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Collier County Rights and Responsibilities
Regarding Development in the Rural Lands Stewardship Area
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Introduction:

In 2002, Collier County, Florida, created a Rural Lands Stewardship Area Overlay ("RLSA") adjacent to Big Cypress National Preserve and Florida Panther National Wildlife Refuge. The RLSA was adopted to "create a land-use plan to protect agricultural areas, natural habitats, wetlands, and flow ways while directing growth away from these areas."[1]

The RLSA "compensates"[2] landowners for designating environmental or agricultural lands as Stewardship Sending Areas (SSAs) to transfer density to Stewardship Receiving Areas (SRAs) and exchange Stewardship Credits for approvals of compact development which must be "self sufficient in the provision of services, facilities and infrastructure,"[3] have either "direct access to a County collector or arterial road or indirect access via a road provided by the developer with adequate capacity,"[4] and "fiscally neutral or positive to Collier County at the SRA horizon year."[5]

Collier County's RLSA Ordinance defines public benefit uses as affordable housing, public schools, and parks, yet does not require the use of Stewardship Credits.[6]

Recent agreements between developers and Collier County for the Town of Big Cypress SRA demonstrate that in addition to exempting the use of Stewardship Credits for public benefit uses, the County is also allowing for direct monetary compensation to developers for the acquisition of affordable housing sites at $22,500 per acre, park impact fee credits to the developer at $22,500/acre for a Community park parcel, educational impact fee credits for two parcels up to $23,000/acre upon the conveyance of School sites to the District,[7] and reimbursement for average permitting and mitigation costs as a reward to the developer for including affordable housing and community park sites within conceptual permits[8], despite these uses being a requirement to comply with regulatory standards for development.

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[1] https://www.colliercountyfl.gov/government/growth-management/divisions/planning-and-zoning-division/comprehensive-planning-section/rural-lands-stewardship-area (last visited August 1, 2022)
[2] Policy 1.4, 3.8.
[3] Policy 4.2, *see also* Policy 4.16.
[4] Policy 4.14.
[5] Policy 4.18.
[6] Policy 4.20.
[7] Resolution No. 2021-119 for the Longwater Village SRA and Resolution No. 2021-120 Bellmar Village SRAs under Developer /Owner Commitments. Longwater and Bellmar are approved villages within the Town of Big Cypress.
[8] "Town Agreement" between the County and Collier Land Holdings, Ltd and CDC Land Investments, LLC, made June 8, 2021, and recorded by Collier County Clerk of Courts August 2, 2021.

These incentives are essentially reverting the financial burden onto the taxpayer and relieving the developer of accountability for its impacts in the RLSA. **The legality of these agreements are in question and the subject of this legal memorandum.**

The Conservancy of Southwest Florida hired the law firm of Robert H. Hartsell P.A. to answer three questions pertaining Collier County's legal responsibilities for covering costs to support new development in the Rural Lands Stewardship Area.

Questions and Answers:

1. Is Collier County ***required by law*** to provide an ***impact fee credit***, or ***any other type of reimbursement of costs***, for a developer or property owner's ***contribution of land*** set aside for public purposes? Please answer as it pertains to ***affordable housing***.

   The short answer is ***no, unless the public purpose is for a public facility or infrastructure****.* ***Affordable housing does not fall within either definition.***

   Responsible land-use policy mandates that "landowners internalize the negative externalities of their conduct."[9] Accordingly, local governments impose impact fees, "an important source of revenue for a local government to use in funding the infrastructure necessitated by new growth,"[10] that must be proportional, based on the most recent and localized data, and demonstrate a reasonable connection, or rational nexus, between (1) the need for additional capital facilities and the growth in population generated by residential development, and (2) the expenditures of the funds collected and the benefits to the residential development.[11] This is known as the "dual rational nexus test."[12]

   Under the 2021 amendments to the Florida Impact Fee Act, Collier County is required by law to provide "*credit against the collection of the impact fee*" to developers on a dollar-for-dollar basis at fair market value for any contribution "related to ***public facilities or infrastructure***, including land dedication, site planning and design, or construction."[13]

