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

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"established aberration,"[50] the exemption of professional baseball from the antitrust laws. It is doubtful that the courts will be confronted with challenges to the legality of perpetual player control clauses, nor will they have to berate Congress for its "positive inaction."[51] The door is open to arbitration governed by the principles of federal labor law. Methods of player control must be resolved by the Club Owners and the Players Association through negotiation. For baseball to continue in its present format, these negotiations must be expeditious and characterized by goodwill. Unfortunately, the past performance of the parties at the bargaining table does not bode well for the future.[52] Should an air of hostility prevail, fanned by the exercise of the parties' "lock out" and "strike" privileges, entire seasons may pass without significant competition. The greatest loss would then be suffered by the fans.

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Local Government—CONCEPT OF IMPACT FEES UPHELD BUT RESTRICTIONS IMPOSED ON SCOPE OF THE FEE AND USE OF FUNDS.—*Contractors & Builders Association v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976).

For the first time, the Supreme Court of Florida has established the authority of municipalities to impose charges in the nature of impact fees.[1] In May 1972, the City of Dunedin, Florida, enacted ordinances which imposed fees for new water and sewer connections.[2] The charges, supplementary to the actual cost of connection into the water and sewer systems, were collected "to defray the cost of production, distribution, transmission and treatment facilities for water and sewer provided at the expense of the City of Dunedin . . . ."[3] Local contractors and the Con-

50. Flood v. Kuhn, 407 U.S. 258, 282 (1972).

51. *Id.* at 283. Over fifty bills concerning the relationship of baseball to the antitrust laws have been introduced in Congress; none has passed. *Id.* at 281.

52. For example, the Club Owners exercised their power to "lock out" the players from training camps and thus threatened a delay in the 1976 season's schedule. The season began on time and after six months of intense negotiations both parties agreed to a modified form of the reserve system. But the perpetual control issue is still unsettled.

1. Contractors and Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976).

2. *Id.* at 316–17 nn.1–3.

3. The Dunedin ordinance requires an $800 total charge for sewer and water connections for each dwelling or business unit. 329 So. 2d at 316–17 nn.1 & 2.

tractors and Builders Association of Pinellas County sought declaratory and injunctive relief against the imposition of these fees.[4] The circuit court enjoined collection, but the Second District Court of Appeal reversed, finding the ordinances "valid and enforceable."[5] The decision was certified by the district court as a question of great public interest and was reviewed by the Supreme Court of Florida. While the supreme court found the ordinances invalid because they lacked sufficient restrictions on the use of the revenue, the court did uphold the charges "in principle."[6]

Crucial to this decision was the court's finding that the Dunedin ordinances exacted a user charge and not a tax.[7] Traditionally, municipal revenue has come from three sources: taxes, special assessments, and user charges.[8] The supreme court accepted the reasoning of the district court, finding the fees "analogous to fees collected by privately owned utilities for services rendered."[9] If the supreme court had classified the fees as a tax, they would have been impermissible because Florida's constitution permits municipalities to levy only ad valorem taxes or such other taxes as have been authorized by general law.[10] The court found that there was no such authorization in this case.[11] Having classified the fees as user charges, however, the court held that the Dunedin ordinances failed to meet the requirement that they be "just and equitable."[12]

The Florida Constitution grants municipalities the power to render municipal services.[13] Chapter 180, Florida Statutes, which governs municipal public works, does not expressly provide for financing of capital expenditures other than through mortgage revenue certificates or debentures;[14] however, it does provide that a municipality may impose "just and equitable rates or charges" for the use of utility services.[15]

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4. Contractors and Builders Ass'n v. City of Dunedin, Civil No. 73-827 (Fla. Cir. Ct. Pinellas County, Mar. 29, 1974).

5. City of Dunedin v. Contractors and Builders Ass'n, 312 So. 2d 763, 767 (Fla. 2d Dist. Ct. App. 1975).

6. 329 So. 2d at 317-18.

7. *Id.* at 317.

8. *See* 15 E. McQUILLIN, MUNICIPAL CORPORATIONS § 39.03 (3d ed. 1970).

9. 329 So. 2d at 317.

10. FLA. CONST. art. VII, §§ 1, 9; City of Dunedin v. Contractors and Builders Ass'n, 312 So. 2d at 766.

11. 329 So. 2d at 317.

