FINAL BILL ANALYSIS

BILL #: SB 410

FINAL HOUSE FLOOR ACTION:
92 Y's 24 N's

SPONSOR: Sen. Bennett (Rep. Hooper)

GOVERNOR'S ACTION: Approved

COMPANION BILLS: HB 7021

SUMMARY ANALYSIS

SB 410 passed the House on April 20, 2011. The bill was approved by the Governor on June 17, 2011, chapter 2011-149, Laws of Florida, and took effect on June 17, 2011. The bill reenacts existing law created by chapter 2009-49, Laws of Florida, (Council Substitute for Committee Substitute for House Bill 227) passed by the Legislature in 2009 that codified the "preponderance of the evidence" standard of review for the government in a case involving an impact fee challenge. SB 410 states that it fulfills an important state interest.

See the "Current Situation" section for an analysis of the existing law reenacted by the bill.

SB 410 is to take effect upon becoming law and is retroactive to July 1, 2009. If a court of last resort finds retroactive application unconstitutional, the bill is to apply prospectively from the date it becomes law.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Current Situation

Legal Challenge to Chapter 2009-49, Laws of Florida, (CS/CS/HB 227)

Procedural Background

In 2009, the Legislature passed and the Governor signed into law CS/CS/HB 227. The Senate passed the final measure with a vote of 26-11, less than a two-thirds vote, and the House passed the final measure with a vote of 107-10.[1] The law was subsequently codified as chapter 2009-49, Laws of Florida.

In February of 2010, a group of nine counties,[2] along with the Florida Association of Counties, the Florida League of Cities, and the Florida School Boards Association filed a lawsuit against the Speaker of the House and the Senate President in Leon County Circuit Court challenging the constitutionality of chapter 2009-49, Laws of Florida based on four counts.[3]

- Count I alleged that the law is an unauthorized adoption of a court rule by the Legislature in violation of Article V, section 2.
- Count II alleged that the law violates the separation of powers provision in Article II, section 3.
- Counts III and IV alleged that the law is an unfunded mandate on counties and municipalities in violation of Article VII, section 18(a), and that the law restricts the ability of counties and municipalities to raise revenues in violation of Article VII, section 18(b).

In June of 2010, the Legislature filed a motion to dismiss on the grounds that the Speaker of the House and the Senate President are immune from suits challenging their legislative actions. The trial court judge denied the legislature's motion to dismiss,[4] and the Legislature then filed a petition in the First District Court of Appeal for writ of certiorari citing irreparable harm and asking the court to review the trial judge's denial of the motion to dismiss.[5]

By reenacting existing law, providing a legislative finding of an important state interest, and providing an effective date that is retroactive to July 1, 2009, the bill is attempting to moot the constitutional infirmity arguments related to Article VII, section 18(a) and 18(b) that were raised in the litigation.

On May 9, 2011, the First District Court of Appeal granted the Legislature's petition for writ of certiorari and quashed the trial court's order denying the Legislature's motion to dismiss. The

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[1] *See* CS/CS/HB 227 *available at*: http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=40083&SessionId=61 (last visited June 2, 2011).
[2] The counties filing suit included: Alachua, Collier, Lake, Lee, Levy, Nassau, Pasco, St. Lucie, and Sarasota.
[3] Amended Complaint for Declaratory and Supplemental Relief, *Alachua County et al., v. Cretul*, Case No. 10-CA-0478 (Fla. 2d Jud. Cir. February 19, 2010).
[4] Order Denying Motion to Dismiss, *Alachua County, et al.*, Case No. 10-CA-0478 (Fla. 2d Jud. Cir. November 4, 2010).
[5] Petition for Writ of Certiorari, *Haridopolos v. Alachua County, et al.*, Case No. 1D10-6433 (Fla. 1st DCA December 6, 2010).

appellate court found that the petitioners were acting in their legislative capacity when they adopted the statute being challenged, and therefore, were entitled to legislative immunity.[6]

Mandates- *Article VII, section 18(a), Florida Constitution*
The Florida Constitution provides 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 unless the Legislature has determined that such law fulfills an important state interest and the law satisfies one of the following conditions:

