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Impact fee refunds big issue for county

STORY BY STEVEN M. THOMAS, (Week of December 15, 2011)
Photo of Indian River County Attorney Alan Polackwich

Local activist Charlie Wilson says the county may be liable for tens of millions of dollars in impact fee refunds to developers whose projects went bust when the real estate boom collapsed.

"Court suits are either in place or pending that could leave taxpayers on the hook for upwards of \$50 million," says Wilson, one-time Vero Beach City

Council member and former president of Asset Research and Recovery, the company that brought the impact refund issue to the forefront earlier this year.

Others with knowledge of impact fee ordinances say Wilson is mistaken about the county's liability, but a close reading of the one case filed so far, "Miami Lakes FVP v. Indian River County," reveals potential problems for the county.

County Attorney Alan Polackwich was scheduled to meet with county commissioners Tuesday to discuss the costs of defending and possibility of settling the Miami Lakes case, and then meet with opposing attorneys Wednesday, but he said ahead of time the case would be hard to resolve out of court.

"We will enter court-ordered mediation in good faith, but I have advised the other side that it will be difficult to settle," Polackwich said prior to the settlement conference.

The case dates back to March 5, 2005, when Lennar Homes paid \$4.1 million in road, water and sewer impact fees to fund new infrastructure to support two subdivisions planned north of State Route 60 at 82nd Ave.

The subdivisions, Tripson Estates and Maderia Isles, were supposed to have a total 462 houses and, in the midst of a building boom, Lennar paid nearly \$9,000 per house in fees far in advance of planned construction to reserve its right to build that many dwellings.

It turned out Lennar's engineer had made an error in figuring the density that would be allowed on the land and when time came for permits in November 2006, the county would only issue 316, which amounted to reduction of 32 percent in the number of houses.

Lennar asked for that percentage of its impact fees back but before the issue was resolved, the real estate market began its epic collapse and Lennar decided not to build any homes in the subdivisions.

In May 2009, Lennar told the county it was giving up its reserved right to build houses on the land and asked for all of its impact fees back.

The county declined for two reasons – first, because Lennar signed a waiver acknowledging its fees were non-refundable, and second because, in the words of a court document filed by the county, the county had already "undertaken to plan, design and construct traffic facilities to provide capacity for Lennar's projects," spending some or all of the money.

In November 2009, Lennar sold the subdivision property to Florida Value Partners and FVP renewed the request for a refund.



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Former County Attorney William Collins informed the partners' attorneys that "none of your requested refunds may be granted under the express terms of your clients' agreements with Indian River County, county ordinances, or Florida case law."

In October 2010, the company filed suit in Indian River County Circuit Court to get the impact fee money back. Over the next seven months, company attorneys and Polackwich filed a series of motions and counter motions seeking favorable judgment from the court. In May, at Polackwich's request, the county commission hired Vero Beach law firm of Murphy and Walker at \$290 an hour to take the case to trial, which was then scheduled for September.

The case was eventually postponed and is now slated for a non-jury trial before Judge Cynthia Cox in March.

On the surface, the county seems to be in strong position.

When the impact fees were paid in 2005, Lennar Homes Vice President Michael Smolak signed a document that has been submitted to the Circuit Court waiving "any and all rights for a refund of traffic impact fees paid in connection with this project in exchange for an irrevocable initial 5-year right" to build the 462 houses.

"Charlie Wilson is woofing up the wrong tree," says Arthur Neuberger, who was a member of the county commission in 2005 when the impact fees were paid. "The county is spending its impact fees properly."

"Charlie Wilson makes statements he can't back up," says developer Joe Paladin, who has paid impact fees on many residential developments and served as chairman of the Growth Awareness Committee of Indian River. "I have hundreds of hours invested in understanding impact fees. If a project isn't built, the fees go with the land as a credit for future development. They should not be refunded because the county needs that money for new infrastructure. If you give back the impact fees it means raising taxes, which nobody wants."

But the company's attorneys argue the fees should be refunded, in part or in whole, because Lennar never built any houses or impacted county infrastructure, and they cite numerous precedents in case law to support their position.

State law requires impact fees be used for the purpose they were collected for and for the benefit of those who paid them. Neither of these requirements is met in the Miami Lakes case, except to the extent that the county spent money planning and designing infrastructure in anticipation of the Lennar subdivisions before they were abandoned – a point that will have to be documented in detail and proved in court.

Attorneys with Weiss, Handler, Angelos & Cornwell, P.A., the firm representing the company, are especially insistent the county has no right to money collected for the 147 houses that were never permitted. The firm has asked for a summary judgment ahead of trial for the return of those fees, amounting to approximately \$1.34 million.

Polackwich has admitted this may be the strongest part of the plaintiff's case.

Company attorneys also deny the validity of the waiver, calling it "arbitrary, capricious, and unreasonable in that it purportedly denied Lennar a right to a refund in violation of Florida law declaring any such 'no refund' rule to constitute an illegal development exaction or tax," citing a 1995 case in which Florida courts ordered impact fees refunded even though the developer signed a similar waiver.


They also point out that, even if the waiver is legal, Lennar only signed a waiver of refund for traffic impact fees, not water and sewer fees.

The case is made more complicated and dangerous for the county because there is little settled law in regard to impact fee refunds, and because losing the case would set a damaging precedent.

Last summer, after hiring Murphy and Walker, Polackwich undertook a comprehensive survey of all legislative and case law regarding impact fees in Florida. He found impact fees came into existence on the local level in the 1970s and 1980s and that a fairly clear body of law has been built up addressing the imposition of these fees as developers challenged them and courts made rulings, but that there is no legal precedent regarding refunds.

"All the law deals with the front end, with what constitutes a legitimate impact fee," he says. "The courts never got around to ruling on refunds. There is not one case out there. I am in a position where I have to try and divine from how courts have ruled regarding other types of refunds how they may view this question."

With no clear precedent, the outcome of Miami Lakes v. Indian River County is anything but certain. It will be decided by a single judge over a four-day period on the basis of how much evidence each side can gather and how persuasively they present it.



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Polackwich has said of another impact fee controversy, "from a legal standpoint, those who say the law requires us to refund the money have some reasonably good arguments. But at the same time, I think there are some reasonably good arguments on the other side."

That seems to be the case in Miami Lakes, as well.

If the judge decides in favor of the company, it will likely have huge repercussions, opening the courtroom door to a flood of similar lawsuits in Indian River County and across the state.

"The issues [here] are obviously significant," Polackwich wrote in a memo to the county commission. "If FVP wins, other developers will no doubt seek refunds and use the FVP case as precedent."