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MEMORANDUM

TO: BRADLEY ARNOLD, COUNTY ADMINISTRATOR

FROM: JENNIFER C. REY, ESQ.
THE HOGAN LAW FIRM, LLC AS COUNTY ATTORNEY

SUBJECT: IMPACT FEES

DATE: DECEMBER 28, 2020

The use of impact fees has become an accepted method of paying for public improvements that must be constructed to serve new growth. *St. Johns Cty. v. Ne. Fla. Builders Ass'n*, 583 So. 2d 635, 638 (Fla. 1991). Several cases in Florida have developed the legal framework for the imposition of impact fees.¹ Many of the key holdings of these cases have since been codified in statute.

The current statutory framework providing for local governments to establish and assess impact fees is set forth in Section 163.31801, Florida Statutes (2020). Any impact fee adopted by ordinance must satisfy several conditions. The amount of the fee must be (1) calculated based on the most recent and localized data, (2) proportional and reasonably connected to, or have a rational nexus with, the need for additional capital facilities and the increased impact generated by the new residential or commercial construction, and (3) proportional and reasonably connected to, or have a rational nexus with, the expenditures of the funds collected and the benefits accruing to the new residential or nonresidential construction.

In addition, impact fees collected must be accounted for in a separate fund. So that the funds are specifically earmarked for use in acquiring, constructing, or improving capital facilities to benefit new users. Revenues generated by the impact fee may not be used, in whole or in part,

¹ *Contractors and Builders Association of Pinellas County v. City of Dunedin*, 329 So.2d 314 (Fla. 1976); *Hollywood, Inc. v. Broward County*, 431 So.2d 606 (Fla. 1976); *Home Builders and Contractors Association of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County*, 446 So.2d 140 (Fla. 4th DCA 1983); *Seminole County v. City of Casselberry*, 541 So.2d 666 (Fla. 5th DCA 1989); *City of Ormond Beach v. County of Volusia*, 535 So.2d 302 (Fla. 5th DCA 1988); and *St. Johns County v. Northeast Florida Builders Association*, 583 So. 2d 635, 637 (Fla. 1991); and *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 2000 Fla. LEXIS 911, 25 Fla. L. Weekly S 390.

to pay existing debt or for previously approved projects unless the expenditure is reasonably connected to, or has a rational nexus with, the increased impact generated by the new residential or nonresidential construction.

There is a variety of requirements for the administrative and procedural mechanisms used in imposing impact fees. Administrative charges for the collection of impact fees must be limited to actual costs. Not less than 90 days' notice must be provided before the effective of the ordinance imposing a new or increased fee. Fees may not be collected earlier than the date of issuance of a building permit for the property subject to the impact fee. Furthermore, in its obligation to provide financial reporting on impact fees the County must report on the specific purpose of the impact fee, including the specific infrastructure needs to be met, the policy describing the method of calculating impact fees, such as flat fees, tiered scales based on number of bedrooms, or tiered scales based on square footage, the amount assessed for each purpose and for each type of dwelling, and the total amount of impact fees charged by type of dwelling.

With these parameters in mind, I will address the specific question posed as part of the County's review of its impact fee schedule. May the County segregate the commercial uses from the residential uses for the purpose of raising the impact fee at a disproportionate amount for each?

While the simple answer is no because impact fees may not be disproportionate, a multi-tiered analysis is required as there are policy options the County may consider in determining how it calculates and imposes impact fees. First, the County must consider the method for calculating its impact fee. If the consumption-based methodology is used, as opposed to the needs based methodology, the methodology itself incorporates the differing levels of consumption of public infrastructure by use; therefore, any policy to implement recommendations provided by the study would need to be uniform across all parcels in order to be consistent with the proportionality requirements set forth in the statute. For example, if a maximum value for a fee is established for a particular type of infrastructure and the County determines to set its impact fee at a percentage of that value, then the percentage would need to be the same for all parcel types; otherwise, the fee would not be proportional across new development. Impact fees imposed cannot exceed a pro-rata share of the cost of expanding public facilities necessary to serve the new development. What is not permissible is an arbitrary determination of a fee amount not otherwise substantiated by the adopted methodology.

Second, the type of infrastructure for which the fee is imposed is also a factor in determining how such fees may be assessed. Different types of fee structures may be supported

for different types of public infrastructure. Types of fees structures that have been determined to be legally defensible include flat fees, tiered fees based on square footage, or tiered based on number of bedrooms. However, the fee structure must be substantiated by the methodology, must be proportional, and must satisfy the dual rational nexus requirements.

Third, new development may not bear the full cost of a higher level of service than existing development, and it may not bear the full cost of increased capacity that is beyond its proportional share. If impact fees are based on a higher level of service standard than currently exists, the impact fees must be reduced to account for taxes that will be paid by new development and used to help pay to remedy the deficiency. To shift the burden of a higher level of service entirely to new development would not be consistent with the proportionality requirements.

Therefore, given the County's current study and adopted methodology, the County may establish a uniform percentage of the recommended range, but it may not arbitrarily set different percentage amounts for different parcel types as that would violate the proportionality requirements. However, the County may determine that an alternative methodology would be more effective for the County's current growth and development needs, and the County may determine a new study is needed to address current localized growth needs.

If you should have any questions regarding the information contained in this memo, please feel free to contact me.