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.

REPLY 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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OPENING STATEMENT

Appellants have presented their basic argument in their Initial Brief. In this Reply Brief, Appellants summarize their argument and briefly respond to Appellee's counter-argument.

SUMMARY OF ARGUMENT

Appellants argue that the lower court erred in holding that, because the formula that Volusia County uses to calculate school impact fees does not exempt adult-only/student-free residential communities, the County's school impact fee, as applied to Appellee, is an unconstitutional tax and not an impact fee. Appellants contend, as acknowledged by the Fifth District Court of Appeal (R. at 456), that the lower court's ruling effectively mandates that school impact fees must be user fees. Such a ruling is in direct conflict with article IX, section 1 of the Florida Constitution and cannot be upheld.

Appellants do not disagree with Appellee's argument that there is a distinction between a tax and an impact fee. Appellants are cognizant of the distinction but argue that school impact fees are valid impact fees and are not unconstitutional taxes. Appellants rely on the holding in *St. Johns County v. Northeast Florida Builders Association, Inc.,* 583 So. 2d 635 (Fla. 1991), for the proposition that school impact fees are valid. Appellants argue that while the dicta in footnote 6 in *St. Johns County*

suggests that adult-only/student-free residential communities may be exempt from paying school impact fees the footnote cannot be interpreted to require such an exemption. The footnote suggests a permissive not a mandatory exemption. (*See St. Johns County* at 640.)

This Court has held that, if the dual rational nexus test is met, a school impact fee is a valid method of raising money to meet the free public school mandate of the Florida Constitution (*see St. Johns County* at 636-40). Unlike other impact fees (e.g., water and sewer impact fees), school impact fees, because of the restraint of the constitutional mandate for free public schools, cannot be "user fees." Therefore, Appellants contend that the reasonable connection standard (i.e., the "rational nexus") applied for determining whether the dual rational nexus test has been met for a school impact fee (i.e., whether a school impact fee is a true fee and not a tax) cannot be the same "use" standard that has been applied to other impact fees.

The Florida Constitution does not mandate free water and sewer lines, free roads, parks, etc. Article IX, section 1 of the Florida Constitution, however, mandates that the state provide a system of free public schools (i.e., not paid for only by those who use the schools). Appellants contend that this unique constitutional mandate for free public schools requires the application of a unique rational nexus test for determining the validity of a school impact fee.

In treating public education as it would water, sewer and road construction issues, the lower court ignored the public policy of this state to provide a free and adequate public education to all children. This guarantee is embedded in our Constitution and was ratified and enhanced as recently as November 1998, by the voters. Because of this guarantee, no child is condemned to a life of ignorance or poverty because of the circumstances of his or her birth or parents' economic status.

Article IX, section 4 of the Florida Constitution mandates that each county shall constitute a school district with an elected school board that must build and operate these free public schools. School impact fees, which raise money to help build new schools, are based on a complicated formula that is driven by a countywide student generation rate that recognizes that some developments will produce more students than others. To base the obligation of each subdivision to pay a school impact fee on the student impact of that particular subdivision clearly would convert a school impact fee into a user fee. Thus, while a "use" standard may work for roads and water and sewer lines, a different standard must be applied to public schools.

Appellants also argue that, even if it were to be determined that an exemption must be made available to communities that have <u>irrevocable</u> deed restrictions that create an adult-only/student-free community, Aberdeen is NOT such a community and does NOT qualify for any such exemption. The Appellee's Prospectus for its development that was

filed with the Division of Florida Land Sales, Condominiums and Mobile Homes (R. at 301) contains the original, primary Declaration of Covenants and Restrictions ("Primary Declaration") that specifically reserves for the Appellee the absolute power to revoke any age restriction that is imposed in the Primary Declaration or any future supplemental declaration(s). (R. at 348.)

The lower court based its ruling that the Appellee is an age-restricted community entitled to an exemption on a finding that Aberdeen would not exercise its power to revoke or that, if it did exercise its power, upon a challenge to such an exercise of power a court of equity would not uphold the revocation. (*See* R. at 439-441.) Appellants contend that the lower court addressed the wrong issue. The issue is whether the Appellee has the power to revoke (i.e., whether the restriction is irrevocable); the issue is not whether the Appellee would be able to meet a theoretical challenge to the exercise of such power. There simply is no basis in law to ignore the absolute power reserved by the Appellee just because there could be negating repercussions upon the exercise of such power.

