FLORIDA CITY AND COUNTY MANAGEMENT ASSOCIATION (FCCMA)

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Please be advised that the attached document is a “white paper” prepared by Dr. James Nicholas at the University of Florida, and his colleagues. This paper was requested by the Board of Directors of the FCCMA as a statement of impact fee history and a discussion of current issues facing city and county governments with regard to proposed impact fee legislation at the state level. It is not a legislative position paper by the FCCMA. It has been shared with the Florida Association of Counties and the Florida League of Cities, as these are the entities through which the FCCMA shares all legislative or policy analysis/information. The FCCMA is not a lobbying organization.

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Impact Fees in Florida: Their Evolution, Methodology, Current Issues and Comparisons with Other States

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1. Introduction

Florida is a state without an impact fee enabling act but it is also a state that recognizes the home rule authority of local government's to require the payment of impact fees. The Florida Constitution and various statutes establish the state as a home rule powers jurisdiction in regard to both cities and counties. Generally speaking, Florida local governments have all authority not specifically denied them by general law or the Florida Constitution. Impact fees are within this grant of home rule power. This paper addresses impact fees as they have evolved in Florida.

Impact fees are the subject of considerable controversy and a matter of increasing fiscal importance. In 2004, impact fee collections in Florida were reported as $1,182,450,641, with $510,833,648 going to school districts. To put impact fees in perspective, all of the presently enacted local option motor fuel taxes raise only $732 million, 60% of which is raised by impact fees. Impact fees can be seen as costs of development, which they are, but they are also an important source of capital improvement funding. Florida and its local governments have been challenged in coping with the extent of development that has occurred and is expected to continue. Impact fees are one means of meeting the needs of new development.

This paper will discuss the evolution of impact fees in Florida, the methodology of establishing impact fees and some of the current controversies surrounding impact fees. The authority for the use of impact fees by local governments came not from an enabling act but from judicial approval of the use of home rule powers as the basis for their enactment and adoption. Since impact fees were first discussed in the 1960's to the present they have been frequent subjects of litigation. It is through this litigation that impact fees have evolved into an important means of infrastructure finance. This paper will not present the amounts of impact fees currently charged. This matter is being dealt with by others and need not be repeated here. The goal of this paper is to explain where impact fees came from and how they are being developed and used in Florida.

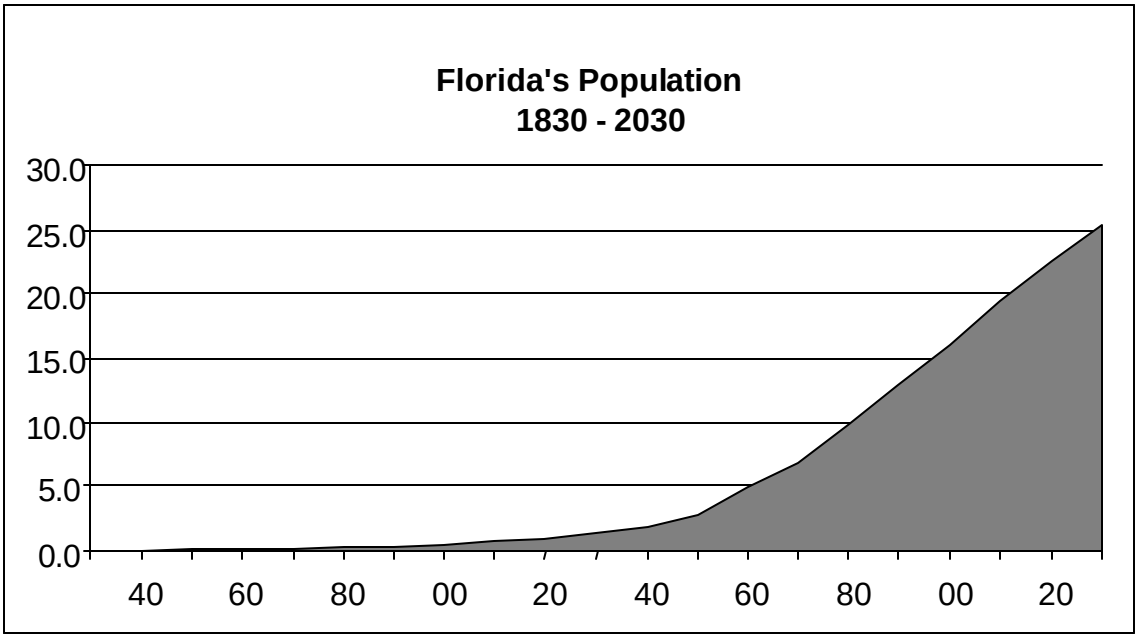
The history of impact fees in Florida is the first topic discussed. This is followed by a primer of impact fee methodology as it is practiced in Florida today. As Florida local governments are diverse, so also are impact fees in terms of methodology and usage. Two specific impact fee issues are addressed. The first is the issue of impact fee credits. Impact fees exist within the context of a variety of other means of capital improvement funding. There are instances when impact fees may duplicate other means of funding, thus raising the issue of a "double charge" and a need for credits against impact fees. The second issue is school impact fees. School impact fees have been a matter of great and continuing controversy and are thus deserving of individual attention in this brief overview of impact fees. The last subject dealt with herein is a discussion of impact fee prin-

ciples in other states. The issues being confronted by Florida cities and counties exist throughout the country and looking elsewhere may be instructive. Conclusions are reached at the end, based on the information and analysis presented.

2. The Evolution of Impact Fees in Florida

Local Government Finance in Florida

Impact fees arose as an issue in Florida in the 1960's. This was a period of rapid growth and high inflation. During the 1950's population doubled from 2.8 million to 5 million. This decade saw the start of the 300,000 person per year growth of



the state, a rate that continues today. While population grew so also did the costs of providing services. Significant inflation began in the 1960's and escalated to double digits in the 70's and 80's. Coping with rapid growth and inflation set off a taxpayer's revolt, first in California and eventually nationwide. Non-taxation means of finance were demanded by the public in an effort to stem escalating tax burdens. User charges, and their cousin impact fees, were responses to this demand.

