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Committee on Community Affairs

Senator Michael Bennett, Chair

CODIFICATION OF THE IMPOSITION OF IMPACT FEES BY LOCAL GOVERNMENTS

SUMMARY

During the 2004 Legislative Session, legislation was filed to provide for codification of case law with regard to the imposition of impact fees. This report provides an overview of the current status of the law as it relates to impact fees, and profiles impact fee revenues.

After consulting with the various stakeholders, we conclude that there is no consensus as to whether to codify case law with regard to impact fees. Local government representatives indicated that there is no need for codification, as they have the necessary authority to impose impact fees and court decisions provide sufficient guidance as to how such fees may be imposed. While the building interests generally support codification, recent litigation suggest that it is the method of or data used in the calculation of impact fees that presents the most significant problems for their industry. Consequently, any codification of authority should also address the process of imposing the fee.

BACKGROUND

Local governments impose impact fees, as a condition of development approval, to fund public facilities that are necessitated by development projects. These fees are assessed against new development or a change in use that results in an increased need for public facilities. Section 163.3202(3), F.S., encourages:

“the use of innovative land development regulations which include provisions such as transfer of development rights, incentive and inclusionary zoning, planned-unit development, impact fees, and performance zoning.”

Impact fees are imposed for a variety of facilities, including transportation; parks and recreation; police and corrections; fire and emergency management; libraries; schools; and water and sewer. The concurrency provisions of ch. 163, F.S, require that

public facilities be in place concurrent with the impacts of development. In local fiscal year ending September 30, 2002, forty of Florida’s 67 counties imposed impact fees and collected \$466,571,712 (see TABLE 1 and 3). One hundred fifty-six of Florida’s 405 municipalities imposed impact fees and collected \$133,132,215 (see TABLE 2 and 4). An estimated 19 counties levy school impact fees on behalf of school districts in their county (see TABLE 6).

METHODOLOGY

Staff of the Senate Committee on Community Affairs reviewed the current policies and relevant case law relating to impact fees, collected data profiling impact fee revenues, and consulted with the various stakeholders to obtain their perspective on the codification issue.

FINDINGS

Home Rule Fee Authority

The Florida Constitution grants local governments broad home rule authority. Specifically, non-charter county governments may exercise those powers of self-government that are provided by general or special law.¹ Those counties operating under a county charter have all powers of self-government not inconsistent with general law, or special law approved by the vote of the electors.² Likewise, municipalities have those governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform its functions and provide services, and exercise any power for municipal purposes except as otherwise provided by law.³ Section 125.01, F.S., enumerates the powers and duties of all county governments, unless preempted on a particular subject by general or special law. Those powers include the provision of fire protection, ambulance services, parks and recreation, libraries, museums and other cultural facilities, waste

¹ Art. VIII, § 1(f), Fla. Const.

² Art. VIII, § 1(g), Fla. Const.

³ Art. VIII, § 2(b), Fla. Const. Also See s. 166.021, F.S.

and sewage collection and disposal, and water and alternative water supplies.

Given these constitutional and statutory powers, local governments may use a variety of revenue sources to fund services and improvements without express statutory authorization.⁴ Special assessments, impact fees, franchise fees, and user fees or service charges are examples of these home rule revenue sources.⁵

Statutory Provisions Addressing Impact Fees⁶

Impact fees are a unique product of local governments' home rule powers, and the development of such fees has occurred in Florida by home rule ordinance rather than by direct statutory authorization or mandate. Therefore, the characteristics and limitations of impact fees are found in Florida case law rather than statute.⁷

However, there are several statutory provisions that affect the imposition of certain impact fees. Section 191.009(4), F.S., provides that an independent special fire control district that has been authorized to impose an impact fee by special act or general law may establish a schedule of impact fees, in compliance with standards set by law for new construction, to pay for the cost of new facilities and construction. These fees must be kept separate from the other revenues of the district and used exclusively to acquire, purchase, or

⁴ The exercise of home rule powers by local governments is constrained by whether an inconsistent provision or outright prohibition exists in the constitution, general law, or special law regarding the power at issue. Counties and municipalities cannot levy a tax without express statutory authorization because the constitution specifically prevents them from doing so. [Art. VII, s. 1(a)] However, local governments may levy special assessments and a variety of fees absent any general law prohibition provided such home rule source meets the relevant legal sufficiency tests.

