**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 Community Affairs Committee

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| BILL: | SB 1122 |
| INTRODUCER: | Senator Bennett |
| SUBJECT: | Growth Management |
| DATE: | March 23, 2011 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Wolfgang | Yeatman | CA | **Pre-meeting** |
| 2. | | | EP | |
| 3. | | | BC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

The bill:

- Revises the definition of urban service area;
- Clarifies the way that joint planning agreements are to be interpreted;
- Extends the deadline for having a financially feasible capital improvements element;
- Clarifies that the amount of land designated for future land uses may not be limited solely by the projected population;
- Reenacts the burden of proof for impact fees;
- Places a moratorium on new or increased impact fees (with certain exceptions);
- Creates provisions related to signs and billboards in industrial or commercial areas;
- Requires the Office of Program Policy Analysis to analyze to comprehensive plan programs and setting a date when the certified communities program would terminate;
- Creates a new method reducing state oversight of comprehensive plans;
- Prohibits local governments from duplicating regulations by the Department of Environmental Protection (DEP) or a water management district; and
- Prohibits a water management district from duplicating DEP regulations or permitting.

This bill substantially amends the following sections of the Florida Statutes: 163.3164. 163.3171, 163.3177, 163.31801, 163.3194, and 163.3246.

This bill creates ss. 163.3250 and 163.3260 of the Florida Statutes.

## II. Present Situation:

### Growth Management

The Local Government Comprehensive Planning and Land Development Regulation Act (the Act),[1] also known as Florida's Growth Management Act, was adopted by the 1985 Legislature. Significant changes have been made to the Act since 1985 including major growth management bills in 2005 and 2009. The Act requires all of Florida's 67 counties and 413 municipalities to adopt local government comprehensive plans that guide future growth and development. "Each local government comprehensive plan must include at least two planning periods, one covering at least the first 5-year period occurring after the plan's adoption and one covering at least a 10-year period."[2] Comprehensive plans contain chapters or "elements" that address future land use, housing, transportation, water supply, drainage, potable water, natural groundwater recharge, coastal management, conservation, recreation and open space, intergovernmental coordination, capital improvements, and public schools. A key component of the Act is its "concurrency" provision that requires facilities and services to be available concurrent with the impacts of development. The state land planning agency that administers these provisions is the Department of Community Affairs (DCA). Generally, local governments can only affect comprehensive planning within their jurisdiction. However, under s. 163.3171, F.S., local governments may enter into a joint planning agreement authorizing one or both of the jurisdictions to exercise extrajurisdictional authority.

### Urban Service Areas

Urban service areas are defined as built-up areas where public facilities and services, including, but not limited to, central water and sewer capacity and roads, are already in place or are committed in the first 3 years of the capital improvement schedule. Urban service areas and their functional equivalent that were in existence in 2009 were grandfathered into the definition. An urban service area generally delineates the area where a local government intends to plan for growth as opposed to natural and agricultural areas where the local government does not intend to significantly extend infrastructure. If a local government adopts an urban service area into its comprehensive plan, the urban service area is a transportation concurrency exception area and is exempt from development of regional impact review.

### Certification Program

Authorized by the 2002 Florida Legislature, the Certification Program allows up to eight local governments per year to be exempt from comprehensive plan review by DCA. To be eligible, a local government must demonstrate a record of effectively adopting, implementing and enforcing its comprehensive plan and demonstrate technical, financial and administrative expertise. The local government must also demonstrate that it has adopted programs in the comprehensive plan and land development regulations that promote infill development and redevelopment; promote affordable housing, achieve effective intergovernmental coordination and address extrajurisdictional effects of development; promote economic diversity; provide and maintain public urban and rural open space and recreational opportunities; manage transportation and land

[1] *See* Chapter 163, Part II, F.S.
[2] Section 163.3177(5), F.S.

uses to support public transit; use design principles; redevelop blighted areas, adopt a local mitigation strategy; encourage clustered mixed-use development, encourage urban infill, and assure protection of key natural areas and agricultural lands.

