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DATE: NOVEMBER 19, 2021

TO: BOARD OF COUNTY COMMISSIONERS

FROM: ADAM MENGEL, GROWTH MANAGEMENT DIRECTOR
SEAN MOYLAN, ASSISTANT COUNTY ATTORNEY

RE: EDUCATIONAL FACILITIES IMPACT FEES

The Commission on November 2, 2021, postponed an ordinance to raise educational facilities impact fees for sixty days. We would like to address several assertions made during this process that require some clarification. This is not intended to denigrate the considered opinion of our School District staff or our community stakeholders but to help clarify positions as we navigate a complex matter that fundamentally impacts the County for the long term. Our hope is this will help you to better understand the important issues that have been raised and, equally as important, the following discussion will facilitate a collaborative dialogue.

Below we paraphrase in **bold print** several points made, followed by our reaction to each. The first part is our reaction to statements by school officials. The second part addresses the correspondence from the attorneys of the Flagler Home Builders Association ("Flagler HBA") dated October 29, 2021. We will refer to the Florida Impact Fee Act, Section 163.31801, *Florida Statutes*, as, "the Act."

PART I. Response to Certain Points of the School District

1. **The County Commission is bound to either approve the entire amount of impact fee increase the School Board has requested or reject it altogether.**

   This is not the law. Article VIII, Section 1(f) of the Florida Constitution states in relevant part:

> "The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law…."

Flagler County is a non-charter county, and this constitutional provision is the source of the County's home rule authority. The Act, a general law, authorizes the County, not the School Board, to adopt impact fees by ordinance.

Impact fees are unique products of the county's home rule authority to regulate land use and their statutory responsibility to adopt and enforce comprehensive planning. In contract, the School Board does not have the home rule authority to enact ordinances, and therefore, for better or worse, the School Board cannot impose, raise, or have the final say on the amount of school impact fees. That is the prerogative of the County Commission. And although the Act imposes a number of parameters and restrictions on the County Commission when imposing or raising impact fees, none of those restrictions require the County to wholly accept or reject the School Board's requested impact fee increase. Rather, in adopting an impact fee by ordinance, the County Commission is acting in a legislative capacity with discretion to determine the impact fee amount, subject to the requirements of the Act.

Any fee adopted by the County Commission must meet the "dual rational nexus test" and cannot be arbitrary. If the amount approved is greater than the phase-in limitations of the Act (for example greater than 50%), then the Board must find that there are extraordinary circumstances justifying the increase. The amount set must be based on the most recent localized data. Within these parameters, the County Commission has discretion to set the amount of the impact fee.

In fairness to the School District, the Legislature amended the Act in 2021 adding new language that hasn't been tested by the courts. Subpart (6) now states, "A local government, school district, or special district may increase an impact fee only as provided in this subsection." Later in Subsection (6), instead of listing each of these entities, the Act simply uses the phrase, "local government jurisdiction" or "governing body." The school officials feel these references to local government jurisdictions and governing bodies are meant to include the School Board itself. However, we believe the local jurisdiction is clearly the County Commission and that the guidance of the Florida Supreme Court in St. Johns County v. Northeast Florida Builders Association, Inc., 583 So. 2d 635 (Fla. 1991), which affirmed the ability of a county to adopt school impact fees in implementation of a county's home rule power to regulate growth, is still controlling law. This is particularly so when the last sentence of the subsection reiterates that the impact fee can only be increased by adoption of an ordinance, which only the County Commission can do. The legislative history of the Act also supports our view.

2. **It is unnecessary for the County Commission to make the finding of extraordinary circumstances. That it is solely within the purview of the School Board.**

   Nothing in the law prevents the School Board from passing a resolution finding extraordinary circumstances. Given the threatened litigation over these matters, it is probably prudent for the School Board to do so. The finding of extraordinary circumstances by the School Board validates their request to the County Commission and provides the County with evidence to consider when amending the school impact fee ordinance. Nevertheless, Subsections (6)(g)2. - 3. of the Act require the local government jurisdiction to hold the two workshops dedicated to extraordinary circumstances before adopting an increase by ordinance. For the reasons stated above, this can only be the County Commission. Perhaps the Legislature or the courts will clarify the meaning of the amended language of the Act. At present, on balance, we feel the County Commission must make the findings of extraordinary circumstances when passing an ordinance raising the impact fees beyond the phase-in limitations of the statute. Not making that determination would invite legal action by interest groups opposed to school impact fees.

3. **Once we raise impact fees, they cannot be raised again for another four years.**

   Although this is a correct statement of the general rule, the Act allows impact fees to be raised more frequently than every four years if the Commission finds extraordinary circumstances based on a study justifying the increase. The Act provides the following exception to the general rule:

   > "A local government, school district, or special district may increase an impact fee rate beyond the phase-in limitations established under paragraph (b), paragraph (c), paragraph (d), or paragraph (e) by establishing the need for such increase in full compliance with the requirements of subsection (4), provided the following criteria are met…." Section 163.31801(5)(g), *Fla. Stat*, (emphasis added).

