IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA
CIVIL ACTION

TINA BROWN, individually and on behalf of other similarly situated, **FIRST HOME BUILDERS OF FLORIDA,** a Florida partnership, on its own behalf and on behalf of other general contractors similarly situated and **LEE COUNTY BUILDING INDUSTRY ASSOCIATION, INC.,** a Florida Corporation, etc.

Plaintiffs,

v.

LEE COUNTY, FLORIDA, a political subdivision,

Defendant.

CASE NO. 01-011623 CA-H

"CLASS REPRESENTATION"

PARTIAL FINAL JUDGMENT IN FAVOR OF DEFENDANT, LEE COUNTY, ON THE FIRST PART OF THE BIFURCATED CHALLENGE TO THE LEE COUNTY SCHOOL IMPACT FEE ORDINANCE WITH OPINION

INTRODUCTION

This cause came on to be heard as a class action constitutional challenge to Lee County Ordinance No. 01-21, effective December 1, 2001, which enacted what will be referred to as the Lee County School Impact Fee, or just simply "the impact fee." Originally three parties filed suit, each seeking to become a representative of a challenging class. At the conclusion of the class certification proceedings, the Court identified and certified only one class and one subclass,[1] and appointed one class

[1] The challenge of the subclass is not before the Court today.

representative for both. The lone class representative was determined to be Patricia Shatto, who was not an originally named plaintiff, but was substituted in for Tina Brown as the case progressed. The main class was identified and certified as

> All parties who have paid or been assessed an impact fee pursuant to the Lee County School Impact Fee Ordinance (01-21) in order to obtain a building permit, mobile home move-in permit or mobile home park development order.

For ease of reference all claimants will be collectively known as "the Plaintiff."

The Defendant is Lee County. The impact fee under attack here is for the use and benefit of the Lee County School District, a political subdivision which lacks the power to enact, impose and collect impact fees. Many, if not most of the acts, decisions and choices under scrutiny herein were those of the Lee County School Board or of its agents and consultants. Although not a named party, the Lee County School Board, or simply the School Board, will be referred to as though it is a party defendant because it indeed is the beneficiary of the School Impact Fee Ordinance. Lee County served as both the midwife for delivery of capital funds for school construction to the School Board through passage of enabling legislation and as its surrogate in the courts to withstand any legal challenges to same.

This cause challenges Lee County Ordinance No. 01-21 on two separate and distinct legal grounds. The claim of the main class seeks a full refund of all impact fees collected, or to be collected, on grounds that the Ordinance violated the dual rational nexus test, the accepted standard for determining the legal sufficiency of impact fee legislation and other governmental exactions. The second challenge is brought by a subclass of persons who already had contracts to build homes in force but no building permits in hand when the Ordinance was passed,[2] and were required to pay the impact fee in order to obtain their building permits. These class members claim the Ordinance is invalid as applied to them because it places an impermissible impairment upon the right of contract in violation of Article 1, § 10 of the Florida Constitution. The two claims

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[2] The Ordinance took effect immediately upon passage and the impact fee became collectable at the time of pulling a building permit.

were bifurcated for trial.[3] The main claim based upon the dual rational nexus test was the first of the two to be tried. It was tried before the Court without a jury on March 9, 10, 11, and 12, 2004.

THE OPINION OF THE COURT

I. The Dual Rational Nexus Test

Since 1976, impact fees have been found to be a lawful means of raising funds for capital improvements, so long as "[t]he cost of new facilities . . [is] . . borne by new users to the extent new use requires new facilities."[4] The dual rational nexus test was adopted and applied in Florida in order to satisfy this connection between the cost of new facilities and the extent of demand created by new users. There is no dispute here that this is the correct standard to apply in this case.

The dual rational nexus test, as applied to this case, can be stated as follows:

1. Lee County must demonstrate a reasonable connection, or rational nexus, between the need for additional schools and the new homes being constructed to meet the County's population growth; and
2. Lee County must show a reasonable connection, or rational nexus, between the expenditures of funds collected and the benefits accruing to the fee payers.[5]

Lee County must meet both parts, or prongs, of the dual rational nexus test for the Lee County School Impact Fee to be valid.

II. The Burden of Proof

Although the dual rational nexus test requires Lee County to demonstrate that the two aforementioned reasonable connections have been met, the Plaintiff has the

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[3] Lee County has appealed the Court's certification of the subclass to the Second District Court of Appeal.

