Golden Gate University Law Review

Volume 31
Issue 3 *Business & Technology Forum*

Article 3

January 2001

Imposition of Impact Fees After Volusia County v. Aberdeen: Has Florida Finally Reached its State and Federal Constitutional Limit?

Shari Cruse

NOTE

IMPOSITION OF IMPACT FEES AFTER *VOLUSIA COUNTY v. ABERDEEN*: HAS FLORIDA FINALLY REACHED ITS STATE AND FEDERAL CONSTITUTIONAL LIMIT?

I. INTRODUCTION

On May 18, 2000, the Florida Supreme Court decided *Volusia County v. Aberdeen*,[1] holding that a public school impact fee ordinance was unconstitutional as applied to an exclusively retirement age community.[2] The court reasoned that when minors are prohibited from living in a subdivision, the subdivision's residents neither contribute to the need for additional schools nor do they benefit from school construction.[3] Therefore, the fee is an unlawful tax imposed contrary to the provisions of the Florida Constitution.[4] As a result of this decision, to impose impact fees without running afoul of either state or federal constitutions, local government must prove that the impact fee is imposed only on the particular population of a subdivision which causes a need for additional capital facilities and that the fees collected provide a unique benefit to the members of that subdivision.[5]

---

[1] *Volusia County v. Aberdeen,* 760 So. 2d 126 (Fla. 2000).

[2] *See id.* at 137.

[3] *See id.* at 136.

[4] *See* FLA. CONST. art. VII, § 9(a).

[5] *See infra* notes 100 through 114 and accompanying text for the court's analysis of the dual rational nexus test.

This Note first discusses the difference between the assessment of fees and the imposition of taxes, and provides a brief history of the development, limitations and expansion of impact fees in Florida.[6] Parts III and IV of this Note provide an outline of the facts and procedural history of *Volusia County v. Aberdeen*, including the initial lawsuit filed by Aberdeen, L.P., and other leading Florida case law on assessment and impact fees.[7] Part V of this Note discusses the Florida Supreme Court's rationale for upholding the lower court's ruling in favor of Aberdeen, L.P., which will then be comparatively analyzed in Part VI.[8] Lastly, this Note concludes that had the Florida Supreme Court failed to hold that the imposition of public school impact fees upon Aberdeen Community is unconstitutional under Florida law, Aberdeen, L.P. would likely have prevailed with a claim that the imposition of the fee was a "taking" in violation of the Fifth Amendment of the United States Constitution.[9]

II. BACKGROUND

A. TAXES VERSUS FEES

To supplement state authorized taxing, local county and municipal governments exact monies from property owners in the form of taxes, in lieu fees, user fees, special assessments, and impact fees.[10] User fees, special assessments, and impact fees must all confer some special benefit on the party paying the fee, "in a manner not shared by those *not* paying the fee."[11] Taxes differ from these fees in that taxes may be levied for the general benefit of residents and property in the taxing unit, without any requirement that each property receive a

---

[6] *See infra* notes 10 through 51 and accompanying test for the background discussion.

[7] *See infra* notes 52 through 81 and accompanying text for the facts and procedural history of *Aberdeen,* 760 So. 2d 126.

[8] *See infra* notes 82 through 148 and accompanying text for the court's analysis of *Aberdeen,* 760 So. 2d 126, and for a comparative analysis with California law.

[9] *See infra* note 149 and accompanying text for this Note's conclusion.

[10] *See* Brief Amicus Curiae of Pacific Legal Foundation in Support of Appellee Aberdeen at Ormond Beach at 2, *Aberdeen,* 760 So. 2d 126 (No. 97-31544).

[11] *See Collier County v. State*, 733 So. 2d 1012, 1016 (Fla. 1999).

specific benefit from the tax imposed.[12]

Although Florida statutes do not specifically authorize the imposition of impact fees, they have been commonly justified under the police and proprietary powers of the local governments.[13] A local government may exercise its police powers and exact money from its citizens, if the primary purpose of the exaction is regulation.[14] If the primary purpose of the exaction is to raise revenue, the exaction is an unauthorized exercise of the taxing power.[15] The Florida Constitution restricts local government's power to levy taxes[16] and the Florida Supreme Court has just recently begun to assume "a vigilant stance to prevent local government from circumventing these restrictions through the imposition of fees."[17]

B. FLORIDA ADOPTS THE "SPECIFICALLY AND UNIQUELY ATTRIBUTABLE" TEST AND EFFECTIVELY PRECLUDES THE USE OF IMPACT FEES

In the early 1970's, the Florida Supreme Court addressed several cases which alleged that local governments were adopting impact fee ordinances in an effort to circumvent constitutional and/or other limitations on their taxing power.[18] In response to this concern, judicial treatment of new develop-

---

[12] *See id.* at 1017. "A tax is an enforced burden of contribution imposed by sovereign right for the support of the government, the administration of the law, to execute the various functions the sovereign is called upon to perform." *See id.* at 1017 (quoting *City of Boca Raton v. State*, 595 So. 2d 25, 29 (Fla. 1992) and *Klemm v. Davenport*, 100 Fla. 627, 631-32 (1930)).

[13] *See* FLA. CONST. art. VIII, § 2; *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 805 (Fla. 1972); *Wald Corp. v. Metropolitan Dade County*, 338 So. 2d 863, 868 (Fla. 3d Dist. Ct. App. 1976).

[14] *See* U.S. CONST. AMEND. V.

[15] *See* *4 THOMAS COOLEY, THE LAW OF TAXATION § 1784 (1924).