   Public facilities include transportation, educational, parks, recreational, emergency medical, fire, and law enforcement facilities,[14] and infrastructure is defined as: fixed capital expense associated with the construction, reconstruction or improvement of public facilities that have a life expectancy of at least five years; related land acquisition, land improvement, design, engineering, and permitting costs; and other related construction costs required to bring the public facility into service.[15]

[9] *See Village of Euclid v. Ambler Realty Co*., 272 U.S. 365 (1926).
[10] Fla. Stat. § 163.31801 (2).
[11] Fla. Stat. § 163.31801; *Bd. of Cnty. Commissioners, Santa Rosa Cnty. v. Home Builders Ass'n of W. Fla., Inc*., 325 So. 3d 981, 984–85 (Fla. 1st DCA 2021).
[12] *Id*. at 984.
[13] Fla. Stat. § 163.31801 (5)(a).
[14] Fla. Stat. §§ 163.3164 (39), 163.31801(3)(b).
[15] Fla. Stat. § 163.31801 (3)(a).

Notably missing from these definitions is affordable housing. Although Collier County considers affordable housing to be a public benefit, Florida Statutes do not legally define affordable housing as a public facility.

However, if a developer provides affordable housing and the county collects impact fees for public facilities that would service the affordable housing, such as water, sewer, fire, etc., the local government ***may, but is not legally required to,*** provide an ***exception or waiver*** of impact fees, or the ***reduction*** of those fees.[16]

A local government may enact an "inclusionary housing ordinance" which would mandate either (1) a specific percentage of affordable housing units be included in the approved development, (2) a contribution to a housing fund, or (3) other alternatives in lieu of building the affordable housing units.

Under an inclusionary housing ordinance, the local government would be required by law to provide incentives to *fully offset all costs* to the developer *of its affordable housing contribution*, including but not limited to, allowing increased density or intensity bonuses, additional floorspace greater than allowed, reducing or waiving impact fees, or granting other incentives.[17]

While there is some vagueness in the allowance of "other incentives" to offset the cost of the affordable housing units, the traditional bonuses of affordable housing have included bundling incentives such as density / intensity bonuses, exemptions from land-use regulations such as setbacks or height restrictions, reduced parking requirements, and up-zoning making land more valuable.[18] Very rarely do you see direct compensation to the developers for the inclusion of affordable housing units.

It is also important to note that the statute for inclusionary housing is really ***standardless***. There is no clear statutory guidance on what it means to "offset costs," nor is it clear how anyone could assess the value of regulatory approvals or assess the cost to the applicant to comply with the standard. This ambiguity in the law makes the obligation to fully offset costs less certain when requiring the inclusion of affordable housing in new development. Furthermore, the statute does not give clear guidance as to what would be considered an "inclusionary housing ordinance" that would bring the statute into play as there is the open-ended option of "other alternatives in lieu of building the affordable housing units."

[16] Fla. Stat. §§ 163.31801 (11), 163.3180 (5)(f)6.
[17] Fla. Stat. § 125.01055 (4).
[18] National Housing Conference, *Common Incentives and Offsets in Inclusionary Housing Policies*, https://nhc.org/policy-guide/inclusionary-housing-the-basics/common-incentives-and-offsets-in-inclusionary-housing-policies/ (last visited September 8, 2022)
[18]Florida Housing Coalition, *Inclusionary Zoning & HB 7103 FAQ*, https://flhousing.org/wp-content/uploads/2020/04/Inclusionary-Zoning-FAQ-.pdf (last visited September 8, 2022).

The guidance provided by the Florida Housing Coalition on Florida's inclusionary statute presents real life calculations on how a County can implement a policy to the benefit of its residents and fully offset the costs of the developer for the affordable housing units allocated after calculating the costs to build the units and subtracting the revenue realized by the developer on the sale or rental of the affordable units.[19]

In the case of the RLSA, since the program provides landowners / developers with additional intensity and density up to twenty times greater than would be allowed under base zoning (four homes per acre versus one home per five acres), the County could utilize the guidance to calculate and determine that this additional density is sufficient to fully offset the costs of providing affordable housing units.