**Control of Outdoor Advertising**

Since the passage of the Highway Beautification Act (HBA) in 1965, the Federal Highway Administration (FHWA) has established controls for outdoor advertising along Federal-Aid Primary, Interstate and National Highway System (NHS) roads.[3] The HBA allows the location of billboards in commercial and industrial areas, mandates a state compliance program, requires the development of state standards, promotes the expeditious removal of illegal signs, and requires just compensation for takings.

The primary features of the Highway Beautification Act include:

- Billboards are allowed, by statute, in commercial and industrial areas consistent with size, lighting and spacing provisions as agreed to by the state and federal governments. Billboard controls apply to all Interstates, Federal-Aid Primaries, and other highways that are part of the National Highway System.
- States have the discretion to remove legal nonconforming signs[4] along highways. However, the payment of just (monetary) compensation is required for the removal of any lawfully erected billboard along the Federal-Aid Primary, Interstate and National Highway System roads.
- States and localities may enact stricter laws than stipulated in the HBA.
- No new signs can be erected along the scenic portions of state designated scenic byways of the Interstate and Federal-Aid Primary highways, but billboards are allowed in segmented areas deemed un-scenic on those routes.

The HBA mandates state compliance and the development of standards for certain signs as well as the removal of nonconforming signs. While the states are not directly forced to control signs, failure to impose the required controls can result in a substantial penalty. The penalty for noncompliance with the HBA is a 10 percent reduction of the state's annual federal-aid highway apportionment.

Under the provisions of a 1972 agreement between the State of Florida and the U.S. Department of Transportation (USDOT) incorporating the HBA's required controls, FDOT requires commercial signs to meet certain requirements when they are within 660 feet of Interstate and Federal-Aid Primary highways in urban areas, or visible at any distance from the same roadways when outside of urban areas. The agreement embodies the federally-required "effective control of the erection and maintenance of outdoor advertising signs, displays, and devices". Absent this effective control, the non-compliance penalty of 10 percent of federal highway funds may be imposed.

[3] The Highway Beautification Act of 1965, 23 U.S.C. § 131.
[4] A "legal nonconforming sign" is a sign that was legally erected according to the applicable laws or regulations of the time, but which does not meet current laws or regulations.

Florida's outdoor advertising laws are found in ch. 479, F.S., and are based on federal law and regulations, and the 1972 agreement which includes definitions of certain relevant terms, such as "commercial and industrial zone" and "unzoned commercial and industrial areas".

Section 479.07, F.S., regulates sign permits. A person may not erect, operate, use, or maintain, or cause to be erected, operated, used, or maintained, any sign on the State Highway System outside an urban area or on any portion of the interstate or federal-aid primary highway system without first obtaining a permit for the sign from DOT and paying the annual fee as provided in this section. As used in this section, the term "on any portion of the State Highway System, interstate, or federal-aid primary system" means a sign located within the controlled area which is visible from any portion of the main-traveled way of such system.

**Commercial and Industrial Areas**

Outdoor advertising signs may legally be located in commercial or industrial areas. In conformance with the 1972 agreement, s. 479.01(4), F.S., also defines "commercial or industrial zone" as a parcel of land designated for commercial or industrial use under both the Future Land Use Map (FLUM) of the local comprehensive plan and the land development regulations adopted pursuant to ch. 163, F.S. This allows FDOT to consider both land development regulations and future land use maps in determining commercial and industrial land use areas.

**Unzoned Commercial and Industrial Areas**

If a parcel is located in an area designated for multiple uses on the FLUM, and the land development regulations do not clearly designate the parcel for a specific use, the area will be considered an unzoned commercial or industrial area and outdoor advertising signs may be permitted there provided three or more separate commercial or industrial activities take place. However, the following criteria must be met:

- One of the commercial or industrial activities must be located within 800 feet of the sign and on the same side of the highway,
- The commercial or industrial activity must be within 660 feet of the right-of-way, and
- The commercial or industrial activity must be within 1600 feet of each other.

Regardless of whether the criteria above are met, the following activities are specifically excluded from being recognized as commercial or industrial activities and therefore cannot be considered when determining whether a parcel is an unzoned commercial or industrial area:

- Signs.
- Agriculture, forestry, ranching, grazing, and farming.
- Transient or temporary activities.
- Activities not visible from the traveled way.
- Activities taking place more than 660 feet from the right of way.
- Activities in a building principally used as a residence.
- Railroad tracks and sidings.
- Communication Towers.

