Florida Law Review

Volume 28 | Issue 4 Article 11

June 1976

Land Use Planning: Financial Savior or Social Villain--The Bittersweet Impact Fee is Born in Florida

Lori Tofflemire

LAND USE PLANNING: FINANCIAL SAVIOR OR SOCIAL VILLAIN – THE BITTERSWEET IMPACT FEE IS BORN IN FLORIDA

Contractors & Builders Association v. City of Dunedin, 329 So. 2d 314 (Fla.1976)

In order to finance the future capital expansion of its water and sewage treatment and distribution facilities, the city of Dunedin passed ordinances imposing impact charges on each new connection to its water and sewer systems.[1] Plaintiffs, an association of building contractors,[2] brought suit seeking declaratory and injunctive relief against the imposition of the charges,[3] alleging the funds so collected constituted taxes that a municipality is forbidden to impose in the absence of enabling legislation.[4] The circuit court found the ordinance an ultra vires attempt to impose taxes.[5] On appeal, the Second District Court of Appeal reversed,[6] certifying its decision to the supreme court as a question of "great public interest."[7] The Supreme Court of Florida HELD, a municipality may impose user fees for purposes of capital expansion of public facilities provided the funds are not excessive and are used within the same municipal department[8] in which they are collected.[9]

Rapid population growth, once considered a blessing, is now creating serious problems for many Florida communities. As population increases, existing public services and facilities become overloaded and new ones must

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1. The ordinance states: "In addition to the meter installation charges described herein, there shall be paid an assessment to defray the cost of production, distribution, transmission, and treatment facilities for water and sewer provided at the expense of the City of Dunedin, as follows:

Each dwelling unit; for water	$325.00
for sewer	475.00
Each transient unit; for water	150.00
for sewer	275.00
Each business unit; for water	325.00
for sewer	475.00

DUNEDIN, FLA., CODE §25-71(c) *as cited in* Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 317 n.1 (Fla. 1976).

2. As building contractors, plaintiffs could not assert new residents' claims that the ordinance infringed on their right to travel or violated the equal protection clause. *See, e.g.*, Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975). The Second District Court of Appeal found the ordinance did not discriminate against newcomers in any event since both old and new residents connecting to the system must pay the fee. City of Dunedin v. Contractors & Builders Ass'n, 312 So. 2d 763, 767 (2d D.C.A. Fla. 1975).

3. 312 So. 2d at 764.

4. FLA. CONST. art. VII, §1(a). *See* Belcher Oil Co. v. Dade County, 271 So. 2d 118 (Fla. 1972).

5. City of Dunedin v. Contractors & Builders Ass'n, 312 So. 2d 763, 766 (2d D.C.A. Fla. 1975) (the circuit court opinion was not reported).

6. *Id.* at 763.

7. *Id.* The case was certified June 10, 1975, pursuant to FLA. CONST. art. V, §3(b)(3).

8. Municipal department will be used to refer to any public service facility or utility system operated by a municipality.

9. Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976). The Dunedin ordinance was found defective, however, for failure to restrict explicitly the use of the fees collected to improvement of the water and sewer system. *Id.* at 321.

be built to meet increased demands. This expansion, traditionally financed by municipal bond issues, has resulted in higher property taxes and utility rates for Florida residents.[10] In response, several cities have sought to shift the costs of expansion to the new residents who create the need for the additional facilities.[11]

Florida municipalities are limited, however, in their ability to assess residents for funds. While, under the constitution, cities may exercise "any power for municipal purposes except as otherwise provided by law,"[12] Florida courts have only recently acknowledged this provision as a grant of broad police powers to local government.[13] In contrast, municipalities' taxing powers remain strictly limited. In reserving its taxing powers, the state has expressly prohibited cities from imposing any taxes other than ad valorem property taxes unless authorized by general law.[14] There is no general law specifically authorizing the imposition of impact fees,[15] nor is there any statute that

