

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Community Affairs

BILL: SB 350

INTRODUCER: Senators Hutson and Mayfield

SUBJECT: Impact Fees

DATE: February 26, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Toman	Yeatman	CA	Pre-meeting
2.			IS	
3.			AP	

I. Summary:

SB 350 prohibits a local government from charging an impact fee for the development or construction of housing that is affordable as defined within the State Housing Initiatives Partnership Program. The prohibition would begin on July 1, 2019.

II. Present Situation:

Local Government Authority

The Florida Constitution grants local governments broad home rule authority. Specifically, non-charter county governments may exercise those powers of self-government that are provided by general or special law.¹ Those counties operating under a county charter have all powers of self-government not inconsistent with general law or special law approved by the vote of the electors.² Likewise, municipalities have those governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform their functions and provide services, and exercise any power for municipal purposes, except as otherwise provided by law.³

Unlike counties or municipalities, independent special districts do not possess home rule power. Therefore, the powers possessed by independent special districts are those expressly provided by, or which can be reasonably implied from, the special district's charter or by general law.⁴

¹ FLA. CONST. art. VIII, s. 1(f).

² FLA. CONST. art. VIII, s. 1(g).

³ FLA. CONST. art. VIII, s. 2(b). See also s. 166.021(1), F.S.

⁴ Section 189.031, F.S. See also *State ex rel. City of Gainesville v. St. Johns River Water Mgmt. Dist.*, 408 So. 2d 1067 (Fla. 1st DCA 1982).

Local Government Revenue Sources Based on Home Rule Authority⁵

Pursuant to home rule authority, counties and municipalities may impose proprietary fees,⁶ regulatory fees, and special assessments⁷ to pay the cost of providing a facility or service or regulating an activity. Each fee imposed under a local government's home rule powers should be analyzed in the context of requirements established in Florida case law that are applicable to its validity.

Regulatory fees are home rule revenue sources that may be imposed pursuant to a local government's police powers in the exercise of a sovereign function. Examples of regulatory fees include building permit fees, impact fees, inspection fees, and storm water fees. Two principles guide the application and use of regulatory fees. The fee should not exceed the regulated activity's cost and is generally required to be applied solely to the regulated activity's cost for which the fee is imposed.

Special districts do not possess home rule powers; therefore, special districts may impose only those taxes, assessments, or fees authorized by special or general law.⁸

Impact Fees

As one type of regulatory fee, impact fees are charges imposed by local governments against new development to provide for capital facilities' costs made necessary by such growth.⁹ Examples of capital facilities include the provision of additional water and sewer systems, schools,¹⁰ libraries, parks and recreational facilities. Impact fee calculations vary from jurisdiction to jurisdiction and from fee to fee. Impact fees also vary extensively depending on local costs, capacity needs, resources, and the local government's determination to charge the full cost or only part of the cost of the infrastructure improvement through utilization of the impact fee.

In 2017, the most recent year for which the Office of Economic and Demographic Research (EDR) has impact fee data, 35 counties reported impact fee revenues totaling \$629.1 million, 194 cities reported impact fee revenues of \$279.7 million, and 28 school districts reported impact fee revenues of 329.7 million.¹¹

⁵ Office of Economic and Demographic Research, The Florida Legislature, *2018 Local Government Financial Handbook*, 9-13, available at <http://edr.state.fl.us/Content/local-government/reports/lghf18.pdf> (last visited Feb. 26, 2019).

⁶ Examples of proprietary fees include admissions fees, franchise fees, user fees, and utility fees.

⁷ Special assessments are typically used to construct and maintain capital facilities or to fund certain services.

⁸ See ch. 189, F.S. See also State Affairs Committee and Local, Federal & Veterans Affairs Subcommittee, The Florida House of Representatives, *The Local Government Formation Handbook 2018-2020*, 70, available at <http://www.myfloridahouse.gov/Sections/Committees/committeesdetail.aspx?CommitteeId=3025> (last visited Feb. 26, 2019).

⁹ See *supra* note 5.

¹⁰ *Id.* With respect to a school impact fee, the fee is imposed by the respective board of county commissioners at the request of the school board. The fee amount is usually determined after a study of the actual impact/costs of new residential construction on the school district has been made.

¹¹ Office of Economic and Demographic Research, The Florida Legislature, *Impact Fees*, available at <http://edr.state.fl.us/Content/local-government/data/data-a-to-z/g-l.cfm> (last visited Feb. 26, 2019).

