

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/ SB 2874

SPONSOR: Comprehensive Planning Committee and Senator Bennett

SUBJECT: Financing of Public Facilities

DATE: April 17, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Herrin</u>	<u>Yeatman</u>	<u>CP</u>	<u>Fav/CS</u>
2.	_____	_____	<u>FT</u>	_____
3.	_____	_____	<u>ATD</u>	_____
4.	_____	_____	<u>AP</u>	_____
5.	_____	_____	<u>RC</u>	_____
6.	_____	_____	_____	_____

I. Summary:

This committee substitute (CS) creates the “Florida Impact Fee Act.” It codifies case law with regard to the imposition of impact fees and authorizes a local government to adopt an impact fee ordinance in accordance with the provisions of this act. It requires certain record keeping procedures, specifies that an impact fee ordinance must allow for credits against impact fees, and must provide a process for refunding impact fees under certain circumstances. It allows 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 the ordinance may also allow for voluntary binding arbitration. It does not repeal existing laws or ordinances, but requires an impact fee ordinance that does not comply with the act’s provisions to do so by October 1, 2005. The CS also includes legislative findings, intent, and definitions.

In addition, the CS allows a county to levy a real estate transfer surtax on certain documents if the county does not increase the rate of any impact fee imposed pursuant to the act beyond the rate imposed on January 1, 2003. The rate of the surtax may not exceed 5 cents on each \$100 or fractional part thereof. The grantor of the real estate shall pay the surtax. However, a surtax may not be levied on the document that conveys a specific interest in real property for the first time following July 1, 2004. The levy of the surtax is subject to a referendum or an extraordinary vote of the governing board of the county. The CS specifies procedures relevant to the levy of the surtax and collecting such surtax.

This CS creates unspecified new sections of the Florida Statutes and s. 201.032 of the Florida Statutes.

II. Present Situation:

Impact Fees

Local governments impose impact fees, as a condition of development approval, to provide 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, 2001, thirty-three of Florida’s counties imposed impact fees and collected \$385,440,873.

Although the Florida Statutes do not specifically authorize local governments to impose impact fees, there are several 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 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.

Under s. 380.06, F.S., which governs developments of regional impact (DRI), 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 has to 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.

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 Municipalities have those governmental, corporate, and proprietary powers that enable

¹ Art. VIII, § 1(f), Fla. Const.

² Art. VIII, § 1(g), Fla. Const.

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 county government, 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 and sewage collection and disposal, and water and alternative water supplies. Given these powers, local governments may impose a variety of revenue sources for funding 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.

There have been a number of court decisions that address impact fees.⁵ In *Hollywood, Inc. v. Broward County*⁶, 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.⁷ 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.⁸ Because the ordinance at issue satisfied these requirements, the court affirmed the circuit court's validation of the ordinance.⁹

The Florida Supreme Court addressed the issue of impact fees in *St. Johns County v. Northeast Builders Association, Inc.*¹⁰ The Fifth District Court of Appeal certified as a question of great public importance whether a county could impose an impact fee on new residential construction to be used for new public facilities. 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."¹¹ Also, the ordinance provided for a system of credits to feepayers for land contributions or the construction of educational facilities. This ordinance required funds not expended within 6 years to be returned, along with interest on those funds, to the current landowner upon application.¹²

³ Art. VIII, § 2(b), Fla. Const.

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. 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 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).

⁶ 431 So. 2d 606 (Fla. 4th DCA 1983).

⁷ See *id.* at 611.

⁸ See *id.* at 611-12.

⁹ See *id.* at 614.

¹⁰ 583 So. 2d 635 (Fla. 1991).

¹¹ See *id.* at 637, citing, *St. Johns County, Fla., Ordinance 87-60, § 10(B)* (Oct. 20, 1987).

¹² See *id.* at 637.

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 sufficiently ensure the such fees would be spent to the benefit of those who paid the fees.¹³

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

- 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 feepayers receive credit for the contributions towards the cost of the increased capacity for public facilities.

Documentary Stamp Tax

The documentary stamp tax levied under ch. 201, F.S., is actually two taxes imposed on different bases at different tax rates. Section 201.02, F.S., imposes the tax on deeds and other documents related to real property at the rate of 70 cents per \$100.¹⁴ Sections 201.07 and .08, F.S., imposes the tax on certificates of indebtedness, promissory notes, wage assignments and retail charge account agreements at a tax of 35 cents per \$100.¹⁵ Revenue from the documentary stamp tax is divided between the General Revenue Fund and various trust funds, primarily to acquire and manage public lands or support affordable housing. In FY 2003/4, the state will collect an estimated \$2.1 billion in documentary stamp tax revenue, with \$881 million going to the General Revenue Trust Fund.

