County building inspection fees, uses

Number: INFORMAL

Date: May 06, 2010

Ms. Heather J. Encinosa
Wakulla County Attorney
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308

Dear Ms. Encinosa:

You ask whether Wakulla County may use building inspection fees collected pursuant to section 125.56, Florida Statutes, to pay for services provided to the county's building department based upon a cost allocation plan.
You indicate that there are county services provided to the building department which represent that department's proportionate share of the cost for administrative salaries and expenses, fire protection, legal counsel, management and budgeting services, and other governmental services and facilities.[1] It is assumed that administrative salaries and expenses refer to those for the county in general and do not represent the administration of the building department. It would appear that you are questioning whether the building department may be assessed a proportionate share of the overall cost of running the county (for services it may receive) which may be paid with fees collected by that department.

Section 553.80, Florida Statutes, requires local governments to regulate building construction by enforcement of the Florida Building Code.[2] Local governments may adopt a fee schedule in accordance with section 125.56, Florida Statutes, for counties, and section 166.222, Florida Statutes, for municipalities.[3] These fees "shall be used *solely* for carrying out the local government's responsibilities in enforcing the Florida Building Code."[4] (e.s.) The statute states:

"As used in this subsection, the phrase 'enforcing the Florida Building Code' includes the *direct costs and reasonable indirect costs associated with review of building plans, building inspections, reinspections, and building permit processing*; building code enforcement; and fire inspections associated with new construction. The phrase may also include training costs associated with the enforcement of the Florida Building Code and enforcement action pertaining to unlicensed contractor activity to the extent not funded by other user fees."[5] (e.s.)

It further provides:

"The following activities may not be funded with fees adopted for enforcing the Florida Building Code:

1. Planning and zoning or *other general governmental activities*.
2. Inspections of public buildings for a reduced fee or no fee.
3. Public information requests, community functions, boards, and any program not directly related to enforcement of the Florida Building Code.

4. Enforcement and implementation of any other local ordinance, excluding validly adopted local amendments to the Florida Building Code and excluding any local ordinance directly related to enforcing the Florida Building Code as defined in paragraph (a)."[6] (e.s.)

The statute makes it clear that there are no other purposes for which such fees may be used by requiring local governments to "use recognized management, accounting, and oversight practices to ensure that fees, fines, and investment earnings generated under this subsection are maintained and allocated or used *solely* for the purposes described in paragraph (a)."[7] (e.s.) Thus, the county must ensure that the fees collected pursuant to section 125.56, Florida Statutes, are only used to fund: the direct costs and reasonable indirect costs associated with review of building plans, building inspections, reinspections, and building permit processing; building code enforcement; and fire inspections associated with new construction.

This office, in Attorney General Opinion 2005-19, has previously determined that a county could use building permit and inspection fees to pay for a building used only by the county's building department. Recognizing that section 125.26, Florida Statutes, allows a county to impose inspection fees to cover the necessary reasonable costs of the enforcement of the Florida Building Code and the Florida Fire Prevention Code, the opinion found that the provision of space to house such activities would appear to be a reasonable cost of providing enforcement of such codes. No Florida law was found that specifically prohibits such an allocation. This office concluded, therefore, that the fees may be used only for those expenses directly related to the enforcement of the building and fire prevention codes. The opinion further cautioned that if the county building department is carrying out functions unrelated to enforcement of the building and fire prevention codes, the fees may not be used for such purpose and must be prorated to cover only that portion of the construction or rent directly relating to the enforcement of building and fire prevention codes.

Subsequently to the issuance of Attorney General Opinion 2005-19, section 553.80, Florida Statutes, was amended by adding the language in subsection (7) explaining the context of "enforcing the Florida Building Code" for purposes of determining whether costs are directly or reasonably indirectly related to such enforcement.[8] The analysis accompanying this clarification states it "[r]estricts local governments' ability to use building code fee revenues for non-related activities[.]"[9] The analysis also cites a 2004 study by the Florida Home Builders Association assessing local governments' compliance with the fees provision of section 553.80, Florida Statutes. Among the problems highlighted in the study was that "other non-enforcement costs are included in the same department and the costs are being subsidized by building permit fees and other fees[.]"