With the exception of communication towers, the exclusion of these activities is specifically required by the 1972 agreement between the State and USDOT.

**Home Rule Powers**

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.[5] 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.[6] 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.[7]

The Florida Statutes enumerate the powers and duties of all county governments, unless preempted on a particular subject by general or special law.[8] Those powers include the provision of fire protection, ambulance services, parks and recreation, libraries, museums and other cultural facilities, waste and sewage collection and disposal, and water and alternative water supplies. Municipalities are afforded broad home rule powers except: annexation, merger, exercise of extraterritorial power, and subjects prohibited by the federal, state, or county constitutions or law.[9]

Given these constitutional and statutory powers, local governments may use a variety of revenue sources to fund services and improvements without express statutory authorization.[10] Special assessments, impact fees, franchise fees, and user fees or service charges are examples of these home rule revenue sources.[11]

**Impact Fees**

Impact fees are enacted by local home rule ordinance. These fees require total or partial payment to counties, municipalities, special districts, and school districts for the cost of additional infrastructure necessary as a result of new development. Impact fees are tailored to meet the infrastructure needs of new growth at the local level. As a result, 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 of the fee's earmarked purposes.

[5] FLA. CONST. art VIII, s. 1(f).

[6] FLA. CONST. art VIII, s. 1(g).

[7] FLA. CONST. art VIII, s. 2(b). *See also* s. 166.021(1), F.S.

[8] Section 125.01, F.S.

[9] Section 166.021, F.S.

[10] The exercise of home rule powers by local governments is constrained by whether an inconsistent provision or outright prohibition exists in the constitution, general law, or special law regarding the power at issue. Counties and municipalities cannot levy a tax without express statutory authorization because the constitution specifically prevents them from doing so. *See* FLA. CONST. art. VII, s. 1. However, local governments may levy special assessments and a variety of fees absent any general law prohibition, provided such home rule source meets the relevant legal sufficiency tests.

[11] For a catalogue of such revenue sources, see the most recent editions of the Florida Legislature's *Local Government Financial Information Handbook* and the *Florida Tax Handbook*.

**Statutory Authority for Impact Fees**

In 2006, the Legislature enacted s. 163.31801, F.S., to provide requirements and procedures to be followed by a county, municipality, or special district when it adopts an impact fee. By statute, an impact fee ordinance adopted by local government must, at a 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 a new or amended impact fee.[12]

**Dual Rational Nexus Test**

Impact fees have their roots in the common law. There have been a number of court decisions that address impact fee challenges.[13] For example, in *Hollywood, Inc. v. Broward County,*[14] 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 needs that are sufficiently attributable to the new development and (2) the fees collected are adequately earmarked for the benefit of the residents of the new development.[15] These two requirements are called the dual rational nexus test. In order to show the impact fee meets those requirements, the local government must demonstrate a rational nexus between the need for additional public facilities and the proposed development. In addition, the local government must show the funds are earmarked for the provision of public facilities to benefit the new residents.[16] Because the ordinance at issue satisfied these requirements, the court affirmed the circuit court's validation of the impact fee ordinance.[17]

The Florida Supreme Court addressed the application of impact fees for school facilities in *St. Johns County v. Northeast Florida Builders Association, Inc.*[18] The ordinance at issue conditioned the issuance of a new building permit on the payment of an impact fee. Those fees that were collected were placed in a trust fund for the school board to expend solely "to 'acquire, construct, expand and equip the educational sites and educational capital facilities necessitated by new development.'"[19] Also, the ordinance provided for a system of credits to fee-payers for

[12] Section 163.31801, F.S. Other sections of law also address the ability of local governments or special districts to levy impact fees. *See* ss. 163.3202(3), 191.009(4), and 380.06, F.S.
[13] *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).
[14] *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. 4th DCA 1983).
[15] *Id.* at 611.
[16] *Id.* at 611-12.
[17] *Id.* at 614.
[18] *St. Johns County v. Northeast Florida Builders Association, Inc*., 583 So. 2d 635 (Fla. 1991).
[19] *Id.* at 637 (quoting St. Johns County, Fla., Ordinance 87-60, s. 10(B) (Oct. 20, 1987)).

land contributions or the construction of educational facilities. This ordinance required funds not expended within six years to be returned, along with interest on those funds, to the current landowner upon application.[20] The court applied the dual rational nexus test and found the county met the first prong of the test, but not the second.

