IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR NASSAU COUNTY, FLORIDA

SEDA CONSTRUCTION COMPANY,
a Florida corporation,

Plaintiff,

CASE NO.: 45-2010-CA-000294
DIVISION A

v.

NASSAU COUNTY, Florida,
a public body, and the NASSAU COUNTY
SCHOOL BOARD,

Defendants.
_____/

FINAL JUDGMENT

This cause having come before this Court for a non-jury trial and having considered the testimony and the evidence submitted and the arguments of counsel, makes the following Findings of Fact and Conclusions of Law.

Procedural History

On April 13, 2010, Plaintiff, SEDA Construction Company ("SEDA" or "Plaintiff"), a builder of single family homes filed this action against Nassau County, Florida ("the County") alleging the invalidity of educational impact fees imposed by the County pursuant to Ordinance 2005-56. Subsequently, SEDA filed an Amended Complaint joining the Nassau County School Board ("the School Board") as a Defendant to this action and alleged the following counts:

Count I - an action against the County alleging that the impact fee was unauthorized by ordinance and general law;

Count II - an action against the School Board enjoining the further appropriation of educational impact fees collected;

Count III - an action against the County and the School Board seeking refund of educational impact fees previously paid; and

Count IV - an action against the School Board seeking an accounting.

In response to various motions directed to the Amended Complaint, the Court entered an Order dismissing Count II, which had sought the preliminary injunction. Leave to amend was granted to SEDA, however, no amendment was ever filed.

FINDINGS OF FACT

In 1987, Nassau County ("the County") adopted Ordinance 87-17, which imposed a transportation impact fee upon new development within the County and made various provisions for the imposition of future fees. (Def. Ex. 1). Although educational impact fees were contemplated at that time, the County requested that the Nassau County School Board ("School Board") conduct further study before imposition of the fee.

As growth continued in the County, the School Board became concerned about its ability to provide new capital facilities necessitated by such growth and began exploring alternatives for the funding of needed school improvements required as a result of growth. To explore various options, a capacity solutions committee was formed, which included representatives of the School Board as well as representatives from the developer community, and regional planning committee. (Tr. V.2 at 6-7). The capacity solutions committee recommended that an analysis be conducted to determine the need for an education impact fee and, in furtherance of this recommendation, the firm of Fishkind & Associates was hired by the School Board to prepare a study. That study was completed on September 29, 2004 (the "2004 Study"). (Def. Ex. 6).

The 2004 Study

The 2004 Study contained two primary components. The first was an analysis of need and the second was the calculation of the amount of the education impact fee. Based upon the recommendation of the capacity solution committee, the 2004 Study first analyzed the need for an educational impact fee. (Tr. V.2 at 7). The purpose of this analysis was to provide the School Board and the County[1] relevant information on which they could base a policy decision as to whether an educational impact fee should be imposed for the first time within the County. After examining the projected student capacity and the costs of the projected new facilities to serve that additional capacity, the conclusion reached in the 2004 Study was that although the School District had sufficient funding to meet its capacity needs from 2003 through 2008, beginning in 2008, the School District would be facing a shortage of funds needed to ensure that future capacity demands are met. (Def. Ex. 6). The testimony presented confirmed that this data was separate from the calculation of the fee itself and was prepared to provide a tool for the School Board and the County to utilize in determining whether they should proceed with the imposition of the fee. (Tr. V.2 at 79-84, 173, 175-76, 208-09). These projections had no bearing on the actual amount of the fee calculated. (Tr. V.2 at 175).

The second component of the 2004 Study was the calculation of the amount of the impact fee required to meet the needs of growth. (Tr. V.2 at 70, 175). The approach used within the 2004 Study generally considered three factors. These are: (1) the average number of students reasonably anticipated to be generated per household (student generation rate); (2) the cost per student station; and (3) a credit to be deducted from the amount of the impact fee based upon the revenue from other taxes and fees which would be derived from the dwelling unit and used to

[1] Because the School Board has no legal authority to adopt an impact fee, the impact fee must be adopted by the County on behalf of the School Board.

provide the same improvements for which the impact fee was collected. (Def. Ex. 6 at 12-14; Tr. V.2 at 176).

First, to calculate the student generation rate, the 2004 Study reviewed the total number of students actually generated by the households in Nassau County. It was determined that the average number of students per household was .40. (Tr. V.2 at 98). The purpose of this analysis was to determine the number of students reasonably anticipated to be generated from such dwelling unit over the life of the unit. (Tr. V.2 at 145). This overall student generation rate was obtained through the use of localized Nassau County data. (Tr. V.2 at 98).

The 2004 Study also calculated the projected average student generation rates for single family, multi-family, and mobile homes. As there was an insufficient data sample relating to the various types of dwelling units for Nassau County, the Study calculated the student generation rates for the different types of dwelling units based on comparable data from a Lake County study. (Tr. V.2 at 98-99, 144, 178-79).

Second, the Study also looked at the costs per student station in order to arrive at school costs per dwelling unit. A student station includes all facilities and improvements necessary to educate a student and includes such things as the actual classroom facility and space for the student, ancillary facilities, and bus services. (Tr. V.2 at 143-144). In arriving at the costs of the student stations, the 2004 Study looked at historic construction and land cost of the School Board, along with the adopted state standards for the cost of student stations for the various types of schools. (Def. Ex. 6 at 7-9; Tr. V.2 at 88-91, 143).

Finally, the Study calculated the amount of credits each dwelling unit would receive from the impact fee for other types of taxes paid which were used to provide the same type of capital improvements. The purpose of this analysis was to adjust the amount of the impact fee for other

revenues that would be generated from the same dwelling unit and which would go for the same purpose as the impact fee. (Tr. V.2 at 144-45). This adjustment assured that a dwelling unit would not contribute more than its fair share.