Appellants also point out to the Court that Aberdeen's age restriction only applies to individuals under the age of 18. Thereby, Aberdeen's age restriction does NOT exclude all potential members of the student population served by the free public schools in Volusia County. As noted in footnote 5 of the Initial Brief (Initial Br. at 10-11), under

the federal Individuals with Disabilities Education Act and pursuant to school district policy, the Volusia County School District is required to provide a free, appropriate public education to all students with disabilities up to the age of 21 who reside in the school district - including residents of Aberdeen who are between the ages of 18 and 21. The lower court, in applying the "use" rational nexus standard, found that this benefit of providing a free, appropriate education to potential student-residents of Aberdeen between the ages of 18 and 21was not a sufficiently reasonable connection to pass the dual rational nexus test. (R. at 444-45.) Appellants point out to the Court that the benefit of providing a free appropriate education to disabled students is significant. Recent reports show that "[s]tudents classified as disabled receive, on average, double the resources of their 'regular education' counterparts." The Daytona Beach Sunday News-Journal, June 20, 1999, at 1B. Having the benefit of a free, appropriate education available to potential student-residents of Aberdeen has a significant impact - a costly one - on the Volusia County School District. There is a sufficient rational nexus to Aberdeen.

REPLY TO APPELLEE'S ARGUMENT

1. Statement of facts. Appellants point out to the Court that Appellee's Statement of Facts omits the critical fact that Appellee's Primary Declaration reserves for the Appellee the absolute power to revoke all restrictions, including age restrictions that are

in the supplemental declaration. (R. at 348.) By omission, the Appellee conveys the false impression that, as a matter of fact, Aberdeen is an age-restricted community pursuant to restrictions in its supplemental covenants and restrictions. As discussed above, the Appellee has the absolute power to revoke the age restriction; the age restriction is not, as a matter of fact, irrevocable.

2. Standard for determining the validity of a school impact fee. Appellants do not argue that there is not a distinction between a tax and an impact fee. Because of the unique constitutional requirement that school impact fees, unlike impact fees for other public services, cannot be user fees, none of the cases regarding impact fees for other public services that are cited by the Appellee control the case at bar.

Appellants argue that the unique constitutional mandate for free public schools necessitates a unique reasonable-connection standard for evaluating the validity of school impact fees. Appellee relies on the common law "user" standard for water, sewer, etc., impact fees; Appellants contend this is not and, under the Florida Constitution, cannot be the standard applied when determining whether a school impact fee is a fee and not a tax.

This Court in *St. Johns County* expressly acknowledged that "an impact fee to be used to fund new schools is different from one required to build water and sewer facilities or even roads." *St. Johns County* at 638. The Court rejected the argument of the builders in *St. Johns County* that because many of the residents will not have an impact on the

schools, the fee is a tax. *Id.* The Court found that, since the fee challenged in *St. Johns County* was designed to provide the capacity to serve the educational needs of all the new residents, the fee met the need-connection-to-growth prong of the rational nexus test. *Id.* at 638-39.

Because the Court in *St. Johns County* used an excerpt from *Hollywood, Inc. v. Broward County,* 431 So. 2d 606, (Fla. 4th DCA 1983), at 611-12, in which the term "subdivision" is used, Appellee argues that the holding in *St. Johns County* "expressly requires subdivision- level scrutiny." (*See* Am. Answer Br. at 4 and 14.) Appellants contend this is a fallacious argument. Appellee uses the quote out of the context in which it was cited in *St. Johns County* and, thereby, misinterprets and misrepresents the Court's analysis in *St. Johns County.* What the Court in *St. Johns County* did state "expressly"is: "<u>[i]n essence</u>, we approved the imposition of impact fees that meet the requirements of the dual rational nexus test adopted by other courts in evaluating impact fees." (Emphasis added.) *St. Johns County* at 637. The Court in *St. Johns County* then used the quote from *Broward County* to explain the dual rational nexus test. The Court did not adopt the *Broward County* explanation as its blueprint for school impact fees, as Appellee suggests. (Am. Answer Br. at 15.) Acknowledging the acceptance of the theory of the dual rational nexus test "in essence" does not equate with adopting a subdivision-level scrutiny, as the Appellee claims. Indeed, the Court noted that "the propriety of imposing impact fees to

finance new schools is an issue of first impression in Florida" in the *St. Johns County* case, *id*. at 638; and the Court acknowledged that "an impact fee to be used to fund new schools is different from one required to build water and sewer facilities . . . ." *Id.*