The builders in *Northeast Florida Builders Association, Inc.* argued that many of the residences in the new development would have no impact on the public school system. The court found the county's determination that every 100 residential units would result in the addition of 44 students in the public school system was sufficient and, therefore, concluded the first prong of the test was satisfied. However, the court found that the ordinance did not restrict the use of the funds to sufficiently ensure that such fees would be spent to the benefit of those who paid the fees.[21]

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.[22] In *City of Zephyrhills v. Wood*, the district court 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.[23]

As developed under case law, a legally sufficient impact fee has the following characteristics:

- 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 proportional 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.

**Burden of Proof and Standard of Review**

The obligation to prove a material fact in issue is known as the "burden of proof." Generally, in a legal action the burden of proof is on the party who asserts the proposition to be established, and the burden can shift between parties as the case progresses. The level or degree of proof that is required as to a particular issue is referred to as the standard of proof or "standard of review." In most civil actions, the party asserting a claim or affirmative defense must prove the claim or defense by a preponderance of the evidence.[24] The preponderance of the evidence (also known as

[20] *Id.* at 637.
[21] *Id.* at 639. Because the St. Johns County ordinance was not effective within a municipality absent an interlocal agreement between the county and municipality, there was the possibility that impact fees could be used to build a school for development within a municipality that is not subject to the impact fee.
[22] *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 134 (Fla. 2000). Volusia County had imposed a school impact fee on a mobile home park for persons age 55 and older.
[23] *City of Zephyrhills v. Wood*, 831 So. 2d 223, 225 (Fla. 2d DCA 2002).
[24] 5 Fla. Prac., Civil Practice s. 16:1 (2009 ed.).

the "greater weight of evidence") standard of proof requires that the fact finder determine whether a fact sought to be proved is more probable than not.

For impact fee cases, the dual rational nexus test states that *the government* must prove: (1) a rational nexus between the need for additional capital facilities and the growth in population generated by the development and (2) a rational nexus between the expenditures of the funds collected and the benefits accruing to the development.[25] Although the challenger has to plead its case and allege a cause of action, beyond the pleading phase the courts' language seems to place the burden of proof on the local government. Some parties have argued that prior to 2009 the standard being adopted by Florida courts was that an impact fee will be upheld if it is "fairly debatable" that the fee satisfies the dual rational nexus test.[26] In *Volusia County v. Aberdeen at Ormond Beach*, the Florida Supreme Court rephrased the standard as a "reasonableness" test.[27] Although the standard was not clearly defined, prior to 2009 the courts generally did not require a local government to defend its impact fee by as high of a standard as preponderance of the evidence.

House Bill 227 (2009 Regular Session) amended s. 163.31801, F.S., to codify the burden of proof for impact fee ordinance challenges.[28] The bill placed the burden of proof on the government to prove by a preponderance of the evidence that the imposition or amount of the fee meets the requirements of state legal precedent or s. 163.31801, F.S. The bill also prohibited the courts from applying a deferential standard.

**Litigation**

A number of counties and the Florida Association of Counties sued the Florida House and Senate claiming the bill was unconstitutional.[29] The complainants are making the following arguments:

- The law violates the Separation of Powers Clause because it:
  - Changes the burden of proof,[30] and
  - Disallows a deferential standard of review.

- The law violates Section 18, Art. VII of the Florida Constitution, both:
  - Subsection (a) because the complainants argue that it requires local governments that want to levy impact fees to take action requiring the expenditure of funds because "they must assume additional burdens which would not normally exist prior to the adoption of that provision,"[31] and
  - Subsection (b) because the complainants argue that HB 227 reduced local governments' authority to raise revenues in the aggregate.