Following the analysis, the 2004 Study determined that the amount of impact fees from the various types of dwelling units were as follows: Single Family Homes of $4,212; Multi-Family of $3,834; and Mobile Home of $2,591. (Def. Ex. 6 at 14) A blended uniform rate impact fee in the amount of $3,726 was also calculated which could be applied to all types of dwelling units. (Def. Ex. 6 at 14-15).

Under the methodology utilized in the 2004 Study, the amount of an impact fee imposed on a new dwelling unit relates to the cost to provide the needed capacity to serve the number of students expected to be generated from that dwelling unit over its life, as represented by the student generation rate. (Tr. V.2 at 175-76). Because the study applies the average student generation rate, it is irrelevant whether a particular dwelling unit is vacant or that there are numerous students residing at the dwelling unit at any particular time. Further, the impact fee is calculated based upon the impacts of an individual dwelling unit on the school system over the life of the dwelling unit; as such, factors such as the level of growth during a limited period of time or whether projected schools are actually built as projected have no effect on the amount of the fee calculated based on capacity costs. (Tr. V.2 at 149-50). The study recognizes the impact of an individual dwelling unit on the school system, regardless of when it is built and regardless of growth as a whole.

The evidence supports that the methodology of the 2004 Study is a recognized and approved methodology for the calculation of education impact fees, and that the fee is properly calculated in conformity with the law. Plaintiff presented no evidence to the contrary.

Education Impact Fee Ordinance 2005-56

On February 24, 2005, the School Board adopted a resolution requesting Nassau County pass an ordinance imposing School Impact Fees. (Def. Ex. 5). On July 25, 2005, the County, after proper and lawful notice, considered and adopted Ordinance 2005-56 to provide for education impact fees at the blended rate of $3,726 ("Education Impact Fee Ordinance"). (Def. Exs. 2, 3, 19; Tr. V.3 at 123-24). The decision by the County to impose the blended rate of $3,726 per dwelling, rather than the specific rates for each type of dwelling unit, benefitted building permit holders for single family homes, such as Plaintiff, who would otherwise have been charged the single family rate of $4,212, which would be the "true" impact of that type of development. (Tr. V.2 at 151).

In adopting the education impact fee, the County specifically found and declared, among others, that:

> (18) As set forth in the impact fee study, the student capacity of the public education system available as of the adoption date of this Ordinance must be expanded in order to maintain the public education system's level of service within the County, as of such date, if new residential development is to be accommodated without a reduction in such level of service.
>
> (19) New residential development should assume a fair share of the cost of providing adequate capital facilities for public schools.
>
> (20) School impact fees are an equitable and appropriate means to help finance the capital costs of additional and expanded school facilities needed to serve new residential development.
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> * * * *
>
> (23) The implementation of an education impact fee that requires new residential development to contribute its fair share of the cost of capital improvements to the public educational system, necessitated by growth caused by such development, promotes the general welfare of all County residents.

> (24) The provision of public educational facilities which are adequate for the needs of growth caused by new residential development, promotes the general welfare of all County residents and constitutes a public purpose.
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> * * * *
>
> (30) The impact fee study provides an adequate and lawful basis for the adoption and imposition of education impact fees in accordance with this Ordinance.

(Def. Ex. 2 at 6-7).

As with the County's other impact fees, the education impact fee is collected at the time of issuance of the building permit and is imposed countywide. (Def. Ex. 2 at 10). The County collects the education impact fee only within the unincorporated area, while the City of Fernandina Beach and the Towns of Hilliard and Callahan collect impact fees within their respective jurisdictions. This system was memorialized within an interlocal agreement, entered into between the County, the School Board, and the City and Towns (the "Interlocal"). (Def. Ex. 4). As reflected in the Interlocal, the County remits the impact fees collected to the School Board on a quarterly basis. (Def. Ex. 2 at 15; Ex. 4 at 6).

When collected, the County retains records regarding the particular benefit district in which education impact fees are collected, and other various accounting records. These impact fees are separately accounted for from other revenue held by the County. (Def. Ex. 2 at 15). Once transferred to the School Board, the fees are separately accounted for by the School Board, but are not deposited and maintained in a separate account. (Tr. V.1 at 159-160). Fees are spent within the benefit district collected, unless otherwise approved by the School Board upon recommendation of the Superintendent. (Tr. V.2 at 23; Def. Ex. 2 at 13).

Administrative Fee

As set forth in the Education Impact Fee Ordinance and the Interlocal, the County and the School Board have agreed that the County will retain five percent (5%) of the education impact fee for administrative costs. The Clerk of Courts, a separate constitutional officer, also retains an additional five percent (5%) of the education impact fee for administrative costs. (Def. Ex. 2 at 15; Ex. 4 at 6). This amount is not an additional cost to permit holders, but is retained from the $3,726 education impact fee imposed. (Tr. V.3 at 126-27). The evidence reflected that the amount of the administrative fee is the same imposed on other County impact fees and was established at the time of the original adoption of the County's impact fee ordinance. (Tr. V.3 at 127).

Expert witness testimony was presented on the subject of the administrative fee by Dr. Fishkind. Dr. Fishkind testified that he reviewed the costs involved in the process, including costs relating to the accounting, analysis, and administration of the fee. (Tr. V.2 at 183). He further considered the salaries of the personnel involved, and their estimated efforts, as well as estimated costs for administering the program. (Tr. V.2 at 184). He identified a variety of administrative tasks, including clerical and communications support, the accounting of fees separate from other revenue and other accounting functions, the tracking of use of funds, the auditing/reporting on these functions, quarterly transmittal of fees, the costs involved in the adoption of the fees, and fixed costs including one time and annual costs. (Tr. V.2 at 184-86). Additionally, the various adoption functions in regard to the County's efforts constitute a significant cost. Dr. Fishkind noted that the administrative rates in smaller communities, such as Nassau County will be higher on a percentage basis than in larger communities and that the costs for administration will be higher where two independent bodies are both reviewing the fees. (Tr.

