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.

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

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE ABERDEEN AT ORMOND BEACH

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INTRODUCTION

Pursuant to Florida Rule of Appellate Procedure Rule 9.370, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Appellee Aberdeen at Ormond Beach, L.P., a Florida limited partnership. Counsel for Appellee has consented to the participation of PLF as Amicus Curiae in this matter. Counsel for Appellants Volusia County and the Volusia County School Board have declined PLF's request for consent.

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has offices in Sacramento, California; Bellevue, Washington; Honolulu, Hawaii; and Miami, Florida. PLF's Florida office, known as the Atlantic Center, is staffed by a full-time attorney who is a member of the Florida Bar.

Amicus seeks here to augment the argument of the Appellee. Among the participants in this case, PLF brings unique expertise to this task. For 25 years, PLF's attorneys have been litigating in support of the right of individuals to make reasonable use of their private property. PLF's attorneys have been before the United States Supreme Court on two occasions representing individuals whose rights to use their property were unlawfully denied by government agencies. *See Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), and *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725 (1997). PLF has also participated in significant litigation involving real property in the State of Florida. *See, e.g., Martin County v. Yusem,* 690 So. 2d 1288 (1997). Finally, PLF has a significant history of participation in cases where local governments have sought to exact monies in the form of in lieu fees, user fees, special assessments, impact

fees, and other revenue generating mechanisms which have been employed by local county and municipal governments to supplement and sometimes circumvent their state authorized taxing. *See, e.g., Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989); *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996).

The present case involves an important question under Florida law concerning the extent to which local government may utilize development impact fees to generate additional revenue to support governmental services before running afoul of state and federal constitutionally circumscribed taxing powers. The final order below applies the "dual rational nexus" test, the adoption of which can be traced back nearly 25 years in Florida law, to review the validity of impact fees imposed as a condition of development. The trial court held that real property may not be burdened by such a fee unless there is a "substantial demonstrably clear" relationship between the fee sought to be collected and the impact which the citizens are having on the service sought to be supported. Trial Court opinion at 20. The local government entity in this case seeks to have this Court further relax that standard. Appellee's Brief at 13. PLF submits as Amicus that, more properly stated, Appellants seek to emasculate or obliterate the standard. PLF respectfully suggests

that adoption of the rationale sought by Appellants would effectively eliminate the legal distinctions between taxes, special assessments, user fees, and in lieu fees in Florida. Finally, adoption of the position proposed by Appellants would run afoul of federal constitutional principles.

STATEMENT OF FACTS

PLF adopts the Statement of Facts set forth in the Appellees' brief.

SUMMARY OF ARGUMENT

The history of the development of impact fees in Florida seems to have paralleled the perceived need for additional revenues to support new growth in the state. Although it is arguable that the utilization of development impact fees to generate new revenue has already gone too far, the expansion of their use in Florida has reached both their state and federal constitutional limit. However noble the cause, an extension by local government of impact fees on new development to reach communities which prohibit school age children is unsupportable under the local government proprietary or police power authority and would constitute a taking under the Fifth Amendment to the United States Constitution.

ARGUMENT

I

AS A MATTER OF POLICY, THIS COURT SHOULD NOT FURTHER RELAX ITS STANDARD OF REVIEW OF DEVELOPMENT IMPACT FEES IN FLORIDA

This case provides this Court an opportunity to define the limits on the utilization of development impact fees by local governments to supplement their general taxing powers. In this portion of its brief, PLF will provide a brief history of the development of impact fees in Florida, summarize the present status of the law in Florida in the field, outline the parameters of the application of impact fees in other states for capital funding for schools, and suggest that Florida has reached its state law and state constitutional limit in their use for financing the needs of the public schools.

A. A Brief History of Development Impact Fees in Florida and Their Expansion

The history of development impact fees in Florida has been a history of movement from skepticism to acceptance and expansion. However, the acceptance has been far from universal and the expansion itself far from unlimited.