Florida first enacted a documentary stamp tax in 1931, at the rate of 10 cents per \$100 of consideration. In 1957, the tax on documents relating to realty (mainly deeds) was raised to 20 cents, and the tax has been assessed at two separate rates on deeds and notes ever since. Major rate increases occurred in 1957, 1963, 1979, 1981, 1985, 1987, 1990, 1991, and 1992. In 1983, the Legislature authorized Miami-Dade County to levy a discretionary surtax on deeds of up to 45 cents for each \$100 except for deeds on single family residences.

¹³ See *id.* at 639.

¹⁴ It is estimated that in FY 2004/05, the value of 1 cent levy for each \$100 of consideration on deeds will generate \$14.1 million. See 2004 FLORIDA TAX HANDBOOK, p. 50.

¹⁵ It is estimated that in FY 2004/05, the value of 1 cent levy for each \$100 of consideration on corporate shares, bonds, certificates of indebtedness, promissory notes, wage assignments and retail charge account agreements will generate \$21.1 million. See 2004 FLORIDA TAX HANDBOOK, p.50.

Taxes on documentation of the recording or transfer of certain intangibles are levied by 39 states and the District of Columbia. Although most of these states levy documents recording taxes only on real estate, many, including Florida, have a more general tax levied on the transfer of deeds.

III. Effect of Proposed Changes:

Section 1 provides the act may be cited as the “Florida Impact Fee Act.”

Section 2 provides legislative findings regarding the planning and financing of public facilities. It provides the following statements of legislative intent for the act:

- Ensure that adequate public facilities are available to serve new growth and development.
- Promote orderly growth and development by codifying the minimum standards for the adoption of an impact fee ordinance as provided for in case law.
- Ensure that new growth and development is not required to pay more than its proportionate share of the cost of any public facilities necessary to accommodate a development project.
- Ensure the funds collected are expended to provide a benefit for those who have paid the fee.

Section 3 defines the following terms as used in the act: developer, development, development order, impact fee, local government, proportionate share, public facility, system improvement, and system improvement costs. The definition of “impact fee” excludes any charge or fee to connect to a municipal-owned utility.

Section 4 authorizes a local government to impose an impact fee as a condition of a development order in accordance with the provisions of the act. It specifies the local government must follow certain notice and hearing provisions. An ordinance may exempt all or part of a development from impact fees, but must provide criteria for such an exemption. It prohibits the use of impact fees to remedy existing deficiencies.

The CS allows a local government to impose an impact fee only if it can show a rational nexus between the need for additional public facilities and the development. The impact fee ordinance must require the fees to be expended only for the category of system improvements for which the fees were collected and those improvements must provide a benefit to those who have paid the fee. An impact fee may not exceed the proportionate share of the cost of system improvements needed to serve the new development.

Under this CS, an impact fee ordinance must include a schedule of impact fees for each public facility. The ordinance must include a process for a developer to receive a certification of the application of an impact fee schedule or individual assessment to a development project. This certification must establish that the fee may not be increased for 1 year for that development project or longer as determined by the local government to accommodate a longer construction period. The ordinance must also include a provision for credits against the payment of impact fees. These provisions must allow for a developer to receive credit for the present value of any construction of system improvements or contribution or dedication of land or money required by the local government.

In addition, the CS requires an impact fee ordinance to provide a process for refunding impact fees that have been collected but not encumbered within a reasonable period of time, not to exceed 8 years. These unencumbered fees or any excess impact fee, plus interest earned on those monies, must be refunded to the current owner.

Section 5 provides that an impact fee ordinance must require the collected fees to be maintained in one or more interest-bearing accounts. Accounting records must be maintained for each category of system improvements and the interest on those fees are considered funds of the account on which it is earned and are subject to the same restrictions as impact fees are under this act. Local governments are required to keep records that identify the amount of any impact fees collected and how those fees were encumbered or expended during the preceding year for each category of system improvements.

Section 6 allows a local government that imposes an impact fee to provide for a separate administrative appeal to its governing body, or other body designated in the ordinance, of a determination of the amount of an impact fee or an interpretation of the fee. An administrative appeal under this section does not affect the availability of other legal remedies. This CS also allows an impact fee ordinance to provide for voluntary binding arbitration.

Section 7 specifies that this act does not prevent or prohibit agreements between property owners or developers and local governments regarding the construction or installation of system improvements and the provision of credits or reimbursements for those system improvement costs.

Section 8 provides the act does not repeal any existing laws or ordinances authorizing impact fees. However, an existing ordinance that does not comply with the act must be brought into compliance by October 1, 2005.

Section 9 creates s. 201.032, F.S., to allow counties to impose a real estate transfer surtax (tax) on deeds, under specified conditions.

Subsection (1) provides that subject to the restrictions in subsections (9) and (10), the governing authority of a county may levy a tax on deeds, as are taxed under s. 201.02, at a rate not exceeding 5 cents on \$100 of consideration. The seller is responsible to pay the tax. However, such deeds sold for the first time after July 1, 2004 are exempt from the tax. Subsequent transactions on the same property or interests are subject to the tax.

