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: CS/CS/SB 1730

INTRODUCER: Infrastructure and Security Committee, Community Affairs Committee, and Senator Lee

SUBJECT: Community Development and Housing

DATE: April 10, 2019 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Peacock	Yeatman	CA	**Fav/CS**
2.	Price	Miller	IS	**Fav/CS**
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1730 amends various statutes relating to community development and housing. The bill authorizes local inclusionary housing ordinances that require developers to make affordable housing contributions, but a county or municipality must provide incentives to fully offset all costs to developers for their affordable housing contributions.

After receiving an application for approval of a development permit or order, the bill requires a county and municipality to review the application for completeness and issue a response to an applicant within a specified period of time. The bill applies certain provisions of current law applicable to development permits to development orders.

The bill requires a local government to credit certain contributions, constructions, expansions, or payments toward any other impact fee or exaction imposed by local ordinance for public educational facilities, based on the total impact fee assessed and not on the fee for any particular type of school.

The bill also requires the collection of an impact fee to occur no earlier than the issuance of the building permit for the property that is subject to the fee. The bill also codifies the 'dual rational nexus test' for impact fees as articulated in case law.

Other requirements of the bill include:
- Earmarking impact fees for capital facilities that benefit new users.
- Prohibiting the use of impact fee revenues to pay existing debt unless the expenditure is reasonably connected to, or has a rational nexus with, the increased impact generated by the new construction, residential or nonresidential.
- Requiring a local government to credit against an impact fee any contributions related to public educational facilities.
- Providing that if a local government increases its impact fee rates, the holder of any impact fee credits which were in existence prior to the increase is entitled to a proportionate increase in the credit balance.
- Placing the burden of proof on the government in an action challenging the government's failure to provide dollar-for-dollar credits for payment of impact fees association with public education facilities.
- Applying certain provisions governing impact fees to mobility fees.
- Authorizing a county, municipality, or special district to provide an exception or waiver for the impact fee for the development or construction of affordable housing and providing that such local governments or special districts are not required to use any revenue to offset the impact.

Lastly, the bill revises the definition of the term "mortgage loan, which allows residential loans made for a business purpose to be subject to regulation by the Office of Financial Regulation.

The fiscal impact of the bill is indeterminate. See the Fiscal Impact Statement heading for further details.

The bill takes effect upon becoming law.

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 Authority[5]

Pursuant to home rule authority, counties and municipalities may impose proprietary fees,[6] regulatory fees, and special assessments[7] 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."[8]

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.[9] "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."[10]

Impact Fees

Impact fees, one type of regulatory fee, are "charges imposed by local governments against new development to provide for capital facilities' costs made necessary by such growth."[11] Examples of such capital facilities include the provision of additional water and sewer systems, schools,[12] 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.[13]

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.[14] In 2009, the Act was amended to impose new restrictions on impact fees by requiring local governments to

---

[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/lgfih18.pdf (last visited March 18, 2019).
[6] Examples of proprietary fees include admissions fees, franchise fees, user fees, and utility fees. *Id.* at p. 9.
[7] Special assessments are typically used to construct and maintain capital facilities or to fund certain services. *Id.*
[8] *Id.*
[9] *Id.*.
[10] *Id.*
[11] S*upra* note 5 at p. 13.
[12] 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. *Id*.
[13] 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 March 18, 2019).
[14] Chapter 2009-49, L.O.F. and s. 163.31801, F.S.

bear 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.[15]

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.[16]

Dual Rational Nexus Test

While s. 163.31801, F.S., outlines the 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.[17] A number of court decisions have addressed the dual rational nexus test and challenges to the legality of impact fees.[18]

In *Hollywood, Inc. v. Broward County,*[19] 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.[20] 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 addition, the local government must show the funds are earmarked for the provision of public facilities to benefit the new residents.[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

[15] 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.

