IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

55 WEST ON THE ESPLANADE, JV,
a Florida limited partnership, and
PARAMOUNT LAKE EOLA, L.P.,
a foreign limited partnership,

CASE NO.: 2007-CA-9009-O
WRIT NO.: 07 - 47

Petitioners,

vs.

ORANGE COUNTY FLORIDA,

Respondent.
_____/

On a Petition for a Writ of Certiorari.

Janet M. Courtney, Esq.
for the Petitioner.

Joel D. Presnell, Esq.
for the Respondent.

Gregory T. Stewart, Esq.
for Amicus Curiae,
Orange County School District.

Before G. ADAMS, WATTLES, AND LAUTEN, JJ.

PER CURIAM.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

Petitioners, 55 WEST ON THE ESPLANADE, JV ("55 West") and PARAMOUNT LAKE EOLA, L.P. ("Paramount") (collectively "Petitioners" or "Developments"), seek certiorari review of the decisions of the Orange County Board of County Commissioners ("Board") denying their applications for calculation of an alternative school impact fee. This

Court has jurisdiction. Fla. R. App. P. 9.030(c)(3); 9.100. We dispense with oral argument, Fla. R. App. P. 9.320, and deny the Developments' Petition for a Writ of Certiorari.

II. FACTS

The Petitioners are two mixed-use developments, each of which contain more than three hundred condominium units and are located in downtown Orlando.

Orange County ("County" or "Respondent") imposed school impact fees[1] of $1,381,941 upon Paramount and $1,191,591 on 55 West. These charges were calculated at the rates established in the Orange County Code ("School Impact Fee Ordinance" or "Ordinance"), which assessed school impact fees at $7,000 per dwelling unit for a single family detached house; $3,807 per dwelling unit for multi-family structures and $4,104 per dwelling unit for mobile homes. The calculation of these fees was based upon the findings of a school impact fee study which had been adopted by the Board.

The Developments paid these fees under protest and embarked upon the process of seeking an alternative fee as authorized by the School Impact Fee Ordinance.

Section 23-144 of the Orange County Code provides that:

> (a) In the event an applicant believes that the impact to the school system necessitated by residential construction is less than the fee established in section 23-141, such applicant may, prior to the

[1] "[L]ocal governments have no other authority to levy taxes, other than ad valorem taxes, except as provided by general law." *Collier County v. State*, 733 So. 2d 1012, 1014 (Fla. 1999). Local governments rely upon impact fees as an alternative source of funding which may be established by local ordinance. Generally, impact fees are imposed on new development "to recoup or offset a proportionate share of public capital costs required to accommodate such development with necessary public facilities." Josephine W. Thomas, *Increasing the Homestead Tax Exemption: "Tax Relief" or Burden on Florida Homeowners and Local Governments?* 35 Stetson L. Rev. 509, 544 (2006). In the face of constitutional challenges to school impact fees, the Florida Supreme Court has upheld their use. *See St. Johns County v. Ne. Fla. Builders Ass'n, Inc*., 583 So. 2d 635 (Fla. 1991). "The use of impact fees has become an accepted method of paying for public improvements that must be constructed to serve new growth." *Id.* at 638.

> issuance of a building permit for such residential construction, submit a calculation of an alternative school impact fee. Consistent with the Florida case law requirements for a valid school impact fee and the mandate for the provision of a uniform system of free public school in Article IX, section 1, Florida Constitution, any determination of a lesser impact to the school system necessitated by residential construction under the alternative school impact fee calculation process provided in this subsection shall not be based on the projected or current use of the residential construction but shall solely be based on a consideration that the permanent physical characteristics or limitations of the dwelling units within the residential construction will generate less students initially and during their useful life than the student generation assumptions utilized in the impact fee study.
>
> (b) The alternative school impact fee calculation shall be calculated for that land use type analyzed on a countywide basis and based on data, information or assumptions contained in this article and impact fee study, or an independent source, provided that:
>
> > (1) The independent source is a generally accepted standard source of demographic and education planning; or
> >
> > (2) The independent source is a local study supported by a database adequate for the conclusion contained in such study and performed pursuant to a generally accepted methodology of education planning.

Orange County Code §23 - 144(a),(b) (2005).