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10. A comparison of per capita property taxes and expenditures for personal services in several Florida cities for the years 1970 and 1973 follows:

		Ft. Lauderdale	Orlando	Tampa	Pensacola	Hialeah	Jacksonville
Prop.	'70	53.64	41.03	46.91	12.79	19.23	49.00
tax	'73	85.20	57.42	47.32	21.15	35.22	61.85
Exp. Pers.	'70	99.65	135.76	76.54	81.07	36.91	92.94
Serv.	'73	131.00	220.36	82.65	116.28	71.82	169.82

The sharp rise in per capita expenditures for personal services is clearly responsible in part for the per capita increase in property taxes. U.S. DEP'T OF COMMERCE, CITY GOV'T FINS. Table 5 (1969-1970); U.S. DEP'T OF COMMERCE, CITY GOV'T FINS. TABLE 5 (1973-1974).

11. *See, e.g.*, Broward County v. Janis Development Corp., 311 So. 2d 371 (4th D.C.A. Fla. 1975); Venditti-Siravo, Inc. v. City of Hollywood, 39 Fla. Supp. 121 (17th Cir. Ct. 1973). *See also* Home Builders Ass'n v. Provo City, 28 U.2d 402, 503 P.2d 451 (1972).

12. FLA. CONST. art. VIII, §2(b).

13. The Florida constitution of 1855 granted cities only those powers enumerated in their charters and specifically provided by law. In 1968 the new Florida constitution, seeking to give cities more freedom to resolve local problems, shifted the presumption of validity to exercises of power by municipalities in art. VIII, §2(b). Nevertheless, the Florida supreme court was slow to accept this expansion of municipal powers. In City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972), the court struck down a rent control ordinance as beyond the scope of municipal powers, stating the paramount law of a municipality is its charter. In response, the 1973 Florida legislature enacted the Municipal Home Rule Powers Act, FLA. STAT. §166.011 (1975), which repeats the constitutional provision that cities "may exercise any power for municipal purposes except when prohibited by law." The supreme court deferred to the explicit legislative intent, upholding the Municipal Home Rule Powers Act and acknowledging the expansion of municipal powers in City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764 (Fla. 1974).

14. FLA. CONST. art. VII, §1(a) reads: "No tax shall be levied except in pursuance of the 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." *See also* FLA. CONST. art. VII, §9; Tampa v. Birdsong Motors, Inc., 261 So. 2d 1 (Fla. 1972).

15. Several bills that would have specifically authorized municipalities to impose impact fees have been introduced in the Florida legislature but have died in committee. *See, e.g.*, Fla. H.R. 837 (Reg. Sess. 1975, introduced by Rep. Boyd).

can be interpreted to imply such authorization.[16] Therefore, to be upheld, the charges must emanate from the exercise of municipal police powers.

There is no doubt that cities have not only the power to provide municipal services[17] but also the concurrent power to construct, maintain, and operate the necessary facilities.[18] Municipal authority to charge residents for maintenance and expansion of these services[19] is limited only by such constitutional guarantees as due process[20] and equal protection[21] and statutory requirements that such rates and charges be "just and equitable."[22]

Prior to the instant decision, it was unclear to what extent a city could impose charges for future capital improvements within the scope of its police powers[23] without invading the taxing powers reserved by the state.[24] Earlier charges were challenged as arbitrary in application,[25] or excessive,[26] or unconstitutional.[27] Although the extent of municipal police power vis-à-vis the taxing power was at issue in two recent cases, the courts failed to articulate any precise limits.[28]

In *Broward County v. Janis Development Corp.*,[29] the Fourth District Court of Appeal considered an impact charge to be a tax when it was collected for use in the construction of new roads and bridges and imposed as a condition to the issuance of a building permit.[30] Noting that the city anticipated the collection of approximately six million dollars in the first year,[31] the court found it "impossible that such revenue could approximate

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16. The charges in the instant case were not special assessments as authorized by FLA. STAT. §170.01 (1975). Assessments are levied directly against the property benefited by the improvement in proportion to the benefits derived and are charged to all owners of property in the assessed area. Since the charges imposed by the city of Dunedin were for the use of water and sewer facilities, the property owner who did not use the facilities was not required to pay the impact fee. The burden on a public facility, not the benefit to property, is the basis for impact fees.