Florida local governments get their money almost equally from the State, from taxes and from charges. Table 1 shows total receipts by all local governments in Florida by type and as a percent of total revenue for both 1992 and 2002. Over this period there is a slight tendency for all taxes and property taxes to go down

as a portion of all funds while charges rise. Table 1 also shows local government revenues in the nation. It is clear that Florida local governments make less use of taxes than is the case nationally. Both nationally and in Florida the use of taxes is going down as a source of revenue. The rising revenue source is charges and miscellaneous, specifically current charges. User charges are a

Table 1
SOURCES OF STATE & LOCAL GOVERNMENT REVENUES
UNITED STATES AND FLORIDA
1992 & 2003

	1992		2002	
UNITED STATES – ALL LOCAL GOVERNMENTS				
General revenue from own sources	$361,086,317	100.0%	$623,216,218	100.0%
Taxes	$228,679,193	63.3%	$389,980,887	62.6%
Property	$172,973,029	47.9%	$286,212,675	45.9%
Charges & miscellaneous	$132,407,124	36.7%	$233,235,331	37.4%
Current charges	$42,638,334	11.8%	$89,899,576	14.4%
FLORIDA – ALL LOCAL GOVERNMENTS				
General revenue from own sources	$21,560,860	100.0%	37,852,976	100.0%
Taxes	$11,420,295	53.0%	19,488,212	51.5%
Property	$9,453,944	43.8%	15,326,588	40.5%
Charges & miscellaneous	$10,140,565	47.0%	18,364,764	48.5%
Current charges	$3,377,510	15.7%	$7,188,991.0	19.0%

SOURCES: Statistical Abstract of the United States, 1979, p. 286, and
US Bureau of the Census, www.census.gov/govs/www/cog1992 and 2002.

large component of current charges. The trend nationally is away from taxes and towards charging those that use or benefit from a service the cost of providing that facility or service.

Table 2 shows local government finance data from Table 1 on a per capita basis.

Table 2
SOURCES OF STATE & LOCAL GOVERNMENT REVENUES
PER CAPITA
UNITED STATES AND FLORIDA

	1992	2003
UNITED STATES - ALL LOCAL GOVERNMENTS		
General revenue from own sources	$1,401	$2,143
Taxes	$887	$1,341
Property	$671	$984
Charges & miscellaneous	$514	$802
Current charges	$165	$309
FLORIDA - ALL LOCAL GOVERNMENTS		
General revenue from own sources	$1,597	$2,220
Taxes	$846	$1,143
Property	$700	$899
Charges & miscellaneous	$751	$1,077
Current charges	$250	$422

Here we see Florida local governments receiving slightly more revenue per capita than the national norm. However, they receive less of their revenues from taxes than is the norm, meaning that Florida local governments have been turning more to non-taxation means of funding. This is especially true for all charges and current charges.

While there is a general movement toward non-tax means of local government funding, this trend is even more pronounced in Florida. The fact that Florida local governments receive more money per capita than the national norm might suggest that there are adequate funds and thus no need for supplementation. However, the State of Florida raises $3,312 per capita as contrasted with $4,683 for all states. When state and local revenues are considered together, Florida's per capita receipts amount to $5,468 as contrasted with $6,607 for the nation. Perhaps most significant is that Florida state intergovernmental spending is $851 per capita as contrasted with $1,317 nationally. If Florida appropriated intergovernmental funds at the average rate it would mean an additional $7.9 billion in revenue to local governments. In addition, Florida's sharing of state revenues with local governments has fallen behind the practices of other states. Table 3 focuses on state revenues provided to local governments. Revenue to local governments from state governments in 1992 were $841.32 per capita in Florida and $986.76 for all states. In 2002 Florida's per capita amount grew by 11% to $934.22 and the national norm grew by 28% to $1,263.38. These very simple data, when read with those of Table 2, clearly show what has been the situation

Table 3
INTERGOVERNMENTAL REVENUES FROM STATE PER CAPITA

	1992	2002
Florida	$841.30	$934.32
All States	$986.76	$1,263.38
Florida as %	85.3%	74.0%

SOURCE: Bureau of the Census, Census of Governments, http://www.census.gov/govs/www/

with local government finance in Florida. Per capita tax burdens imposed by Florida local governments increased by 35% while property taxes grew by 28%. All charges grew by 43.4% while current charges grew by 68.5%. All of these increases occurred while the state of Florida was cutting taxes and falling further behind in intergovernmental revenue. Impact fees fall within the general pattern of moving toward non-taxation means of funding as local governments attempt to accommodate growth.

The Rise of the Impact Fee

The first appearance of an "impact fee" was by Gulf Breeze when it imposed a charge for parks at the time of subdivision. This was ruled an unauthorized tax

and therefore unconstitutional in *Carlann Shores v Gulf Breeze* (26 Fla. Supp. 94 (Cir.Ct. 1966). Hollywood's and Maitland's attempts to get money for parks met a similar end in *Venditti-Siravo v Hollywood*, 418 So.2d 1251, 1253 (Fla. 4th DCA 1982) and *Admiral Devl. Corp. v Maitland*, 267 So.2d (Fla. 4th DCA 1972). In 1976 two significant cases appeared. In *Wald Corporation v Dade County*, 338 So.2d 863 (Fla. 3rd DCA 1976) Dade County's requirement for the dedication of land for drainage canals was upheld. Also in 1976 the Florida Supreme Court decided *Contractors and Builders Association of Pinellas County v City Of Dunedin*, 329 So. 2d 314 (Fla. 1976). In *Dunedin* the court wrote:

> Raising expansion capital by setting connection charges, which do not exceed a pro rata share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, if use of the money collected is limited to meeting the costs of expansion. Users 'who benefit especially, not from the maintenance of the system, but by the extension of the system . . . should bear the cost of that extension." (citations *omitted*)

The *Dunedin* court also makes clear that such charges, impact fees, are not unlimited. Extending their rationale:

> [t]he cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent. When new facilities must be built in any event, looking only to new users for necessary capital gives old users a windfall at the expense of new users.

New users can only be held responsible for the costs attributable to new use and not for other costs, especially any charge that would yield a "windfall" to the existing community.

Dunedin was a case involving a municipally owned water and sewer utility. It fell to *Hollywood Inc. v Broward County*, 431 So.2d 606 (Fla. 4th DCA 1983) to deal with the application of the *Dunedin* logic to parks, the facility that Gulf Breeze, Maitland and Hollywood unsuccessfully tried to fund with development charges. In *Hollywood Inc*. the court wrote:

> [w]e discern the general legal principle that reasonable dedication or impact fee requirements are permissible so long as they offset needs sufficiently attributable to the subdivision and so long as the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents. In order to satisfy these requirements, the local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision. In order to satisfy this latter requirement, the ordinance must specifically earmark the funds collected for use in acquiring capital facilities to benefit the new residents.

