

FAIRNESS OF ORANGE COUNTY AND HILLSBOROUGH COUNTY
SCHOOL IMPACT FEES

By

STEPHEN FULTON SHAW

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By

Stephen Fulton Shaw

This paper is dedicated to those affected by economic injustice. For the deserved denied opportunity as well as the prudent taxed by the profligate.

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Ultimately, I give credit to Jesus Christ.

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Abstract of Dissertation Presented to the Graduate School
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FAIRNESS OF ORANGE COUNTY
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Stephen Fulton Shaw

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Chair: James C. Nicholas
Cochair: R. Raymond Issa
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Impact fees are a matter of increasing fiscal importance for Florida counties and school districts within Florida counties. School impact fees are a charge placed upon new residential development to cover the county's cost of additional required school infrastructure necessitated by school-aged population growth. With shrinking public school funds from traditional sources and increasing school-aged population growth, counties are under increasing pressure to use school impact fees as a means for funding new school construction.

There exists rich literature regarding the *legality* of impact fees. Lacking, however is scholarship addressing the fundamental *fairness* of impact fees. Hence, the fundamental fairness of the fees remains unclear and the fees continue to be a source of much controversy.

This dissertation will first discuss the evolution of school impact fees in Florida and the methodology of establishing school impact fees. Thereafter, philosophy, ethics, courts of equity, psychology, social science, and Judeo-Christian theology will be surveyed to determine fundamental concepts of fairness from which to analyze the fairness of school impact fees. The objective of this dissertation is to determine whether Orange County and the Hillsborough County school impact fees are fair. When these school impact fees were analyzed against

philosophic and disciplinary ideas on fairness, Orange County's \$7,000 fee on single family homes was determined fair while Hillsborough County's fee of \$195.95 could not be determined fair.

CHAPTER 1 INTRODUCTION

Impact fees are a matter of increasing fiscal importance for Florida counties and school districts within Florida counties. In 2004, impact fee collections in Florida were reported as \$1,182,450,641, with \$510,833,648 going to school districts.¹ To put impact fees in perspective, all of the presently enacted Florida local option motor fuel taxes raised only \$732 million, 60% of which is raised by impact fees. Impact fees can be seen as costs of development, which they are, but they are also an important source of capital improvement funding. Florida and its local governments have been challenged in coping with the extent of development that has occurred and is projected to continue. Impact fees are one means of meeting the needs of new development.

While of increasing fiscal importance, however, impact fees are not without controversy. On the one hand, the majority of Floridians believe that public money is being spent efficiently on public schools and that public schools are under-funded.² As shown in Figure 1-1, a majority of Floridians believe that public school officials are spending taxpayer's money somewhat effectively or very effectively. Figure 1-2 shows that 81% of Floridians believe that the amount of money spent on public schools is either about right or too low with 58% saying that the spending is too low.

Further, in 2002, Floridians passed Constitutional Amendment Nine requiring smaller class sizes in public schools. It is estimated that the construction cost required to implement Amendment Nine is \$9.3 billion over a period of 8 years or \$1,371.67 each year for every

¹ See Julian C. Jurgensmeyer, Clancey Mullen, James C. Nicholas, Tyson Smith, Gregory T. Stewart, Bob Wallace, and Randy Young, *Impact Fee in Florida: Their Evolution, Methodology, Current Issues and Comparisons with other States* (White paper prepared for the Florida City and County Management Association, October 2005).

² See Greg Forster and Susan Schuler, *Florida's Opinion on K-12 Public Education Spending* (a poll conducted on behalf of the Milton and Rose D. Friedman Foundation for Educational Choice, January 24, 2006).

Florida household for the same period. Accordingly, Floridians believe that their public schools are operating efficiently and that they believe that more needs to be spent on public schools and public school infrastructure. Regarding impact fees specifically, 68% of Floridians believe that new housing developments should pay impact fees for schools and other government infrastructure.³

On the other hand, many developers, landowners and homebuilders believe that school impact fees are not fair. A recent Florida Supreme Court case highlighted the school impact fee opponents' claim of unfairness. Developers who paid impact fees on their newly built homes in a community that permanently prohibits school-aged children claimed that the school impact fees were unfair because their development produced no increase of students.⁴ Therefore, while a majority of Floridians support school impact fees, there exists the likelihood for ongoing controversy and the ultimate question of the fairness of school impact fees.

Statement of the Problem, Methodology and Objective

Local governments are under increasing pressure to use school impact fees as a means for funding new school construction. Rich literature exists regarding the *legality* of impact fees. Lacking, however is scholarship addressing the fundamental *fairness* of impact fees. In the broader sense, John Friedmann explored the influence of philosophy on planning and argued that planning itself is the application of fairness concepts developed from various philosophies and disciplines.⁵ However, inquiry into the fundamental fairness of impact fees as a specific planning

³ See Executive Summary, NPG Florida Opinion Poll on Population, Growth, Development, Immigration and Sprawl 1999 (a poll conducted by Negative Population Growth, September 23-27, 1999).

⁴ See *Volusia County v. Aberdeen at Ormond Beach*, LP, 760 So.2d 126 (2000).

⁵ See John Friedmann, *Planning in the Public Domain: From Knowledge to Action* (1987) (tracing the roots of planning as an application of fairness. Friedmann notes that Saint-Simon (1760-1825) is credited as an early proponent of planning based upon scientific principles and not the rule of men. He argued that scientific principles of planning (found in Philosophers such as Kant) are much more likely to create a meritocracy and meritocracies are

mechanism is absent. In this absence, the fundamental fairness of the fees remains unclear and the fees continue to be a source of much controversy.

The evolution of school impact fees in Florida will be discussed. Thereafter, philosophy, ethics, courts of equity, psychology, social science, and Judeo-Christian theology will be surveyed to determine fundamental concepts of fairness from which to analyze the fairness of school impact fees. The objective is to determine if the Orange County and Hillsborough County school impact fees are fair.

Public Education Finance in the United States and Florida

Public finance for formal education is a relatively new phenomenon. Prior to the age of public finance for education, the education of children was seen as a duty of parents. British legal philosopher Blackstone, whose *Commentaries* (1723-1780) were highly influential in the American legal and government system, said that parents' duty to educate children was self-evident and by far a parent's greatest duty to his or her children. Blackstone expressed confusion

fair. Thus, planning can bring fairness. August Comte (1798-1857), as a pedagogue of Saint-Simon argued for planning as an application of fairness because planners could be separated from administrators. Therefore, planners could make plans that are fair without the pressure to alter plans to fit the desires of any particular constituency. This view is closely connected to Kant's Categorical Imperative and Rawls' Original Position discussed later. Friedmann also identifies four paradigms in which planning applies fairness. The first is planning as social reform using a scientific paradigm to inform and limit purely political decisionmaking. Karl Mannheim (1893-1947) originated this concept of planning in his 1929 book, *Wissenschaftliche-Politik*. The second is planning as policy analysis based upon the work of Herbert Simon (1916-2001) on administrative behavior. Simon studied how large organizations might make better decisions using a "bounded rationality" that puts logical and fairness constraints upon individual decisionmakers in the context of large organizations (i.e. governments, corporations.) The third is social learning of which John Dewey (1859-1952) made substantial contributions. Social Learning focused upon overcoming contradictions between theory and practice. This paradigm seeks to reduce dissonance between what a decision-maker knows to be fair (i.e. possibly a determination of what is fair based upon Kant's Categorical Imperative or Rawls' Original Position and actual practice). This paradigm is often referred to as Pragmatism. The fourth and final paradigm is planning as social mobilization characterized by direct collective action from "below" as opposed to "top down" planning. Friedmann regarded this paradigm as planning without science and fairness by direct democracy. This paradigm, however, might be limited in its ability to produce fair outcomes for the same reason that Plato's Socrates found democracy unfair. That is, the rule of the will of a majority of the masses might not produce a fair result. As an example, if there are three people with each an equal vote, 2 of the three can vote to take away the property of the other. In this pure democracy, the two persons who took the other's property are not constrained by anything other than each one's ability to combine with the other persons to determine the outcome of property allocations).

as to the lack of laws punishing parents who failed to educate his or her children. He reasoned that perhaps society thought it was punishment enough to leave the parent, who neglected the instruction of his or her family to those troubles that inevitably result from allowing children to remain uneducated.⁶

Early American legal philosopher James Kent continued the theme of parental responsibility for education in his *Commentaries*. Like Blackstone, Kent extended this duty to a civil liability. He noted that should a parent abscond and leave his or her children a public charge, the absconding parent's estate should be liable to be sequestered and the proceeds applied to the education of the child. Over the past two centuries however, the education of children has moved from an individual parental duty to a public function.

The Philosophical Context for Public Education Finance

The public schools of the United States were formed from a philosophical reasoning that dates back to Aristotle.⁷ In *Politics*, Aristotle envisioned each citizen pledging allegiance to the state to place the interests of the common good of all above those of self and common interest. Aristotle argued that man has a natural impulse to increase his own pleasure and decrease his personal pain by advancing the condition of society. This advancement of the common good would ensure liberty and justice for the individuals in the society. Aristotle argued that individuals are better served by the wisdom of collective judgments than the determinations of individuals because, over the long run, considerations made only in self-interest will factor just a part and not the whole of any given issue. This philosophy holds that the common will is a more reliable standard for social conduct than the caprice of the individual.

⁶ Grace Abbott, *Child and the State* (1968) at 11.

⁷ Kern Alexander and Richard G. Salmon, *Public School Finance* (1995) at 6.

In his 1792 report on the status of public education to the French National Assembly philosopher Condorcet argued that “only through universal education could citizens be taught effectively to enjoy their rights and fulfill their responsibilities.”⁸ This quest for the general will was enunciated earlier by Rousseau as the “most important rule of legitimate and popular government.” Rousseau’s general will envisioned collective decision-making as opposed to an individual’s determination.⁹

This philosophy translated into the need for an educated citizenry to preserve the republican form of government. The view was best expressed by Founding Father James Madison when he concisely explained, “[a] people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”¹⁰ This view held simply that if an individual failed to receive an education, it was not that individual alone who suffered the consequences but that society too would also suffer. In the individual’s subsequent limitation in knowledge, and the skills for getting knowledge, the individual would not be helping the electorate to make the best possible decisions. Anthropologists support this view that a publicly educated electorate assists in the efficient functioning of a state.¹¹

Accordingly, the state has an interest in educating the masses that surpasses even the individual’s interest in his or her own education. As the individuals’ level of civic competency increases commensurately with education, so too does the civic efficiency and fairness of the State.

⁸ R. Freeman Butts and Lawrence E. Credmin, *History of Education in American Culture* (1953) at 190.

⁹ Jean Jacques Rousseau, *Discourse in Political Philosophy* (1785) from *The Social Contract and Discourses*, G.D.H. Cole trans. (1973) at 135.

¹⁰ James Madison, *Writings of James Madison: Comprising his Public Papers and his Private Correspondence* (letter to W.T. Barry, August 4, 1822) Gilliard Hunt ed. (1910) at 103.

¹¹ Yehundi A. Cohen, *Shaping of Men’s Minds: Anthropological Perspectives on Education* 39-40 (1971) at 39-40.

The above political philosophers directly connect the effectiveness of a republic or democracy to the education of its citizenry.

Moving past merely the interest of the state, some contemporary political philosophers find adequate education an individual human right. The movement toward recognition of a human right to education started in the 1800s through the emergence of liberalism embodied in Engels.¹² Nineteenth century liberal thought influenced the definition of educational rights in Europe. Beginning with Germany in 1849, the right to education began appearing in the constitutions of European nations. The German constitution affirmed education as a right of every German. This provision, however, did not create an absolute duty of the state to provide the fulfillment of the right.

The first instance of international recognition of the right to education occurred in the aftermath of WWI. The various broken nations and minorities sought protection of religious and linguistic identity through treaties adjunct to the principle peace treaty ending the war. The Treaty between the Principal Allied Powers and Associated Powers and Poland in 1919 sought to provide guaranteed minority educational rights. The 1924 League of Nations *Declaration of Geneva* implied a universal right to education but did not expressly proclaim the right.

On the national scale, the 1936 Constitution of the Soviet Union provided the first proclamation of a right to education with a corresponding state duty to educate. This provision was for all grade levels including higher education and vocational training. Other socialist states correspondingly followed. On the world scale, the United Nations General Assembly declared in 1948 that everyone has the right to education. Since that time, most internationally recognized declarations on human rights enumerate education as a human right.

¹² See Douglas Hodgson, *Human Right to Education* (1998).

The Historical Context of Public Education Finance in the United States

State concern for public education and tax support for the public schools can be traced to actions of the colonial legislature of Massachusetts. The Massachusetts law of 1642 directed “certain men of each chosen town to ascertain from time to time, if parents and masters were attending to their educational duties; if the children were being trained in learning and labor and other employments . . . profitable to the state; and if children were being taught to read and understand the principles of religion and the capital laws of the country they were empowered to impose fines on those who refuse to render such accounts to them when required.”¹³ Cubberly observed that this was the first time in the English-speaking world that a legislative body enacted legislation requiring that children be taught to read.

The 1642 law was tried for five years and found unsatisfactory. In 1647, the legislative body of the Massachusetts colony enacted *ye olde deluder* law. The preamble of the law stated that one of the chief projects of *ye olde deluder* Satan was to keep people in ignorance of the Scriptures. Accordingly, the obvious way to defeat Satan’s purposes was to teach the people to read and write. To that end, the legislative body ordered that every town must provide, at public expense, teachers and schools for the education of the children in that town. This Massachusetts law influenced other colonies so that by 1720 Connecticut, Maine, New Hampshire, and Vermont had all followed Massachusetts.

Throughout the colonial period, while New England continued to develop publicly funded education, the central colonies like New York, Pennsylvania and New Jersey relied upon parochial schools. These parochial schools were primarily funded by their respective denominations but were also able to benefit from fees and rate bills. Rate bills are special taxes

¹³ Ellwood P. Cubberly, *History of Education* (1920) at 364.

levied upon parents and are assessed in proportion to the number of children sent to the schools. The primary purpose of these parochial schools, like the schools in New England, was to teach religion. However, reading, writing and arithmetic were seen as an essential means to that end.

Large portions of the New England and central colony populations consisted of religious dissenters from Europe. Alternatively, the early settlers of Virginia and the rest of the South were not religious dissenters but rather agents of British businesses. As a result, the majority of these settlers supported the Church of England and continued to provide education in much the same way as existed in England. Under the British system, schools were either under the church or private control. Private schools were financed by private tuition and patronized almost exclusively by the wealthy. Wealthy families also hired private tutors in the home or sent their children to Europe for education. The poorer children generally had only apprenticeship training or a small number of seats in charity schools.

Summarizing the public educational landscape in the colonial period of America, public education was available in only a few New England colonies and even in those colonies education was not entirely free. Outside of New England, education was provided by parochial or private schools financed primarily by the parents of the children attending them. Under this system educational opportunity was a generally a function of the wealth of a child's parents and few children were educated who did not come from wealthy parents.

The general public's attitude toward education in the national period of American history, approximately 1783 to 1876, can be summed up in Article III of the Ordinance of 1787 that was enacted by the Continental Congress contemporaneously with the United States Constitution. It reads, "[t]he means of education shall forever be encouraged."¹⁴ Although applied only to the

¹⁴ Federal and State Constitutions, Vol. II, F.N. Thorpe ed. (1909) at 957.

states known at the time as the Northwest Territories (i.e. areas west of the Appalachians that we now call the Midwestern States), this ordinance implied that education was a state responsibility and a vital aspect of a republican or democratic form of government. The provisions of this ordinance encapsulate the political and educational philosophies of the founding fathers.

The beliefs of persons of advanced knowledge and forward-looking perspectives have a profound influence on subsequent events even though the policies advocated may not have been accepted at the time. Here we see the philosophy that liberty, equality, and good government is linked to an educated citizenry.