It is at least noteworthy at the outset that it is quite arguable that the relaxation which has occurred in the utilization of development impact fees to generate additional revenue has already gone too far. According to Professor Thomas

Cooley, a demand for money can be upheld under the police power[1] only if its primary purpose is regulation. If its primary purpose is revenue, it is an exercise of the taxing power. 4 Thomas Cooley, *The Law of Taxation Section* 1784 (1924). According to those who argue that impact fees are taxes *vel non*, such fees are primarily a revenue raising device.[2] That their historical appearance and proliferation in Florida parallel perceived increased financial demands from new growth in the state suggests that development impact fees would be considered a tax under Professor Cooley's analysis.[3]

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[1] Since there is no specific statutory authorization for the imposition of impact fees in Florida, the police powers and proprietary powers lodged in local governments are the common legal justifications for their levy. Fla. Const. art. VIII, § 2; *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 805 (Fla. 1972); *Wald Corporation v. Metropolitan Dade County*, 338 So. 2d 863, 868 (Fla. 3d DCA 1976).

[2] Indeed, the New Jersey Supreme Court has invalidated a school impact fee using reasoning that it was just another revenue raising device and thus a tax. *Daniels v. Borough of Point Pleasant*, 129 A.2d 265, 266 (N.J. 1957).

[3] *See St. John's County v. Northeast Florida Builders Association*, 559 So. 2d 363, 364 (Fla. 5th DCA 1990) ("[I]t is becoming onerous, unfair and impractical for those who are already residents of Florida to bear the entire cost of new schools which must be built for the anticipated migration of the multitudes. A way must be found to constitutionally require those who wish to expand Florida's residential facilities to shoulder a fair share of the resulting increase in costs of schools. Taxation through general tax increases or bond issues puts the full burden on existing residents. Impact fees could partially shift this burden." Sharp, J., dissenting at 364); *see also Broward County v. Janis Development Corporation*, 311 So. 2d

(continued...)

The history of the judicial treatment of development impact fees for the purpose of financing new capital in Florida can be said to have begun in the late 1960s and early 1970s. During these early years, Florida appeared to be following the "specifically and uniquely attributable test," articulated by the Illinois Supreme Court in *Pioneer Trust & Savings Bank v. Village of Mount Prospect,* 176 N.E.2d 799 (Ill. 1961). Using this test, the Illinois Supreme Court invalidated a municipal ordinance requiring a dedication of land for school and recreational purposes because the local government could not prove that the exaction of impact fees resulted solely from new growth. The *Pioneer Trust* court held that

> if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of constitutional prohibitions rather than reasonable regulation under the police power.

176 N.E.2d at 802.

This early skepticism appears to have resulted from a concern that local governments--counties and municipalities--were

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[3] (...continued)
371 (Fla. 4th DCA 1975). According to the Office of Economic and Demographic Research of the Florida Legislature, the population of the State of Florida increased from 6,789,443 in 1970 to 12,937,926 in 1990. It is estimated that Florida will have 15,512,940 residents in the year 2000. It has been during these decades that the adoption of impact fees as a condition of development has gained currency.

adopting impact fee ordinances in an effort to circumvent constitutional or other limitations on their taxing power. And in these seminal years of the adoption and judicial consideration of development impact fees in this state, Florida followed the trend. For example, in *Broward County v. Janis Development Corporation,* 311 So. 2d 371, the Fourth District Court of Appeal invalidated an impact fee of $200 per dwelling unit to fund road and bridge construction even though the ordinance specified that the funds were to be expended "solely for the purposes of constructing or improving roads, streets, highways and bridges . . . serving the vicinity of the project in which the charges are collected." *Janis Development Corporation*, 311 So. 2d at 374. During the same era, an impact fee for recreation was found to be an invalid tax. *See Venditti-Siravo, Inc. v. City of Hollywood,* 39 Fla. Supp. 121, 122 (17th Cir. Ct. 1973) (fee collected to underwrite administrative cost of issuing building permit invalid because a portion allocated for another purpose).

The practical effect of *Pioneer Trust* was to preclude the use of impact fees for most purposes, including educational facilities. In Florida, this meant that substantially all local government monies to support capital expenditures for new educational funding had to be procured through current ad valorem

taxes or deficit financing.[4] User fees, in lieu fees, and special assessments, the only other alternatives for local governments to increase support for new public school financing, were unavailable because of the near certainty that they were all prohibited by the state's obligation to provide a system of free public schools. Fla. Const. art. IX, § 1.[5]

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[4] Article VII, section 1(a), of the Florida Constitution provides:

> No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law.