17. FLA. CONST. art. VIII, §2(b) states: "Municipalities shall have the power . . . to perform municipal functions and render municipal services."

18. Cooksey v. Utilities Comm'n, 261 So. 2d 129, 130 (Fla. 1972).

19. *See, e.g.*, State v. City of Miami, 113 Fla. 280, 152 So. 6 (1933) (the supreme court upheld utility rates set high enough to finance operation of the system and repayment of a bond issue. In so ruling, the court recognized expansion as a valid element in utility charges). *Accord*, Hartman v. Aurora Sanitary Dist., 23 Ill. 2d 109, 177 N.E.2d 214 (1961).

20. U.S. CONST. amend. XIV, §1; FLA. CONST. art. I, §9.

21. U.S. CON.T. amend. XIV, §1; FLA. CONST. art. I, §2.

22. FLA. STAT. §180.13(2) (1975).

23. See note 13 *supra*.

24. See note 14 *supra*.

25. Pinellas Apartment Ass'n v. City of St. Petersburg, 294 So. 2d 676 (2d D.C.A. Fla. 1974).

26. Broward County v. Janis Dev. Corp., 311 So. 2d 371, 375 (4th D.C.A. Fla. 1975).

27. Cooksey v. Utilities Comm'n, 261 So. 2d 129 (Fla. 1972).

28. Broward County v. Janis Dev. Corp., 311 So. 2d 371 (4th D.C.A. Fla. 1975); Venditti-Siravo v. City of Hollywood, 39 Fla. Supp. 121 (17th Cir. Ct. 1973).

29. 311 So. 2d 371 (4th D.C.A. Fla. 1975).

30. *Id.* at 375.

31. *Id.*

any cost of regulation."[32] In addition, the *Janis* court faulted the ordinance for failure to specify where and when the funds were to be spent for the roads.[33] Although the charges collected were to be placed in special trust funds[34] and were to be spent only on roads serving the vicinity of the project in which the charges were collected,[35] land other than that on which the charges were imposed would likely receive benefit from the road construction and some land subject to charges might receive no benefit. The court viewed the charge as resembling a general revenue measure and, it was deemed to be a tax.

Similarly, a circuit court in *Venditti-Siravo, Inc. v. City of Hollywood*[36] struck down a charge of one percent of the cost of construction collected at the issuance of a building permit for use in the construction of neighborhood parks.[37] The court held that the charge was unconstitutional because its operation worked to discriminate unlawfully against the plaintiff class.[38] As an additional ground for disapproving the charge, the court summarily labeled it a tax.[39]

In the instant decision the supreme court delineated the extent to which municipalities can, within the scope of their police powers, impose charges on their residents for future capital improvements. Under the new rule, a charge collected for capital improvements to be made within the same municipal department[40] imposing the charge, and not excessive for that purpose, is a valid exercise of police powers[41] and constitutes a fee rather than a tax.[42]

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32. *Id.* The court was apparently convinced that these fees were exacted "solely for revenue purposes" rather than for a regulatory purpose. *Id. See* Bateman v. City of Winter Park, 160 Fla. 906, 37 So. 2d 362 (1948).

33. 311 So. 2d at 375.

34. Broward County, Fla., Ordinance 73-2, §6, May 7, 1973.

35. *Id.* §5.

36. 39 Fla. Supp. 121 (17th Cir. Ct. 1973).

37. *Id.* at 122.

38. *Id.* The court did not explain its rationale for finding the charges arbitrary, partial, and discriminatory.

39. *Id.* at 123.