[16] *See* FLA. CONST. art. VII, which mandates that local governments have the authority to levy *ad valorem* taxes specifically authorized by state law, except as provided by general law, and to impose special assessments and user fees. *See id.* at §§ 1(a), 9(a). *See Collier*, 733 So. 2d at 1014. Therefore, if the revenue a county seeks to collect is not specifically authorized by general law, and it is not a special assessment or valid fee, the ordinance will constitute an unconstitutional tax. *See id.*

[17] *See* Answer Brief * at 5, *Aberdeen,* 760 So. 2d 126 (No. 97-31544).

[18] *See*, e.g., *Broward County v. Janis Dev. Corp.*, 311 So. 2d 371 (Fla. 4th Dist. Ct. App. 1975) (where the court invalidated an impact fee of $200.00 per dwelling unit to fund road and bridge construction in the area where the fees were collected). *See id.* at 375-376.

ment impact fees in Florida followed the stringent "specifically and uniquely attributable" test articulated by the Illinois Supreme Court.[19] This test requires local government to demonstrate that the exaction is precisely proportional to the burden, and that the burden is directly and specifically created by the development or the exaction is not a reasonable regulation permitted under the police power.[20] When the burden failed this test, the Illinois Supreme Court considered the regulation a taking in violation of the Fifth Amendment to the United States Constitution.[21] This test effectively precluded the use of impact fees in Florida for most purposes, including educational facilities, because the local governments were required to prove that the exaction of impact fees resulted solely from new growth and that the funds collected were to be used only for the purpose collected; a stringent requirement that the local governments could not meet.[22] Therefore, almost all of the money needed to support capital expenditures for new educational funding had to be procured through *ad valorem* taxes[23] or deficit financing.[24]

---

[19] *See Rosen v. Village of Downers Grove*, 167 N.E.2d 230, 233 (Ill. 1960). The Illinois Supreme Court invalidated an ordinance that required subdividers to dedicate land for educational facilities by charging each lot a fee. *See id.* at 233-234. *See also Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961). In *Pioneer*, the Illinois Supreme Court held that the only permissible burden upon a subdivider is one that is "specifically and uniquely attributable to his activity," otherwise the regulation becomes "a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations." *See id.* at 802.

[20] *See id.*

[21] *See id.* at 802-803.

[22] *See Broward County*, 311 So. 2d at 374. *See also Venditti-Siravo, Inc. v. City of Hollywood*, 39 Fla. Supp. 121 (17th Cir. Ct. 1973). Where a fee was imposed to underwrite the administrative costs of issuing a building permit, the court invalidated the fee because a portion was allocated for another purpose. *See id.* at 122.

[23] *See* BLACK'S LAW DICTIONARY 53 (7th ed. 1999). *Ad valorem* taxes are imposed proportionally to the value of the thing taxed. *See id. See also* § 192.001(1) Fla. Stat. (1997). The term "*ad valorem* tax" may be used interchangeably with the term "property tax." *See id.*

[24] "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." FLA. CONST. art. IX, § 1.

C. FLORIDA RECOGNIZES IMPACT FEES AS A VALID MEANS OF NEW PUBLIC FACILITY EXPANSION

Impact fees continued to be precluded until the 1976 Florida Supreme Court case of *Contractors & Builders Association of Pinellas County v. City of Dunedin*[25] where the court rejected a claim that the imposition of connection fees to pay for the expansion of water and sewer systems constituted an unauthorized tax, and thereby authorized local government to use impact fees to finance infrastructure improvements necessitated by growth.[26] In *Dunedin*, building contractors and landowners challenged a municipal ordinance that permitted a municipality to charge an impact fee for connection to its water and sewer systems.[27] The court stated that exactions from a developer for "capital improvements to the [water and sewerage system]" would not violate the Constitution under the appropriate circumstances.[28] The court analogized the impact fees demanded by a municipality to raise money for water and sewerage system expansions, to fees that privately owned utilities charge to provide similar services.[29] The court reasoned that a private utility in the same circumstances could pass the cost of facility expansion to the users who created the demand, and have it not be considered levying a tax on its customers.[30] Therefore the court determined that it was permissible for a public utility to raise expansion capital by charging utility connection fees as long as those fees did not exceed the customer's pro rata share of the reasonably anticipated costs of expansion, and that the money received was used solely for the purpose of that expansion.[31] In *Dunedin*, the Florida Supreme Court was essentially applying a less stringent test which was later specifically articulated as the dual rational nexus test in *Hollywood Inc. v. Broward*

---

[25] *Contractors & Builders Ass'n of Pinellas County v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976).

[26] *See id.* at 314.

[27] *See id.* at 317. The court determined that setting utility connection charges to raise expansion capital is permissible if the money collected is used solely to meet the costs of the expansion. *See id.*

[28] *See id.*

[29] *See id.*

[30] *See Dunedin*, 329 So. 2d at 318.

[31] *See id.* at 320.

County.[32]

D. FLORIDA APPLIES THE DUAL RATIONAL NEXUS TEST AND IMPACT FEES ARE VALIDATED

In *Hollywood*, the issue before the Florida Supreme Court was the validity of a county ordinance that required a developer/subdivider to either dedicate land or pay a fee to be used by the county to acquire and develop county level parks in return for plat approval.[33] To determine whether the impact fee was constitutional, the court used the dual rational nexus test.[34] Under the dual rational nexus test "impact fee requirements are permissible so long as they offset needs sufficiently attributable to the subdivision and so long as the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents."[35]

To assist in the development of county level parks, Broward County had implemented a park program with a standard of three acres of developed county level parkland per one thousand residents and the fees collected from the ordinance were less than the amount necessary for the county to maintain this standard.[36] Since the impact fees exacted for county parks were set at a reasonable amount sufficiently attributable to the new subdivision residents, and because the funds were to be used specifically to benefit the entirety of the new residents paying the fees, the court determined that the county had demonstrated a reasonable connection between the need for additional park facilities and the population

---

[32] *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. 4th Dist. Ct. App. 1983).

