WILD WEST

The Unfettered Impact Fee Industry

Impact fees are well-known. But the cadre of consultants, lawyers, economists and others behind the fees play by Wild West rules. None. Yet they have performed a critical function in super-charging Florida’s stunning growth in the taxes placed on new structures.

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There is a cottage industry of consultants and others built around impact fees. Should the “art” of regulatory fees be regulated?

Key laws in other states

The following comes from a presentation by Clancy Mullen of Duncan Associates, given in October at the Impact Fee Roundtable meeting in Orlando.

States that don’t charge for a higher level of service.

**Colorado:** No impact fee or other similar development charge shall be imposed to remedy any deficiency in capital facilities that exists without regard to the proposed development.

**Georgia:** “Development impact fees shall be calculated on the basis of levels of service for public facilities that are applicable to existing development as well as the new growth and development.”

**Montana:** “New development may not be held to a higher level of service than existing users unless there is a mechanism in place for the existing users to make improvements to the existing system to match the higher level of service.”

**Utah:** “...the local political subdivision may not impose an impact fee to cure deficiencies in public facilities serving existing development.”

Most states don’t charge twice for the same level of service.

Of the 27 state laws governing impact fees, 23 explicitly require credit for developer contributions. The majority require revenue credits, such as this wording from Arizona: “...in determining the extent of the burden imposed by the development, ...shall consider, among other things, the contribution made or to be made in the future in cash by taxes, fees or assessments by the property owner toward the capital costs of the necessary public service covered by the development fee.”

A cottage industry

The details of ever-changing fee methodologies are largely up to those who make up the cottage industry of impact fee consultants. They also invented them and continue to modify them, and are the same consultants often called upon to testify as expert...
Happily unregulated

So why do impact fee consultants object to impact fee legislation in Florida? University of Florida economist James Nicholas puts it bluntly, and realistically, when he told the Florida Impact Fee Review Task Force that there is no need for state impact fee enabling act because it would really act as an impact fee limitation act. Duncan Associates' home state of Texas sees it differently in its 1984 impact fee act which states in part:

"Impact fees may not be adopted or used to pay for:
- upgrading, updating, expanding, or replacing existing capital improvements to serve existing development in order to meet stricter safety, efficiency, environmental, or regulatory standards.
- upgrading, updating, expanding, or replacing existing capital improvements to provide better service to existing development.

This is the kind of limitation language consultants may be most concerned with because if impact fees cannot be imposed for such purposes then they cannot (or presumably would be more reluctant to) concoct a fee designed to cover such costs.

This was the basis brought before the Sarasota County Commission in 2006 and 2007 when it was holding hearings on Duncan's proposed fee nexus framework which charged the existing-use fee method to also charge for major stormwater, sidewalks, bike lanes, medians, lighting and landscape upgrades to existing roads that were planned as part of a capacity adding project.

The argument by CORA attorney Martelhouse that the new method effectively charged for new development for a higher level of service was rejected in favor of the consultants' argument that there was no statutory provision permitting it.

The new method also charges new development for the cost of replacing existing lands that had exceeded their useful life and charges for travel on the state road system although the impact fees are almost exclusively programmed to fund city and county roads.

It's not all gloom and doom, however.

More local governments in Florida are taking action to reduce or suspend impact fees with the latest being the city of Brunswick in Flagler County, which recently suspended the collection of four of its fees, but left road and school fees in effect.

More legislation may be in the offing with the 2009 Florida legislature, and the economic stimulus bill will likely include impact fee language.

Nicholas, who has consistently opposed such measures in the way of legislation for fear that the Legislature would make things worse, concedes that he would support a "very targeted economic development effort within impact fees." Such language would allow local governments to lower commercial and industrial impact fees without also being required to lower residential fees.

If something different doesn't happen, impact fee method opponents can expect more of the same.

Impact fees are an unregulated segment of local government planning, and the consultants making a living in that area want to keep it that way. But the results can be costly for the construction economy.