V2 at 186, 201). Dr. Fishkind concluded that the administrative fees retained by the County and the Clerk were within the norms he observed around the State and that in his opinion and experience, that the administration charge is reasonably related to the actual cost of administration. (Tr. V.2 at 187-88). Plaintiff presented no expert testimony in rebuttal of the expert opinions expressed by Dr. Fishkind set forth above.

Florida Impact Fee Act

In June 2006, the Legislature passed the first statutory provision regarding impact fees to provide certain minimum requirements for the adoption of an impact fee by ordinance, titled the Florida Impact Fee Act ("the Act"). § 163.31801, Fla. Stat. In general, the Act provides the following requirements:

> (a) Require that the calculation of the impact fee be based on the most recent and localized data.
>
> (b) Provide for accounting and reporting of impact fee collections and expenditures. If a local government entity imposes an impact fee to address infrastructure needs, the entity shall account for the revenues and expenditures of such impact fee in a separate accounting fund
>
> (c) Limit administrative charges for the collection of impact fees to actual costs.
>
> (d) Require that notice be provided no less than 90 days before the effective date of an ordinance or resolution imposing a new or amended impact fee.

§ 163.31801, Fla. Stat. (2006).

Additionally, in 2009, the Legislature amended the Act to add subsection (5) which provided as follows:

> (5) In any action challenging an impact fee, the government has the burden of proving by a preponderance of the evidence that the imposition or amount of the fee meets the requirements of state

> legal precedent of this section. The court may not use a deferential standard.

As a result of legal challenges, the Legislature readopted this provision in 2011.

In an effort to determine compliance with the Act, the County contacted the Florida Office of the Auditor General regarding whether the Act applied to an impact fee adopted by an Ordinance prior to the effective date of the Act. The response received from the Auditor General indicated it interpreted the Act as not applying until there was an amendment to the Ordinance itself. (Def. Ex. 16; Tr. V.3 at 134-35).

While the legislature enacted subsection (5) of the statute in 2009, such provision is procedural in nature and retroactively applies to SEDA's challenge of the 2005 Ordinance. See e.g., Shaps v. Provident Life & Accident Ins., Co., 826 So. 2d 250, 254 (Fla. 2002)(holding that "generally in Florida the burden of proof is a procedural issue") citing Ziccardi v. Strother, 570 So. 2d 1319, 1321 (Fla. 2d DCA 1990)("Burden of proof requirements are procedural in nature."); See also Walker v. Cash Register Auto Ins. Of Leon County, Inc., 946 So. 2d 66, 70-1 (Fla. 1st DCA 2006)(Finding "[i]n the absence of clear legislative intent that a law apply retroactively, the general rule is that procedural statutes apply retroactively and substantive statutes apply prospectively" (citations omitted) and applying only a subsection of a statute retroactively). Therefore, Defendants have the burden of proving by a preponderance of the evidence that the imposition or amount of the fee meets the requirements of state legal precedent.

Expenditure of Impact Fees by School Board for New Growth

The Education Impact Fee Ordinance specifically restricts the use of education impact fees by the School Board "solely to provide school facilities which are necessitated by new residential construction . . . and shall not be used for any expenditure that would be classified as an operating expense, routine maintenance, or repair expense." (Def. Ex. 2 at 16). Under the

ordinance, these fees can be used for the following specifically identified capital improvements: (1) costs of school sites; (2) school building costs; (3) relocatable classroom costs; (4) building contents costs; (5) costs of non-building improvements; and (6) costs of vehicles. (Def. Ex. 2 at 16).

In addition, the Education Impact Fee Ordinance provided that impact fees collected shall be returned to the fee payer or his successor in interest if the fees have not been spent within six (6) years from the date the building permit was issued, along with interest at the federal rate. This time period can be extended for up to three years by Resolution of the School Board upon a finding that specified capital improvements are planned and evidenced by the adoption and incorporation into a capital improvement plan, that the improvements are reasonably attributable to the fee payer's land development activity, and that the fees collected which have not been spent are committed for capital improvements which shall be constructed within the next three years. A refund process is specifically set forth in the Ordinance. (Def. Ex. 2 at 17-18).

Although growth in Nassau County was not as significant as predicted in the 2004 Study, growth in the community did occur, which had an impact on the school system and necessitated construction of additional capacity. For example, although three elementary schools were not built subsequent to the 2004 Study as predicted, new capacity was added to several existing elementary schools, including Callahan Elementary School, Hilliard Elementary School, Yulee Elementary School and Southside Elementary School . (Tr. V.1 at 62-63). Currently, the School Board also has a recommendation for a new elementary school in Yulee. (Tr. V.1 at 61-63). In the same vein, because growth was not as significant as predicted and less building permits were being pulled, the amount of impact fees collected for the construction of new capital improvements was also not as high as predicted. (Tr. V.1 at 61). Other revenue sources used by

the School Board for providing new capacity were also decreased significantly. (Tr. V.1 at 93; Tr. V.2 at 9-11).

