Counties, fee for wellfield protection

Number: INFORMAL

Date: October 04, 2010

Ms. Denise M. Nieman
County Attorney, Palm Beach County
Post Office Box 1989
West Palm Beach, Florida 33402-1989

Dear Ms. Nieman:

On behalf of the Board of County Commissioners of Palm Beach County, you have asked whether the County Commissioners of Palm Beach County may amend the county's Wellfield Protection Ordinance to impose a per well fee on public and private water utilities as a user fee or administrative fee or as a regulatory fee to cover a portion of the cost of the county well field program.

According to your letter, Palm Beach County has adopted a countywide ordinance relating to the protection of wells and well fields. This ordinance provides criteria for regulating and prohibiting the use, handling, production, and storage of certain deleterious substances which may impair potable water supply wells and well fields. Businesses that store, handle, or use certain pollutants within well field zones are required to obtain a well field operating permit and are charged an annual fee to cover the cost of permitting, inspections, and enforcement. However, the fees that are currently charged to regulated businesses are not sufficient to cover the costs of the program. In addition, the majority of the costs of the program have been funded through ad valorem taxes and these fees on regulated businesses. However, due to the current budget climate, ad valorem funds are no longer available to fund the program. The county is considering funding this program or shortfall in the program by imposing a fee on each well operated by public and private water utilities in the county.

I understand your question to be whether the fee the county proposes may constitute a tax or may be classified as a user fee or impact fee. As discussed more fully below, I cannot conclude based on the information you have provided that the county's proposal is in the nature of a user fee or a service fee. However, it is beyond the authority of this office to provide the county with suggestions as to how such a fee could be imposed and collected based on various hypothetical models. The following informal comments will discuss the distinction between taxes and impact and user fees in an effort to provide direction to the county in crafting legislation to address this matter.

The Florida Supreme Court has held that taxation by a city must be expressly authorized either by the Florida Constitution or grant of the Florida Legislature. "Doubt as to the powers sought to be exercised must be resolved against the municipality and in favor of the general public."[1] The Court has expressly stated that "the power of a municipality to tax should not be broadened by semantics which would be the effect of labeling what the City is here collecting a fee rather than a tax." County governments are under the same constraints as municipalities in exercising their

powers of taxation.[2]

In distinguishing a tax from a user fee, the Florida Supreme Court in *City of Boca Raton v. State* ,[3] noted that "a tax is an enforced burden imposed by sovereign right for the support of the government, the administration of law, and the exercise of various functions the sovereign is called on to perform."[4] Thus, funding for the maintenance and improvement of an existing municipal road system, even when limited to capital projects was determined to be revenue for exercise of a sovereign function within the court's definition of a tax. Similarly, a fee designed to produce revenue for funding the maintenance and improvement of a county well field protection system would appear to be in the nature of a tax not a user fee.

User fees, as identified by the Court in *City of Boca Raton*, are "charges based upon the proprietary right of the governing body permitting the use of the instrumentality involved." Such fees share common traits that distinguish them from taxes: they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society,[5] and they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge.[6] This description of user fees was approved by the Florida Supreme Court in *City of Daytona Beach Shores v. State*.[7] In *City of Boca Raton*, the Court held that the city's transportation utility fee fell within the definition of a tax not a user fee.

The circuit court in the *Boca Raton* case found the city's transportation utility fee to be similar to the concept of impact fees which the Florida Supreme Court has approved. Impact fees imposed by a municipality were upheld in *Contractors and Builders Association of Pinellas County v. City of Dunedin*.[8] However, in that case, impact fees were clearly limited:

"Raising expansion capital by setting connection 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. Users 'who benefit expecially [sic], not from the maintenance of the system, but by the extension of the system . . . should bear the cost of that extension.' On the other hand, it is not 'just and equitable' for a municipally owned utility to impose the entire burden of capital expenditures, including replacement of existing plant, on persons connecting to a water and sewer system after an arbitrarily chosen time certain.

The cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent. When new facilities must be built in any event, looking only to new users for necessary capital gives old users a windfall at the expense of new users."[9] (citations omitted)

The court determined that the impact fee in *Contractors and Builders Association v. City of Dunedin* was a valid user fee because it involved a voluntary choice to connect into an existing instrumentality of the municipality.

You have cited to a recent case, *City of Miami v. Quik Cash Jewelry & Pawn, Inc.*,[10] in which the city passed an ordinance imposing administrative fees to cover the cost of police-conducted inspections of pawn shops and for processing transaction forms by local law enforcement

officers. The pawn shop fees were challenged and the trial court declared them to be an unconstitutional tax not user fees as the city contended. The district court reversed the trial court and held that the benefits from the fee payments went to the pawnshop owners, rather than the general public. The fees enabled the business owners to perform their statutorily-required duties and to conduct business since the fees supported the police detail administering the shops' transaction reports. Further, the court held that these fees were voluntary, another indicia of a fee. As the court stated:

"User fees are charges based upon the proprietary right of the governing body permitting the use of the instrumentality involved. Such fees share common traits that distinguish them from taxes: they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society, *National Cable Television Assn. v. United States* [citation omitted]; and they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge."[11]

The court determined that "[a]s the City's pawnshop fees are voluntary and benefit pawnshop owners in a manner not shared by others, they are not a tax, but are constitutional user fees."[12]

I would note that nothing to which you have directed my attention in the Florida Safe Drinking Water Act, sections 403.850 - 403.864, Florida Statutes, authorizes local governments to impose and collect a per well fee on public and private water facilities to cover costs of a countywide well field program. Infrastructure financing for implementing the public policy goals of the act are the subject of several statutory provisions: for example, section 403.8532(3), Florida Statutes, authorizes the Department of Environmental Protection to make loans for purposes of the act; and subsection (4), authorizes the department of appropriate funds for activities authorized under the federal Safe Drinking Water Act. The act makes the Department of Environmental Protection responsible for establishing fiscal controls and accounting procedures for the proper disbursement of funds appropriated or otherwise provided for the purpose of carrying out provisions of the act. The act establishes a fee schedule and licensing fees for water systems operating in Florida pursuant to this act.[13]

Your letter indicates that "due to the current tight budget climate, ad valorem funds are no longer available to fund the Program." Further, you have advised that increasing the fees currently being paid by regulated businesses was considered and rejected as an option because increased fees could create an undue burden on those businesses. Like the Florida Supreme Court in *City of Dunedin*, this office recognizes the revenue pressures upon all levels of government in Florida. We understand that these per well fees are a creative effort in response to the need for revenue. However, in Florida's Constitution, the voters have placed a limit on ad valorem millage available to counties, Article VII, section 9, Florida Constitution; made homesteads exempt from taxation up to minimum limits, Article VII, section 9, Florida Constitution; and exempted from levy those homesteads specifically delineated in article X, section 4 of the Florida Constitution. These constitutional provisions cannot be circumvented by referring to a tax as a user fee.

With regard to the imposition of a viable impact fee, assessment and collection of such a fee must be based upon the pro rata share of the reasonably anticipated costs of capital expansion

required to provide a service to a user.[14] The nature of such fees was expressed by the Supreme Court of Florida in *Contractors and Builders Association of Pinellas County v. City of Dunedin*,[15] as follows:

"The avowed purpose of the ordinance in the present case is to raise money in order to expand the water and sewerage systems, so as to meet the increased demand which additional connections to the system create. The municipality seeks to shift to the user expenses incurred on his account. . . ."[16]

This office has also concluded that impact fees are in the nature of user charges.[17] In Attorney General Opinion 76-137, this office commented upon the imposition of an impact fee for the construction of municipal water and sewer facilities, stating, "there is little doubt that the fee imposed (by city ordinance) is not a tax or a special assessment but is a valid imposition of an 'impact fee' or user charge for the privilege of connecting to the city's water and sewer system . . . ."

In *City of Dunedin*, the Court set forth the test to be applied to test the validity of a locally imposed "impact fee." Such an impact fee must meet the following test: (1) new development must require that the present system of public facilities be expanded; (2) the fees imposed on users must be no more than what the local governmental unit would incur in accommodating the new users of the system; and (3) the fees must be expressly earmarked and spent for the purposes for which they were charged.