With local governments (who have strongly opposed impact fee legislation) as their clients and allies, it is no surprise impact fee consultants oppose impact fee laws that would set standards for impact fee calculations. Such standards exist to varying degrees in 26 states.

In fact, according to Duncan Associates consultant Cheney Mulderrig's presentation at the 2009 Impact Fee Roundtable meeting, the trend is for state amendments to shift the authority for imposing impact fees. Supporters of standards maintain there would be less uncertainty about how fees were actually calculated and thus less litigation and fewer appeals.

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urities for consultants to earn a living as expert witnesses when their calculations are called into question. As one might expect, local governments argue that more uniform standards compromise home rule powers and will lead to more litigation. University of Florida economist James Nicho-

Masquerading as “they don’t trust the legislature and the law basically favors them now.”

The American Planning Association sees it differently, supporting state legis-

lation that establishes clear standards for impact fees that will require local governments to follow established planning processes. One has only to look at the 2008 impact fee survey to see the wide disparity in fees throughout Florida and the U.S. During the first half of this decade, fees were growing at high rates and spreading across growing and not-so-growth communities in Florida.

It may be no coincidence that states with the highest impact fees also have the highest foreclosure rates in the country and are the most likely to have the worst budget shortfalls. Impact fees’ effects on housing affordability have not gone unnoticed by some key observers including a 2005 HUD report, which stated: “Impacts may not reflect the true infrastructure costs of a development and can artificially inflate the cost of housing.” Economist Fischel also states that impact fees have “detrac-

tious effects on home affordability that are significant.” Another research report sponsored by HUD, authored by Vicki Been in April 2006, concluded that “impact fees also can be abused, either to exclude low- and moderate-income res-

idents or people of color from communities, or to exploit new homebuyers, who have no voice in the community.”

Wild West pioneers

In concept, impact fees make sense. New development pays for its share of infrastructure needed to serve it. Existing development pays for fixing existing deficiencies to maintain the adopted levels of service.

After that, little makes sense, particularly when it comes to the big bikinis of impact fees — roads and schools.

A comprehensive study of Manatee County impact fees a few years ago by James Dewey, Economic Analysis Program director at the University of Florida Bureau of Economic and Business Research, concluded that development overall pays its way even without impact fees factored in. The Manatee County Commission chose to ignore it. A similar previous study for Alachua County came to the same conclusion.

These studies were significant in that they were the first to fully account for direct and indirect revenue benefits of development. Such revenues include property taxes, sales taxes on construction materials and furnishings, gas taxes, cable franchise fees and others which are the very same revenues that local and state governments are now crying for. With such differences in approach to whether growth pays its way and how to measure it, Nicholas and Dewey are both PhD economists from the same university, it is little wonder that fees vary widely between jurisdictions.

There is little debate that there are local differences in land costs and to some extent construction costs. Greater effects on the fees are often due to economics factors such as discount rates and capitalization periods used to calculate credits for fees paid by development and are used to fund infrastructure capacity.

A good example is Sarasota County, where, on the advice of consultants Daniel An-

n late to do is authorize a new tax credit against the fee for tele-

communication tax revenue identified in their capital improvements plan as a funding source for road capacity improvements. The quasi-legal logic of-

nered by the non-attorney consultants: there is no requirement in Florida law that a credit is required for a revenue source that does not require it to be spent on road capacity.

In essence, the consultants were saying it was acceptable for development to be double-taxed. For these consultants, who are well-versed in Florida impact law and regularly called on as expert witnesses, they chose to rely on the fact that no explicit statutory provision existed for these purposes in Florida.

Apparently, the dual rational nexus provisions of Florida case law requiring, in part, that an impact fee cannot exceed a pro rata share, was either not relevant or could be ignored. Opponents wonder if some consultants purposefully challenge legal boundaries in hopes that their studies will draw litigation to enhance prospects for expert witness work.