⁵ For a catalogue of such revenue sources, see the most recent editions of the Legislative Committee on Governmental Relations *Local Government Financial Information Handbook* and the *Florida Tax Handbook* published jointly by the Florida Senate Finance and Taxation Committee, the House of Representatives Committee on Fiscal Policy and Resources, the Office of Economic and Demographic Research, and the Florida Department of Revenue.

⁶ Much of this information was previously published in the Senate Bill Analysis for CS/SB 2874, 2004 Legislative Session.

⁷ This information is adapted from the Legislative Committee on Intergovernmental Relations (LCIR) publication *Local Government Financial Information Handbook, 2002 Edition*, p. 25.

construct the facilities needed to provide fire protection and emergency services to new construction. The district's board is required to maintain adequate records to ensure the fees are only expended for permissible facilities and equipment.

Section 380.06, F.S., governs developments of regional impact (DRI).⁸ If the development order for a DRI requires a developer to contribute land or a public facility, to construct or expand such facility, or to pay for the acquisition or expansion or construction, and the developer is also subject to an impact fee imposed by local ordinance, the local government must establish and implement a procedure for the developer to receive a credit of the development order fee towards the impact fee for the same need. Also, if the local government imposes or increases an impact fee after the development order for a DRI has been issued, the developer may petition the local government for a credit for any contribution required by the development order towards the impact fee for the same need. This section authorizes the local government and a developer to enter into "capital contribution front-ending agreements" as part of a development order for a DRI that allows a developer or his or her successor to be reimbursed for voluntary contributions paid in excess of his or her fair share.

Court Decisions and Impact Fees⁹

There have been a number of court decisions that address impact fees.¹⁰ In *Hollywood, Inc. v. Broward County*,¹¹ the Fourth District Court of Appeal addressed the validity of a county ordinance that required a developer, as a condition of plat approval, to dedicate land or pay a fee for the expansion of the county level park system to accommodate the new residents of the proposed development. The court found that a reasonable dedication or impact fee

⁸ Section 380.06, F.S., governs the DRI program and establishes the basic process for DRI review. The DRI program is a process to provide state and regional review of local land use decisions regarding large developments that, because of their character, magnitude, or location, would have a substantial effect on the health, safety, or welfare of the citizens of more than one county.

⁹ Much of this information was previously published in the Senate Bill Analysis for CS/SB 2874, 2004 Legislative Session.

¹⁰ See, e.g., *Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976); *Home Builders and Contractors' Association v. Board of County Commissioners of Palm Beach County*, 446 So. 2d 140 (Fla. 4th DCA 1983).

¹¹ 431 So. 2d 606 (Fla. 4th DCA 1983).

requirement is permissible if it offsets needs that are sufficiently attributable to the new development and the fees collected are adequately earmarked for the benefit of the residents of the new development.¹² In order to show the impact fee meets those requirements, the local government must demonstrate a rational nexus between the need for additional public facilities and the proposed development. In addition, the local government must show the funds are earmarked for the provision of public facilities to benefit the new residents.¹³ Because the ordinance at issue satisfied these requirements, the court affirmed the circuit court's validation of the ordinance.¹⁴

The Florida Supreme Court addressed the issue of impact fees for school facilities in *St. Johns County v. Northeast Builders Association, Inc.*¹⁵ The ordinance at issue conditioned the issuance of a new building permit on the payment of an impact fee. Those fees that were collected were placed in a trust fund for the school board to expend solely "to acquire, construct, expand and equip the educational sites and educational capital facilities necessitated by new development."¹⁶ Also, the ordinance provided for a system of credits to fee-payers for land contributions or the construction of educational facilities. This ordinance required funds not expended within six years to be returned, along with interest on those funds, to the current landowner upon application.¹⁷

The court applied the dual rational nexus test and found the county met the first prong of the test, but not the second. The builders in *Northeast Builders Association, Inc.* argued that many of the residences in the new development would have no impact on the public school system. The court found the county's determination that every 100 residential units would result in the addition of forty-four students in the public school system was sufficient and, therefore, concluded the first prong of the test was satisfied. However, the court found that the ordinance did not restrict the use of the funds to sufficiently ensure that such fees would be spent to the benefit of those who paid the fees.¹⁸

¹² See *id.* at 611.