Public education developed slowly in the early national period. The best known of the early advocates was Thomas Jefferson. In 1787 he wrote in a letter to James Madison, “[a]bove all things I hope the education of the common people will be attended to; convinced that on this good sense we may rely with the most security for the preservation of a due sense of liberty.”¹⁵ In 1816, after his retirement from the presidency, he wrote to Charles Yancy, “[i]f a nation expects to be ignorant and free in a state of civilization it expects what never was and never will be . . . There is no safe deposit [for the foundations of government] but with the people themselves; nor can they be safe with them without information.”¹⁶

Despite the advocacy of Jefferson and others, tax-supported public education did not generally become available in the Middle-Atlantic and Midwestern states until after 1830 and in the Southern states until the late 1800s. Although some progress had been made by the middle 1800s, free public education was not generally available in the United States. According to the

¹⁵ See Thomas Jefferson, *Works of Thomas Jefferson in Twelve Volumes, The Federal Edition* (Letter to James Madison, 1787) Paul Leicester Ford ed. (1906).

¹⁶ See Thomas Jefferson, *Works of Thomas Jefferson in Twelve Volumes, The Federal Edition* (Letter to Colonel Charles Yancey 1816) Paul Leicester Ford ed. (1906).

Seventh Census of the United States, in 1850 only about half of the children of New England, one-sixth in the western territories, one seventh in the Mid-Atlantic States and paltry numbers of children in the South were provided with a free public education. As late as 1870, 57% of the student-aged population was enrolled in the public schools and the average length of the school term was only 78 days.

Tax support for the public schools was largely confined to the elementary grades until the latter part of the 1800s. Up until 1840, not much more than a dozen public high schools had been established in Massachusetts and not more than an equal number in all of the other states combined. Private academies and parochial schools provided most of the secondary education available. Throughout this period, legislation providing for the establishment of high schools was attacked in the courts of many states. One such challenge, the Kalamazoo case, was to become a resounding justification for the creation of public high schools nationwide. In the 1875 Kalamazoo case, the Supreme Court of Michigan rendered an opinion so favorable and so positive in support of taxes for high schools that it greatly influenced the development of high schools in other states. Yet high school education was not universally available by the close of the nineteenth century. Only 8% of the population 14-17 years of age was enrolled in grades 9 through 12 in public high schools by 1900. In rural areas, public high schools did not become available until after World War I.

Free public education developed very slowly in the United States during the first quarter of the nineteenth century. However, between 1830 and 1860, constitutional and statutory authorization for tax-supported public schools was general in the Mid-Atlantic and Midwestern states. All of the New England states had authorized tax support of public schools prior to 1830. Legal provision for tax support of public schools in the South was not generally authorized by

the state legislatures until the late 1800s. But even after tax levies for public schools were authorized supporters of public schools, not only in the South but also in other states, frequently faced bitter opposition to such levies. The colonial belief that church and parents were solely responsible for the education of children was an obstacle that was to give ground grudgingly and remains very much in evidence today.

Although taxes for public schools were generally authorized during the nineteenth century, they were frequently supplemented by tuition charges and/or rate bills. Rate bills were abolished in most of the Northern and Midwestern states between 1834 and 1871. However, the practice of charging tuition, especially for public schools, continued well into the twentieth century. Tuition was disguised by calling it an *incidental fee*. Such fees made education still the largely the province of the wealthy with the poor mostly unable to participate.

In summary, public finance for formal education is a relatively new phenomenon. At the birth of our nation's colonial period, a child's education was viewed as a duty of his or her parents and not that of the state. However, concomitant with the ideals of a republican or democratic government and liberty, philosophies that saw virtue and necessity in an educated citizenry were taking root in the American psyche. During the colonial period, governments, beginning in New England and graduating southward, began creating public schools and taxing their citizens to finance those schools. In the early national period and throughout the 1800s, this trend slowly continued with more and more public schools becoming available for children throughout the growing country. By World War I, children even in remote rural areas were provided free education by public schools.

The Historical Context of Public Education Finance in Florida

Florida's movements towards public schools started in 1831 through the efforts of the Florida Educational Society. This movement created the first free school in Saint Augustine in

1832. Through the 1860s, a few Florida counties organized public schools. The 1865 Florida Constitutional Convention recorded some discussion of a constitutional provision for free public schools statewide. Subsequently, the 1868 Constitution created a fund for public schools and introduced language that public education is to be provided by the state. Finally, the 1885 Constitution contains the language that we see today regarding the right to a free, state funded, education for the children of Florida.

In 1947, the Florida legislature passed an act creating a Minimum Foundation Program. This legislation recognized inequalities in public school funding among the Florida counties and school districts that resulted from differences in the wealth of local landowners (who paid local ad valorem real estate taxes). A minimum foundation program guarantees a certain foundation level of expenditure for each student, together with a minimum tax rate that each county or local school district must levy for educational purposes. State aid from state general taxes is used to make up for the difference between the minimum tax rate and the foundation expenditures.¹⁷ Opponents of impact fees point out that the fees can usurp the principles of the Minimum Foundation Program because wealthier communities can build more expensive schools than can less wealthy communities.

Florida's Minimum Foundation Program has grown into the more comprehensive Florida Education Finance Program (FEFP) that was initiated in 1973.¹⁸ A main thrust of the FEFP is to insure equal access to education for all Florida students regardless of geographic or local economic conditions. The FEFP recognizes four factors to equalize public school funding: varying local property tax bases; varying education program cost; varying cost of living; and

¹⁷ See A.R. Odden and L.O. Picus, *School Finance: A Policy Perspective* (1992).

¹⁸ *Doing the Math: Southern State School Finance Systems*, Jonathan R. Watts Hull ed. (2004) at 12.

varying cost for equivalent educational programs due to sparseness and dispersion of the population. The FEFP operates by determining the number of full-time equivalent students in a school system and then applying multipliers to that number. The multiplier adjusts for the four equalization factors and the result is an adjusted value for each individual school district. The product of that calculation is then multiplied by a legislatively set base per-student allocation (\$3,537.11 for FY 2002-2003) and further adjusted by a cost of living and other adjustments. Combined, the multipliers and adjustments attempt to equalize funding to all public schools regardless of the wealth of the ad valorem taxpayers in that school district. Where ad valorem taxation falls short of the minimum state-legislated level of funding per student, the state makes up the difference.

Since enactment of the Minimum Foundation Program and FEFP, public school financing has come from a combination of state and local sources (including an optional ad valorem tax surcharge made available in 1996).¹⁹ While impact fees are a growing component of local contribution to county and school district public school financing combinations, they are not the only innovative financing mechanism. Some districts have begun Educational Facility Benefit Districts (EFBDs). These districts are a public/private agreement to levy non-ad valorem assessments and borrow money to finance/construct public schools within the EFBD.

Another growing source of public school financing is the use of charter schools. The original intent of charter schools was to provide a forum for innovative instruction and learning but they have since evolved into an innovative source of public school construction funds. Charter school construction is characterized by cooperation amongst school districts, city/counties, developers and private individuals/agencies. The North Lake Park Community

¹⁹ D. Brent Wilder, Financing Solutions for Florida Schools (2004).

School in Orange County is an example of private/public cooperation for charter school construction. In 1997, Orange County Public Schools (OCPS) was approached by a local developer and the City of Orlando with the request to build a new elementary charter school through private and public cooperation.²⁰ The school was planned and built with the private developer's funds to OCPS specifications. The gymnasium was financed by the private non-profit YMCA. OCPS was to pay back the developer for the principal cost of building the school over a five-year period after the school opened. OCPS would pay the interest through reimbursement of impact fees collectable from the developer. Thus, the need for a new public elementary school was met through cooperation of the school board, the developer and outside non-profit organizations. This innovative arrangement opens the possibility for any number of private and non-profit contributions to public school construction costs.

Impact fee opponents criticize the current public school financing scheme in Florida by asserting that the current system is either failing to work within the massive amounts of dollars it currently receives or there is a changing of the burden from state (general taxation) finance of public schools to private financing of public schools. Going back to the 1906 report of the state school superintendent, Florida public schools provided education to 130,345 students with state spending of \$1.02 million dollars. Since that time, Florida's public school student enrollment has constantly increased to its current level of 2.7 million students with state spending of about \$5.9 billion dollars this fiscal year.²¹ Although there has been a massive increase in the number of students, the cost of providing of education to those students has increased exponentially. In

²⁰ Henry Boekhoff, Financing Solutions for Florida Schools (2004).

²¹ Florida's e-budget (2006).

1909, the state spent \$149 per student (adjusted for inflation).²² Last year, the state spent \$2,185 per student. Therefore, this year’s spending figure represents an increase by a multiple of fifteen. Similarly, local millage rates have increased significantly and local taxation initiatives have passed. Even with such an increase in spending, Florida local governments and school districts continue to assert that more public school construction is needed. This, of course, requires more money and innovative ways to appropriate that money. Opponents of impact fees assert that what had traditionally been a burden upon the state under general taxation is now unfairly being shifted to developers, homebuilders and residential landowners through impact fees.

Now that the philosophical and historical context for public school financing has been set, details of public school financing will be discussed. For the purpose of the objective, school impact fees in particular will be examined.

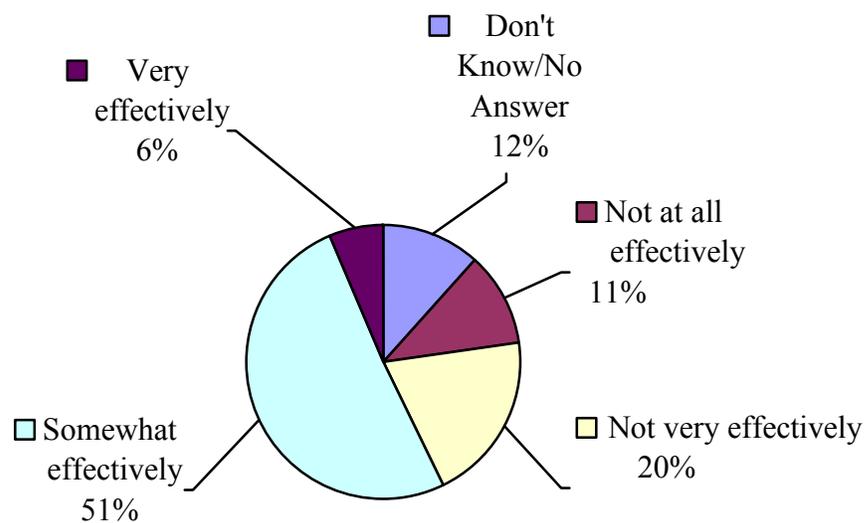


Figure 1-1. Floridian’s perception of spending of tax dollars on public schools. Source: Forster & Schuler (2006).

²² Inflation Calculator (2006).

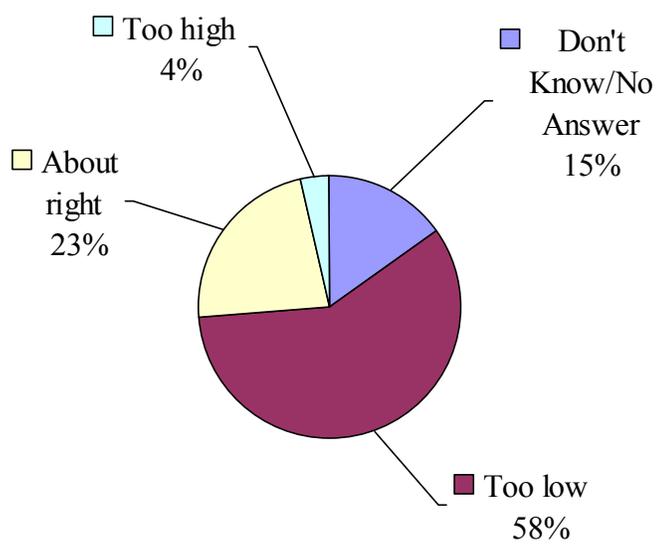


Figure 1-2 Floridian's perception of the degree of spending on public schools. Source: Forster & Schuler (2006).

CHAPTER 2 THE SCHOOL IMPACT FEE

Impact fees arose as an issue in Florida in the 1960's a period of rapid population growth and high inflation. Between the 1950's and the 1970's, Florida's population doubled from 2.8 million to 5 million.¹ As Figure 2-1 indicates, this decade began the nearly 300,000 person per year growth of the state that continues today. As Florida's population grew, so also did the costs of providing services. Significant inflation began in the 1960's and escalated to double digits in the 1970's and 1980's.² The condition of rapid growth combined with inflation set off a taxpayer's revolt, first in California and eventually nationwide. Non-taxation means of financing public goods and services were demanded by the public in an effort to stem escalating tax burdens. User charges, including impact fees, were a response to the public's demand.

Florida local governments get money almost equally from the State, from local property taxes and from user charges such as impact fees. Table 2-1 shows total receipts by all local governments in Florida by type and as a percent of total revenue for both 1992 and 2002. Over this period there is a slight tendency for all taxes and property taxes to go down while current charges rise. Table 2-1 also shows local government revenues in the nation. These data reveal that Florida local governments make less use of taxes than do local governments nationally. Both nationally and in Florida, the use of taxes is decreasing as a source of revenue. Conversely, charges and miscellaneous, specifically current charges, are the rising source of revenue. User charges are a large component of current charges.

¹ See Julian C. Jurgensmeyer, Clancey Mullen, James C. Nicholas, Tyson Smith, Gregory T. Stewart, Bob Wallace, and Randy Young, *Impact Fee in Florida: Their Evolution, Methodology, Current Issues and Comparisons with other States* (White paper prepared for the Florida City and County Management Association, October 2005).

² *Inflation by Decade* (2006).

The trend nationally is away from taxes and towards charging those that use or benefit from a service the cost of providing that facility or service. Table 2-2 shows local government finance data from Table 2-1 on a per capita basis. Here we see Florida local governments receiving slightly more revenue per capita than the national norm. However, they receive less of their revenues from taxes than is the norm, meaning that Florida local governments have been turning more to non-taxation means of funding. This is especially true for all charges and current charges.

While there is a general movement toward non-tax means of local government funding, this trend is even more pronounced in Florida. Given that Florida local governments receive more money per capita than the national norm might suggest that there are adequate funds and no need for supplementation. However, the State of Florida raises \$3,312 per capita as contrasted with \$4,683 for all states. When state and local revenues are considered together, Florida's per capita receipts amount to \$5,468 as contrasted with \$6,607 for the nation.

Perhaps most significant is that Florida state intergovernmental spending is \$851 per capita as contrasted with \$1,317 nationally. If Florida provided local governments with intergovernmental funds at the national rate, local Florida governments would have gotten an additional \$7.9 billion in revenue last year. In addition, Florida's sharing of state revenues with local governments has fallen behind the practices of other states. Table 2-3 focuses on state revenues provided to local governments. Revenue to local governments from state governments in 1992 was \$660.27 per capita in Florida and \$775.79 for all states. In 2002 Florida's per capita amount grew by 42.9% to \$934.22 and the national average grew by 61.4% to \$1,263.85. These data, when read with those of Table 2-2, clearly show what has been the situation with local government finance in Florida. Per capita tax burdens imposed by Florida local governments

increased by 35% while property taxes grew by 28%. All charges grew by 43.4% while current charges grew by 68.5%. All of these increases occurred while the state of Florida was cutting taxes and lagging further behind in intergovernmental revenue. Impact fees fall within the general pattern of moving toward non-taxation means of funding as local governments attempt to accommodate growth.

The Emergence of the Impact Fee

The first appearance in Florida of what is currently termed an impact fee was by the local government of Gulf Breeze when it imposed a charge for parks at the time of subdivision in the early 1960's. This was ruled an unauthorized tax and therefore unconstitutional in *Carlann Shores v. Gulf Breeze*.³ Hollywood's attempt to get money for parks met a similar end in *Venditti-Siravo v. Hollywood*.⁴ Maitland followed also followed this trend in *Admiral Development Corp. v. Maitland*.⁵ The year 1976 had two significant cases. In *Wald Corp. v. Dade County*, Dade County's requirement for the dedication of land for drainage canals was upheld.⁶ Also, the Florida Supreme Court decided *Contractors and Builders Assn. of Pinellas County v. City of Dunedin*.⁷ In this case the court wrote:

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 especially, not from the maintenance of the system, but by the extension of the system . . . should bear the cost of that extension.