The *Hollywood Inc*. Court provides the principles of the Dual Rational Nexus Test. Specifically, that:

- The local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth generated by the development being charged the impact fees, and
- The government must specifically earmark the funds collected for use in acquiring capital facilities to benefit the development charged the impact fees.

Home Builders and Contractors Association v Palm Beach County 446 So. 2d 140 (Fla. 4TH DCA 1983) established that road impact fees were permissible and within the authority of a non-charter county. *St. Johns County V Northeast Florida Builders Association*, 583 So.2d 635 (Fla. 1991) recognized school impact fees as within a county's power if the rational nexus requirement from *Dunedin* was followed. *Volusia County v Aberdeen At Ormond Beach*, 760 So.2d 126 (Fla. 2000) held that if a nexus cannot be established then no impact fee can be charged.

The use of impact fees by counties is:

IMPACT FEE TYPE	USE
Road & Transportation	96.9%
Fire	81.3%
Water	81.3%
Sewer	81.3%
Parks	71.9%
Schools	71.9%
Law Enforcement & Jails	53.1%
Library	43.8%
Public Bldg	34.4%
EMS	34.4%
Solid Waste	12.5%
Other	3.1%

These data show that the most common impact fee is for roads and transportation. This is a bit misleading because not all counties operate utility systems and utility impact fees are the most commonly used. The most dramatic increase in usage in the past few years has been for schools, reflecting the increasing concern with school crowding and the public's reaction to that crowding.

Impact fees evolved in Florida through the courts, ultimately being recognized as being within city and county home rule authority. This method of evolution was perhaps the only option since Florida cities and counties were exploring new issues of governance and government finance. In the end, the body of law that came out of this process clearly established that

- Impact Fees are permissible;
- Impact fees cannot exceed a pro rata share of the cost of expanding facilities required to serve new development;

- Impact fees cannot be imposed or structured to benefit or provide a "windfall" to existing residents;
- Impact fees must satisfy the dual rational nexus between the need for facility improvements and new development; and
- Local governments are required to show that developments paying impact fees will receive benefit from the expenditure of those fees.

Impact fees began in Florida as minor supplements to local government capital improvement funds. The park fee at issue in *Hollywood Inc*. was $125 and the school fee at issue in *St Johns* was $385. The amounts today are much greater so the evolution has been both in the use and scope of impact fees and in the amount of those fees.

3. General Methodology

There are two generally accepted methodologies commonly used in Florida to formulate impact fee programs. These are the consumption based and improvements based methodologies. These methodologies have evolved during the last twenty years and while the majority of Florida impact fees are consumption based, both have been used to satisfy the requirements of the dual rational nexus test discussed earlier. While there are variations in the application of these methodologies, this section discusses the basic methodology, underlying assumptions, and implementation requirements of each methodology. This section also addresses the basic differences between the methodologies and how each of the methodologies furthers the implementation of the comprehensive plan and in particular the Capital Improvements Element.

Consumption Based Impact Fees

The consumption based (also known as "standards based") methodology calculates impact fees based on the value of public infrastructure consumed per unit of land use. The value of the public infrastructure is usually developed by calculating the replacement cost of the existing public capital infrastructure. This value is then related to a facility based standard such as, fire stations per 1000 population, acres of parks per 1000 population, library or other building square footage per 1000 population, etc.

For transportation infrastructure, the value of the infrastructure is calculated by looking to the typical types of recently built or planned road improvements that are representative of the transportation system. The analysis is based on the need for transportation improvements contained in transportation plans and programs that may include capital improvement programs, comprehensive plan transportation elements and long range transportation plans. This resulting value of the transportation infrastructure is generally expressed in terms of cost per

lane mile or cost per vehicle mile of capacity added. Other facilities, such as parks, are measured in terms relevant to those facilities such as value per acre and per capita. In the consumption based impact fee methodology, the key underlying supposition is that growth consumes some identifiable quantity of public infrastructure capacity and the fee is based on the cost of providing that identified quantity.

Proponents of consumption based impact fees cite the flexibility to the government as a significant advantage to that approach. Specifically, a government that uses a consumption based impact fee can develop its capital improvement program to include projects that directly respond to where growth and the need for the public infrastructure occurs. The capital improvement program list of improvements is reviewed annually and that list can change as growth patterns change, resulting in new project priorities. Generally, these changes only occur in the out years of the capital improvement program. Finally, it should be noted that ordinances that implement consumption based impact fees generally include a provision that ties the need for and benefit of impact fees to projects that must be included in the local government's capital improvements program and comprehensive plan capital improvements element.

Improvements Based Impact Fees

The improvements based (also known as "needs based") methodology charges new development based on a specific set of capital improvement projects. This approach is usually based on a long-range master plan that includes a list of future projects that are determined to be necessary to accommodate existing and future growth at the adopted level of service. Under the needs based approach, an analysis is usually made of the impact of any existing deficiencies and an adjustment is made to account for deficiencies existing at the beginning of the planning period to assure that the cost of correcting those deficiencies is not shifted to new development. However, generally, no adjustment is made for excess capacity built as part of the improvements list that is available at the end of the planning period, since the improvements driven approach did not charge for the existing excess capacity that is available at the start of the planning period and that is consumed by new development. The implicit or explicit assumption is that there may be excess capacity in every infrastructure system, and as long as the amount or proportion of excess capacity at the end of the planning period is reasonably similar to what was there at the beginning, there is no need to make adjustments for excess capacity.

Proponents of the improvements based methodology indicate that this method provides a direct tie to the Local Government Comprehensive Planning and Land Development Regulation Act that requires local governments to adopt a list of planned capital improvements as part of their comprehensive plans. In the improvements based methodology, the list of capital improvements used in the calculation of the cost component is usually the list of improvements included in the

five year or longer Capital Improvement Program and the local government's Capital Improvements Element. Proponents say that this methodology gives the development community assurance that the impact fees they pay are being spent on the specific improvements under which the impact fee was calculated. When the local government changes the list of capital improvements, the resulting impact fee should be recalculated using the new list of capital improvements. Finally, similar to ordinances for consumption based impact fees, improvements based impact fee ordinances also include provisions that tie the need for and benefit of impact fees to projects included in the local governments capital improvements program and comprehensive plan capital improvements element.

