

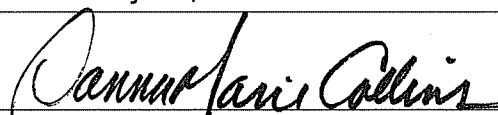
**MEMORANDUM
FROM THE
OFFICE OF COUNTY ATTORNEY**

VIA EMAIL ONLY

DATE: February 27, 2013

TO: Board of County Commissioners

FROM:


Donna Marie Collins
Chief Assistant County Attorney

RE: Legal Effects of Proposed Suspension/Reduction of Impact Fees
File LU-13-01.085.MM.

I. Cities

A. School Impact Fee Ordinance

All five municipalities are subject to the school impact fee ordinance as it was adopted specifically to apply county-wide. A County ordinance temporarily suspending or reducing school impact fees will result in the cities having to follow suit until the conclusion of the suspension period, or until the municipalities adopt their own school impact fee ordinance.

B. Parks, Roads, EMS

Bonita Springs, Cape Coral, and Fort Myers Beach do not participate in the County impact fee program. Accordingly, the procedures relative to the collection of impact fees within those jurisdictions will not be affected by the County's suspension or reduction of fees. (Exception: School Impact Fees. *See above.*)

Sanibel participates in the County Impact Fee Program pursuant to interlocal agreement. The interlocal agreement requires the City to collect impact fees in accordance with impact fee schedules in the Land Development Code (LDC). Sanibel retains road and community park fees for use in the City. Regional Park and EMS fees are remitted to the County on a quarterly basis. If the County were to suspend the collection of, Regional Park and EMS fees, it is likely that Sanibel would request an amendment to the governing interlocal agreements to suspend the collection of those fees during the suspension period. Sanibel must continue the collection of fire impact fees and to remit those fees to the Fire District, pursuant to a three-party interlocal agreement between Lee County, the Fire District and Sanibel. The Fire District interlocal must be amended by the parties in order to suspend or reduce the rate of collection of fire impact fees.

The City of Fort Myers is similar to Sanibel, in that a County suspension or reduction of fees would not affect Fort Myers' collection of impact fees unless the governing interlocal agreements are amended to allow for those changes. Fort Myers does not participate in Community Park Impact Fee programs, but collects all others. Regional Park and EMS fees

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are remitted back to the County. This practice would continue notwithstanding the County's action on fees unless the governing interlocal agreements are amended by the parties. (Exception: School Impact Fees. *See above.*)

II. Fire Districts

Lee County adopted impact fee schedules for 18 Fire Districts. Those fees are collected by the County and remitted directly to the fire districts pursuant to the terms of separate interlocal agreements with each district. The interlocal agreements require collection of impact fees consistent with the impact fee schedule, unless the interlocal agreement is amended to specify otherwise. Therefore, if the Board suspends or reduces impact fees, the decision will not affect the County's obligation to continue collecting fire impact fees in accordance with the fee schedules in the LDC until the interlocals have been amended with each district.

III. School Board of Lee County

The County adopted a county-wide ordinance for the collection of school impact fees pursuant to its constitutional powers as a Charter County. There is no interlocal agreement with the School Board mandating the collection of fees. The County has the legal authority to suspend or reduce the rate of collection of those fees without the consent of the School Board.

IV. EMS

EMS impact fees are collected in unincorporated Lee County, the City of Fort Myers and the City of Sanibel. The two cities collect EMS impact fees and remit them to the County on a quarterly basis. The County's decision to suspend or reduce fees, would apply solely within unincorporated areas, unless the EMS interlocal agreements with Fort Myers and Sanibel are amended to allow for a similar suspension/reduction. The Lehigh and Fort Myers Beach Fire Districts provide EMS services within those fire districts. EMS fees collected by the County in the unincorporated areas within for those districts must be remitted back to the district pursuant to the governing interlocal agreements. This practice would continue until the interlocal agreement is amended to provide otherwise.

V. Credits

A. Suspension

Suspending the collection of impact fees will prevent credit holders from redeeming impact fee credits for permits during the suspension. It could be argued that the inability to tender/redeem impact fee credits during that time interval represents a lost opportunity. Some may argue that the lost opportunity rises to the level of a temporary taking, since the credits will only have value for 18 of their 20 year term. For this reason, it is recommended that any

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ordinance suspending the collection of impact fees include a provision that extends the duration of outstanding credits for a similar time interval to address potential claims of lost opportunity.

