictions could be abrogated "at a moment's notice at the whim of Aberdeen" (B. 35) on an array of meritorious grounds. (A. 15-16). The court found that the age restriction was not subject to revocation under the broad amendment provision of the original declaration because the original declaration was never executed or recorded. By the terms of the instrument as they appear in the Aberdeen prospectus, the declaration was not to take effect until "recorded in the public

records of Volusia County, Florida." (R. 339). See Volunteer Security Co. v. Dowl, 33 So.2d 150 (Fla. 1947) (restrictions must appear in the owner's muniments of title to be enforceable).

Appellants complain that "Appellee and the lower court disavow the importance and value of the original Primary Declaration because it was never executed or recorded." (B. 34). Appellants argue that the court's rejection of their interpretation of the efficacy and import of the unrecorded instrument denies Aberdeen homeowners the protection of Chapter 723. However, it is Appellants, not Aberdeen, who are seeking to undermine the age restrictions, to the detriment of the homeowners. Aberdeen seeks to protect and enforce the restrictions, insisting that the non-waiver provisions of the supplemental declaration should be construed and enforced, for the benefit of the homeowners.

The lower court concluded that even if the original declaration had been duly executed and recorded, the specific language of the supplemental declaration, which expressly states in two places (Sections 2.3 and 3.2) that the prohibition against minors is not subject to waiver or revocation, still would control. (A. 26-27). Mizell v. Deal, 654 So.2d 659, 663 (Fla. 5th DCA 1995)

(a restriction "which sufficiently evidences the intent of the parties and which is unambiguous will be enforced according to its terms"); Raines v. Palm Beach Leisureville Community Ass'n., 317 So.2d 814, 817 (Fla. 4th DCA 1975) ("a specific clause takes precedence over a general clause"). In accordance with its express terms, the supplemental declaration would be a waiver and modification of the right to amend reserved in the earlier instrument insofar as the prohibition against minors is concerned. Such a waiver is valid. Johnson v. Three Bays Property, 159 So.2d 924 (Fla. 3d DCA 1964). Moreover, both the unrecorded and supplemental declaration provide that the owner's good faith construction and interpretation of the covenants and restrictions shall be final and binding. (A. 26, §3.6; R. 349, §7.6). Aberdeen has consistently taken the position that the supplemental declaration means what it says and that prohibition against minors is not subject to revocation. At the very least, Aberdeen's construction is reasonable and should not be rejected based on the Appellants' officious arguments (they are not parties to the instruments in question and have no standing to construe them).

The lower court also noted that Aberdeen would have to overcome several other daunting obstacles to revoke the ban on minors, including a possible administrative challenge or a lawsuit by the homeowners. In the final analysis, the court recognized that regardless of whatever technical legal possibility there might be that the restrictions could be revoked, there is nothing "whimsical," transient or suspect about them. The age restrictions appear throughout Aberdeen's organizational documents. It is uncontradicted that the "community age restrictions are strictly enforced." (¶6, Donald W. Forbes affidavit, R. 298). Aberdeen obviously is committed to serving senior citizens. 119 of Aberdeen's 142 residents are over 60 and the youngest ever was 42 (R. 298).

As Volusia County school officials acknowledge, such a community does not have any impact on the new school planning process unless the restrictions change or are not enforced (Drago depo. 23-25). Commercial and industrial land uses likewise could conceivably be changed to residential, yet they are not subject to school impact fees. As the lower court stated, "there is no reason to believe that Aberdeen could or will be opened to minors in the foreseeable

future" (A. 16). If Appellants are concerned that a change in use is a possibility, then the solution is to address it in the ordinance.

CONCLUSION

In conclusion, Aberdeen has no quarrel with the principle that new school funding is a countywide obligation. All Volusia County residents share that burden through the various taxes they pay. What Aberdeen objects to is being charged with what amounts to a surtax when it will not add any students to the school rolls. There is no need for Volusia County to provide new schools to accommodate Aberdeen's population, most of whom are over 60 and all of whom are adults. (R. 300). The fees are not spent for its benefit by any stretch of the imagination. The fees are an unlawful tax.

For the foregoing reasons, the court is respectfully requested to affirm the order of the lower court in all its particulars.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this answer brief is 14 point proportionately spaced Times New Roman, in accordance with this Court's administrative order dated July 13, 1998.

____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail service to Richard S. Graham, Landis, Graham, French, Husfeld, Sherman & Ford, P.A., 543 S. Ridgewood Avenue, Daytona Beach, Florida 32114 and Daniel D. Eckert, 123 West Indiana Avenue, Third Floor, DeLand, Florida 32720-4613, co-counsel for Appellants; this ___ day of June, 1999.

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