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IMPACT FEES

Statement of the Issue

Impact fees are enacted by local ordinance and require new development to pay for the cost of additional infrastructure attributable to the new development. Chapter 2009-49, L.O.F., creates a “preponderance of the evidence” standard of review placing the burden of proof on the local government to show that the imposition or amount of an impact fee meets the requirements of case law and s. 163.31801, F.S. There have been no challenges to impact fees to date under this new standard of review. Therefore, this issue brief gives an overview of the law as it applied to impact fees prior to the change in the burden of proof.

Discussion

Impact Fees

The Florida Constitution grants local governments broad home rule authority. Special assessments, impact fees, franchise fees, and user fees or service charges are examples of these home rule revenue sources.¹ Impact fees are enacted by local ordinance. These fees require total or partial payment to counties, municipalities, special districts, and school districts for the cost of additional infrastructure necessary as a result of new development. Impact fees are tailored to meet the infrastructure needs of new growth at the local level. As a result, impact fee calculations vary from jurisdiction to jurisdiction and from fee to fee. Impact fees also vary extensively depending on local costs, capacity needs, resources, and the local government’s determination to charge the full cost of the fee’s earmarked purposes.

There are several characteristics common to legally sufficient impact fees. The fee is levied on new development or new expansion of existing development. The fee is a one-time charge, although collection may be spread out over time. The fee is earmarked for capital outlay only; operating costs are excluded. The fee represents a proportional share of the cost of the facilities needed to serve the new development. To withstand legal challenge, the governing authority should adopt a properly drafted impact fee ordinance. Such ordinance should specifically earmark funds collected for use in acquiring capital facilities to benefit new residents.

Florida Impact Fee Review Task Force

In 2005, the Legislature created the Florida Impact Fee Review Task Force (Task Force). The 15-member Task Force was charged with surveying the current use of impact fees, reviewing current impact fee case law, and making recommendations as to whether statutory direction was necessary with respect to specific impact fee topics. The Task Force concluded that:

- Impact fees are a growing source of revenue for infrastructure in Florida;
- Local governments in Florida do not have adequate revenue generating resources with which to meet the demand for infrastructure within their jurisdictions;
- Without impact fees, Florida’s growth, vitality, and levels of service would be seriously compromised;

¹ For a catalogue of such revenue sources, see the most recent editions of the Legislative Committee on Intergovernmental 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.

- Impact fees are a revenue option for Florida’s local governments to meet the infrastructure needs of their residents;
- Because Florida comprises a wide variety of local governments – small and large, urban and rural, high growth and stable, built out and vacant land – each with diverse infrastructure needs, a uniform impact fee statute would not serve the state;
- Impact fees must remain flexible to address the infrastructure needs of the specific jurisdiction; and
- Statutory direction on impact fees is needed to address and clarify certain issues regarding impact fees.

The Task Force voted against recommending statutory guidance regarding the legal burden of proof for impact fee ordinance challenges.

Statutory Authority for Impact Fees

In 2006, the Legislature enacted s. 163.31801, F.S., to provide requirements and procedures to be followed by a county, municipality, or special district when it adopts an impact fee. By statute, an impact fee ordinance adopted by local government must, at a minimum, include the following elements:

- Require that the calculation of the impact fee be based on the most recent and localized data;
- Provide for accounting and reporting of impact fee collections and expenditures; if a local government imposes an impact fee to address its infrastructure needs, the entity must account for the revenues and expenditures of such impact fee in a separate accounting fund;
- Limit administrative charges for the collection of impact fees to actual costs;
- Require that notice be provided at least 90 days before the effective date of a new impact fee or an increase to an existing impact fee; and
- Address whether credits should be granted for future local tax payments for capital improvements, outside funding sources, and in-kind contributions from developers.

Existing law 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.”²

Current law also 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.³ These fees must be kept separate from the other revenues of the district and used exclusively to acquire, purchase, or 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 expended only for permissible facilities and equipment.

Section 380.06, F.S., governs developments of regional impact (DRI).⁴ If the development order for a DRI requires a developer to contribute land or a public facility, to construct or expand the 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 toward 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 toward the impact fee for the same need. This section authorizes the local government and a developer to enter into “capital contribution front-

² Section 163.3202(3), F.S.

³ Section 191.009(4), F.S.; *but see* AGO 2009-36 (stating that when the law does not give the independent special fire district the authority to levy an impact fee, the district may not levy an impact fee).

⁴ 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.

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.⁵

Dual Rational Nexus Test

There have been a number of court decisions that address impact fee challenges.⁶ For example, in *Hollywood, Inc. v. Broward County*,⁷ 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 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.⁸ 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.⁹ Because the ordinance at issue satisfied these requirements, the court affirmed the circuit court’s validation of the impact fee ordinance.¹⁰

The Florida Supreme Court addressed the application of impact fees for school facilities in *St. Johns County v. Northeast Builders Association, Inc.*¹¹ 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.”¹² 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.¹³

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 44 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.¹⁴

In *Volusia County v. Aberdeen at Ormond Beach*, the Florida Supreme Court ruled that when a residential development has no potential to increase school enrollment, public school impact fees may not be imposed.¹⁵ In the *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.¹⁶

⁵ Section 380.06(16)(c), F.S.

⁶ 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).

⁷ *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. 4th DCA 1983).

⁸ *Id.* at 611.

⁹ *Id.* at 611-12.

¹⁰ *Id.* at 614.

¹¹ *St. Johns County v. Northeast Builders Association, Inc.*, 583 So. 2d 635 (Fla. 1991).

¹² *Id.* at 637 (citing *St. Johns County, Fla.*, Ordinance 87-60, s. 10(B) (Oct. 20, 1987)).

¹³ *Id.* at 637.

¹⁴ *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 build a school for development within a municipality that is not subject to the impact fee.

¹⁵ *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 134 (Fla. 2000). Volusia County had imposed a school impact fee on a mobile home park for persons aged 55 and older.

¹⁶ *City of Zephyrhills v. Wood*, 831 So. 2d 223 (Fla. 2d DCA 2002).

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 toward the cost of the increased capacity for public facilities.

Chapter 2009-49, L.O.F., places the burden on local governments to prove by a preponderance of the evidence that the imposition of the fee meets state legal precedent and the requirements of s. 163.31801, F.S. As no challenges to impact fees have been made under this new burden of proof, it is unclear what affect the legislation will have on local governments' impact fees.