[4] *Contractors and Builders Association of Pinellas County v. City of Dunedin*, 329 So. 2d 314, 321 (Fla. 1976).

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

burden of proof throughout this entire lawsuit. While this may seem to be a paradox, it is not. The dual rational nexus test is the legal standard Lee County must meet in establishing and calculating an impact fee. When it enacted Ordinance 01-21, Lee County made findings that it is aware that the dual rational nexus test is the legal standard it must abide by and that the Ordinance does indeed meet those standards. Now that the Ordinance is under attack in court, the burden falls upon the Plaintiff to produce evidence and proof of sufficient weight, force and effect that the Court, upon review, will be convinced that Lee County in fact failed to meet both requirements of the dual rational nexus test.

Enactment of an impact fee ordinance is a legislative act of the Lee County Board of County Commissioners.[6] When a legislative act of a board of county commissioners is challenged in circuit court, the applicable standard of review by the court is the "fairly debatable" rule, which states that in deference to the legislative powers delegated to said boards by state law, the courts (which lack legislative power) must sustain the board's legislative acts so long as they are fairly debatable.[7] The term "fairly debatable" has been described by courts in different ways, all trying to say the same thing in the most effective and understandable way. The more orthodox definition is that the validity of such legislative acts is sustainable if reasonable persons could differ as to its propriety.[8] Accordingly, if some reasonable people agree with the notion that the need for more schools is reasonably related to new residential construction, and that the impact fee charged is reasonably related to the benefits accruing to the fee payers, then the ordinance is valid even though other reasonable people might disagree. Put another way, for the Lee County Impact Fee Ordinance to be invalidated and nullified by this Court, the Plaintiff must prove that a sufficient number of findings made or data used to support the Ordinance are indisputably unreasonable, such that

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[6] *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993).

[7] *Id.*, at 474.

[8] *Martin County v. Yusem*, 690 So. 2d 1288 (Fla. 1997).

the propriety of the Ordinance cannot be said to be fairly debatable.[9]

If the Plaintiff fails to carry her burden of proof, then Lee County has satisfactorily met both prongs of the dual rational nexus test and the Ordinance is deemed fairly debatable and valid. If the Plaintiff proves that one or both prongs of the dual rational nexus test have not been met, then the propriety of the Ordinance is not fairly debatable and it will be struck down.

III. The Methodology

The methodology used to determine the Lee County School Impact Fee was developed by Dr. James C. Nicholas of the University of Florida.[10] In essence it is a formula. The various local governments determine the appropriate numbers to plug into the formula, and the impact fee then becomes merely an arithmetic calculation.

The methodology, or formula, requires local governments to determine within each school district or county (1) the ratio of the number of public school students per newly constructed household, called a "student generation rate;"[11] (2) the total capital cost per each new student station; and (3) certain credits.[12] Each of these three variables has its own formula for determining its numerical value.

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[9] The issue for the Court to decide is not whether imposing a school impact fee was a good idea or a bad idea. The Court must look at the methodology and the supporting data used to establish and calculate this particular impact fee and decide whether any of the various elements therein are indisputably unreasonable, and if so, whether the overall effect is sufficient to find that the reasonableness of the Ordinance is not fairly debatable.

[10] The methodology had been used ten years earlier by another county and had been approved by the Florida Supreme Court. *See St. Johns County v. Northeast Florida Builders Association, Inc.*, 583 So. 2d 635 (Fla. 1991).

[11] There are actually three rates: one each for single family residences, multi-family residences and mobile homes.

[12] There are three credits: (1) a credit for capital funds supplied by the state; (2) a credit for a portion of past property taxes generated from vacant residential land (lands which supply capital funds for schools but which are obviously not creating a demand for student stations); and (3) a credit for a portion of the future property taxes which will supply school capital improvement funds.

The credits are subtracted from the total capital cost per student station to arrive at a net capital cost per student station. The net capital cost per student station is multiplied by the student generation rates derived for single family residences, multi-family residences and mobile homes. The final product is an impact fee for each of the three types of new households.