To make certain that the impact fees were only utilized to fund growth needs, the School Board established certain baseline numbers regarding deficiencies in capacity at existing schools. (Tr. V.2 at 24). For example, Callahan Middle School was over capacity by 165 students in 2005. (Tr. V.1 at 212-13; Def. Ex. 13). When planning the use of impact fees for the provision of new student stations, the School Board staff, including the Superintendent of Schools, the Finance Director, and the Facilities Director, would analyze the planned student stations against existing deficiencies. In the example used above for Callahan Middle School, the School Board added 220 additional student stations in 2009. Because there was an existing deficiency of 165, the School Board contemplated only 55 of the additional student stations could be attributed to new growth and therefore funded by impact fees. (Tr. V.2 at 24-25). However, of these 55 student stations, the School Board actually used impact fees for only 39.12 student stations. (Tr. V.1 at 218-19).

Based on the evidence, the education impact fees have only been expended for capital improvements to serve new growth which has occurred since the adoption of the Education Impact Fee Ordinance in 2005 because the School Board took into account existing deficiencies when the impact fee program began. Further, Dr. Ruis specifically testified that the fees have been expended within 6 years of collection, as the Ordinance requires. (Tr. V.2 at 34-35).

The Plaintiff focused on the School Board's use of impact fee to partially finance the construction of Yulee High School, which was planned prior to the adoption of the Education Impact Fee Ordinance, as evidence of improper expenditure by the School Board. However, the evidence submitted clearly shows that the School Board properly accounted for existing

deficiencies in its expenditure of impact fees. Though Yulee High School was planned prior to 2005, its construction included new student stations, not only to address the deficiency but also new student stations to accommodate new growth. Of the 1391 new student stations added as part of this High School, approximately 800 of which are due to deficiencies at existing schools, impact fees only funded 59.57 of these student stations, and provided only 5.22 % of the total revenue for the Project. (Tr. V.2 at 28-30; Def. Ex. 13). The School Board noted significant growth in Yulee after August 2005 up through the time the High School was completed. (Tr. V.2 at 30-31). The weight of the evidence presented supports that the School Board properly expended the impact fees.

In all, since the adoption of the Education Impact Fee Ordinance, the School Board has spent close to $60 million in total from all revenue sources for capital projects where impact fees were used. Significantly, of the approximately $60 million total, the School Board could have spent approximately $20 million in impact fees, but only actually expended less than $8 million. (Tr. V.1 at 217; Def. Ex. 13). As explained by Dr. Ruis, and as confirmed by the above numbers, impact fees have never been intended to cover the full cost of growth, and are only sufficient to cover a portion of facilities necessitated by new growth. (Tr. V.1 at 217; V.2 at 33-34). In essence, impact fees merely supplement other available revenue for capital facilities. Because the fees are a limited resource, the School Board had to spread the benefit amongst separate Projects. (Tr. V.2 at 34).

The Court finds that the Defendants have met their burden of proving by preponderance of the evidence that the imposition and amount of the educational impact fee meets the requirements of Florida Statutes, Section 163.31801 and legal precedent.

Accounting of the School Board

The Education Impact Fee Ordinance, at 7-159(r), also contains a requirement that the School Board provide an "annual accounting" to the County, the City, and the Towns, in a report containing a summary of the school impact fees transferred to the School Board during the previous year and a detailed description of the uses and expenditures for which the net school impact fee revenue was expended during the preceding year. At a minimum the report shall contain the following:

> (1) The projects funded in whole or in part with the school impact fee funds;
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> (2) The location of the projects;
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> (3) The capacity in numbers of students served by the projects;
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> (4) The square footage of each project;
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> (5) The use of other funding sources; and
>
> (6) The ratio of existing need to the need created by new residential construction subsequent to the enactment of this Ordinance.

(Def. Ex. 2 at 16-17).

Gail Cook and Kathy Burns, both members of the Nassau County School Board since the inception of the Ordinance, both admitted that the School Board had never implemented any policy to comply with the above minimum reporting requirements set forth in 7-159(r) of the Ordinance. (Tr. V. 1 at 43 and 69). Ms. Burns testified that she was unaware if any report had been prepared in the format set forth in 7-159(r) of the Ordinance. (Tr.V.1 at 76). Defendants' expert witness, Dr. Henry Fishkind, testified that in all the Counties that he had assisted in determining impact fees, all had set policies and procedures in place to ensure that the pro rata share is expended properly. (Tr. V. 2 at 210).

Additionally, Susan Farmer, Director of Facilities for the School Board, testified that the School Board never attempted to comply with Section 7-159(r) until 2008. (Tr. V. 1 at 121). She further testified that in 2008 she only prepared a report that contained the information set forth in requirements 1 and 2 of Section 7-159(r). (Tr. V. 1 at 122). Dr. John Ruis, Superintendent of the School Board, confirmed that the School Board never put together a report that complied with Section 7-159(r) of the Ordinance until 2008. (Tr. V. 1 at 122). When asked about what reports were generated to comply with Section 7-159(r) he testified that the information required by the ordinance had been collected since August of 2005, and that documents exist where the number of permits and calculations of impact fees have been analyzed, but that such documents had not been requested in this case. (Tr. V. 2 at 45). None of the documents referred to by Dr. Ruis were produced at trial.

The only document presented to the Court that purported to comply with the requirements set forth in Section 7-159(r) was Defendant County's Exhibit 13. However, as noted on the face of the Exhibit it fails to include the information required by 7-159(r)(4)-(6). Most notably, in this case is the lack of documentation demonstrating the ratio of existing need to the need created by new residential construction subsequent to the enactment of this ordinance. Moreover, not one document supporting the requirements of Section 7-159(r) was tendered by the Defendants at trial.