It is noteworthy that there may continue to be a market for the purchase and sale of impact fee credits for those parties interested in acquiring credits in anticipation of the resumption of fee collections at the end of the suspension term.

B. Reduction on the Rate of Collection

Florida Statutes requires impact fee schedules to be based on recent localized data. For this reason, the County updates fee schedules every three years. The last update to the fee schedules occurred in 2012.

As long as the fee schedule reflects recent localized data, the Board has the legislative discretion to collect impact fees at a percentage of the schedule. Currently, the Board collects impact fees at 100% of the fee schedule. However, the Board has the legislative authority to collect those fees at a reduced rate, for example 75%, 50%, 25%, etc.

Reducing the percentage rate charged will allow for continuing revenues from new development, albeit at a lower rate. The Board may re-evaluate the percentage rate of collection at any time and make adjustments as desired. Since impact fee credits have a dollar value, credits would maintain their face value during the reduction time frame. Credits would remain viable as a substitute for cash payment of impact fees on a dollar for dollar basis.

C. Elimination of Impact Fees

The County and the School Board have issued impact fee credits as a substitute for cash in exchange for developer contributions of property or capital improvements. Impact fee credits are similar to an "IOU" from the County that may be redeemed by tendering credits in lieu of cash to pay impact fees on future development permits. If impact fees were eliminated entirely, the County and the School Board would have a legal obligation to redeem the value of outstanding credits for cash or other value to avoid claims of unjust enrichment or taking.

The taking argument is not one based on a physical invasion but rather the regulatory effect of discontinuing impact fees, which would render the credits worthless for their intended use. Takings law in the context of inverse condemnation requires that a government regulation completely deprive the owner of all economically beneficial use of property. This would occur if the County were to discontinue impact fees altogether.

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VI. Developments of Regional Impact (DRI)

A. Impact Fees.

DRI's that were assessed impact fees as mitigation would not have to pay impact fees for development permits obtained during a suspension period. If impact fees were collected at a reduced rate, the reduction would apply to fees paid on development permits issued during the reduction period.

B. Prepaid proportionate share payments.

DRI's that paid for transportation impacts in advance of construction using development agreements would not be affected by the County's decision to temporarily suspend or reduce impact fees.

The development agreement vehicle allowed for the prepayment of transportation impact fees in exchange for transportation concurrency vesting. The prepayment was "consideration" for transportation concurrency vesting. DRI's that have prepaid transportation proportionate share assessments are not treated unfairly by the suspension or reduction of impact fees for this reason.

C. Unpaid proportionate share payments.

There are no DRI's with unpaid proportionate share assessments.

VII. Equal Protection Issues

There are challenges presented by a hybrid approach where certain areas of the County or types of development are exempted from impact fees. If exemptions are provided to some members of the same class of development, the County will likely face challenge on the grounds of equal protection. The County must be able to demonstrate a rational basis for distinguishing between similarly situated development. While difficult, this challenge is not insurmountable.

The difficulty presented in meeting this rational basis standard in the context of impact fees is that to be legally sustainable, impact fees must be designed to address the precise impacts of development. Residential development, regardless of size, price or ownership, generates impacts to Roads, Parks, Fire, EMS and Schools. In a similar vein, commercial square footage creates impacts to Roads, Fire and EMS. These impacts directly correlate to square footage and use. Impact fee methodology studies, particularly those prepared to support the fee structure in place in Lee County bears this out.

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In the alternative, staff may identify a revenue source that can be utilized to subsidize the impact fee obligation of certain subclasses of development if the Board desires to incentivize development in this manner.

VIII. House Bill 321

House Bill 321 proposes to suspend impact fees for three years. If adopted, this bill would supersede County ordinance unless a four-vote super majority of the Board elected to reinstate the fees in some fashion.

Note that the bill would not affect fees collected pursuant to interlocal agreements due to constitutional prohibition against impairment of existing contracts.

DMC:tlb

cc via email only: Andrea R. Fraser, Acting County Attorney
Douglas Meurer, Interim County Manager
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