Throughout its opinion, the Court in *St. Johns County* refers to and scrutinizes all new growth and new development without ever itself using the term "subdivision(s)." The only place the word "subdivision" appears in the entire *St. Johns County* opinion is in the explanatory excerpt from the Fourth District Court of Appeals opinion in *Broward County*. The excerpt was not used to restrict the Court's analysis to a subdivision level scrutiny, as Appellee contends. Rather, throughout its opinion in *St. Johns County,* the Court looked to the countywide need for schools. The Court conveyed in its findings that a countywide approach is appropriate in a school impact fee analysis, as suggested by the Appellants (*see* Initial Br. at 9-15). The Court in *St. Johns County* rejected the builders argument that the impact fee was a tax because some residents would not use the school system as being "too simplistic." *St. Johns County* at 638. The Court found that since the impact fee was designed to provide the capacity to serve the educational needs of all the new dwelling units in the county, the first prong of the dual rational nexus test had been met. *Id.* at 638-39. Further, in looking at the second prong of the dual rational nexus test (i.e., the benefit prong) the Court found:

> As indicated, we see no requirement that every new unit of

> development benefit from the impact fee in the sense that there must be a child residing in that unit who will attend public school. It is enough that new public schools are available to serve that unit of development. Thus, if this were a countywide impact fee designed to fund construction of new schools as needed throughout the county, we could easily conclude that the second prong of the test had been met. (Emphasis added.) *Id.* at 639.

Appellants contend that the Appellee incorrectly asserts that the Court in *St. Johns County* required "subdivision-level scrutiny." The Court in *St. Johns County* expressly endorsed a countywide analysis as advocated by the Appellants. The holding in *St. Johns County* clearly shows that school impact fees are unique impact fees and, accordingly, that the standard of review for the dual rational nexus test must be unique.

Appellants respectfully suggest that the summary statement that was quoted by the Appellee (Am. Answer Br. at 22) from *Collier County v. State*, 24 Fla. L. Weekly S206, S208 (Fla. May 7, 1999), regarding the finding in *St. Johns County* that the school impact fee "was invalid because it did not provide a unique benefit to those paying the fee," contradicts the stated reasoning and findings of the Court in *St. Johns County*. The Court in *St. Johns County* did not "invalidate" the school impact fee ordinance; the court upheld "the validity of the ordinance upon the severance" (*St. Johns County* at 642) of the section of the ordinance that permitted the school impact fee funds to be expended for school construction in a municipality that was not subject to the county's ordinance.

Appellants respectively contend that this severance does not translate into a finding of the absence of "unique" benefit for those paying the fee, as stated in *Collier County.* The actual holding in *St. Johns County* is that funds collected by impact fees cannot be spent on schools for those who would not also be subject to the ordinance imposing the impact fee. *Id.* at 639. To allow otherwise would be comparable to assessing new developments in Volusia County to pay for school construction in Flagler County. Therefore, the Appellants contend that the reasoning and findings actually stated in the full context of *St. Johns County* control the analysis of school impact fees now under discussion and not the inaccurate, cursory summary statement found in *Collier County.*

Appellants contend that school impact fees are unique and that the standard of review for the dual rational nexus test for school impact fees also must be unique. The Florida Constitution requires a system of free public schools; Florida law assigns the task of providing these schools to the various counties; all residents of the county have an obligation to pay for these schools; and all new residents of the county have an obligation to pay for the new facilities to meet the countywide need generated by the new development in the county.

Appellants argue that, in order not to collide with the constitutional mandate for free public schools, the burden of providing new educational facilities to meet the need generated by the construction of new dwelling units in the county must be shared by all

new residents and not just by those new residents who will use the schools. As stated by this Court almost 60 years ago:

> Every citizen has a direct interest in the education of the youth of the community . . . and 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).

Applying this long-standing principle to the case at hand, Appellants argue that Appellee is obligated to contribute its share to fulfill the countywide need for new educational facilities generated by countywide growth without receiving a unique benefit in return. The Appellants cannot emphasize enough that school impact fees are unique and that the standard of review for the dual rational nexus test must, likewise, be unique.

Throughout the Amended Answer Brief, Appellee erroneously equates children or minors with students and, in so doing, falsely asserts that no student can live in Aberdeen, that students cannot "come and go" from Aberdeen, that there is no potential for Aberdeen to generate students, that Aberdeen categorically prohibits students, or that Aberdeen will not add any students to the school rolls. (*See*, *e.g.*, Am. Answer Br. at 4, 19, 21, 30, and 36.) As noted in the Summary Argument above, Volusia County School District is required to provide a free, appropriate education to students who are not minors or children (i.e., disabled students between the ages of 18 and 21). Students can live in and

"come and go" in Aberdeen; the potential for Aberdeen to generate students and to add students to the school rolls is present. Certain disabled students who are entitled to a free, appropriate public education with a costly impact on the school district can reside in Aberdeen. *See supra* at 4-5.