Differences Between Consumption Based and improvements Based Impact Fees

The basic difference between the two is that the consumption based impact fee charges new development based on the value of the capital asset being consumed by each unit of land use, whereas, the improvements based impact fee charges new development based on the cost of a specific set of improvements and their associated cost per unit of land use. As indicated previously, the key underlying assumption for consumption based impact fees is that growth consumes some capacity of all public facilities and not just the new infrastructure being built.

In improvements based impact fees, growth is being charged based on a specific set of project improvements that the local government is planning to build through their adopted capital improvements program. When the list of improvements in the capital improvements program changes, the impact fee should be recalculated based on the new list of capital improvements.

At times, studies use a method that is a combination of the consumption based and improvements based methods. For example, some improvements based transportation impact fees include calculations that result in using only the share of the cost of a roadway improvement projected to be consumed by future traffic over the planning period. When this is done, the improvements based impact fee functions closer to consumption based impact fee methodology.

In summary, both methods have been used successfully in Florida; both methods satisfy the requirements of the dual rational nexus test; and in Florida, the majority of the impact fees use the consumption based methodology. Additionally, each approach tends to be more applicable in particular situations. The inherent flexibility of the consumption based approach allows the jurisdiction to match impact fee receipts to specific projects as the needs for specific projects are identified. Improvements based systems are more inflexible and are more applicable to those situations where specific needed improvements can be identified well in advance and impact fees can be tailored to those specific needs. Experience

has shown that both approaches are valuable tools of capital improvement planning and funding.

The Impact Fee Formula and Basic Implementation Considerations

The general impact fee formula can be represented as:

IMPACT FEE = (DEMAND X UNIT COST) – CREDIT

Where:

DEMAND = the amount of capacity needed to accommodate new development, based on the existing or adopted LOS standard, or the associated need for service such as, vehicle miles of travel, fire stations per 1000 population, acres of parks per 1000 population, library or other building square footage per 1000 population, among others;

UNIT COST = the cost per unit of capacity or demand based on the calculated value of the asset or set of improvements.

CREDIT = the value of the future non-impact fee revenues that growth will generate that will also be used to pay for the capital facility expansion of that pubic infrastructure.

Regardless of which methodology is used in the impact fee study, there are certain criteria and procedures that need to be followed in developing and implementing impact fee programs. These include, but are not limited to:

- Local governments must establish LOS standards for each impact fee program area.
- Local governments must apply the same LOS standard to both existing and new development.
- An "existing deficiency" is created when a local government establishes a LOS standard that is greater than the current LOS.
- New development cannot be charged impact fees designed to correct an existing deficiency. To charge new development based on a LOS standard higher than what exists today, the local government must have a financial plan (non-impact fee revenue sources) to eliminate the existing deficiency within a reasonable amount of time (generally five years or less).
- Facility costs should be reflective of recently built projects, current bids and architects and engineers estimates of project costs.
- Credits, discussed more thoroughly in the next section, should reflect the additional non-impact fee revenues reasonably expected to be generated by new development being charged the impact fee when such revenues are used for the same infrastructure for which impact fees are being charged.

There are many other policy related issues that are addressed as each community updates and implements impact fees. These policy issues are unique to each community and are reflected in the impact fee technical analysis.

4. Impact Fee Credits

Most impact fees include as a component of their methodology the consideration of whether a credit as a deduction from the cost component of the fee calculation is required. Generally, a credit is a reduction in the amount of an impact fee due from a newly constructed development resulting from either the donation of the property or improvements by that developer or the payment of tax or other revenues applied to pay for the same infrastructure that is being funded by the impact fee. This contribution generally takes one of the following forms:

a. Developer Contributions - This credit may be due as a result of the donation of property or improvements from a particular development to a governmental entity which reduces that development's impact on the system. Frequently these contributions take the form of the donations of right of way or a particular site upon which some type of government facility will be constructed. Under these circumstances, the amount of the credit is generally determined through either the provisions of the impact fee ordinance or by the terms of a specific development agreement.

b. Tax and Other Revenues – A credit may also be due as a result of the payment of taxes and other revenues by the newly constructed development which are available and applied toward the funding of the same infrastructure for which the impact fee is collected. These contributions are normally applicable to all similar developments and are incorporated into the calculation of the impact fee itself.

The genesis of the credit component derives from the fundamental nature of fees in the State of Florida and are a component of the dual rational nexus test. Impact fees, as with all other types of fees, are limited to offsetting the cost of the regulation or the service that that is being provided. See *Atkins v. Phillips*, 26 Fla. 281, 8 So. 429 (Fla. 1890); *Tamiami Trail Tours, Inc. v. City of Orlando*, 120 So. 2d 170, 172 (Fla. 1960); *Broward County v. Janis Dev. Corp.,* 311 So. 2d 371 (Fla. 4th DCA 1975). In the context of impact fees, the amount of the fee cannot exceed the capital cost of the impacts resulting from the newly constructed development. See *Contractors & Builders Ass'n of Pinellas County v. City of Dunedin*, 329 So. 2d 314, 320 (Fla. 1976); and *Home Builders & Contractors Ass'n of Palm Beach County, Inc. v. Board of County Com'rs of Palm Beach County*, 446 So. 2d 140 (Fla. 4th DCA 1983). To make certain that the amount of the fee does not exceed this cost, a credit is given for contributions of property and im-

provements made by a developer and for the payment of taxes and other revenues that are available and applied toward the provision of the same infrastructure for which the impact fee is collected. The clear purpose of the credit is to make certain a newly constructed development pays no more than the unfunded cost of the infrastructure needed to serve that new development. See *St. Johns County v. N.E. Florida Builders Ass'n*, 583 So. 2d 635, 638 (Fla. 1991) (where the Supreme Court discussed the credit calculation and characterized the fee as "the average net cost of $448 for building new schools that would not be covered by existing revenue mechanisms.")

The particular approach utilized to consider the availability of a credit within the context of an impact fee methodology may vary, and the courts have generally recognized that the local government imposing the fee is best able to evaluate the differing approaches. See *St. Johns County v. N.E. Builders Ass'n,* 583 So. 2d 635 (Fla. 1991); *Sarasota County v. Sarasota Church of Christ, Inc.,* 667 So. 2d 417 (Fla. 1995). The only limitation is that any methodology utilized must consider and provide a credit for other revenues that are available and applied toward providing the same infrastructure for which the impact fee is collected.