IV. The First Prong: Whether There Is a Reasonable Connection Between the Need for Additional Schools in the County and the New Homes Being Constructed to Meet the County's Population Growth

Although this part of the dual rational nexus test conceptually appears to be rather simple, it is not. Common sense and deductive reasoning tell us that new residential development within a county signifies a growth in the county's population. Moreover, population growth predictably means there will be more school age children seeking free public education, thus pressuring the county's existing facilities and generating the need for more capacity, whether it be enlarging existing schools or building new schools. Therefore, the question seems to virtually answer itself.

Impact fees are designed to pay the cost for additional or accelerated capital improvements necessitated by new development. In other words by the exaction of impact fees new development timely pays its fair share of the added cost burden for additional capital improvements necessitated by new growth. Is it enough for this Court to simply find that some need exists, or must the Court find that a reasonably quantified need exists? The answer to that question determines the level of scrutiny that must be given to this first prong of the dual rational nexus test.

Unpacking the language used to state the first prong of the rational nexus test (i.e., there must be a reasonable connection between the need for additional capital facilities and new residential development), the key phrase is "reasonable connection." Case law in other states use the synonymous term "reasonable relationship." It is this concept the United States Supreme Court adopted when it was renamed the "rough

proportionality" test.[13] *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2039, 129 L.Ed.2d 304 (1994). Rough proportionality, the Court ruled, is an intermediate level of scrutiny in which "[n]o precise mathematical calculation is required, but . . . some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development [must be made]." *Id.* at 390 (emphasis added).

Because *Dolan* was a mandatory dedication of real property case and this case is one of exaction of fees, this Court became concerned about *Dolan's* applicability to this case. Like this case, *Dolan* is a building permit case. In it the Supreme Court does talk about "exactions" required in exchange for a permit. *Id.* at 386, 388. While the "exaction" here is payment of an impact fee as opposed to a dedication of land, the Court concludes that the *Dolan* level of scrutiny, i.e. the intermediate level of "rough proportionality," applies to the rational nexus test here. That means the Court must look not only to the nature of the impact (more new homes mean more schools), but also the extent of the impact (how much of the need for new schools is attributed to new development). It is also clear that the extent of the impact need not be measured with precision or exactitude.

The term "rational" in the phrase rational nexus is defined as "substantial, demonstrably clear and present." *Lee County v. New Testament Baptist Church of Fort Myers, Florida, Inc.*, 507 So. 2d 626, 629 (Fla. 2d DCA 1987). The Court believes that the term "demonstrably clear and present" describes the nature of an impact, which simply means there can be no ambiguity over or reasonable disagreement with the proposition that new home construction will have an immediate impact upon school capacity. The term "substantial" describes the extent of impact. "Substantial" means the nexus must be determined to be more than negligible, but it likewise implies an inexact amount. Together the terms "substantial" and "demonstrably clear and present" simply

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[13] The Supreme Court substituted "rough proportionality" for "reasonable relationship" to avoid confusing the latter with another level of scrutiny standard under the Equal Protection Clause, but the substitution was not intended to either raise or lower the standard encapsulated in these terms.

require that the impact under scrutiny be immediate, considerable and capable of rough estimation. It is no different than the level of scrutiny announced seven years later in the *Dolan* case.

Making some sort of individualized determination that school impact fees are reasonably related both in nature and extent to new residential development is a little trickier than other types of impact fees. Both newly constructed homes and established homes are providing habitat to the new population growth in Lee County. Both established homes and new homes are feeding more new students into the school system and together they are impacting the need for new schools. Moreover, not all newly constructed homes will house the same number of students, if any at all. This makes a government's task of determining a school impact fee more difficult than determining other types of impacts fees, but not impossible.[14]

Furthermore, impact fees are most commonly imposed for capital improvements within discrete geographic areas such as a drainage district, a fire and rescue district, a subdivision or a planned unit development. School impact fees on new development are usually imposed countywide and not targeted at areas of intensive residential development where the new schools are more likely to be constructed. Here in Lee County it is reasonably safe to infer that all new homes are not being built in the regions of intensive new development. Some newly constructed homes are deeply embedded within old neighborhoods[15] near long-established schools. Even though there is virtually

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[14] Every new home has the essential, "intra-habitation" needs of water for drinking, cooking, cleaning and cultivating, as well as a sewer for waste water disposal, and a nearby fire station in case the house catches fire. Impact fees were originally created to meet such obvious needs and they can be easily and accurately quantified based on authoritative empirical data. On the other hand the "extra-habitation" needs of new development for park land for recreation, roads, law enforcement and schools are not as uniformly predictable and therefore not as easy to measure. A gated subdivision, for example, will not impact the need for police substations in the same way or to the same extent as a complex of high-rise public housing buildings.