[33] *See id.* at 607. *See* BLACK'S LAW DICTIONARY 1151 (6th ed. 1990). A plat is a map, usually drawn to scale, of a specific land area such as a subdivision, that depicts the location and boundaries of individual parcels of land subdivided into lots with streets, alleys, easements, etc. *See id.*

[34] *See Hollywood*, 431 So. 2d at 611. To meet the requirements of the dual rational nexus test, "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." *See id.*

[35] *See id.*

[36] *See id.* at 612.

growth generated by the subdivision.[37] Therefore, the Florida Supreme Court held the impact fees to be constitutional.[38]

E. *ST. JOHN'S COUNTY V. NORTHEAST FLORIDA BUILDERS ASSOCIATION, INC.*[39]

In 1991, the Florida Supreme Court addressed the issue of school impact fees and expanded the parameters within which impact fees could be utilized.[40] In *St. John's County,* the builders association challenged an ordinance which charged residential properties an impact fee for school capital facilities, regardless of whether a child was residing on the property.[41] Unlike *Dunedin* and *Hollywood,* where the impact fees collected were clearly being used for the benefit of the properties paying the fees, the St. John's County ordinance charged a public school impact fee on residential property regardless of whether a benefit would be conferred on that property.[42] Under the dual rational nexus test, the local government was required to demonstrate a reasonable connection between the need for additional capital facilities and the growth in population generated by the subdivision, and the expenditures of the funds collected and the benefits accruing to the subdivision.[43]

1. The Needs Prong of the Dual Rational Nexus Test is Applied and the Florida Court Finds that the Need for Additional Capital Facilities Springs from the Growth in Population Generated by the Subdivision

In *St. John's County*, it was unclear whether there was a reasonable connection between the need for additional schools and the growth in population caused by the subdivision development because the ordinance indiscriminately charged the

---

[37] *See id.* at 611.

[38] *See Hollywood*, 431 So. 2d at 614.

[39] *St. John's County v. Northeast Florida Builders Ass'n, Inc.*, 583 So. 2d 635 (Fla. 1991).

[40] *See id.* at 638-39.

[41] *See id.* at 636-637.

[42] *See id.* at 639.

[43] *See id.* at 638-639.

impact fees.[44] Nevertheless, the court concluded that "during the useful life of the new dwelling units, school-age children will come and go," and although there was a possibility that some of the units would never house children, the fee was enacted to expand the public school system to provide for the educational needs of the entire community being charged with the fee.[45] Therefore, although the St. John's County impact fee was designed to provide a benefit to all of the properties as a group, the Florida Supreme Court held that the ordinance met the first prong of the rational nexus test.[46]

2. The Benefits Prong of the Dual Rational Nexus Test is Applied and Florida Finds that the Ordinance Does Not Earmark the Funds Collected for the Specific Benefit of Those Paying the Fee

The ordinance under attack in St. John's County required that new building permits could only be issued upon payment of an impact fee.[47] These fees were then to be deposited into a trust fund for the express purpose of expanding educational sites and facilities "necessitated by new development."[48] The court held that the fees were invalid because although they were imposed only on persons residing outside a municipality, there was nothing in the ordinance to preclude the use of the funds for the benefit of those paying the fee.[49] Although the fee passed the first prong of the dual rational nexus test, it failed the second prong because it did not provide a unique benefit to those paying the fee.[50] Therefore, the impact fee was determined to be unconstitutional.[51]

---

[44] *See St. John's County*, 583 So. 2d at 638-639.

[45] *See id.* at 638. The court considered evidence that for every one hundred new dwelling units constructed, there are forty-four students who require a public education. *See id.*

[46] *See id.*

[47] *See id.* at 637.

[48] *See St. John's County,* 583 So. 2d at 637.

[49] *See id.* at 639.

[50] *See id.*

[51] *See id.*

III. FACTS OF *VOLUSIA COUNTY V. ABERDEEN* [52]

Aberdeen at Ormond Beach Manufactured Housing Community (hereinafter "Aberdeen Community"), located in Ormond Beach, Florida, was developed by Aberdeen at Ormond Beach, L.P. (hereinafter "Aberdeen, L.P."), as a community for senior citizens.[53] As a retirement community, Aberdeen Community provides housing for persons of at least 55 years of age.[54] Aberdeen Community's rules and regulations, standard lot leases, and recorded Supplemental Declaration of Covenants, Conditions, and Restrictions on the property prohibit any person under the age of eighteen from residing at Aberdeen Community, and this condition is not subject to waiver, exception, revocation or amendment.[55] However, in its Primary Declaration of Covenants, Conditions, and Restrictions on the property (hereinafter "Primary Declaration"), Aberdeen, L.P. reserved a general right to amend and revoke covenants and restrictions on the property, including any subsequently enacted.[56] While the terms of the Primary Declaration required that it be executed and recorded to be enforceable, Aberdeen, L.P. neither executed nor recorded this Declaration.[57]

On May 15, 1997, Volusia County passed countywide ordinance No. 97-7, which assessed public school impact fees on new dwelling units constructed in Volusia County.[58] The fees

---

[52] 760 So. 2d 126 (Fla. 2000).

[53] *See* Answer Brief of Appellee at 2, *Aberdeen,*760 So. 2d 126 (No. 97-31544). By the end of July, 1998, Aberdeen had developed 191 of 537 planned lots and had constructed 84 manufactured mobile homes at Aberdeen Community. *See id.* Of the 142 residents, the majority were over the age of 60; the youngest resident was 42. *See id.* at 2.

