Impact fees -- Schools -- Counties

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Subject:
Impact fees -- Schools -- Counties

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Ms. Leslie Campione, Chairman
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RE: IMPACT FEES – USER FEES – SCHOOLS – COUNTIES – whether county can levy school impact fees for portion of county, but not entire county. s. 163.31801, Fla. Stat.; Art. IX, s. 1, Fla. Const.

Dear Mr. Johnson and Ms. Campione:

On behalf of the School Board of Lake County and the Lake County Board of County Commissioners, you have asked substantially the following question:

May the Lake County Board of County Commissioners levy school impact fees for one portion of the county and not the entire county?

In sum:

The Lake County Board of County Commissioners may levy school impact fees for one portion of the county and not the entire county so long as the ordinance satisfies the dual rational nexus test and does not implicate Article IX, section 1, Florida Constitution.

Impact fees, which include connection fees, are the method by which a new user of a government-owned system pays his or her fair share of the costs that the new use of the system involves.[1] Impact fees are the accepted method of paying for public improvements to serve new growth.[2]

In Florida, impact fees are imposed pursuant to local legislation. As the Florida Legislature recognizes in section 163.31801, Florida Statutes, the "Florida Impact Fee Act":

"(2) The Legislature finds that impact fees are an important source of revenue for a local

government to use in funding the infrastructure necessitated by new growth. The Legislature further finds that impact fees are an outgrowth of the home rule power of a local government to provide certain services within its jurisdiction. Due to the growth of impact fee collections and local governments' reliance on impact fees, it is the intent of the Legislature to ensure that, when a county or municipality adopts an impact fee by ordinance or a special district adopts an impact fee by resolution, the governing authority complies with this section."

The act imposes minimum requirements for adoption of impact fees by local ordinance. Any such fee must, at a minimum:

"(a) Require that the calculation of the impact fee be based on the most recent and localized data.
(b) 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.
(c) Limit administrative charges for the collection of impact fees to actual costs.
(d) Require that notice be provided no less than 90 days before the effective date of an ordinance or resolution imposing a new or increased impact fee. A county or municipality is not required to wait 90 days to decrease, suspend, or eliminate an impact fee."[3]

Impact fees, and issues related to their imposition, have been the subject of several Florida court cases. In *Hollywood, Inc. v. Broward County*,[4] the Fourth District Court of Appeal considered the validity of a county ordinance that required a developer to dedicate land or pay a fee for the expansion of the county park system as a condition of plat approval. 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.[5] This is the "dual rational nexus test" that the courts have applied to test the validity of impact fees. In order to show that the impact fee meets these requirements, the local government must demonstrate a rational nexus between the need for additional public facilities and the proposed development. Further, the local government must show that the funds are earmarked for the provision of public facilities to benefit the new residents.[6] The Fourth District Court of Appeal in *Hollywood, Inc.*, determined that the ordinance at issue satisfied these requirements and affirmed the circuit court's validation of the impact fee ordinance.[7]

The Florida Supreme Court, in *St. Johns County v. Northeast Florida Builders Association, Inc.* ,[8] addressed the assessment of impact fees on new residential construction for new school facilities. The county ordinance being challenged conditioned the issuance of a new building permit on the payment of an impact fee. The impact 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.'"[9] The builders in *Northeast Florida Builders Association, Inc.*, argued that many of the residences located in the new development would have no impact on the public school system. The Florida Supreme Court found that the county's determination that every one hundred residential units would result in the addition of 44 students in the public school system was sufficient and, therefore, concluded that the first prong of the dual rational nexus test had been met. However, the Court determined that the ordinance did not restrict the use of the funds to sufficiently ensure

that such fees would be spent for the benefit of those who had paid the fees[10] and on this basis, the ordinance did not satisfy the second prong of the test.

In *Volusia County v. Aberdeen at Ormond Beach*,[11] the owner of a mobile home park with restrictive covenants prohibiting children from living in the park brought suit against the county to challenge the constitutionality of a public school impact fee assessed countywide on new homes. The Florida Supreme Court applied the dual rational nexus test to determine the constitutionality of the impact fee. The Court advised that the local government must demonstrate reasonable connections between: (1) "the need for additional capital facilities and the growth in population generated by the subdivision" and (2) "the expenditures of the funds collected and the benefits accruing to the subdivision."[12] As the Court noted,

"The language of the test itself belies the assertion that a countywide standard should be employed.[13] The first prong of the test explicitly requires a nexus between the County's need and the 'growth in population generated by the subdivision.' (citation omitted) Similarly, the test's second prong ensures that 'benefits accru[e] to the subdivision.' Thus, the explicit references to subdivisions indicate that the standard is not tailored to countywide growth, but to growth of a particular subdivision."[14]

The Court determined that a broad reading of the dual rational nexus test would "obliterate the distinction between an unconstitutional tax and a valid fee."[15] As the Court explained:

"Indeed, imposing a countywide standard would eviscerate the substantial nexus requirement. This nexus is significant because of the distinction between taxes and fees. As this Court noted in *Collier County*, '[T]here is no requirement that taxes provide any specific benefit to the property; instead, they may be levied throughout the particular taxing unit for the general benefit of residents and property.' *Collier County*, 733 So.2d at 1016 (quoting *City of Boca Raton v. State*, 595 So.2d 25, 29 [Fla.1992]). Fees, by contrast, must confer a special benefit on feepayers 'in a manner not shared by those not paying the fee.' *Id.* at 1019. We likewise noted in *State v. City of Port Orange*, 650 So.2d 1, 3 (Fla. 1994), that 'the power of a municipality to tax should not be broadened by semantics which would be the effect of labeling what the City is here collecting a fee rather than a tax.'"[16]

The Court concluded that where there was no potential for student-generating housing to exist within the subdivision, as was the case in the age-restricted community,[17] the subdivision may be exempt from paying public school impact fees.