40. See note 8 *supra.*

41. 329 So. 2d at 318. The court reasoned that the charges imposed in *Janis* and *Venditti-Siravo* would have been analogous to those in the instant case if they "had been used to underwrite the administrative costs of issuing building permits, or . . . in enforcing the building code," or had been designated for future outlay such as the "acquisition of automobiles for building inspectors." Thus, use of the funds within the collecting service is essential. Note that the charges imposed in *Janis* and *Venditti-Siravo* were paid as prerequisites to the issuance of building permits. *Id.* DUNEDIN, FLA., CODE §25-71(d) provides that the charges in the instant case are payable at the time a building permit is obtained. Such payment need not be made in order to obtain a building permit, however. The time of payment coincides with the time of permit issuance merely for convenience since payment is a prerequisite to connection to the water and sewer system. *Id.* at 316-17.

42. 329 So. 2d at 318. The court purported to follow numerous cases as precedent in concluding that the instant charges were fees. None of these cases, however, were decided on the criteria here enunciated by the Florida supreme court. Hartman v. Aurora Sanitary Dist., 23 Ill. 2d 109, 177 N.E.2d 214 (1961) (sewer connection charges were deemed fees because of their nonmandatory nature; the funds collected were not limited to use within

Utility charges are also required by statute to be "just and equitable."[43] An ordinance imposing utility charges to defray the costs of capital expansion must meet three more criteria to satisfy this statutory requirement.[44] First, it must be shown that expansion is reasonably required.[45] Second, the charges cannot exceed a pro rata share of the anticipated costs of expansion.[46] Finally, the use of the funds must be expressly limited to meeting the costs of expansion.[47] The Dunedin ordinance was found defective for failure to include on its face the necessary restrictions on the use of the funds even though such restrictions existed in fact.[48]

The instant court established the crucial criteria for distinguishing between a valid exercise of police power and an intrusion on taxing powers. The imposition of an impact fee is a lawful exercise of police power if the funds are used internally within the municipal department collecting the charge and if the charge is not excessive. This test not only encompasses the objections found by the *Janis* court regarding the excessive nature of some fees but also assures that those burdening a particular facility pay for and benefit from its expansion.

Approving the use of impact fees,[49] the supreme court apparently recognized the difference between a "special assessment" on property specifically benefited by the improvement and an "impact fee" related to the burden placed on a public facility.[50] Under the fee in the instant case, old and new residents alike must pay when a new connection is made, but the

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the sewer system); City of North Muskegon v. Boleman Constr. Co., 335 Mich. 520, 56 N.W.2d 371 (1953) (charge imposed to retire bonds not for direct finance of future expansion); Maryville v. Cushman, 363 Mo. 87, 249 S.W.2d 347 (1952) (charge imposed to retire bonds not to finance capital improvement); State *ex rel.* Gordon v. Taylor, 149 Ohio 427, 79 N.E.2d 127 (1948) (regular monthly user charge applied to tax exempt university); Chastain v. Oklahoma City, 208 Okla. 604, 258 P.2d 635 (1953) (regular user charge).

43. FLA. STAT. §180.13(2) (1975).

44. 329 So. 2d 319-20. The court also discussed several criteria that need not be present for a charge to be "just and equitable." Charges need not be limited to maintenance costs alone and may be used for capital requirements. *Id.* at 320. Nor must charges be uniform. Differential rates determined by the character of the user, *i.e.*, residential, business, etc., are not inequitable. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* "[I]t is not 'just and equitable' to impose the entire burden of capital expenditures, including replacement of existing plant, on persons connecting to a water and sewer system after an arbitrarily chosen time certain." *Id.* Although earmarked for expansion, it is apparent that the monies collected must be restricted in the ordinance to use for expansion and improvement to insure its validity.

48. The supreme court acknowledged that Dunedin city officials had in fact limited the use of the monies collected under the ordinance to the expansion of the water and sewer system. The court feared that future officials might not act so prudently; therefore, the court required that the limitation be written into the ordinance.