[54] *See id.* at 1.

[55] *See id.* (citing Supplemental Declaration art. II, §§ 2.2, 3.2). The declaration states "In no event shall any person under the age of eighteen (18) years reside within any dwelling unit on the Property as a permanent resident. While the prohibition against minors . . . shall not be subject to waiver or exception, the Owner reserves the right to allow persons under the age of 55 years to reside on the Property under limited circumstances, in compliance with the Federal Fair Housing Act and the Community rules." *See* Supplemental Declaration art. II, § 2.2.

[56] *See Aberdeen,* 760 So. 2d at 129.

[57] *See id.*

[58] *See id.* Ordinance 97-7 was enacted as a result of a Stipulated Final Judgment in a case challenging the number of tax credits used in calculating the original im-

were based on the county's student generation rate and the projected fees were designed to "not require feepayers to bear more than their equitable share of the net capital cost in relation to the benefits conferred."[59] Accordingly, the County assessed the public school impact fees on the new homes constructed at Aberdeen Community in the amount of $850.00 per dwelling unit.[60]

In June, 1997, Aberdeen, L.P. brought suit against Volusia County and the Volusia County School Board (collectively "Volusia County") challenging the county's authority to assess Aberdeen Community dwelling units with public school impact fees.[61] Aberdeen, L.P. attacked the ordinance alleging that the public school impact fees were unconstitutional as

---

pact fee. See *Florida Home Builders Ass'n, Inc. v. County of Volusia*, No. 93-10992-CIDL, Div. 01 (Fla. 7th Cir. Nov. 21, 1996). Volusia County originally enacted Ordinance No. 92-9 to assess new dwelling units with a public school impact fee in the amount of $1,832.00. *See id.* This amount represented each new dwelling unit's proportionate share of the cost required to expand public school facilities necessitated by the new development. *See id.* Volusia County first determined the cost per student by dividing the cost of a new school by its enrollment. *See id.* This cost was then multiplied by the student generation rate, 0.254 students per dwelling unit, to determine the gross cost per dwelling unit. *See Florida Home Builders Ass'n*, No. 93-10992-CIDL. The county then deducted credits for other taxes and sources of school construction funding from this amount. *See id.* The net cost per dwelling unit was thereby determined to be $1,832.00, the amount of the impact fee. *See id.* However, the amount of the impact fee was litigated on the grounds that the county failed to give sufficient credits for taxes and other funding sources in the calculation of the fee. *See id.* Subsequently, on May 15, 1997, Volusia County enacted Ordinance 97-07 which repealed 92-09 and lowered the impact fee to $850.00 per dwelling unit. *See id.* Ordinance 97-07 is calculated in the same manner as Ordinance 92-09 but provides more liberal credits, thus a lower fee. *See id.* Ordinance 97-07 calls for periodic recalculation of the fee amount and its state purpose is to assess new development "with a proportionate share of the capital cost of educational facilities which are necessary to accommodate new development." *See Volusia County v. Aberdeen*, No. 97-31544 (Fla. Cir. Ct., 2000) (order granting plaintiffs' motion for summary judgment) (quoting Volusia County, Fla., Code of Ordinances, ch. 70, art. V, § 70-173(h) (1997)).

[59] *See Aberdeen,* 760 So. 2d at 129. Impact fees represent the cost per dwelling unit to provide new facilities. *See id.* The student generation rate is the average number of public school students per dwelling unit. *See id.* at 130 (quoting Volusia County, Fla., Ordinance 97-7, § VI (May 15, 1997) (enacting Volusia County, Fla., Code of Ordinances, ch. 70, art. V, § 70-174(d) (1997)).

[60] *See Aberdeen,* 760 So. 2d at 128.

[61] *See id.* at 130. By July 31, 1998, under protest, Aberdeen at Ormond Beach, L.P. had paid $86,984.07 to Volusia County for public school impact fees assessed on 84 homes. *See id.*

applied to Aberdeen Community because the deed for each dwelling unit included restrictions prohibiting minors from residing on the property, thus the development of Aberdeen Community homes did not affect public school enrollment numbers.[62]

IV. PROCEDURAL HISTORY

In June, 1997, Aberdeen, L.P. filed an action against Volusia County for declaratory and injunctive relief, and reimbursement for fees paid.[63] Aberdeen, L.P. requested the Florida Circuit Court for Volusia County to review Volusia County's public school impact fee ordinance alleging that the public school impact fees were unconstitutional, as applied to Aberdeen Community, because the deeds to its properties included restrictions prohibiting residence by minors.[64] Therefore, the development of properties at Aberdeen Community had no impact on public school enrollment numbers.[65] However, Volusia County argued that it was entitled to summary judgment because (1) exempting Aberdeen from the impact fee would convert the impact fee into a "user fee," in violation of the state constitutional guarantee of a free public school system,[66] and (2) because *stare decisis* precluded review of Aberdeen, L.P.'s claims.[67] Both parties moved for summary judgment.[68]

The Florida Circuit Court determined that the Volusia County public school impact fee, as applied to Aberdeen Community, constituted an unlawful tax imposed in violation of Article VII, Section 9(a) of the Florida Constitution, and

---

[62] *See* Answer Brief of Appellee at 3, *Aberdeen,* 760 So. 2d 126, (No. 97-31544).

[63] *See Aberdeen,* No. 97-31544 (order granting plaintiffs' motion for summary judgment).

[64] *See Aberdeen,* 760 So. 2d at 130.