- The Legislature appropriates funds or provides a funding source not available to the local government on February 1, 1989;
- The law requiring the expenditure is approved by a two-thirds vote of the membership of each house;
- The expenditure is required to comply with a law that applies to all persons similarly situated, including state and local governments; or
- The law is either required to comply with a federal requirement or required for eligibility for a federal entitlement, which federal requirement specifically contemplates actions by counties or municipalities for compliance.[7]

The counties and organizations challenging chapter 2009-49 alleged that by codifying the "preponderance of the evidence" standard of review for the government in a case challenging an impact fee, the Legislature has required counties and municipalities that adopt impact fees or have impact fees in place to spend funds or take actions requiring the expenditure of funds in order to meet "additional burdens" that did not exist prior to passage of the law.[8] Although the counties did not specify what additional burdens they were now forced to assume, they argued that the law was an unconstitutional mandate because the Legislature did not find that the law fulfilled an important state interest and did not meet any of the other conditions outlined in Article VII, section 18(a).

The bill states that it fulfills an important state interest. To the extent that chapter 2009-49, Laws of Florida, is found by a court of last resort to be a mandate on counties and municipalities, a two-thirds vote of the membership of each house of the Legislature is required to have the legislation binding on counties and municipalities, in the absence of one of the other conditions provided for in Article VII, section 18, of the Florida Constitution. The House of Representatives and the Senate both approved SB 410 by a two-thirds vote of its respective memberships.[9]

Ability to Raise Revenues- *Article VII, section 18(b), Florida Constitution*
The Florida Constitution provides that except upon approval of a two-thirds vote of the membership of each house of the Legislature, "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

[6] Opinion Granting Petition for Writ of Certiorari, *Haridopolos v. Alachua County, et al.*, Case No. 1D10-6433 (Fla. 1st DCA May 9, 2011).
[7] Art. VII, s.18(a), Fla. Const.
[8] Amended Complaint for Declaratory and Supplemental Relief, *Alachua County, et al., v. Cretul*, Case No. 10-CA-0478 (Fla. 2d Jud. Cir. February 19, 2010).
[9] The House of Representatives passed SB 410 on April 20, 2011, by a vote of 92-24 and the Senate passed SB 410 on May 4, 2011, by a vote of 38-0.

municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989."[10]

In 2009, CS/CS/HB 227 failed to pass by a two-thirds vote in one house of the Legislature.[11] The counties and organizations challenging the law alleged that codifying a preponderance of the evidence standard of review for the government "substantially alters the ability of the local governments to impose or collect impact fees and places significant restrictions on the ability of cities and counties to raise revenue through impact fees in the aggregate."[12] Presumably, the argument is that local governments would have more impact fees struck down by the courts under this standard of review, and therefore their ability to raise revenues would be reduced.

To the extent that chapter 2009-49, Laws of Florida, is found by a court of last resort to reduce the authority that counties and municipalities have to raise revenues, a two-thirds vote of the membership of each house of the Legislature is required to have the legislation binding on counties and municipalities. The House of Representatives and the Senate both approved this bill by a two-thirds vote of its respective memberships.[13]

Adoption of Court Rules- *Article V, section 2, Florida Constitution*
Under the Florida Constitution, the Florida Supreme Court has exclusive authority to adopt rules of practice and procedure.[14] That is, rules that govern the administration of courts and the behavior of litigants within a court proceeding. The Legislature cannot adopt rules of practice and procedure but can repeal a court rule with a general law passed by a two-thirds vote of the membership of each house of the Legislature.[15] The Legislature has exclusive authority over the enactment of substantive law such as defining the authority of government and the rights of citizens relating to life, liberty, and property. However, because the courts have exclusive rulemaking authority, the validity of a legislative act often depends on whether it is one of substantive law, exclusive to the Legislature, or one of procedure, exclusive to the Supreme Court.

The counties and organizations are alleging that the Legislature sought to create a new court rule of practice and procedure by codifying the "preponderance of the evidence" standard of review for the government in impact fee challenge cases. They alleged that chapter 2009-49, Laws of Florida, caused the burden of proof in establishing the validity of impact fees to shift from the plaintiff to the local government,[16] and that the Legislature had no authority to change the standard of review and level of deference granted to impact fees adopted by local governments.