Therefore, impact fees were found valid where the cost of the additionally required infrastructure

³ *Carlann Shores v. Gulf Breeze*, 26 Fla. Supp. 94 (1966).

⁴ *Venditti-Siravo v. Hollywood*, 418 So.2d 1251, 1253 (1982).

⁵ *Admiral Development Corp. v. Maitland*, 267 So.2d (1972).

⁶ *Wald Corp. v. Dade County*, 338 So.2d 863 (1976).

⁷ *Contractors and Builders Association of Pinellas County v. City of Dunedin*, 329 So. 2d 314 (1976).

is borne by the new development causing the need for additional infrastructure but also that the new development does not pay any additional amounts that would cause a windfall to existing development. The *Dunedin* court makes clear that such charges, impact fees, are not unlimited.

Extending their rationale:

[t]he 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. New users can only be held responsible for the costs attributable to new use and not for other costs, especially any charge that would yield a “windfall” to the existing community.

Dunedin was a case involving a municipally owned water and sewer utility.

Hollywood Inc. v. Broward County extended into the application of the *Dunedin* logic to parks, the same government facility that the cities of Gulf Breeze, Maitland and Hollywood unsuccessfully tried to fund with development charges.⁸ In *Hollywood Inc.* the court focused on requiring new users to pay for the costs attributable serving the new users. The *Hollywood Inc.*

Court provides the principles of the Dual Rational Nexus Test. Specifically:

- The local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth generated by the development being charged the impact fees, and
- The government must specifically earmark the funds collected for use in acquiring capital facilities to benefit the development charged the impact fees.

Home Builders and Contractors Ass’n. v. Palm Beach County established that road impact fees were permissible and within the authority of a non-charter county.⁹ The Court in *St. Johns County v. Northeast Florida Builders Ass’n.* recognized school impact fees as within a county’s power if the rational nexus requirement from *Dunedin* was followed.¹⁰ *Volusia County v.*

⁸ *Hollywood Inc. v. Broward County*, 431 So.2d 606 (1983).

⁹ *Home Builders and Contractors Association v. Palm Beach County*, 446 So. 2d 140 (1983).

¹⁰ *St. Johns County v. Northeast Florida Builders Association.*, 583 So.2d 635 (West 1991).

Aberdeen at Ormond Beach, LP held that if a nexus cannot be established then no impact fee can be charged. Impact fees evolved in Florida through the courts, ultimately being recognized as being within city and county home rule authority.¹¹ This method of evolution was perhaps the only option since Florida cities and counties were exploring new issues of governance and government finance. In the end, the body of law that came out of this process clearly established that:

- Impact fees are permissible;
- Impact fees cannot be imposed or structured to benefit or provide a windfall to existing residents;
- Impact fees must satisfy the dual rational nexus between the need for facility improvements and new development; and
- Local governments are required to show that developments paying impact fees will receive benefit from the expenditure of those fees.

Impact fees began in Florida as minor supplements to local government capital improvement funds. The park fee at issue in *Hollywood Inc.* was \$125 per single family home and the school fee at issue in *St Johns* was \$385 per single family home. The amounts today are in the thousands with Collier County's school impact fee topping \$10,000.00. Therefore, the evolution has been both in the use of impact fees and in the amount of those fees.

Impact Fee Formulation

There are two generally accepted impact fee formulation methodologies commonly used in Florida. These are the consumption-based and improvements-based methodologies. These methodologies have evolved during the last twenty years. While the majority of Florida impact fees are consumption-based, both have been used to satisfy the requirements of the dual rational nexus test discussed earlier. Although there are variations in the application of these methodologies, this section discusses the basic methodology, underlying assumptions, and

¹¹ *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126 (West 2000).

implementation requirements of each methodology. This section also addresses the basic differences between the methodologies and how each of the methodologies furthers the implementation of the comprehensive plan and in particular the Capital Improvements Element.

Consumption Based Impact Fees

The consumption-based or *standards based* methodology calculates impact fees based on the value of public infrastructure consumed per unit of land use. The value of the public infrastructure is usually developed by calculating the replacement cost of the existing public capital infrastructure. This value is then related to a facility-based standard such as, elementary schools per 1000 population or acres of parks per 1000 population. Values are generally expressed in terms relevant to those facilities such as value per acre and per capita. The key underlying supposition is that growth consumes some identifiable quantity of public infrastructure capacity, and the fee is based on the cost of providing that identified quantity.

Proponents of consumption based impact fees argue the flexibility to the government as a significant advantage to the consumption approach. Specifically, a government that uses a consumption based impact fee can develop its capital improvement program to include projects that directly respond to where growth and thus the need for the public infrastructure occurs. The capital improvement program list of improvements is reviewed annually and that list can change as growth patterns change, resulting in new project priorities. Finally, it should be noted that ordinances that implement consumption based impact fees generally include a provision that ties the need for and benefit of impact fees to projects that must be included in the local government's capital improvements program and comprehensive plan capital improvements element.

Improvements Based Impact Fees

The improvements based or *needs based* methodology charges new development based on a specific set of capital improvement projects. This approach is usually based on a long-range master plan that includes a list of future projects that are determined to be necessary to accommodate existing and future growth at the adopted level of service. Under the needs based approach, an analysis is usually made of the impact of any existing deficiencies and an adjustment is made to account for deficiencies existing at the beginning of the planning period to assure that the cost of correcting those deficiencies is not shifted to new development. However, generally, no adjustment is made for excess capacity built as part of the improvements list that is available at the end of the planning period, since the improvements driven approach did not charge for the existing excess capacity that is available at the start of the planning period and that is consumed by new development. The implicit or explicit assumption is that there may be excess capacity in every infrastructure system, and as long as the amount or proportion of excess capacity at the end of the planning period is reasonably similar to what was there at the beginning, there is no need to make adjustments for excess capacity.

Proponents of the improvements based methodology indicate that this method provides a direct tie to the Local Government Comprehensive Planning and Land Development Regulation Act that requires local governments to adopt a list of planned capital improvements as part of their comprehensive plans. In the improvements based methodology, the list of capital improvements used in the calculation of the cost component is usually the list of improvements included in the five year or longer Capital Improvement Program and the local government's Capital Improvements Element. Proponents say that this methodology gives the development community assurance that the impact fees they pay are being spent on the specific improvements under which the impact fee was calculated. When the local government changes the list of capital

improvements, the resulting impact fee should be recalculated using the new list of capital improvements. Finally, similar to ordinances for consumption based impact fees, improvements based impact fee ordinances also include provisions that tie the need for and benefit of impact fees to projects included in the local governments capital improvements program and comprehensive plan capital improvements element.

Differences between Fees

The basic difference between the two is that the consumption based impact fee charges new development based on the value of the capital asset being consumed by each unit of land use, whereas, the improvements based impact fee charges new development based on the cost of a specific set of improvements and their associated cost per unit of land use. As indicated previously, the key underlying assumption for consumption based impact fees is that growth consumes some capacity of all public facilities and not just the new infrastructure being built.

In improvements based impact fees, growth is being charged based on a specific set of project improvements that the local government is planning to build through their adopted capital improvements program. When the list of improvements in the capital improvements program changes, the impact fee should be recalculated based on the new list of capital improvements.

In summary, both methods have been used successfully in Florida and both methods satisfy the requirements of the dual rational nexus test. In Florida, the majority of the impact fees use the consumption based methodology. Additionally, each approach tends to be more applicable in particular situations. The inherent flexibility of the consumption based approach allows the jurisdiction to match impact fee receipts to specific projects as the needs for specific projects are identified. Improvements based systems are more inflexible and are more applicable to those situations where specific needed improvements can be identified well in advance and impact fees can be tailored to those specific needs.

Experience has shown that both approaches are valuable tools of capital improvement planning and funding.¹²

The Fee Formula and Basic Implementation Considerations

The general impact fee formula can be represented as:

$$\text{IMPACT FEE} = (\text{DEMAND X UNIT COST}) - \text{CREDIT}$$

Where:

DEMAND = the amount of capacity needed to accommodate new development, based on the existing or adopted LOS standard, or the associated need for service such as, vehicle miles of travel, elementary schools per 1000 population, acres of parks per 1000 population, library or other building square footage per 1000 population, among others;

UNIT COST = the cost per unit of capacity or demand based on the calculated value of the asset or set of improvements.

CREDIT = the value of the future non-impact fee revenues that growth will generate that will also be used to pay for the capital facility expansion of that public infrastructure.

Regardless of which methodology is used in the impact fee study, there are certain criteria and procedures that need to be followed in developing and implementing impact fee programs.

These include, but are not limited to:

- Local governments must establish LOS standards for each impact fee program area.
- Local governments must apply the same LOS standard to both existing and new development.
- An “existing deficiency” is created when a local government establishes a LOS standard that is greater than the current LOS.
- New development cannot be charged impact fees designed to correct an existing deficiency. To charge new development based on a LOS standard higher than what exists

¹² See Jurgensmeyer, Mullen, Nicholas, Smith, Stewart, Wallace, and Young, *supra* note 1.

today, the local government must have a financial plan (non-impact fee revenue sources) to eliminate the existing deficiency within a reasonable amount of time (generally five years or less).

- Facility costs should be reflective of recently built projects, current bids and architects and engineers estimates of project costs.
- Credits, discussed more thoroughly in the next section, should reflect the additional non-impact fee revenues reasonably expected to be generated by new development being charged the impact fee when such revenues are used for the same infrastructure for which impact fees are being charged.

There are many other policy related issues that are addressed as each community updates and implements impact fees. These policy issues are unique to each community and are reflected in the impact fee technical analysis.

Impact Fee Credits

Most impact fees include as a component of their methodology the consideration of whether a credit as a deduction from the cost component of the fee calculation is required.

Generally, a credit is a reduction in the amount of an impact fee due from a newly constructed development resulting from either the donation of the property or improvements by that developer or the payment of tax or other revenues applied to pay for the same infrastructure that is being funded by the impact fee. This contribution generally takes one of the following forms:

- **Developer Contributions** - This credit may be due as a result of the donation of property or improvements from a particular development to a governmental entity which reduces that development's impact on the system. Frequently these contributions take the form of the donations of right of way or a particular site upon which some type of government facility will be constructed. Under these circumstances, the amount of the credit is generally determined through either the provisions of the impact fee ordinance or by the terms of a specific development agreement.
- **Tax and Other Revenues** – A credit may also be due as a result of the payment of taxes and other revenues by the newly constructed development which are available and applied toward the funding of the same infrastructure for which the impact fee is collected. These contributions are normally applicable to all similar developments and are incorporated into the calculation of the impact fee itself.

The credit component comports with the fundamentals of the dual rational nexus test. Impact fees, as with all other types of fees, are limited to offsetting the cost of the regulation or the service that that is being provided.¹³ In the context of impact fees, the amount of the fee cannot exceed the capital cost of the impacts resulting from the newly constructed development.¹⁴ To make certain that the amount of the fee does not exceed this cost, a credit is given for contributions of property and improvements made by a developer and for the payment of taxes and other revenues that are available and applied toward the provision of the same infrastructure for which the impact fee is collected. The clear purpose of the credit is to make certain a newly constructed development pays no more than the unfunded cost of the infrastructure needed to serve that new development.¹⁵ The particular approach utilized to consider the availability of a credit within the context of an impact fee methodology may vary, and the courts have generally recognized that the local government imposing the fee is best able to evaluate the differing approaches. The only limitation is that any methodology utilized must consider and provide a credit for other revenues that are available and applied toward providing the same infrastructure for which the impact fee is collected. In determining whether the payment of taxes or other revenues is credited against the impact fee, only those revenues that are applied toward the funding of improvements and create additional capacity to serve that development, are entitled to a credit under Florida law. Newly constructed development, just as existing development, pays a

¹³ See *Atkins v. Phillips*, 26 Fla. 281 (1890); *Tamiami Trail Tours, Inc. v. City of Orlando*, 120 So. 2d 170 (1960); and *Broward County v. Janis Development Corp.*, 311 So. 2d 371 (1975).

¹⁴ See *Contractors & Builders Association of Pinellas County v. City of Dunedin*, 329 So. 2d 314, 320 (1976) and *Home Builders & Contractors Association of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County*, 446 So. 2d 140 (1983).

¹⁵ See *St. Johns County v. Northeast Florida Homebuilders Association*, 583 So.2d 635 (1991) (where the Supreme Court discussed the credit calculation and characterized the fee as the average net cost of \$448 for building new schools that would not be covered by existing revenue mechanisms).

variety of taxes and revenues to the Federal, State and local governments. Those revenues may be used for operations maintenance, repair and even renovations, but they are not connected to new capacity. Therefore, no credit is required. However, those taxes and revenues that fund additional capacity in the same infrastructure system for which the impact fee is being collected are entitled to a credit under existing law in the State of Florida. All impact fees in Florida provide such credits.¹⁶ As we have seen validated previously, a two-pronged test determines whether taxes or other revenues must be credited from an impact fee:

- First, whether the taxes or other revenues paid by that newly constructed development are legally available to fund the same infrastructure for which the impact fee is collected. (Legally available in this context means not restricted or otherwise committed for purposes other than for what the impact fee was collected).
- Second, whether those legally available taxes or other revenues are actually applied toward reducing the cost of the infrastructure requirements for the newly constructed development that pays the impact fee.

If a revenue source meets this two-pronged test, then a credit must be deducted from the capital cost determined in the impact fee calculation.

Impact fee methodologies may, and frequently do, vary in how they approach the consideration of credits. Some methodologies employ a more generous approach to credits not necessarily because they are legally required but rather for ease of administration, to avoid legal challenge or based on direction from the elected officials. These approaches are valid and represent a judgment by the legislative body. However, merely because a more generous approach to credits is incorporated into a methodology does not mean that it is a legal requirement for a valid impact fee. For example, some methodologies incorporate a credit for past taxes and revenues paid to a local government prior to the actual development of a property.

¹⁶ Jurgensmeyer, Mullen, Nicholas, Smith, Stewart, Wallace, and Young, *supra* note 1, at 13.

Though such adjustments may be made in the calculation of an impact fee, they are not required to be credited unless the created capacity is available to serve that property at the time it was developed. If these contributions were not applied to provide the capacity to serve any development on that property, then they are not a substitute for the impact fee and no credit is due.

Additionally, a variety of planning periods have been used to analyze credits from a newly developed property. The courts have granted local governments deference in the selection of the particular planning period to be used. However, the particular period selected should be consistent with the ultimate aim of the impact fee which is to provide the necessary infrastructure to serve that development and to do so in a timely fashion. Therefore, an inherent connection exists between the use of impact fees and the requirements of growth management laws to provide the necessary infrastructure to serve a development concurrently with its impacts.

School Impact Fees

School impact fees have been the most frequently litigated of all impact fees. To date, there have been four major suits dealing with school impact fees in Florida. With the average school impact fee in Florida now reaching \$3,286, the amount of school impact fees is probably a major factor in the frequency of litigation. While amounts vary, it is common for the school fee to be the highest of all the impact fees charged and the fastest growing. Further, as Figure 2-2 denotes, school districts are rapidly expanding the use of impact fees. As mentioned earlier, most Floridians recognize public schools as important to the well-being of Florida. Paying for school capacity however, has become more difficult with declining state revenues, voter resistance to local taxes and bonds, and increasing public sentiment that new growth should pay for new

schools. As a result, school impact fees have increased in use and amount.¹⁷

Like other impact fees, school fees involve the costs of building schools, demands placed on the school system from increased enrollment, and credits for other revenues that pay for the needed improvements. School impact fee costs typically include school buildings, furnishings and equipment, support facilities, the land for schools and support facilities, and school buses. The demands placed on schools are usually measured by the average number of public school students per dwelling unit. The credits against impact fees involve several sources of revenue that are restricted to capital improvements for educational facilities, including money from the State of Florida, the school district Capital Improvement (real estate) Tax that is capped at 2 mills, revenues derived from the sale of Certificates of Participation or General Obligation Bonds and the Half-Cent Local Option Sales Tax for schools. To the extent that these sources of revenue are available and appropriated to pay the capital costs of expanding school capacity, they are incorporated as reductions in the amount of impact fees adopted.