However, rather than requiring developers to build affordable housing units within towns and villages, or charging impact fees related to the services necessary to serve the affordable housing units, Collier County RLSA Policy 4.7.5 requires for Affordable Housing Land Reservation – i.e. the setting aside of land that is equal or greater than 2.5% of the gross area of the SRA for acquisition by the County or third party that would ***meet standards needed to provide affordable housing***. This may be an attempt by the County to avoid the inclusionary housing ordinance and the requirement to "fully offset costs," yet the policy does not hold the developer responsible for the impact created by the town or village for the need for affordable housing, and even more concerning there is no guarantee that the affordable housing units will ever be built.

On June 8, 2021, the County entered into an agreement with developers for the set aside of two parcels of land, totaling 88.2 acres, as affordable housing sites to be appraised at $22,500 per acre and offered for acquisition by the County, a Community Land Trust, private developer, or other affordable housing provider, with the purchase price going directly to the SRA developer.[20] Additionally, the County has agreed that if the affordable housing sites are included within conceptual ERP permits for Bellmar Village, the SRA developer would be entitled to a reimbursement of average permitting and mitigation costs to be calculated by the landowner's average per acre permitting and mitigation cost multiplied by the acreage of the affordable housing site.

This is far beyond what is required by the law as affordable housing is not a public facility or infrastructure that would allow for credit of fees paid for land acquisition, permitting, and mitigation. Furthermore, there are no impact fees being collected for affordable housing that would allow for a reduction or waiver thereof.

By compensating the developer for the affordable housing sites, mitigation, and permitting costs, the County may be, to the detriment of taxpayers, trying to minimize an argument from SRA developers that there has been a governmental taking without just compensation or imposing an illegal tax.[21]

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[20] *See* note 8.

[21] In 1999 the Florida Supreme Court ruled against Collier County finding that its "special assessment impact fee" was an unauthorized tax and unconstitutional. *Collier County v. State of Florida*, 733 So.2d 1012 (Fla. 1999).

However, as affordable housing serves a legitimate public purpose that does have an essential nexus to the impact of the proposed development on the public – i.e. the need for housing for the working class that will service the 1.7 million square feet of commercial, civic and industrial in the Town of Big Cypress – an exaction, such as land dedication, would not be prohibited so long as it is roughly proportional to the impact.[22]

Accordingly, Collier County is only ***legally required to issue impact fee credit*** *for (1) impact fees paid* for (2) *public facilities or infrastructures*, of which affordable housing is neither. All other incentives, compensation, and reimbursement are **not** legal requirements, but merely discretionary by the County that go above and beyond to lessen the burden on the SRA developer of its impacts in the RLSA. Furthermore, there are a variety of incentives that may be offered to developers that do not burden the taxpayer with impacts necessitated by the increased growth of the new development that is required to be self-sufficient and fiscally neutral.

2. Is the local government required to reimburse the developer, or property owner, with any permitting and mitigation costs associated with any of the sites that the developer or property owner sets aside for public purposes?

   The short answer is ***it depends on whether the public purpose is for a public facility or infrastructure. Affordable housing does not fall within either definition.***

   Collier County is ***only legally required to issue impact fee credits*** for related land acquisition, land improvement, design, engineering, and permitting costs of public facilities and infrastructures.[23]

3. The costs to Collier County for providing Rural Lands Stewardship Area (RLSA) development with roads, pipelines, and services, such as school bussing and emergency response, will be more expensive due to the expansiveness of the region, the limited existing infrastructure, and the long travel distances from the County's existing urban area. Could Collier County charge higher impact fees to RLSA developers?

   The short answer is yes, so long as the impact fee falls within the legal confines of the Florida Impact Fee Act.

   Impact fees may be increased for RLSA developers, so long as the fees remain proportional, based on the most recent and localized data, and demonstrate a reasonable connection, or rational nexus between the need for additional capital facilities and the growth in population generated by residential development, as well as the expenditures of the funds collected and the benefits to the residential development.

[22] *Nollan v. California Coastal Comm'n*, 482 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); Fla. Stat. § 70.45
[23] Fla. Stat. § 163.31801 (5).