Separation of Powers- *Article II, section 3, Florida Constitution*
Florida's constitution explicitly provides for the separation of powers between the legislative, executive, and judicial branches, stating that "[n]o person belonging to one branch shall

[10] Art. VII, s. 18(b), Fla. Const.
[11] The Senate passed CS/CS/HB 227 on April 29, 2009, by a vote of 26-11, and the House passed CS/CS/HB 227 on April 30, 2009, by a vote of 107-10.
[12] Amended Complaint for Declaratory and Supplemental Relief, *Alachua County. et al., v. Cretul*, Case No. 10-CA-0478 (Fla. 2d Jud. Cir. February 19, 2010).
[13] *Supra* note 10.
[14] Art. V, s. 2(a), Fla. Const.
[15] *Id*.
[16] House Bill 227, in fact, simply codified existing case law providing that the government had the burden of proving whether an impact fee was valid. *See Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126 (Fla. 2000).

exercise any powers appertaining to either of the other branches unless expressly provided [in the Florida Constitution]."[17]

The counties and organizations are alleging that chapter 2009-49, which directs courts not to apply a deferential standard in impact fee challenge cases, violates the separation of powers provision in 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 granted to counties and municipalities, and therefore, the Legislature cannot by statute direct courts not to apply a deferential standard to the validity of impact fee ordinances since that deference is derived from the Constitution itself.

Local Governments' Use of Impact Fees

Impact fees are enacted by local home rule ordinance. They 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.

2005 Impact Fee Review

In 2005, the Legislature created the Florida Impact Fee Review Task Force. The 15-member Task Force was charged with surveying the current use of impact fees, reviewing current impact fee case law and making recommendations as to whether statutory direction was necessary with respect to specific impact fee topics.[18] The Task Force concluded that:

- Impact fees are a growing source of revenue for infrastructure in Florida.
- Local governments in Florida do not have adequate revenue generating resources with which to meet the demand for infrastructure within their jurisdictions.
- Without impact fees, Florida's growth, vitality and levels of service would be seriously compromised.
- Impact fees are a revenue option for Florida's local governments to meet the infrastructure needs of their residents.
- Because Florida comprises a wide variety of local governments – small and large, urban and rural, high growth and stable, built out and vacant land – each with diverse infrastructure needs, a uniform impact fee statute would not serve the state.
- Impact fees must remain flexible to address the infrastructure needs of the specific jurisdictions.
- Statutory direction on impact fees is needed to address and clarify certain issues regarding impact fees.

The Task Force voted against recommending any statutory guidance as to the legal burden of proof for impact fee ordinance challenges.

Current Law on Impact Fees

[17] Art. II, s. 3, Fla. Const.
[18] *See* THE FLORIDA IMPACT FEE REVIEW TASK FORCE, February 1, 2006 Final Report & Recommendations, *available at* http://www.floridalcir.gov/taskforce.cfm (last visited March 15, 2011).

In 2006, the Legislature enacted s. 163.31801, F.S., to provide requirements and procedures that a county, municipality, or special district must follow when it adopts an impact fee.[19] By statute, an impact fee ordinance adopted by a local government must, at a minimum, include the following elements:

- 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.
- Require that notice be provided no less than 90 days before the effective date of an ordinance or resolution imposing a new or increased impact fee, however, a county or municipality is not required to wait 90 days to decrease, suspend, or eliminate an impact fee.

Case Law on Impact Fees

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There have been a number of court decisions that address impact fees.[20] In *Hollywood, Inc. v. Broward County*,[21] 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 it offsets needs that are sufficiently attributable to the new development and the fees collected are adequately earmarked for the benefit of the residents of the new development.[22] 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.[23] Because the ordinance at issue satisfied these requirements, the court affirmed the circuit court's validation of the ordinance.[24]

The Florida Supreme Court addressed the issue of impact fees for school facilities in *St. Johns County v. Northeast Builders Association, Inc.*[25] 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."[26] Also, the ordinance provided for a system of credits to fee-payers for land contributions or the construction of educational facilities. This ordinance required funds not