¹³ See *id.* at 611-12.

¹⁴ See *id.* at 614.

¹⁵ 583 So. 2d 635 (Fla. 1991).

¹⁶ See *id.* at 637, *citing*, St. Johns County, Fla., Ordinance 87-60, § 10(B) (Oct. 20, 1987).

¹⁷ See *id.* at 637.

¹⁸ See *id.* at 639. Because the St. Johns County ordinance was not effective within a municipality absent an interlocal agreement between the county and municipality, there was the possibility that impact fees could be used to

Recent decisions have further clarified the extent to which impact fees may be imposed. In *Volusia County v. Aberdeen at Ormond Beach*, the Florida Supreme Court ruled that when residential development has no potential to increase school enrollment, public school impact fees may not be imposed.¹⁹ In *City of Zephyrhills v. Wood*, the district court upheld an impact fee on a recently purchased and renovated building, finding that structural changes had corresponding impacts on the city's water and sewer system.²⁰

As developed under case law, a legally sufficient impact fee has the following characteristics:

- The fee is levied on new development, the expansion of existing development, or a change in land use that requires additional capacity for public facilities;
- The fee represents a proportional share of the cost of public facilities needed to serve new development;
- The fee is earmarked and expended for the benefit of those in the new development who have paid the fee;
- The fee is a one-time charge, although collection may be spread over a period of time;
- The fee is earmarked for capital outlay only and is not expended for operating costs; and
- The fee-payers receive credit for the contributions towards the cost of the increased capacity for public facilities.

LCIR Impact Fee Data

Local governments are required to submit their annual financial reports to the Department of Financial Services.²¹ The Legislative Committee on Intergovernmental Relations (LCIR) compiles and maintains this information in a variety of formats on its website.²²

The LCIR reports that forty counties imposed impact fees in FY 2001/02, collecting \$466,571,712 (see TABLE 1 & 3). In addition, 156 municipalities levying impact fees collected \$133,132,215 in FY 2001/02, with thirty-one cities collecting more than \$1

build a school for development within a municipality that is not subject to the impact fee.

¹⁹ 760 So. 2d 126 (Fla. 2000), at 134. Volusia County had imposed a school impact fee on a mobile home park for persons aged 55 and older.

²⁰ 831 So.2d 233 (Fla. 2d DCA 2002)

²¹ Section 218.32(1), F.S.

²² <http://fcn.state.fl.us/acir/>

million (See TABLE 2 & 4). The largest category of impact fees is transportation for counties, and physical environment for municipalities (see TABLE 5). An estimated 19 counties levy school impact fees on behalf of school districts in their county (see TABLE 6).

TABLE 1

**Change in Total County Impact Fee Revenue:
FY 1992/93 to 2001/02**

Fiscal Year	# of Counties Levying Fee	Revenue
FY 1993	28	\$113,595,514
FY 1994	26	142,835,074
FY 1995	34	157,598,994
FY 1996	34	160,396,998
FY 1997	34	196,634,639
FY 1998	35	214,357,753
FY 1999	36	262,544,090
FY 2000	34	324,233,477
FY 2001	37	385,440,873
FY 2002	40	466,571,712

Source: Florida Legislative Committee on Intergovernmental Relations, <http://fcn.state.fl.us/lcir/data/impfeeco.xls>
Compiled from information submitted by counties to the Department of Financial Services. These totals do not include impact fees levied by counties on behalf of school districts within their respective counties.