One variable that distinguishes school impact fees from other types of impact fees is that school impact fees involve more than one public sector organization and their elected officials. School districts provide the schools but local governments regulate development. The creation and use of a school impact fee typically involves different roles by school districts and local governments and school impact fees require a high degree of cooperation among local governments. The school district cannot receive impact fees unless the county agrees to adopt the ordinance. The county depends on the school district to have properly calculated the fees and to spend them appropriately. Cities typically collect the school impact fee adopted by the county pursuant to a countywide ordinance adopted by the county. In *St Johns* the Florida Supreme

¹⁷ See *St. Johns County v. Northeast Florida Builders Association*, 583 So. 2d 365 (1991).

Court held that school impact fees cannot be collected unless substantially the entire county is subject to the requirement thereby underscoring the need for intergovernmental cooperation. In some instances, the cooperation between school district and county is sufficient to lead to the approval of a school impact fee, but with some disagreement about the amount. While many counties adopt rates calculated by their school district, some counties have reduced the amount of the impact fee proposed by the school district.

Another variable involves exemption from school impact fees for development that creates no impact on schools by forbidding school age children from living there.¹⁸ Simply put, the *Aberdeen* Court held that developments where school aged children are legally barred cannot be required to pay school impact fees.

Two recent cases raised questions about the methodology and data that are used to calculate school impact fees. In *Brown v. Lee County*,¹⁹ a significant part of the plaintiff's challenge to the school fee involved issues about specific data and methods used to calculate the fee. The plaintiff's witnesses disagreed with many of the data and methods used by the district in calculating the fee. The court ruled that the school board made a reasonable choice which does not become automatically unreasonable simply because, with some extra effort, the school board could have developed a potentially better data source. In other words, school boards and local governments must use reasonable data and methods to comply with the dual rational nexus requirements, but there is no official or sanctioned, or even preferred way to achieve the requirements.

¹⁸ See *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2nd 126 (2000).

¹⁹ See *Brown v. Lee County*, Lee County Circuit Court Case No.: 01-11623-CA (2001) (currently on appeal in the 2nd District Court of Appeals).

The most recent school fee case is *Homebuilders of Metro Orlando v. Osceola County*.²⁰ The central issue in this case was a policy decision by the school board to prioritize its spending of general capital improvement funds such that the highest priority was given to the maintenance, repair and renovation of the existing schools. Once these needs were met, general capital improvement funds would be devoted to expanding capacity to meet the growth needs of the district. What particularly aroused opposition was that there was no general capital improvement funds remaining after the needs of the existing schools were met. The result was that no credit against impact fees was provided because there was no other revenue available to be applied to school capacity for new development.

Another aspect of *Osceola* was the use of a global credit methodology that considered all capital revenues received by the school district from all taxpayers, not just the taxes paid by new development. Yet another issue was the use of a five-year planning period for determining costs and the revenue credit. The Court held that the choice of impact fee methodology, including the priority use of revenue, the global calculation of credits, and the use of a five-year planning period is at the discretion of the school board and county provided that the choices are not arbitrary. The Court found that Osceola County's choices were reasonable, rational and not arbitrary.

The issue of implementing the 2003 constitutional amendment to reduce class sizes in public schools looms on the horizon of the impact fee continuum. The amendment requires that the State of Florida pay for the cost of the additional classrooms. However, state funding has only met a small fraction of the need. The responsibility for compliance with the Class Size Amendment falls to the local school district, regardless of state funding. Some districts have

²⁰ *Homebuilders of Metro Orlando v. Osceola County*, Osceola Circuit Court case CI-04-OC-1024 (2004) (currently an open case).

already expressed a reluctant willingness to use local taxes to build the necessary classrooms (at the same time they will press the state for reimbursement from funding the state is supposed to provide). Use of local taxes for the class size amendment reduces the amount of money available to pay for new classrooms for new development, which will inevitably increase pressure to enact school impact fees or increase the existing ones.

Another issue affecting school impact fees is the recently passed legislation that mandates school concurrency. Florida now requires schools as a mandatory component of concurrency. If school capacity is not available or assured, new developments expected to house new school enrollees cannot be approved or must be conditioned on school capacity availability. This again will increase the need for new school construction, thereby increasing pressure to enact impact fees or increase the existing ones.

In summary, school impact fees arose out of a shortage of the general capital improvement fund. Impact fees were recognized as a legal means to fill the funding shortfall. As the shortfall grows, school impact fees have risen. While the provision of school capital funds by other means will automatically reduce school impact fees through the credit procedure, increasing populations, the Class Size Amendment, and the new concurrency requirement will all place tremendous pressure on local governments to enact school impact fees or increase the existing ones.

School Impact Fees as an Urban Planning Tool

School impact fees have become an important tool for Florida school planners.²¹ Impact fees help to implement the planning goals of adequate provision of facilities, concurrency and cooperation between school districts, local governments and developers. Inherent in impact fee

²¹ See Steve Donnelley, *Toolkit for Tomorrow's Schools: New Ways of Bringing Growth Management and School Planning Together* (2003).

formulation is the provision of adequate public schools for a growing population. Impact fees are generally charged at the issuance of building permits for new residential development and fund school construction for the increase in students anticipated from the new development. Further, the fees can assist in the requirement of concurrency by relating the construction of the new schools necessitated by new development. Planners attempt to insure for the provision of school facilities when they are needed. School impact fee ordinances require a temporal relationship between population growth and new school construction and, therefore, further this planning goal. As mentioned earlier, Florida's new concurrency requirement is likely to increase pressure upon school planners to use impact fees a concurrency compliance tool.²² While sometimes viewed by opponents as growth inhibitors, school planners can actually use school impact fees as growth facilitators. Unlike moratoriums which bar development for a period of time, impact fees allow for development to continue but require residential developers to incorporate more of the true cost of the development. The fees also facilitate growth by incorporating credits into the fee scheme. In this way, planners have the flexibility to allow development to pay for itself through dedications and other inputs.

School planners use impact fees to enhance cooperation amongst school districts and local governments. Impact fees, as a planning tool, require a higher degree of cooperation between school districts and local governments than do other planning mechanisms. Thus, the use of impact fees facilitates coordination of site selection, construction timing, and fee collection. Similarly, impact fees allow planners to increase cooperation from developers. Impact fees create certainty for residential developers in that they set forth an exact cost to obtain a permit in favor of the uncertainty of negotiating development exactions and dedications.

²² Florida Statutes § 163.3180(13) (2006).

Impact fees help to implement the planning goals of adequate provision of facilities, concurrency and cooperation between school districts, local governments and developers. Because they are effective in implementing these planning goals, there will likely be increased pressure for school planners to use impact fees to comply with Florida's new mandatory school concurrency requirement.

School Impact Fees in Other States

In addition to Florida, school fees are found in California, Hawaii, Maryland (authorized in some counties by special acts), New Hampshire, Pennsylvania, Vermont, Washington and West Virginia. School impact fees tend to be in the thousands of dollars and imposed only on residential development. Thus, their prohibition in much of the country might be an indication of both the controversy surrounding these fees and their political sensitivity.

Colorado counties and towns had used school impact fees to fund infrastructure. More recently however, Colorado has adopted an impact fee enabling act that has all but shut down local government's ability to adopt school impact fees.²³ Because the enabling act is a legislative product of the legislature however, there is less of an explanation of the reasoning behind the measure than if the rule would have come from the Courts.

Massachusetts, alternatively, struck down school impact fees through its Courts.²⁴ The Massachusetts Court revealed its reason for ruling that school impact fees are unfair. The Massachusetts Court specifically cited the Florida rational nexus standard set forth in *St. Johns* and emphasized that its own standard is elevated over the Florida standard. In particular, the Massachusetts Court noted that the benefits provided by school impact fees were not

²³ Colorado Local Government Land Use Enabling Act, Title 29, Article 20 (2006).

²⁴ Greater Franklin Developers Association v. Town of Franklin, 49 Mass. Ap. Ct. 500 (2000).

particularized enough to the payer. In its analysis, the Court found it unfair that the fees, earmarked for capital improvements, could be used to buy a new cafeteria in which students in (previously existing) homes not paying the fee would be allowed to eat. This reasoning is overly simplistic and narrow in that it fails to account for the premise that the fees would not be earmarked for a new cafeteria were it not for the fact that an additional cafeteria is needed to accommodate new growth. The philosophy behind this ruling will be revisited later.

Summary

Florida is both a low tax and a rapidly growing state. Florida's population increase between 1990 and 2000 alone exceeds the entire population of 22 states. Thus a substantial demand exists for capital facility expansion to accommodate this growth. There is also a clear preference on the part of the public to remain a low tax state. The financial responsibility for accommodating the growth of Florida has been borne increasingly by local governments. The State has been reducing taxes during the recent past as burdens for many costs, most significantly roads and schools, have been shifted to local governments. Local governments have responded to these demands in a variety of ways. Local taxes have been raised, especially taxes on all retail and motor fuel sales, but property taxes have only increased by \$198 between 1992 and 2003. Impact fees have been instituted or raised as local jurisdictions responded to the needs of their growing communities. According to the 2003 Census of Government, local government capital outlay in Florida was \$5.2 billion. The best available estimate is that impact fees raise some \$1.2 billion, which is 23% of total local government capital spending, showing that 77% of all local capital funding is paid for by the general public.

Capital funds for school construction in rapidly growing Florida counties are needed. While sometimes unpopular, impact fees have evolved in Florida to supplement available means of funding growth to accommodate capital improvements. The courts have imposed standards

with respect to the fairness of impact fees and imposed limitations to assure that impact fees are used only to accommodate the new developments being charged. No local government is required to charge impact fees, and there are some notable exceptions that choose to deal with funding needs in other ways. Local governments, largely on their own, are accommodating over 300,000 additional people per year and doing so with declining assistance from the State and within a context of maintaining low taxes. Impact fees are an established component of this success.

Like other counties in Florida, Orange County and Hillsborough County have enacted school impact fees. Each fee is a planning tool that is legal under the principles set forth previously. While these fees are legal, a determination of the fairness of the fees is discussed in the next chapters.

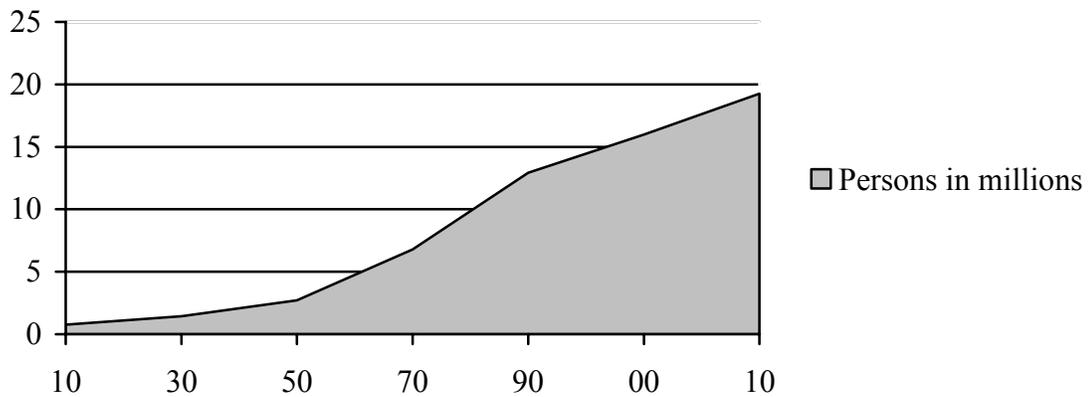


Figure 2-1. Florida’s population 1910-2010. Source: U.S. Department of Commerce, Bureau of the Census, Census Population of Counties by Decennial Census 1900-1990; Profile of General Demographic Characteristics: 2000; and Interim State Population Projections: 2005.

Table 2-1. Sources of state and local government revenues 1992 and 2002 (values in millions of dollars).

		1992		2002
United States – All local governments				
General revenue from own sources	\$389,470	100.0%	\$597,359	100.0%
Taxes	\$201,130	63.3%	\$369,730	61.9%
Property	\$149,765	47.9%	\$269,419	45.1%
Charges & Miscellaneous	\$120,469	36.7%	\$227,629	38.1%
Current charges	\$72,795	11.8%	\$153,382	25.7%
Florida – All local governments				
General revenue from own sources	\$21,561	100.0%	\$37,897	100.0%
Taxes	\$11,420	53.0%	\$19,533	51.5%
Property	\$9,454	43.8%	\$15,372	40.5%
Charges & Miscellaneous	\$10,141	47.0%	\$18,365	48.5%
Current charges	\$6,317	29.3%	\$12,095	32.0%

Sources: US Bureau of the Census, Statistical Abstract of the United States, Table 441, Local Governments – Revenue by State: 2002 and Table 498, Local Government General Revenue, By State: 1992 and State and Local Government Finances by Level of Government and by State 2001-2002 and 1991-1992.

Table 2-2. Sources of state and local government revenues per capita 1992 and 2002 (values in millions of dollars).

		1992		2002
United States – All local governments				
General revenue from own sources		\$1,401		\$2,143
Taxes		\$887		\$1,341
Property		\$671		\$984
Charges & Miscellaneous		\$514		\$802
Current charges		\$165		\$309
Florida – All local government				
General revenue from own sources		\$1,597		\$2,220
Taxes		\$846		\$1,143
Property		\$700		\$899
Charges & Miscellaneous		\$751		\$1,077
Current charges		\$250		\$422

Sources: US Bureau of the Census, Statistical Abstract of the United States, Table 441, Local Governments – Revenue by State: 2002 and Table 498, Local Government General Revenue, By State: 1992 and State and Local Government Finances by Level of Government and by State 2001-2002 and 1991-1992.

Table 2-3. Intergovernmental revenues from state per capita 1992 and 2002 (values in millions of dollars).

	1992	2002
Florida	\$660.27	\$934.32
All states	\$775.79	\$1,263.85
Florida as %	85.1%	73.9%

Sources: U.S. Department of Commerce, Bureau of the Census, 1992 Census of Local Governments, State and Local Government Finances, Table 1. U.S. Department of Commerce, Bureau of the Census, 2002 Census of Governments, State and Local Government Finances Table 1.

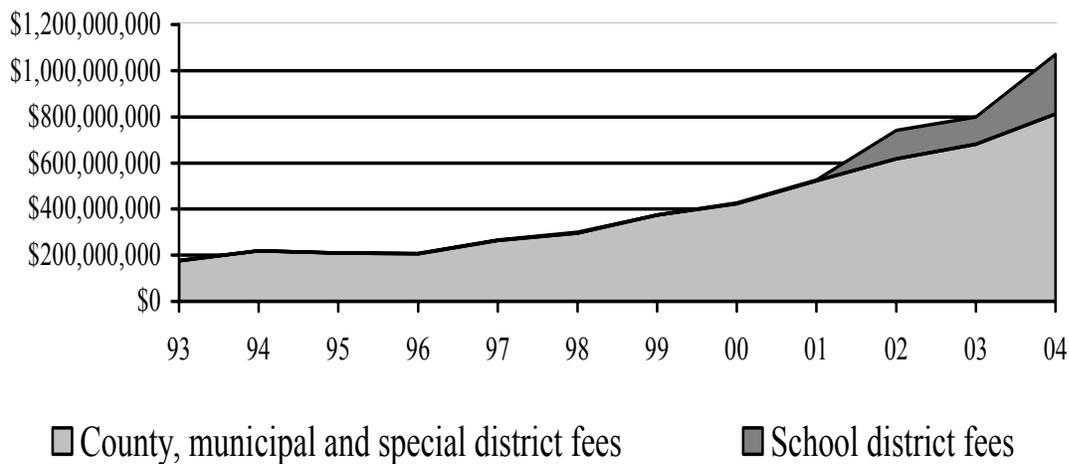


Figure 2-2. Reported impact fees by government type, fiscal years 1993-2004. Source: Florida Legislative Committee on Intergovernmental Relations, Florida Impact Fee Review Task Force, Final Report and Recommendations, February, 2006, Appendix 3, Chart1.