[19] Impact fees are also addressed in other areas of the Florida Statutes including: s. 163.3180(13) and (16), s. 163.3202(3), s. 191.009(4), and s. 380.06.
[20] *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).
[21] 431 So. 2d 606 (Fla. 4th DCA 1983).
[22] *See id.* at 611.
[23] *See id.* at 611-12.
[24] *See id.* at 614.
[25] 583 So. 2d 635 (Fla. 1991).
[26] *See id*. at 637, *citing*, St. Johns County, Fla., Ordinance 87-60, § 10(B) (Oct. 20, 1987).

expended within six years to be returned, along with interest on those funds, to the current landowner upon application.[27]

The court applied the dual rational nexus test and found that the county met the first prong of the test, but not the second. The builders in *Northeast 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 that the county's determination that every 100 residential units would result in the addition of forty-four 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.[28]

More recent decisions have further clarified the extent to which impact fees may be imposed. In *Volusia County v. Aberdeen at Ormond Beach*, the Florida Supreme Court ruled that when residential development has no potential to increase school enrollment, public school impact fees may not be imposed.[29] In the *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.[30] 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 towards the cost of the increased capacity for public facilities.

Burden of Proof and Standard of Review

The obligation of a party in litigation 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.[31] The preponderance of the

[27] *See id.* at 637.
[28] *See 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 was not subject to the impact fee.
[29] 760 So. 2d 126 (Fla. 2000), at 134. Volusia County had imposed a school impact fee on a mobile home park for persons aged 55 and older.
[30] 831 So. 2d 223 (Fla. 2d DCA 2002).
[31] 5 Fla. Prac., Civil Practice § 16:1 (2009 ed.).

evidence (also known as the "greater weight of the evidence"[32]) 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.[33]

Although the challenger has to plead their case and allege a cause of action, beyond the pleading phase the court's language seems to place the burden of proof on the local government. Prior to 2009, some parties argued that 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.[34] In *Volusia County v. Aberdeen at Ormond Beach*, the Florida Supreme Court rephrased the standard as a "reasonableness" test.[35] Although the standard is 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.

The Legislature, in 2009, codified the standard of review in chapter 2009-49, Laws of Florida, requiring 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 that of section 163.31801, Florida Statutes, and prohibiting the court from using a deferential standard.

Effect of the Bill:

SB 410 reenacts existing law created by chapter 2009-49, Laws of Florida, that amended s. 163.31801, F.S., requiring that, in a challenge to an impact fee ordinance, the government that enacted the ordinance must show, by a preponderance of the evidence, that the imposition or amount of the fee meets the requirements of state legal precedent or section 163.31801, Florida Statutes. The bill provides that the court may not use a deferential standard. The effect of this law is that the court may not use the "fairly debatable" standard of review when evaluating the legality of an impact fee ordinance.

The bill states that it fulfills an important state interest. A two-thirds vote of the membership of each house of the Legislature is required to moot the constitutional arguments that chapter 2009-49, Laws of Florida, is an unconstitutional mandate on counties and municipalities and restricts their authority to raise revenues. The House of Representatives and the Senate both approved SB 410 by a two-thirds vote of its respective memberships.[36]

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[32] The Florida Standard Jury Instructions define "greater weight of the evidence" as the more persuasive and convincing force and effect of the entire evidence in the case. *See In re Standard Jury Instructions In Civil Cases-Report* No. 09-01 (Reorganization of the Civil Jury Instructions), 35 So. 3d 666 (Fla. 2010).
[33] *See St. Johns County v. Northeast Florida Builders Ass'n, Inc.,* 583 So. 2d 635 (Fla. 1991).
[34] *See* THE FLORIDA IMPACT REVIEW TASK FORCE, February 1, 2006 Final Report & Recommendations, *available at* http://www.floridalcir.gov/taskforce.cfm (last visited March 15, 2011).
[35] 760 So. 2d 126 (Fla. 2000).
[36] The House of Representatives passed SB 410 on April 20, 2011, by a vote of 92-24 and the Senate passed SB 410 on May 4, 2011, by a vote of 38-0.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

The bill reenacts existing law and therefore does not contain any fiscal impact on local governments.

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.