[15] The Court confesses there was no evidence brought out at trial as to the distribution of new homes in Lee County, but again it is clearly apparent to any resident of the County that most new residential development in Lee County tends to be clustered in brand new or recently developed subdivisions. However, it is also apparent that in the virtually built out areas of the county, especially within the City of Fort Myers, its oldest municipality, new construction on

no likelihood these impact fees will benefit the schools which serve them,[16] new homes in old neighborhoods are still subject to the school impact fee.[17]

Turning first to the nature of the impact, it remains self-evident and logical that new homes to meet the rising demand for housing in a rapidly growing county will generate a need for new schools. The Plaintiff does not deny that proposition, but does question whether the impact is immediate, or whether the need is imminent. In November of 2001, there was a sufficient inventory of student stations in the Lee County school system. Evidence at trial showed, however, that it takes three years to get from the point of decision to build a new school to the point of opening that new school. The existing availability of student stations at the time of the Ordinance's passage was small enough to reasonably infer that the need for new schools, especially for a middle school, would be immediate in 2004. If the School Board had to wait for there to exist both a deficit in student stations and projected shortfalls in capital improvement funding from other sources before Lee County could consider and impose an impact fee, the School Board would never be able to timely supply the demand.

Anticipation of need based on recent history, current trends and best estimates

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scattered vacant lots still occurs. Furthermore, old homes are regularly being torn down and new homes are being constructed, or a one-home site is being subdivided and new homes are being built on the newly created lots.

[16] Lee County argued throughout the trial that it was not rational to take away playgrounds, music rooms and other student enrichment spaces from existing schools in order to add more student stations. It was clear from the evidence, notwithstanding the pronouncements in the preamble to the Ordinance, that the School Board wants impact fee funds to build new schools; and if recent history is any indicator, they will be strategically placed to capture the more intensive current and future new growth; and they will not be expanding or refurbishing existing schools in the older, established neighborhoods. That is a very sound and reasonable policy, and one the Court has neither the desire nor the authority to challenge, but it does indicate that some new homes will have little or no direct impact on the need for new student stations (other than temporary, portable classrooms).

[17] Ordinance 01-21 does not allow a new home builder to avoid the fee altogether on grounds the development causes no impact or confers no benefit. The Ordinance requires that every new residential unit pay either the established impact fee or opt for an independent fee calculation, which, despite Dr. Fishkind's testimony, is a byzantine and formidable process which only sophisticated developers with large sums of money at risk would attempt.

of available capital from other sources have to be taken into account in order for school impact fees to work as an effective financing tool. Consequently, the Court finds that new growth's impact on the need for new student stations was demonstrably clear and present.

Next, looking to the issue of extent of impact, there has to be some individualized determination that the impact is more than negligible, i.e., substantial and to some extent calculable. The proof tendered by Lee County is the countywide student generation rate, i.e., the ratio of the number of school age children to each dwelling unit in Lee County. It is not a student generation rate attributable only to new growth, but includes all homes, new and existing. The Plaintiff's most credible challenge to the first prong of the dual rational nexus test is the School Board's selection of a countywide student generation rate based on 11 year old data to demonstrate the extent of impact on schools caused by new home construction. She claims that because the data is too stale and its scope is too broad, the decision to use it was indisputably unreasonable.

The seminal case in Florida on school impact fees and the first case to consider student generation rates is *St. Johns County v. Northeast Florida Builders Association,* 583 So. 2d 635 (Fla. 1991). The Florida Supreme Court acknowledged therein that impact fees for school construction are different from those imposed to fund water, sewer, and even road construction. *Id.* at 638. In *St. Johns County*, the first prong of the dual rational nexus test was challenged only on the argument that many new residences will have no impact on the public school system, thus amounting to nothing more than a tax.[18] The Court rejected that argument because the county's consultant, Dr. Nicholas, determined a student generation rate. The student generation rate used therein was a countywide average of students per single family home. By upholding St. Johns County's impact fee, the Court implicitly held that the countywide average per household is reasonably connected, or roughly proportional, to the average student

[18] In addition there was evidence of a finding made by the county commissioners which states that St. Johns County "must expand its educational facilities in order maintain current levels of service if new development is to be accommodated without decreasing the current levels of service." The Court mentioned therein that no one had quarreled with that proposition. Here there is a quarrel.

generation rate per new household. Consequently, the Court is saying that a countywide student generation rate is a valid, hence reasonable indicator of the extent of the impact of new home construction on the need for new schools.