[16] A county or municipality is not required to wait 90 days to decrease, suspend, or eliminate an impact fee. Secction 163.31801(3)(d), F.S.

[17] *Supra* note 4.

[18] *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).

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

[20] *Id.* at 611.

[21] *Id.* at 611-12.

may not be imposed.[22] 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.[23]

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.[24]

Timing of Collection for Impact Fees

Florida Statutes do not specify when a local government must collect impact fees. As a result, the applicable local government makes this decision, and the time of collection varies.[25] For example, in Orange County, residential impact fees are due when the building permit is issued, although the county allows the fees to be deferred in certain circumstances.[26] In contrast, in Volusia County, impact fees are due before the issuance of a certificate of occupancy or business tax receipt.[27]

Concurrency and Proportionate Share

Concurrency requires public facilities and services to be available concurrent with the impacts of new development. Concurrency was formerly required for transportation, schools, and parks and recreation, but in 2011, the Legislature made concurrency for these facilities optional with the

---

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

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

[24] 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 March 18, 2019).

[25] Common benchmark development actions include plat approval, building permitting, and certificate of occupancy. A 2015 national impact fee study by Duncan Associates entitled *State Impact Fee Enabling Acts* identified 29 states with impact fee enabling acts. The study found that "about one-third of enabling acts allow impact fees to be collected at any time during the development process. Most of the others provide that impact fees cannot be collected prior to the building permit or certificate of occupancy." *See* http://impactfees.com/publications%20pdf/state_enabling_acts.pdf (last visited March 18, 2019).

[26] Orange County Government, Florida, *Residential Impact Fees, available at* http://www.orangecountyfl.net/PermitsLicenses/Permits/ResidentialImpactFees.aspx#.WgnLs0kUmUl. (last visited March 18, 2019).

[27] Volusia County, Florida, *Frequently Asked Questions on Impact Fees*, *available at* https://www.volusia.org/services/growth-and-resource-management/impact-fees/faqs-impact-fees.stml (last visited March 18, 2019).

passage of the Community Planning Act (CPA).[28] Concurrency on a statewide basis is required only for sanitary sewer, solid waste, drainage, and potable water. However, any local government is authorized to extend the concurrency requirement to additional public facilities within its jurisdiction.[29]

Many local governments continue to exercise the option to impose concurrency on transportation and school facilities. If a local government elects to apply concurrency to either transportation or school facilities, or both, its comprehensive plan must provide principles, guidelines, standards, and strategies, including adopted levels of service,[30] to guide its application of concurrency requirements.[31] Concurrency is tied to provisions requiring local governments to adopt level-of-service (LOS) standards, address existing deficiencies, and provide infrastructure to accommodate new growth reflected in the comprehensive plan.[32] Local governments are charged with setting LOS standards within their jurisdictions. The local comprehensive plan must demonstrate, for required or optional concurrency requirements, that the adopted LOS standards can be reasonably met, and infrastructure needed to ensure that the LOS standards are achieved and maintained for a five-year period must be identified.[33] Generally, if the LOS standards are not met, development permits may not be issued without an applicable exception.

Proportionate share is a tool local governments may use to require developers to help mitigate the impacts of their development notwithstanding a failure to achieve and maintain the adopted LOS standards.[34] Proportionate share generally requires developers to contribute to costs, or build facilities, necessary to offset a new development's impacts.[35] Local governments may require proportionate share contributions from developers for both transportation and school impacts.[36]

With respect to school concurrency applied by a local government, when a contribution of land; the construction, expansion, or payment for land acquisition; the construction or expansion of a public school facility, or a portion thereof; or the construction of a specified charter school is used as proportionate-share mitigation, the local government is required to credit such contribution, construction, expansion, or payment toward any other impact fee or exaction imposed by a local ordinance for the same need, on a dollar-for-dollar basis.[37]

