The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Community Affairs Committee

BILL:	SB 410
INTRODUCER:	Senator Bennett
SUBJECT:	Impact Fees
DATE:	January 26, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	**Pre-meeting**
2.			JU	
3.			RC	
4.				
5.				
6.				

I. Summary:

In response to ongoing litigation,[1] this bill reenacts the section of law created by Chapter 2009-49, Laws of Florida (HB 227 enacted in 2009) that created the "preponderance of the evidence" standard of review for the government in cases challenging the imposition or amount of an impact fee.

This bill substantially reenacts section 163.31801 of the Florida Statutes.

II. Present Situation:

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.[2] 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.[3] Likewise, municipalities have those governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform their functions and provide services, and exercise any power for municipal purposes, except as otherwise provided by law.[4]

The Florida Statutes enumerate the powers and duties of all county governments, unless preempted on a particular subject by general or special law.[5] Those powers include the provision

[1] *Alachua County v. Cretul*, Case No. 10-CA-0478 (Fla. 2d Jud. Cir. 2010).
[2] FLA. CONST. art VIII, s. 1(f).
[3] FLA. CONST. art VIII, s. 1(g).
[4] FLA. CONST. art VIII, s. 2(b). *See also* s. 166.021(1), F.S.
[5] Section 125.01, F.S.

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. Municipalities are afforded broad home rule powers except: annexation, merger, exercise of extraterritorial power, and subjects prohibited by the federal, state, or county constitutions or law.[6]

Given these constitutional and statutory powers, local governments may use a variety of revenue sources to fund services and improvements without express statutory authorization.[7] Special assessments, impact fees, franchise fees, and user fees or service charges are examples of these home rule revenue sources.[8]

Impact Fees

Impact fees are enacted by local home rule 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.

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:

- 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; and
- Address whether credits should be granted for future local tax payments for capital improvements, outside funding sources, and in-kind contributions from developers.[9]

Dual Rational Nexus Test

Impact fees have their roots in the common law. There have been a number of court decisions that address impact fee challenges.[10] For example, in *Hollywood, Inc. v. Broward County*,[11] the

[6] Section 166.021, F.S.

[7] 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. *See* FLA. CONST. art. VII, s. 1. 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.

[8] For a catalogue of such revenue sources, see the most recent editions of the Florida Legislature's *Local Government Financial Information Handbook* and the *Florida Tax Handbook*.

[9] Section 163.31801, F.S. Other sections of law also address the ability of local governments or special districts to levy impact fees. *See* ss. 163.3202(3), 191.009(4), and 380.06, F.S.

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 (1) it offsets needs that are sufficiently attributable to the new development and (2) the fees collected are adequately earmarked for the benefit of the residents of the new development.[12] These two requirements are called the dual rational nexus test. 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 impact fee ordinance.[14]

The Florida Supreme Court addressed the application 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 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.[18]

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.[19] In the *City of Zephyrhills v. Wood*, the district court upheld an impact fee

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[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] *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. 4th DCA 1983).
[12] *Id.* at 611.
[13] *Id.* at 611-12.
[14] *Id.* at 614.
[15] *St. Johns County v. Northeast Builders Association, Inc.*, 583 So. 2d 635 (Fla. 1991).
[16] *Id.* at 637 (citing St. Johns County, Fla., Ordinance 87-60, s. 10(B) (Oct. 20, 1987)).
[17] *Id.* at 637.
[18] *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.
[19] *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.

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 toward the cost of the increased capacity for public facilities.

Burden of Proof and Standard of Review

The obligation 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.[21] The preponderance of the evidence (also known as the "greater weight of evidence") standard of proof requires that the fact-finder determine whether a fact sought to be proved is more probable than not.