[5] Prior to November, 1998, this section read:

> Adequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require.

(continued...)

B. The Present Legal Status of Impact Fees in Florida

As the years passed, the adoption by local governments of impact fees to finance new capital needs became more prevalent. In 1976, impact fees were first recognized approvingly by the Florida Supreme Court as a legitimate means of financing the expansion of new public facilities in *Contractors & Builders Association of Pinellas County v. City of Dunedin,* 329 So. 2d 314 (Fla. 1976). In that case, the court observed that "municipal corporations have 'governmental, corporate and proprietary powers' and 'may exercise any power for municipal purposes, except as otherwise provided by law.'" *Dunedin*, 329 So. 2d at 319 (citing Fla. Const. art. VIII, § 2(b) and *City of Miami Beach v. Fleetwood Hotel, Inc.,* 261 So. 2d 801). Again, however, the utilization of this proprietary power of local governments appeared quite circumscribed. Historically, utility connection or hookup fees had been charged to customers for the actual hookup of the customer to the local government point of service. The significance of *Dunedin* was that while striking down the fee as proposed in the ordinance under review, this Court stated that charges made against a developer for "capital improvements to the

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[5] (...continued)
The section was amended by the voters in November, 1998. There have been no reported decisions treating this section of the constitution since its amendment.

[water and sewerage system] as a whole" would pass constitutional muster under the appropriate circumstances. *Dunedin*, 329 So. 2d at 317. In so doing, the Court analogized to the fees which privately owned utilities charge to provide similar services. The Court stated:

> The avowed purpose of the ordinance in the present case is to raise money in order to expand the water and sewage systems, so as to meet the increased demand which additional connections to the system create. *The municipality seeks to shift to the user expenses incurred on his account.* A private utility in the same circumstances would presumably do the same thing, in which surely even petitioners would not suggest that the private corporation was attempting to levy a tax on its customers.

Dunedin, 329 So. 2d at 318.

The Court went on to state:

> Raising expansion capital by setting connection charges, which do not exceed a *pro rata* share of reasonably anticipated costs of expansion is permissible where expansion is reasonably required *if use of the money collected is limited to meeting the costs of the expansion.*

Id. at 320 (emphasis added).

Without expressly so stating, the *Dunedin* court was applying the dual rational nexus test which was later more succinctly articulated in *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. 4th DCA), *rev. denied*, 440 So. 2d 352 (Fla. 1983). That court stated:

> In order to satisfy these requirements, the local government must demonstrate a reasonable connection, or

> rational nexus between the need for additional capital facilities and the growth of the 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 the use in acquiring capital facilities to benefit new residents.

Hollywood, Inc., 431 So. 2d at 611-612. However, even in *Hollywood, Inc.*, the court seemed influenced by its belief that the required dedication, recreational facilities in this case, provided a benefit to the entirety of the properties from which the exaction was made:

> Open space, green, parks and adequate recreation are vital to a community's mental and physical well-being. As such the ability to regulate subdivision development in order to ensure the adequate provisions of parks and recreational facilities is a matter which falls squarely with the state's police powers to provide for the health, safety and welfare of the community.

Hollywood, Inc., 431 So. 2d at 614.

In *St. John's County v. Northeast Florida Builders Association, Inc.*, 583 So. 2d 635 (Fla. 1991), this Court again expanded the factual parameters within which impact fees may be utilized. Unlike *Dunedin* and *Hollywood, Inc.*, where it was clear that the fees collected were being directly utilized to benefit the property from which the fee was exacted, the court was faced with an ordinance which charged an impact fee on residential property for school capital facilities when it was unknown

whether the properties would ever house a child--*i.e.*, whether there would ever be a benefit to the property and its inhabitants. The court nevertheless held that the fee, properly applied, would again pass muster:

> The builders argue that because many of the new residences will have no impact on the public school system, the impact fee is nothing more than a tax insofar as those residences are concerned. We reject the contention as too simplistic. 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 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 of the rational nexus test.