---

[28] Chapter 2011-139, s. 15, Laws of Fla.
[29] Section 163.3180(1), F.S.
[30] "Level of service" is defined in s. 163.3164(28), F.S., to mean "an indicator of the extent or degree of service provided by, or proposed to be provided by, a facility based on and related to the operational characteristics of the facility. Level of service shall indicate the capacity per unit of demand for each public facility."
[31] *See* ss. 163.3180(5) and (6), F.S., with respect to concurrency applied to transportation facilities and to public education facilities, respectively.
[32] Section 163.3180, F.S.
[33] Section 163.3180(1)(b), F.S.
[34] Florida Department of Community Affairs (now Department of Economic Opportunity), *Transportation Concurrency: Best Practices Guide*, pg. 64 (2007), retrieved from http://www.cutr.usf.edu/pdf/DCA_TCBP%20Guide.pdf (last visited March 18, 2019).
[35] *Id.*
[36] Sections 163.3180(5) and 163.3180(6), F.S.
[37] Section 163.3180(6)(h)2.b., F.S.

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)[38] 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;[39]
- Low-income households, i.e., total annual gross household income does not exceed 80 percent of the median annual income for the area;[40]
- Moderate-income households, i.e., total annual gross household income does not exceed 120 percent of the median annual income for the area.[41]

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.[42]

The Florida Housing Finance Corporation administers the SHIP Program that 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[43] and the State Apartment Incentive Loan (SAIL) Program that provides low-interest loans on a competitive basis to affordable housing developers each year.

Inclusionary Housing

In 2001, the Legislature created ss. 125.01055[44] and 166.04151, F.S.,[45] respectively authorizing a county or municipality, notwithstanding any other provision of law, a to "adopt and maintain in effect any law, ordinance, rule, or other measure that is adopted for the purpose of increasing the supply of affordable housing using land use mechanisms such as inclusionary housing ordinances."

"Inclusionary housing ordinances (sometimes called inclusionary zoning ordinances) are land use regulations that require affordable housing units to be provided in conjunction with the development of market rate units. The intent of these ordinances is to increase the production of

[38] *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.
[39] Section 420.9071(28), F.S.
[40] Section 420.9071(19), F.S.
[41] Section 420.9071(20), F.S.
[42] *See* ss. 420.9071(19), (20), and (28), F.S.
[43] See ss. 420.907-420.9089, F.S.
[44] Ch. 2001-252, s. 16, Laws of Fla.
[45] Ch. 2001-252, s. 15, Laws of Fla.

affordable housing in general and to increase the production in specific geographic areas that might otherwise not include affordable housing."[46]

Elements of an inclusionary zoning ordinance typically include a minimum project size, a percentage set aside, density bonus, and costs offsets.[47] The threshold size must be large enough to contribute to the financial feasibility of the required affordable units. The share of affordable units varies, and requirements for developers to set aside ten to 25 percent of their new housing developments as affordable are most common. A density bonus allows a developer to construct a certain number of additional market rate units beyond what is normally allowed under the current zoning ordinance, in exchange for providing a specified number of affordable units. To enable the construction of affordable housing, developers may be given waivers from certain development standards and receive waivers for fees, such as demolition, water and sewer charge, and utility connection fees. Developers may be eligible for reduced parking requirements and other benefits, such as expedited permitting.[48]

Development Permit Process

A development permit is defined to mean any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land.[49] When local governments are reviewing applications for such permits, current law specifically excludes building permits from this definition.[50] A "development order" is "any order granting, denying, or granting with conditions an application for a development permit.[51]

Sections 125.022(1) and 163.033(1), F.S., provide that when reviewing an application for a development permit, counties and municipalities cannot request additional information from an applicant more than three times, unless the applicant waives the limitation in writing. Prior to the third request for information, the county or the municipality is directed to offer a meeting to try to resolve outstanding issues. With one exception discussed below, if the applicant believes the request for additional information is not authorized by ordinance, rule, statute or other legal authority, the county or municipality, at the applicant's request, must proceed with processing the application.