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.[22] Although the challenger has to plead their case and allege a cause of action, beyond the pleading phase the courts' language seems to place the burden of proof on the local government. Some parties have argued that prior to 2009 the standard being adopted by Florida courts was that an impact fee will be upheld if it is "fairly debatable" that the fee satisfies the dual rational nexus test.[23] In *Volusia County v. Aberdeen at Ormond Beach*, the Florida Supreme Court rephrased the standard as a "reasonableness" test.[24] Although the standard was not clearly defined, prior to 2009 the courts generally did not require a local government to defend its impact fee by as high of a standard as preponderance of the evidence.

In 2009, HB 227[25] amended s. 163.31801, F.S., to codify the burden of proof for impact fee ordinance challenges. The bill placed the burden of proof on the government to prove by a

[20] *City of Zephyrhills v. Wood* , 831 So. 2d 223 (Fla. 2d DCA 2002).
[21] 5 Fla. Prac., Civil Practice s. 16:1 (2009 ed.).
[22] *See St. Johns County v. Northeast Florida Builders Ass'n, Inc.*, 583 So. 2d 635 (Fla. 1991).
[23] *See* THE FLORIDA IMPACT REVIEW TASK FORCE, February 1, 2006, Final Report & Recommendations, *available at* http://www.floridalcir.gov/taskforce.cfm.
[24] 760 So. 2d 126 (Fla. 2000).
[25] Chapter 2009-49, L.O.F.

preponderance of the evidence that the imposition or amount of the fee meets the requirements of state legal precedent or s. 163.31801, F.S. The bill also prohibits the courts from applying a deferential standard.

Litigation

A number of counties and the Florida Association of Counties sued the Florida House and Senate claiming the bill was unconstitutional.[26] The complainants are making the following arguments:

- The law violates the Separation of Powers Clause because it:
  - Changes the burden of proof,[27] and
  - Disallows a deferential standard of review.
- The law violates Section 18, Art. VII of the Florida Constitution, both:
  - paragraph (a) because the complainants argue that it requires local governments that want to levy impact fees to take action requiring the expenditure of funds because "they must assume additional burdens which would not normally exist prior to the adoption of that provision,"[28] and
  - paragraph (b) because the complainants argue that HB 227 reduced local governments' authority to raise revenues in the aggregate.

Separation of Powers

HB 227 is being challenged on separation of powers grounds. Section 2, Art. V of the Florida Constitution gives the Supreme Court the power to adopt rules relating to practice and procedure of the courts. The complainants in the pending lawsuit challenging HB 227 argue that the bill (1) changed the burden of proof and (2) changing the burden of proof violated the courts' exclusive right to adopt rules relating to practice and procedure. HB 227 did not change the burden of proof, just the standard of review. Moreover, it does not appear that the burden of proof and the standard of review are procedural issues falling squarely in the domain of the judiciary. Rather, the standard of review is often related to the underlying substantive issue and is often specified by statute.[29]

Section 3, Art. II of the Florida Constitution states that the "powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to the other branches unless expressly provided [in the Florida Constitution]." However, courts have held that "if a power is not exclusive to one branch, the exercise of that non-exclusive power is not unconstitutional."[30] Complainants argue that the

[26] *Alachua County v. Cretul*, Case No. 10-CA-0478 (Fla. 2d Jud. Cir. 2010).

[27] In fact, HB 227 did not change the burden of proof. The local government always had the burden of proving that the impact fees it levies are proper. *See e.g. Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126 (Fla. 2000).

[28] *Alachua County v. Cretul*, Case No. 10-CA-0478 (Fla. 2d Jud. Cir. 2010).