Although the School Board admits that it did not provide all of the above information in one form submitted to the County since the inception of the education impact fee program, it maintains that the type of information required by the Ordinance was submitted to the County as part of other reports. (Tr. V.1 at 206-07; V.2 at 12). For example, as part of its State reporting requirements, the School Board is required to submit yearly a Facilities Five-Year Work

Program which contain, among other information, details on all of the School Board's capital improvements to add student stations. (Plf. Exs. 3, 4, 8, 9, 10, 11, 13, 14, 16, 23, 28). These five-year work programs were submitted to the County, as required by law.

In addition, beginning for the year 2008, the County began requesting accounting reports from the School Board, which the School Board has routinely provided since that time. (Def. Ex. 12). Dr. Ruis has, on one or two occasions, made a presentation to the County and provided the County with a thorough analysis of projects which were partially funded by impact fees. (Tr. V.1 at 208; Def. Ex. 13). There is no record evidence that the School Board ever refused to provide information to the County; however, it does not appear that the School Board made reasonable efforts to comply with the "annual accounting" requirement of the Ordinance, even though the County indicated it had no problem with being able to obtain the necessary back-up information from the School Board to provide oversight. (Tr. V.3 at 128-29).

The significance of the failure to provide annual accountings, in the format required by the Ordinance, is highlighted by the Defendants' own acknowledgements that the economy had taken a downturn as far as new residential construction and that as a result in 2008 the Nassau County School system actually lost students in some areas and that there were only minimal increases in other areas. (Tr. V. 1 at 53). Despite this, Board member Gail Cook made no recommendation to update the educational impact fee. Id. She further testified that she did not know that the impact fee should be updated periodically until her deposition in this case. Id. at 52.

Similarly, School Board member Kathy Burns testified that she was aware that growth in Nassau County began declining as early as 2008. (Tr. V. 1 at 53).

The 2004 Report identified that the total enrollment at Nassau County's schools in 2004-2005 was 10,474 and that the schools at that time were presently over capacity by 931 students. (Defendant County's Exhibit 6, section 2.2). The 2004 Report projected that over the next 10 years enrollment in the Nassau County school systems enrollment would be 13,460, representing an increase of 2,986 students. Id. However, as of 2011-2012 the enrollment in the Nassau County school system was only 11,078 evidencing growth of only 604 students. (Defendant County's Exhibit 7, section 5.0). Susan Farmer, Director of Facilities for the School Board, testified that even though the enrollment numbers were not keeping up with the projected growth, she was never asked to prepare any analysis regarding possibly reducing the educational impact fee. (Tr. V. 1 at 159).

The Court also heard testimony from Tom Ford, Chairman of the Planning and Zoning Board for Nassau County for 15 years. (Tr. Vol. 2 at 60). Mr. Ford testified that he believed the growth in Nassau County began to decline in 2006. Id. at 62. Mr. Ford was on the impact fee task force for Nassau County and testified that he was concerned that educational impact fee imposed in 2005 had not been changed in 6 years. Id. He further testified that letters were written requesting the School Board to consider a moratorium as there was no growth in Nassau County. Id. at 61.

Dr. Ruis, School Board Superintendent, testified that one of the reasons he did not want to relinquish educational impact fees was due to the recession and loss of other revenue sources for the School Board. (Tr. Vol. 1 at 231 and 233).

The Court also heard testimony from Theodore Selby, the Nassau County Manager. Mr. Selby testified that Nassau County did not perform a semi-annual review as required by Section 7-155(b) of the Ordinance and no document exists regarding the review. (Tr. V. 3 at 142-143).

Thus, the evidence presented at trial demonstrated that the County failed to comply with the terms of its own ordinance. It did not review on a semi-annual basis the education impact fees as required by Sec. 7-155(b) of the Ordinance. Such a review would have permitted adjustment of the fees based upon actual growth and increases or decreases in capital costs of providing governmental services to accommodate new growth. The School Board likewise failed to deposit the education impact fees in a separate trust account. Besides commingling the education impact fees with general revenues, the School Board failed to establish and implement necessary accounting controls to ensure that all education impact fees were properly deposited, accounted for, and appropriated in accordance with the Ordinance and legal requirements. Similarly, the School Board failed to provide the annual accounting report containing the six (6) minimum requirements identified in Sec. 7-159(r) of the Ordinance.

Defendants, however, assert that the School Board substantially complied with the accounting reporting requirements specified in Sec. 7-159(r) through a variety of separate other documents. Nevertheless, the School Board did not provide such information on an annual basis as required. At no time did the School Board provide a report identifying the "the ratio of existing need for capital improvements to the need created by new residential construction" as directed by the Ordinance. Reference was made that other documents may contain the information required by Sec. 7-159(r) such as the Facilities Work Program. However, Cris McConnell, Director of Facilities for the Nassau County School Board conceded that the Facilities Work Program does not identify projects being funded by impact fees nor the key requirement of the ratio of existing need to the need created by new residential construction. (Tr. Vol. 3 at 24-25).

The Plaintiff argues that the School Board also unreasonably delayed in reviewing the continued need for educational impact fees and in seeking an adjustment to the amount of the fees. Even though it was evident that new residential construction had substantially declined due to the economy, the Defendants continued collecting $3,726 for educational impact fees upon the issuance of each building permit.

In 2011, the School Board engaged Fishkind & Associates to update its earlier report on educational impact fees. This decision was made for several reasons including that it had been several years from the prior impact fee report; there had been a decrease in revenues from all sources that are used by the School Board for capital facilities; and the School Board received both formal and informal inquiries from the Board of County Commissioners regarding the Educational Impact Fee. (Tr. V. 1 at 229-30; V.2 at 16). The 2011 Nassau County School Impact Fee Study ("2011 Study") was completed November 7, 2011 and employed a nearly identical methodology as utilized in the 2004 Study. (Def. Ex. 7; Tr. V.2 at 177). The 2011 Study determined that a flat rate fee of $3,268 was justified, which amounted to $458 less than the original rate of $3,726. The 2011 Study also determined impact fee rates by dwelling unit in the following amounts: $3,509 for Single Family; $1,885 for Multifamily; and $3,903 for Mobile Homes.