In determining whether the payment of taxes or other revenues is required to be credited against the impact fee, it is only those revenues which are applied toward the funding of improvements which create additional capacity to serve that development, which are entitled to a credit under Florida law. Newly constructed development, just as existing development, pays a variety of taxes and revenues to the Federal, State and local governments. Those revenues may be used for operations maintenance, repair and even renovations, but they do not create new capacity. Therefore, no credit is required. However, those taxes and revenues which provide additional capacity in the same infrastructure system for which the impact fee is being collected are entitled to a credit under existing law in the State of Florida. All impact fees in Florida known to the authors provide such credits.

As developed in Florida, there is a two-pronged test as to whether taxes or other revenues must be credited from an impact fee:

- First, whether the taxes or other revenues paid by that newly constructed development are legally available to fund the same infrastructure for which the impact fee is collected. (Legally available in this context means not restricted or otherwise committed for purposes other than for what the impact fee was collected).
- Second, whether those legally available taxes or other revenues are actually applied toward reducing the cost of that infrastructure requirements for the newly constructed development which pays the impact fee.

If a revenue source meets this two-pronged test, then a credit must be deducted from the capital cost determined in the impact fee calculation.

Impact fee methodologies may and frequently do vary in how they approach the consideration of credits. Some methodologies employ a more generous approach to credits not necessarily because they are legally required but rather for ease of administration, to avoid legal challenge or based on direction from the elected officials. These approaches are valid and represent a judgment by the legislative body. However, merely because a more generous approach to credits is incorporated into a methodology does not mean that it is a legal requirement for a valid impact fee. For example, some methodologies incorporate a credit for past taxes and revenues paid to a local government prior to the actual development of a property. Though such adjustments may be made in the calculation of an impact fee, they are not required to be credited unless it created capacity which is available to serve that property at the time it was developed. If these contributions were not applied to provide the capacity to serve any development on that property, then they are not a substitute for the impact fee and no credit is due.

Additionally, a variety of planning periods have been utilized to analyze credits from a newly developed property. The courts have granted local government's wide deference in the selection of the particular planning period to be utilized. However, the particular period selected should be consistent with the ultimate aim of the impact fee, which is to provide the necessary infrastructure to serve that development and to do so in a timely fashion. Therefore, there is an inherent connection between the use of impact fees and the requirements of growth management laws to provide the necessary infrastructure to serve a development concurrently with its impacts.

4. School Impact Fees

School impact fees have been the most frequently litigated of all impact fees. There have been four major suits dealing with school impact fees. Certainly a factor in the frequency of litigation is the amount of these fees. The average school impact fee in Florida is now $3,286. While amounts vary, it is common for the school fee to be the highest of all the impact fees charged. It is also the most rapidly growing. Most recognize that schools are as important to a functioning society and sound economy as transportation, utilities, and public safety. Paying for schools, like other public facilities, has become more difficult with declining state revenues, voter resistance to local taxes and bonds, and increasing public sentiment that "growth should pay for growth." As a result, school impact fees have increased in use and amount, since the foundation for school impact fees was established in *St. Johns County v. Northeast Florida Builders Association*, 583 So. 2d 365 (Fla. 1991).

School impact fees involve some variables that are unique to schools, but they are also subject to the same issues described elsewhere in this paper. Like other impact fees, school fees involve the costs of building schools, demands

placed on the school system from increased enrollment, and credits for other revenues that pay for the needed improvements.

School impact fee costs typically include school buildings, furnishings and equipment, support facilities, the land for schools and support facilities, and school buses. The demands placed on schools are usually measured by the average number of public school students per dwelling unit. The credits against impact fees involve several sources of revenue that are restricted to capital improvements for educational facilities, including money from the State of Florida, the school district Capital Improvement Tax (property) that is capped at 2 mills, revenues derived from the sale of Certificates of Participation or General Obligation Bonds and the ½ Local Option Sales Tax for schools. To the extent that these sources of revenue are available and appropriated to pay the capital costs of expanding school capacity, they are incorporated as reductions in the amount of impact fees adopted.

One variable that distinguishes school impact fees from other types of impact fees is that school impact fees involve more than one public sector organization and their elected officials. School districts provide the schools, but local governments regulate development. The creation and use of a school impact fee typically involves different roles by school districts and local governments:

- A study calculating school impact fee rates is prepared by the school board.
- An ordinance imposing the school impact fee is adopted by the county.
- School impact fees are collected by the county and the cities.
- The local governments transfer the impact fees to the school district.
- The school district spends the impact fee money to provide the educational facilities needed by new development.

School impact fees require a high degree of cooperation among local governments. The school district cannot receive impact fees unless the county agrees to adopt the ordinance. The county depends on the school district to have properly calculated the fees, and to spend them appropriately. Cities typically collect the school impact fee adopted by the county, pursuant to a countywide ordinance adopted by the county. In St Johns the Florida Supreme Court held that school impact fees cannot be collected unless substantially all of the county is subject to the requirement, thereby underscoring the need for intergovernmental cooperation.

In some instances, the cooperation between school district and county is sufficient to lead to the approval of a school impact fee, but with some disagreement about the amount. While many counties adopt rates calculated by their school district, some counties have reduced the amount of the impact fee proposed by the school district.

Another variable involves exemption from school impact fees for development that creates no impact on schools by forbidding school age children from living

there (see *Volusia County v. Aberdeen at Ormond Beach, L.P.,* 760 So. 2nd 126 (Fla. 2000). Simply put, the court held that developments where school aged children are legally barred cannot be required to pay school impact fees.

Two recent cases raised questions about the methodology and data that were used to calculate school impact fees.