The Plaintiff counters by asserting that a countywide student generation rate was expressly rejected by a later Supreme Court decision in *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2000). In that case the Court held that a new development which creates no impact on schools – because it forbids school age children from living there – cannot be subject to a school impact fee. By Volusia County's imposition of its school impact fee ordinance to the Aberdeen development, the Court ruled that a countywide statistical standard which demonstratively is so inapplicable to the real and actual impact created by the development belies the very purposes behind both prongs of the dual rational nexus test. *Aberdeen* was an "as applied" challenge to a school impact fee ordinance and did not expressly reject the use of countywide standards for all cases. Here, there is no claim that public school children are not living in Lee County's newly developed residences. In fact there is no empirical evidence that the student generation rate from new development is less than, more than or the same as that for existing homes countywide.

The Supreme Court in *Aberdeen* rejected a countywide student generation rate as being inapplicable to a certain development based on the peculiar facts of that case. It did not rule that a countywide student generation rate is a *per se* impermissible measuring tool for determining the rate at which new homes are introducing children into a public school system. Consequently, this Court finds that the School Board's use of a countywide student generation rate is not impermissible as a matter of law. That leaves the Court with determining whether the application of the countywide student generation rate herein is reasonably related or roughly proportional to the student generation rate from new residential development. That requires some examination of the evidence.

The student generation rate derived and used in this case is based on data gathered from the 1990 Census' Public Use Micro Sample (PUMS). Generally, PUMS is

widely accepted as a reliable data source.[19] However, every witness who weighed in on this issue testified that, in the abstract, the 1990 PUMS data would not be their favorite choice for determining a student generation rate in 2001 if there was a reasonable alternative. Lee County argued it was the best available, and therefore it was reasonable. The Plaintiff argued there was a better way.

The School Board's consultant, Mr. Mullen of Duncan Associates, asked the School Board by e-mail if there were more current data than the 1990 PUMS data, but received no reply. He testified that there was some discussion about matching new home information from the Property Appraiser's Office with School Board enrollment records, but he was eventually told such an endeavor was unfeasible, and the matter seemed to drop there. That hearsay statement does not prove that this alternative data collection process was unfeasible. It only proved that Mr. Mullen stopped asking for more data and used the 1990 PUMS data.

The Plaintiff called an expert planner, Mr. Lunney, who testified that the matching of Property Appraiser records with current school enrollment records could yield a more accurate student generation rate based on current data which would be more reasonable than the student generation rate chosen by the School Board. The issue, however, is not whether an alternative is more reasonable. What matters is whether the student generation rate chosen is reasonably close (roughly proportional) to the true and actual student generation rate. If 11 year old data can do that, then certainly reasonable people will disagree over whether the School Board needed to expend more time, effort and money to gather more current data and do a new study.

Since no comparison study using this newer data was made, the Court still lacks any notion of what is a true, actual student generation rate for the year 2001. All it has is the rate derived from the1990 PUMS survey. Consequently, two questions remain: (1) whether it was indisputably unreasonable for the School Board to decide to forego the search for and use of more current data and default to the only existing data; and

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[19] The only criticism heard was that the representative sample for statistical extraction may in some circumstances be too small.

(2) whether the 1990 PUMS data is *per se* indisputably unreasonable.

The Lee County School District is a political subdivision of the State of Florida with its own governing board, all created by Article 9, § 4 of the Florida Constitution. It routinely make decisions, some of which are subject to judicial review by way of a lawsuit, and some are not. For example, the decision not to wait for more current Census data[20] before proceeding with an impact fee study is a political decision beyond the reach of the courts. However, the decision to use data so inaccurate or irrelevant that it cannot withstand constitutional scrutiny is a proper matter for a court to decide.

The question of whether the School Board's decision not to collect and use accessible, fresher data,[21] is generally a political decision not subject to judicial review. However, if the only data source available is indisputably inaccurate or irrelevant, and the School Board nevertheless decides to forego a search for competent data and instead continues to rely upon incompetent data, such a decision is challengeable in court. If on the other hand the School Board possesses reasonably competent data and decides to forego a search for data which might be more competent, that is an untouchable, political decision. Constitutional scrutiny of a local government's legislative act does not require them to make the best decision, but only one which is not indisputably unreasonable. A reasonable choice does not become indisputably unreasonable simply because, with some extra effort, the School Board could have developed a potentially better data source for determining a student generation rate.