In light of the Court's discussion of the subdivision-based standard for the dual rational nexus test in *Volusia County v. Aberdeen at Ormond Beach*, it would appear that a geographically limited school impact fee ordinance could be crafted so long as the ordinance satisfied the test.

In addition to a consideration of the dual rational nexus test, the Court has considered whether the school impact fee could constitute an unconstitutional user fee.[18] In *St. Johns County v. Northeast Florida Builders Association, Inc.*,[19] the county ordinance imposed an impact fee on new residential construction to be spent by the school board to "acquire, construct, expand and equip the education sites and educational capital facilities necessitated by new development."[20] The ordinance was applicable to both unincorporated and incorporated areas

of the county, except that it was not effective within the boundaries of any municipality until the municipality entered into an interlocal agreement with the county to collect the impact fees.

The St. Johns County ordinance allowed property owners who warranted that their children would attend private school to be exempted from the impact fee with the understanding that if a school child later occupied the home, the fee would have to be paid. Childless couples could also obtain an exemption. The Court noted that

"[I]n a very real way the alternative mechanism of determining the impact fee . . . permits households that do not contain public school children to avoid paying the fee. This means that the impact fees have the potential of being user fees that will be paid primarily by those households that do contain public school children, thereby colliding with the constitutional requirement of free public schools."[21]

In order to avoid implicating a violation of Article IX, section 1, Florida Constitution, the Court severed the offending section to preserve the validity of the balance of the ordinance. The Court made a clear distinction between the developer of an adult retirement living facility who could avoid the payment of the impact fee because no children would ever be allowed to live in the facility and who would never receive a special benefit from payment of the impact fee and the property owners whose current situation did not involve children in the home using public school facilities, but whose property could, through the years, be home to school-age children who could take advantage of the impact-fee funded schools. Thus, by removing the provision for certain exemptions, the St. Johns County ordinance was determined to be an impact fee not a users fee and was constitutionally acceptable.

Likewise, the Court in *Volusia County v. Aberdeen at Ormond Beach*,[22] determined that allowing an exemption from public school impact fees for age-restricted communities did not violate the provisions of Article IX, section 1, Florida Constitution (guaranteeing free public schools), by converting impact fees into school user fees:

"[T]he logical conclusion is that where there is no potential for student-generating housing to exist within the subdivision, the subdivision may be exempt from paying public school impact fees."[23]

In sum, it is my opinion that the Lake County Board of County Commissioners may levy school impact fees for one portion of the county and not the entire county so long as the ordinance satisfies the dual rational nexus test and is drafted in such a way that it does not implicate Article IX, section 1, Florida Constitution.

Sincerely,

Pam Bondi
Attorney General

PB/tgh

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[1] *See Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976).

[2] *See St. Johns County v. Northeast Fla. Builders Ass'n*, 583 So. 2d 635 (Fla. 1991) (school impact fees to finance new schools); *Home Builders & Contractors Ass'n of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County*, 446 So. 2d 140 (Fla. 4th DCA 1983) (road impact fees upheld), *review denied*, 451 So. 2d 848 (Fla. 1984), *appeal dismissed*, 469 U.S. 976, 105 S.Ct. 376, 83 L.Ed.2d 311 (1984); *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. 4th DCA), *review denied*, 440 So. 2d 352 (Fla. 1983) (park impact fees upheld).

[3] Section 163.31801(3), Fla. Stat.

[4] 431 So. 2d 606 (Fla. 4th DCA 1983).

[5] *Supra* n.4 at 611. *And see Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126 at 134 (Fla. 2000), employing the *Hollywood, Inc. v. Broward County* standard and citing *St. Johns County v. Northeast Florida Builders Ass'n, Inc., supra* n.2.

[6] *Id.* at 611- 612.

[7] *Id.* at 614.

[8] 583 So. 2d 635 (Fla. 1991).

[9] *Id.* at 637.

[10] *Id.* at 639. The Court determined that because the county ordinance was not effective within a municipality in the absence of an interlocal agreement, there was the possibility that impact fees could be used to build a school within a municipality that would not be subject to the impact fee.

[11] 760 So. 2d 126 (Fla. 2000).

[12] Citing *St. Johns County, supra* n.9.

[13] *Volusia County* argued that the dual rational nexus test required that needs and benefits should be assessed based on countywide growth. The Court rejected this argument: "Thus, we expressly repudiated [in Collier County v. State, 733 So. 2d 1012 (Fla. 1999)] a countywide standard for determining the constitutionality of impact fees."

[14] *Volusia County, supra* n.11 at 134.

[15] *Id.* at 135.

[16] *Supra* n.15.

[17] The mobile home park was an age-restricted community pursuant to restrictive covenants which were contained in a supplemental declaration of covenants, conditions, and restrictions.

The supplemental declaration provided that the mobile home park owner retained the right to revoke or modify restrictions except those prohibiting minors from residing on the property.

[18] Article IX, section 1 of the Florida Constitution, requires a uniform system of free public schools.

[19] 583 So. 2d 635 (Fla. 1991).

[20] *Id.* at 637 citing St. Johns County, Fla., Ordinance 87-60 s. 10(B) (Oct. 20, 1987). The ordinance applied to residential building permits, permits for residential mobile home installations, and permits to make improvements to land reasonably expected to place additional students in St. Johns County public schools.

[21] *Supra* n.19 at 640.

[22] *Supra* n.11.

[23] *Id.* at 135.