Petitioners retained the services of Kirk Sorenson, Ph. D., an "Economist and Fiscal and Planning Consultant," to prepare and submit a study in support of their alternative fee impact applications.[2] Mr. Sorenson's study concluded that an appropriate alternative impact fee for both projects would be $922 per multi-family residential unit rather than $3,807 established by the School Impact Fee Ordinance.

[2] Petitioners' separate applications relied upon the same study by Mr. Sorenson and his firm, Government Solutions.

Under the procedures set forth in the Ordinance, the applications were reviewed by the Superintendent of Orange County Public Schools ("Superintendent"), who recommended that the County deny the respective applications for alternative impact fees.

Next, the County Administrator, after consulting with the Superintendent, considered the applications and the Alternative Impact Fee Study of each Petitioner and sent letters to each Development rejecting its proposed alternative school impact fee.

Each Development appealed this determination to the Orange County Development Review Committee ("DRC") which held a hearing on November 1, 2006. The DRC considered the testimony of Petitioners' expert, Mr. Sorenson, as well as that of Mr. Stan Gerberer, an economist and an expert for the Orange County School District ("School District") and also heard the arguments of counsel for Petitioners and the School District. The DRC voted unanimously to reject the applications.

Having exhausted the requisite preliminary steps in attempting to secure an alterative school impact fee, Petitioners appealed to the Board. Like the DRC, the Board also considered the testimony of Mr. Sorenson and Mr. Gerberer as well as the legal argument of counsel. Like the DRC, the Board voted unanimously to reject the applications for an alternative school impact fee. Petitioners then commenced the instant proceedings.

III. STANDARD OF REVIEW

The parties agree, and are correct, that we review the Board's decision to deny the alterative impact fee to determine whether procedural due process was accorded, whether the essential requirements of the law were observed and whether that decision was supported by competent, substantial evidence. *Orange County v. Butler*, 877 So. 2d 810, 812 (Fla. 5th DCA 2004). Petitioners add, however, that this determination is "to be made by this Court employing

'strict judicial scrutiny.'" (Pet'rs' Reply Br. 18) *(citing Brevard County v . Snyder*, 627 So. 2d 469 (Fla. 1993)). The *Snyder* case, upon which Petitioners rely, emphasizes, however, that "the review by 'strict scrutiny' in zoning cases appears to be the same as that given in the review of other quasi-judicial decisions." *Brevard County v . Snyder*, 627 So. 2d 469, 475 (Fla. 1993). Although they embrace the *Snyder* standard, the Developments fail to acknowledge the limited scope of the term "strict scrutiny" employed in that case, as compared with its use in constitutional analysis. The "strict scrutiny" of *Snyder* "must be distinguished from the type of strict scrutiny review afforded in some constitutional cases." *Id.* Thus, the "strict scrutiny" applicable here is not an elevated standard as Petitioners suggest and we apply the familiar formulation of our standard of review set forth in *Orange County v. Butler*, 877 So. 2d at 812.

IV. PARTIES' ARGUMENTS AND DISCUSSION

Pursuant to the Orange County Code, the calculation of an alternative school impact fee "shall be solely based on a consideration that the permanent physical characteristics or limitations of the dwelling units within the residential construction will generate less students initially and during their useful life than the student generation assumptions utilized in the impact fee study." Orange County Code §23-144(a) (2005).

The Orange County Code also provides definitions of key terms within this section concerning calculation of alternative school impact fees. As used in the School Impact Fee Ordinance, "dwelling unit" means "a building or a portion thereof, which is designed for residential occupancy consisting of one (1) or more rooms which are arranged, designed or used as living quarters for one (1) family . . . ."[3] Orange County Code §23-121 (2005).

[3] Excluded from the Ordinance's definition of the term "dwelling unit" are time share estates or licenses, student housing and "housing for older persons."

Petitioners address their basis for calculating an alternative school impact fee and claim that

> [t]he permanent physical characteristics of the projects consist of their location in the downtown Orlando high-density urban core with the ability to develop up to 200 dwelling units per acre in density as a matter of right; that they are high rises consisting of a 32-story tower and 17-story tower, respectively; that the units are accessed by elevators as opposed to stairwells; that the projects have associated parking garages/structured parking; and the lack of playgrounds and child-friendly recreational amenities such as tot lots.

(Am. Pet. Cert. 23-24.)