After extensive consideration, the Court now concludes that the 1990 Census PUMS survey is not *per se* indisputably unreasonable.[22] Accordingly, the decision to

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[20] The PUMS data from the 2000 Census would not have been available to the School Board for another year or more.

[21] That is, data which meets the reasonable relation/rough proportionality test.

[22] There was evidence tending to discredit the accuracy of 1990 Census data as applied to conditions in 2001. For example, new homes are getting larger and more expensive, suggesting that new home builders are more likely to be the retired and the working "empty nesters," i.e., people no longer burdened with current and future education and child-rearing expenses. It could also be argued that using 11 year old demographic data in a dynamic, transient, rapidly growing county is tantamount to building computers in 2001 using 1990

forego a more up to date survey is a political decision beyond the reach of the Court.[23] The Court finds the countywide student generation rate derived herein meets the reasonably related/rough proportionality test for individualized determination of the extent of the impact of new home construction upon the need for more new schools in 2001.

Lee County, therefore, has met the first prong of the dual rational nexus test.

V. The Second Prong: Whether There Is a Reasonable Connection Between the Expenditures of Funds Collected and the Benefits Accruing to the Fee Payers

This second prong focuses on the actual determination, or calculation, of the impact fee. It requires the Court to examine the methodology (the formula) and all the numerical elements thereof (the findings and supporting data plugged into the formula) in determining whether this prong of the dual rational nexus test has been met. As previously discussed the Court finds that the methodology used herein is a reasonable and legally sufficient way to arrive at an impact fee ("Funds Collected") from which the payers will derive a roughly proportional benefit.

Although impact fees are paid by people, the exaction is upon the new residence to be constructed, not necessarily its inhabitants. The residents of these new homes will

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technology. These considerations weighed heavily on the Court's mind, but in the end there has been no significant shift in the general character of Lee County from a housing and public education standpoint. Nothing was brought to the Court's attention suggesting either an abnormally large exodus of families with children from the county or an abnormally large influx of adults without children into the county. Lee County is growing and becoming more economically and ethnically diverse, but it still remains a retirement/resort-oriented community comprised of a larger than normal percentage of retirees, but there was no evidence of shifts in housing and school capacity trends and patterns of such seismic proportion that the 1990 student generation rate would now be considered an indisputably inaccurate or irrelevant indicator of new housing's impact upon schools.

[23] Whether the decision to bypass alternative methods of obtaining a student generation rate was consciously considered and deliberately rejected or carelessly forgotten and abandoned is of no consequence because such matters are now simply beyond the reach of this Court's authority.

come and go over the life of the home. There will be times when a home will be empty of school-age children, and other times it will be loaded with school-age children. Therefore, the presence of sufficient schools to serve this home will from time to time benefit the home during its lifetime and will not at other times. Consequently, it does not matter whether a new home's first occupants have children. In all likelihood the day will come that the home will have children living in it and a school built with impact fee funds will benefit that home. These considerations were taken into account in determining the propriety of the student generation rate.[24]

The real issue on the second prong of the dual rational nexus test is the values the School Board chose to plug into Dr. Nicholas' methodology formula. Numerous findings had to be made, numerous data had to be gathered and "crunched," and many calculations had to be made. The Court will not discuss each and every element of the methodology and each and every value derived. It will discuss only the three elements which gave the Court some concern: the student generation rates, the projected land costs for new schools, and the calculation of future property tax credits.

The Court previously discussed in great detail the student generation rates. It held that the use of countywide rates using PUMS data taken from the 1990 Census was roughly proportional to a student generation rate from newly constructed homes in 2001. Although the Court was concerned about the use of 11 year old data, it could not find it to be indisputably unreasonable. That finding does not change now that the scrutiny has shifted from the first prong of the dual rational nexus test to the second prong.