[65] *See id.*

[66] *See id.* User fees are fees "charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society." *See id.* at 137 (quoting *State v. City of Port Orange*, 650 So. 2d 1, 3 (Fla. 1994)). The Florida Supreme Court further explained that "the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge." *See id.*

[67] *See* Defendant's Motion for Summary Judgment at 3-12, *Aberdeen.*

[68] *See Aberdeen,* 760 So. 2d at 130.

granted Aberdeen, L.P.'s motion for summary judgment based on four factors.[69] First, the court found that the Supplemental Declaration prohibiting minors from residing at Aberdeen Community was controlling because the Primary Declaration was neither executed nor recorded, therefore, Aberdeen, L.P. is estopped from modifying the age restriction on the property.[70] Second, the court held that the doctrine of *stare decisis* was not applicable because the issues raised by Aberdeen, L.P. were not the same issues raised and decided in the case precedent cited by Volusia County.[71] Third, the court held that exempting Aberdeen Community from the impact fee would not convert the impact fee into a "user fee," in violation of the state constitutional guarantee of a free public school system.[72] Fourth, the court held that the public school impact fee ordinance failed a dual rational nexus test.[73]

Volusia County subsequently filed an appeal in the United States Court of Appeals for the Fifth Circuit.[74] Concurrently, Volusia County filed a request for certification to the Florida Supreme Court on the grounds that the case was a "matter of great public importance."[75] The Fifth District immediately certified the case to the Florida Supreme Court which accepted jurisdiction.[76] Volusia County appealed to the Florida Supreme Court, claiming that the trial court misapplied the doctrine of *stare decisis* and the dual rational nexus test, and incorrectly held that Aberdeen Community is controlled by the Supplemental Declaration rather than the Primary Declaration.[77]

---

[69] *See id.*

[70] *See id.*

[71] *See id.*

[72] *See id.* at 137.

[73] *See Aberdeen,* 760 So. 2d. at 130. The dual rational nexus test for determining the constitutionality of impact fees states that the local government must demonstrate reasonable connections between (1) the need for additional capital facilities and the growth in population generated by the subdivision and (2) the expenditures of the funds collected and the benefits accruing to the subdivision. *See id.* at 134.

[74] *See id.*

[75] *See id.* Pursuant to the pass-through certification provision of the Florida Constitution, article V, section 3(b)(5), the Fifth District refrained from hearing the case and granted Volusia County's certification request. *See id.*

[76] *See id.*

[77] *See Aberdeen,* 760 So. 2d at 131, 132, 134.

On May 18, 2000, the Florida Supreme Court determined that the Supplemental Declaration was controlling and that stare decisis was not applicable because the issues raised by Aberdeen, L.P. were not decided in the case precedent cited by Volusia County.[78] The court also determined that the imposition of impact fees upon Aberdeen Community does not satisfy the dual rational nexus test because Aberdeen Community neither contributes to the need for additional schools, nor do its residents benefit from their construction.[79] For these reasons, the court held that Volusia County's public school impact fees were unconstitutional as applied to Aberdeen Community.[80] The court then affirmed the trial court's holding which enjoined Volusia County from assessing and seeking to collect the impact fee against dwelling units constructed in Aberdeen Community, and ordered Volusia County to return to Aberdeen, L.P. the sum of $86,984.70, including interest.[81]

V. COURT'S ANALYSIS

In its analysis of *Volusia County v. Aberdeen*, the Florida Supreme Court addressed four issues. First, the court discussed whether the trial court had misapplied the doctrine of stare decisis.[82] Second, to determine whether Aberdeen Community created a need or benefited from Volusia County's impact fee, the court examined whether Aberdeen Community is an age restricted community.[83] Third, the court applied the dual rational nexus test to Volusia County's public school impact fees to consider the constitutionality of the fee as applied to Aberdeen Community.[84] Fourth, the court explained why an exemption for age-restricted communities does not convert the public school impact fee into a user fee, in violation of the

---

[78] *See id.* at 131, 134.

[79] *See id.* at 137.

[80] *See id.*

[81] *See id.* This amount represents the $850.00 impact fee paid on each of 84 homes and interest on that amount for the time the money was held by Volusia County. *See Aberdeen*, 760 So. 2d at 137. *See also* Florida Circuit Court, Seventh Judicial Circuit, Order Denying Defendants' Motion for Summary Judgment and Granting Plaintiff's Motion for Summary Judgment at 4, *Aberdeen*.

[82] *See Aberdeen,* 760 So. 2d at 131.

[83] *See id.* at 132.

[84] *See id.* at 131, 132, 134.

constitutional guarantee of free public schools.[85]

A. ABERDEEN, L.P.'S CLAIMS ARE NOT PRECLUDED BY STARE DECISIS

The first issue before the Florida Supreme Court was whether the trial court correctly determined that Aberdeen, L.P. was entitled to prevail as a matter of law.[86] Volusia County, relying on two prior cases, contended that the trial court misapplied the doctrine of *stare decisis*.[87] However, the Florida Supreme Court rejected both cases as controlling precedent because Aberdeen, L.P. was neither challenging the methodology used to determine an impact fee nor challenging the impact fee ordinance as unconstitutional on its face.[88] Therefore, the court held that *stare decisis* did not preclude review of Aberdeen, L.P.'s claims because the issues of law raised in the instant case had not been decided in earlier cases.[89]

B. ABERDEEN COMMUNITY IS AN AGE RESTRICTED COMMUNITY

To determine whether Aberdeen Community increased Volusia County's need to build more schools, the court discussed Aberdeen Community's age restriction.[90] To do so, the court considered whether the Primary or Supplemental Declaration controls Aberdeen Community.[91] If the Primary Declaration controls, the developer could revoke the restriction prohibiting

---

[85] *See id.* at 137. *See also* FLA. CONST. art. IX, § 1 (1998) (provides in part that "adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools.").