TABLE 2

**Change in Total Municipal Impact Fee Revenue:
FY 1992/93 to 2001/02**

Fiscal Year	Revenue
FY 1993	\$ 65,309,045
FY 1994	70,215,815
FY 1995	46,723,612
FY 1996	41,191,660
FY 1997	57,600,001
FY 1999	73,655,715
FY 2000	102,323,355
FY 2001	120,531,903
FY 2002	133,132,215

Source: Florida Legislative Committee on Intergovernmental Relations, <http://fcn.state.fl.us/lcir/data/impfeeco.xls>
Compiled from information submitted by counties to the Department of Financial Services.

TABLE 3

**Reported County Impact Fee Revenue:
FY 01/02**

Bay	\$ 89,062
Brevard	4,471,475
Broward	6,724,000
Charlotte	2,648,121
Citrus	4,507,693
Collier	34,064,972
Columbia	3,047,912
Dixie	67,400
Flagler	1,916,158
Gilchrist	197,799
Hernando	6,210,115
Highlands	91,893
Hillsborough	20,927,467
Indian River	3,972,717
Jackson	24,934
Jefferson	1,039,160
Lafayette	450,413
Lake	11,415,061
Lee*	30,531,263
Leon	38,916
Manatee	1,453,157
Marion	9,080,631
Martin	7,088,066
Miami-Dade	27,392,433
Monroe	408,257
Nassau	1,487,389
Okeechobee	1,104,855
Orange	106,013,341
Osceola	5,302,685
Palm Beach*	80,487,172
Pasco	22,409,509
Pinellas	4,406,104
Saint Johns	3,863,206
Saint Lucie	2,096,614
Sarasota	26,250,570
Seminole	14,612,618
Sumter	102,810
Volusia	7,375,868
Wakulla	235,463
Walton	111,002

TOTAL (40 Counties) \$466,571,712

Source: Florida Legislative Committee on Intergovernmental Relations, <http://fcn.state.fl.us/lcir/data/impfeeco.xls>
Compiled from information submitted by counties to the Department of Financial Services. Except those counties designated with an asterisk (*), these totals do not include impact fees levied by counties on behalf of school districts within their respective counties.

* Staff of the Florida Association of Counties indicate that these totals include impact fees levied by counties on behalf of school districts within their respective jurisdictions.

TABLE 4

**Municipalities With Over \$1 Million in Revenue:
FY 2001/02**

Altamonte Springs (Seminole)	\$ 1,049,280
Apopka (Orange)	3,496,202
Boca Raton (Palm Beach)	4,069,067
Bradenton (Manatee)	2,501,761
Cape Coral (Lee)	5,635,051
Clermont (Lake)	6,298,485
Deltona (Volusia)	4,652,331
Fort Myers (Lee)	2,116,643
Gulf Breeze (Santa Rosa)	1,242,841
Jennings (Hamilton)	1,289,000
Jupiter (Palm Beach)	1,218,948
Lakeland (Polk)	7,910,732
Lynn Haven (Bay)	1,026,860
Melbourne (Brevard)	2,619,811
Miami Beach (Miami-Dade)	1,490,845
Miramar (Broward)	3,341,661
North Port (Sarasota)	3,167,426
Ocoee (Orange)	1,285,441
Oldsmar (Pinellas)	1,514,031
Orlando (Orange)	13,383,499
Ormond Beach (Volusia)	3,082,000
Port St. Lucie (St. Lucie)	3,664,875
Royal Palm Beach (Palm Beach)	7,003,788
St. Petersburg (Pinellas)	2,290,330
Sanford (Seminole)	1,830,857
Sebastian (Indian River)	1,030,674
Sunny Isles Beach (Miami-Dade)	2,151,972
Tampa (Hillsborough)	4,664,468
Tarpon Springs (Pinellas)	1,261,485
Wellington (Palm Beach)	1,243,927
Winter Garden (Orange)	6,016,883

TOTAL Municipal Collections
(156 municipalities) \$ 133,132,215

Source: Florida Legislative Committee on Intergovernmental Relations, <http://fcn.state.fl.us/lcir/data/impfeemu.xls>
Compiled from information submitted by cities to the Department of Financial Services.

