

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.

STORY ON PAGE 16



Madness to the Method

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

Editor's note: This is the second part of a two-part series on the state of impact fees on the Gulf Coast.

Impact fee consultants may sound like a snoozer bunch of economists, planners, engineers and lawyers. But in many ways, they are the Wild West — unregulated and intending to keep it that way.

The fact that Florida had the highest absolute increase in non-utility impact fees over the four-year period from 2004 to 2008 is indicative of the competitive nature of both the local governments and their consultants in their quest to one-up each other. Florida only trails California, according to the National Impact Fee Survey: 2008 published in October.

According to the survey, in Florida the average non-utility fee for a single-family unit grew by a compounded annual average of 22.9%, from \$4,752 to \$10,846 per unit over the four years. Nationally, the same fee increased by a compound rate of 15.2%.

Part of the increase can be attributed to new types of fees, particularly schools. Much can also be attributed to changes in calculation methods for schools and roads.

There is effectively nothing in the way of state laws regulating how the fees are calculated, just a handful of legal cases providing general guid-

ance and no specific standards as to how the fees should or should not be calculated. Judging from the recent run-up in fees, case law has proven ineffective in controlling rates.

The Florida Impact Fee Act, adopted by the legislature in 2006, is the shortest impact fee enabling legislation in the nation. It is a one-page law of but 307 words, or about 4,300 words less than the average of the other 26 enabling acts.

It is the predictable outcome of a political tug of war of the Florida Impact Fee Review Task Force, dominated by the politically powerful Florida Association of Counties, the Florida League of Cities, the Florida City and County Management Association and other pro-impact fee government consultants and lobbyists.

The law provides nothing in the way of specific standards for calculating the fees because the task force decided early on to focus only on what the two opposing factions could agree on, which the 307 words illustrates was not much. The only calculation-related standard it imposes is a common sense requirement that impact fee ordinances use the most recent and localized data. With no requirement to update fees within a minimum time period, this standard has little effect.

A proposed amendment to the Florida Impact Fee Act, considered in the 2008 Legislature, that would have required independent verifica-

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."

tion of the data on which the calculation of the impact fee is based, was ultimately withdrawn from consideration.

However, state Sen. Mike Bennett, R-Bradenton, chairman of the Community Affairs Committee, says, "It will come back up this session."

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

defense witnesses for local governments in court.

They make money creating impact fee ordinances that embody their methodologies and make more money defending them in court, win or lose. Then, they make more money updating or correcting the fees if a court decision goes against them.

Critics claim that designing complex impact fees methodologies is more art than science, and that the run-up in fees over the past few years can largely be attributed to growing competition among these principal actors to push fees higher to attract more clients — the common charge against consultants that they often provide the study results their clients want.

The irony is local government clients are now discovering that higher fees do not necessarily result in more revenue.

Deborah Martohue, a St. Pete lawyer and former St. Pete Beach councilwoman, is one of the few who takes on the consultants at local hearings. She is not one to mince words when it comes describing the abuses she has witnessed.

"Impact fee consultants recklessly use court cases for what they don't say rather than what they do say to justify the exponential increases in impact fees based upon self-created methodologies," she says.

Michael Reitmann, executive vice president of the Lee Building Industry Association, has been on the front lines fighting impact fee increases proposed by Duncan Associates for Lee County.

"It is a cottage industry that they determine what the fee should be and then create the methodology," he says. "They use outdated data. They use incorrect data. They use national data instead of local data."

Some, like Tampa's Tindale-Oliver & Associates, are now making money by encouraging clients such as in Collier County to reduce the highest fees in Florida, which Tindale-Oliver earlier had championed.

The firm's school impact fee method has also been recently challenged by the Volusia County Home Builders Association, giving them the opportunity to make more money defending that fee.

In Sarasota County, the Commission went to great lengths in hiring impact fee consultant Duncan Associates to totally revamp a well-established impact fee methodology that had been periodically updated over nearly 20 years based on recommendations from staff and an advisory board. To entice the county, Duncan's reports claimed that if the county raised the fees as recommended that fee revenues would increase proportionately.

In other words, by assuming fee payers would not change their decision to build even if the fees tripled, the consultants ignored what every Economics 101 student is taught: price affects demand.

Duncan's studies claimed that the county might increase annual non-utility impact fee revenue to \$55.5 million by assuming future development would mirror construction for the six-year pe-

Happily unregulated

So why do impact fee consultants object to impact fee legislation in Florida? University of Florida economist James Nicholas put it bluntly, and revealingly, when he told the Florida Impact Fee Review Task Force that there is no need for a 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 their 8,641 word 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 explicitly be used for such purposes then they cannot (or presumably would be more reluctant to) concoct a fee designed to cover such costs.

This issue was brought before the Sarasota County Commission in 2006 and 2007 when it was holding hearings on Duncan's proposed fee increases which changed the existing road fee method to also charge for major storm-

water, sidewalks, bike lanes, medians, lighting and landscape upgrades to existing roads that were planned as part of a capacity adding project.

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

The new method also charges new development for the cost of replacing existing lanes 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 actions to reduce or suspend impact fees with the latest being the city of Bunnell 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. An economic stimulus bill will likely include impact fee language.

Nicholas, who has consistently opposed much in the way of legislation for fear that the Legislature could make things worse, concedes that he would support "a very targeted economic development effort within impact fees." Such language would allow



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.

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.

riod from 2000-2005. This fiscal year the county has budgeted for less than 27% of that, only \$14.9 million. For the fiscal year ended Sept. 30, the county collected only \$10.9 million, less than 20% of Duncan's projection. It appears likely the county will not reach the budgeted impact fee revenue this fiscal year.