Florida Impact Fee Act

In response to local governments' reliance on impact fees and the growth of impact fee collections, the Legislature adopted the Florida Impact Fee Act in 2006, which requires local governing authorities to satisfy certain requirements when imposing impact fees.¹² The Act was amended in 2009 to impose new restrictive rules on impact fees by requiring local governments to shoulder the burden of proof when an impact fee is challenged in court and prohibiting the judiciary from giving deference to local government impact fee determinations.¹³

Section 163.31801(3), F.S., provides requirements and procedures for the adoption of an impact fee. An impact fee adopted by ordinance of a county or municipality or by resolution of a special district must, at minimum:

- Require that the calculation of the impact fee be based on the most recent and localized data;
- Provide for accounting and reporting of impact fee collections and expenditures. If a local government imposes an impact fee to address its infrastructure needs, the entity must account for the revenues and expenditures of such impact fee in a separate accounting fund;
- Limit administrative charges for the collection of impact fees to actual costs; and
- Require that notice be provided at least 90 days before the effective date of an ordinance or resolution imposing a new or increased impact fee.

Dual Rational Nexus Test

While s. 163.31801, F.S., outlines many characteristics and limitations of impact fees, case law serves an integral role in the impact fee process in Florida. As developed under case law, an impact fee imposed by a local government should meet the 'dual rational nexus test' in order to withstand legal challenge.¹⁴ A number of court decisions have addressed the dual rational nexus test and challenges to the legality of impact fees.¹⁵

In *Hollywood, Inc. v. Broward County*,¹⁶ the Fourth District Court of Appeal addressed the validity of a county ordinance that required a developer, as a condition of plat approval, to dedicate land or pay a fee for the expansion of the county level park system to accommodate the new residents of the proposed development. The court found that a reasonable dedication or impact fee requirement is permissible if (1) it offsets reasonable needs that are sufficiently attributable to the new development and (2) the fees collected are adequately earmarked for the acquisition of capital assets that will benefit the residents of the new development.¹⁷ In order to show the impact fee meets those requirements, the local government must demonstrate a rational relationship between the need for additional capital facilities and the proposed development. In

¹² Section 163.31801, F.S.

¹³ Chapter 2009-49, L.O.F., creates a "preponderance of the evidence" standard of review placing the burden of proof on the local government to show that the imposition or amount of an impact fee meets the requirement of case law and s. 163.31801, F.S.

¹⁴ See *supra* note 4.

¹⁵ See, e.g., *Contractors & Builders Ass'n v. City of Dunedin*, 329 So.2d 314 (Fla. 1976); *Home Builders and Contractors' Association v. Board of County Commissioners of Palm Beach County*, 446 So.2d 140 (Fla. 4th DCA 1983).

¹⁶ *Hollywood, Inc. v. Broward County*, 431 So.2d 606 (Fla. 4th DCA 1983).

¹⁷ *Id.* at 611.

addition, the local government must show the funds are earmarked for the provision of public facilities to benefit the new residents.¹⁸

In *Volusia County v. Aberdeen at Ormond Beach*, the Florida Supreme Court ruled that when a residential development has no potential to increase school enrollment, public school impact fees may not be imposed.¹⁹ The county in that case had imposed a school impact fee on a deed-restricted community for adults 55 years old and older. In *City of Zephyrhills v. Wood*, the Second District Court of Appeal upheld an impact fee on a recently purchased and renovated building, finding that structural changes had corresponding impacts on the city's water and sewer system.²⁰

As developed under case law, an impact fee must have the following characteristics to be legal:

- The fee is levied on new development, the expansion of existing development, or a change in land use that requires additional capacity for public facilities;
- The fee represents a proportionate share of the cost of public facilities needed to serve new development;
- The fee is earmarked and expended for the benefit of those in the new development who have paid the fee;
- The fee is a one-time charge, although collection may be spread over a period of time;
- The fee is earmarked for capital outlay only and is not expended for operating costs; and
- The fee-payers receive credit for the contributions toward the cost of the increased capacity for public facilities.²¹

Affordable Housing

Affordable housing is generally defined in relation to the annual area median income of the household living in the housing adjusted for family size. Section 420.9071(2), F.S., within the State Housing Initiatives Partnership (SHIP)²² Program defines “affordable” to mean that monthly rents or monthly mortgage payments, including taxes and insurance, do not exceed 30 percent of that amount which represents the percentage of the median annual gross income for:

- Very-low-income households, i.e., total annual gross household income does not exceed 50 percent of the median annual income for the area;²³
- Low-income households, i.e., total annual gross household income does not exceed 80 percent of the median annual income for the area;²⁴

¹⁸ *Id.* at 611-12.