Plaintiff contends that the length of time for the update to the impact fee study was too long and inappropriate. However, the unrebutted expert witness testimony provided that the time period for the update in this case was reasonable and appropriate for a calculation based on the methodology utilized. (Tr. V.2 at 156, 181). Further, the determination as to when an update should be conducted is necessarily dependent upon the judgment of the enacting entity. That

determination shall not be set aside absent a clearly arbitrary decision. That is not present in this case.

The 2011 Study was considered in March of 2012 by the School Board, and a resolution was passed requesting the County modify the education impact rates to adopt the Flat Rate of $3,268 as calculated in the Study. On January 13, 2014, the County adopted Resolution 2014-005, which amended the education impact rate to $3,268 for all dwelling types. (Tr. V.3 at 131-32; Def. Ex. 8). The County Manager, Ted Selby, explained that the County did not immediately act on this reduction in rates because an ongoing review was being conducted on all of the County's impact fees and the County sought to take action on all of the various fees at one time. (Tr. V.3 at 131). Selby testified that this resulted in a longer delay than anticipated, and that the County is preparing to take action to address the difference. (Tr. V.3 at 132).

Plaintiff argues that the Court should find that that the Defendants wholly disregarded their respective obligations under the terms of the Ordinance. In this light, it should be noted that that no deference can be given to municipal legislative action if it is shown that "fraud, corruption, improper motives or influence, plain disregard of duty, gross abuse of power or violation of law enter into and characterize the result." *Town of Riviera Beach v. State*, 53 So. 2d 828, 831 (Fla. 1951) (citation omitted); *see also Webster v. N. Orange Mem'l Hosp. Tax Dist*., 187 So. 2d 37, 42 (Fla. 1966); S*anta Rosa Island Auth. v. Pensacola Beach Pier, Inc*., 834 So. 2d 261, 262-63 (Fla. 1st DCA 2002) (citing *Liberty Cnty. v. Baxter's Asphalt & Concrete*, 421 So. 2d 505 (Fla. 1982)); *State v. City of Daytona Beach*, 158 So. 2d 300, 305 (Fla. 1934).

While the Court does find that the Defendants failed to comply with the requirements of the Ordinance, it does not find that such failure was the product of fraud, corruption, improper motives or influence, plain disregard of duty, or a gross abuse of power or violation of law, or

that these procedural irregularities in any way denied the Plaintiff due process. Irregularities in carrying out specific acts do not render such acts invalid or void, so long as constitutional guarantees are not denied. *Whitman v. City of North Miami*, 223 So.2d 105 (Fla. 3d DCA 1969); *Rinker Materials Corporation v. Town of Lake Park*, 494 So.2d 1123 (Fla. 1986).

Plaintiff's Education Impact Fee Payments

Plaintiff is a builder of single-family homes, including primarily speculative houses, as well as some custom homes. (Tr. V.3 at 55-56). The County presented evidence that Plaintiff has paid a total of $1,325,540 in education impact fees to the County since April 13, 2006, which is four years prior to the filing of the original complaint. (Def. Ex. 11; Tr. V.3 at 135-36). Although Plaintiff presented some conflicting evidence on amounts of impact fees paid to the County, most of this difference is based on the time period reviewed and that it includes payments to the City of Fernandina Beach. These amounts are not collected by the County, and the City is not a party to these proceedings.

John Seminik, owner of Plaintiff, testified that Plaintiff paid the education impact fees for many of the houses it built in Nassau County since 2005 at the time of permitting. Because many of these were speculative houses, Plaintiff would build the homes, and sell them on the market after construction. As a result, Seminik testified that because Plaintiff took the risk and paid the carrying costs for many of the homes it built, it was his belief that Plaintiff did not receive a "reimbursement" for the impact fees from the ultimate purchaser of the home. (Tr. V.3 at 73). However, Seminik did admit that this was taken into account in figuring up the costs of the home which are used to determine profit of Plaintiff. (Tr. V.3 at 75).

Seminik also acknowledged a separate lawsuit which was filed by Plaintiff against Nassau County shortly after the adoption of the education impact fee arguing that the impact fee

was an impairment of contract with regard to contracts Plaintiff had entered into prior to the passage of the Ordinance. Significantly, the Complaint for this prior lawsuit specifically alleged that Plaintiff's contracts with customers had been impaired at the time of the adoption of the fee, as it was unable to "contractually charge the $3,726 Education Impact Fee to their customers and thus were obligated to pay the fee themselves." The Complaint further alleged that Plaintiff "would have increased each contract for the construction of a residence by at least $3,726 if they were aware of the Impact Fee Ordinance at or before the time of contracting." (Def. Ex. 21 at 5-6). Seminik acknowledged that he believed these statements to be true at the time the lawsuit was filed, and also that Plaintiff received a settlement payment in that lawsuit. (Tr. V.3 at 83, 85).

In considering the testimony as a whole, the Court finds that Plaintiff sought to and was able to pass on its costs of education impact fees to homebuyers on a significant number of homes for which these fees were paid. Plaintiff failed to establish the extent of fees allegedly paid by Plaintiff that actually had been reimbursed by the customer. The Court rejects the testimony by Mr. Seminik that Plaintiff was never "reimbursed" these fees. In addition, Dr. Fishkind, who has also been active in the home building business, provided testimony that impact fees generally will be included in the price of a home, and these types of costs are ultimately passed by the builder to the homeowner. (Tr. V.2 at 182).