Many counties in Florida implement a tier-based impact fee structure typically distinguishing by the appropriate geographic scale: urban, suburban, and rural.[24] The zone with the most need for public facilities and infrastructure tends to have the highest impact fees.

To lawfully implement differing impact fees, the local government must satisfy the dual rational nexus test;[25] the fees must be proportional, based on the most recent and localized data, and demonstrate a reasonable connection, or rational nexus, between (1) the need for additional capital facilities and the growth in population generated by residential development, and (2) the expenditures of the funds collected and the benefits to the residential development.[26]

Here, Collier County has two impact fee schedules, yet instead of considering location, it is based upon whether the development will be residential or commercial / non-residential, and considers the land use, size of the property, and installation of meters and cross-connection control devises.[27] In fact, according to the County's 2019 Road Impact Fee Update Study, despite there being eight road impact fee districts, Collier County charges the same roadway impact fee rate, except for Road Impact Fee Benefit Districts 7 and 8, of which no fee is charged.

Collier County may increase its impact fees for RLSA developers pursuant to the Florida Impact Fee Act.[28] The Florida Impact Fee Act allows impact fees to be increased at a certain rate, for example an increase of not more than 25% of the current rate must be implemented in two equal annual increments, where as a fee rate between 26-50% must be implemented in four equal installments, all of which begin with the date of adoption for the increased fee. There are additional restrictions on fee increases, such as that the increase may not exceed 50% of the current rate, may not be increased more than once every four years, and may not be increased retroactively. [29]

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[24] Hillsborough County, Florida: *Estimated Residential Impact/Mobility Fee Assessment by Zone per Dwelling Unit*, https://www.hillsboroughcounty.org/library/hillsborough/media-center/documents/development-services/permits-and-records/fees/residential-impact-mobility-fee-assessment-10-1-2022.pdf (last visited September 13, 2022); Orange County, Florida, *Impact Fees at a Glance,* https://www.orangecountyfl.net/PermitsLicenses/Permits/ImpactFeesAtAGlance.aspx#.YyClSi2B30p (last visited September 13, 2022); Pasco County, Florida: *Multimodal Mobility Fee Program* (U.S. Dept. of Transportation case study as a highly effective and legally sound program to be looked at as an example by other counties). https://www.fhwa.dot.gov/ipd/pdfs/value_capture/case_studies/pasco_county_fl_multimodal_mobility_fee.pdf (last visited September 13, 2022).

[25] AGO 2013-20, Fla. Op. Att'y Gen (Sep. 12, 2013), *Impact Fees – Schools – Counties* (finding that a county may levy school impact fees for portion of county, but not entire county so long as dual rational nexus test satisfied).

[26] Fla. Stat. § 163.31801; *Bd. of Cnty. Commissioners, Santa Rosa Cnty. v. Home Builders Ass'n of W. Fla., Inc*., 325 So. 3d 981, 984–85 (Fla. 1st DCA 2021).

[27] https://www.colliercountyfl.gov/government/growth-management/divisions/capital-project-planning-impact-fees-and-program-management/impact-fees (last visited August 22, 2022).

[28] *Bd. of Cnty. Commissioners, Santa Rosa Cnty. v. Home Builders Ass'n of W. Fla., Inc*., 325 So. 3d 981, 984–85 (Fla. 1st DCA 2021); Fla. Stat. § 163.31801 (6).

[29] Fla. Stat. § 163.31801 (6).

However, the law allows for an exception to increase a rate beyond the phase-in limitations by establishing the need through a demonstrated "need study," completed within 12 months before adoption, expressly demonstrating the extraordinary circumstances, holding no less than two publicly noticed workshops, and the increase is approved by a super majority of governing body.

The extraordinary residential development approved in the RLSA, which is essentially a blank slate necessitating the construction of new and widened roadways, traffic intersections, water and sewer facilities, schools, libraries, parks, fire and EMS stations, as well as commercial space, to accommodate the growth, will result in extraordinary impacts. The RLSA is therefore ripe and appropriate for increased impact fees to appropriately fund the necessary core of public facilities and infrastructures.

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