[86] Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law. *See Aberdeen,* 760 So. 2d at 130.

[87] *See St. John's County v. Northeast Fla. Builders Ass', Inc.*, 583 So. 2d 635 (Fla. 1991), where the plaintiffs challenged an impact fee ordinance as unconstitutional on its face not unconstitutional as applied. *See id. See also Florida Homebuilders Ass'n Inc. v. County of Volusia*, No. 93-10992-CIDL, Div. 01 (Fla. 7th Cir. Nov. 21, 1996), where the plaintiffs challenged an impact fee based on the way the amount of the fee was calculated. *See id.*

[88] *See Aberdeen,* 760 So. 2d at 132.

[89] *See id.* at 131.

[90] *See id.* at 132.

[91] *See id.*

minors from residing on the property and Aberdeen Community may at some time permit children to reside on the property.[92] If this were the case, the court would have to apply its holding from *St. John's County*.[93] In *St. John's County*, the court held that a public school impact fee was valid because children were permitted to live in the dwelling units at any particular point in time.[94] However, if the Supplemental Declaration controls, Aberdeen Community is an age-restricted community without the possibility of minors ever residing on the property.[95] If Aberdeen Community is forever barred from allowing children to reside on the property, the holding in *St. John's County* does not apply.[96]

In deciding which declaration controlled, the Florida Supreme Court compared the validity of the Supplemental and Primary Declarations.[97] After careful consideration, the court determined that the Primary Declaration was legally defective because: (1) it was neither executed nor recorded, (2) "the rules of construction militate in favor of enforcing the specific provisions of the Supplemental Declaration," and (3) because the "reservation of the right to revoke is circumscribed by an implied reasonableness test."[98] Therefore, the Supplemental Declaration, which prohibits minors from permanently residing on the premises, controls making Aberdeen Community an age-restricted community.[99]

C. As Applied to Aberdeen Community, The Public School Impact Fee Fails the Dual Rational Nexus Test

The Florida Supreme Court applied its two-prong test from *Hollywood* to determine whether the trial court properly found that the public school impact fee is unconstitutional as applied to Aberdeen Community.[100] To satisfy the elements of this test, Volusia County needed to satisfy both the "needs"

---

[92] *See id.*

[93] *See St. John's County*, 583 So. 2d at 638.

[94] *See id.*

[95] *See Aberdeen*, 760 So. 2d at 132.

[96] *See id.*

[97] *See id.* at 132-133.

[98] *See id.* at 134.

[99] *See id.*

[100] *See Aberdeen*, 760 So. 2d at 134.

and "benefits" prongs of the test.[101] However, Volusia County could not satisfy the necessary elements of either prong.[102]

1. Needs Prong

The Florida Supreme Court initially addressed the "needs" prong of the dual rational nexus test and stated that "housing that allows children is the land use that creates the need for new school facilities."[103] Yet, the court found that basing needs and benefits on countywide growth was without merit.[104] The court opined that the dicta in *St. John's County* did not support Volusia County's contentions regarding countywide assessments, but rather that it created an ambiguity in determining the application of the test.[105] Moreover, the court rejected the argument that student generation rates used to calculate the impact fees are directly affected by Aberdeen Community's growth.[106] The court determined that any effect Aberdeen Community has on the student generation rate does not satisfy the dual rational nexus test, because at issue is whether Aberdeen Community increases the need for new schools, not whether Aberdeen Community influences the student generation rate or the amount of the impact fee.[107]

Furthermore, although the Florida Supreme Court in *St. John's County* refused to exempt households without minor children from paying a public school impact fee, it did so because minor children could potentially reside in those households.[108] In *St. John's County*, the court distinguished restricted housing such as Aberdeen Community, stating "we would not find objectionable a provision that exempted from the payment of an impact fee permits to build adult facilities in which, because of land use restrictions, minors could not reside."[109] Therefore, in accordance with its opinion in *St. John's County*, the court held that the public school impact fee

---

[101] *See id.*

[102] *See id.* at 136.

[103] *See id.*

[104] *See id.* at 134 (quoting *St. John's County*, 583 So. 2d at 637)).

[105] *See Aberdeen,* 760 So. 2d at 135.

[106] *See id.*

[107] *See id.*

[108] *See id.*

[109] *See St. John's County*, 583 So. 2d at 640.

ordinance did not meet the "needs" prong of the dual rational nexus test as applied to Aberdeen Community.[110]

2. Benefits Prong

After analyzing the "needs" prong of the dual rational nexus test, the Florida Supreme Court considered whether the impact fees met the "benefits" prong of the dual rational nexus test.[111] Children are prohibited from living at Aberdeen Community, therefore, any impact fees collected from Aberdeen Community residents would not be spent for their direct benefit.[112] Therefore, the court determined that Volusia County was unable to satisfy the "benefits" prong of the dual rational nexus test.[113] Based on Volusia County's failure to satisfy the "needs" and "benefits" prongs of the dual rational nexus test, the court affirmed the trial court's holding which enjoined Volusia County from assessing and seeking to collect the impact fee against dwelling units constructed in Aberdeen Community, and ordered Volusia county to return to Aberdeen, L.P. the sum of $86,984.70, including interest.[114]

D. THE EXEMPTION FOR AGE-RESTRICTED COMMUNITIES DOES NOT CONVERT THE IMPACT FEE INTO A USER FEE, IN VIOLATION OF THE CONSTITUTIONAL GUARANTEE OF FREE PUBLIC SCHOOLS

The final issue before the Florida Supreme Court was Volusia County's claim that an exemption for age-restricted communities would convert the impact fees into user fees, in violation of the Florida constitutional guarantee of free public schools.[115] To address this issue, the court first cited precedent stating that user fees are fees "charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society,"[116] and that with respect to a user fee, "the party paying the fee has the option of not utilizing the governmental ser-

---

[110] *See Aberdeen,* 760 So. 2d at 137.