Appellants do not disagree with Appellee's argument that the need for new schools in Volusia County is not attributable solely to new development. However, Appellants do object to Appellee's suggestion that the county's school impact fee does not account for this fact and do object to Appellee's corollary implication that school impact fees fund the total cost of new school construction. (*See* Am. Answer Br. at 27-30.) The school impact fee is just that: a fee assessed because of the effect (i.e., the impact) new development has on countywide growth. (*See* explanation of calculation in Initial Brief at 15-19.) Funding for new schools may come from numerous sources, for example: legislative appropriations, grants, donations, and local ad valorem taxes. *See* §§ 235.42, 235.4235, 236.25(2)(a), and 236.36, Fla. Stat. (1997). School impact fees do not pay for all new school construction. The fees are a pro rata "impact" charge to new development.

3. All housing is incorporated in the student generation rate calculation. In arguing that Aberdeen does not affect the student generation rate, the Appellee, once again, presents a "use" analysis in its argument. Appellee insists that the need for new schools must be on a subdivision-by-subdivision analysis: will the subdivision "use" the county

schools? As discussed above, Appellants argue that Appellee's subdivision-by-subdivision "use" analysis is prohibited by article IX, section 1 of the Florida Constitution. Further, as discussed in the Initial Brief, the basic student generation rate accounts for all housing and does not use a subdivision-by-subdivision analysis. (*See* Initial Br. at 15-18.)

4. Lower court's order mandates that school impact fee must be a user fee. Appellants' reply to Appellee's contention that the lower court's ruling does not convert the Volusia County school impact fee into a user fee by reaffirming their argument that, as succinctly stated by the Fifth District Court of Appeal: the lower court's order "in effect mandates that impact fees, in order to be constitutional, must be user fees." (Emphasis added.) (R. at 456.)

5. Aberdeen does not have an irrevocable age restriction on its community. The question before this Court is whether the Appellee has the legal power to revoke the age restriction in its Supplemental Declaration. The question is not, as the Appellee would have us believe, whether if Appellee chose to exercise its power to revoke the age restriction the Appellee could withstand a challenge to such exercise in a court of equity. Pursuant to the terms of its Primary Declaration, the Appellee has "the absolute and unconditional right to alter, modify, change, revoke, rescind, or cancel any or all of the restrictive covenants contained in this Declaration or hereinafter included in any subsequent Declaration." (R. at 348.) Whether the Appellee will ever exercise this power or whether, upon exercising the power, the Appellee would prevail if challenged in a court of equity is not the issue.

There is no basis in law to require the Appellants, when making a determination as to the revocable status of an age restriction, to look beyond the power to revoke the restriction. Since the Appellee has reserved in its Primary Declaration the absolute power to revoke any age restriction, Appellee is not a deed-restricted community entitled to any exemption that may apply to adult-only/student free communities.

CONCLUSION

Volusia County's school impact fee is not an unconstitutional tax. The constitutional mandate for free public schools for all Florida students requires the

application of a unique rational nexus test for determining the validity of a school impact fee. The lower court erred in applying the rational nexus "use" standard that has been applied to impact fees for other public services.

Even if it were to be determined that an exemption from paying school impact fees must be made available to communities that have irrevocable deed restrictions that create an adult-only/student-free community, the Appellee does not qualify for such an exemption. Appellee has the power to revoke its age restriction. In addition, Aberdeen's age restriction does not exclude 18- to 21- year-old exceptional students who, pursuant to federal law and school district policy, must be served by the free public schools in Volusia County. The lower court erred in ordering that the Appellee recover monies from Appellants.

For all the foregoing reasons, the Order Denying Defendants' Motion for Summary Judgment and Granting Plaintiff's Motion for Summary Judgment should be reversed.

Respectfully submitted this _________ day of July, 1999.

____

Richard S. Graham, Florida Bar No. 100468
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Daniel D. Eckert, Florida Bar No. 180083

CERTIFICATE OF SERVICE

I hereby certify that on the ______ day of July, 1999, a true and correct copy of the

foregoing **REPLY 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 Reply 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 3,847, excluding the caption, cover page, and certificate of compliance.

____

Richard S. Graham