When a county or municipality denies an application for a development permit, the county or municipality must give written notice to the applicant. The notice must include a citation to the applicable portions of ordinance, rule, statute or other legal authority for the denial of the permit.[52]

---

[46] *Ross, J.* and *Outka, U.,* The Florida Housing Coalition, *Inclusionary Housing: A Challenge Worth Taking*, *available at* https://www.flhousing.org/wp-content/uploads/2012/05/Inclusionary-Housing-A-Challenge-Worth-Taking.pdf (last visited March 18, 2019).
[47] *See* Florida Housing Coalition, *Affordable Housing Incentive Strategies: A Guidebook for Affordable Housing Advisory Committee Members and Local Government Staff,* at p. 36, available at http://www.flhousing.org/wp-content/uploads/2012/03/AHAC-Guidebook-2017.pdf (last viewed April 4, 2019).
[48] *Id.*
[49] Section 163.3164(16), F.S.
[50] Sections 125.022(3) and 166.033(3), F.S.
[51] Section 163.3164(15), F.S.
[52] Sections 125.022(2) and 166.033(2), F.S.

For any development permit application filed with a county or municipality after July 1, 2012, that county or municipality is prohibited from requiring, as a condition of processing or issuing a development permit, that an applicant obtain a permit or approval from any state or federal agency unless the agency has issued a final agency action that denies the federal or state permit before the county or municipality action on the local development permit.[53] The issuance of a development permit by a county or municipality does not create any rights on the part of the applicant to obtain a permit from a state or federal agency and does not create any liability on the part of the local government for issuance of the permit if the applicant fails to obtain requisite approvals or fulfill the obligations imposed by a state or federal agency or undertakes actions that result in a violation of state or federal law.[54] A county or municipality must attach such a disclaimer to the issuance of a development permit and must include a permit condition that all other applicable state or federal permits be obtained prior to commencement of the development.[55]

Federal Oversight of Mortgage Brokerage Industry

Secure and Fair Enforcement for Mortgage Licensing Act of 2008

On July 30, 2008, the federal Housing and Economic Recovery Act of 2008 was enacted.[56] Title V of this act is titled the "Secure and Fair Enforcement for Mortgage Licensing Act of 2008" or the "S.A.F.E. Mortgage Licensing Act of 2008" (SAFE Act). The SAFE Act establishes minimum standards for state licensure of residential mortgage loan originators in order to increase uniformity, improve accountability of loan originators, combat fraud, and enhance consumer protections. The act required all states to adopt a system of licensure meeting minimum standards for mortgage loan originators by August 1, 2009, or be subject to federal regulation. The act establishes regulatory requirements for individuals, rather than businesses, licensed or registered as mortgage brokers and lenders, collectively known as loan originators.

Pursuant to the SAFE Act, states are required to participate in a national licensing registry, the Nationwide Mortgage Licensing System and Registry (registry), which contains employment history as well as disciplinary and enforcement actions against loan originators. Applicants are subject to licensure by the state regulator.[57]

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

In 2010, the federal Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) created the Consumer Financial Protection Bureau (CFPB) and provided sweeping changes to the regulation of financial services, including changes to federal mortgage loan origination and lending laws.[58] The Dodd-Frank Act authorizes the CFPB to have rulemaking, enforcement, and supervisory powers over many consumer financial products and

---

[53] *See* ss. 125.022(4) and 166.033(4), F.S.
[54] *See* ss. 125.022(5) and 166.033(5), F.S.
[55] *Id*.
[56] Pub. L. No. 110-289.
[57] NLMS Resource Center, *available at* http://mortgage.nationwidelicensingsystem.org/about/Pages/default.aspx (last visited March 20, 2019).
[58] Pub. L. No. 111-203.

services, as well as the entities that sell them. Some of the consumer laws under the CFPB include the Truth in Lending Act (TILA)[59] and the Real Estate Settlement Procedures Act (RESPA).[60] The TILA is intended to ensure that credit terms are disclosed in a meaningful way so consumers can compare credit terms, and is implemented by Regulation Z. The RESPA requires lenders, mortgage brokers, or servicers of home loans to provide borrowers with pertinent and timely disclosures regarding the nature and costs of the real estate settlement process, and is implemented by Regulation X.