[111] *See id.* at 136.

[112] *See id.*

[113] *See id.*

[114] *See id.* at 136-137.

[115] *See Aberdeen,* 760 So. 2d at 136-137.

[116] *See id.* (quoting *State v. City of Port Orange*, 650 So. 2d 1, 3 (Fla. 1994)).

vice and thereby avoiding the charge."[117] The court further cited its holding from *St. John's County* in which it held that pursuant to article IX, section 1 of the Florida Constitution, counties are prohibited from imposing school user fees on new development.[118] To provide households with an exemption from school impact fees because they did not presently have children residing on the property would constitute an unconstitutional user fee.[119] However, in *St. John's County*, the court also specifically stated that it would not deem a school impact fee a prohibited user fee simply because adult-only facilities are exempt; "[w]e would not find objectionable a provision that exempted from the payment of an impact fee permits to build adult facilities in which, because of land use restrictions, minors could not reside."[120] The court then stated that the distinction between the facts of *St. John's County* and the instant case is that in *St. John's County* some units had the potential to generate students whereas Aberdeen Community is a deed-restricted adult community where there is no potential to generate students, and thus no impact warranting the imposition of fees.[121] Therefore, consistent with its earlier statement *in St. John's County,* that deed-restricted housing could be exempt, the court determined that exempting Aberdeen Community from paying public school impact fees does not convert the impact fee into an unconstitutional user fee.[122]

VI. COMPARATIVE ANALYSIS

Impact fees are land use regulations and their imposition on private property is governed by the Fifth Amendment Takings Clause; "private property [shall not] be taken for public use, without just compensation."[123] In cases involving land-

---

[117] *See id.*

[118] *See Aberdeen*, 760 So. 2d at 137 (quoting *St. John's County*, 583 So. 2d at 640)).

[119] *See St. John's County*, 583 So. 2d at 640.

[120] See *Aberdeen,* 760 So. 2d at 137 (quoting *St. John's County*, 583 So. 2d at 640 n.6.)).

[121] *See id.*

[122] *See id.*

[123] *See* U.S. CONST. AMEND. V. *See also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987).

owners' objections to local land use authorities' demand for the possessory dedication of real property in exchange for permit issuance, the United States Supreme Court has held that a use restriction on real property must be "reasonably necessary to the effectuation of a substantial public purpose" or that restriction constitutes a "taking" for which there must be just compensation.[124] The Court has further held that government agencies seeking to restrict or regulate land use must demonstrate that there is both an "essential nexus" between the demand and the burden to be alleviated,[125] and that the demand made by local government is "roughly proportional" in both nature and extent to the impact of the proposed development.[126]

The issue in Aberdeen involved a monetary exaction in the form of an impact fee rather than a possessory land dedication, however, in *Ehrlich v. City of Culver City,*[127] the California Supreme Court applied the Nollan-Dolan "essential nexus" and "rough proportionality" test to determine whether a special, discretionary permit condition imposed by local government on development by an individual property owner, was in fact a "taking" when the permit condition was in the form of a monetary exaction rather than a possessory land dedication.[128]

In *Ehrlich*, the plaintiff acquired a vacant lot and Culver City granted his request to rezone the property to allow him to develop the land for private recreational use.[129] Plaintiff built and operated a private sports complex for several years until the business began to fail.[130] Plaintiff applied to the City for a change in land use in order to construct an office building on the site.[131] Plaintiff's request was denied and he ultimately closed his sports facility due to financial losses.[132] Plaintiff again applied to the City for a zoning change, this

---

[124] *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978).

[125] *See Nollan,* 483 U.S. at 837.

[126] *See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

[127] 911 P.2d 429 (Cal. 1996).

[128] *See Ehrlich*, 911 P.2d at 433.

[129] *See id.* at 434.

[130] *See id.* at 435.

[131] *See id.*

[132] *See Ehrlich,* 911 P.2d at 435.

time to allow construction of a condominium complex.[133] The City Council finally approved plaintiff's permit application conditioned upon his payment of a $280,000.00 recreation fee.[134] The City claimed that this fee would compensate the City for the lost public recreation facility caused by plaintiff's sports complex closure.[135] Plaintiff agreed to pay the recreation fee in exchange for his permits but retained the right to challenge the fee as an unconstitutional taking in violation of the Fifth Amendment.[136] The California Supreme Court held that the United States Supreme Court's opinions in *Nollan* and *Dolan* not only apply to possessory dedication of real property, but also when local government seeks to exact a monetary fee as a condition of development permit issuance.[137]

While the United States Supreme Court has only applied the *Dolan* rough-proportionality test to cases involving land use dedications demanded as conditions of development,[138] *Ehrlich* provides a clear basis for predicting how the California Supreme Court would decide a case such as *Aberdeen*. In light of its expansion of the federal constitutional takings guideposts of the *Nollan-Dolan* test to a monetary exaction in *Ehrlich*, the California Supreme Court would likely have come to the same conclusion as the Florida Supreme Court in *Aberdeen* by finding that the exaction of a public school impact fee was invalid when imposed upon a particular development that did not create the need for increased public school facilities.

