

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/HB 227

Impact Fees

**SPONSOR(S):** Aubuchon

**TIED BILLS:**

**IDEN./SIM. BILLS:** SB 580

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	<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR</b>
1)	Military & Local Affairs Policy Committee	12 Y, 0 N, As CS	Fudge	Hoagland
2)	Civil Justice & Courts Policy Committee			
3)	Economic Development & Community Affairs Policy Council			
4)				
5)				

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**SUMMARY ANALYSIS**

Currently, the adoption of an impact fee ordinance is subject to the “fairly debatable” standard of review which favors local governments.

CS/HB 227 requires the government to show, by a preponderance of the evidence, that the imposition or amount of the impact fee does not meet the requirements of state legal precedent or s. 163.31801, F.S. The bill also removes any deferential standard.

The bill is effective July 1, 2009.

## 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:

##### **Current Situation**

Impact fees are charges imposed against new development for the cost of additional infrastructure made necessary by that growth. In 2006 The Florida Impact Fee Review Task Force considered issues related to impact fees and recommended statutory direction on certain issues. However, on other issues presented to the Task Force, it did not recommend statutory direction. One of those issues was the legal burden of proof that a party challenging an impact fee must meet to successfully challenge an impact fee ordinance. Proponents argued that because of this burden, impact fee challenges are rarely successful.<sup>1</sup> Proponents recommended elimination of the "fairly debatable" standard and adoption of the "greater weight of the evidence" (preponderance of the evidence) standard. The Task Force voted eight to three against recommending statutory guidance to the legal burden of proof for impact fee challenges.<sup>2</sup>

In 2006, the "Impact Fee Act"<sup>3</sup> was created to provide a framework for the creation of impact fee ordinances and levy of impact fees. The adoption of an impact fee must, at a minimum:

- 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 governmental entity imposes an impact fee to address its infrastructure needs, the entity shall 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 no less than 90 days before the effective date of an ordinance or resolution imposing a new or amended impact fee.<sup>4</sup>

The Act does not address challenges to impact fees.

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<sup>1</sup> The Report indicates that very few impact fees have been challenged since 1991. Of the 282 responses to whether an impact fee was challenged, only 13 (4 percent) indicate that the impact fee was challenged. Task Force Report p. 8.

<sup>2</sup> Final Recommendations and Reports of the Florida Impact Fee Review Task Force available at <http://www.floridalcir.gov/UserContent/docs/File/taskforce/020106finalreport.pdf>

<sup>3</sup> s. 163.31801, F.S.

<sup>4</sup> s. 163.31801(3), F.S.

## Challenges to the Adoption of Impact Fee Ordinances

The adoption of an impact fee ordinance is a quasi-legislative function<sup>5</sup> and as such is subject to the “fairly debatable” standard of review. This standard of review is a highly deferential standard that requires approval of an action if reasonable persons could differ as to its propriety. *Martin County v. Yusem*,<sup>6</sup> “In other words, ‘[a]n ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity.’”<sup>7</sup>

### As Applied Challenges Impact Fee Ordinances--Exactions

In *St. Johns River Water Management District v. Koontz*,<sup>8</sup> the court stated that “the threshold question of what constitutes an exaction, thereby triggering the *Nollan/Dolan* analysis is far from settled.”<sup>9</sup> In *Koontz*, Mr. Koontz, a landowner, requested permits from the District to develop a greater portion of his commercial property than was authorized by existing regulation. The District replied that it would only approve the permit on certain conditions, one of which was to require “‘off-site’ mitigation involving property a considerable distance from Mr. Koontz’s property.”<sup>10</sup> When Mr. Koontz refused, the District denied his permit.

An exaction could be a requirement that a landowner give up a constitutionally-protected right in exchange for some benefit from the government. The court, citing the Utah Supreme Court in *Salt Lake County v. Bd. Of Education of Granite School District*, 808 P.2d 1056, 1058 (Utah 1991) explained:

[D]evelopment exactions may be defined as contributions to a governmental entity imposed as a condition precedent to approving the developer’s project. Usually exactions are imposed prior to the issuance of a building permit or zoning/subdivision approval ... [and] may take the form of: (1) mandatory dedications of land for roads, schools or parks, as a condition to plat approval, (3) water or sewage connection fees, and (4) impact fees.<sup>11</sup>

However, the court went on to state that “regardless of how one chooses to define an ‘exaction,’ the first step in a *Nollan/Dolan* analysis is to determine whether the required ‘exaction,’ be it a dedication, fee or improvement, if separated from the development prohibition, would constitute a taking. If it would constitute a taking separate from the development prohibition, only then [does] the *Nollan/Dolan* standard become relevant.”<sup>12</sup>

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<sup>5</sup> *City of Cape Canaveral v. Rich*, 562 So.2d 445 (Fla. 5th DCA 1990), citing *Manatee County v. Circuit Court of the Twelfth Judicial Circuit*, 433 So.2d 537 (Fla. 2d DCA 1983)

<sup>6</sup> 690 So.2d 1288, 1295 (Fla. 1997).

<sup>7</sup> *Id.* citing, *City of Miami Beach v. Lachman*, 71 So.2d 148, 152 (Fla.1953).

<sup>8</sup> 2009 WL 47009 (Fla.App. 5 Dist), 34 Fla. L. Weekly D123 (Fla. Jan. 9, 2009). A Motion for Rehearing and Motion to Suggest Certification were filed on January 26, 2009.

<sup>9</sup> *Id.* See e.g., *Greater Atlanta Homebuilders Assoc. v. DeKalb County*, 588 S.E.2d 694 (2003), in which the Georgia Supreme Court refused to apply the double nexus test to a takings challenge brought by owners of surface parking lots who objected to city wide requirements that all parking lots provide landscaping on 10% of the lot and plant one tree for every eight parking spaces. The court characterized the ordinance as a “legislative determination” that applied to everyone and concluded that the *Nollan/Dolan* double nexus test was inapplicable.

<sup>10</sup> *Id.* \*1.

<sup>11</sup> *Koontz*, 2009 WL 47009 \*4.

<sup>12</sup> *Id.*

## Effect of Proposed Changes

CS/HB 227 requires the government to show, by a preponderance of the evidence, that the imposition or amount of the impact fee does not meet the requirements of state legal precedent or s. 163.31801, F.S. The bill also removes any deferential standard.<sup>13</sup>

### B. SECTION DIRECTORY:

Section 1: Creates section (5) of 163.31801, F.S., describing the burden of proof applicable to government and removing deferential standard of review.

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:

None.

#### 2. Expenditures:

Indeterminate: Some local governments may experience an increase in litigation costs due to removal of its deferential standard of review.

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

Indeterminate: The removal of a deferential standard of review of impact fee ordinances may increase the likelihood of such challenges. The development community may or may not benefit from the passage of this bill.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

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

Not applicable because this bill does not appear to: require cities or counties to spend funds or take an action requiring expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

#### 2. Other:

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<sup>13</sup> See e.g. *City of Lake Mary v. County of Seminole*, 419 So.2d 737, 738 (Fla. 5th DCA 1982)(stating that “[i]f the Legislature has the power to create a right of appeal in the circuit court for a proceeding where none previously existed, it is incongruous to assert that it cannot limit the scope of that review.”)

None.

**B. RULE-MAKING AUTHORITY:**

None.

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

None.

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