¹⁹ *Volusia County v. Aberdeen at Ormond Beach*, 760 So.2d 126, 134 (Fla. 2000).

²⁰ *City of Zephyrhills v. Wood*, 831 So.2d 223, 225 (Fla. 2d DCA 2002).

²¹ Committee on Community Affairs, The Florida Senate, *Impact Fees*, 4 (Issue Brief 2010-310) (Sept. 2009), available at http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-310ca.pdf (last visited Feb. 26, 2019).

²² See ss. 420.907-420.9089, F.S. Administered by Florida Housing Finance Corporation, the SHIP Program provides funds to all 67 counties and Florida's larger cities on a population based formula to finance and preserve affordable housing for very low, low, and moderate income families based on locally adopted housing plans.

²³ Section 420.9071(28), F.S.

²⁴ Section 420.9071(19), F.S.

- Moderate-income households, i.e., total annual gross household income does not exceed 120 percent of the median annual income for the area.²⁵

With respect to rental units, a household's annual income at initial occupancy may not exceed the three threshold percentages above. While occupying the unit, the household's annual income may increase to an amount not to exceed 140 percent.²⁶

SHIP Program - Affordable Housing Incentive Strategies related to Impact Fees

Administered by the Florida Housing Finance Corporation, the SHIP Program provides funds to all 67 counties and Florida's larger cities on a population-based formula to finance and preserve affordable housing based on locally adopted housing plans.²⁷ Funds are expended per each local government's adopted Local Housing Assistance Plan which details the housing strategies they will use.²⁸ Local governments must appoint members to an Affordable Housing Advisory Committee (AHAC) to review and recommend strategies to reduce barriers to and incentivize the development of affordable housing.²⁹ Section 420.9076(4)(b), F.S., requires AHACs to provide their local governing bodies with an affordable housing strategy recommendation on the modification of impact fee requirements, including reduction or waiver of fees and alternative methods of fee payment for affordable housing.

Pursuant to s. 420.531, F.S., the Affordable Housing Catalyst Program (Catalyst) provides community-based organizations and state and local governments with technical assistance to meet affordable housing needs.³⁰ A 2017 Catalyst-funded guidebook reviews commonly implemented local government strategies to incentivize affordable housing within the SHIP program including the strategy linked to impact fee modifications, waivers, or reimbursement.³¹

In the guidebook, among the issues local governments are advised to consider related to the impact fee strategy is "assurance that any waiver or modification of impact fees will result in greater affordability to the consumer, not greater profitability to the developer."³² In addition, the guidebook states that "some legal advisors take the position that waiving impact fees is not permissible. In these cases, it is possible for the fee to be paid, but by other sources."³³

²⁵ Section 420.9071(20), F.S.

²⁶ See ss. 420.9071(19), (20), and (28), F.S.

²⁷ See ss. 420.907-420.9089, F.S.

²⁸ Section 420.9075, F.S.

²⁹ Section 420.9076, F.S.

³⁰ Florida Housing Finance Corporation operates and administers Catalyst. Presently, Florida Housing contracts with the Florida Housing Coalition to provide training and technical assistance.

³¹ See Florida Housing Coalition, *Affordable Housing Incentive Strategies: A Guidebook for Affordable Housing Advisory Committee Members and Local Government Staff*, 27-31, available at <http://www.flhousing.org/wp-content/uploads/2012/03/AHAC-Guidebook-2017.pdf> (last visited Feb. 27, 2019).

³² *Id.* at 31.

³³ *Id.* at 32.