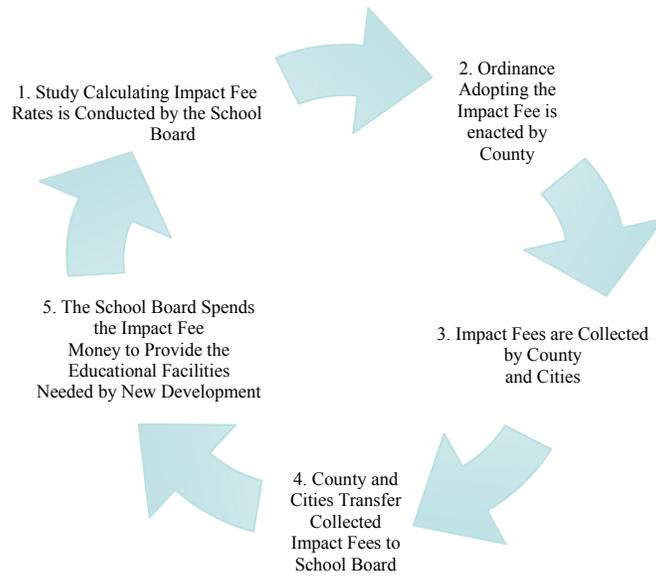


Figure 2-3 Intergovernmental coordination of impact fees. Source: Jurgensmeyer, Mullen, Nicholas, Smith, Stewart, Wallace, and Young.

CHAPTER 3 IMPACT FEE FAIRNESS

Western political philosophy traces its literary roots to ancient Greece around 400 BC. During that time, Plato and Aristotle and even their earlier predecessors argued and wrote about fairness in political decisions and outcomes. These original philosophers started what is deemed the Great Conversation. The Great Conversation is the discourse of the large questions of life such as: fairness, evil, the existence or non-existence of God, and the meaning of life. This discussion began rather informally as ancient man began to discuss the large questions of life and continues today both informally and formally through academic philosophy, academic disciplines and theology. This chapter will survey a broad spectrum of philosophies, academic disciplines and even some theology to determine fundamental concepts of fairness against which the fairness of impact fees is analyzed. Table 3-1 gives an overview of the philosophies and disciplines and their position with respect to fairness.

When the philosophies and disciplines are examined comprehensively, a zone of impact fee fairness emerges within the broader public school finance continuum. As described in Figure 3-1, the public school finance continuum spans between the extremes of general taxes only and impact fees only. Within this continuum lies a zone of impact fee fairness whereby impact fees are fair.

The philosophies and disciplines help to construct a zone of impact fee fairness based upon logic, history, experience and thought but without a discrete mathematical explanation because fairness is a non-discrete mathematical concept. That being said, however, the studied philosophies and disciplines do set forth general parameters of the fairness of impact fees so that the zone of fairness can be roughly identified.

School impact fees can be determined fair under the parameters set forth in the philosophies and disciplines. However, this support is qualified in that the fees must not be so miniscule as to constitute too little of the general taxation/impact fee combination. Likewise, on the other end of the continuum, the fees cannot be the only means of public school finance. If the fees occupy too little of a proportion of the combination, the elements of fairness that impact fees bring to the combination are negligible. On the other hand, if the fees occupy too great a proportion of the general taxation/impact fee combination, the elements of fairness that general taxation bring to the combination are negligible. As a county's general taxation/impact fee combination approaches the extremes of general taxation only (on the left) and impact fees only (on the right), gray areas emerge where it cannot be determined whether the fees are fair or not. Where the Orange and Hillsborough County impact fees lie on the public school finance continuum will determine whether they are fair or not.

Orange County and Hillsborough County Impact Fees

Orange and Hillsborough Counties' school impact fee ordinances were chosen for analysis for three reasons. First, the ordinances are similar in that both contain provisions and language that is representative of the Model Impact Fee Ordinance.¹ Second, they are similar in that they are both representative of many school impact fee ordinances in Florida. Third, however, they are dissimilar in that the Hillsborough fee is \$195.95 per household whereas the Orange County fee is \$7,000 per household. This difference provides a good means for determining the fairness of the respective fees.

Orange County, FL Impact Fee Ordinance

On March 8, 2005, Orange County, FL enacted its latest school impact fee.² The

¹ Model Impact Fee Ordinance, Article 22-1, Section 22-109 (1988/1989).

² Orange County Impact Fee Ordinance (2006).

ordinance's provisions and language are comparable to the Model Impact Fee Ordinance. The Orange County ordinance requires that builders of new residential dwelling units must pay an impact fee, at permitting, for the cost of required new educational facility construction. The builder must pay \$7,000 per new single family home. As a reference point, this amount is about 3% of the \$242,000 average home price in Orange County.³ The ordinance provides an alternative calculation method if the builder can show that the actual impact of his or her dwelling units is less than the impact estimated by the economic and population study. Of particular interest to this study, however, are the exemptions to the fees.

Exemptions are situations whereby builders of new dwelling units are not required to pay the impact fee. The Orange County ordinance contains six exemptions, four of which are for instances where the new residential building activity would not create any new dwelling units. Exemptions under Section 23-161, Subsections (1) and (2) are given for the expansion of existing structures or construction of accessory buildings that would create no new dwelling units. Subsection (3) exempts replacement of an existing dwelling unit and Subsection (4) exempts mobile home tie-down permits where the impact fee has been previously paid. Under these four exceptions, the ordinance recognizes that there are certain residential building activities that do not create the need for additional educational facility construction.

A fifth exemption is for construction of new senior housing as defined under the federal Fair Housing Act.⁴ Different from the four above, this type of building activity does produce new residential dwelling units. However, this exemption is based upon the assumption that this

³ Orlando Regional Realtor Association (2006).

⁴ Senior housing that prohibits permanent residence by persons under the age of 18 by recorded deed restriction, recorded declaration of covenants and restrictions, or recorded plat restrictions and which qualifies as one of the three types of communities designed for older persons that are exceptions from the prohibitions of discrimination in the Fair Housing Act, 42 U.S.C. *et seq.*

type of residential building activity will not produce the need for any additional new educational facility construction. It is assumed that new qualified senior housing communities will not create any additional student-age residents and, hence, not create any need for additional educational facilities construction.

A sixth exemption for government-owned residential construction, however, is not based upon the premise that no additional dwelling units will be created nor that new educational facility construction will be necessitated by the new additional dwelling units. Rather, this exemption simply grants a blanket exemption for government-owned residential construction with no other constraints.

Hillsborough County, FL Impact Fee Ordinance

Hillsborough County, FL enacted its updated school impact fee in April of 2000.⁵ Like Orange County's ordinance, Hillsborough's provisions and language are comparable to the Model Impact Fee Ordinance. Hillsborough County's ordinance is a large and comprehensive and should be considered one of the most sophisticated impact fee ordinances existing. The ordinance's economic and population support comes from the adopted two-phase study entitled *Comprehensive Impact Fee Study* released in two parts in March and April of 2004.⁶

Similar to the Orange County ordinance, the Hillsborough County ordinance provides that builders of new residential dwelling units must pay an impact fee, at permitting, for the cost of required new educational facility construction. The builder must pay a proportionate share of the cost of the new educational facility construction necessitated by his or her proposed new dwelling unit. Hillsborough school impact fees are currently a \$195.95 for a single family home.

⁵ Hillsborough County Consolidated Impact Assessment Program Ordinance (2006).

⁶ Duncan and Associates, in association with James C. Nicholas, *Comprehensive Impact Fee Study* (2004).

As a point of reference, this amount is .05% of the \$272,175 average existing single family home price in Hillsborough County.⁷ Intense debate surrounds this relatively trivial amount, and the fees are likely to increase substantially in the near future.

As in Orange County, the ordinance provides an alternative calculation method if the builder can show that the actual impact of his or her dwelling units is less than the impact estimated by the economic and population study. Again, of particular interest are the exemptions to the fees. Unlike the Orange County ordinance, however, Hillsborough's fees include an exemption for residential construction when the builder is providing low income housing.

The Hillsborough County ordinance contains seven exemptions, six of which are for instances where the new residential building activity would not create any new dwelling units. A seventh exemption is for government-owned residential construction. Again, like the Orange County ordinance, this exemption assumes that government-owned housing will create new school capacity need but grants a blanket exemption none-the-less.

Distinguishing itself from the Orange County ordinance, the Hillsborough County ordinance contains an exemption for construction of new affordable housing. While the affordable housing builder or developer is exempted from the impact fee, the county does not forfeit the fee. Instead, an equivalent fee is transferred from the Municipal Service Tax Unit (MSTU) Fund. An MSTU is a taxing district authorized by State of Florida Constitution Article VII and Florida Statute §125.01.⁸ The MSTU is a legal and financial mechanism for providing specific services and/or improvements to a defined geographical area. An MSTU may levy ad valorem taxes to provide funds for the improvements within the geographical area. With the MSTU paying the fee, the

⁷ Greater Tampa Area Realtors Association (2006).

⁸ Florida Constitution, Article VII §9(a)(b) (2006) and Florida Statutes § 125.01(2)(q) (2006).

cost of the new school construction is shifted. The cost is shifted from the low income households to higher income households within the same MSTU.

Summarizing this section, Orange County and Hillsborough County school impact fee ordinances were chosen for analysis for three reasons. First, the ordinances are similar in that they contain provisions and language that is representative of the Model Impact Fee Ordinance. Second, they are similar in that they represent of many of the characteristics found in all school impact fee ordinances in Florida. Third, the ordinances differ in that the Hillsborough is currently \$195.95 per three-bedroom, single family detached household whereas the Orange County fee is \$7,000 per single family household.⁹ This significant difference provides a numeric basis for inquiry as to whether one, both, or neither are fair.

Philosophies and Disciplines on Fairness

We will now look at the fairness criteria against which to analyze the two selected impact fee ordinances. This represents nearly five thousand years of inquiry into the question of fairness.

⁹ Both Orange County and Hillsborough County ordinances require payment of an impact fee for multi-family and mobile home dwelling units in addition to single family dwelling units. Orange County's fees for these types are \$3,807 and \$4,104 respectively and the Hillsborough County Fees range respectively from \$8.54 to \$236.62 and from \$56.56 to \$285.98 depending upon the number of bedrooms. The range of impact fees for single family detached in Hillsborough County ranges from \$63.50 for a two-bedroom dwelling to \$488.05 for a five-bedroom dwelling. The fee of \$195.95 for a three-bedroom, single family detached was selected because three-bedroom, owner-occupied, single family detached is the most prevalent form of residential households in the Tampa-St. Petersburg MSA according to the 1998 U.S. Department of Housing and Urban Development American Housing Survey for the Tampa-St. Petersburg Metropolitan Area, page 19. Three-bedroom single family detached also logically corresponds to Orange County's blanket designation of *Single Family Detached House* that forms that county's basis for its non-multi-family and non-mobile home category. Orange County does not make a distinction for the number of bedrooms within the single family detached category. While Hillsborough County distinguishes between the number of bedrooms within the single family detached category and requires different fees for each category and both counties distinguish between single family detached, multi-family and mobile home, these fees are not otherwise different for the purpose of determining their fairness. The categories of fees within each county's fee ordinance are based upon relatively minor differences in the projected need for additional infrastructure that each different residential land use type will necessitate. All of the fees in each category are similar in scale. For instance, while there are some greater disparities, the Hillsborough County fees for a three-bedroom dwelling unit are approximately: \$196 for single family detached; \$178 for multi-family residential; and \$237 for mobile homes. Thus, in general, differences in fees for the different dwelling unit categories are based upon their relatively minor difference in projected impact and are not considered so disparate as to require separate fairness analysis. Therefore, the fee for three-bedroom, single family detached is used as the representative fee for both counties.

Plato on Fairness

Prominent modern philosopher Alfred North Whitehead remarked, “[t]he safest general characterization of the Western philosophical tradition is that it consists of a series of footnotes to Plato.”¹⁰ While Plato wrote on a wide array of philosophical issues, this section will focus on Plato’s notions of fundamental fairness.

Republic provides elements of Plato’s fundamental political philosophy.¹¹ Plato uses the Greek word *dikaisyne* for fairness. *Dikaisyne* comes very near to the meanings of morality or righteousness and connotes a positive duty of man or a metaphysical virtue.¹² It covers the whole field of the individual's conduct in so far as it affects others. Plato contended that fairness is a quality of the soul, a virtue in which men set aside the desire to taste every pleasure and to get selfish satisfaction out of every object.

To clarify his own idea of fairness, Plato first uncovers various other prevalent views. In the *Republic* dialog, we see one character’s description of fairness as giving to those that which is due to them. Plato criticizes this notion of fairness by connoting that it is not fair to give a psychopathic killer his weapon back.

A second actor comes along with an augmented view of fairness. He asserts that justice is doing good to friends and harm to enemies. Plato emphasizes that fairness is a virtue and that virtues are, by their elemental nature or essence, good. He posits that good can only come from good actions and truly good actions lead only to good results. Doing evil to anyone, including one’s enemy, is inconsistent with the most elemental definition of fairness.

¹⁰ Alfred Whitehead North, *Process and Reality: An Essay in Cosmology*, David Ray Griffin and David W. Sherburne, eds. (1979) at 320.

¹¹ Plato, *Republic*, Benjamin Jowett trans. (2005).

¹² See D. R. Bandari, *Plato’s Concept of Justice: An Analysis* (2005).

A third actor arrives with another construct of fairness. Fairness to this actor is simply the application of power by those who have power. This philosophy can be expressed in the maxim: *might makes right*. Under this definition, it is fair for the powerful to exert their personal desires upon the weaker masses simply because the powerful *own* the power and have a right to use it. In interpersonal relationships, this form of fairness can be expressed when a bully child takes candy from a more passive and weaker group of children. On the societal scale, it is expressed when laws or government action are made by, and for the benefit of, the powerful few.

Again, Plato criticizes this view of fairness. Plato uses the analogy of a physician with his or her patient. He argues that a physician exercises his power not in his or her own interest but in the interest of a patient. Likewise, he argues that the rulers should do what is good for the people for whom they exercise their governing power over. Plato characterizes fairness by observing that injustice creates divisions and hatreds and fighting, and justice imparts harmony and friendship.

Plato and School Impact Fees

A tenet of Plato's conception of fairness is that it is the natural role of the more powerful to use his or her skill, intelligence and wealth to insure that society's systems and interactions are fair. His ultimate conclusion is that fair systems and interactions will result in harmony and friendship. This philosophy is found in the modern premise that a society that provides universal free education is peaceful and that a society void of free universal education creates unfavorable conditions. This view is confirmed in recent studies.

Laynard's 2005 study found that, while educational *level* does not directly correlate to happiness, increased education leads to an increased ability to learn and an increase in this ability

directly correlates to an increase in happiness.¹³ This theory indicates a correlation between education and happiness in the individual. Following, the less educated are less able to constructively engage in activities that lead to their happiness. Following the allegory of the physician and patient, Plato would find unfairness where the powerful and knowing in society fail to enable the weaker and unknowing to engage in activities that lead to happiness as a result of failing to provide education. In this analogy, parents represent the powerful and knowing and school aged children represent the weaker and unknowing.

As to society, Eisenberg and Martinez's 2000 study found a strong correlation between the lack of education and crime.¹⁴ The study found that the prison population of the United States is about 1.5 million and that the typical offender is uneducated. Of these prisoners, 19% are illiterate and up to 60% are functionally illiterate as compared to 4% and 23% respectively for the national adult population. The study concluded that prison education is far more effective at reducing recidivism than other methods. Further, a 1999 Taxwatch study concluded that for every \$1 Floridians spend on education, Floridians save more than \$2 on prison costs.¹⁵ These studies suggest a strong correlation between education and unfavorable and costly condition of criminal behavior. If we look at Plato's determination that divisions and violence are the result of injustices in society, differences in education might be elements of unfairness that foster these negative societal characteristics.