St. John's, 583 So. 2d at 638-39.

In the case presently under review, the governmental authority now seeks to abandon this Court's standards for approval of impact fees by urging that the dual rational nexus test requires only that there be a relationship between "total growth" in the county and "county wide need for and benefit from new schools." Appellants' brief at 12. PLF submits that such an abandonment of the standards for approval of impact fees during

the last quarter century would eviscerate any nexus requirement for the approval of development impact fees and obliterate the requirement for a "substantial demonstrably clear" relationship between the fee sought to be collected and the impact which the citizens are having on the service sought to be supported. PLF further submits that the position argued by Appellants in this case is a position beyond that which has been adopted in the approval of development impact fees in any other state and also runs afoul of the Fifth and Fourteenth Amendments to the United States Constitution.

C. The Relaxation of the Standard of Review Urged by Appellants Is Unsupported by the Law of Other States

PLF submits that it is at least noteworthy that while some other states have upheld school impact fees in the face of various state law and federal constitutional challenges, none are known to PLF to have extended the imposition of impact fees to the extent sought by Volusia County and the Volusia County School Board in this case.

In a review of the law of other states, PLF has been able to find only three jurisdictions other than Florida where a court has found the imposition of school impact fees to be valid:

1. California--*Candid Enterprises, Inc. v. Grossmont Union High School District*, 705 P.2d 876, 879 (Cal. 1985) (impact fee imposed by school district to be used for temporary or permanent

school facilities necessitated by rapid growth upheld against claim that it was preempted by state law and violated equal protection);

2. Illinois--*Krughoff v. City of Naperville*, 369 N.E.2d 892, 895 (Ill. 1977) (city ordinance requiring developer to make contribution of land or money for school and park sites upheld as within city's home-rule power and not violative of equal protection); and

3. Wisconsin--*Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442, 449 (Wis. 1965) (ordinance requiring dedication of land or payment of money in lieu thereof for schools, parks, or recreational sites upheld against challenge that it constituted an unconstitutional tax and a taking without just compensation).

As previously noted, at least one court has determined that the imposition of a school impact fee was a revenue raising device and therefore an unauthorized tax. *See Daniels v. Borough of Point Pleasant*, 129 A.2d 265. *See also West Park Avenue, Inc. v. Township of Ocean,* 224 A.2d 1 (N.J. 1966). PLF has been unable to locate a case where a jurisdiction has approved the imposition of a school impact fee upon a deed restricted, adult

only community such as urged here by Volusia County and the Volusia County School Board.[6]

II

FURTHER RELAXATION OF THE STANDARD OF REVIEW FOR IMPACT FEES WOULD RESULT IN AN UNCONSTITUTIONAL REGULATORY TAKING UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

It is axiomatic that impact fees, like conditions requiring the dedication of a portion of one's real property, are land use regulations. *Homebuilders and Contractors Association of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County*, 446 So. 2d 140, 145 (Fla. 4th DCA 1983); *Wald Corporation v. Metropolitan Dade County*, 338 So. 2d at 866. As such, the imposition of the burden of an impact fee on private property is limited by the Fifth Amendment Takings Clause command that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V; *Nollan v. California Coastal Commission*, 483 U.S. at 841-42. It is also well recognized that citizen protections provided by the Fifth Amendment Takings Clause "[are] as much a part of the Bill of

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[6] The question of whether a school impact fee can be imposed on a nondeed restricted adult community appears to be a closer question. *See McClain Western No. 1 v. County of San Diego*, 146 Cal. App. 3d 772, 779 (1983) (county-imposed school impact fee upheld against challenge that fee was unreasonably applied to project designed to attract weekend or retirement home purchasers where school-age children were not legally prohibited from residing in units).

Rights as the First Amendment or the Fourth Amendment." *Dolan v. City of Tigard,* 512 U.S. 374, 392 (1994).

A land use restriction or regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). *See also Penn Central Transportation Company v. City of New York,* 438 U.S. 104, 127 (1978) ("[A] use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose."). Although the case under review has not been brought or argued under federal constitutional principles, PLF submits that it is instructive to consider briefly the proximity of the current parameters of the "dual rational nexus" to federal constitutional takings guideposts.

