

The Evolving Law on Impact Fees

Florida Association of County Attorneys
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Robert C. Volpe
Holtzman Vogel, PLLC

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Impact Fees: the Constitutional Dimension

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Types of Exactions

- Subdivision/Site related
 - Site improvement dedications (dedicate roads, water/sewer, drainage)
 - Site - regional improvement dedications (dedicate/establish region-serving areas or improvements – water/sewer, stormwater, road right-of-way, etc.)
 - Land dedication or fee in lieu (historically parks or schools)
 - Off-site/adjacent improvements (intersection/roadway improvements beyond those required for project).
- Regulatory (Impact) Fees
 - Connection fees (water and sewer)
 - Impact fees for public facilities
- Quasi-Exactions
 - Special Assessments
 - User Fees

Limits under the U.S. Constitution

“Unconstitutional Conditions” – Cannot Condition Development Approval if it would Otherwise Be a Taking

- *Nolan v. California Coastal Commission* -
 - Exactions must have nexus to impact – designed to offset impact
- *Dolan v. City of Tigard* –
 - Exactions must be roughly proportional to impact
- *Koontz v. St. John’s Water Management District*
 - Doctrine applies to money as well as land (easements) and to off-site as well as on-site exactions

Limits under Florida Constitution

- Takings under Florida Constitution
 - Florida’s takings provision (Art. I, Sec. 2; Art. X, Sec. 6) interpreted consistent with United States Constitution
- Illegal taxes – other than ad valorem taxes, all taxation is preempted to the state and must be authorized by statute (Art. VII, Sec 1 and 9)
 - Quasi-Exactions (special assessments and user fees) are considered proprietary payments and not taxes, even when they are enforced by liens and foreclosure.
 - Direct exactions of land or improvements are not considered taxes, but are subject to limits under Takings/Unconstitutional Conditions
 - Impact fees and similar “regulatory” charges are considered taxes unless they pass the “Dual Rational Nexus” test

The Dual Rational Nexus Test

the local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision.

Hollywood, Inc. v Broward County, 431 So. 2d 606. 611-12 (Fla. 4th DCA 1983).

Confirmed by Fla. Supreme Court in *St. Johns County v NE Fla. Builders Ass'n Inc.*, 583 SO. 2d 635 (Fla. 1991) and *Volusia County v. Aberdeen at Ormond Beach LP*, 760 So. 2d 126 (Fla. 2000).

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Meeting the Impact Nexus

- Impact fees only for **capital improvement necessitated by growth** – administrative of fees acceptable, but **not for operational costs**.
- **Level of Service** – relating the consumption of capital costs to the kind and amount of the new development.
 - Quantity of **the facility** used by some aspect of development that can be reasonably measured
 - Cost of the facilities that will be (or have been) provided to meet the demands of new development.
 - Special studies for impacts or costs if developer believes the standard adopted does not apply.
- **Service/Benefit areas** – if **need for new facilities or cost of providing them** varies significantly in different areas of the jurisdiction
- Credits – to prevent payment that exceeds the impact
 - Taxes that pay for the same facilities
 - Proportionate share or other exactions for the same facilities
 - Facilities or land contributed provided by the developer/development (for the same impacts)

Meeting the Benefit Nexus

Fee Payers Must Get the Facilities They Pay For

- Capital improvements program
 - Demonstrate that level of service will be met by expended funds
 - Plans for particular improvements, demonstrated improvements to capacity and actual expenditures
- Service areas
 - Ensure that paying development benefit from the facilities built with the fees they pay
- Segregated trust funds by infrastructure type/service area
 - Ensure that funds collected are used only for the facility/service area
- Refunds – if collected fees are not used in a reasonable time

Issues Over Time

- Burden of proof – what is burden on government?
 - Is an impact fee valid if it appears “reasonable”, regardless of the quality of the data or actual implementation?
 - How good or recent does the data have to be to support an impact fee?
 - Does challenger have to establish methodology is flawed or that fee cannot be proper
- What is a capital improvement – Library books? Desks and chairs? Vehicles or equipment with relatively short life-span?
- How to separate imposition/use of fees where infrastructure is already constructed (recoupment)? (***Save Our Septic Systems Committee, Inc. v. Sarasota County***, 957 So. 2d 671 (Fla. 2nd DCA 2007).
- Measuring impact and exempting development that would not create impacts (***Volusia v Aberdeen***)
- County-wide fees imposed on municipalities

Impact Fees: the Statutory Dimension

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§ 163.31801, Florida Statutes “Florida Impact Fee Act”

Recent Amendments:

- 2019 - House Bill 7103
- 2020 - Senate Bill 1066
- 2021 - House Bill 377

House Bill 7103 (2019)

- Dual Rational Nexus Test:
 - “Ensure that the impact fee is *proportional and reasonably connected to, or has a rational nexus with...*
 - earmark funds to acquire, construct, or improve capital facilities to benefit new users.
 - Cannot be used to pay existing debt.
- Credits:
 - Dollar-for-dollar credit against contribution related to public education facilities (stay tuned...)
 - ↑ rates = ↑ credit value

House Bill 7103 (2019)

- Other significant amendments:
 - Cannot collect impact fees prior to building permit
 - Waiver for affordable housing
 - Does not apply to water and sewer connection fees
 - Burden of proof in challenge to dollar-for-dollar credits:
 - Government has the burden - “preponderance of the evidence”
 - Courts may not use deferential standard to benefit of the government.