49. "In principle however we see nothing wrong with transferring to the new user of a municipally owned water or sewer system a fair share of the costs new use of the system involves." 329 So. 2d at 317-18.

50. See note 16 *supra*.

former can recoup this loss in the increased resale value of their previous residences.[51] Thus, new residents anywhere in the city are paying for the expansion that they require. In contrast, under special assessments, once a land area is shown to benefit specially from an improvement, all owners of property therein must pay for the improvement.[52] Old residents who purchase property within the assessed area cannot recover the amount of the charge in the sale of their old homes, which are outside the assessed area.[53]

While the scope of the instant decision clearly encompasses municipal utilities such as water, sewer, and electricity, other public services and facilities could meet the standards enunciated by the court.[54] Public libraries are one example. Requiring each new family seeking to obtain a library card to pay a nonexcessive pro rata fee that could be used only for the necessary expansion of the library would appear to be a valid exercise of police power under the rationale of the instant case. Both old and new residents seeking to use the facility for the first time would be required to pay for the increased burden on the facility.[55] In this example, however, an old resident could not shift his loss to a newcomer; therefore, the essential purpose of the impact fee is not satisfied.

The enactment of impact charges to discourage growth may prove to be self-defeating. If only 1, 2, or even 10 cities imposed such fees, growth would be slowed in those cities. With the success of such fees, however, it is likely that many municipalities would adopt such charges in the near future, which would minimize the effect on growth from out-of-state newcomers as initial moving costs increased uniformly. While impact on overall growth would be de minimis, the impact on Florida residents seeking to move to a new municipality would be great. Having paid charges for the use of one city's facilities, many would be discouraged from moving to a new home outside the city boundary by the burden of paying impact charges again.[56]

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51. The resale value of a home already connected to the water and sewer system should increase by the amount of the charge for new connections. The purchaser of the old home absorbs the expense of the connection charge incurred by the old resident moving to a new home.

52. See note 16 *supra.*

53. The special assessment is levied on specific property. It does not increase the value of other property not benefited by the improvement. Since resale value of a home outside the assessed area would not increase, the old resident moving into the assessed area could not shift the expense of the improvement to his old property.

54. Public swimming pools, tennis courts, libraries, and perhaps garbage collection services are a few examples that might come under the scope of the instant decision.

55. This equality of application should defeat any constitutional attack on the validity of the ordinance made by new residents. See note 2 *supra.*

56. A person who moves from one city to another can recoup his impact fee expenditures if the charges are imposed on mandatory facilities such as water and sewer systems. See note 51 *supra* and accompanying text. The charge is shifted through displacement to the purchaser of the vacating resident's home. The chain continues until the purchaser is one who is new to the homeowner class in the area. If the charge is imposed on a nonmandatory facility, however, there is no displacement or loss shifting. While subscription to such typically nonmandatory facilities as libraries is not attached to saleable property, this is

The test set down in the instant case clearly articulates for the first time what charges a city may impose within the scope of its recently expanded police powers. If there are faults in the instant decision, they exist not in the court's reasoning but in the breadth of its ruling. The test in the instant case appears to prevent all forseeable abuses of the municipal power to impose impact fees. By failing to limit the scope of the test to mandatory services and facilities, the court may have obscured the essential nature of the impact charge. The additional burden on a mandatory facility can accurately be measured by new applications for service.[57] Absent the possibility of displacement, the additional burden imposed by a new subscriber to a nonmandatory facility can never be precisely determined. In addition, the nonmandatory facility charges present recoupment problems for the Florida resident who seeks to move across city boundaries. The decision in the instant case is well-reasoned and comprehensive, however, its application should be limited to mandatory facilities.

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not the critical distinction. If library subscription were mandatory for all families, refunds could easily be made to those no longer in the city. When the facility is not mandatory, refunds are impractical since there is no accurate record of when a person stops using the services of a facility permanently.

57. See note 56 *supra.*