

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 Transportation and Economic Development Appropriations Committee

BILL: CS/SB 580

INTRODUCER: Judiciary Committee, Senator Haridopolos and others

SUBJECT: Impact Fees/Challenges

DATE: April 20, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	Fav/1 amendment
2.	Treadwell	Maclure	JU	Fav/CS
3.	Fournier	McKee	FT	Favorable
4.	Weaver	Noble	TA	Favorable
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | ☒ | Statement of Substantial Changes |
| B. AMENDMENTS..... | ☐ | Technical amendments were recommended |
| | ☐ | Amendments were recommended |
| | ☐ | Significant amendments were recommended |

I. Summary:

This bill creates a “preponderance of the evidence” burden of proof for the government in cases challenging the imposition or amount of an impact fee. In effect, the government will be required to prove by a preponderance of the evidence that the imposition or amount of the impact fee meets the requirements of state legal precedent or the statute governing impact fees. In addition, the bill precludes the court from using a deferential standard.

This bill substantially amends section 163.31801, 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.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

¹ FLA. CONST. art VIII, s. 1(f).

electors.² 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.³ Current law enumerates the powers and duties of all county governments, unless preempted on a particular subject by general or special law.⁴ 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. 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.⁵

Given these constitutional and statutory powers, local governments may use a variety of revenue sources to fund services and improvements without express statutory authorization.⁶ Special assessments, impact fees, franchise fees, and user fees or service charges are examples of these home rule revenue sources.⁷

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.

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;

² FLA. CONST. art VIII, s. 1(g).

³ FLA. CONST. art VIII, s. 2(b). *See also* s. 166.021(1), F.S.

⁴ Section 125.01, F.S.

⁵ Section 166.021, F.S.

⁶ 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.

⁷ 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.

- 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 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 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.

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.”⁸

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.⁹ 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

⁸ Section 163.3202(3), F.S.

⁹ Section 191.009(4), F.S.

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).¹⁰ 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-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.¹¹

Dual Rational Nexus Test

There have been a number of court decisions that address impact fee challenges.¹² For example, in *Hollywood, Inc. v. Broward County*,¹³ 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.¹⁴ 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.¹⁵ Because the ordinance at issue satisfied these requirements, the court affirmed the circuit court’s validation of the impact fee ordinance.¹⁶

The Florida Supreme Court addressed the application of impact fees for school facilities in *St. Johns County v. Northeast Builders Association, Inc.*¹⁷ 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,

¹⁰ 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.

¹¹ Section 380.06(16)(c), F.S.

¹² 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).

¹³ *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. 4th DCA 1983).

¹⁴ *Id.* at 611.

¹⁵ *Id.* at 611-12.

¹⁶ *Id.* at 614.

¹⁷ *St. Johns County v. Northeast Builders Association, Inc.*, 583 So. 2d 635 (Fla. 1991).

expand and equip the educational sites and educational capital facilities necessitated by new development.”¹⁸ 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.¹⁹

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.²⁰

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 a residential development has no potential to increase school enrollment, public school impact fees may not be imposed.²¹ 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.²²

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

¹⁸ *Id.* at 637 (citing St. Johns County, Fla., Ordinance 87-60, s. 10(B) (Oct. 20, 1987)).

¹⁹ *Id.* at 637.

²⁰ *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.

²¹ *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.

²² *City of Zephyrhills v. Wood*, 831 So. 2d 223 (Fla. 2d DCA 2002).

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. In most civil actions, the party asserting a claim or affirmative defense must prove the claim or defense by a preponderance of the evidence.²³ 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.

For impact fee cases, the dual rational nexus test states that the government must prove:

- a rational nexus between the need for additional capital facilities and the growth in population generated by the development; and
- a rational nexus between the expenditures of the funds collected and the benefits accruing to the development.²⁴

Although the challenger has to plead his or her case and allege a cause of action, it appears that beyond the pleading phase, the court has placed the burden of proof on the local government to satisfy the dual rational nexus test. Some parties have argued that the standard evolving in Florida is that an impact fee will be upheld if it is “fairly debatable” that the fee satisfies the dual rational nexus test.²⁵ In *Volusia County v. Aberdeen at Ormond Beach*, the Florida Supreme Court rephrased the standard as a “reasonableness” test.²⁶ Although the standard is not clearly defined, the courts have generally not required a local government to defend its impact fee by a preponderance of the evidence.

