STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VOLUSIA HOME BUILDERS ASSOCIATION, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 05-1507RU
VOLUSIA COUNTY SCHOOL BOARD,	)	
Respondent.	)	

FINAL ORDER

Administrative Law Judge Don W. Davis of the Division of Administrative Hearings ("DOAH") held a final hearing in the above-styled case on July 27, 2005, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Respondent's January 26, 2005 school board vote, adopting the recommendation of Respondent's Superintendent that a set, single impact fee amount be imposed by the Volusia County Council (the equivalent of the county commission in non-chartered counties) on newly constructed housing in Volusia County, constituted a rule or rule amendment without satisfying applicable due process requirements of Section 120.54(1)(a), Florida Statutes, since Respondent's existing policy determines the impact fee amount through the impact fee calculation report (defined in Section 70-171 of the Volusia County Ordinance Code as the Volusia County School Impact Fee Update Final Report dated December 2004, prepared by Tindale-Oliver & Associates, Inc., and approved by Respondent) which proposed the adoption of a varying impact fee amount for different types of housing.

PRELIMINARY STATEMENT

Petitioner, through its counsel, filed a Petition for Determination of Unadopted and Invalid Rule on April 25, 2005.

By motion filed May 10, 2005, Respondent sought dismissal of the Petition on the basis that Petitioner lacked standing. On May 25, 2005, Petitioner filed a Response to Respondent's Motion to Dismiss. The Motion to Dismiss was denied on May 26, 2005, and the case proceeded to final hearing as scheduled.

At the final hearing on July 27, 2005, Respondent's Motion in Limine was granted in part and this matter proceeded to final hearing on the sole issue of whether the action of the Respondent in approving agenda item 16 during a meeting of its members on January 26, 2005, constituted rulemaking. If so, Respondent concedes that the procedural requirements for rulemaking were not observed.

At the final hearing, Petitioner presented the testimony of Bob Fitzsimmons, Susan Darden, Robert B. Wallace, William C. Kelly, Jr., and the expert testimony of Mark D. Soskin, Ph.D. Respondent presented the testimony of Richard A. Kizma. Petitioner's Exhibits 1-5 were received into evidence. Respondent's Exhibits 1-8 were received into evidence.

A transcript of the final hearing was filed with DOAH on August 17, 2005. Each party timely submitted a proposed final order. A review of these post-hearing submittals has been completed and utilized, where practical, in the composition of this Final Order.

Absent a contrary indication, citations to Florida Statutes refer to the 2004 edition.

FINDINGS OF FACT

1. Petitioner is a not-for-profit corporation, consisting of about 600 builder and associate members. Petitioner's members are affected by market fluctuations in the home

construction industry. Purposes of the corporation with respect to governmental affairs are to forward, or promote, the industry and the values and goals of the industry. Petitioner has specifically taken an active position with respect to the adoption of school impact fees within Volusia County. Petitioner regularly surveys its members and determines their reaction to existing and proposed ordinances and regulations.

2. Testimony of Bob Fitzsimmons, past president and governmental affairs committee chair of the Petitioner, and Sue Darden, executive director of the Petitioner, establishes that members of the Petitioner have been affected by the action of Respondent challenged in this case. A substantial number of members have absorbed the cost of increased school impact fees, while other members have raised prices or found nearby counties to be more attractive to their potential customers.

3. Dr. Mark Soskin, an associate professor of economics at the University of Central Florida, opined that members of Petitioner are affected by increases in school impact fees in three ways: (1) they pay the impact fees directly; (2) the value of their product is determined by the types of expenditures, location and types of services provided to schools in the neighborhood of their product; (3) impact fees add to the cost and therefore affect the bottom line of home builders. The

industry's market is volatile, and subject to rapid swings between profitability and loss based on external cost changes.

4. Respondent is a public body corporate and governing body of the School District of Volusia County.

5. On August 24, 1993, Respondent adopted Policy 612, (Petitioner's Exhibit 1, originally numbered 609) entitled "Level of Service for Educational Facilities". The stated reason for the alleged rule was "to determine and declare the policies of the Volusia County School Board for the financing, construction and utilization of educational facilities." These policies, adopted, reviewed and from time to time revised, constitute the certifications of the Board, which in turn are contemplated in ordinance 92-9 of the Volusia County Council imposing a countywide impact fee.