[25] *See St. Johns County v. Northeast Florida Builders Ass'n, Inc.*, 583 So. 2d 635 (Fla. 1991).
[26] *See* FLORIDA IMPACT REVIEW TASK FORCE, February 1, 2006, Final Report & Recommendations, 15, *available at* http://www.floridalcir.gov/taskforce.cfm.
[27] *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126 (Fla. 2000).
[28] Chapter 2009-49, Laws of Fla.
[29] *Alachua County v. Cretul*, Case No. 10-CA-0478 (Fla. 2d Jud. Cir. 2010).
[30] In fact, HB 227 simply codified existing case law providing that the local government had the burden of proving whether an impact fee was valid. *See, e.g. Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126 (Fla. 2000).
[31] *Alachua County v. Cretul*, Case No. 10-CA-0478 (Fla. 2d Jud. Cir. 2010).

***Separation of Powers***

House Bill 227 is being challenged on separation of powers grounds. The complainants are alleging that Chapter 2009-49, Laws of Florida, (HB 227 (2009 Regular Session)), which directs courts not to apply a deferential standard in impact fee challenges cases, violates the separation of powers provision in Section 3, Art. II of the Florida Constitution. They argue that the deference afforded to the legislative acts of local governments by the courts is derived from the Florida Constitution and specifically the home rule authority[32] granted to counties and municipalities, and therefore, the Legislature cannot by statute direct the courts not to apply a deferential standard to the validity of impact fee ordinances since that deference is derived from the Constitution itself.[33]

Section 2, Art. V of the Florida Constitution gives the Supreme Court the power to adopt rules relating to practice and procedure of the courts. The complainants in the pending lawsuit challenging House Bill 227 argue that the bill (1) changed the burden of proof and (2) changing the burden of proof violated the courts' exclusive right to adopt rules relating to practice and procedure. House Bill 227 did not change the burden of proof, just the standard of review. Moreover, it does not appear that the burden of proof and the standard of review are procedural issues falling squarely in the domain of the judiciary. Rather, the standard of review is often related to the underlying substantive issue and is often specified by statute.[34]

Section 3, Art. II of the Florida Constitution states that the "powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided [in the Florida Constitution]." However, courts have held that "if a power is not exclusive to one branch, the exercise of that non-exclusive power is not unconstitutional."[35] Complainants argue that the provision in HB 227 prohibiting the courts from applying a deferential standard of review to the validity of impact fees infringes on the power of the judiciary.

One of the primary powers of the court is to interpret the constitution.[36] In a federal or state constitutional case, standards of review and burdens of proof can become constitutional issues. An impact fee is open to being challenged on a number of state and federal constitutional

[32] FLA. CONST. art VIII, s. 2.
[33] *Id.*
[34] *See, e.g.*, ss. 39.206, 39.407, 39.827, 57.105, 61.13001, 61.14, 68.09, 98.075, 101.048, 112.1815, 112.534, 120.56, 120.57, 163.3177, 163.31777, 163.3184, 163.3187, 163.32465, 194.301, 222.21, 287.133, 287.134, 320.6412, 322.2615, 322.2616, 322.64, 363.06, 376.305, 376.308, 379.337, 379.502, 390.01114, 400.023, 400.121, 403.121, 403.519, 403.706, 403.727, 408.08, 409.2558, 415.1045, 429.29, 440.104, 443.101, 448.110, 456.032, 552.40, 556.107, 556.116, 559.77, 560.123, 560.125, 569.23, 608.441, 627.062, 627.0628, 627.0651, 648.525, 655.50, 709.08, 732.805, 744.301, 765.109, 768.28, 768.81, and 775.082, F.S. (all applying the preponderance of evidence standard of review in different situations); s. 617.0126, F.S. (applying de no review standard to suits challenging certain action by the Department of State); and s. 120.57(1)(e), F.S. (providing a clearly erroneous standard of review related to an unadopted rule).
[35] *Simms v. Dep't of Health & Rehabilitative Servs.*, 641 So. 2d 957 (Fla. 3d DCA 1994) (citing *Dep't of Health & Rehabilitative Servs. v. Hollis*, 439 So. 2d 947, 948 (Fla. 1st DCA 1983)); *see also Florida House of Representatives v. Crist*, 999 So. 2d 601, 611 (Fla. 2008) (finding that a branch of government has the inherent right to accomplish all objects naturally within its orbit, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution).
[36] *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992).

grounds including: federal and state takings claims,[37] challenges that it is an improperly enacted tax,[38] and challenges that it violates the state constitutional requirement for free public schools.[39] While decreasing the standard of review might be viewed as a separation of powers problem, increasing the standard of review further protects the constitutional rights raised in these cases. Increasing constitutional protections is a function within the jurisdiction of the Legislature.