[29] *See, e.g.* ss. 39.206, 39.407, 39.827, 57.105, 61.13001, 61.14, 68.09, 98.075, 101.048, 112.1815, 112.534, 120.56, 120.57, 163.3177, 163.31777, 163.3184, 163.3187, 163.32465, 194.301, 222.21, 287.133, 287.134, 320.6412, 322.2615, 322.2616, 322.64, 363.06, 376.305, 376.308, 379.337, 379.502, 390.01114, 400.023, 400.121, 403.121, 403.519, 403.706, 403.727, 408.08, 409.2558, 415.1045, 429.29, 440.104, 443.101, 448.110, 456.032, 552.40, 556.107, 556.116, 559.77, 560.123, 560.125, 569.23, 608.441, 627.062, 627.0628, 627.0651, 648.525, 655.50, 709.08, 732.805, 744.301, 765.109, 768.28, 768.81, 775.082, F.S. (all applying the preponderance of evidence standard of review in different situations); s. 617.0126, F.S. (applying de no review standard to suits challenging certain action by the Department of State); and s. 120.57(1)(e), F.S. (providing a clearly erroneous standard of review related to an unadopted rule).

[30] *Simms v. Dep't of Health & Rehabilitative Servs.*, 641 So. 2d 957 (3d DCA 1994) (citing *Dep't of Health & Rehabilitative Servs. v. Hollis*, 439 So. 2d 947, 948 (Fla. 1st DCA 1983)); *see also Florida House of Representatives v. Crist*, 999 So. 2d

prohibition in HB 227 prohibiting the courts from applying a deferential standard of review to the validity of impact fees infringes on the power of the judiciary.

One of the primary powers of the court is to interpret the constitution.[31] In a federal or state constitutional case, standards of review and burdens of proof can become constitutional issues. Impact fees are open to being challenged on a number of state and federal constitutional grounds including: federal and state takings claims,[32] challenges that it is an improperly enacted tax,[33] and challenges that it violates the state constitutional requirement for free public schools.[34] While decreasing the standard of review might be viewed as a separation of powers problem, increasing the standard of review further protects the constitutional rights raised in these cases. Increasing constitutional protections is a function well within the jurisdiction of the Legislature.

Furthermore, it has been held that a statute that attempts to control a court's judgment is valid where it merely establishes rebuttable presumptions, rather than setting forth mandatory guidelines.[35] While HB 227 does not allow a deferential standard, it still allows the court to come to its own judgment regarding the validity of the impact fee. In summary, the separation of powers challenge to the Legislature's delineation of the standard of review in impact fee cases will ultimately turn on a court's determination of whether this delineation of the standard of review infringes upon the judiciary's authority over practice and procedure.

Mandates

HB 227 has been challenged as an unconstitutional mandate. Article VII, Section 18(a) of the Florida Constitution states that no county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds with certain exceptions and exemptions. Although the complaint argues that HB 227 violated this provision, the bill does not require any action from the local governments. The complaint does not specify what "additional burdens" it is alleging local governments are required to carry out. Therefore, it is unlikely that HB 227 violated Article VII, Section 18(a) of the Florida Constitution.

Section 18(b), Art. VII of the Florida Constitution provides that except upon approval by two-thirds of the members of each house, the Legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989. HB 227 did not qualify for the exemptions provided in s. 18(d), Art. VII of the Florida Constitution and did not receive a two-thirds vote in the Senate. Versions of both the Senate and House staff analyses in 2009 stated that the bill reduced local governments' authority to raise revenues.[36] However, the bill did not restrict local governments from levying impact fees nor did

601, 611 (Fla. 2008) (finding that a branch of government has the inherent right to accomplish all objects naturally within its orbit, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution).

[31] *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992).

[32] U.S. CONST. amend. V; FLA. CONST. art. I, s. 9.

[33] FLA. CONST. art. VII, s. 1.

[34] FLA. CONST. art. IX, s. 1.

[35] *Department of Agriculture and Consumer Services v. Bonanno*, 568 So. 2d 24 (Fla. 1990).