12. *Id.*

13. FLA. CONST. art. VIII, § 2(b), provides: "Municipalities shall have governmental, corporate and proprietary powers to enable them to . . . render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law."

14. FLA. STAT. § 180.08 (1975).

15. *Id.* § 180.13(2).

Traditionally, municipal spending has been supported in part by deficit financing, with utility revenues repaying municipal debentures.[16]

The core of the impact fee concept is that the expense of expanding municipal or county services is immediately passed on to the user. The term impact fee distinguishes between the traditional minimal water and sewer connection charges and those fees created to meet the financial burdens of community growth. Because Florida is experiencing extraordinary growth from natural population increase and migration,[17] an increasing number of communities are adopting impact fee ordinances.[18]

Traditionally, the cost of expanding capital service facilities was borne by the community population as a whole, the capital cost being amortized over several years and all users sharing in its cost.[19] Impact fees, however, isolate and charge the new user as the initiator of the expansion.[20] The Dunedin impact fee ordinances required that the new user immediately help defray the capital cost of that user's addition to the system and thereafter contribute toward maintenance and replacement as part of the community. The court found that the charges imposed were an acceptable alternative to the more traditional method of deficit financing.[21] Although amortization of a water and sewer bond issue may be administratively simpler, having current capital available can be advantageous and is perhaps a necessity in light of the recent decline of investor confidence in municipal bonds.[22]

Only two reported Florida cases dealing with a form of impact fee

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16. *See generally* 15 E. McQUILLIN, MUNICIPAL CORPORATIONS §§ 39.03, 39.17 (3d ed. 1970).

17. Florida's rank among the states in population has continuously increased. Ranked 27th in 1940, Florida was 20th in 1950, 10th in 1960, and 9th in 1970. BUREAU OF BUSINESS AND ECONOMIC RESEARCH, UNIVERSITY OF FLORIDA, FLORIDA STATISTICAL ABSTRACT 1975, at 24 (9th ed. 1975). There was a 78.7% increase in population from 1950 to 1960 and a 37.1% increase from 1960 to 1970. *Id.* In 1974, Pinellas County, where Dunedin is located, ranked as the third most populous county in Florida. *Id.* at 27. Pinellas County gained over 127,000 residents in the period 1970 to 1974, a gain solely attributable to net migration rather than natural population increase because deaths exceeded births. *Id.* at 26. In 1970, the population of Dunedin was 17,639; it was estimated to be 23,660 in 1974. *Id.* at 22.

18. *See, e.g.*, Clearwater, Fla., Ordinance 1452 (May 7, 1973); Tallahassee, Fla., Ordinances 74-0-1424 (June 25, 1974) and 75-0-1484 (Oct. 14, 1975). The Clearwater ordinance specifically designates the charge imposed as an "impact fee." The fee is imposed on all new buildings at the time of final inspection, and all revenue collected is placed in a special account to be used only for road construction, public transit facilities, and storm drainage. The Tallahassee ordinances impose a "systems charge" on new users to fund a water and sewer line extension and depreciation fund to meet expansion costs.

19. *See generally* 12 E. McQUILLIN, MUNICIPAL CORPORATIONS § 35.37f (3d ed. 1970).

20. *See* Contractors and Builders Ass'n v. City of Dunedin, 329 So. 2d at 318.

21. *Id.* at 319.

22. *See id.* at 320.

are apposite here, and both decisions have held the fees to be invalid. *Venditti-Siravo, Inc. v. City of Hollywood*[23] dealt with a surcharge to a building permit fee consisting of one percent of the estimated cost of construction. The revenue was to be used for development of recreational parks and open space, a use unrelated to the building permit fees. The circuit court declared the charges discriminatory and an unauthorized tax.[24]

Broward County v. Janis Development Corp.[25] concerned a county ordinance which imposed a land use fee assessed when building permits were issued. The ordinance provided for a scaled fee which increased in proportion to the intensity of land use on the theory that higher density development imposed a greater burden on the community.[26] The revenue was earmarked for construction and improvement of roads, streets, highways, and bridges. The appellate court found the fee to be an improper tax enacted without statutory authorization but did not consider whether the impact fee was discriminatory.[27]