- In *Brown v. Lee County*, a significant part of the plaintiff's challenge to the school fee involved issues about specific data and methods used to calculate the fee. The plaintiff's witnesses disagreed with many of the data and methods used by the district in calculating the fee. The court ruled that the School Board made a reasonable choice which "...does not become indisputably unreasonable simply because, with some extra effort, the School Board could have developed a potentially better data source.. ." In other words, School Boards and local governments must use reasonable data and methods to comply with the dual rational nexus requirements, but there is no official or sanctioned, or even preferred way to achieve the requirements.
- The most recent school fee case is *Homebuilders of Metro Orlando v. Osceola County*. The Circuit Court issued its final judgment on August 5, 2005. The central issue in this case was a policy decision by the school board to prioritize its spending of general capital improvement funds such that the highest priority was given to the maintenance, repair and renovation of the existing schools. Once these needs were met, general capital improvement funds would be devoted to expanding capacity to meet the growth needs of the district. The particular aspect of this case that drew so much attention was that there was no general capital improvement funds remaining after the needs of the existing schools were met, with the result that no credit against impact fees was provided because there was no other revenue available to be applied to school capacity for new development. Another aspect of *Osceola* was the use of a "global" credit methodology that considered all capital revenues received by the school district from all taxpayers, not just the taxes paid by new development. Yet another issue was the use of a 5-year planning period for determining costs and the revenue credit. The Court held that the choice of impact fee methodology, including the priority use of revenue, the "global" calculation of credits, and the use of a 5-year planning period is at the discretion of the school board and county provided that the choices are not arbitrary. The Court found that Osceola County's choices were reasonable, rational and not arbitrary.

It appears that the next big issue for school impact fees will involve the 2003 constitutional amendment to reduce class sizes in public schools. The amendment also required that the State of Florida pay for the cost of the additional classrooms, but state funding has been only a small fraction of the need. The responsibility for compliance with the Class Size Amendment falls to the local school district, regardless of state funding. Some districts have already expressed a reluctant willingness to use local taxes to build the necessary class-

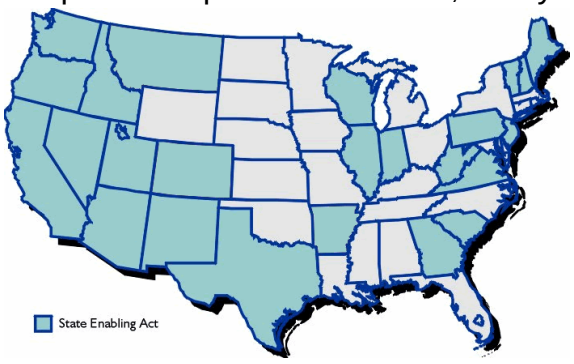
rooms (at the same time they will press the state for reimbursement from funding the state is supposed to provide). Use of local taxes for the class size amendment reduces the amount of money available to pay for new classrooms for new development, which will inevitably lead to higher impact fees.

Another issue affecting school impact fees is the recently passed legislation that mandates school concurrency. Section 163.3180 now includes schools as a mandatory component of concurrency. If school capacity is not available or assured, new developments expected to house new school enrollees cannot be approved or must be conditioned on school capacity availability. This will only increase the need for new school construction, thereby raising the question as to the source of those funds.

School impact fees arose out of a shortage of general capital improvement fund. Impact fees were recognized as a legal means to fill the funding shortfall. As the shortfall grows, school impact fees have risen. The provision of school capital funds by other means will automatically reduce school impact fees through the credit procedure.

5. Impact Fees in Other States

Impact fees were pioneered by local governments in the absence of explicit state enabling legislation. Consequently, such fees were originally defended as an exercise of local government's broad "police power" to protect the health, safety and welfare of the community. The courts gradually developed guidelines for constitutionally valid impact fees, based on a "rational nexus" that must exist between the regulatory fee or exaction and the activity that is being regulated. Texas adopted the first general impact fee enabling act in 1987. To date, 26 states have adopted impact fee enabling legislation (for facilities other than water and wastewater). These acts have tended to embody the constitutional standards that have been developed by the courts. In some other states, such as Maryland, Tennessee and North Carolina, impact fees are authorized for individual jurisdictions through special acts of the legislature.



Florida is one of several states where impact fees are used and there is no state enabling act. Others include Ohio, Wyoming, Missouri and Kansas. In these states, as in Florida, the authority of cities and counties to adopt impact fees pursuant to home rule authority is sufficiently broad to include the adoption of proportionate share impact fees. In states that have adopted enabling acts, local governments often lacked the authority to enact impact fees independent of the

state legislature and, as a result, are subject to the restrictions, limitations and rigidities imposed by the legislation.

Eligible Facilities

One of the most important things that most enabling acts do is restrict the types of facilities for which impact fees may be imposed. The types of major facilities that are eligible for impact fees in the various state acts are listed in Table 4. It is noteworthy that only seven states authorize school impact fees. Outside of Florida, school fees are found in California, Hawaii, Maryland (authorized in some counties by special acts), New Hampshire, Pennsylvania, Vermont, Washington and West Virginia. School impact fees tend to be high fees that are imposed only on residential development, and their prohibition in much of the country is an indication of both the controversy surrounding these fees and their political sensitivity.

Table 4: ELIGIBLE FOR IMPACT FEES IN STATES WITH IMPACT FEE ACTS

State	Roads	Water	Sewer	Storm Water	Parks	Fire	Police	Library	Solid Waste	School
Arizona (cities)	■	■	■	■	■	■	■	■	■	
Arizona (counties)	■	■	■		■	■	■			
Arkansas	■	■	■	■	■	■	■	■		
California	■	■	■	■	■	■	■	■	■	■
Colorado	■	■	■	■	■	■	■	■	■	
Georgia	■	■	■	■	■	■	■	■		
Hawaii	■	■	■	■	■	■	■	■	■	■
Idaho	■	■	■	■	■	■	■			
Illinois	■									
Indiana	■	■	■	■	■					
Maine	■	■	■		■	■			■	
Montana	■	■	■	■	■	■	■	■	■	
Nevada	■	■	■	■	■	■	■			
New Hampshire	■	■	■	■	■	■	■	■	■	■
New Jersey	■	■	■	■						
New Mexico	■	■	■	■	■	■	■			
Oregon	■	■	■	■	■					
Pennsylvania	■									
Rhode Island	■	■	■	■	■	■	■	■	■	■
South Carolina	■	■	■	■	■	■	■			
Texas	■	■	■	■						
Utah	■	■	■	■	■	■	■			
Vermont	■	■	■	■	■	■	■	■	■	■
Virginia	■									
Washington	■				■	■				■
West Virginia	■	■	■	■	■	■	■			■

State	Roads	Water	Sewer	Storm Water	Parks	Fire	Police	Library	Solid Waste	School
Wisconsin (cities)										
Wisconsin (counties)										