6. Policy 612 defined a "student station" and prescribed the necessary space for such a station in both existing and new schools, and provided for the temporary expansion of the capacity of any school through the provision of adequate area within portable or modular classrooms.

7. Policy 612 further provided that when an elementary school reaches 100 percent of its capacity and is experiencing an annual growth rate of at least 10 percent, Respondent shall give consideration to planning the redrawing of school attendance areas, or in the case of schools with capacity of 650

or more, planning for implementation of a multi-track modified school calendar.

8. Policy 612 further required that if for two consecutive years, more than 20 percent of Respondent's elementary school population is enrolled in schools which utilize a multi-track modified calendar; Respondent shall certify that fact to the Volusia County Council for consideration of an appropriate increase in school impact fees.

9. Policy 612 further determined the initial ratio of students per each new dwelling, for purposes of certifying, at the request of the County or any municipality, the expected demand for new school facilities arising from the issuance of county or city development orders. The Policy further authorized Respondent to study and certify any corrections in that ratio, for purposes of adjusting the school impact fees.

10. Policy 612 further established a "cost per student" based on the Respondent's average cost of each new student station, and initially fixed such costs. The Policy further provided that for purposes of considering any adjustments to the cost of facilities per student to be served under the adopted level of service, Respondent would further certify, biennially commencing in 1994, the proportion of student stations being utilized on a modified multi-track calendar or located in portable classrooms.

11. Policy 612 also provided that the initial school impact fee was calculated on the premise that Respondent would allocate .4 mills of its local capital improvement fund, and 10 percent of state public education capital outlay funds, to new school construction. The policy specified that Respondent would update and certify its actual receipts and allocations at the times required by County Ordinance 92-9.

12. Article VIII(C) of Policy 612 (Petitioner’s Exhibit 1 at page 7) provides formal policy restrictions upon the expenditure of impact fee receipts, restricting their use solely to provide for or reimburse capital improvements necessitated by the growth in student population, and prohibiting use of such funds for any improvement that does not produce a new increase in the student capacity of the school district.

13. On December 13, 1994, Respondent adopted an amendment to Policy 612 (then still numbered 609) “to update the cost per student station of new school facilities for purposes of adjusting the school impact fees in compliance with Volusia County Ordinance 92-9".

14. Except for renumbering, Policy 612 has not been further amended since December 13, 1994.

15. Volusia County Ordinance 92-9 was substantially amended in 1997. That 1997 version was in turn amended by County Ordinance 2005-01 adopted February 24, 2005. Ordinance

2005-01 has been codified in Chapter 70, Article V of the County Code of Ordinances.

16. Section 70-174 of the County Code of Ordinances provides that "this Article is consistent with, and intended to assist in the implementation of, the Volusia County Comprehensive Plan."

17. The Capital Facilities Element of the Volusia County Comprehensive Plan provides in Policy 15.3.4.4 that "the County has adopted, at the request of the School Board of Volusia County, a level of service standard by reference with the adoption of Chapter 70, Article 5 Code of Ordinances, County of Volusia."

18. Section 70-175(a) of the County Code of Ordinances provides that "[t]he amount of the impact fee shall be determined by the impact fee calculation set out in the impact fee calculation report..." The impact fee calculation report is further defined in Section 70-171 of the Code as "the report entitled 'Volusia County School Impact Fee Update Final Report' dated December 2004, prepared by Tindale-Oliver & Associates, Inc. and approved by the school board."

19. Section 70-175(b) of the County Code of Ordinances further provides that:

> On February 1, 2006, and February 1 of every subsequent year thereafter the impact fee shall be adjusted to reflect any inflation

> or deflation in school construction costs after December 1, 2004, ... the school board shall provide the adjustment rate with the revised impact fee amount to the county by December 1 of the year preceding the effective date for collection of the revised impact fee.

20. Section 70-176 of the County Code of Ordinances provides that "commencing on June 6, 2005, the amount of the impact fee shall be $5,442.52 (including three percent administrative fee) per dwelling. Thereafter, the impact fee shall be the amount calculated under Section 70-175."

21. Section 70-175 of the County Code of Ordinances further provides for purposes of future calculations, that:

> The impact fee calculation shall apply the following formula: Impact fee (net capital cost) = Total capital cost - External revenues - Local capital revenues apportioned per dwelling based on the student generation rate."

