Building fees and inspection, private contract

Number: INFORMAL

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Ms. Audrey Vance
City Attorney
City of Bonita Springs
9101 Bonita Beach Road
Bonita Springs, Florida 34135

Dear Ms. Vance:

On behalf of the City of Bonita Springs City Council, you have asked for this office's assistance in determining whether a conflict may exist when the city contracts with a private, for profit company to perform the responsibilities of its building department. Among the duties and responsibilities which will be outsourced to this private company are the responsibility to establish fees to be charged by the city for the inspection of buildings.

Public officers and employees, including municipal building department officials, are subject to Part III, Chapter 112, Florida Statutes, the Code of Ethics for Public Officers and Employees.[1] Conflicts of interest, including such matters as doing business with one's agency and conflicting employment or contractual relationships are treated in section 112.313, Florida Statutes. Pursuant to section 112.322, Florida Statutes, the Commission on Ethics is responsible for issuing advisory opinions on questions falling within the scope of the Ethics Code. Therefore, this office cannot assist you with a consideration of any conflict of interest issues. However, in an effort to provide you with some direction on the matter of adoption of building code inspection fees, I offer the following informal comments.

Section 553.80(7), Florida Statutes, provides:

"*The governing bodies of local governments* may provide a schedule of reasonable fees, as authorized by s. 125.56(2) or s. 166.222 and this section, for enforcing this part. These fees, and any fines or investment earnings related to the fees, shall be used solely for carrying out the local government's responsibilities in enforcing the Florida Building Code. When providing a schedule of reasonable fees, the total estimated annual revenue derived from fees, and the fines and investment earnings related to the fees, may not exceed the total estimated annual costs of allowable activities. Any unexpended balances shall be carried forward to future years for allowable activities or shall be refunded at the discretion of the local government. The basis for a fee structure for allowable activities shall relate to the level of service provided by the local government and shall include consideration for refunding fees due to reduced services based on services provided as prescribed by s. 553.791, but not provided by the local government. Fees charged shall be consistently applied.
(a) 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.
(b) The following activities may not be funded with fees adopted for enforcing the Florida Building Code:
1. Planning and zoning or other general government 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).
(c) A local government shall 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)." (e.s.)

The statute specifically authorizes the governing bodies of local governments to set a schedule of reasonable fees for these services, prescribes their use, and provides the statutory authority for the exercise of that authority.

As provided above, municipalities derive their authority to adopt and impose building code inspection fees from section 166.222, Florida Statutes (read together with section 553.80, Florida Statutes), not from section 166.021, Florida Statutes, generally outlining municipal home rule powers. Pursuant to section 166.222, Florida Statutes:

"*The governing body of a municipality* may provide a schedule of reasonable inspection fees in order to defer the costs of inspection and enforcement of the provisions of its building code." (e.s.)

Thus, it appears from the language of these statutes that the governing body of the municipality is ultimately responsible for developing a "schedule of reasonable inspection fees." Nothing in section 166.222, or in section 553.80, Florida Statutes, would authorize a municipality to divest itself of the responsibility to determine these fees.[2] However, the statutory requirement that a municipality must take ultimate action in this regard would not preclude input into the process from interested parties. The City of Bonita Springs City Council may wish to accept and consider recommendations from private companies working with the city on issues relating to building construction and inspection in providing the schedule of fees it ultimately adopts pursuant to section 166.222 and section 553.80, Florida Statutes.

This office, in Attorney General Opinion 2001-63, considered the provisions of section 166.222, Florida Statutes, and 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 and thus, they fall within the police power granted to local governments. Recognizing that the courts had held that a levy of taxes under the guise of exercising the police power to raise revenue was not permissible, this office 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, inspection fees levied by a building department should not be greater than necessary to

defray the costs of such inspection and enforcement to avoid any charge that by imposing a fee in excess of the actual cost of administration, the excess portion of the fee actually constitutes an unauthorized and unlawful tax in violation of the Florida Constitution.[3] Thus, based on this analysis, Attorney General Opinion 2001-63 concluded that the City of Coral Gables was not authorized to use the building permit and inspection fees it imposed to construct a building that would, in part, house the city's building and zoning department.

Section 166.222, Florida Statutes, provides that the fees imposed thereunder are to defray the costs of inspection and enforcement of the building code. When read together with section 553.80(7), Florida Statutes, which provides that such fees may only include "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 . . . 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[,]" it is clear that the amount of any fee for such services is limited by the terms of these statutes. The City of Bonita Springs is charged with adopting a schedule of building code inspection fees that comply with the directives of section 166.222, Florida Statutes, and section 553.80(7), Florida Statutes. However, working within the statutory framework, the city may wish to request and consider input from interested parties in developing its schedule of fees.

I hope that these informal observations may be of assistance.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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[1] *See* s. 112.312(2), Fla. Stat., defining "[a]gency" to include municipalities.

[2] A legislative direction as to how a thing shall be done is, in effect, a prohibition against its being done in any other way. *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).

[3] *See* Art. VII, s. 1, Fla. Const., stating that "[n]o tax shall be levied except in pursuance of law." *Cf. Contractors and 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.