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MEMORANDUM

TO: Board of County Commissioners

FROM: Maite Azcoitia, Deputy County Attorney /s/ *Maite Azcoitia*

DATE: July 29, 2020

RE: **Ordinance Amending Section 5-182.9 of the Broward County Code of Ordinances Related to School Impact Fees**
CAO File: 41005-0002

The proposed Ordinance was drafted at the direction of the Board of County Commissioners ("Board") at its meeting of October 15, 2019. Our Office was also asked to address several questions regarding the proposed Ordinance as related to Chapter 2019-106, Laws of Florida, commonly referred to as House Bill ("HB") 7103. This memorandum will summarize the amendments contained in the proposed Ordinance and respond to the questions of the Board.

Section 163.31801, Florida Statutes, the "Florida Impact Fee Act," recognizes impact fees as an important source of revenue for a local government to use in funding infrastructure necessitated by new growth. HB 7103 amended the Florida Impact Fee Act to codify the U.S. Supreme Court's "dual rational nexus" test; i.e., the impact fee or exaction must be proportional and reasonably connected to, or have a rational nexus with, the need for additional capital facilities and the increased impact generated by the new construction; and must also be proportional and reasonably connected to, or have a rational nexus with, the expenditure of the funds collected and the benefits accruing to the new construction. HB 7103 added a requirement that impact fee funds be specifically earmarked for use in acquiring, constructing, or improving capital facilities to benefit new users and authorized the use of impact fee revenues to pay existing debt or for previously approved projects, provided the expenditure is reasonably related to, or has a rational nexus with, the increased impact generated by the new development.

Section 5-182.9 of the Broward County Code of Ordinances, the "Land Development Code," sets forth the processes for addressing public school concurrency and establishes student generation rates and school impact fee amounts to be paid by developers of residential development to provide for the educational needs of the residents of the new dwelling units. On August 6, 2019, the School Board of Broward County ("School Board") adopted Resolution No. 20-03, which recommended that Broward County amend the

student generation rates and school impact fees consistent with the Broward County Public School Student Generation Rate and School Impact Fee Study Update prepared by Tindale Oliver and dated July 23, 2019 ("Update"), as modified by the School Board. Specifically, the School Board recommended that all impact fee increases be capped at forty-nine percent (49%) of the existing fee. The proposed Ordinance amends Section 5-182.9 of the Land Development Code consistent with the recommendation of the School Board.

Section 5-182.9(b)(6) of the Land Development Code divides the County into four (4) service areas for purposes of public school concurrency and establishes a nonlapsing trust fund account for each area for the deposit of school impact fee monies. Pursuant to the Third Amended and Restated Interlocal Agreement for Public School Facility Planning among Broward County, the School Board, and twenty-seven (27) municipalities, expenditure of funds within each account is at the discretion of the School Board consistent with the School Board's Adopted Five-Year District Educational Facilities Plan ("DEFP"). The proposed Ordinance replaces the four (4) concurrency service areas with seven (7) planning areas and provides for the establishment of a nonlapsing trust fund account for each of the seven (7) planning areas. The seven (7) planning areas are also used by the School Board for its school concurrency analysis.

The proposed Ordinance also requires that school impact fee monies be expended at the schools impacted by the residential development. If it is not feasible to do so and the second prong of the dual rational nexus test continues to be met, school impact fee monies may be expended within the applicable planning area or within an adjacent planning area. The proposed Ordinance includes language from HB 7103 that allows the School Board to leverage school impact fee monies to pay for existing and new debt service or for previously approved projects, provided there is a reasonable connection to, or a rational nexus with, the expenditure of the collected school impact fees and the benefits accruing to the new residential development.

Section 163.31801, Florida Statutes, requires that notice of ordinances that increase impact fees must be provided no less than ninety (90) days before the effective date of the ordinance. Accordingly, if enacted, the proposed Ordinance will become effective on January 1, 2021.