A General Review

A review of the state enabling acts reveals that, outside of the general principles of rational nexus and rough proportionality laid down by the courts, there is little agreement about what form state regulation should take. Selected characteristics of state impact fee enabling acts are summarized below in Table 5. The first column, showing the length of the various acts, illustrates that enabling acts range from brief grants of authority and statements of general principles (Arizona,

Table 5: SELECTED IMPACT FEE ENABLING ACT CHARACTERISTICS

State	Length (Word Count)	Time to Collect	Explicit Revenue Credit Reqm't	Spending Time Limit	Assess-ment Locks-in Fee	Explicit Waivers	Waiver Funding Req'd?	Update Fre-quency
Arizona	1,068	anytime	yes	none	no	none	n/a	None
Arkansas	1,634	cert occ	no	7 years	no	none	n/a	None
California	22,907	bldg pmt	no	5 years	no	none	n/a	None
Colorado	3,980	anytime	no	none	no	afford hsg	No	None
Georgia	3,757	bldg pmt	yes	6 years	180 days	econ devt	yes	None
Hawaii	2,017	bldg pmt	yes	6 years	no	none	n/a	None
Idaho	7,124	bldg pmt	yes	10 years	1 year	afford hsg	yes	5 years
Illinois	5,670	bldg/C.O.	yes	5 years	no	none	n/a	5 years
Indiana	9,705	bldg pmt	yes	6 years	3 years	afford hsg	No	5 years
Maine	465	anytime	no	none	no	none	n/a	None
Montana	1,809	bldg pmt	yes	none	no	none	n/a	None
Nevada	4,685	bldg pmt	no	10 years	no	schools	No	3 years
New Hampshire	2,356	cert occ	no	6 years	no	none	n/a	None
New Jersey	8,670	bldg pmt	no	none	no	none	n/a	None
New Mexico	6,575	bldg pmt	no	7 years	4 years	afford hsg	unclear	5 years
Oregon	4,111	anytime	no	none	no	none	n/a	none
Pennsylvania	6,115	bldg pmt	yes	none	no	afford/other	No	None
Rhode Island	1,942	cert occ	no	8 years	no	general	No	None
So. Carolina	4,571	bldg pmt	yes	5 years	forever	afford hsg	yes	None
Texas	8,641	bldg pmt	yes	10 years	forever	afford hsg	No	5 years
Utah	4,818	anytime	yes	6 years	no	afford hsg	yes	None
Vermont	1,229	anytime	no	6 years	no	general	No	None
Virginia	1,893	cert occ	yes	15 years	forever	none	n/a	2 years
Washington	2,064	anytime	yes	6 years	no	general	yes	None
West Virginia	3,105	anytime	yes	6 years	no	general	yes	None
Wisconsin	1,167	anytime	no	none	no	none	n/a	None

Arkansas, Maine, Vermont, Wisconsin) to the exhaustive, confusing and conflicting provisions of California's legislation.

About one-third of the 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.

States with impact fee legislation are inconsistent in whether or how impact fees should be reduced to account for past or future revenues that will be generated by new development and potentially used to the same types of capital improvements for which the impact fees are imposed. About half existing state enabling acts require that some consideration be given to such "revenue credits," while the rest are completely silent on this issue. Despite an absence of state legislation, Florida local governments, relying on the principles of the dual rational nexus test, provide revenue credits to ensure that developers are not charged more than their proportionate share of facility costs.

A majority of state acts require that impact fee revenues be spent within a specified number of years or be refunded to the feepayer. These requirements range from five to 15 years, with six years being the most common. The rational nexus standard, adopted in Florida more than 20 years ago, already requires local governments to spend impact fee revenues in a timely manner, but, consistent with the State's home rule doctrine, each local government is given the latitude to decide the appropriate timeframe based on its particular circumstance and needs. In Florida most jurisdictions require that impact fees be expended or encumbered within 6 years, with some as long as 10 years.

Several states, following Texas' early lead, have imposed a rather onerous provision that fees are assessed at platting and locked in for a period of time. In the Texas Act, the fee schedule in effect at time of platting is the maximum fee that may be charged at time of building permit to development within the subdivision, regardless of when development actually occurs. Two other states have this same provision, while another four lock the fee in for one to four years. Not only would these types of provisions unnecessarily restrict local governments from tailoring their requirement to their particular needs, they may have the result of diminishing the nexus between the fee and the provision of facilities by extending the time between the impact of development and construction of facilities.

While half of the enabling acts are silent on the issue of waivers or exemptions, the other half explicitly authorize local governments to waive impact fees for certain types of projects. Most of them limit waivers to affordable housing and, to a lesser extent, economic development projects. Of the acts that authorize waivers, half require that the local government reimburse the impact fee fund from some other, non-impact fee revenue source. Many Florida local governments

have dealt with affordable housing and economic development issues in a variety of creative ways, many of which would be impermissible in those states that enable such exemptions. Every enabling act also limits what has been enabled and precludes creativity and innovation.

The final column indicates the frequency within which the fees must be updated. Most acts are silent on this issue. Of the less than one-third that require periodic updates, every five years is the most common requirement.

Recent Developments

Montana is the latest state to adopt an impact fee enabling act. Senate Bill 185 was passed by the legislature on April 9, 2005 and was signed by the Governor on April 19, 2005. It is relatively brief and has few restrictive provisions. A key provision, however, is that the "impact fees imposed may not exceed a proportionate share of the costs incurred or to be incurred by the governmental entity," which might rule out the imposition of impact fees by a city or county on behalf of a separate agency, such as a school district.

Before that, Arkansas was the most recent state to adopt an impact fee enabling act. The 2003 Arkansas Act only applies to municipalities and water or wastewater providers – it does not authorize impact fees for counties. It clarified the authority of cities to enact impact fees, which had not been firmly established before this. Like most state acts, it does not allow school impact fees. It is relatively short and has few requirements. Its most unusual feature is that it requires that the amount of the impact fee paid be itemized separately on the closing statements when property is sold. The original version of the bill, drafted at the behest of the state homebuilders association, had proposed that the fees for single-family homes actually be paid at time of closing by the buyer, but this requirement was dropped in conference committee.