Impact fees are an attempt to stave-off the problems associated with low educational opportunity. Florida counties are pressured to provide free education to a growing population of

¹³ See Richard Layard, *Happiness: Lessons from a New Science* (2005).

¹⁴ See Michael Eisenberg and Alma I. Martinez, *Impact of Educational Achievement of Inmates in the Windham School District on Recidivism* (2000).

¹⁵ Taxwatch and the Center for Needs Assessment and Planning, *Return on Investment for Correctional Education in Florida* (1999).

children with less money from ad valorem taxes, intergovernmental transfers, and other historic sources. Impact fees are being used to force those residential developments adding this pressure to pay for the infrastructure. Impact fees, as an augmentation to general taxation, fall under Plato's allegory of the physician patient relationship whereby the equipped physician is the fee payers and the patient is unequipped school-aged children. School children are not in a position to administer their own education whereas the fee payers are in a position to provide education to the children. These impact fees restore the financial connection between the payers and school children that is being eroded away by other inadequate means of public school finance.

Aristotle on Fairness

Aristotle's *Nicomachean Ethics* is an early treatise on, among other things, concepts of fairness.¹⁶ In the broadest sense, Aristotle finds that all of man's pursuits aim at a Supreme Good. Aristotle equates the Supreme Good with happiness and the term he uses is the Greek *eudaemonia*.¹⁷ Eudaemonia's meaning differs somewhat from our modern English word *happiness*. The English *happiness* comes from the root 'hap' meaning by chance or fortune as in the word happenstance.¹⁸ *Eudaemonia*, alternatively, connotes purposely living well or a life well lived.

Aristotle posited that happiness comes through a person's purposeful personification of virtues. Virtue is a state of character that has been developed through the practice of righteous actions. The righteous actions then become a characteristic of the person practicing them.¹⁹ In society, the collection of virtuous people results in a society that is closer to the supreme good.

¹⁶ See *Complete Works of Aristotle*, The Revised Oxford Translation, Jonathan Barnes ed. (1984).

¹⁷ Definition of Eudaemonia obtained from Word Reference Online (2005).

¹⁸ Definition of Happen obtained from Merriam-Webster Online (2006).

¹⁹ See Aristotle, *Nicomachean Ethics*, Book V, David Ross ed. (1980).

Aristotle viewed virtues as a mean between two extremes of vices. For instance, Aristotle identifies the virtue of courage as the mean between cowardice and brashness. He saw the virtue of fairness as a mean between the two extremes of gaining more than one's fair share and gaining less than one's fair share. In his discussion of wealth, he thought that people should be as liberal as possible when spending upon the public good. In fact, for wealthy individuals, Aristotle found fairness in wealthy persons financing expensive public services, equipping villages, or erecting statues. Such giving is voluntary but virtuous and leads to happiness for the giver and the community. Likewise, the virtue of fairness is manifested through the less wealthy receiving the voluntary contributions of the wealthy. In this scheme, fairness is the mean between getting too much and getting too little.

Aristotle and School Impact Fees

Aristotle's idea of fairness is closely linked to an arithmetic mean between the extremes of getting too much and getting too little. This notion led to his conclusion that a relatively proportional distribution of wealth is fair. That is, while it is natural for some to have more and some to have less, it is fair for those with more to spend more on the public while it is equally fair that those with less receive more from the public.

Impact fees, as an augmentation to general taxation, find support in Aristotle's ideas. The effect of the fees is to place some of the cost of new school construction upon those causing the need for new construction. If new residents don't pay some of the cost of their children's additional impact upon public school infrastructure the result is the extreme position where the new residents are receiving from the public good without recompensing for their children's impact. Alternatively, if the new residents are required to pay only for the impact that their children have on the public schools the result is the extreme where only those who have children in public schools pay for public schools and free public education is lost. Orange and

Hillsborough County impact fees are the mean between these extremes. When combined with the existing forms of public school finance, these fees shift more of the cost of additional infrastructure to the new residents but do not go so far as to reconfigure public school finance to a user pay system. In this way the fees are a mean between two extremes and fair.

Further, both fees contain an exemption for construction of government housing. So government housing, even though it will generate additional school infrastructure, is not required to pay for the impact of the additional school children. These exemptions comport with Aristotle's idea of fairness whereby those with more give more to the public good for those with less to consume. Government housing has means testing that is designed to screen-out higher income residents so government housing is occupied by less wealthy. By not requiring government housing developers to pay impact fees, the cost of new school infrastructure is disproportionately shifted to those new residents who must pay the fee. This disproportionate result however is reconciled by the disproportionate wealth between the two income groups. Aristotle found it fair for the wealthier to give to the public good, and public education is considered a vital public good for the reasons discussed earlier. These reasons include the production of a citizenry that understands and values principles of a representative republic, develops job skills to compete in an increasingly complex economy, and is less likely to choose a life of crime.

In summary, both Plato and Aristotle begin with the premise that when individuals practice fairness, the result is a peaceful and happy society. Plato envisions fairness similar to the physician/patient relationship. Aristotle places the virtue of fairness as a mean between extremes. It is also fair for those with greater wealth to spend more on public works, and it is likewise fair for those with less wealth to use the benefits created through the state.

Social Contract Theorists on Fairness

Social Contract Theory is the philosophy that a society is fair, happy and peaceful only when an individual's obligations are dependent upon an agreement between that individual and other individuals as a society. Elements of Social Contract Theory can be gleaned from the teachings of the ancient philosophers but its modern expression emerges through Thomas Hobbes. Thereafter, the philosophy is fully established by John Locke and Immanuel Kant. Social Contract Theory remains highly influential in Western Thought.

Thomas Hobbes

Thomas Hobbes explained fairness through social contract theory. He begins with the premise that, in the natural state, the basic motive of human activity is self-preservation.²⁰ Also, in the natural state, power is distributed relatively equally.²¹ Hobbes' contends that natural rights (rights that are self evident and self-authorizing) arise out of the natural condition of mankind whereby, while some people may have more strength or intelligence than other people, no person is strong or smart enough to be beyond the common fear of a violent death.

When confronted with the threat of a violent death, a person in the natural state will go to any length to defend him or herself. Self-defense against violent death is the highest human necessity and, because self-defense is a necessity, the right of a person to defend one's self is a natural right.

Hobbes also theorized that people have an equal right to necessary property. However, because of the scarcity of tangible things, and in the absence of a common power to keep people in awe, the result is a condition called warlike state of existence. Therefore, if any two people

²⁰ Anthony Gottlieb, *Dream of Reason: A History of Philosophy from the Greeks to the Renaissance* (2000) at 429.

²¹ See Thomas Hobbes, *Leviathan*, originally published in 1651 (2004).

desire the same thing, which nevertheless they cannot both have, they become enemies and fight. Under this chaos of man's self-defense against a violent death, self-interest, and equal claim to property cause a dismal life that is a permanent condition of dangerous social unrest.

Hobbes found that people have a self-interested desire to avoid the horrible state of nature because it is so futile. To avoid this horrible state, society creates a social contract. Under such a contract, individuals acknowledge that they are surrendering some of their natural right to an absolute sovereign so to ensure internal peace and a common defense.²²

John Locke

Locke followed Hobbes in the social contract tradition. However, Locke's natural state is a condition of complete liberty to conduct one's own affairs as one sees fit and free from the interference of others. People are free to do as they see fit so long as they don't violate the Law of Nature. The Law of Nature, which forms the basis for Locke's morality, is established by God and requires that people do not harm others with regards to their life, liberty, health, limb, or goods.²³ Locke assumes that all men belong equally to God and are, therefore, God's property. Therefore, because someone cannot rightfully take from God what is God's, it is wrong to take from others or to harm others. Following, Locke's state of nature is a peaceful state where people can pursue their own interests free from interference and also free from the fear that others will take their life, liberty or property.

Locke found that in practice, however, the Law of Nature is ignored and war ensues. Therefore, government is necessary. Locke also believed that government can be created only by the consent of the governed. Thus, Locke saw the only answer as the creation of a social

²² Robert E. Goodin and Phillip Pettit, *Companion to Contemporary Political History* (2000) at 380.

²³ See John Locke, *Second Treatise of Government*, Part II-6, originally published in 1690 (1986).

contract. That is, society consenting to be governed under a commonwealth of laws to protect each person from immoral acts of other people. Locke posited that all who enter the social contract agree that the terms and conditions of the social contract are fair because they are freely entered into and are necessary for the protection of the individual and society. Locke's theories are influential in the American political system and on the doctrine of property rights.²⁴

Immanuel Kant

Immanuel Kant revolutionized the foundation of social contract theory, changing it from a science directed toward achieving a pre-given (i.e. God-given or natural) good into an inquiry into the way free agents govern their own lives according to self-given rational principals.²⁵ Kant developed a theory of a central moral obligation, from which all other moral obligations originate. He called this obligation the Categorical Imperative. The Categorical Imperative says “[a]ct as if the maxim of your action were to become through your will a universal law of nature.”²⁶ Kant applied this concept to society, “Right is . . . the totality of conditions, under which the will of one person can be unified with the will of another under a universal law.”²⁷

Under the Categorical Imperative, Kant harmonized rationality and fairness. More succinctly, Kant found that humans understand that it is smart to act fairly so humans form societies based upon fair rules. Therefore, it is fair for the individual to acquire and own private property so long as the acquisition and ownership resonate with society's construction of a fair distribution of private property under the Categorical Imperative.

²⁴ John Ferling, *Setting the World Ablaze: Washington, Adams, Jefferson and the American Revolution* (2000) at 81-82.

²⁵ See Alan W. Wood, *Basic Writings of Kant* (2001).

²⁶ Immanuel Kant, *Groundwork of the Metaphysics of Morals*, originally published in 1785 (1964) at 70.

²⁷ Immanuel Kant, *Metaphysics of Morals*, originally published in 1797 (1999) at 344.

Summarizing this section, Hobbes and Locke envisioned individuals as incapable of defending property or liberty in the State of Nature. Following, the social contract is the only way to reconcile individual property rights with property protection. This philosophy constructed a scheme of fairness whereby individuals surrender some private rights to a powerful sovereign so that the strong sovereign can protect individuals' property rights.

Kant also saw fairness in the context of social contract theory. Kant theorized a Categorical Imperative where each individual acts in a manner as if the individual would want the action to become universal law. Fairness in Kant's philosophy is a resonance between an individual's actions and that individual's definition of an acceptable result under the Categorical Imperative.

Social Contract Theory and School Impact Fees

The fairness of impact fees as an augmentation to general taxation is supported by social contract theory. The most important element of social contract theory with respect to impact fees is an intergenerational cost/benefit connection whereby older generations bear the economic cost of education but also reap the economic benefits of an educated citizenry. Whether financed by parents or the government, the education of the younger generation has always been viewed as essential to the well-being of society. Hobbes and Locke theorized that individuals must give up some property and liberty to the government in order to stave-off chaos. With respect to free public education this theory would support contributing to the education of every child to avoid the pitfalls of an uneducated society. Uneducated children have neither the workforce skills nor the values needed to benefit the society in which they are thrust. Hobbes and Locke would find fairness in the impact fee payers giving up their property (money) for the protections and benefits of an adequately funded public educational system. Consistent with social contract theory impact fees, coupled with existing funding sources, make an intergenerational connection between the payers and school children. This intergenerational connection provides that the

payers pay their proportionate share of the cost of additional school infrastructure and that school children, in return, provide the protections and benefits that result from the application of their education.

Used alone rather than an augmentation of the existing general taxation scheme however, impact fees become strictly user fees. In a strict user fee scheme there is a precise connection between the payment made and the government benefit received. Therefore, the elements of fairness that are imputed by social contract theory through general taxation are negligible. The result is that an impact fee only scheme has no elements of social contract theory and is unfair.

Kant perfects social contract theory by identifying fairness in the abstract notion of doing only that which the individual would want as a universal law. It would seem that every child, no matter what means they have, would at least want the opportunity and option for a free education. Conversely, there is a strong propensity for payers to not want to pay taxes or fees. The question then remains, how can Kant's theory reconcile these opposing forces? Kant's Categorical Imperative provides guidance.

Kant forces the thinker to act in a manner whereby he or she would want his or her actions to define fairness. Therefore, payers must make the judgment of which scheme is fair: paying for a relatively proportionate share of additional public school cost or reducing the availability of free public education. From the payer's perspective, he or she might think that paying for the additional cost is unfair. However, the Categorical Imperative requires that these payers think from the position of the student who can only gain education through free public schools. It would follow from this opposite perspective that the thinkers would think it fair that they be afforded the same educational opportunity as other children. If fairness is then defined as acting as if one would want their actions to become universal law, then the impact fees are fair.

The Categorical Imperative also supports impact fees' fairness as an augmentation to existing general taxes. Consider an existing household and a newly developed household. Under a general taxes only scheme, the new households would not be required to pay the incremental cost of newly necessitated school infrastructure. If the new householders thought through the Categorical Imperative they would, from the perspective of the existing householders, think it unfair to pay for additional infrastructure that is needed through no action of their own. Similarly, from the perspective of the new householders, the existing householders would think it unfair that they are benefiting from new infrastructure for which they did not pay a proportion of the cost. Again, the households must think from the perspective that their actions will become universal law. In other words, what comes around goes around. In this case, all of the thinkers would determine that a general tax only scheme is unfair.

As determined previously, an impact fee only scheme is unfair because it disrupts the intergenerational social contract. Therefore, both a general taxation only and an impact fee only scheme are equally unfair. Impact fees as an augmentation to existing general taxation emerges as the fair public school finance scheme.

Summarizing this section, impact fees, as an augmentation of general taxation, are fair under social contract theory. Hobbes and Locke would find fairness in these fees because the payers are entering into an intergeneration agreement whereby the payers exchange property for the protections and benefits of an educated citizenry. The fees are also fair under Kant's Categorical Imperative in that, if the payers act as if their actions defined fairness, the payers would pay the impact fees (in the fee's role as an augmentation to the existing general taxation scheme) and agree that paying the fees is fair.

Utilitarianism on Fairness

Originating in the mid-Eighteenth Century, Utilitarianism is a philosophy of fairness that remains highly influential in political thought today. In fact, Utilitarianism is so influential that Contemporary philosopher John Rawls (discussed later) revealed that his intention for writing *Theory of Fairness* was to work out a conception of [fairness] that provides a reasonably systematic alternative to utilitarianism which, in one form or another, has long dominated the European and American tradition of political thought.²⁸ Put roughly, Utilitarianism posits that it is fair to distribute goods where the scheme creates the greatest happiness for the greatest amount of beneficiaries. Utilitarian thought was popularized by Jeremy Bentham and later modified by John Stuart Mills.

Jeremy Bentham

Jeremy Bentham believed that actions and institutions should be judged by the sum of their relative contribution to happiness as opposed to pain. In other words, a fair outcome is one that provides the greatest happiness of the greatest number.

Under his Greatest Happiness Principle, Bentham notes that, “[n]ature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do.”²⁹ In the context of government policy, Bentham argues that the fairness is achieved when a policy collectively produces the most happiness for the most individuals and the least amount of corporate pain.

²⁸ See John Rawls, *Theory of Justice* (1999).

²⁹ Jeremy Bentham, *Introduction to the Principles of Morals and Legislation*, originally published in 1789 (1907) at 1-I.

John Stuart Mill

Mill augmented Bentham by allowing for a stratification of pleasure and rejecting Bentham's strict application of egoism. Bentham's simple egoistic (selfish) definition of pleasure was relatively restricted to the more basic pleasures such as an abundance of material things. Mill, however, allows for more types of pleasures and ranks pleasures in a hierarchy. He places a greater value in pleasures like contentment and appreciation than in more base human pleasures like an accumulation of goods or power over other people. Therefore, Mill places a higher value on the pleasure gained from helping to increase *other's* pleasure whereas Bentham only valued the pleasure gained from self gratification.