The Board asked several questions when this topic was discussed on October 15, 2019. Those questions are answered as follows:

May school impact fees collected be used for renovating existing educational facilities?

No, the Florida Impact Fee Act requires that impact fees must be used to fund new or expanded capital facilities necessitated by the new development.

May school impact fees collected be used to reimburse the School Board for previously approved educational facilities and debt service?

Yes, HB 7103 authorizes school impact fee revenues to be used to pay existing debt or for previously approved projects where the expenditure is reasonably connected to, or has rational nexus with, the increased impact generated by the new development.

Does the Land Development Code apply school impact fees uniformly across the County? If so, should it be applied uniformly, given that some schools in western Broward County are at or over capacity and some schools in eastern Broward County are under capacity?

School impact fees are uniformly applied throughout Broward County. School impact fee studies indicate that the number of students generated by a dwelling unit is dependent on the residential dwelling unit type and not the location of the dwelling unit. This methodology for calculating student generation rates and associated impact fees was approved by the Florida Supreme Court in *St. John's County v. Northeast Florida Builders Association, Inc.*, 583 So. 2d 635 (Fla. 1991). Further, in order to meet the second prong of the dual rational nexus test that the expenditure of school impact fee monies be rationally related to the benefits accruing to the new residential units, the Court held that impact fees must be applied uniformly throughout the County.

Article IX, Section 1 of the Florida Constitution requires the provision by law for a uniform system of free public schools that meets the required needs. While charter and private schools have reduced the number of students attending public schools which has resulted in some public schools being under capacity, school impact fee ordinances may not provide for a waiver or reduction of school impact fees in such areas. In *St. John's County*, the school impact fee ordinance exempted homeowners who warranted that their children would attend private schools but agreed to pay later if their children switched to the public school system. The Court held that such a provision would turn the fee into a user fee, violative of the Florida Constitution's guarantee of free public schools. Further, the Court stated that there is no requirement that every new unit of development benefit from the impact fee in the sense that there must be a child residing in each unit who will attend public school. It is enough that new public schools are available to serve each unit of development.

If Broward County enacts the proposed Ordinance and is thereafter sued regarding the Ordinance and loses, who is ultimately responsible for paying?

If an action is brought challenging the impact fee Ordinance itself, Broward County would be responsible for defending the action and any associated liability. However, given the holding in *St. John's County*, we believe such an action is unlikely to be successful.

If an action is brought related to the collection or expenditure of school impact fee monies, the School Board could be contractually obligated to defend and indemnify Broward County in such action. In 1982, Broward County and the School Board entered into an "Agreement Relating to Educational Impact Fee Monies" that provides for the County's collection and remission of school impact fee monies to the School Board, to be spent by the School Board to substantially benefit the residents of the new development ("1982 Agreement"). The 1982 Agreement requires the School Board to actively defend Broward County from any claims related to the collection of school impact fees.

An item will be brought before the Board on September 10, 2020, for consideration of an Agreement that supersedes and updates the 1982 Agreement consistent with the proposed Ordinance and the requirements of HB 7103. The proposed Agreement provides for: (i) the School Board's expenditure of school impact fee monies for the acquisition or leveraging of school sites or facilities, as identified in the DEFP, to substantially benefit the residents of the planning area where the monies were collected or an adjacent planning area; (ii) the School Board's submission of an annual report specifying the School Board's receipts and expenditures of school impact fee monies by site and planning area; (iii) the County's right to inspect the School Board's financial records and account books relating to school impact fee monies; and (iv) the School Board's defense and indemnification of Broward County in any action brought as a result of an intentional, reckless, or negligent act or omission of the School Board in connection with the Agreement.

AJM/MA/gmb

- c: Bertha Henry, County Administrator
Bob Melton, County Auditor
Leonard Vialpando, Director, Environmental Protection and Growth
Management Department
Andrew J. Meyers, County Attorney