Both TILA and RESPA exempt from their regulations a mortgage loan made "primarily for a business, commercial or agricultural purpose."[61] Therefore, TILA and RESPA do not cover "business purpose" mortgage loans but rather only "consumer purpose" mortgage loans. When determining whether credit is for a consumer purpose, the creditor must evaluate all of the following factors:

- Any statement obtained from the consumer describing the purpose of the proceeds;
- The primary occupation of the consumer and how it relates to the use of the proceeds;
- Personal management of the assets purchased from proceeds;
- The size of the transaction; and
- The amount of income derived from the property acquired by the loan proceeds relative to the borrower's total income.

The Dodd-Frank Act mandated that the CFPB adopt an integrated disclosure form for use by lenders and creditors to comply with the disclosure requirements of RESPA and TILA,[62] and the CFPB issued final rules in 2015.[63] The integrated rule applies to most closed-end consumer mortgages secured by real property. It does not apply to home equity lines of credit (HELOCs), reverse mortgages, or mortgages secured by a mobile home or by a dwelling that is not attached to real property (i.e., land). *The Small Entity Guide* published by the CFPB does not specify whether loans for business purposes or for investment properties are exempt from the rule. However, the guide does provide that creditors are not prohibited from using the integrated disclosure forms on loans that are not covered by the rule.[64]

State Regulation of Mortgage Loans

The Office of Financial Regulation (OFR) regulates a wide range of financial activities, such as state-chartered banks, credit unions, and non-depository loan originators, mortgage brokers and mortgage lenders. In 2009, the Florida Legislature implemented the minimum standards of the SAFE Act, which increased licensure requirements and required licensure through the registry.[65]

[59] 15 U.S.C. 1601, *et. seq.*
[60] 12 U.S.C. 2601, *et. seq.*
[61] Consumer Financial Protection Bureau, *2013 Integrated Mortgage Disclosure Rule Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), available at* https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/2013-integrated-mortgage-disclosure-rule-under-real-estate-settlement-procedures-act-regulation-x-and-truth-lending-act-regulation-z/ (last visited March 20, 2019).
[62] 12 U.S.C. ss. 5532(f) and 2603; 15 U.S.C. s. 1604(b).
[63] 78 Fed Reg 79730.
[64] *See* CFPB, *TILA-RESPA Integrated Disclosure Rule: Small Entity Compliance Guide*, *available at* http://s3.amazonaws.com/files.consumerfinance.gov/f/documents/kbyo_smallentitycomplianceguide_v4_10072016.pdf (last visited March 20, 2019).
[65] Chapter 2009-241, Laws of Fla.

Section 494.001(24), F.S., defines the term "mortgage loan" to mean a:

- Residential loan primarily for personal, family, or household use which is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling, as defined in s. 103(v) of the federal TILA,[66] or for the purchase of residential real estate upon which a dwelling is to be constructed;
- Loan on commercial real property if the borrower is an individual or the lender is a noninstitutional investor; or
- Loan on improved real property consisting of five or more dwelling units if the borrower is an individual or the lender is a noninstitutional investor.