The cost of acquisition of land for new schools is clearly a legitimate component, along with construction costs and ancillary facilities costs, of the total capital cost for new student stations. The Plaintiff contends the School Board abandoned its historical spending patterns in favor of the comparable sales approach method of real estate appraisal in order to artificially bloat this cost item, thus driving up the amount of the impact fee to an unreasonably high level. The Plaintiff showed that based on historical

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[24] *See St. Johns County v. Northeast Florida Builders Association, Inc.*, 583 So. 2d, at 638.

data, with adjustments for time and excluding lands donated for schools, the School Board could expect to pay $41,852 per acre in 2001, for land for new schools. The School Board hired a reputable real estate appraiser to make a comparable sales approach estimate of the per acre cost for new land. His opinion of $87,000 per acre was adopted and incorporated into the impact fee calculation. This is a very wide disparity.

While historical spending is a good indicator of what the School Board has spent and would like to continue spending, what it may have to spend is an equally, if not an even more persuasive, indicator of projected land acquisition costs. Historical spending fails to take into account the increasingly more difficult problem of the ever-shrinking inventory of suitable land for future school sites. As suitable land becomes more precious from both a rarity and existing market conditions viewpoint, it is not indisputably unreasonable for the School Board to explore other valuation methods than the traditional, historical method. The sales comparison approach to real estate appraising is unquestionably a reasonable method of valuing real property.[25] Therefore, using the comparable sales approach, valuations certainly cannot *per se* be considered indisputably unreasonable.

The main concern the Court had with the comparable sales approach used here was the freedom of choice given the appraiser in the selection of comparable sales. The School Board presumably has some criteria, either implicit or in a written policy, by which it selects school sites. Had the School Board scouted potential school sites for the appraiser to use as a benchmark for selecting comparable sales, the Court believes he would have selected more suitable parcels for sales comparison, thus boosting the credibility of his final cost figure.[26] Consequently, the Court cannot find that the figure it believes would have been more accurate and the figure the appraiser actually arrived at

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[25] In fact it is the overwhelmingly preferred valuation method of appraisers who have testified in this Court in eminent domain, divorce and other civil litigation where the value of real property was at issue.

[26] Morever, the Court believes he would probably have arrived at a lower cost estimate, but that is speculation.

would be so disproportionate that the estimate of $87,000 per acre would be indisputably unreasonable.

Finally, we come to the future property tax credit. This is the present value of a stream of capital improvement funds flowing to the School Board from a portion of each residential property owner's annual property tax called the Capital Improvement Tax (CIT).[27] This calculation has several components: the taxable value of all residential land (taxable value), student enrollment, the CIT millage rate, the number of years over which the credit will apply (the capitalization period) and a discount rate to reach present value. The Plaintiff disputes the values chosen for three of those components: taxable value, the capitalization period and the discount rate.

The School Board chose to take a static, or snapshot approach, instead of a dynamic, or videotape approach to making this calculation. The static approach assumes that in each of the 20 years to come the taxable value, student enrollment and the CIT millage rate will remain the same. The Plaintiff, in the strongest terms, argued that it is indisputably unreasonable to assume that taxable value will not increase throughout the next 20 years. The Court agrees and finds this assumption to be indisputably unreasonable.

Property values have historically gone up, assessed values generally increase every year on the overwhelming majority of residences in the County, and there is no credible evidence that values will not continue to climb in the future. Although there are limitations on the rate at which assessments on homestead property can increase while it remains under present ownership,[28] no reasonable person would agree with the notion that the taxable value of developed residential property in Lee County will not increase over the next 20 years. However, it is equally disingenuous to believe that student

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[27] The amount is currently 2 mils, or $2 per $1,000 of taxable assessed value. This is the maximum millage rate allowed by law for CIT.

[28] Article VII, § 4(c)(1) of the Florida Constitution, better known as the "Save Our Homes Amendment." The amendment provides that the annual assessment of homestead property shall not exceed the lower of either three percent (3%) of the assessment for the prior year or the percent increase in the Consumer Price Index (CPI).

enrollment will not increase every year as well. Therefore, if both numbers are increasing every year, then it can reasonably be inferred that the ratio of these numbers, one to another, will not drastically fluctuate from year to year.

In the future property tax credit formula, taxable value is divided by the student enrollment to arrive at a figure called the "residential taxable value per student." This is the number which when multiplied by the millage rate yields the "annual tax payments per student," the average amount of tax residential property owners contribute annually for capital improvement funding for schools. If we rightly assume that both property values and student enrollment are increasing each year, then the residential taxable value per student should not radically fluctuate. In any event only the hypothesis was made that a flat line taxable value over 20 years would create a lower credit, and hence a higher impact fee. There was no analysis given to the Court suggesting that would be the case if twenty-year projections had been made for both taxable value and student enrollment.