As previously noted, the first prong of the "dual rational nexus" test requires that there be a "nexus between the need for additional capital facilities and the growth of the population generated." The second prong requires the government to "show a reasonable connection, or rational nexus, between the funds collected and the benefits accruing" to the property. *Hollywood, Inc.*, 431 So. 2d at 611-12. This test bears a striking similarity to the federal constitutional protections by which

government agencies must abide in order to avoid running afoul of the Fifth Amendment Takings Clause. The first prong is very similar to the "essential nexus" test of *Nollan*. The second prong substantially parallels *Dolan's* "rough proportionality" requirement.

In *Nollan,* the California Coastal Commission was requested to approve the lifting of a land use restriction--*i.e.*, approve a building permit request--on Mr. Nollan's beachfront property. For years, however, the Coastal Commission had been attempting to assemble beachfront easement passage along the entire beachfront in the area for pedestrians to walk along the beach. The Commission, therefore, used the occasion to condition their consent to the permit upon the Nollan's conveying a lateral easement bounded by the mean high tide along the beachfront portion of their property. It was conceded that requiring the conveyance of the property in the absence of the permit application would constitute a taking without just compensation. In that context, the Supreme Court stated:

> [T]he question becomes whether requiring [the easement] to be conveyed as a condition for issuing a land-use permit alters the outcome. We have long recognized that land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner of economically viable use of his land. [A] use restriction may constitute a "taking" if not reasonably necessary to the effectuation of a substantial government purpose.

Nollan, 483 U.S. at 834.

Applying this standard to the *Nollan* facts, the Court concluded that there was no nexus between the condition imposed and the permit requested. The Court stated that

> the Commission may well be right that [a pedestrian easement along the beach] is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization.

Id. at 841. Indeed, the condition sought to be imposed was characterized by the Court as "an out-and-out plan of extortion." *Id.* at 837.

In *Dolan,* 512 U.S. 374, the United States Supreme Court was faced with another case in which a local governmental entity sought to condition the issuance of a building permit upon the dedication of a portion of property. Here, however, the Court concluded that there was a legitimate governmental interest or rational nexus for the request--flood protection and the alleviation of traffic congestion. However, the Supreme Court still held that the government had not met its burden to justify the condition because it was not proven that the conditions imposed upon the grant of the permit were "roughly proportional" to the needs created by the new development. Applying this standard, the Court concluded that the governmental agency had not offered proof sufficient to support the conditions imposed.

This reasoning parallels the second prong of the "dual rational nexus" test that there be a rational connection between the exaction of funds collected and the benefits accruing to the property.

Employing these guideposts, it is apparent that the present parameters of the "dual rational nexus" test as expanded over the decades are now at the limit of federal constitutional takings guideposts. It is also apparent that the abandonment of the test requested by Appellants will not likely pass federal constitutional muster, however "good an idea," *cf*. *Nollan,* 483 U.S. at 841, Volusia County and its school board may consider it. As Chief Justice Rehnquist has stated in *Dolan*: "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way." *Dolan*, 512 U.S. at 396 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).

CONCLUSION

For the foregoing reasons, PLF submits that the opinion of the trial court on review as a question of great public interest should be affirmed.

DATED: June ___, 1999.

Respectfully submitted,

By _____
FRANK A. SHEPHERD

Attorney for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE ABERDEEN AT ORMOND BEACH was prepared in Courier New 12 point font.

By _____
FRANK A. SHEPHERD

Attorney for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by United States mail, postage prepaid, to Mr. Daniel D. Eckert, Volusia County Attorney, 123 West Indiana Avenue, 3rd Floor, DeLand, Florida 32720-4613, Counsel for Appellants; Mr. Richard S. Graham, Ms. Carol L. Allen, Landis, Graham, French, Husfeld, Sherman & Ford, P.A., 543 South Ridgewood Avenue, Daytona Beach, Florida 32114, Counsel for Appellants; Mr. Frank D. Upchurch, III, Upchurch, Bailey & Upchurch, P.A., P.O. Drawer 3007, Saint Augustine, Florida 32085-3007, Counsel for Appellee; this ___ day of June, 1999.

FRANK A. SHEPHERD