Colorado also recently adopted an impact fee enabling act. Senate Bill 15 was signed by the governor on November 16, 2001. Home-rule cities in Colorado had long assessed impact fees, but the authority of counties and towns to assess impact fees was less clear. While clarifying the authority issue, the enabling act has created some confusion about whether local governments can assess impact fees at time of building permit, or whether they must assess them at some earlier stage in the development process.

Experience Under Enabling Acts

The experience of states that have adopted impact fee enabling acts suggests that the adoption of such legislation in Florida will not result in more clarity or less litigation. The principles of Florida's impact fee practice arguably are more

clearly established, through case law, than in many states with legislation. To shift from the current system, which recognizes local government's right and ability to decide local issues locally, to one that restricts each city or county to a state-prescribed methodology, will introduce uncertainty into a system that has worked for over 30 years. Despite statutory provisions, a vast body of case law is developing among states with impact fee legislation as local governments in those states seek to have clarified the statutes under which they operate.

For example, local governments in Georgia, which adopted its legislation in 1990, have litigated issues that have been long settled in Florida. In 2002, the Court of Appeals of Georgia addressed the authority of a county to charge impact fees within incorporated municipalities, finding that counties lack the authority to charge impact fees within cities. See *Greater Atlanta Homebuilders Association, Inc. v. Cherokee Co.*, 566 S.E. 2d 470 (Ga. Ct. App. 2002). That decision turned on a judicial interpretation of the Georgia statute and was required to resolve an issue addressed by the Florida courts more than a decade before. See *St Johns County v. Northeast Florida Builders Association*, 583 So. 2d 635, 638 (Fla. 1991). California, Arizona, and other states with impact fee legislation have seen their share of litigation as well. See e.g., *Home Builders Ass'n of Central Ariz. v. Apache Junction*, 11 P. 2d 1032 (Az. Ct. App. 2000); *Co. Sanitation Dist. No. 2 of Los Angeles Co. v. County of Kern*, 27 Cal. Rptr. 3d 28 (Cal. 5th Dist. Ct App. 2005). Litigation arises from uncertainty and there are few states, if any, where what is allowed and what is not is more certain than in Florida**.**

By Florida continuing to operate under a system that is based on constitutional principles and not statutory ones both local governments and those paying impact fees are assured of fair and equal treatment required under the law. In fact, in some instances, where the legislative branch has attempted to restrict impact fee methodology, resulting fees have been inconsistent with the fair share and proportionality principles that have defined Florida's system for decades. For example, the Idaho legislature recently amended that state's impact fee enabling act in a way that favored one particular company in its dispute with a local jurisdiction over impact fees. This simply changes the venue from the courthouse to the statehouse.

6. Conclusion

Need for Authority.

There is no need to provide authority for Florida's local governments to impose impact fees and impact fee enabling legislation would be, at best, redundant. Furthermore, since the courts long ago established the constitutional parameters within which impact fees must be calculated and imposed, further statutory restrictions within those parameters simply are unnecessary and would amount to

a limitation on Florida's long tradition of local government autonomy. At this time the Florida courts have held that impact fees cannot exceed a pro rata share of the costs of expanding capital facilities. Additionally, developers are given credits against impact fees for dedications and all new developments are provided with reduced impact fees for taxes or other revenues that serve the same purpose. What would enabling legislation do that is any different?

Reduced Litigation.

Would an enabling act reduce litigation? Impact fee litigation proceeds in states with impact fee enabling acts with similar frequency. When individuals challenge impact fees they do so because they believe that the fee charged is not fair or is unreasonable. The existence of an enabling act has not eliminated the perception or reality with respect to fairness or reasonableness of an impact fee. The existence of an enabling act has not reduced the need for a forum to hear such challenges. Recent litigation in Florida has challenged the appropriateness of the data used in calculating impact fees and have raised issues of local government fiscal policy that no enabling act could resolve. The same issues are being raised in court in states with enabling legislation. Unless potential plaintiffs are precluded from going to court, it is hard to see how an enabling act will reduce litigation. To the extent that an enabling act introduces new concepts or procedures, there will probably be an increase in litigation as those new elements are implemented.

Increasing Taxes.

Florida is both a low tax and a rapidly growing state. Just the change in Florida's population between 1990 and 2000 exceeds the entire population of 22 states. Thus there is a substantial demand for capital facility expansion to accommodate this growth. There is also a clear preference on the part of the public to remain a low tax state. The financial responsibility for accommodating the growth of Florida has been borne increasingly by local governments. The State has been reducing taxes during the recent past as burdens for many costs, most significantly for roads and schools, have been shifted to local governments. Local governments have responded to these demands in a variety of ways. Taxes have been raised, most especially taxes on all retail and motor fuel sales, but property taxes per capita increased by $198 between 1992 and 2003 (28%). Impact fees have been instituted or raised as local jurisdictions responded to the needs of their growing communities. According to the 2003 Census of Government, local government capital outlay in Florida was $5.2 billion. The best available estimate is that impact fees raise some $1.2 billion, which is 23% of total local government capital spending, showing that 77% of all local capital funding is paid for by the general public.

There can be little doubt that capital funds are needed. The question is, how should those funds be raised? Alternatively, what portion of those costs is it rea-

sonable to shift to new development? In proposals involving impact fees the usual discussion is not to prohibit impact fees but to limit them, frequently by making their adoption and administration more onerous. Of course, costs are not limited so if impact fees are limited, what would pick up the difference?

While sometimes unpopular, impact fees have evolved in Florida to supplement available means of funding growth accommodating capital improvements. The courts have imposed standards with respect to the fairness of impact fees and imposed limitations to assure that impact fees are used only to accommodate the new developments being charged. No local government is required to charge impact fees and there are some notable exceptions that choose to deal with funding needs in other ways. Local governments, largely on their own, are accommodating over 300,000 additional people per year and doing so with declining assistance from the State and within a context of maintaining low taxes. Impact fees are a component of this success.

Alternatives.

An increased documentary stamp tax, commonly referred to as the Real Estate Transfer Tax, is commonly mentioned as an alternative to impact fees. Such a tax would require legislative authorization. Using currently followed impact fee methodology, any additional capital improvement revenues from such an increased documentary stamp tax would have to be considered as a credit (reduction) against impact fees and impact fees would decline in proportion to the availability and use of such alternative revenues. The Florida Legislature has, on many occasions, declined the opportunity to authorize this tax. However, if such a levy were to be authorized and funds restricted to capital facility improvements, any use of that authority would result in an automatic reduction in impact fees without any legislative action.