A capitalization period of 20 years is arguably not long enough to reflect the true life of a tax-contributing home. This can be compensated for by the fact that in doing this calculation the School Board is assuming, and therefore allocating 100% of 20 years worth of capital improvement funds to new school construction, when in actuality that would not happen. Some CIT money will inevitably be spent on major repairs and replacements of existing facilities.

The discount rate of 5% could be argued as too conservative, but it is not indisputably unreasonable.

The future property tax credit is the largest of the three credits and has five components. Accordingly, if one or more of the component values deviates significantly in either direction from its real and actual value, it creates more potential to skew the entire credit, either making it too low, thus making the impact fee too high, or vice versa. This gives the Court concern because it would rather know that the values were reached on sound assumptions and credible numbers rather than having to subjectively decide whether the use of a marginal value here has been adequately offset by a generous assumption there. It may be an acceptable practice in the field of financial planning, but

it is a troublesome and dangerous one when it must come under judicious constitutional scrutiny. Nevertheless, having weighed the marginal against the generous, the Court again finds that, overall, the future property tax credit is not indisputably unreasonable.

Accordingly, the Court finds Lee County met the second prong of the dual rational nexus test.

CONCLUSION

If this lawsuit were a horse race, Defendant, Lee County, would win in a photo finish by a nose. Although winning by a nose is a victory just the same, Lee County, and surely the Lee County School Board, had to pay a dear price. That price was having to endure a strong, credible, impressively prosecuted court challenge from affected citizens who saw in Lee County's School Impact Fee Ordinance flaws and deficits they believed to be of an unconstitutional magnitude. In the eyes of the Court they were almost correct. This challenge has cost either Lee County or the School Board, or both, an enormous sum of money in legal fees, expert witness expenses and court costs. Perhaps even worse, the School Board has been unable to spend the millions of dollars it claimed it so desperately needed for over two years.

Generally, impact fees are very popular with those who do not have to pay them but very unpopular with those who do. Because they can be highly controversial and because of their limited purposes and uses, impact fees should be conceived, planned, researched, analyzed and crafted with thoroughness, reasonableness, fairness, wisdom, and critical oversight.[29] They should be clearly credible and easily justified so that, from

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[29] It was clear from the evidence that the School Board desperately needed a new capital funding source and impact fees was perhaps the only alternative it had. Having an impact fee seemed to be a forgone conclusion. When Duncan Associates was hired, its charge was to calculate a fee, not make an independent determination of the whether a fee was justified. There appeared to be no one on the inside acting as a critical, independent examiner forcing those crafting the impact fee to justify the selection of data, to ask if better data might be available, to point out sloppy procedures, and to warn against cutting corners or taking shortcuts. Thoughtful, internal accountability could have avoided a challenge altogether, or one which the courts could have dispatched with greater ease and with much less loss of time and

the outset, reasonable legal minds will not disagree about their legality and reasonable people will be deterred from challenging them. The choices and decisions underlying this Ordinance not only invited a formidable challenge, the ordinance was almost defeated.

Notwithstanding these criticisms, which the Court offers in a spirit of constructive advice, the Court finds that the Lee County School Impact Fee contained in Lee County Ordinance 01-21 has met both requirements of the dual rational nexus test, and said Ordinance, therefore, is not unconstitutional on those grounds.

IT IS THEREFORE ORDERED AND ADJUDGED as follows:

1. On all Counts and claims in Plaintiffs' Complaint pertaining to the invalidity of Lee County Ordinance 01-21 based on dual rational nexus test grounds, the Court finds for Defendant, Lee County; the applicable Plaintiff class shall take nothing by this action; and Defendant shall hence go forth without day as to said claims.
2. Jurisdiction is specifically reserved to try all remaining claims and issues not covered by this Partial Final Judgment.
3. Jurisdiction is also reserved to tax costs after all issues in this case have been resolved.

DONE AND ORDERED at Fort Myers, Lee County, Florida, this 25th day of May, 2004.

James H. Seals

James H. Seals, Circuit Judge

Copies furnished counsel

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money to the School Board, and ultimately its customers, the students and the taxpayers.