Petitioners argue that the 1995 School Impact Fee Ordinance used the term "physical characteristics of the structure" as an "alternative to creating a separate category for high-density, high rise, multi-family units. . . ." (Am. Pet. Cert. 24.) According to Petitioners, "although [the County] would not create a separate category for this designation, it would provide developers [of high-rise, high-density, multi-family buildings] an opportunity to show on a case-by-case basis that the permanent physical characteristics of the structure create a lower impact." (Am. Pet. Cert. 24.) This conclusion is based on the testimony of Petitioners' expert, Mr. Sorenson, who told the Board that several years earlier he had suggested to the School District and County Commissioners the adoption of a category for high-rises but "Orange County didn't want to establish that as a matter of policy" but "to be fair," the County agreed to permit applicants seeking an alternative school impact fee to "show that there are permanent physical characteristics of the structure which create a lower impact. . . ." (Pet. Cert. App. Ex. P. at 19.)

The Board counters that

> characteristics of the projects that were emphasized by the Petitioners (high-rise towers, elevators, associated structure parking, and lack of playgrounds or tot lots) are in actuality

> not "permanent physical characteristics or limitations *of the dwelling units*," paraphrasing from Section 23-144(a). (Emphasis added.) Instead, they are permanent physical characteristics or limitations of the parts of the buildings outside the dwelling units.

(Resp't's Resp. Pet. Cert. 20).

In reply, Petitioners characterize the Board's position as "a semantical attempt to avoid approval of an alternative fee." (Pet'rs' Reply Br. 12.) It is only by considering the physical characteristics of projects as a whole, Petitioners urge, that the Board can properly evaluate the differing impacts of distinct land use types including high-rise, high-density, such as 55 West and Paramount. Petitioners charge that "[b]y refusing to acknowledge the physical characteristics of the Petitioners' projects, the County ignores the plain meaning of the Impact Fee Ordinance and violates the essential requirements of the law." (Pet'rs' Reply Br. 13.)

We disagree with the Petitioners.

It is our duty to give effect to the language used by the local governing body which adopted the ordinance. *See Baker v. State*, 636 So. 2d 1342, 1343 (Fla. 1994).

> It is well established that construction and interpretation of a statute are unnecessary when it is unambiguous. *State v. Egan*, 287 So. 2d 1 (Fla.1973). "Whether the law be expressed in general or limited terms, the Legislature should be held to mean what they [sic] have plainly expressed, and consequently no room is left for construction." *Van Pelt v. Hilliard*, 78 So. 693, 695 (Fla. 1918). The courts "are obliged to give effect to the language the Legislature has used." *Cobb v. Maldonado*, 451 So. 2d 482, 483 (Fla. 4th DCA 1984). "Courts have then no power to set it aside or evade its operation . . . . If it has been passed improvidently the responsibility is with the Legislature and not with the courts." *Van Pelt*, 78 So. at 695. The proper remedy for a harsh law will not be found through construction or interpretation; it rests only in amendment or repeal.

Id.[4]

[4] "Municipal ordinances are subject to the same rules of construction as are state

When construing a statute or ordinance, courts strive to effectuate the intent of the legislature or governing body. *See, e.g., Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006) ("We endeavor to construe statutes to effectuate the intent of the Legislature."). To determine that intent, we look first to the ordinance's plain language. *Id.* "[W]hen the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." *Id.* (*quoting Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla.2005)).

Here, the School Impact Fee Ordinance clearly provides that alternative fees are to be based upon "a consideration that the permanent physical characteristics of the *dwelling units within* the residential construction" will generate fewer students than assumed by the prevailing impact fee study. *See* Orange County Code, §23-144(a) (2005) (emphasis added). Petitioners, however, equate the term "physical characteristics of the dwelling units" with "physical characteristic of the project." (Pet'rs' Reply Br. 12-13.)