Like Bentham, Mill believed that each person seeks his or her own pleasure. However, Mill believed that persons could be trained to find pleasure in the pleasure of others.³⁰ In the broader sense, Mill's utilitarian calculus brings in additional values on the *pleasure* side of the equation. For instance, if a tax is levied against wealthy persons to insure the education of children from lesser means, Bentham's calculus would look at the pain that the tax caused times the number of wealthy taxpayers. He would compare that product against the pleasure of the recipients times the number of recipients. Mill's calculus follows Bentham's but also factors-in the pleasure that the taxpayers derive from the recipient's satisfaction from a good education.

In summary, utilitarianism remains a major philosophy in America. This philosophy asserts that fairness results when an action produces more overall pleasure than pain. Mill expanded upon Bentham's definition of pleasure to include the pleasure derived from helping others to experience pleasure.

³⁰ See Oliver A. Johnson, *Great Thinkers of the Western World*, Ian P. McGreal ed. (1992).

Utilitarianism and School Impact Fees

Mill's utilitarianism supports the fairness of impact fees as an augmentation of general taxation. When initially analyzing impact fees under Bentham's utilitarianism, the fees might not appear fair. For instance, new upper and middle income neighborhoods could create new schools in their neighborhoods through impact fees. These schools, in turn, provide their children the knowledge and skills necessary to enter the workforce and earn an upper or middle income lifestyle. Simultaneously, lower income citizens might be unable to move and remain stuck in lower achieving schools. Bentham's utilitarianism might find this scenario fair because the product of the increased happiness of the first group is greater than the product of the pain of the second. Although fair under Bentham's utilitarianism, this scenario does not resonate with other fairness schemes because of unequal opportunity for education.

Careful consideration of the inputs into the utilitarian equation might overcome this dissonance though. As discussed earlier, lack of education causes negative externalities such as criminal activity and social unrest. In turn, these conditions reduce happiness and increase pain. Theoretically, the pleasure derived from a society free of these negative externalities should be factored into the pleasure side of the equation. Reduction or elimination of negative externalities would therefore add to the impact fee payer's pleasure.

Mill's extension of Bentham's equation allows for imputation of pleasure derived not only from egoistic elements but also from helping others to find pleasure. This extension allows for the imputation of the pleasure that the Payers obtain by helping children gain the pleasures of education and increases the overall value for pleasure.

Viewed in this light, impact fees are supported by the utilitarian equation. The exemptions for government and low income housing might initially render the fees unfair because the pain of paying the fees gets shifted from the government and low income residents to

the other residents. However, when the pain side of the equation is reduced through a reduction of negative externalities (less crime, etc.) and the pleasure side is increased by the payer helping others to experience pleasure, the utilitarian equation finds impact fees fair.

In summary, Bentham and Mill envisioned a calculus for determining a fair outcome when overall pleasure is greater than overall pain. Bentham's equation scaled pleasure and pain quantitatively. Mill expanded Bentham's foundational formula by scaling pleasure and pain qualitatively. Mill also allowed for pleasure derived from other's increase in pleasure. At first impression, utilitarianism does not resonate appear to resonate with the other fairness schemes in that it allows for differences in educational opportunity to pass as fair. Careful consideration of inputs to include Mill's expanded criteria resolves this dissonance. When Mill's extended criteria is included, impact fees are fair as an augmentation to general taxation.

Contemporary Political Philosophers on Fairness

Contemporary political philosophers continue The Great Conversation. John Rawls and Robert Nozick oppose each other on basic concepts of fairness. John Rawls builds upon the work of the social contract philosophers while Robert Nozick upholds an opposing *libertarian* view. In the context of contemporary academia, these two philosophers are often read together to examine the opposing philosophies.

John Rawls

As stated earlier, Rawls' purpose for developing his theory of justice was to work out a conception of justice that provides a reasonably systematic alternative to utilitarianism, which, in one form or another, has long dominated the Anglo-Saxon tradition of political thought.³¹ Rawls argues that fundamental fairness is found when starting philosophical point of view is one of

³¹ See Rawls, *supra* note 28.

absolute impartiality. Rawls calls this position the *Original Position*. He asks the thinker to participate in a thought experiment whereby his or her idea of fairness is conceptualized from behind a *Veil of Ignorance*.

From behind a Veil of Ignorance, each thinker is denied any particular knowledge of other's individual circumstances, including his or her own. For instance, no thinker would be aware of anyone else's social status, age, gender, race, talents, or any particular political or philosophical leanings. Rawls also assumed that thinkers starting from this Original Position are rational and disinterested in one another's well-being. From this Original Position and under a Veil of Ignorance, Rawls argues that the thinkers can choose principles of fairness which are themselves chosen from initial conditions that are inherently fair. Further, because each individual thinker is veiled from any knowledge that could be used to develop principles that favor his or her own particular circumstances, the principles that the thinkers would choose from such a perspective are necessarily fair.

From a collective perspective, everyone in a given community or society is in the same situation and presumed equally rational. Because everyone theoretically adopts the same method for choosing the basic principles for society, everyone would agree upon the same principles of fairness. Under Rawls' theory of fairness, any one person would reach the same conclusion as any other person concerning the most basic principles of a fair society.

Rawls posited that two principles of fairness would result from this morality. Rawls' first principle provides that each individual in a society should have as much liberty as possible so long as every other individual is granted the same liberty. According to this principle, each person must be granted the maximum amount of civil liberties without depriving others of civil liberties. The second principle provides that economic goods and social positions must be open

to access by all persons. This principle connotes equal access and mobility between positions and classes. Contrasted against utilitarianism, which allows the least advantaged to be worse off if the sum of the benefits to the whole of society produces more overall happiness, Rawls' principle provides that economic and social inequalities are only justified when the least advantaged member of society is nonetheless better off than he or she would be under an alternative structure.

Rawls partially bases his idea of fairness on a dissonance between rights to private property and the unequal distributions of wealth that result from unrestrained capitalism.³² Thus, Rawls asserts that fairness cannot exist where participants are not willing to allow for the government to tax and redistribute of wealth.

Rawls and impact fees

Impact fees are supported by Rawls' scheme of fairness in the Original Position under a Veil of Ignorance. Rawls would require that everyone clear his or her mental slate and begin to think of what is fair without any prejudicial reference point. This means that both prince and pauper must contemplate what is fair without the benefit of knowing his or her current condition or history. In this thought experiment, the prince does not know that he is a prince and must concoct a scheme to provide for his educational opportunity. To insure his opportunity, the prince would design a system of free public education. Conversely, the prince must also think of what is fair for the person paying for the public education. From this perspective, he would choose a system that insures that each pays no more than a proportionate share of the cost of financing the education.

³² J. Waldron, *Right of Private Property* (1980) at 5.

Similar to Kant's scheme, Rawls Original Position requires that the fee payers judge which scheme is fair: paying for a proportionate share of additional public infrastructure or reducing the availability of free public education. Again, from this perspective, he or she might think that paying for additional infrastructure is unfair. However, if the payers judge from the perspective of the student who can only gain education through free public schools, these same payers would think it fair that they be afforded the same educational opportunity as other children.

The government housing exemption in the Orange County fee and the government and low income exemptions in the Hillsborough County fee embody the Rawlsean definition of fairness. These exemptions mimic the role of general taxation and afford the children of lower income households a similar opportunity for education as do those children of higher income households. The exemptions shift the burden of paying for the new facilities from lower income households to the higher income households. The higher income households might instinctively find this shifting of burden unfair. However, if viewed from the Original Position under a Veil of Ignorance, these same higher income households would find the burden shifting fair.

Robert Nozick

Robert Nozick criticizes Rawls' position through his version of *Libertarian* philosophy. Libertarian ideas of fairness emphasize the primacy of private property and a rejection of government intervention in an individual's decision regarding his or her property. Nozick equates redistribution of wealth through government tax and spending with slavery.³³ Nozick's definition of private property follows Locke in that it is fair for a person to claim as his or her own property that which he or she has commingled his or her labor with. Accordingly, Nozick finds no fairness in a system that takes a person's property or labor and redistributes it to others

³³ Robert Nozick, *Anarchy, State and Utopia* (1975) at 169.

when the others have not imputed the same labor into the property. This reasoning posits that private property is the fair reward or dessert for one's labor. It similarly posits that it is unfair to take the desserts from one laborer and give it to another.³⁴ Thus, Nozick finds it unfair to construct a mechanism that removes wealth from those who labored for it and redistributes it to those who didn't labor for it.

Although Nozick opposed Rawls' vision of fairness, his opposition is more accurately directed to government's taxation power. General ad valorem real estate taxes are involuntary and charged to both existing and newly created residential units. Alternatively, Orange and Hillsborough impact fees are fair under Nozick's scheme because they are voluntary. Because the impact fees are attached only to newly-constructed residential units, the fees can be avoided by simply choosing not to purchase a new residential unit.

Alternatively, the fees can be avoided by using the alternative calculations methods contained in the ordinances. Both ordinances contain provisions where new residential development can avoid the fees by insuring that adequate school infrastructure will be provided by the developer. These alternative calculations generally are used by larger scale developments rather but are none-the-less available to individual purchasers within the larger developments.

Summarizing this section, vigorous debate about fundamental fairness continues amongst contemporary philosophers. Rawls' position is that fairness can only be achieved if each actor in society resets his or her consciousness to the Original Position. From this perspective, Rawls argues that actors can choose principles of fairness which are chosen from initial conditions that are inherently fair. Rawls found that redistributions of wealth are fair so long as they arise from the Original Position. Nozick opposed Rawls in that he found government redistribution unfair.

³⁴ S.R. Munzer, *Theory of Property* (1990) at 7.

Nozick holds that it is fair for an individual to claim property as his or her own when that person applies his or her labor to the property. Further, he reasoned that redistribution schemes are unfair and tantamount to slavery.

Both of these positions support Orange and Hillsborough school impact fees in their current role as an augmentation to existing forms of public school finance. Rawls' Original Position supports the government exemption to both fees and the low income exemption to the Hillsborough fee. Nozick's theory of fairness which is generally at odds with Rawls', none-the-less supports the fees because the fees are voluntary. Therefore, the fees are fair under both Rawls' and Nozick's theories.

Courts of Equity on Fairness

Courts of Equity arose from plaintiffs' assertions that the existing judicial process was unfair. As the law became more structured and technical, plaintiffs found themselves unable to overcome intransigent rules in favor of fair outcomes. Courts of equity arose as a forum for litigants to gain remedies for wrongs and "will not [allow a party to] suffer a wrong without a remedy."³⁵

Concepts of Fairness in the Courts of Equity

The courts of equity originated in direct appeals to the conscience of the king under the king's inherent judicial authority. Later, the king delegated this function to his chancellor who was an officer of the Church. Therefore, early concepts of fairness in the courts of equity were whatever the king or his chancellor deemed fair.³⁶ Assuming that the king or chancellor refrained from ruling in his self-interest, and assuming that the chancellor (who was also the king's

³⁵ Michael Hanrahan and William T. Quillen, *Short History of the Delaware Court of Chancery 1792-1992* (1993) (citing *Weinberger v. UOP, Inc.*, Del.Ch., C.A. No. 5642 (1985), slip op.) at 21.

³⁶ F.C. Maitland and F.C. Montague, *Sketch of English Legal History* (1915) at 125.

confessor and a member of the clergy) studied in Christian monasteries, early concepts of fairness were derived from Christian theology. However, there was no requirement that a chancellor follow Christian doctrine.

As the courts of equity evolved, general rules of fairness replaced the personal consciousness of each individual chancellor and the courts of equity began to follow general principles of fairness.³⁷ One general principle is that equity remedies unjust enrichment.³⁸ For example, if a mortgagor makes years of mortgage payments and then comes under hard times and fails to make one of the last payments, a court of law might find a breach of contract and allow the lender to repossess the property even though the mortgagor had nearly satisfied the entire course of payments. Courts of equity, alternatively, might open opportunities for the mortgagor to claim credit for the payments that he or she has made through the course of the loan.

The principle that courts of equity remedy unjust enrichment gives insight into the court's fundamental concept of fairness. Equity finds it unfair for one party to become enriched to the detriment of another party. If a court of equity finds that one party benefits to the detriment of another, the court will take from the unjustly enriched party and recompense the party that suffered detriment. Alternatively, the court will restructure the arrangement to require fair transactions in the future.

In summary, courts of equity will not let a party suffer a wrong without a remedy. One facet of a court of equity's construct of fairness is the court's refusal to allow a party to become unjustly enriched. Courts of equity take from one party and give it to the other as a remedy.

³⁷ Walter Denton Smith, *Manual of Elementary Law* (1896) at 60.

³⁸ Bernard Bailyn and Donald Fleming, *Law in American History* (1972) at 97.

Courts of Equity and Impact Fees

Orange and Hillsborough fees are fair under the theory of unjust enrichment from the courts of equity. Controversy regarding impact fees is often rooted in opponents claiming that the other is gaining a windfall through the fees. New households attempt to assert that, with impact fees, they are paying what should be paid by all tax payers under general taxation and the county is getting a windfall. Alternatively, without impact fees, existing households assert that new households gain the windfall of new schools that were funded by the existing taxpayers. The Orange and Hillsborough fees prevent a windfall on either side and thus prevent unjust enrichment.

Implementation of impact fees void existing household's assertion that new growth is not paying for the real cost of new infrastructure. New school capacity is paid for by new households through impact fees and the additional burden is not placed upon existing households. With impact fees, the existing households are relieved of the burden of financing new school construction necessitated by the new households.

From the new household's position, Orange and Hillsborough County impact fees prevent existing households from gaining a windfall because exemptions are granted for circumstances where new households are not expected to cause a need for additional school construction and offsets are granted for circumstances where the new households are providing their own schools. One of the exemptions is for senior housing. Senior housing is not expected to house any public school students so development that includes only senior households is not required to pay for new school construction. This same issue was litigated in *Aberdeen*. By not requiring senior households to pay school impact fees, the exemption prevents existing and new residents from gaining a windfall at the expense of seniors. However, this exemption undermines impact fees' fairness under social contract theory and other philosophies and disciplines examined. That is

why it is asserted that impact fees are not fair solely on their own but rather in the role of an augmentation to the already existing school finance mechanism. Were impact fees to exist on their own, seniors under the Orange and Hillsborough County ordinances would be exempted from paying *any* of the cost of public schools, and seniors would gain unjust enrichment from the benefits of an educated citizenry. However, because the impact fee ordinance augments an already existing public school finance mechanism, and the exemptions only apply to the impact fees, the Orange and Hillsborough County fees prevent unjust enrichment and are therefore fair.

Summarizing this section, the courts of equity arose to insure fairness in the outcome of court disputes. A fundamental principle of courts of equity is that unjust enrichment is unfair. In their current role as an augmentation to existing school finance mechanisms, Orange and Hillsborough County impact fees are fair because they prevent unjust enrichment.

Psychology on Fairness

Psychologists study mental functions to arrive at theories of human thought. The psychology of fairness will hereafter be explored.

Piaget's development of fairness

The study of the psychological development of fairness was pioneered by Jean Piaget.³⁹ Piaget looked into the thought processes behind children's moral decision-making, concluding that younger children differ from older children in the ways that they think about fairness. A child's individual level of thinking development, along with informal interactions with other children, determines how the child perceives fairness.

Piaget posited that preschoolers tend to think of fairness in absolute terms. He posited that preschool children think an action is fair based upon their perception of absolute and sacrosanct

³⁹ See J. Piaget, *Moral Development of the Child*, M. Gabain, trans. (1932).

rules and whether the action evokes punishment. Also, preschool children have difficulty taking another person's view so their perception of fairness is based largely on what benefit they receive from a given course of action. Piaget's work on younger children was followed by Kohlberg's work on older children and young adults.

Kohlberg's development of fairness

Kohlberg classified moral development into stages which he believed were invariant and hierarchical.⁴⁰ That is, all people pass through the stages in sequence on a progression to higher levels of moral thought. Kohlberg suggests, however, that some individuals get stuck somewhere in the progression and never reach the highest levels of moral thinking.⁴¹

Like Piaget, Kohlberg believed that in order to move up the progression of moral thought, individuals must possess the ability to think about moral issues in increasingly abstract ways. In other words, an individual's ability to think in the abstract sets limits upon the individual's ability to reason about fairness. He notes, however, that an understanding of fairness can be fostered if the individual is regularly exposed to reasoning that is slightly higher than the level on which the individual is reasoning. Exposure to slightly higher reasoning resolves cognitive conflict and helps fairness thinking advance.