Subsection (2) provides that the tax may be levied pursuant to an ordinance approved in a referendum or enacted by an extraordinary vote of the governing authority of the county. However, a public hearing on the issue must be held at least 2 weeks before the formal adoption of the ordinance.

Subsection (3) requires the county to notify the Department of Revenue (DOR) within 10 days after final adoption by ordinance or referendum of an imposition, termination, or rate change of the tax. The notice must specify the period during which the surtax will be in effect and the rate of the tax and must include a copy of the ordinance, and any other information as the department may require by rule. Failure to timely provide such notification to the department will result in

the delay of the effective date of the tax for a period of 1 year. A surtax or an increase or decrease in the rate of the surtax must take effect on January 1 and must terminate on December 31.

Subsection (4) provides that if the tax is conditioned to take effect upon referendum approval, the county governing authority must place on the ballot a statement that includes a brief general description of the projects to be funded by the tax and that conforms to the requirements of s. 101.161, and this subsection.

Subsection (5) restricts the use of tax proceeds to the provision of infrastructure necessary to implement adopted local government comprehensive plans. "Infrastructure" is defined as "any fixed capital expenditure or fixed capital outlay associated with the construction, reconstruction, or improvement of public facilities that have a life expectancy of 5 or more years and any land acquisition, land improvement, design, and engineering costs related thereto."

Subsection (6) allows the tax proceeds to be pledged to pay principal and interest on bonds issued for the provision of this infrastructure. The county must continue to levy the surtax as long as any bonds are outstanding.

Subsection (7) requires DOR to administer the surtax pursuant to s. 201.11, F.S. Section 201.15, F.S., which subjects tax proceeds to the General Revenue Service Charge, does not apply to this tax. In addition, DOR may retain up to 1 percent of the tax proceeds to pay the department's cost of collection and enforcement.

Subsection (8) restricts using tax proceed for operating costs. In addition, a county that levies a surtax must, within 90 days after the close of its fiscal year, submit to the Department of Financial Services a financial report that contains information showing the use of the tax proceeds.

Subsection (9) provides that if a county does not impose an impact fee pursuant to section 4 of this CS and chooses to levy the tax authorized by this section, the county may not levy any impact fee until the ordinance imposing this tax has been rescinded and all obligations against which the surtax revenues have been pledged are satisfied.

Similarly, subsection (10) provides that if a county imposes this tax, the county may not increase the rate of any impact fee imposed pursuant to **section 4 of this CS** beyond the rate imposed on January 1, 2003, and may not impose an additional impact fee until the ordinance imposing this tax has been rescinded and all obligations against which the surtax revenues have been pledged are satisfied.

Subsection (11) requires the Department of Revenue to adopt forms to be used when the surtax is paid. If the seller is exempted from the tax, he or she must record an affidavit verifying that they are exempt. At the time of recording, the clerk of the court must collect and remit the surtax proceed to the Department of Revenue for distribution to the county levying the surtax. The clerk is authorized to retain 1 percent of the surtax paid as a service charge.

Subsection (12) authorizes the Department of Revenue to adopt emergency rules to implement and enforce the provisions of this act. These emergency rules will remain in effect until the adoption of permanent rules.

Subsection (13) provides that the surtax does not apply to a deed, transfer, or conveyance between spouses or former spouses pursuant to an action for dissolution of their marriage if the property is or was their marital home. Furthermore, any surtaxes paid pursuant to this section must be refunded in those cases in which a deed, transfer, or conveyance occurred 1 year before a dissolution of marriage.

Section 10 provides that this act will take effect July 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

If all counties levied the real estate transfer surtax on deeds authorized by this CS, \$70.5 million could be raised statewide. However, this estimate does not consider the “first sale” exemption; consequently, it is likely that this will raise very little money in the first few years that this authority exist.

B. Private Sector Impact:

The second conveyance of an interest in real property following July 1, 2004 is subject to the real estate transfer surtax authorized in this CS. In order to levy this surtax, the county must not increase its impact fee beyond the rate imposed on December 31, 2003. Thus, new construction in a county that levies the surtax will not be subject to increased impact fees.

C. Government Sector Impact:

A local government imposing an impact fee that does not comply with the requirements of this act, which are intended to codify existing case law, must bring the ordinance into compliance with the act by October 1, 2005. The adoption or modification of a local government ordinance is subject to certain notice and hearing provisions.

The DOR will be required to administer the collection of the surtax, which will require adoption of forms to be used when the surtax is paid. The respective Clerks of Court must collect and remit the surtax proceeds to DOR for distribution to the county levying the surtax. DOR and the respective Clerks of Court are authorized to retain service charges to offset the costs of their responsibilities.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