   The "paragraph (e)" referenced above is the limitation that impact fees cannot be increased more than once every four years. The criteria to be met to bypass this limitation are (i) the need based study; (ii) two workshops dedicated to extraordinary circumstances, and (iii) adoption by a two-thirds supermajority vote.

4. **Because the 2019 amendment to the Act require the School Board to provide developers dollar for dollar credit against impact fees for up front proportionate share payments, the School Board is unable to collect proportionate share payments above the amount of impact fees.**

To unravel this issue, it is useful to consider concurrency exactions (commonly referred to as, proportionate share mitigation payments, and broadly referenced as a concurrency exaction) separately from impact fees. Concurrency exactions are payments made by developers to reserve school capacity, measured in units of student stations, based on the cost per student station. The exaction only comes into play if there is no capacity to accept the students that will be generated by the proposed development (i.e., the adopted level of service is not met). The developer pays the School District the exaction so that the School Board can build student stations creating the capacity for the development while maintaining the adopted level of service.

Impact fees are paid by applicants for individual permits to build residences. Impact fees are similar to mitigation payments in that they are intended to provide the capital funds to construct the school facilities that new residents will utilize. However, unlike mitigation payments, school impact fees are paid regardless of the current level of capacity and are not designed to reserve capacity.

In 2019, the Legislature amended the Act to require the School Board to credit against impact fees any payments made by a developer through a concurrency exaction. For example, if the School Board requires a developer to pay $100,000 as an exaction, and the development would result in $150,000 in impact fees, then the exaction is deemed to cover the first $100,000 in impact fees, and only $50,000 in impact fees would be paid. This example runs counter to the School District's assertion that it cannot collect mitigation payments above the impact fee amount. In addition, if school impact fees are increased, the credits currently held by a developer will increase proportionately; however, the statutory credit toward impact fees for any mitigation payment is calculated on a dollar-for-dollar basis.

The County staff is not involved in the School Board's concurrency negotiations with developers. We also are not involved in any way in the calculation of the exactions. If there is something we are not aware of that would change our conclusion, we invite the school officials to educate us. That said, in our opinion, there is nothing presently in the record and nothing in the 2019 amendment to the Act, that would prevent school officials from collecting impact fees beyond the amount of concurrency exactions.

5. Without an increase in school impact fees, the School District would be unable to make concurrency determinations resulting in a de facto moratorium on development.

When we first heard this point made, we understood the School District to mean that it could not calculate concurrency exactions without knowing what the school impact fee will be. But since proportionate fair share exactions are based on the cost of student stations and the number of stations that will be needed to serve development, the amount of the impact fee is not needed to calculate the concurrency exaction.

As we evaluated more closely what the School District is asserting, we now believe the School District is asserting that it cannot approve developments because concurrency does not exist. Because of this, the School Board voted to table all concurrency negotiations *until the impact fee adjustment is finalized.* We frankly cannot understand how this de facto moratorium on development can be tied to impact fees. If nothing else, the School District can continue its negotiations based on the current impact fee. The district could also work contingencies into any proportionate share mitigation agreement to account for adjustments in the impact fee. Also, does the School Board realize that any increase in school impact fees will result in a proportionate increase in impact fee credits held by developers?

To support its position, the School District correctly points out language in Chapter 163 as well as the County's Comprehensive Plan that require concurrency. However, it should be noted that both the Comprehensive Plan and Chapter 163 provide mitigation alternatives when concurrency cannot be reached. We address them each in turn below.

In order to protect the County from legal liability to landowners, Section 163.3180(6)(h)1., Florida Statutes, allows the County to approve a development despite the School District having reached capacity (i.e., without a concurrency determination) if three criteria are met. First, the particular development at issue must be consistent with the future land use designation for the site. In other words, the proposed development cannot increase residential density beyond what is currently in place in the Comprehensive Plan. Second, either the School Board's educational facilities plan must include school facilities adequate to serve the proposed development, or the development itself includes constructing school facilities to serve the development such as a charter school. Third, the local government and the School Board must provide a means by which the developer will pay a proportionate fair share of the cost of providing the school facilities necessary to serve the development.

The same statute prohibits the County from denying approval of a development based on failing to meet the level of service standard for schools if school facilities adequate to serve the development will be under construction within three years. School concurrency is achieved if the developer executes a legally binding commitment to provide mitigation proportionate to the demand for school facilities to be created by the development. See Section 163.3801(6)(h)2., Florida Statutes. Mitigation could include cash or land contributions or the construction of a charter school.

Likewise, our Comprehensive Plan and Interlocal Agreement for Public School Facility Planning include mitigation alternatives. These include land contributions, the donation of school facilities or the expansion of current facilities, the payment for construction or land acquisition or for the cost of financing capital improvements. Mitigation options also include

the establishment of a charter school, creation of mitigation banking, or the establishment of an educational benefit district.

We are not stating that mitigation alternatives in the absence of concurrency are ideal for the students of our County. Concurrency is the goal. The point is that under Florida law residential development does not necessarily halt when concurrency cannot be achieved or when we fall below the level of service required by the Comprehensive Plan. Rather there are mechanisms by which a developer can pay and go. The de facto moratorium of concurrency negotiations potentially exposes the School Board to legal attack and will likely involve joining the local governments who collect the fees on behalf of the School Board as necessary parties to the dispute.