Although there is no prior Florida case upholding an impact fee, there is precedent in other jurisdictions. Courts in Illinois,[28] Indiana,[29] Oregon,[30] and Utah[31] have upheld similar sewer connection fees as permissible user charges. Those courts approved charges when there was a direct relationship between the fee assessed and the service rendered.[32] The Florida Supreme Court cited these decisions to support its conclusions. The Dunedin *fees* were distinguished from the invalid *taxes* of *Janis* and *Venditti-Siravo* because the latter were collected for purposes unrelated to the capital utility costs incurred by the city.[33] The

23. 39 Fla. Supp. 121 (Cir. Ct. Broward County 1973).

24. *Id.* at 122-23.

25. 311 So. 2d 371 (Fla. 4th Dist. Ct. App. 1975), *aff'g* Janis Development Corp. v. City of Sunrise, 40 Fla. Supp. 41 (Cir. Ct. Broward County 1973).

26. The text of the ordinance appears at 311 So. 2d at 372 n.1.

27. *Id.* at 375. *See* 40 Fla. Supp. 41, 60 (Cir. Ct. Broward County 1973). In effect, the circuit court found the issues of constitutionality and taxing authority to be a single issue. *Id.* at 55.

28. Hartman v. Aurora Sanitary Dist., 177 N.E.2d 214 (Ill. 1961).

29. Brandel v. Civil City of Lawrenceburg, 230 N.E.2d 778 (Ind. 1967).

30. Hayes v. City of Albany, 490 P.2d 1018 (Ore. Ct. App. 1971).

31. Home Builders Ass'n of Greater Salt Lake v. Provo City, 503 P.2d 451 (Utah 1972).

32. The fees in *Venditti* and *Janis*, in contrast, bore no direct relationship to the subsequent expenditures and could not be user charges. New construction creates direct and indirect expenses for local government. There are the direct costs of utility connections and roads to the site. Indirect costs may include increased demand upon all roads, schools, and recreational facilities. Since the out-of-state cases all involved sewer connection fees, it was easy for the *Dunedin* court to see a relationship between the charge and the benefit conferred. *See* 14 E. McQUILLIN, MUNICIPAL CORPORATIONS § 38.02 (3d ed. 1970).

33. 329 So. 2d at 318. The court found no direct relationship between enforcement of the building code and the increase in building permit fees, since the revenues were used for roads and parks.

court, quoting from the Supreme Court of Illinois in *Hartman v. Aurora Sanitary District*,[34] stated that "such reasonable charges have been uniformly sustained as a service charge rather than a tax."[35]

While upholding the authority of a municipality to obtain capital for future expansion through increased connection charges, the *Dunedin* court imposed certain restrictions on the use of moneys collected.[36] The court found that differential utility rates—those which distinguish between categories of users—were permissible but that such rates must still be "just and equitable."[37] More specifically, the court stated that the cost of new facilities should be borne by new users only to the extent that additional use requires new facilities.[38] The cost of original capitalization and of subsequent replacement must be borne by old and new users alike.[39] Thus, the court required that all moneys collected under an ordinance such as Dunedin's must be used to meet costs of expansion and for no other purpose.[40] Applying these principles to the Dunedin ordinance, the court concluded that "the whole burden of supplementary capitalization" was impermissibly placed upon the new users.[41]

The court also required that such revenue-producing ordinances set forth explicit restrictions on the use of the fees collected, citing the ordinance involved in *Hayes v. City of Albany*[42] as an example.[43] That ordinance restricted the use of connection fee revenue to meeting emergency repairs and expanding existing facilities.[44]

While the *Dunedin* decision does give municipalities the authority to impose user charges, nowhere does the supreme court employ the term "impact fee," even though state newspapers publicized the decision using this term.[45] Moreover, there is no indication that costs of expansion of other services may be specifically assessed to new users.[46]

34. 177 N.E.2d 214 (Ill. 1961).
35. 329 So. 2d at 318 n.4.
36. *Id.* at 320–21.
37. *Id.* at 320.
38. *Id.* at 321.
39. *See id.*
40. *Id.* at 320.
41. *Id.* at 321.
42. 490 P.2d 1018 (Ore. Ct. App. 1971).
43. 329 So. 2d at 321.
44. *Id.*
45. *See* St. Petersburg Times, Feb. 26, 1976, § B, at 1, col. 1; Tallahassee Democrat, Feb. 26, 1976, at 33, col. 1.
46. The United States District Court for the Middle District of Florida has approved a Jacksonville water pollution control charge levied on all new users of the city's sewerage system after the effective date of the act. Charges collected are placed in a separate fund for construction, extension, and replacement of sewerage treatment plants and pumping stations. Ivy Steel and Wire Co. v. City of Jacksonville, 401 F. Supp. 701 (M.D. Fla. 1975).