We note that the very next section of the Ordinance *does* refer to "the permanent physical characteristics or limitations *of the specific residential development proposed*." Orange County Code, §23-145(b) (2005) (emphasis added). "The legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended." *Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006) (*quoting State v. Mark Marks, P.A.*, 698 So. 2d 533, 541 (Fla. 1997)). "When the legislature has used a term . . . in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded." *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995). Where, in

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statutes." *Rinker Materials Corp. v. City of No. Miami*, 286 So. 2d 552, 553 (Fla. 1973). Thus,

succeeding sections of the same ordinance, Orange County uses the distinct terms "dwelling units" and "residential development," we can only conclude that these terms are not synonymous. Further, the School Impact Fee Ordinance, itself, defines "dwelling unit" as "a building, or a portion thereof, which is designed for residential occupancy, consisting of one (1) or more rooms arranged, designed or used as living quarters for one (1) family only," but excluding time-shares, student housing or senior housing. *See* Orange County Code §23-121 (2005). We find nothing within this definition inclusive of elevators, parking spaces, playgrounds or tot lots - the "physical characteristics or limitations" highlighted by Petitioners.

In sum, while Petitioners have analyzed several physical characteristics and limitations which they contend depress the number of school age children generated in their developments, these were not "brick and mortar" features "*of the dwelling units*." We reject, therefore, Petitioners' contention that our holding "ignores the plain meaning of the Impact Fee Ordinance and violates the essential requirements of the law." (Pet'rs' Reply Br. 13.) To the contrary, we adhere to the plain, unambiguous language of the Ordinance and find that Petitioners stray from its express terms which require that proposed alternative impact fees be based on physical characteristics or limitations "of the dwelling units." We decline Petitioners' invitation to accord to the term "dwelling units" the same meaning as "project" or "construction." Our conclusion is based upon the plain and differing meaning of these terms, as actually utilized in the ordinance and as employed in common language.[5]

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the cited cases concerning statutory construction are also applicable to ordinances.

[5] Petitioners argue that the reference in the ordinance to characteristics or limitations of the "dwelling units" is the equivalent of characteristics and limitations of the building. (Pet'rs' Reply Br. 12.) The Ordinance, however defines "building" separately from and differently than "dwelling unit." *See* Orange County Code §12-121 (2005).

We conclude that Petitioners' applications for alternative school impact fees did not meet the requirements of the Ordinance. Therefore, the Board's decisions to deny those applications were supported by competent, substantial evidence, due process was accorded all parties and the essential requirements of the law were observed.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari of the Petitioners, 55 West on the Esplanade, JV, a Florida limited partnership, and Paramount Lake Eola, L.P., a foreign limited partnership, be and hereby is **DENIED.**

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this __3rd_____ day of ____February_____, 2010.

__/S/_____
GAIL A. ADAMS
Circuit Judge

_/S/_____
BOB WATTLES
Circuit Judge

_/S/_____
FREDERICK J. LAUTEN
Circuit Judge

Lauten, J., Concurs.

If Orange County wishes to encourage high density, mixed use development in an urban core rather than residential sprawl throughout the county, then considering the overall physical characteristics of a development rather than just the individual unit characteristics when determining the appropriateness of an alternative impact fee makes sense. For example, 55 West and Paramount both lack playgrounds and other child friendly amenities, are both located in the midst of the urban core in an environment unlikely to attract families with school age children at its primary residents. But the Orange County Code as currently written limits the court's review of the denial of an alternative impact fee to a consideration that the dwelling units in the development will generate fewer students then the general assumptions used in the impact fee study. Thus the criteria for review is limited. The criteria also provides little incentive, in terms of the impact fee a developer pays, for high density, mixed use development of the kind at issue here.

But the decision to encourage high density, mixed use urban development is a policy decision for the Board of County Commissioners and that issue appropriately belongs to the elected officials of this county and not to the court. The language of the code as currently written supports the Board's decision to deny the alternative impact fee, and thus I concur in the decision of my colleagues.

_/S/_____
FREDERICK J. LAUTEN
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail on this __3rd___ day of _____February_____, 2010, to the following:

1) Janet M. Courtney, Esquire, LOWNDES, DROSDICK, DOSTER, KANTOR & REED, P.A., 215 North Lake Eola Drive, Post Office Box 2809, Orlando, Florida 32802;

2) Joel D. Prinsell, Esquire, DEPUTY COUNTY COUNSEL, Orange County Administration Center, P.O. Box 1393, Orlando, Florida 32802-1393; and

3) Gregory T. Stewart, Esquire, NABORS, GIBLIN & NICKERSON, P.A., 1500 Mahan Drive, Suite 200, Tallahassee, Florida 32308.

_/S/_____
Judicial Assistant