The use of impact fees has become an accepted method of paying for public improvements that must be constructed to serve new growth.[18] However, information in your letter indicates that the fees the county proposes are not intended to fund the construction of new facilities to meet increased demand from new growth. Rather, this appears to be a program that the county has developed and implemented over a number of years previously and that funding from current sources is no longer sufficient. Thus, it does not appear that this fee may be characterized as an impact fee.

I trust that these informal comments will be helpful to you in crafting local legislation to meet the demands of Palm Beach County's Wellfield Protection Ordinance.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

GH/srh

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[1] *City of Tampa v. Birdsong Motors, Inc.*, 261 So. 2d 1, 3 (Fla. 1972).

[2] *See* Art. VII, s. 9(a), Fla. Const., providing that counties, school districts, and municipalities must be authorized by law to levy *ad valorem* taxes and may be authorized by general law to

levy other taxes.

[3] 595 So.2d 25 (Fla. 1992),

[4] *Klemm v. Davenport*, 100 Fla. 627, 631, 129 So. 904, 907 (Fla. 1930).

[5] *National Cable Television Assn. v. United States*, 415 U.S. 336, 341, 94 S.Ct. 1146, 1149, 39 L.Ed.2d 370 (1974).

[6] *Emerson College v. City of Boston*, 391 Mass. 415, 462 N.E.2d 1098, 1105 (1984) (citing *City of Vanceburg v. Federal Energy Regulatory Comm'n*, 571 F.2d 630, 644 n. 48 (D.C.Cir.1977), *cert. denied*, 439 U.S. 818, 99 S.Ct. 79, 58 L.Ed.2d 108 (1978).

[7] 483 So. 2d 405 (Fla.1985).

[8] 329 So. 2d 314 (Fla.1976).

[9] *Id.* at 320-21

[10] 811 So. 2d 756 (Fla. 3d DCA 2002).

[11] Citing *State v. City of Port Orange*, 650 So. 2d 1, 3 (Fla. 1994).

[12] *Supra* n.10 at 759.

[13] *See, e.g.,* s. 403.861(7), Fla. Stat., authorizing the department to issue permits for construction, alteration, extension, or operation of a public water system including issuance of an annual operation license; subsection (a), authorizing a permit application fee; and subsection (b), requiring public water systems to submit an annual operation license fee.

[14] *See Contractors and Builders Association of Pinellas County v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976), *appeal after remand*, 358 So. 2d 846 (Fla. 2d DCA 1978), *cert. denied*, 444 U.S. 867 (1979). *See also Home Builders and Contractors Association of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County*, 446 So. 2d 140 (Fla. 4th DCA 1983), *petition for review denied*, 451 So. 2d 848 (Fla. 1984), *appeal dismissed*, 105 S.Ct. 376 (1984).

[15] 329 So. 2d 314 (Fla. 1976).

[16] 329 So. 2d at 318. *Cf. Loxahatchee River Environmental Control District v. School Board of Palm Beach County*, 496 So. 2d 930 (Fla. 4th DCA 1986), *approved*, 515 So. 2d 217 (Fla. 1987), in which the court determined that certain service availability standby charges were within the definition of impact or service availability fees established by the State Department of Education.

[17] *See* Ops. Att'y Gen. Fla. 76-137 (1976), 82-09 (1982), and 85-101 (1985).

[18] *See Home Builders and Contractors Association of Palm Beach County, Inc. v. Board of*

County Commissioners of Palm Beach County, 446 So. 2d 140 (Fla. 4th DCA 1983), *petition for review denied*, 451 So. 2d 848 (Fla. 1984), *appeal dismissed*, 469 U.S. 976, 105 S.Ct. 376, 83 L.Ed.2d 311 (1984) (road impact fees upheld); *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. 4th DCA 1983), *petition for review denied*, 440 So. 2d 352 (Fla. 1983) (park impact fees upheld); *St. Johns County v. Northeast Florida Builders Association, Inc.*, 583 So. 2d 635 (Fla. 1991).