III. Effect of Proposed Changes:

The bill amends s. 163.31801, F.S., to codify the burden of proof for impact fee ordinance challenges. The bill places the burden of proof on the government to prove by a 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. Some courts may not consistently place the burden on the government in impact fee challenges. The bill makes it clear that the government bears the burden of proof in impact fee challenges.

Currently, in impact fee challenges, the government has the burden of satisfying the dual rational nexus test and the statutory requirements associated with impact fees. However, the bill provides that the government has the burden of establishing that the impact fee meets the requirements of state precedent *or* the statutory requirements. If it is the intent of the Legislature to require the government to satisfy both the substantive tests established by the judiciary and the relevant statutory requirements, it may wish to change the conjunction “or” to “and.”

The bill also prohibits the courts from applying a deferential standard. In practice, courts will be precluded from using the “fairly debatable” standard when evaluating impact fee challenges. The fairly debatable standard is most widely applicable in land use cases and is a “highly deferential

²³ 5 Fla. Prac., Civil Practice s. 16:1 (2009 ed.).

²⁴ See *St. Johns County v. Northeast Florida Builders Ass’n, Inc.*, 583 So. 2d 635 (Fla. 1991).

²⁵ See the Florida Impact Review Task Force, *Final Report & Recommendations* (Feb. 1, 2006), available at <http://www.floridalcir.gov/taskforce.cfm> (last visited Mar. 17, 2009).

²⁶ *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126 (Fla. 2000).

standard requiring approval of a planning action if reasonable persons could differ as to its propriety.”²⁷ This standard requires deference to the policy-making function of a board when acting in a legislative capacity, providing that its actions will be sustained as long as they are fairly debatable.²⁸

It is not clear if the bill’s reference to “state legal precedent” will only capture case law as it now stands, or if it will capture the evolving state of the law as cases regarding impact fee challenges are decided by the courts. When a general cross-reference appears in a statute, courts will treat the cross-reference as incorporating future amendments. Specific references included in statutes will usually be treated as a reference to the other statute or law as it existed at the time the reference was adopted. A court’s interpretation of this provision will likely turn on its conclusion of whether the reference to “state legal precedent” is specific or general.

The bill provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Section 18, Art. VII, State 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. Because this bill does not qualify for one of the exceptions or exemptions provided in s. 18, Art. VII, State Constitution, and reduces the authority of local governments to impose impact fees, the bill does fall under the mandate provisions of s. 18, Art. VII, State Constitution, and may require a two-thirds vote of the membership of each house of the Legislature.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

In a federal or state constitutional case, standards of review and burdens of proof can become constitutional issues. The argument might be made that it is within the purview of the courts and not the Legislature to interpret the constitution. This raises a constitutional separation of powers issue. In this bill, the language forbidding the courts to use a more deferential standard of review, though reasonable in general, may emphasize the separation of powers problem if an impact fee is challenged on a

²⁷ *Island, Inc. v. City of Bradenton Beach*, 884 So. 2d 107 (Fla. 2d DCA 2004).

²⁸ 7 FLA. JUR 2d *Building, Zoning, and Land Controls* s. 246.

constitutional basis. Impact fees are open to being challenged on a number of state and federal constitutional grounds including: federal and state takings claims,²⁹ challenges that it is an improperly enacted tax,³⁰ and challenges that it violates the state constitutional requirement for free public schools.³¹

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The Revenue Estimating Conference has determined that this bill has a negative but indeterminate impact on local government revenue.

B. Private Sector Impact:

The bill clarifies that the government bears the burden of proof in impact fee cases. In addition, courts will be precluded from applying a deferential standard to the challenge, which usually favors the local government. As a result, in some instances, individuals and developers may be more successful in suits challenging the assessment of these fees.

C. Government Sector Impact:

The preponderance of the evidence burden of proof is likely less deferential to local governments than the inconsistent deference courts currently afford impact fees. Therefore, there may be an increase in litigation challenging impact fees, and those impact fees that do not have data and analysis to show that they meet the dual rational nexus test are more likely to be struck down on constitutional grounds.

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.)

CS by Judiciary on April 1, 2009:

The committee substitute incorporates the traveling amendment adopted in the Committee on Community Affairs (Barcode 666974). The committee substitute:

²⁹ U.S. CONST. amend. V; FLA. CONST. art. I, s. 9.

³⁰ FLA. CONST. art. VII, s. 1.

³¹ FLA. CONST. art. IX, s. 1.

- Provides that the government, not the challenger, bears the burden of proof by a preponderance of the evidence in impact fee challenge cases; and
- Specifies that the “court may not use a deferential standard” rather than the “court may not use a deferential standard *that favors either party*.”

B. Amendments:

None.