Senate Bill 1066 (2020)

- Preempts credits:
 - “Notwithstanding any charter provision, comprehensive plan policy, ordinance, or resolution...” (stay tuned...)
- Credits are assignable and transferrable ... within the same zone or district OR to adjoining zone or district.

House Bill 377 (2021)

- ... Expands credit for dedications from public school facilities to all public facilities or infrastructure.
- Limits impact fee increases
 - No more than 25% - 2 annual increments
 - Between 25 and 50% - 4 annual increments
 - In no case more than 50%
 - Can only increase once every 4 years
- Can exceed with demonstration of “extraordinary circumstances necessitating the need to exceed phase-in limitations.”

Summary (2019-2021):

1. CODIFICATION OF DUAL RATIONAL NEXUS TEST
2. PHASE IN IMPACT FEE INCREASES
3. CREDITS
 - Dollar-for-Dollar / Full benefit
 - Assignment and transfer
4. NEW STANDARDS AND BURDENS

Santa Rosa Cnty. and School Board of Santa Rosa Cnty.
v.
Home Builders Association of West Florida, Inc.

2021 WL 3177293 (Fla. 1st DCA, July 28, 2021)

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Santa Rosa Cnty. v. Home Builders Assoc. of W. Fla.

ORDINANCE BOOK 16 PG 103

ORDINANCE NO. 2020 - 01

AN ORDINANCE RELATING TO SANTA ROSA COUNTY, FLORIDA, AMENDING ARTICLE V OF THE SANTA ROSA COUNTY, FLORIDA, CODE; RELATING TO THE CREATION OF AN EDUCATIONAL FACILITIES IMPACT FEE; PROVIDING A SHORT TITLE, AUTHORITY, AND APPLICABILITY; PROVIDING LEGISLATIVE FINDINGS; PROVIDING INTENT AND PURPOSE; PROVIDING DEFINITIONS; PROVIDING FOR IMPOSITION OF AN EDUCATIONAL FACILITIES IMPACT FEE; PROVIDING A FEE SCHEDULE; PROVIDING FOR PAYMENT OF FEES AND FOR CREDITS; PROVIDING FOR USE OF FUNDS COLLECTED; PROVIDING EXEMPTIONS; PROVIDING FOR APPEALS; PROVIDING FOR REVIEW; DECLARING THE EXCLUSION FROM THE ADMINISTRATIVE PROCEDURES ACT; PROVIDING FOR NOTICE OF IMPACT FEE RATES; PROVIDING FOR CONFLICTS OF LAW; PROVIDING FOR SEVERABILITY; PROVIDING FOR CODIFICATION; AND PROVIDING AN EFFECTIVE DATE

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF SANTA ROSA COUNTY, FLORIDA:

SECTION 1. SHORT TITLE, AUTHORITY, APPLICABILITY, AND LEGISLATIVE FINDINGS

(a) This Ordinance shall be known and may be cited as the "Santa Rosa County Educational Facilities Impact Fee Ordinance."

(b) The Board of County Commissioners has the authority to adopt this Ordinance pursuant to Article VIII of the Constitution of the State of Florida, and Chapter 125 and Sections 163.3201 and 163.3202, Florida Statutes.

(c) This Ordinance shall apply to all areas of the County in a manner consistent with the opinion of the Florida Supreme Court in *St. Johns County v. Northeast Florida Builders Association, Inc.*, 583 So.2d 635 (Fla. 1991).

(d) Section 163.3202(3), Florida Statutes, encourages the use of innovative land development regulations, including the use of Impact Fees, to implement the goals, objectives and policies of a County's Comprehensive Plan.

(e) The School Board has adopted a resolution which requests the County to adopt an Educational System Impact Fee which requires future Residential Construction to contribute its fair share of the cost of capital improvements and additions to the Educational System which are necessary to accommodate the impact generated by such growth.

(f) The School Board has determined that ad valorem tax revenue and other revenues will not be sufficient to provide the capital improvements and additions to the Educational System which are necessary to accommodate such growth.

(g) Part II, Chapter 163, Florida Statutes, requires the County to adopt a Comprehensive Plan containing a capital improvements element which considers the need and location of public facilities which its areas of jurisdiction and the projected revenue source which will be utilized to fund these facilities.

(h) Pursuant to Section 1013.33, Florida Statutes, the School Board and the County are required to coordinate the planning of Educational Facilities with the planning of Residential Construction and the providing of other necessary services. Moreover, Section 1013.33(10), Florida Statutes, requires Educational Facilities to be consistent with the Comprehensive Plan.

(i) Implementation of the Educational System Impact Fee to require Residential Construction to contribute its fair share of the cost of growth-necessitated capital improvements to the Educational System promotes the general welfare of the citizens of Santa Rosa County. The provision of Educational Facilities which are adequate for the needs of growth is in the general welfare of all County residents and constitutes a public purpose.