Undoubtedly, economic conditions have played a part. Yet, the county is now seriously considering taking Orlando economist Hank Fishkind's recommendations of 20 months ago. At that time, Fishkind explained how to lower commercial and industrial impact fees that could increase impact fee revenue and other revenues derived from development and subsequent economic activity they now hope to stimulate.

The county accepted the consultants' recommendations despite the county's own advisory board's near unanimous recommendations to use other data and revise the new method. Collectively, the advisory board's recommendations would have resulted in a slight reduction of the road fee, the highest and most contentious fee.

Instead, the Duncan recommendations would have immediately increased the road fee for a single-family detached home by 196%. Ultimately, the Sarasota

County Commission voted to phase-in the fee in partial deference to the business community's strong coalition lobbying efforts and Fishkind's May 2007 presentation showing how higher fees could be anticipated to result in lower fee revenue, particularly for commercial and industrial uses.

Writing in a June 2007 Review article titled, "Impact Fee Explosion", Martohue, who had been retained by the Coalition of Business Associations of Sarasota County (COBA) to argue for a more legally defensible road fee method, wrote, "More than 75% of that increase resulted from including state road and road reconstruction costs. To put it bluntly, Florida has an impact fee crisis."

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 Clancy Mullen's presentation at the 2008 Impact Fee Roundtable meeting, the trend is for more state amendments to shrink 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 oppor-

See **IMPACT FEES** page 18A



Impact fees can have a negative effect on the construction industry, which impacts multiple levels of the Gulf Coast economy. And the difference in the fees between jurisdictions raises issues of fairness and legality.

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Deborah Martohue: 'Impact fee consultants recklessly use court cases for what they don't say rather than what they do say to justify the exponential increases in impact fees based upon self-created methodologies.'

IMPACT FEES continued from 17A

tunities 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 compromises home rule powers and will lead to more litigation. University of Florida economist James Nicholas maintains "they don't trust the legislature and the law basically favors them now."

The American Planning Association sees it differently, supporting state legislation 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-growing 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 more 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: "Impact fees may not reflect the true infrastructure costs of a development and can artificially inflate the cost of housing." Economist Fishkind also states that impact fees have "dele-

rious effects on home affordability that are significant." Another research report sponsored by HUD, authored by Vicki Been in April 2004, concluded that "impact fees also can be abused, either to exclude low- and moderate-income residents or people of color from communities, or to exploit new homebuyers, who have no vote 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 kahunas 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 of opinion as to whether growth pays its way and how to measure it, between Nicholas and Dewey, two Ph.D. 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 economic factors such as discount rates and capitalization periods used to calculate credits for taxes paid by development also used to fund infrastructure capacity.

A good example is Sarasota County, where, on the advice of consultant Duncan Associates, the county declined to give a tax credit against the fee for telecommunications tax revenue identified in their capital improvements plan as a funding source for road capacity improvements. The quasi-legal logic offered 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 fee law and regularly called on as expert witnesses, they chose to rely on the fact that no explicit statutory provision exists on this point 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 COBA attorney Martohue, "Impact fee consultants recklessly use court cases for what they don't say rather than what they do say to justify the exponential increases in impact fees based upon self-created methodologies."

Devil in the details

Sarasota County also had a choice of whether to discount to present value other future tax payments to be paid by new development over 20, 25 or 30 years. (These payments they agreed were required to be used for road improvements.) With no law requiring a longer capitalization period, and despite support from even Nicholas for discounting future tax revenues over 25 years, the county stuck with the minimum 20 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 legislation 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 but now based in Washington state,

Consultants

These 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 Duncan Associates in 1989. He holds a Masters of Science degree in Community and Regional Planning from the University of Texas at Austin. Clients include Collier, Hillsborough, Sarasota and Lee County, and the Cities of Bonita Springs, Cape Coral and North Port.

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

Professor Emeritus of Urban & Regional Planning and Affiliate Professor of Law, University of Florida, Gainesville, Florida; Associate Director, Environmental and Land Use Law Program, College of Law, 1999 to 2006. Ph.D. in Economics from University of Illinois. Clients include Hillsborough, Lee and Sarasota County.

STEVE TINDALE, P.E., AICP, President, Tindale-Oliver & Associates, Tampa, Fla.

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

RANDY YOUNG, Principal, Henderson Young & Company, Redmond, Wash.

Randy Young is a senior partner with Henderson, Young and Company. He was on the staff of local and state agencies in California, and since 1973 he has been a consultant for cities, counties and other public agencies throughout the U.S. Clients include Collier, Lee, Osceola, Polk and Volusia County.

caused an upheaval when he "pioneered" a new impact fee calculation method for schools a few years ago resulting in a school fee alone now exceeding \$10,000 for a home in Osceola County, and a major lawsuit against that county.

The new method, known as the "global approach," has been described as one that "calculates the maximum potential impact fee costs" and minimizes revenues to be credited, if factored in at all. The method was rejected by the Sarasota County School Board after Young tried to substitute his new method for another school impact fee study he had completed within the previous year.

Martohue explains, "When the global approach was challenged in the Osceola case, including the borrowing costs 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 proposed a \$10,000 school impact fee, a 134% increase, which was ultimately rejected by the School Board in early January 2008."

However, in Lake County in 2007, that School Board accepted Young's global approach methodology and recommended the County Commission adopt Young's doubling of the school impact fee to over \$14,600, she says. That would have given Lake County the second highest impact fee in the nation. In an effort to compromise and avoid litigation, the Lake County Commission increased fees by a little more than a fairly arbitrary \$2,000.

"Young's global approach including borrowing costs remains unchallenged again," she concludes.

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

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