The definitions of each of the factors in the formula show that the factors are determined by the policies of Respondent as initially expressed in Policy 612 and as revised by the Update, here challenged as an unadopted rule or rule amendment.

22. William C. Kelly, Respondent's deputy superintendent for financial and business services, was unaware of Respondent's existing Policy 612 when, in 2004, Respondent determined the necessity to revisit school impact fees.

23. The responsible principal of Tindale-Oliver & Associates was Robert Wallace. Wallace's firm was engaged by Respondent, through Deputy Superintendent Kelly, to conduct an update of the Volusia County school impact fee data and methodology. The contract between Respondent and Wallace's firm was paid by the school district. Wallace's role was to coordinate with the district in the collection of data for subsequent analysis by his subordinate staff, and to also subsequently answer questions from Volusia County staff and Council members.

24. The Tindale-Oliver Update (Petitioner's Exhibit 4) proposed two alternatives for Respondent's consideration in adopting an impact fee schedule. At page 15, the Update states that the first option is to adopt a separate and unique impact fee for each land use type (single family, multi-family, mobile home) ranging from $2,354 to $6,905. The second option is to charge a single amount ($5,284) to all housing types, based on a weighted average of student generation ratios from all housing types. The recommendation by the consultant was that Respondent adopt and forward to the Volusia County Council the first option's varied impact fee. Respondent's superintendent recommended at the January 26 meeting of Respondent's Board that the Board adopt and give approval for subsequent presentation to the Volusia County Council at that body's meeting on

February 24, 2005, an increase in the Volusia County School District impact fee to $5,284, based on the Tindale-Oliver and Associates, Inc. study. Respondent, at that meeting, approved the recommendation; an action tantamount to increasing the impact fee to an amount in conflict with the preferred choice of the consultant.

25. Comparison of the Tindale-Oliver recommendation and the Respondent's action documents that Respondent chose a fee schedule different from that preferred by its consultant. That choice, rather than the Tindale-Oliver recommendation, was ultimately incorporated into Ordinance 2005-01 (together with a County-added 3 percent administrative fee).

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter under Sections 120.56 and 120.57(1), Florida Statutes.

27. Petitioner has challenged Respondent's action with regard to the Tindale-Oliver recommendation pursuant to Section 120.56(4)(a), Florida Statutes, which provides in pertinent part:

> Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s.120.54(1)(a)....

28. Associations such as Petitioner may maintain an action to challenge a rule or an agency statement as an unadopted rule in its representative capacity if it can demonstrate that a substantial number of its members are substantially affected by the alleged rule, that the subject matter is within the scope of interests of the association, and that the relief requested is of a type appropriate for an association to request on behalf of its members. Florida Home Builders Ass'n v. Dept. of Labor, 412 So. 2d 351, 353-4 (Fla. 1982). Petitioner has met this burden and possesses standing sufficient to support this challenge to Respondent's action.

29. In order to conclude that Respondent's action with regard to the Tindale-Oliver recommendation at issue in this matter violates Section 120.54(1)(a), Florida Statutes, it must be determined whether that action constitutes rule making or amendment of an existing rule. The burden of proof rests with Petitioner.

30. Respondent is an educational unit as defined in Section 120.52(6), Florida Statutes. Accordingly, Respondent is an agency subject to the requirements of Chapter 120, Florida Statutes, as required by Section 120.52(1)(b)7. It is observed that Section 120.81, Florida Statutes, gives Respondent certain latitude with regard to the particulars of publication of proposed rules, but this does not exempt Respondent from

compliance with the basic procedural due process tenets of Chapter 120, Florida Statutes, in the formulation and codification of polices into administrative rule form.

31. Subsection 120.52(15), Florida Statutes, in relevant part defines a "rule" as follows:

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

32. Respondent has the constitutional power and duty to operate, control and supervise all free public schools within the school district consisting of Volusia County. Art. IX, § 4(b), FLA. CONST.

33. Respondent's existing Policy 612 is a rule establishing a level of service for school facilities, consistent with its constitutional authority and duty. It is within the authority of Respondent to establish the level of service for its school facilities. Governmental entities that are not responsible for providing, financing, operating, or regulating public facilities needed to serve development may not establish binding level-of-service standards on governmental entities that do bear those responsibilities. § 163.3180(3), Fla. Stat. It is not a legitimate local government function,

nor within the constitutional home rule powers of such a government to obstruct or hinder another governmental body in the performance of its exclusive powers and duties. City of Ormond Beach v. County of Volusia, 535 So. 2d 302, 305 (Fla. 5th DCA 1988).