- **FACTS:**
 - Educational Facilities Impact Fee
 - Original report – two impact fee amounts for north and south Santa Rosa County.
 - Final report – one impact fee rate county-wide.
 - Commission imposed county-wide impact fee.

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Santa Rosa Cnty. v. Home Builders Assoc. of W. Fla.

“To be valid, impact fees must satisfy **constitutional** and **statutory** requirements. First, to fall within the limits of a local government's authority, they must be true impact fees and not taxes.”

“To differentiate between a valid impact fee and an unconstitutional tax, courts use the **dual rational nexus test**.”

“And unlike taxes, fees ‘must confer a special benefit on feepayers in a manner not shared by those not paying the fee.’”

Santa Rosa Cnty. v. Home Builders Assoc. of W. Fla.

“Second, the Florida Impact Fee Act sets forth the minimum statutory requirements for a valid impact fee. § 163.31801(3), Fla. Stat. (2019). The Act requires impact fees to be based on the ‘most recent and localized data.’ § 163.31801(3)(a), Fla. Stat.”

Santa Rosa Cnty. v. Home Builders Assoc. of W. Fla.

[Santa Rosa County's] impact fees failed the dual rational nexus test because:

1. Did not account for the differences between the northern and southern parts of the county.
2. Disproportionate to the growth in these geographical regions.
3. Fee payers would not receive a special benefit.
4. Not the most recent and localized data.

Proportionate-Share Basics

- Policy framework—considerations:
 - Residential v. non-residential development
 - Minimize negative impacts on affordable housing, economic development
 - Avoid current deficiencies
 - Recoup past investments in excess capacity
- Level-of-service (LOS) standards
 - Meet first prong of dual rational nexus test
 - Measure of relationship between service capacity and service demand for public facilities by demand-to-capacity ratios

Proportionate-Share Basics

- Service Areas
 - A Defined Geographic Area In Which A Defined Set Of Public Facilities Provide Service To Development Within The Area—sound Engineering, Planning Principles
 - Jurisdiction-wide Or Multiple—generally The Fewest Required
 - Assessment And Benefit Districts

Procedural Issues

- Fee Schedule
- Independent Calculations
- Appeals
- Exemptions And Waivers
- Construction Credits
- Credits For Lapsed Approvals
- Collection Of Fees & Refunds
- Expenditure And Accounting
- Adoption Procedures

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Credits

- Forms of Credits
 - Fees should not generate more revenue than needed to provide facilities required to accommodate new development
 - “External credits”—revenues available to finance the same facilities for which impact fees are used.
 - Dedicated, fixed sources of income
- Estimating credits
- Development credits
 - Facility on capital improvement plan constructed by developer
 - Applied only to same type facilities as fee
 - Allowed only for up to impact fees that would be assessed

The Planning Connection

- Impact fees and exactions
- Capital improvement element
- Level-of-service standards
- Service areas
- Projection of facility needs
- Schedule of improvements
- Funding sources

The Planning Connection

- Impact Fees and Exactions
 - Other exactions—land use regulatory step
 - Two-step development approval process
 - Unique and development specific impacts
 - Community-wide development impacts on public facilities
- CIE/CIP — Public Facilities/Infrastructure
 - Establish future los standards in quantifiable terms
 - Delineate service areas
 - Show capital improvement costs and identify funding sources

The Planning Connection

- Level-of-service standards
 - Measures relationship between service capacity / service demand
 - Jurisdiction specific; uses variety of relationships, units, criteria
- Service areas
- Projection of facility needs
 - Current level-of-service standards
 - Identify deficiencies
 - Variation of service levels throughout jurisdiction
 - Limiting factors for service provision
 - Areas where new infrastructure needed to support growth

The Planning Connection

- **Schedule of improvements**
 - Brief description of each project
 - Assignment of project to service area(s)
 - Implementation time frame; phases; distinct funding sources
 - Quantification of additional capacity
 - Consistent with comprehensive plan goals, objectives, policies
- **Funding sources**
 - Accurate total project costs
 - Percentage of costs attributable to added capacity to serve new development
 - Sources of funds other than impact fees for project costs

Implementation: The Proportionate-share Development Fee Ordinance

Ordinance Design And Drafting

- Adoption
- Assessment
- Collection
- Accounting
- Disbursement
- Enforcement
- Credits
- Waivers
- Variances
- Refunds
- Data Maintenance
- Administrative Expense

Implementation: The Proportionate-share Development Fee Ordinance

Model Ordinance Sections

1. Legislative findings
2. Short title, authority, applicability
3. Intents and purposes
4. Rules of construction
5. Definitions
6. Imposition of fee
7. Computation of fee amount
8. Payment of fee
9. Fee districts
10. Trust fund established
11. Use of funds
12. Refund of fees paid
13. Exemptions and credits
14. Review
15. Penalty provision
16. Severability
17. Effective date

QUESTIONS ???

Robert C. Volpe

Holtzman Vogel, PLLC
rvolpe@holtzmanvogel.com

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