Licensure of Loan Originators, Mortgage Brokers, and Mortgage Lenders

An individual who acts as a loan originator must obtain a loan originator license.[67] A "loan originator" means an individual who, directly or indirectly:

- Solicits or offers to solicit a mortgage loan;
- Accepts or offers to accept an application for a mortgage loan;
- Negotiates or offers to negotiate the terms or conditions of a new or existing mortgage loan on behalf of a borrower or lender; or
- Negotiates or offers to negotiate the sale of an existing mortgage loan to a noninstitutional investor for compensation or gain.[68]

The term "loan originator" includes an individual who is required to be licensed as a loan originator under the SAFE Act. The term does not include an employee of a mortgage broker or mortgage lender whose duties are limited to physically handling a completed application form or transmitting a completed application form to a lender on behalf of a prospective borrower.[69]

A "mortgage broker" means a person conducting loan originator activities through one or more licensed loan originators employed by the mortgage broker or as an independent contractor to the mortgage broker[70] and such persons are required to be licensed as mortgage brokers.[71]

A "mortgage lender" means any person making a mortgage loan or servicing a mortgage loan for others, or, for compensation or gain, directly or indirectly, selling or offering to sell a mortgage loan to a noninstitutional investor,[72] and such persons are required to be licensed as mortgage lenders.[73] "Making a mortgage loan" means closing a mortgage loan in a person's name, advancing funds, offering to advance funds, or making a commitment to advance funds to an applicant for a mortgage loan.[74]

---

[66] The term "dwelling" means a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives. Current law inadvertently references the definition of "material disclosure" under s. 103(v), rather than the term "dwelling," which is defined under s. 103(w). *See* 15 U.S.C. 1602.

[67] Section 494.00312, F.S.

[68] Section 494.001(17), F.S.

[69] *Id.*

[70] Section 494.001(22), F.S.

[71] Section 494.00321, F.S.

[72] Section 494.001(23), F.S.

[73] Section 494.00611, F.S.

[74] Section 494.001(20), F.S.

Section 494.00015, F.S., provides several exemptions from regulation under the general provisions of part I of ch. 494, F.S., as well as under parts II and III, relating to mortgage brokers and mortgage lenders, respectively. The party claiming the benefit of an exemption has the burden of establishing a right to that exemption.

Examination Authority, Administrative Penalties and Fines

The OFR may conduct investigations, examinations, and investigate complaints.[75] The OFR may take disciplinary action against a person licensed or subject to licensure under parts II or III of ch. 494, F.S., for a variety of acts, including but not limited to violation of any provision of RESPA, TILA, or any regulations adopted under such acts, during the course of any mortgage transaction.[76]

III. Effect of Proposed Changes:

Sections 1 and 6 respectively amend ss. 125.01055 and 166.04151, F.S., regarding affordable housing, to authorize an inclusionary housing ordinance that requires a developer to provide a specified number or percentage of affordable housing units to be included in a development or allow a developer to contribute to a housing fund or other alternatives in lieu of building the affordable housing units. In exchange, however, a county or municipality must provide incentives to fully offset all costs to the developer of its affordable housing contribution. Such incentives may include, but are not limited to:

- Allowing the developer density or intensity bonus incentives or more floor space than allowed under the current or proposed future land use designation or zoning,
- Reducing or waiving fees, such as impact fees or water and sewer charges, or
- Granting other incentives.

The current authorization of a county or municipality to adopt inclusionary housing ordinances for the purpose of increasing the supply of affordable housing is restricted by the requirement that local government incentives fully offset all costs to the developer of its affordable housing contribution by way of the authorized incentives.

Sections 2 and 5 respectively amend s. 125.022 and 166.033, F.S., to require a county or municipality to review an application for a development permit or development order for completeness and issue a letter indicating that all required information is submitted or specifying with particularity any areas that are deficient within 30 days after receiving such application.

If the application is deficient, the applicant has 30 days to address the deficiencies by submitting the required additional information. Within 120 days after the county or municipality has deemed the application complete, the county or municipality must approve, approve with conditions, or deny the application for a development permit or development order. These time periods may be waived in writing by the applicant. An approval, approval with conditions, or denial of the application for a development permit or development order must include written findings supporting the county's decision.

---

[75] Section 494.0012, F.S.
[76] S*ee* s. 494.00255, F.S.