There is also a striking similarity between the California Supreme Court's *Nollan-Dolan* analysis and the current parameters of the dual rational nexus test as applied by the Florida Supreme Court in *Aberdeen*.[139] For example, *Nollan* requires an "essential nexus" between the demand and the

---

[133] *See id.*

[134] *See id.* In addition to the recreation fee, pursuant to municipal ordinances, plaintiff was also required to pay $33,200.00 under the City's "art in public places" program, and a $30,000.00 in-lieu "parkland" fee to provide for local parks and recreational facilities to serve the residents of his condominium development. *See id.*

[135] *See id.*

[136] *See id.*

[137] *See Ehrlich*, 911 P.2d at 859.

[138] *See City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702 (1999).

[139] *See* Brief Amicus Curiae of Pacific Legal Foundation in Support of Appellee Aberdeen at Ormond Beach at 13, *Aberdeen,* (No. 97-31544).

burden to be alleviated.[140] Similarly, 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."[141] If the California Supreme Court were to address the facts of *Aberdeen* under a *Nollan* analysis, it would likely find that the fee fails under *Nollan* because there is no nexus between Volusia County's demand for public school impact fees and a development whose residents do not place any burden upon the public school system.[142] Likewise, under the Florida Supreme Court's dual rational nexus analysis the pubic school impact fee failed the first prong of the test because there is no "nexus" between the demand for fees from residents in an exclusively senior community who will never affect pubic school enrollment, and the expansion of the public school system in Volusia County.

Furthermore, if the California Supreme Court were to apply the *Dolan* prong of the test to the facts in *Aberdeen*, the fee would fail the test because it is not sufficient for Volusia County to show that the fee imposed is plausibly related to legitimate regulatory ends, Volusia County would have to "demonstrate a factually sustainable proportionality between the effects of a proposed land use and a given exaction."[143] This would require Volusia County to make an "*individualized* determination that the required dedication is related both in nature and extent to the impact of the proposed development."[144] Therefore, under *Dolan*, the public school impact fee would fail the test because an individualized examination

---

[140] *See Nollan*, 483 U.S. at 834. In *Nollan*, the California Coastal Commission conditioned their consent to Mr. Nollan's building permit request upon his consent to convey a public pedestrian easement along the beachfront portion of his property. *See id.* The Supreme Court held that although the easement was a "good idea," there was no nexus between the condition imposed and the permit requested. *See id.* at 837.

[141] *See Hollywood*, 431 So. 2d at 611-612.

[142] *See Aberdeen,* 760 So. 2d at 136.

[143] *See Dolan*, 512 U.S. at 391. In *Dolan*, the City of Tigard granted Ms. Dolan's request for a building permit upon the condition that she dedicate a portion of her lot to the city as a greenway, and a fifteen foot strip of her land as a pedestrian/bicycle pathway. *See id.* at 379-380. The Supreme Court held that even though an essential nexus existed between a legitimate state interest and the permit conditions, the City could not show a rough proportionality between the exactions and the projected impact of Ms. Dolan's development. *See id.* at 395.

[144] *See Ehrlich*, 911 P.2d at 446-447 (quoting *Dolan*, 512 U.S. at 391).

of the imposition of a public school impact fee upon senior residents at Aberdeen Community would reveal that, as applied, the fee is not even plausibly related to Volusia County's expansion of its public school system because the development being charged has absolutely no impact at all upon the public school system.[145] This parallels the Florida Supreme Court's application of the second prong of the dual rational nexus test which requires a "rational nexus, between the funds collected and the benefits accruing" to the property.[146] As applied to Aberdeen Community, the Florida Supreme Court found that the public school impact fee failed the second prong of the dual rational nexus test because Volusia County does not spend any of the impact fees exacted for the benefit of Aberdeen Community residents.[147]

Although the California Supreme Court observed in *Ehrlich* that "it is not at all clear that the rationale (and heightened standard of scrutiny) of *Nollan* and *Dolan* applies to cases in which the exaction takes the form of a generally applicable development fee or assessment,"[148] this court has not yet expressed an opinion as to whether it would apply the *Nollan-Dolan* test when a generally applicable fee is constitutionally challenged with respect to a specific property owner. Given the parallels between the reasoning of a *Nollan-Dolan* analysis and the dual rational nexus test, if the California Supreme Court were faced with the facts of *Aberdeen*, it would probably find in favor of Aberdeen, L.P. as did the Florida Supreme Court.

VII. CONCLUSION

The court's decision in *Volusia County v. Aberdeen*, in conjunction with its decision in *Collier County* one year prior, provide a clear indication that the current members of the Florida Supreme Court comprise a fiscally conservative bench. Until these cases were decided, the court continued to relax the rational nexus requirement in a series of special assess-

---

[145] *See id.*

[146] *See Hollywood*, 431 So. 2d at 611-612.

[147] *See Aberdeen*, 760 So. 2d at 136.

[148] *See Ehrlich*, 911 P.2d at 447.

ment decisions.[149] This relaxation allowed local governments to effectively levy unauthorized taxes in the guise of fees. The court's current trend will hopefully continue to provide Florida citizens with judicial protection from local government when it seeks to utilize development impact fees to generate additional revenue to support governmental services in violation of federal constitutional principles.

*Shari Cruse**

---

[149] *See infra* notes 24-45 and accompanying text.

* J.D. Candidate 2002, Golden Gate University, School of Law; B.A. Behavioral Science, The University of Chicago; M.S.T., Elementary Education, The University of Chicago. I would like to thank my editor Patricia Caldwell for her patience and assistance, Professor Roger Bernhardt for guiding me with insights and information I would not have discovered on my own, and Frank D. Upchurch, III. for providing me with invaluable research materials. I would also like to thank my husband, Bryce Cruse, and my mother Yvonne Stribling, whose personal sacrifices and support have made it possible for me to attend law school and publish this article.