The emphasis upon the relationship between the charge and the benefit indicates that it might be more difficult to gain judicial approval of assessments for expansion of such services as roads, parks, and libraries, which do not lend themselves to accurate individual assessment.

While giving judicial approval to differential treatment between past and present population sources, the *Dunedin* court pointed out that the ordinance did not deny equal protection of the laws.[47] That issue was raised at the circuit court level in both *Janis*[48] and *Venditti*.[49] The circuit court in *Janis* concluded that impact fees were an unsatisfactory solution and that a comprehensive plan was needed to cope with growth problems.[50] The appellate court, on the other hand, found that implementation of impact fees was a legislative function and declined to rule on constitutionality.[51]

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47. 329 So. 2d at 317 n.2. The equal protection issue was also raised before the federal district court in Ivy Steel and Wire Co. v. City of Jacksonville, 401 F. Supp. 701 (M.D. Fla. 1975). The court held that the assessment of a water pollution control charge against new users had a rational basis and did not violate the equal protection clause as "every regulation, every charge, every tax must have a beginning." *Id.* at 703.

48. 40 Fla. Supp. 41 (Cir. Ct. Broward County 1973).

49. 39 Fla. Supp. 121, 122 (Cir. Ct. Broward County 1973).

50. 40 Fla. Supp. at 58.

51. 311 So. 2d 371, 375–76 (Fla. 4th Dist. Ct. App. 1975). The Florida Legislature has considered authorization of impact fees. The 1974 session adopted a concurrent resolution expressing the state's concern with a policy on growth, and there is a section specifically dealing with impact costs. [1974] 1 Fla. Laws 1344 (Committee Substitute for H.R. Con. Res. 2800). It provides in part:

> Growth, through the influx of new residents and new construction, may impose increased costs on local government in providing essential services and facilities. Local government, whether seeking to stem or to encourage growth, should not place the brunt of these increased costs on present residents but rather may require the new residents and new construction to contribute an equitable share toward meeting these costs.
>
> State and local government shall review the budgets of the local governmental units, including the state revenue sharing, to insure that the tax revenues, charges, and fees collected are allocated equitably between old and new facilities. Consideration shall be given to accepting fees in kind in lieu of impact costs.
>
> Pursuant to these considerations, state and local government shall identify these costs of increased residents and new construction and shall develop an appropriate policy regarding their equitable allocation. State and local government shall also identify the benefits of increased residents and new construction, to the end that decisions about growth may be made on a more factual, rational basis.

Id. at 1346.

In addition, legislation was proposed to grant broad powers in local governments to impose impact fees that would "better enable the several counties and municipalities of this state to accommodate orderly growth and development within their jurisdictions by providing them with a method of meeting increased costs." Fla. H.R. 837 (1976). That bill provided that the costs of essential public facilities and services be "more fairly borne by the owners of new construction and development who make these additional costs necessary, rather than placing the brunt of these costs on owners of existing construction." *Id.* at 2. The proposed legislation granted counties and municipalities the authority to collect

The Florida Supreme Court's treatment of the Dunedin ordinances is significant in the area of growth policy. For the community unit, the growth issue has two related facets—regulation and financing.[52] Over the past fifty years the zoning power has become an effective regulatory tool.[53] Financing of community growth has been accomplished through property taxes, special assessments, and subdivision exactions.[54] Impact fees are a further attempt to cope with the fiscal aspect of increased population. At the same time these fees may have the effect of regulating growth. Impact fees will raise the cost of housing to some extent, old as well as new.[55] This in turn will possibly inhibit migration.[56] Thus, impact fees could have an exclusionary effect.

