

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 227 Impact Fees
SPONSOR(S): Military & Local Affairs Policy Committee, Aubuchon, and others
TIED BILLS: None IDEN./SIM. BILLS: SB 580

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR. Row 1: Military & Local Affairs Policy Committee, 12 Y, 0 N, As CS, Fudge, Hoagland. Row 2: Civil Justice & Courts Policy Committee, Bond, De La Paz.

SUMMARY ANALYSIS

An impact fee is a cost imposed on new construction to account for the impact of such construction on the community's infrastructure. Impact fees are created and amended by local ordinance. Under current law, the courts will uphold an ordinance adopted by a local government against a person challenging the adoption of the ordinance if there is any "fairly debatable" cause for upholding the ordinance. This fairly debatable standard of review is considered difficult to overcome by a challenger.

This bill requires that, should any person challenge an impact fee, the government entity that enacted the ordinance must show, by a preponderance of the evidence, that the imposition or amount of the fee meets the requirements of state legal precedent or law. This bill also provides that the court may not use a deferential standard of review that favors either party.

This bill does not appear to have a fiscal impact on state government. The fiscal impact on local governments is indeterminate.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

Impact fees are enacted by local home rule ordinance. They 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.

#### ***2005 Impact Fee Review***

In 2005, the Legislature created the Florida Impact Review 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.
- 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 jurisdictions.
- Statutory direction on impact fees is needed to address and clarify certain issues regarding impact fees.

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

#### ***Current Law on 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 or amended impact fee.
- Address whether credits should be granted for future local tax payments for capital improvements, outside funding sources, and in-kind contributions from developers.

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.”

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.

Section 380.06, F.S., governs developments of regional impact (DRI).<sup>1</sup> 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.

### **Case Law on Impact Fees**

There have been a number of court decisions that address impact fees.<sup>2</sup> In *Hollywood, Inc. v. Broward County*,<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> Because the ordinance at issue satisfied these requirements, the court affirmed the circuit court’s validation of the ordinance.<sup>6</sup>

<sup>1</sup> 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.

<sup>2</sup> 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).

<sup>3</sup> 431 So.2d 606 (Fla. 4th DCA 1983).

<sup>4</sup> See *id.* at 611.

<sup>5</sup> See *id.* at 611-12.

<sup>6</sup> See *id.* at 614.

The Florida Supreme Court addressed the issue of impact fees for school facilities in *St. Johns County v. Northeast Builders Association, Inc.*<sup>7</sup> 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.”<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

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.

### ***Burden of Proof and Standard of Review***

The obligation of a party in litigation to prove a material fact in issue is known as the burden of proof. Generally, in a legal action the burden of proof is on the party who asserts the proposition to be established and the burden can shift between parties as the case progresses. The level or degree of proof that is required as to a particular issue is referred to as the standard of proof or standard of review. In most civil actions, the party asserting a claim or affirmative defense must prove the claim or defense by a preponderance of the evidence.<sup>13</sup> The preponderance of the evidence (also known as the “greater weight of evidence”) standard of proof requires that the factfinder determine whether a fact sought to be proved is more probable than not.

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<sup>7</sup> 583 So.2d 635 (Fla. 1991).

<sup>8</sup> See *id.* at 637, *citing*, St. Johns County, Fla., Ordinance 87-60, § 10(B) (Oct. 20, 1987).

<sup>9</sup> See *id.* at 637.

<sup>10</sup> 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 build a school for development within a municipality that is not subject to the impact fee.

<sup>11</sup> 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.

<sup>12</sup> 831 So.2d 223 (Fla. 2d DCA 2002).

<sup>13</sup> 5 Fla. Prac., Civil Practice § 16:1 (2009 ed.).

For impact fee cases the dual rational nexus test states that the government must prove: (1) a rational nexus between the need for additional capital facilities and the growth in population generated by the development and (2) a rational nexus between the expenditures of the funds collected and the benefits accruing to the development.<sup>14</sup> Although the challenger has to plead their case and allege a cause of action, beyond the pleading phase the court's language seems to place the burden of proof on the local government. Some parties have argued that the standard being adopted by Florida courts is that an impact fee will be upheld if it is "fairly debatable" that the fee satisfies the dual rational nexus test.<sup>15</sup> In *Volusia County v. Aberdeen at Ormond Beach*, the Florida Supreme Court rephrased the standard as a "reasonableness" test.<sup>16</sup> Although the standard is not clearly defined, the courts have generally not required a local government to defend its impact fee by as high of a standard as preponderance of the evidence.

### **Effect of Proposed Changes**

This bill amends s. 163.31801, F.S., to require that, should a person challenge an impact fee ordinance, the government that enacted the ordinance must show, by a preponderance of the evidence, that the imposition or amount of the fee meets the requirements of state legal precedent or statute.

The bill also provides that the court may not use a deferential standard that favors either party. The effect of this change is that the court will not use the "fairly debatable" standard of review when evaluating the legality of an impact fee ordinance.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 163.31801, F.S., regarding impact fees.

Section 2 provides an effective date of July 1, 2009.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

Indeterminate, see Fiscal Comments.

2. Expenditures:

Indeterminate, see Fiscal Comments.

#### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

Indeterminate, see Fiscal Comments.

#### **D. FISCAL COMMENTS:**

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<sup>14</sup> See *St. Johns County v. Northeast Florida Builders Ass'n, Inc.*, 583 So.2d 635 (Fla. 1991).

<sup>15</sup> See THE FLORIDA IMPACT REVIEW TASK FORCE, February 1, 2006 Final Report & Recommendations, *available at* <http://www.floridalcir.gov/taskforce.cfm>.

<sup>16</sup> 760 So.2d 126 (Fla. 2000).

The fiscal impact of this bill is indeterminate. It is possible that changing the standard of review will lead to an increased number of impact fee ordinances being challenged and found invalid, in which case local government impact fee revenue would be reduced with a corresponding decrease in expenditures by the private sector. It is also possible that impact fee ordinances will generally meet the different standard of court review and thus continue to be upheld by the courts as they are today, which would result in no change in current local government revenues and private party costs. There is also a possibility that local governments may be somewhat more hesitant to enact impact fee ordinances in the future fearing a challenge under the new standard of review. For these reasons, an accurate fiscal impact cannot be determined.

### **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

##### **1. Applicability of Municipality/County Mandates Provision:**

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### **2. Other:**

None.

#### **B. RULE-MAKING AUTHORITY:**

None.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

### **IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

On March 4, 2009, the Military & Local Affairs Policy Committee adopted one amendment to this bill that shifted the burden of proof from the challenger to the local government. The bill was then reported favorably with a committee substitute.