6. **The request for the increase in school impact fees will result in a homeowner with a 30 year mortgage paying $15/month.**

   Fifteen dollars per month for thirty years equals $5,400. The current school impact fee is $3,600. The School District has requested an increase to $7,175, an increase of $3,575. A $15.00 monthly payment at 2.96% interest would work out to $5,397.20 in total payments ($1,822.20 in interest payments based on $3,575.00 borrowed).

PART II: Response to the Flagler Home Builders Association

1. **"The only justification given by the School District for the magnitude of the increase is the erosion in purchasing power of the existing School Impact Fees due to time and inflation, and the increased costs of student stations. There is nothing unusual, unexpected or unavoidable about any of that."**

   The School District has proffered reasons for the requested increase beyond inflation. We see no need to list them here. They are in the record. Therefore, inflation is not the *only* reason for the request. Moreover, to say the rise in costs of construction is not unusual, particularly in the past year, is just not true. Everyday news headlines mention that the inflation we are all experiencing is the worst in decades and some say in nearly half a century.

   In addition, to claim that there is nothing unavoidable about inflation is puzzling. We invite the HBA to explain how the School District can avoid the increased costs of labor and materials that the rest of the community is experiencing.

2. **The School District has not complied with the Act's requirement for a demonstrated needs study because the study itself does not include the words, "extraordinary**

circumstances" and does not provide a justification for exceeding the phase-in limitations of the statute.

This is a creative argument, but it puts form over substance. First, whether the study demonstrates extraordinary circumstances is for the County Commission to decide. The study presents data and conclusions. It is for the Commission to evaluate the study to decide whether the situation is sufficiently compelling to necessitate an increase in fees beyond the phase-in limitations of the Act.

Second, we do not understand how the Flagler HBA concludes that the School District's study does not justify the increase which the study concludes is warranted. The correspondence from the Flagler HBA's attorneys does not elaborate on this point. We understand the Flagler HBA disagrees with the study, but that does not mean the justification is omitted from the study. Based on the study, the School District has concluded that an increase in school impact fees beyond the phase-in limitations of the Act is needed. Without more explanation, it appears the Flagler HBA is asserting that there is no justification because they do not agree with the justification.

3. **The School District notes its revenue sources for capital improvements are disappearing, but the need for revenue alone is insufficient under the Act.**

   The School District is not relying solely on the lack of alternative revenue sources for school construction. It is but one of the extraordinary circumstances the School District is asserting. As long as the impact fee that is adopted complies with the dual rational nexus test and the other requirements of the Act, it is entirely appropriate for the County Commission to consider the dwindling revenue sources for school construction. It is also appropriate to consider other policy goals, such as a desire to avoid the mistakes of the heyday of the early 2000's that led to a proliferation of portable, rented trailer classrooms on Flagler campuses.

4. **"If the County were to adopt the requested fee increases on the basis of what has been presented to date by the School District, it would do so in violation of the Act."**

   The Flagler HBA's correspondence was submitted prior to our second workshop dedicated to extraordinary circumstances. At this point, the County Commission has the authority within its discretion to grant, deny, or modify the School District's requested increase in school impact fees subject to the procedural and substantive requirements of the Act.

5. **The school impact fees do not confer a special benefit on fee payers in a manner not shared by those not paying the fees and therefore fails the second prong of the dual rational nexus test.**

The Flagler HBA misunderstands the dual rational nexus test and the special benefit required. While a high caliber school system does benefit all members of our society, the school impact fees are paid by new residential growth to fund the cost of the student stations needed to ensure adequate school capacity is available to serve the school age children generated by this new residential construction. The Act requires that the facility to be constructed with the fees be identified in the School District's five-year capital improvement plan. Nothing requires the five-year plan to be on a less than countywide basis. Additionally, as is noted in the School District's Report, there is a consistent student generation rate by housing type throughout the County and the School District provides a uniform system of free public schools on a countywide basis through school choice programs and its ability to adjust attendance boundaries to ensure a workable distribution of students among available facilities.

The Florida Supreme Court addressed this issue regarding school impact fees in St. Johns County case cited above:

> "[W]e see no requirement that every new unit of development benefit from the impact fee in the sense that there must be a child residing in that unit who will attend public school. It is enough that new public schools are available to serve that unit of development. Thus, if this were a countywide impact fee designed to fund construction of new schools as needed throughout the county, we could easily conclude that the second prong of the test had been met." *St. Johns County v. Northeast Florida Builders Ass'n, Inc.*, 583 So.2d 635, 639 (Fla. 1991).

The School District is required by the Florida Constitution to provide a uniform system of education. Every school district in the state that imposes impact fees does so on a countywide basis. Our district also has a very liberal school choice policy, and many students avail it. The Flagler HBA's assertion oversimplifies the process by assuming that a fee payer is paying for a particular student station in a particular school. Rezoning attendance zones and shifting grade levels from elementary to middle school, for example, could change where a student attends school.