The bill inserts "development order" throughout both sections of law currently relating to development permits, thereby applying all of the provisions of each section to such orders as they relate to respective county and municipal action on such orders.

Section 3 amends s. 163.3180, F.S., with respect to school concurrency and proportionate share mitigation, to require a local government to credit certain contributions, constructions, expansions, or payments toward any other impact fee or exaction imposed by local ordinance for public educational facilities on a dollar-for-dollar basis at fair market value. The credit must be based on the total impact fee assessed and not upon the impact fee for any particular type of school.

Section 4 amends s. 163.31801, F.S., to prohibit any local government from collecting an impact fee any time prior to the date of issuance of the building permit for the property that is subject to the fee.

The bill codifies the requirement for impact fees to be proportional and reasonably connected to, or have a rational nexus with, the need for additional capital facilities and the increased impact generated by the new residential or commercial construction.

The bill also requires the impact fee to be proportional and reasonably connected to, or have a rational nexus with, the expenditures of the funds collected and the benefits accruing to the new residential or nonresidential construction.

The local government must specifically earmark funds collected under the impact fee for use in acquiring, constructing, or improving capital facilities to benefit new users.

Revenues generated by the impact fee may not be used, in whole or in part, to pay existing debt or for previously approved projects unless the expenditure is reasonably connected to, or has a rational nexus with, the increased impact generated by the new residential or nonresidential construction.

The local government must credit against the collection of the impact fee any contributions related to public educational facilities, including, but not limited to, land dedication, site planning and design, and construction, whether provided in a proportionate share agreement or any other form of exaction. Any such contributions must be applied to reduce impact fees on a dollar-for-dollar basis at fair market value.

If a local government increases its impact fee rates, the holder of any impact fee credits granted by a local government, whether granted under this section, s. 380.06, F.S.(developments of regional impact), or otherwise, is entitled to a proportionate increase in the credit balance.

In any action challenging the government's failure to provided required dollar-for-dollar credits for the payment of impact fees as provided in s. 163.3180(6)(h)2.b, F.S., (school concurrency), the government has the burden of proving by a preponderance of the evidence that the amount of the credit meets the requirements of state legal precedent and the provisions of this section of law. The bill prohibits the court from using a deferential standard for the benefit of the government.

The bill specifies that all provisions governing impact fees in s. 163.31801, F.S., also apply to mobility fees.

A county, municipality, or special district may provide an exception or waiver for the impact fee for the development or construction of housing that is affordable, as defined in s. 420.9071, F.S. If a county, municipality, or special district provides such an exception or waiver, it is not required to use any revenues to offset the impact.

Section 7 amends the definition of the term, "mortgage loan" in s. 494.001(24), F.S., by removing the requirement that residential loans be used primarily for personal, family, or household purposes. As a result, the bill allows residential loans made for a business purpose, for dwellings or for real estate used to construct a dwelling, to fall under the definition of a "mortgage loan" and therefore be subject to regulation by the OFR. The bill may require persons originating, brokering, or lending such loans to obtain licensure under ch. 494, F.S., unless they fall within an exemption under s. 494.00115, F.S. The bill also corrects the federal law reference to the term "dwelling," which is defined under s. 103(w) of the TILA.

Section 8 provides the bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, Section 18(b) of the Florida Constitution provides that the Legislature, except upon approval by a two-thirds vote, may not enact a general law if the anticipated effect of doing so would be to reduce the *authority* that counties or municipalities have to raise revenues in the aggregate. However, the mandate requirements do not apply to laws having an insignificant fiscal impact, which for Fiscal Year 2018-2019 is forecast at slightly over $2 million. [77,78,79]

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.[80] In the memo, the guidelines define the term "authority" to mean the power to levy a tax; the vote required to levy the tax, e.g., increasing the required vote from majority to majority plus one; the tax rate which can be levied; and the base against which the tax is levied, e.g., a bill providing a

[77] FLA. CONST. art. VII, s. 18(d).