[36] House Economic Development & Community Affairs Policy Council, Bill Analysis for CS/CS/HB 227 (2009); Senate Transportation & Economic Development Committee, Bill Analysis for CS/SB 590 (2009).

it change the test by which impact fees are evaluated (the dual rational nexus test). Arguably, an impact fee that is valid under case law and statutory law should be upheld both before and after HB 227 became law. The bill only should affect local governments that levy invalid impact fees, which they never had the authority to levy. To the extent that the standard of review is determined by a court to reduce the authority of the government to raise revenues in the aggregate, the bill could be deemed an unfunded mandate. Practically, the bill may lead to more impact fees being struck down as invalid. Therefore, there are logical arguments on both sides. Creating a preponderance of the evidence standard of review for impact fee challenges *may* or *may not* reduce a local government's authority to raise revenues under the Florida Constitution.[37] In order to eliminate the uncertainty regarding whether the subsection of law enacted by HB 227 was an unconstitutional mandate, SB 410 requires approval of each house of the Legislature by two-thirds of the membership.[38]

III. Effect of Proposed Changes:

In response to litigation, the bill reenacts the section of law that states that the government has the burden of proving by a preponderance of the evidence that an impact fee meets the standards set out in statute or in case law. The section prohibits the courts from using a more deferential standard. To remove any doubt regarding whether this section is an unconstitutional mandate, this bill requires approval by each house of the Legislature by two-thirds of the membership.

The bill provides that it shall become effective upon becoming a law, and shall operate retroactively to June 1, 2009. If such retroactive application is held by a court of last resort to be unconstitutional, the bill states that this act should then apply prospectively from the date that the act becomes a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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[37] Additionally, in 2009 the revenue estimating conference estimated that the bill would have a negative but indeterminate affect on local governments. Section 18(d), Art. VII of the Florida Constitution has an exemption for insignificant fiscal impacts. The Legislature interprets insignificant fiscal impact to mean an amount not greater than the average statewide population for the applicable fiscal year times ten cents; the average fiscal impact, including any offsetting effects over the long term, is also considered. Therefore, if a court did find that the bill was a mandate, the impact of the bill's change in the standard of review would have to have an impact greater than $18.6 million in the applicable fiscal year to be an unconstitutional mandate.

[38] If provisions of a law were unconstitutionally enacted, the Legislature can reenact those provisions using proper constitutional methods so long as the substance of the law is constitutional. *See Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991); *see also State v. Johnson*, 616 So. 2d 1 (Fla. 1993).

D. Other Constitutional Issues:

This bill specifically applies its provisions retroactively to June 1, 2009, the effective date of HB 227 (2009 Regular Session). Retroactive operation is disfavored by courts and generally "statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction."[39] The Florida Supreme Court has articulated four issues to consider when determining whether a statute may be retroactively applied:

- Is the statute procedural or substantive?
- Was there an unambiguous legislative intent for retroactive application?
- Was a person's right vested or inchoate?
- Is the application of the statute to these facts unconstitutionally retroactive?[40]

The general rule of statutory construction is that a procedural or remedial statute may operate retroactively, but that a substantive statute may not operate retroactively without clear legislative intent. Substantive laws either create or impose a new obligation or duty, or impair or destroy existing rights, and procedural laws enforce those rights or obligations.[41]

Notwithstanding a determination of whether the provisions in the bill are procedural or substantive, the bill makes it clear that it is the Legislature's intent to apply the law retroactively. "Where a statute expresses clear legislative intent for retroactive application, courts will apply the provision retroactively."[42] A court will not follow this rationale, however, if applying a statute retroactively will impair vested rights, create new obligations, or impose new penalties.[43] A court would be unlikely to bar the retroactive application of this section as impairing vested rights, creating new obligations, or imposing new penalties because it reenacts current law. As an additional protection, the bill specifies that if retroactive application were held unconstitutional by a court of last resort, it would then apply prospectively.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

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[39] Norman J. Singer and J.D. Shambie Singer, *Prospective or retroactive interpretation,* 2 SUTHERLAND STATUTORY CONSTR. s. 41:4 (6th ed. 2009).
[40] *Weingrad v. Miles,* 29 So. 3d 406, 409 (Fla. 3d DCA 2010) (internal citations omitted).
[41] *See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).
[42] *Weingrad*, 29 So. 3d at 410.
[43] *Id.* at 411.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.