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Advance impact fee payment questioned

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BROOKSVILLE — When the developer of the proposed Hickory Hill subdivision in Spring Lake signed an agreement with the school district to pre-pay impact fees, he became the first in the county to do so.

The agreement, signed in February at a school board meeting, calls for Sierra Properties LLC of Tampa advancing \$703,890 to the school district to be used "as it deems fit to meet its capital needs."

But depending on who you talk to, the agreement means different things to different people.

Many are skittish in using the word "pre-payment," even though that word and "advance" is found sprinkled throughout the document.

Assistant County Attorney Jeff Kirk is adamant: the agreement is not a prepayment of impact fees.

"It is a mitigation payment in lieu of impact fees."

Pre-payment of impact fees is illegal under the county's new impact fee ordinance adopted about a year-and-a-half ago, according to Larry Jennings, deputy county administrator.

"It's an upfront payment of dollars to mitigate the impact to the schools," said Jennings, who likens the confusion to semantics. "Pre-payments are no longer allowed, so it is not technically a pre-payment. It is a mitigation strategy."

But Jacob Varn, the attorney representing Sierra, unhesitatingly called it a prepayment and said the advance money will allow the school district to plan new schools on the county's east side in preparation for the proposed 1,750-home subdivision.

Adding even more confusion to the mix is Planning and Zoning Commissioner Anthony Palmieri, who called the agreement an "interest-free loan." Palmieri, who will vote on whether to approve a new Hickory Hill staff report at tomorrow's planning and zoning meeting, could not be specific as to the parameters of the "loan."

County Attorney Garth Coller preferred to stay out of the matter and referred all questions about the agreement to Kirk, his assistant.

What the agreement says

So who is right?

This much is known: Sierra bypassed the county and went straight to the school district legal staff to negotiate a four-page agreement.

During the first phase of development, which includes 165 homes, Sierra agrees to "advance the amount of \$703,890 to the county commission, which shall in turn advance the payment to the school board."

Sierra would make up the difference in impact fee rates should they increase from the time the agreement is approved.

However, subsequent phases of the development would require Sierra to pay 50 percent of its lots under the then-prevailing impact fee rate at the time the plat is recorded. The other 50 percent would be paid at the time the building permit is issued, which is likely to be months, if not years.

Sierra would pay the prevailing impact fee rate at the time the second 50 percent is paid but would not go back and adjust the first 50 percent. Sierra is locked into those former impact fee rates, regardless if there is a hike.

Kirk was careful in not using the words "pre-payment" in describing the agreement.

Then what about the words "advance" and "pre-pay" laced throughout the document?

"It's not necessarily the way I would have written it," Kirk said.

Kirk said the agreement "is not artfully written" and if it should get to the point where county commissioners must approve it, he would like to present a document free of ambiguities.

"They are entering into a development agreement with the schools to ensure that their school impact fees are mitigated," Kirk said. "It is not a pre-payment."

Sierra is trying to invoke an exemption in the county's impact fee ordinance that would allow them to not pay impact fees, Kirk said.

But the exemption Kirk cites makes it clear that to be excluded from paying school impact fees, the developer would have to provide "full mitigation" to the county. It is unclear whether failure to adjust the first 50 percent of impact fees would qualify as "full" mitigation.

What the developer says

Varn defended the agreement, calling it a huge boon to the cash-strapped school district.

"What we're trying to do is go above and beyond what anyone else has done in Hernando County," Varn said. "We're trying to do things in advance and get ahead of the curve."

"We believe we are in full compliance."

He said the 50-50 payment arrangement for future phases make sense because Sierra is still paying the rates in effect at the time.

"We're locked into the old rates because that's what it costs today to provide those facilities," Varn said.

If the school board uses the advance payment to make the necessary capital improvements at the time of payment, "then we're giving our fair share," he said.

"You can put all kinds of spins on this thing," Varn said.

People can call it a pre-payment, interest-free loan or even a mitigation payment, he said.

But to him, it's a gift to the school board because it allows them to use advance money to prepare for this huge development in Spring Lake. And, should the homes not be built, the district can keep the pre-payments thanks to a non-refundable clause in the agreement, he said.

Does the county have any say?

When it comes to impact fee collection, the buck stops with the county. Commissioners set the rates and are responsible for enforcement.

So why didn't Sierra include the county during the drafting of this landmark impact fee agreement? And will the county have any say in the agreement's adoption?

Varn admitted that Kirk expressed concern when he was told Sierra and the school board negotiated the agreement independent of the county staff.

"Kirk raised questions about the legality of it and we sat down and walked him through the document," he said.

Varn said it took all of 10 minutes to mollify Kirk.

Varn also said he has no problem with the county signing off on the agreement if it gets that far.

"If that's what it takes to make them happy," he said.

But even there, there is a difference in opinion.

School board attorney Paul Carland said he doesn't believe the county has to approve this document.

"I don't technically think they have to sign off on it," he said. "I don't believe they have to be a party to these agreements."

Carland also defended the 50-50 arrangement.

"I think part of the rationale for the advance was that we would have benefit of the money at the time the 50 percent is paid rather than having to wait for the money to come in as building permits are issued," he said.

But, he added, "there is a potential that the county may want changes in (the agreement)."

Setting a precedent?

Kirk would not comment on whether the Sierra agreement with the school district would set a precedent for other developers and builders to negotiate their own deals with the school district.

But perhaps word has already gotten out.

Last Tuesday, school board members approved a separate agreement with Lucky Find Development Co. LLC, which is proposing to build 120 single-family homes on 50 acres at U.S. 19 and Parrot Road.

The builder has agreed to contribute \$500 per home to the school district, which would

add an extra \$60,000 to its coffers. But that agreement — unlike Sierra's — obligates Lucky Find to also pay the prevailing impact fee rates to the county.

County Commissioner Jeff Stabins said he encourages builders and developers to take the initiative and work with the school district, which is already hard-pressed to build enough classrooms to meet the needs of a booming population.

"I encourage builders to step up to the plate and volunteer to donate more to the school system," Stabins said.

Stabins, who interprets Sierra's agreement with the school district as a pre-payment of impact fees, said the \$703,000 up front is money "badly needed by the school system."

But what happens if Hickory Hill doesn't start building homes for 3-5 years and impact fees rise? Will they adjust their pre-paid fees accordingly? Stabins was not sure.

"That's a very good question," Stabins said. "A very good question."

What's next

So far, no money has been exchanged between Sierra and the school district. It is unlikely that will happen for quite some time.

On Monday, planning and zoning commissioners will review a county staff report, take citizen comments and vote on whether to send it off to county commissioners for review next month.

County commissioners will then have to vote on sending it off to the state Department of Community Affairs, which will review whether changes to the county's comprehensive plan should be made to accommodate the Hickory Hill development.

Then it is back to county commissioners for more discussion. At that point, Sierra's agreement with the school district should be discussed, according to Kirk.

Of course, if the board denies the Hickory Hill project, the agreement becomes moot.

Jennings is sure about one thing: the county will have to recognize and include any reference to the agreement in any zoning or development order that is issued. The county will also be responsible for enforcing any agreed-to exchange of money between Sierra and the school district.

"We have to be involved in all phases," Jennings said.

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