According to Corda attorney Martohne, “impact fee consultants recklessly use court cases for what they don’t say rather than what they do say to justify the potential increases in impact fees based upon self-created methodologies.”

Devil in the details

Sarasota County also had a choice of whether to discount present value of future tax revenues to be paid by new development over 10, 15 or 20 years. These payments they agreed were required to be used for road improvements. With no law requiring a longer capitalization period, and despite sup-

port from even Nicholas for discounting future tax revenues over 25 years, the county stuck with the minimum 10 years to minimize the credit and maximize the fee.

It is these kinds of details pertaining to how credits are calculated, whether reconstruction costs should be included or state road travel is charged, that have huge effects on the fees that supporters of Legislative point to when calling for such laws. The local governments and their consultants confuse the rhetoric when they claim adherence to home rule powers is paramount, that every community is different and that uniform standards don’t work where land and construction costs can vary from county to county.

The key point is that local variation can still occur where actual cost differences exist. In many cases, owing to the complexity of the formulas, governing bodies may not be made sufficiently aware that there are key policy decisions embedded in the consultants’ methodologies, and may assume that this is just the way things are done when it comes to impact fee calculations.

Consultant Randy Young, a former Florida planner still practicing in here now but based in Washington state, caused an upheaval when he “pioneered” a new impact fee calculation method for schools a few years ago that was rescinded.

The method was rejected by the Sarasota County School Board after Young tried to use it for another school impact fee study he had complet-

ed while working for Paradise Consultants.

Martohne explains, “When the global approach was challenged in the Osco-

ra case, including the fact that without appropriate credits was ruled unlawful and Osceola had to reduce its fees accordingly. Unfortunately that has not stopped Young from including borrowing costs as recently as 2007 in Hernando County, when he prepared a $30,000 school impact fee, a 124% in-

crease, which was ultimately rejected by the School Board.”

However, in Lake County in 2007, that School Board’s global approach methodology and recom-

mended the County Commission adopt Young’s doubling of the global approach impact fee to over $14,000, she said. This would have given Lake County the second high-

est impact fee in the state, the third highest in the nation. To compromise and avoid litigation, the Lake County Commission increased fees by a little more than an extra $2,000.

Young’s global approach including borrowing costs remains unchallenged again,” she concludes.

Randy leaves the impact fee business a continuing shoot-out between opposing sides, with precious few rules.

Consultants are some of the major players in the world of impact fees:

CLANCY MULLEN, Director of Infrastructure Finance, Duncan Associates, Austin, Texas

Mr. Mullen has been the primary author of most of the firm’s impact fee studies since joining the firm in 1989. He holds a Master’s degree in Community and Regional Planning from Texas at Austin. Clients include Collier, Hillsborough, Sarasota and Lee County, and the City of Orlando, Springs, Cape Coral and North Port.

JAMES NICHOLAS, Professor Emeritus, University of Florida, Gainesville, Florida

Professor Emeritus of Urban & Regional Planning at the University of Florida, Nicholas has been a Professor of Planning, Development and Public Policy at the University of Washington, Seattle, WA, and a Consultant on the Planning and Development of Large Public Projects in the United States and Japan. He is a member of the American Planning Association, the Urban Land Institute, and the American Society of Civil Engineers. He has served on the boards of the International Conference of Local Elected Officials and the International Council on Building and Planning.

STEVE TINDALE, P.E., AICP, President/Tindale-Oliver & Associates, Tallahassee, Florida

Mr. Tindale’s primary work activities over the last 20 years have involved impact fee studies and/or impact fee and impact fee ordinances. His involvement includes impact fee studies for local governments throughout the State of Florida and nationally. Clients include Collier, Pasco and Volusia County.

RANDY YOUNG, Principal, Henderson Young & Company, Redmond, WA

Randy is a senior partner with Henderson, Young and Company. He was on the staff of local and state agencies in California and Oregon before joining the firm in 1983. He has been a consultant for cities, counties and other public agencies throughout the United States including Collier, Lee, Oceola, Polk and Brevard County.

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