Finally, the evidence as a whole supports a determination that in the imposition, collection and expenditure of the education impact fee, while the County and the School Board have failed to comply in some respects with the Ordinance, they have acted in good faith.

CONCLUSIONS OF LAW

Legal Requirements for Validity of Impact Fees

Impact fees are charges imposed against new development to provide for the cost of capital facilities made necessary by that new development. The purpose of the charge is to impose upon the newcomers, rather than the general public, the cost of new facilities necessitated by their arrival. See City of Dunedin v. Contractors & Builders Ass'n of Pinellas County, 312 So. 2d 763, 766 (Fla. 2d DCA 1975) quashed on other grounds, 329 So. 2d 314 (Fla. 1976); Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th DCA 1983).

Impact fees are a product of a local governments' home rule powers and are imposed in conjunction with their power to regulate land use and their statutory responsibility to adopt and enforce comprehensive planning. Impact fees are further justified under the police and proprietary powers of local governments. See Art. VIII, Section 2, Fla. Const.; City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801, 805 (Fla. 1972); Wald Corp. v. Metro. Dade County, 338 So. 2d 863, 868 (Fla. 3d DCA 1976). As the development of the requirements for a valid impact fee has been through the exercise of local governments' home rule powers, their characteristics and limitations are derived from Florida case law.

As developed under state legal precedent, a valid impact fee must meet the "dual rational nexus" two-prong test. First, there must be a reasonable connection or rational nexus between the anticipated need for the additional capital facilities and the growth in population. Second, there must be a reasonable connection or rational nexus between the expenditure of the impact fee proceeds and the benefits accruing to the growth that paid those proceeds. See Hollywood, Inc., 431 So. 2d at 611-12; see also St. Johns County v. N.E. Fla. Builders Ass'n, 583 So. 2d 635, 637 (Fla. 1991).

Under the first prong of the dual rational nexus test, the needs are sufficiently attributable to new development when the need for additional capital facilities is rationally related to the growth generated by that development. See Hollywood, Inc., 431 So. 2d at 611. Under the second prong of the dual rational nexus test, a valid impact fee must exhibit a reasonable connection or rational nexus between the expenditure of the fees collected and the benefits accruing to the new development. See id. at 611. The second prong of the dual rational nexus test is partially met when ordinances or resolutions specifically earmark the fees collected to benefit the new residents by the construction of capital facilities. Id. at 612. See City of Dunedin, 312 So. 2d at 766. Furthermore, under the second prong, local governments may not use proceeds for operation and maintenance expenses; the fees must be expended for capital projects.

Impact fees are sufficiently "earmarked" when the ordinances or resolutions relating to their imposition, collection, and administration expressly limit the use of the fee revenue to meeting the costs of the improvements. Applying the two-prong dual rational nexus test, Florida courts have upheld impact fees imposed by local governments for a variety of capital projects. *See*, *Baywood Construction, Inc. v. City of Cape Coral*, 507 So. 2d 768 (Fla. 2nd DCA 1987) (water and sewer capital expansion fee); *City of Dunedin v. Contractors & Builders Ass'n of Pinellas County*, 358 So. 2d 846 (water and sewer impact fees); *St. Johns County v. N.E. Florida Builders Ass'n*, 583 So. 2d 635 (Fla. 1991) (educational facilities impact fee); *City of Ormond Beach v. County of Volusia*, 535 So. 2d 302 (Fla. 5th DCA 1988) (county road impact fees); *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. 4th DCA 1983) (park expansion impact fee); *Home Builders & Contractors Ass'n of Palm Beach County, Inc. v. Palm Beach County*, 446 So. 2d 140 (Fla. 4th DCA 1983) (county road impact fees).

Legal Validity of the Nassau County Education Impact Fee

The Defendants have established by a preponderance of the evidence that the education impact fee, including the amount of the fee, is valid, and meets the applicable requirements of law. First, the education impact fee imposed by the County for the benefit of the School Board satisfies the requirements of the dual rational nexus test. The education impact fees were calculated based on a study produced by an expert consultant with a substantial background in the subject matter, and which follows methodology specifically approved by the Florida Supreme Court to calculate the amount of the fee. See St. Johns County v. N.E. Florida Builders Ass'n, 583 So. 2d 635 (Fla. 1991). In addition, the fees are collected on residential development county-wide, and generally applied in the benefit district from which they are collected.

Further, the data underlying the Study was appropriately used. Plaintiff argues that the calculation of the fees was inappropriately performed because the consultant used data from Lake County to perform a portion of the study, and therefore, did not use the most recent and localized data. The unrebutted expert testimony on this subject does not support Plaintiff's position. It is reasonable and appropriate to use this alternative and comparable source of information where no sufficient localized data exists and there was no showing that the data was inaccurate or inappropriate.

Plaintiff's argument that there was no "need" for the education impact fee at the time it was proposed because of the availability of other revenue sources of the School Board to fund capital facilities necessitated by new growth is unconvincing. Impact fees allocate the cost of needed infrastructure to new development which has caused the need for these new facilities. There is no requirement that impact fees be a revenue of "last resort" which requires that a local government may only impose them only after a showing that all other revenue sources would be

insufficient. Rather, impact fees are a legally permissible way to allocate the cost to new growth to pay its fair share of capital facilities necessitated by such growth. Impact Fees are just one "tool" a local government can use at its legislative discretion to meet its capital needs, so long as the fees are collected and expended in combination with the appropriate legal standards. As such, the policy decision of the County to impose education impact fees is not subject to judicial review.