34. Respondent's level of service is incorporated by reference in the Volusia County Comprehensive Plan, with which the County's implementing ordinances must be consistent. § 163.3194(1)(b), Fla. Stat.

35. For purposes of the capital facilities element of a local government comprehensive plan, a "level of service" is defined as "an indicator of the extent or degree of service provided by, or proposed to be provided by, a facility based on and related to the operational characteristics of the facility. Level of service shall indicate the capacity per unit of demand for each public facility." Fla. Admin. Code R. 9J-5.003(62).

36. For purposes of establishing a lawful impact fee, "Raising expansion capital by setting ...charges, which do not exceed a pro rata share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, if use of the money collected is limited to meeting the costs of expansion." Contractors and Builders Association v. City of Dunedin, 329 So. 2d 314, 320 (Fla. 1976).

37. Notably, a rule is an agency statement of general applicability that implements, interprets, or prescribes law or policy. The preparation or modification of agency budgets is not rulemaking. *But* see Dunedin, supra, in which the Supreme Court held that a formally adopted policy, restricting the recipient's use of impact fees solely to the expansion of capacity, is a necessary legal component of an impact fee. Consequently, Article VIII(C) of Policy 612, or an equivalent under the Tindale-Oliver "Update" approved by the Respondent, is considered a required rule in the presence of the Volusia County Council's ordinance essentially specifying that the County impact fee determination shall be determined in accordance with the amount or methodology certified to the County by Respondent.

38. Petitioner has not presented any general or special law applicable to the facts of this case, which would not require complete obedience by the Volusia County Council with its own ordinance. Accordingly, Policy 612 is a statement of general applicability, which prescribed and implemented Respondent's level of service for school facilities, upon which any resulting school impact fee ordinance or rule is dependent. Policy 612 specified each of the several policy decisions (area per student, number of students per dwelling, tools for maximizing facilities through modified calendars and portable classrooms, thresholds for realignment of attendance zones,

historic appropriation of other revenues) that affect the level of service per student and the resulting pro rata cost of school facilities. By virtue of the County's incorporation of Respondent's level-of-service policy into the County's Comprehensive Plan and Ordinance 2005-01, Respondent has the power to determine, and from time to time revise, the impact of its level-of-service policies upon builders of new dwellings.

39. The power of Respondent to establish and revise the level of service for school facilities, and the components of that level of service, is recognized by the Comprehensive Plan and by Chapter 70, Article V of the Code of Ordinances of Volusia County. School impact fees may be collected and expended only upon a uniform District-wide basis. St. Johns County v. Northeast Fla. Builders Association, Inc., 583 So. 2d 635, 638 (Fla. 1992). Accordingly, it is unnecessary and inappropriate in this forum to consider whether the county government or individual municipalities within the county could refuse to adopt the level of service for school facilities established by Respondent's policies.

40. In approval of the Tindale-Oliver Update of the District's impact fees, and the choice of an option not recommended by Tindale-Oliver, as reflected in its motion adopted January 26, 2005, Respondent necessarily amended Policy 612.

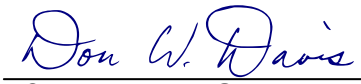
41. Section 70-175 of the County Code of Ordinances provides that the Respondent may further adjust school impact fees unilaterally without further County legislation, by changing the component policies upon which the Tindale-Oliver report is calculated and certifying that fact to the County. Policy 612 also provided for such certifications; but Section 120.54(1)(i), Florida Statutes, prohibits the incorporation of future data or policy choices into existing policy without a rule amendment.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Respondent's January 26, 2005 motion approving the Tindale-Oliver report and selecting an option contained in that report constitutes a rule under the provisions of Section 120.52, Florida Statutes, which has not been adopted in compliance with Section 120.54.

It is further ordered that, pursuant to Section 120.595(4), Florida Statutes, Petitioner is awarded reasonable costs and reasonable attorney fees and jurisdiction is retained solely with regard to the determination of the amount of such cost and fees in a subsequent proceeding upon filing of appropriate documentation by the Petitioner.

DONE AND ORDERED this 13th day of September, 2005, in Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.