Furthermore, the Florida Supreme Court has held that a statute that attempts to control a court's judgment is valid where it merely establishes rebuttable presumptions, rather than setting forth mandatory guidelines.[40] While HB 227 does not allow a deferential standard, it still allows the court to come to its own judgment regarding the validity of the impact fee. In summary, the separation of powers challenge to the Legislature's delineation of the standard of review in impact fee cases will ultimately turn on a court's determination of whether this delineation of the standard of review infringes upon the judiciary's authority over practice and procedure.

***Mandates***

House Bill 227 (2009 Regular Session) has been challenged as an unconstitutional mandate. Article VII, Section 18(a) of the Florida Constitution states that no county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds with certain exceptions and exemptions. Although the complaint argues that HB 227 violated this provision, the bill does not require any action from the local governments. The complaint does not specify what "additional burdens" it is alleging local governments are required to carry out. Therefore, it is unlikely that HB 227 violated Article VII, Section 18(a) of the Florida Constitution.

Section 18(b), Art. VII of the Florida Constitution provides that except upon approval by two-thirds of the members of each house, the Legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989. House Bill 227 did not qualify for the exemptions provided in s. 18(d), Art. VII of the Florida Constitution and did not receive a two-thirds vote in the Senate. Versions of both the Senate and House staff analyses in 2009 stated that the bill reduced local governments' authority to raise revenues.[41] However, the bill did not restrict local governments from levying impact fees nor did it change the test by which impact fees are evaluated (the dual rational nexus test). Arguably, an impact fee that is valid under case law and statutory law should be upheld both before and after HB 227 became law. The bill only should affect local governments that levy invalid impact fees, which they never had the authority to levy. To the extent that the standard of review is determined by a court to reduce the authority of the government to raise revenues in the aggregate, the bill could be deemed an unfunded mandate. Practically, the bill may lead to more impact fees being struck down as invalid. Therefore, there are logical arguments on both sides.

[37] U.S. CONST. amend. V; FLA. CONST. art. I, s. 9.
[38] FLA. CONST. art. VII, s. 1.
[39] FLA. CONST. art. IX, s. 1.
[40] *Department of Agriculture and Consumer Services v. Bonanno*, 568 So. 2d 24 (Fla. 1990).
[41] House Economic Development and Community Affairs Policy Council, Staff Analysis for CS/CS/HB 227 (2009 Reg. Sess.); Senate Transportation and Economic Development Appropriations Committee, Bill Analysis for CS/SB 580 (2009 Reg. Sess.).

Creating a preponderance of the evidence standard of review for impact fee challenges *may* or *may not* reduce a local government's authority to raise revenues under the Florida Constitution.[42] In order to eliminate the uncertainty regarding whether the subsection of law enacted by HB 227 was an unconstitutional mandate, SB 410 requires approval of each house of the Legislature by two-thirds of the membership.[43]

## III. Effect of Proposed Changes:

**Section 1** amends s. 163.3164, F.S., to clarify that an urban service area is any urban service area identified in the comprehensive plan regardless of local government limitation.

**Section 2** amends s. 163.3171, F.S., to clarify that joint planning agreements should be broadly construed, that courts have sole jurisdiction to interpret joint planning agreements, and that the validity of a joint planning agreement may not be a basis for finding plan amendments not in compliance.

**Section 3** amends s. 163.3177, F.S., to extend the deadline for compliance with the CIE financial feasibility requirement to 2013 and to specify that the amount of land designated for future land uses may not be limited solely by the projected population.

**Section 4** reenacts s. 163.31801, F.S., relating to the burden of proof/standard of review for impact fees in response to ongoing litigation. To remove any doubt regarding whether this section is an unconstitutional mandate, this bill requires approval by each house of the Legislature by two-thirds of the membership.

**Section 5** states that if a court of last resort finds that the retroactive application of the reenactment of s. 163.31801(5), Florida Statutes, is unconstitutional, it is the intent of the Legislature that section 4 of this act shall apply prospectively from July 1, 2011. This is an attempt to preserve the burden of proof/standard of review change from 2009 that is now the subject of litigation.