Expenditures of Education Impact Fees

Plaintiff argues that the education impact fees collected by the County have not been properly expended by the School Board on the basis that impact fees were used to construct Yulee High School, which the record reflects was contemplated and planned prior to the imposition of education impact fees. Plaintiff argues that by using impact fees for this project, they were inappropriately used to fund a deficiency. However, that argument is not supported by the evidence. The School Board properly accounted for prior deficiencies prior to making expenditures from impact fees, using 2005 baseline numbers from the imposition of the impact fee ordinance. Only 5.22% of the total revenue used for the Yulee High School Project came from impact fees, and there is no showing that these were not proper expenditures to provide space for new growth within that facility. Plaintiff has failed to make any showing that impact fees were improperly expended on Yulee High School, or on any other project of the School Board since the imposition of the impact fee.

Accounting of the School Board

The Plaintiff asserts that the School Board did not make an annual accounting to the County as required by Section 9(r) of the Ordinance but has failed to offer any evidence as to how SEDA was prejudiced by the School Board's alleged failure to provide the required report.

First and foremost, the School Board's alleged failure to comply with the accounting requirement set forth in the Ordinance had absolutely no bearing on the validity of the education impact fee itself. To the extent there is any deficiency in the reporting of the School Board to the County, this is a matter between the County and the School Board. No private cause of action is created which would allow a private entity, such as SEDA, to enforce this accounting provision. *Horowitz v. Plantation Gen. Hosp. Ltd. P'ship,* 959 So. 2d 176 (Fla. 2007).

The Plaintiff also places "form over substance" with regard to this allegation. The testimony at trial revealed that School Board personnel submitted a five-year work plan to the County and other municipalities each year. This work plan included information required by the ordinance such as the number of existing student stations, the projects that were to be constructed, the funding sources for those projects, the square footage of each project, the costs per student station, and the anticipated student generation over the next five-year period. Moreover and over the course of the last four years, the School Board and the County have held joint meetings in which the information required by the Ordinance was presented.

The trial testimony also established that beginning in 2008, the School Board's staff provided the County Manager with information pertaining to the revenues which were collected, the projects for which impacts fees were expended, and the location of those projects. The School Board substantially complied with the reporting requirements set forth in the Ordinance and provided the County with all necessary information which the County needed to perform its oversight functions.

The five-year work plan, which was submitted to the County and other municipalities each year, included information pertaining to the number of existing student stations, the projects that were to be constructed, the funding sources for those projects, the square footage of each

project, the costs per student station, and the anticipated student generation over the next five-year period. (Trial Tr. Vol. 3, 23-24). There is no evidence that the School Board ever refused to provide the requisite information to the County.

Failure to Maintain Separate Account

Plaintiff also argues that the Defendants violated the Ordinance by failing to establish and maintain a separate Educational Impact Fee Trust Account to deposit the educational impact fees. The Court agrees that this was a violation of the Ordinance. However, the Plaintiff has failed to show how it was damaged by such failure or was in any way prejudiced by this failure. As with the accounting requirement discussed above, the Court finds that this, too, is a matter between the County and the School Board. No private cause of action is created which would allow a private entity, such as SEDA, to enforce this provision. *Horowitz v. Plantation Gen. Hosp. Ltd. P'ship,* 959 So. 2d 176 (Fla. 2007); *Whitman v. City of North Miami,* 223 So.2d 105 (Fla. 3d DCA 1969); *Rinker Materials Corporation v. Town of Lake Park,* 494 So.2d 1123 (Fla. 1986).

Amount of the Administrative Fee

Plaintiff contests the amount of the administrative fee paid to the County for its services in administration of the education impact fee. In reviewing the administrative functions involved, it is important to recognize that there are dual responsibilities between the Office of the Clerk of the Court, who is an independent constitutional officer, and the County. In reviewing the Ordinance, the County is required to perform numerous functions for the implementation, monitoring and regulation of the impact fees. Initially, there are significant expenses involved in the implementation of any impact fee which will involve numerous employees and officials. These include the review and analysis of the study, the preparation of the various ordinances and

resolutions, and the numerous workshops and public hearings of the Planning Commission and Board of County Commissioners, all of which fall clearly within the purview of the administrative costs borne by the County and the Clerk. Once adopted, there are significant costs involved in the collection, recording, monitoring and transmittal of the impact fees to the Clerk and ultimately to the School Board. The Clerk has similar processing costs related to the fee. Generally, in the determination of the amount of administrative fees, the determination of the legislative body in establishing the amount controls. See Stratton v. Sarasota County, 983 So. 2d 51 (Fla. 2d DCA 2008). In this case, the Ordinance expressly authorizes the retention of 5% by both the Clerk and the County to offset their costs.

Further, the administrative fee has no bearing on the amount paid, but rather are deducted from the gross amount of the fee. Therefore, Plaintiff pays exactly the same amount regardless of the administrative charge. The administrative charge is agreed upon by the collecting entities, including the County, and the School Board, through written agreement. The evidence establishes that the fee is reasonable and is related to the actual cost of the service provided. There is no evidence to the contrary.

The County's education impact fee is valid and meets all requirements of law.

NOW THEREFORE, it is Ordered and Adjudged as follows:

1. Final Judgment is entered on behalf of Defendants, Nassau County and Nassau County School Board, and against Plaintiff SEDA Construction Company on each and every claim asserted. Defendants, Nassau County and Nassau County School Board, shall go hence without day.

2. The Court reserves jurisdiction for such other relief as requested.

DONE AND ORDERED in Chambers at Fernandina Beach, Nassau County, Florida, this

____15___ day of ___April_____, 2014.

ORDER ENTERED
April 15, 2014
/s/ Wesley R. Poole

_____

WESLEY R. POOLE
Acting Circuit Judge

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