TABLE 5

**Impact Fee Revenue by Category:
FY 2001/02**

Category	County	Municipality
Public Safety	\$ 33,185,070	\$ 10,627,026
Physical Environment	128,437,719	62,181,647
Transportation	168,417,739	36,021,091
Economic Environment	1,205,485	63,077
Human Service	30,143,607	12,714
Culture & Recreation	47,168,550	14,247,402
Other	58,013,542	9,979,258
TOTAL	\$ 446,571,712	\$ 133,132,215

Source: Florida Legislative Committee on Intergovernmental Relations, <http://fcn.state.fl.us/lcir/data/impfeeco.xls>

Compiled from information submitted by counties to The Department of Financial Services.

TABLE 6

**School Impact Fees:
FY 2001/02**

County	Typical Fee*	Est. Total Revenues
Alachua (considering for 2005)		
Broward	\$ 1,620	\$ 11,876,079
Citrus	636	750,000
Collier	1,778	9,916,845
Hernando	2,406	261,906
Hillsborough	196	1,133,000
Lake	4,142	3,600,000
Lee	2,232	15,000,000
Manatee	2,500	*
Martin	973	1,132,756
Miami-Dade	2,448	20,000,000
Orange	2,828	23,517,149
Osceola	2,828	6,900,000
Palm Beach	1,260	11,163,479
Pasco	1,694	7,658,000
Polk	1,607	*
Saint Johns	729	1,800,630
Saint Lucie	800	1,392,000
Sarasota	***	*
Seminole	1,384	5,000,000
Volusia	1,139	3,524,307

* For typical 2,000 square foot, single-family detached house with 3 bedrooms.
** Imposed after FY 2001/02.
*** Not Available

Source: Florida Legislative Committee on Intergovernmental Relations, the Florida Home Builders Association, and the Florida School Board Association (Duncan Associates).

CS/SB 2874, 2004 Legislative Session

In the 2004 Legislative Session, Committee Substitute for Senate Bill (CS/SB) 2874 was filed to provide for codification of case law with regard to the imposition of impact fees. The CS proposed to codify case law with regard to the imposition of impact fees and authorize a local government to adopt an impact fee ordinance in accordance with the provisions of this act. It proposed to require certain record keeping procedures, specify that an impact fee ordinance must allow for credits against impact fees, and provide a process for refunding impact fees under certain circumstances. It proposed to allow an impact fee ordinance to provide for an optional appeals process to the local government of the amount of an impact fee or an interpretation of the fee, and to allow for voluntary binding arbitration. It did not repeal existing laws or ordinances, but required an impact fee ordinance that

does not comply with the act's provisions to do so by October 1, 2005.

Impact Fees in Other States²³

To date, local governments in thirty states levy some type of impact fee. Twenty-seven states impose the fees pursuant to enabling legislation. Tennessee and North Carolina authorize impact fees by special act for individual jurisdictions, while Florida counties and municipalities impose them under their home rule powers.

According to recent surveys, the average total impact fee per single-family dwelling in Florida was \$5,952. Four states had higher average fees: Maryland (\$8,128), Colorado (\$8,461), Oregon (\$9,820), and California (\$18,786).

Conclusion

Staff of the Senate Committee on Community Affairs consulted with the various stakeholders – local governments, the Florida Home Builders Association, and the Florida Association of Realtors - to obtain their perspective on the codification issue.

Local government representatives indicated that there is no need for codification, as they have the necessary authority to impose impact fees and court decisions provide sufficient guidance as to how such fees may be imposed. While the building interests generally support codification, recent litigation suggest that it is the method of or data used in the calculation of impact fees that presents the most significant problems for their industry. Consequently, any codification of authority should also address the process of imposing the fee.

RECOMMENDATIONS

As there is no consensus as to whether the authority to levy and the imposition parameters should be codified into the statutes, we have no recommendation to make on the issue.

²³ This information is taken from a recent presentation by Clancy Mullen, Director of Infrastructure Finance with Duncan Associates in Austin Texas. See *Florida and National Impact Fee Survey*, FAPA Conference, Gainesville, FL, October 14, 2004.