

Impact fee refunds remain legal issue for Indian River County

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INDIAN RIVER COUNTY — Indian River County is entangled in complicated legal and accounting questions related to impact fee refunds, and is facing the prospect of at least one multi-million-dollar lawsuit.

To help the County Commission navigate murky legal waters surrounding the issue, County Attorney Alan Polackwich earlier this summer began a comprehensive survey and analysis of every statute, regulation and court decision in the State of Florida having to do with impact fees.

After compiling and carefully studying thick binders full of the most relevant documents, Polackwich now has concluded that review and completed the first draft of a legal opinion he will provide to commissioners to help them decide what to do with \$1.15 million in Fund 101, the most pressing impact fee question.

"After looking at everything out there, I am leaning toward the conclusion that, from a legal standpoint, those who say that the law requires us to refund the money have some reasonably good arguments. But at the same time, I think there are some reasonably good arguments on the other side," Polackwich said. "From a county attorney standpoint, if the board wants me to defend keeping the money, I am prepared to do that and I will give it my best. But they should understand this is not an easy case from the county's perspective and they could lose it."

The money in Fund 101 is left over from impact fees the county collected prior to 1999 to improve infrastructure on the barrier island between Beachland Boulevard and the south county line.

County Finance Director Jason Brown and Planning Division Director Bob Keating believe no refunds are owed because the period in which homeowners could apply to get the money back has passed and because most of the money was spent to upgrade island infrastructure.

The county's impact fee ordinance, written in 1986, says that unless fees are spent within six years to upgrade infrastructure in the district where they were collected fee-payers have a one-year window to apply for a refund. That window closed in 2006 with no applications made.

What's more, according to Brown, all but \$150,000 of the money originally collected has been spent on upgrades; the rest of the cash left in Fund 101 is interest earned on fees that were properly expended.

Charlie Wilson, president of Asset Research and Recovery, who is leading the charge to have Fund 101 money returned to homeowners, said Brown is making an artificial distinction.

He believes the impact fees and interest earned on them are indivisible and the entire \$1.15 million belongs to those who own property on which the fees were imposed.

Polackwich said confusion on the issue results from an unclear body of law.

"The oddity of impact fees in Florida is that while they began in the early 1970s, and court cases started showing up in the mid-70s, the Legislature did not pass an impact fee law until 2006.

That legislation, The Florida Impact Fee Act, consists of one page. It doesn't tell us a lot," he said.

Polackwich explained impact fees are created under general home-rule powers and what is and is not allowed is really a product of court cases.

"The way it worked, a county would pass an impact fee ordinance, developers would challenge, it would go to court, and the court would say whether it was valid, wholly or in part," Polackwich said.

The first major court decision came from the Florida Supreme Court in Contractors and Builders Association of Pinellas County et al. v. City of Dunedin in which the contractors argued that impact fees amounted to an unconstitutional tax.

The court sided with the municipality saying if the money was spent to benefit those who paid the fees, it was not a tax.

Polackwich said by the mid-80s, judicial decisions had "pretty much crystallized what the courts would allow and wouldn't allow in the imposition of impact fees."

But he said a major gap in the law remains.

"All the law deals with is the front end - with what constitutes a legitimate impact fee," he said.

"The courts never got around to ruling on refunds. There is not one case out there."

When Polackwich realized there was nothing on the books to "easily and specifically answer Wilson's questions," he launched his research project to clarify the issue.

"It is a tough question and a publicized question and I know I am going to be challenged no matter where I go with it, so I want to do the very best I can," Polackwich said. "The best I can do in this case is literally learn the entire area of law."

Polackwich said he and his staff tracked down every Florida court case and statute that mentions impact fees.

Because there is no case law on impact fee refunds, he had to try and divine the general principles courts had relied on in other impact fee decisions.

He also looked at cases not specifically related to impact fees but dealing with the rights of citizens to collect other types of refunds.

"For me, the question starts to be how would a court look at what we are doing here? I have tried to develop and weigh the legal arguments on both sides to see if a court be comfortable with our refund process."

Polackwich found that, in general, courts have supported the idea of a limited-refund period because "people are charged with knowledge of the law."

At the same time, he said there is an overriding requirement for a reasonable refund mechanism that actually refunds.

"If you don't have that, maybe it is a meaningless refund mechanism that is equivalent to having no refund process at all," Polackwich said.

He plans to deliver his detailed opinion to the County Commission at its Sept. 13 meeting.

Along with addressing the Fund 101 issue, Polackwich's new expertise could come in handy dealing with future impact fee refund requests and court cases, including Miami Lakes LLC vs. Indian River County. The \$4 million lawsuit is scheduled for trial next March and involves a developer suing for refund of impact fees paid for a subdivision that was never built.