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School impact fee decision reversed by appeal court

By Charlie Whitehead

Monday, June 26, 2006

The Second District Court of Appeal has reversed a decision by Lee Circuit Judge Jay Rosman, sending a piece of the lawsuit over the county's school impact fees back to the judge.

Builders filed suit when the fees, which are assessed on new construction and can only go toward building new schools, were created by county commissioners in December of 2001. That same month, Rosman granted an injunction preventing collection of the fees on contracts in existence before the ordinance was adopted.

The larger part of the case — a challenge to the calculation methodology that supports hundreds of millions of dollars in fees across Florida — went the county's way almost two years ago. The fees have been raised once already and have produced more than \$100 million in new school funding.

The reversal affects much less. Under the injunction, more than 900 contracts were exempted from the fee. That's more than \$2 million. The case was argued as a class-action suit, with the 900 contract holders forming the class.

Despite the reversal, Jeff Garvin, attorney for the builders, said the news is not all bad.

"When I first looked at it I was concerned about it," he said. "Then I looked at it close and thought it was a pretty good ruling."

The ruling could start a new round of legal jockeying in the case. The appellate court's decision said Rosman was wrong when he ruled the ordinance "facially unconstitutional" because there are circumstances under which it could be constitutional. He could still find the ordinance unconstitutional "as applied," which would mean those pre-existing contracts could still be exempt.

Those builders or buyers might have to step up individually to prove it, however. County attorneys and outside counsel Greg Stewart of Nabors Giblin & Nickerson are mulling an argument that the ruling decertifies the class.

"Since he said it's not facially unconstitutional, if it's not everybody in the same boat then they're all going to be separate from the boat," said assistant county attorney John Turner. "It'll depend on what's in the contract or the purchase agreement. You can argue the class is no longer appropriate."

Garvin said he's heard that argument before, when the county was trying to get the class decertified. The county lost that argument, he said, appealed, and lost again.

"I guess it could open the door," he said. "But I'd hope with it already being appealed, it would not be."

Garvin said he feels good about going back before Rosman.

"We're actually fairly optimistic," he said. "I believe while the ruling gave a detailed legal analysis, it by no

means eliminated the claims."

A hearing before Rosman has yet to be scheduled.

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