[78] 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 March 18, 2019).

[79] 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 March 18, 2019).

[80] 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).

sales tax exemption should be considered a reduction in authority because counties have authority to levy local option sales taxes against the state sales tax base.

While the bill does not restrict the amount counties and municipalities may charge for impact fees, it does restrict the time at which a county or municipality may collect such fees. An impact fee collected at the platting stage is theoretically worth more than an amount collected no earlier than the issuance of the building permit due to the time value of money.[81] It is unclear if this bill lessens the type of *authority* contemplated by President Margolis and Speaker Wetherell.

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.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The Revenue Estimating Conference has not yet estimated the impact of CS/SB 1730.

B. Private Sector Impact:

Developers who provide the authorized affordable housing contributions pursuant to an inclusionary housing ordinance would have the costs of such contributions fully offset by the required incentives. Developers will receive dollar-for-dollar credit at fair market value relating to their expenditures for public education facilities, land dedication, site planning and design, and construction.

Implementation of the bill would allow borrowers obtaining residential mortgage for business purposes (not primarily for personal, family, or household use) greater consumer

[81] Provided money can earn interest, any amount of money is worth more the sooner it is received.

protections provided under ch. 494, F.S., which requires compliance with RESPA and TILA. All residential mortgage loans for dwellings or for real estate used to construct a dwelling, regardless of the purpose, would be subject to the provisions of ch. 494, F.S.

Persons making residential mortgage loans for business purposes and who are not licensed would be required to obtain licensure under ch. 494, F.S., in order to continue such lending activity.

C. Government Sector Impact:

Counties, municipalities, and special districts will not be able to collect impact fees prior to the issuance of the building permit for a property. There may be a reduction in the amount of impact fees imposed as the bill requires local governments to provide credits to developers at a dollar-for-dollar fair market value regarding expenditures for public education facilities and associated costs. If a county or municipality adopts an inclusionary housing ordinance, it must fully offset a developer's costs for such contributions through the authorized incentives. If a county, municipality, or special district provides an affordable housing impact fee waiver, such county, municipality, or special district may need to find other revenue sources to replace any waived fees. The fiscal impact is indeterminate.

The OFR may need additional staff to perform licensing and regulatory functions for entities that make residential mortgage loans for business purposes.

VI. Technical Deficiencies:

None.

VII. Related Issues:

A violation of RESPA, TILA, or any regulations adopted thereunder committed in any mortgage transaction, is a ground for disciplinary action under ch. 494, F.S. Both RESPA and TILA exclude business purpose loans from the scope of their regulation. Therefore, a person may be subject to licensure under ch. 494, F.S., but would not necessarily be required to provide the disclosures required under RESPA and TILA if the residential mortgage loan is made for business purposes.

VIII. Statutes Affected:

The bill substantially amends sections 125.01055, 125.022, 163.3180, 163.31801, 166.033, 166.04151, and 494.001 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Infrastructure and Security on April 9, 2019:
The committee substitute:

- Authorizes counties and municipalities to adopt an inclusionary housing ordinance that requires developers to make affordable housing contributions, but requires the local government to provide incentives to fully offset all costs to the developer of its affordable housing contribution.
- Extends from 90 to 120 days after an application is deemed complete the time within which a county or municipality is required to act on an application for approval of a development permit or development order.
- Provides that if a local government increases its impact fee rates, the holder of any impact fee credits which were in existence prior to the increase is entitled to a proportionate increase in the credit balance.

CS by Community Affairs on March 20, 2019:
The committee substitute:

- Provides requirements for basis of impact fee credits;
- Removes provision that awards attorney fees and costs in action challenging local government failure to provide required credits for impact fees;
- Authorizes, instead of requiring, a local government to waive impact fees for development or construction of affordable housing; and
- Amends the definition of the term "mortgage loan" in s. 494.001(24), F.S.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.