Thus, it is clear that the purpose of creating section 553.80(7), Florida Statutes, was to restrict the use of building code fee revenues by local governments and to avoid the use of such fees to subsidize non-enforcement costs. When the manner in which something is to be done is prescribed, it operates as a prohibition against its being done in any other way.[10]

I would also point out that this office has often noted that the primary purpose of building codes and regulations is to protect the health, safety, and general welfare of the residents of a municipality or county and thus falls within the police power granted to local governments.[11] Recognizing that the courts have held that a levy of taxes under the guise of exercising the

police power to raise revenue is not permissible,[12] this office has cautioned local governments to not impose inspection fees greater than the amount needed to defray the costs of such inspection and enforcement of the building code. Thus, a surplus of fees after defraying the costs of inspections and enforcement may actually constitute an unauthorized and unlawful tax in violation of the Florida Constitution.[13] Moreover, the Legislature has required that total estimated annual revenues derived from inspection fees may not exceed the annual cost of allowable activities and that any unexpended balances be carried forward for allowable activities or be refunded at the discretion of the local government.[14]

As indicated by the legislative history surrounding the enactment of section 553.80(7), Florida Statutes, expressing a concern that non-enforcement costs of a local government and of the building department were being subsidized by building code fees, the use of such fees must be limited solely as directed in the statute. Accordingly, the county must be able to demonstrate that any particular expenditure of such fees is a direct cost or reasonable indirect cost associated with review of building plans, building inspections, reinspections, and building permit processing; building code enforcement; and fire inspections associated with new construction.

I trust that these informal comments will provide assistance in this matter.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] You indicate that the county's most recent cost allocation study identifies $115,017 in "general fund costs that are allocated to the building department" from the following non-building cost centers: building use allocation; annual audit expenses, property insurance, fringe benefits, other insurance (comprehensive general liability, vehicle, and inland marine), finance, facilities management, legal, management and budget, administration, commissioners, and non-departmental.

[2] Section 553.80(1), Fla. Stat.

[3] Section 125.56(2), Fla. Stat., authorizes the board of county commissioners of each county to provide a schedule of reasonable inspection fees "in order to defer the costs of inspection and enforcement of the provisions of this act, and of the Florida Building Code and the Florida Fire Prevention Code."

[4] Section 553.80(7), Fla. Stat.

[5] Section 553.80(7)(a), Fla. Stat.

[6] Section 553.80(7)(b), Fla. Stat.

[7] Section 553.80(7)(c), Fla. Stat.

[8] Section 12, Ch. 2005-147, Laws of Fla. (2005).

[9] Senate Staff Analysis and Economic Impact Statement, CS/CS/CS/CS/SB 442, Government Efficiency Appropriations Committee, April 21, 2005.

[10] *See Alsop v. Pierce*, 19 So. 2d 799, 805-806 (Fla. 1944); *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952); *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976).

[11] *See* Op. Atty Gen. Fla. 01-63 (2001) and Inf. Op. to Secretary Edward J. Trombetta, Department of Community Affairs, dated January 18, 1974.

[12] *See, e.g.*, *Atkins v. Philips*, 8 So. 429 (Fla 1890); *City of Panama City v. State*, 60 So. 2d 658 (Fla. 1952).

[13] *See* Art. VII, s. 1, Fla. Const., stating that "[n]o tax shall be levied except in pursuance of law." *Cf. Contractors & Builders Association v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976) (absent specific constitutional or statutory authority, revenues exacted from a private entity for the privilege of using municipal services must be earmarked to cover expenses occasioned directly by extending service to that entity). *And see Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-622, 101 S.Ct. 2946, 2955, 69 L.Ed.2d 884, 896-897 (1981), which distinguished between a tax and a user fee, defining a tax as providing revenue for the general support of the government, while defining a user fee as imposing a specific charge for the use of publicly-owned or publicly-provided facilities or services.

[14] Section 553.80(7), Fla. Stat.