2017 Affordable Housing Workgroup - Findings on Impact Fees

Chapter 2017-071, Laws of Florida, created a statewide Affordable Housing Workgroup (workgroup).³⁴ The legislation charged the 14-member body with developing recommendations to address the state's affordable housing needs and to develop strategies and pathways for low-income housing in the state.³⁵ In its final report, the workgroup characterized its investigation and deliberations of impact fees with the following:

“One way impact fees often intersect with affordable housing is through the granting of fee waivers or deferrals. These waivers or deferrals essentially represent a local government's commitment to subsidize and thereby incentivize the production of affordable housing. Though common, waivers for affordable housing are not ubiquitous. Like all issues related to impact fees, decisions to grant waivers for affordable housing are jurisdiction-specific and subject to local circumstances, vetting (including legal interpretation) and control.”³⁶

The workgroup's final report also included the following paired finding and recommendation related to impact fees:³⁷

Finding: The workgroup's review and discussion of impact fee processes across the state confirmed the location-specific character of fees as provided for through home rule powers. In areas where impact fees are waived in some manner for affordable housing, the waivers can act as catalysts for affordable housing by mitigating development costs.

Recommendation: The workgroup recommends that local governments assessing impact fees either waive fees outright for affordable housing or establish local dedicated funds to make such affordable housing waivers possible.

III. Effect of Proposed Changes:

Section 1 amends s. 163.31801, F.S., to prohibit local governments from charging an impact fee for the development or construction of housing that is affordable as defined in s. 420.9071, F.S., beginning on July 1, 2019.

Section 2 provides an effective date of July 1, 2019.

³⁴ Legislation creating the workgroup designated Florida Housing Finance Corporation as the administering entity. Workgroup meeting agendas, research materials and other information is available at <https://www.floridahousing.org/about-florida-housing/workgroup-on-affordable-housing> (last visited Feb. 26, 2019)

³⁵ Chapter 2017-071, s. 46, Laws of Fla.

³⁶ Affordable Housing Workgroup, *Final Report 2017*, 25-26, available at http://www.floridahousing.org/docs/default-source/aboutflorida/august2017/ahwg-report_2017-web-print.pdf?sfvrsn=2 (last visited Feb. 26, 2019). As part of the workgroup's research, Florida Housing staff informally surveyed all SHIP program administrators regarding impact fee calculations and waivers in their locales. Over 80 local governments responded and nearly 30 percent cited mechanisms to waive fees in part or whole for affordable housing. The appendix of the final report provides all responses received.

³⁷ *Id.* at 6.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, Subsection (b) of section 18 of the Florida Constitution, provides that except upon the approval of each house of the Legislature by a two-thirds vote of the membership, the Legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would be to reduce the authority that municipalities or counties have to raise revenue in the aggregate, as such authority existed on February 1, 1989. However, the mandate requirements do not apply to laws having an insignificant impact, which for Fiscal Year 2018-2019 is forecast at slightly over \$2 million.^{38,39,40}

In 1991, Senate President Margolis and House Speaker Wetherell created a memo to guide the House and Senate in the review of local government mandates.⁴¹ Using this guide, the county/municipality mandates provision of Art. VII, S. 18 of the Florida Constitution may apply to SB 350 because the bill reduces local government authority to raise revenue by prohibiting the charging of impact fees for the development or construction of affordable housing. If the bill is determined to reduce the authority that counties and municipalities have to raise revenues in the aggregate and exceeds the threshold for insignificant fiscal impact, the bill may qualify as a mandate and require final passage by a two-thirds vote of the membership of each house of the Legislature.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

³⁸ FLA. CONST. art. VII, s. 18(d).

³⁹ An insignificant fiscal impact is the amount not greater than the average statewide population for the applicable fiscal year times \$0.10. See Florida Senate Committee on Community Affairs, *Interim Report 2012-115: Insignificant Impact*, (Sept. 2011), available at <http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-115ca.pdf> (last visited Jan. 9, 2019).

⁴⁰ Based on the Florida Demographic Estimating Conference's November 5, 2018 population forecast for 2019 of 21,170,399. The conference packet is available at <http://edr.state.fl.us/Content/conferences/population/ConferenceResults.pdf> (last visited Jan. 18, 2019).

⁴¹ Memorandum to Members of The Florida House and The Florida Senate from Gwen Margolis, President of the Senate and T.K. Wetherell, Speaker of the House, *County and Municipal Mandates Analysis*, (March 7, 1991) (on file with the Senate Committee on Community Affairs).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

The Revenue Estimating Committee has not yet determined the impact of SB 350.

B. Private Sector Impact:

The elimination of impact fees for housing defined as affordable may act as an incentive for additional private sector development of various types of affordable housing.

C. Government Sector Impact:

Local governments would be prohibited from charging impact fees for affordable housing and may need to find other revenue sources to replace any waived fees.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill amends section 163.31801 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.