**Section 6** amends s. 163.31801, F.S., to create a moratorium on impact fees. It does not affect impact fees pledged or obligated for the retirement of debt or impact fees for water or wastewater.

**Section 7** adds a new subsection to s. 163.3194, F.S. The bill attempts to put the state land planning agency in the posture of determining land use for the purposes of the HBA's authorization that signs/billboards may be located on commercial or industrial, zoned or unzoned

[42] Additionally, in 2009 the revenue estimating conference estimated that the bill would have a negative but indeterminate affect on local governments. Section 18(d), Art. VII of the Florida Constitution has an exemption for insignificant fiscal impacts. The Legislature interprets insignificant fiscal impact to mean an amount not greater than the average statewide population for the applicable fiscal year times 10 cents; the average fiscal impact, including any offsetting effects over the long term, is also considered. Therefore, if a court did find that the bill was a mandate, the impact of the bill's change in the standard of review would have to have an impact greater than $18.6 million in the applicable fiscal year to be an unconstitutional mandate.

[43] If provisions of a law were unconstitutionally enacted, the Legislature can reenact those provisions using proper constitutional methods so long as the substance of the law is constitutional. *See Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991); *see also State v. Johnson*, 616 So. 2d 1 (Fla. 1993).

parcels. However, the definitions are inconsistent with the provisions of s. 479.01, F.S. Paragraph (c) is unclear. Specifically, the reference to "development order or permit" does not specify what type of development order or permit or the significance of the development order or permit. The reference to 479.02, F.S., which covers all of the Department of Transportation's requirements for signs and billboards seems to supersede a number of statutory requirements. To the extent that this could be viewed as a violation of the federal-state agreement under the HBA, this could cost the state a significant amount of money (see fiscal impact). Finally, it is unclear what determination is intended when the bill refers to the "determination by the local government."

**Section 8** amends s. 163.3246, F.S., revising the local government comprehensive planning certification program (the certified communities program). The bill would require the Office of Program Policy Analysis and Government Accountability (OPPAGA) to study the certified communities program and the program implemented by section 9 of the bill. The bill provides that the certified communities program expires on December 1, 2015.

**Section 9** creates s. 163.3250, F.S. to create an autonomous planning program. The autonomous planning program is modeled after the certified communities program and is designed to allow all local governments to designate all or a portion of their jurisdiction for relief from comprehensive plan amendment review. The state land planning agency shall approve any county or municipal designation of an autonomous planning area if all of the jurisdiction's plan amendments have been found in compliance by final order from the Administration Commission or a court of law within the preceding 2 years. Public hearings are held as part of the process. Plan amendments that apply to lands within an autonomous planning area follow the process set forth in this section, with specified exceptions.

**Section 10** creates s. 163.3260, F.S., prohibits local governments from duplicating reviews by the Department of Environmental Protection or a water management district. It prohibits water management districts from duplicating reviews or permitting carried out by the Department of Environmental Protection.

**Section 11** of the bill provides an effective date.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Section 18(b), Art. VII of the Florida Constitution provides that except upon approval by two-thirds of the members of each house, the Legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989. Since the bill would reduce a county's or municipality's authority to raise revenue in the aggregate, it will require two-thirds vote of the membership of each house of the Legislature for passage.

### B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Should the FHWA determine the provisions of the bill addressing the installation of signs on commercial or industrial land are not in compliance with the 1972 agreement between the State and USDOT, or otherwise result in a loss of effective control of outdoor advertising, section 131(b) of Title 23 U.S.C requires the withholding of up to 10% of federal highway funds (approximately $145 million). Further, if federal action results in the subsequent repeal of a provision, any signs legally erected under the provision would become legal nonconforming signs. The removal of such signs requires just (monetary) compensation.

Impact fee moratoria are likely to reduce the local government's ability to raise revenues to pay for infrastructure improvements. These revenues may be passed on in the form of taxes to the general tax payer instead of new development.

## VI. Technical Deficiencies:

The language in section 7 of the bill is unclear (especially (3)(c), see discussion of effect of proposed changes) and inconsistent with chapter 479. If this language violates the state-federal agreement it could result in fines and other economic losses.

## VII. Related Issues:

None.

## VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.