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a tax defined as an impact fee, the revenues from which would have been used for streets, parks, police and fire protection, hospitals, public housing, public transit, libraries and recreation facilities. *Id.* at 3–4. H.R. 837 died in committee at the end of the 1976 legislative session, as did two other impact fee proposals, H.R. 86 and 743 (1976).

52. The two facets are interrelated. For example, in the context of an exclusionary zoning case, one court has pointed out that

> The motivations of exclusionary zoning practices are deeply embedded in the nature of suburban development. In part these practices are motivated by fear of the fiscal consequences of opening the community to all social and economic classes. Residents of the municipality anticipate that higher density development will require the construction of additional roads, sewers, and water systems, the provision of additional municipal services, and the increase of school expenditures, all of which must be financed through local property taxes.

Southern Burlington City NAACP v. Township of Mount Laurel, 336 A.2d 713, 736 (N.J. 1975) (concurring opinion).

53. Since the United States Supreme Court upheld the constitutionality of zoning in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), zoning has become more widespread, complex, and effective. A recent New York case demonstrates how sophisticated the exercise of planning under the police power has become. In Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291 (N.Y. 1972), *appeal dismissed*, 409 U.S. 1003 (1972), the Court of Appeals of New York upheld a timed development ordinance spanning a period of 18 years. *See* Southern Burlington City NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975); Jimmerson & Campbell, *Cities Fight to Stem Population Growth: Constitutional Crisis From Ramapo to Petaluma*, 7 COLUM. HUMAN RIGHTS L. REV. 313 (1975); Johnston, *Developments in Land Use Control*, 45 NOTRE DAME LAW. 399 (1970).

54. *See* Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964).

55. In Dunedin the fees are to be paid by the builder at the time of issuance of the building permit. Contractors and Builders Ass'n v. City of Dunedin, 329 So. 2d at 316–17 n.1. The builder is unable to recoup any of that expenditure until the house is constructed and sold. The builder must charge the buyer $800 plus some normal rate of return on his investment. The buyer, however, will more than likely finance his purchase through a down payment and a mortgage. For example, if the buyer pays 10% of the total purchase price as a down payment, the Dunedin ordinance would increase the down payment by $80 (10% x $800 "impact fee" = $80), plus some normal rate of return on the builder's investment. There would also be an increase in the monthly mortgage payment of the buyer. If the price of newly constructed houses rises, the demand for lower priced older housing will increase, thereby causing the price of older homes to rise.

56. Evans and Vestal, *Local Growth Management: A Demographic Perspective*,

If, in fact, impact fees should be found absolutely prohibitive of growth, the chance they would be struck down is great. Current decisions indicate that the judiciary will tolerate varying degrees of growth control short of absolute prohibition.[57] Communities around the nation are permitted to regulate the timing, nature, and quantity of growth. For example, the Court of Appeals of New York has sustained use of a timed development program for expansion over an eighteen-year period of time.[58] The Supreme Court has upheld the constitutionality of a village ordinance excluding residences other than one-family units occupied by traditional families or not more than two unrelated persons.[59] Recently, attention has been focused upon the California case, *Construction Industry Association v. City of Petaluma*.[60] The Petaluma plan provided for a slow rate of expansion of municipal services—slower than the natural rate of growth would provide. A restricted number of building permits were to be issued, matched to the slow rate of expansion of municipal services. The plan, designed to inhibit anticipated increases in population, was held unconstitutional in the trial court[61] but upheld on appeal.[62]

Presently, there has been no conclusive demonstration that impact fees slow migration, impede growth, or have a prohibitive effect; there is, however, an increasing recognition of the need for empirical research in this area.[63] Thus, it is likely that Florida courts will have to deal more substantially with the issue of impact fees in the future. In the meantime, the Supreme Court of Florida has joined the ranks of the farsighted portion of the bench in recognizing the need to find solutions to the problems caused by rapid population growth.

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55 N.C. L. REV. 421, 428 (1977).

57. *See, e.g.*, Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291 (N.Y. 1972), *appeal dismissed*, 409 U.S. 1003 (1972).

58. Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291 (N.Y. 1972).

59. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

60. 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

61. Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974). (N.D. Cal. 1974).

62. 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

63. *See* Evans and Vestal, *supra* note 56.