Kohlberg's important contribution is the expansion of the work of Piaget to include three levels: preconventional, conventional, and postconventional. Preconventional and conventional levels of thought pertain to children while postconventional thought is found in young adults.

When preschool children make decisions about fairness, Kohlberg asserts that those decisions are based on avoiding punishment. Further, he discovered that preschool children find that a fair decision is the one that satisfies the child's immediate desires. A child believes that it

⁴⁰ W.C. Crain, *Theories of Development* (1985) at 118-136.

⁴¹ See Lawrence Kohlberg, *Essays on Moral Development: The Nature and Validity of Moral Stages*, Vol. II (1984).

is fair to take something simply because that child wants that something. A child at this age will judge fairness based upon how a given decision will affect him/her without any consideration of societal conventions of fairness.

At the conventional reasoning level, children lose their egoistic view of fairness and begin to consider fairness in the context of working and living together with others. Children begin to think in terms of pleasing others and doing what is helpful as their concern moves beyond self-interest to the good of the group. Children are aware of societal conventions and see fairness in terms of conformity with existing conventions or in terms of what will keep society moving smoothly.

Finally, Kohlberg explained young adult's fairness rationale in terms of the young adult's ability to reason beyond social conventions. In this *postconventional* level, older young adults want to keep society functioning but they are also aware that a smoothly functioning society is not necessarily a good one. For instance, they might reason that a totalitarian society might be well-organized, but it is hardly the ideal of fairness. To fully develop their fairness rationale, these thinkers must factor basic rights and democratic procedures into their fairness rationale. To accomplish this, the thinkers begin to look at situations from the perspective of others. Therefore, young adults at this level emphasize basic rights and democratic processes that give everyone a say in the outcome of a matter.

Psychology and Impact Fees

Orange and Hillsborough County impact fees are fair under postconventional reasoning. Postconventional thinking arrives at fairness by individuals looking at situations from the perspective of others. Such thinking is the highest order of moral development and the gateway to the thought experiments that Kant and Rawls prescribe. In order to enter into the thought experiments of the Categorical Imperative and the Original Position, the thinker must be able to

see things from the abstract perspective of others. Following, the fairness found in social contract theory is reinforced by Kohlberg's theory of postconventional thinking. This support of Kant's and Rawls' theories is psychology's most important contribution to the objective.

Summarizing this section, Kohlberg found that moral development occurred in stages with postconventional thinking as the pinnacle. Postconventional thinking is characterized by looking at situations from the perspective of others. Kohlberg's postconventional thinking supports social contract theory which, in turn, is an important element of the fairness of Orange and Hillsborough County impact fees.

Sociology on Fairness

Sociologists observe sociological phenomenon and develop theories to explain the mechanics of human social interaction. Interesting current sociological research focuses on the application of game-theory under theories of social Darwinism. This section will explore fundamental concepts of fairness through the application of game-theory in a Social Darwinism context.

Game-theory in social science

Game-theory studies optimal behavior when costs and benefits of each option are not fixed, but depend upon the future choices of other individuals. Game theorists study the predicted and actual behavior of individuals in games, as well as optimal strategies.⁴² A particular application of game-theory to the philosophies of rational egoism and social Darwinism were investigated.

⁴² See Martin Osborne and Ariel Rubinstein, *Course in Game Theory* (1994).

Game-theory application of rational egoism and Social Darwinism

Sociologists are asking if it is rational to be fair.⁴³ Put another way: are individuals in a society better off if everyone gives in to his or her desire to simply watch out for their own interests and take whatever offers the greatest advantage? Alternatively, are people better off if they act fair?

Some philosophers have tried to prove that it does not ultimately benefit the individual to act solely out of self interest. Plato resisted the claim that fairness is only the will of the rich and powerful. Plato's detractors, however, raise the example of unjust people who have apparent happiness. Likewise, Plato's detractors offer examples of apparently fair people who do not benefit from their fair actions.

Evolutionary sociologists have raised interest in the idea that Darwin's theory of biological evolution would provide the naturalistic basis for an optimized selfish society. Early sociologist Herbert Spencer coined the phrase *Survival of the Fittest* for his philosophy of Social Darwinism.⁴⁴ Support for the theory, however, waned during the early Twentieth Century and was generally abandoned after the philosophy formed the foundation for abuses such as eugenics by the Nazis.⁴⁵

Some contemporary scientists and philosophers, however, are attempting new ways of deriving a fundamentally rational way of being ethical. They argue that human beings evolved as social animals, not as lone, self-reliant brutes and that cooperation is selected in favor of selfishness because selfishness reduces the fitness of most individuals and of the group.

⁴³ See Massimo Pigliucci, *Rationally Speaking* (2001).

⁴⁴ See Herbert Spencer, *Social Statistics* (1851).

⁴⁵ M.M. Weber, "Psychiatric Research and Science Policy in Germany: The History of the Deutsche Forschungsanstalt für Psychiatrie, German Institute for Psychiatric Research in Munich from 1917 to 1945," *History of Psychology* 43 (2000): 235-258.

Social scientists have provided an example of how mathematical evolutionary theory can be applied to fairness and how social evolution favors fair and cooperative behavior.⁴⁶ To support their theory, they used the *ultimatum game*. In this game, two players are offered the possibility of winning a pot of money, but they must agree on how to divide it. The proposing player makes an offer of a split (i.e. \$9 for me, \$1 for you) to the other player. Then, the other player, the responder, has the option of accepting or rejecting. If the responder rejects, the game is over and neither of them gets any money. Using this example *with two players* it would seem the rational strategy is for the proposing player to behave egoistically and suggest highly uneven splits in which he or she takes most of the money, and for the responder to accept. Alternatively, neither of them gets anything.

Nowak and colleagues, however, simulated the evolution of the game in a situation in which *several* players get to interact *repeatedly*. That is, they considered a social situation rather than isolated encounters. They found that if the players have memory of previous encounters (i.e., each player builds a reputation in the group), the most favorable strategy is to propose fair offers because people are willing to punish dishonest proposing players. Punishing unfair proposing players in turn increases the fair proposing player's reputation for fairness and damages the unfair proposing player's reputation for the next round. Assuming this social environment, it is rational for proposing players to act less selfish towards the other players. Thus, the ultimatum game favors fairness over strict egoism and supports rational egoism in the context of Social Darwinism.

The ultimatum game assumes unselfish behavior as inherently fair behavior. At first glance this assumption appears self-serving and designed to dodge any inquiry as to the fundamental

⁴⁶ Martin Nowak, Karen Page, and Karl Sigmund, "Fairness Versus Reason in the Ultimatum Game," *Science* 8-289 (2000): 1773-1775.

essence of fairness. However, viewing this assumption so narrowly fails to recognize that the proposing players are acting fair because fairness benefits them. Seeking to maximize his or her gain, the proposing player will consider the gain that he or she will receive if he or she proposes transactions that are fair. Further, the proposer iteratively recognizes that fair distributions result in the maximization of his or her own gain. Under this theory, the resulting fair distributions are relatively equal distributions.

Summarizing, sociologists attempt to explain a social scheme whereby acting fairly is rational. Complementary to Darwin's theory of evolution through natural selection, Social Darwinism asserts that fairness has evolved out of iterations of man acting egoistically in social interactions. Social Darwinists theorize that it is in the individual's best interest to act in ways that help society. They further theorize that iterations of individual self-interested acts, when done in the context of a society where proposing players and responders develop a reputation, ultimately results in a proportional distribution of goods throughout the society.

Sociology and Impact Fees

Sociologic theory supports Orange and Hillsborough County impact fees. Under the ultimatum game, it is rational to be fair and fairness is defined as relative proportionality. Both impact fees provide that the cost of new development is portioned pro-rata amongst the new households that have created the need for the increased school capacity. With respect to the exemptions for senior households, the fees in their current role as a supplement to existing sources are because, were the counties to require senior households to pay school impact fees, those counties would develop a reputation for playing unfairly by requiring seniors to pay user fees for schools that they will never use. As a result, seniors would see this disproportional scheme as unfair. The long-term iterative result would then be that the seniors would not "play the game" with the county anymore and refuse to purchase new housing. Social Darwinists

would say that it is rational for the county to exclude senior housing from the impact fees. The result being that the exclusion is fair.

Sociologists would find the government housing exemptions fair also. The government housing exemptions go against strict proportionality in that they do not require new government housing households to pay the cost of new school infrastructure. However, as discussed in the social contract theory section, the exemptions are fair because they provide equality of opportunity. Were the exemptions not in the fees, the government housing households might very well not play the game and society would bear the burden of a greater portion of uneducated citizens. This goes both ways though, if the households who enjoy the benefit of equal educational opportunity do not take advantage of that opportunity, the paying households will discontinue playing the game and demand that the exemptions be removed. The same holds true for the low income exemption found in the Hillsborough fee.

Summarizing this section, Social Darwinists use the ultimatum game to show that it is rational to act fair and further that proportional outcomes are fair. Without the exemptions for senior housing, government housing and low income housing, the Orange and Hillsborough county fees might not hold up as fair under the ultimatum game. However, the exemptions allow the representative constituencies to develop a reputation of acting fairly and iterations of the game can continue. Further, the exemptions provide an opportunity for proportionality. Therefore, the fees are fair under the sociological theory of Social Darwinism.

Judeo-Christian Theology on Fairness

Judeo-Christian theology can be gleaned from theologians or from direct study of the Biblical text. Here, exegesis from the original text is favored over a survey of theologians.

The influence of Judeo-Christian theology in American politics

Recent studies show that nearly 80% of Americans identify with either the Christian or Jewish faith.⁴⁷ Further, studies suggest that a majority of Americans believe that churches should express their views on political matters and that there is either too little or the right amount of expression of faith by political leaders.⁴⁸ Therefore, the influence of Judeo-Christian thought on American politics is substantial.

Hebrew Pentateuch and Christian Old Testament on fairness

The doctrine of the *tithe* is found early in the Hebrew Pentateuch and Christian Old Testament at Genesis 14:20.⁴⁹ The doctrine of tithing simply means that each family is to give a proportion of ten percent of its belongings and income to the mission of the synagogue or church. Implicit in this doctrine is the idea that, regardless of wealth, it is fair for each family to contribute and that each contribution is proportional to the family's individual wealth. Therefore, while the amounts of the contributions are different, the relative impact is equally proportional.

Jesus on fairness

Jesus' teaching regarding fairness also includes proportionality. His doctrine of proportionality is gleaned from his teachings on income and contributing. Regarding a person's income and expectations of income, Jesus is recorded in Luke 11:3 as saying that each should receive his or her "daily bread."⁵⁰ Implicit in this teaching is that it is fair for each individual to receive a certain amount of income that is sufficient for the needs of their individual purpose.

⁴⁷ See Ariela Keysar, Barry A. Kosmin, and Egon Mayer, *American Religious Identification Survey* (2001).

⁴⁸ See Scott Keeter, *Public Divided on Origins of Life: Religion a Strength and Weakness for Both Parties* (2005).

⁴⁹ *New International Version Study Bible*, Kenneth Barker ed. (1995).

⁵⁰ *Supra* note 49.

Jesus also taught the *Golden Rule* in Matthew 7:12, “[s]o in everything, do unto others what you would have them do unto you.”⁵¹ This teaching requires that the contributor construct a fairness paradigm from the perspective of others. This teaching also contains an element of proportionality in that an individual is to give to others in proportion to how much he or she has been given.

Summarizing, Judeo-Christian definitions of fundamental fairness are influential in American society. The Judeo-Christian notion of fairness is closely linked to proportionality whereas it is fair to give in proportion to what one has. This conceptualization of fairness is also other-centered in that it defines fairness as contributing to others in proportion as to how the contributor would want to receive.

Judeo-Christian Theology and Impact Fees

Orange and Hillsborough County impact fees are fair under Judeo-Christian Theology. Similar to psychology, this theology arrives at fairness by requiring individuals to look at situations from the perspective of others. Like postconventional thinking, the theology forms the basis for the thought experiments that Kant and Rawls prescribe. In order to enter into the thought experiments of the Categorical Imperative and the Original Position, the thinker must be able to see things from the abstract perspective of others. The fairness found in social contract theory is reinforced by Jesus’ teachings. Judeo-Christian support of Kant’s and Rawls’ theories is an important contribution to the objective.

Secondarily, the proportionality aspect of both fees is fair under Judeo-Christian Theology. The fees are based upon studies that connect the actual cost of new school infrastructure to the new development that necessitates the new infrastructure. The fees are designed so that each new

⁵¹ *Supra* note 49.

household pays the proportional cost of the newly needed school infrastructure. This proportionality is similar to the tithe requirement. With the tithe in Judeo-Christian theology, each household is to pay its proportionate share of the cost of the mission of the church. Similarly, with the impact fees, each new household pays its proportionate share of the cost of the newly needed schools.

Summarizing this section, Judeo-Christian theology is characterized by looking at situations from the perspective of others. Jesus' teaching supports social contract theory which, in turn, is an important element of the fairness of Orange and Hillsborough County impact fees. Further, the theology supports the proportionality element of the impact fees.

Summary

A given county's general taxation/impact fee combination falls on the public school finance continuum between the extremes of general taxes only and impact fees only. The philosophies studied support a finding that the extremes of general taxation and impact fees only are both unfair. Near the extremes is a gray area where it is not clear if the philosophies and disciplines would support the general taxation/impact fee combination. However, as the distance from the extremes increases, the fees are more supported by the fairness ideas set forth in the philosophies and disciplines. Therefore, the middle region of the public school finance continuum is the zone of impact fee fairness. Where the Orange and Hillsborough County impact fees lie on the continuum and the ultimate question of the fairness of the fees is the subject of the following chapter.

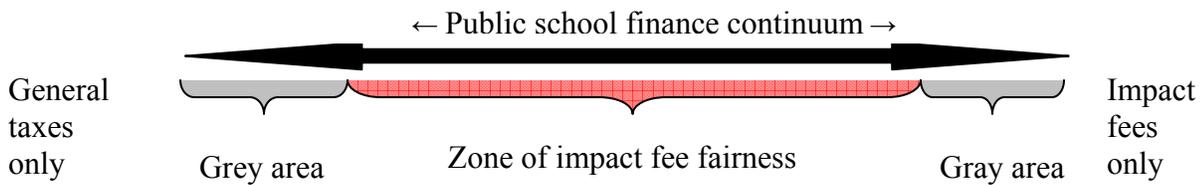


Figure 3-1 Zone of impact fee fairness in the public school finance continuum.

Table 3-1. Philosophy and discipline matrix.

Philosopher or Discipline	Parameter of Fairness	Element of Impact Fees
Plato	Fairness is the equipped acting in the interest of the unequipped like physician to patient.	Impact fees are fair when they augment the role of general taxes. General taxes allow those with resources to provide for those without.
Aristotle	Fairness is a mean between getting too much and getting too little.	Impact fees are fair to the extent that they are a mean between the extremes of general taxation only and impact fees only.
Hobbes	Individuals agree upon a social contract as a fair way of resolving the otherwise intolerable natural state of mankind.	Impact fees are fair because they act to connect the cost of education to benefits of educated society over generations.
Locke	Individuals agree upon a social contract as fair way of resolving the otherwise unfair natural state of mankind.	Impact fees are fair because they act to connect the cost of education to benefits of educated society over generations.
Kant	Individuals rationally formulate and implement fairness through a social contract outside of any divine or natural law.	Impact fees, as an augmentation to general taxation, are fair because, when viewed from the perspective of others, everyone would choose them.
Bentham	Whichever scheme provides the most happiness for the most members of society is fair.	Impact fees provide the most happiness for the most members of society.
Mill	Same as Bentham but more freedom for individual to gain happiness by helping others gain happiness.	Impact fees, as an augmentation to general taxation, are fair because there is greater overall pleasure than pain.
Rawls	Fairness is formulated by constructing rules from a perspective unbiased by one's position or experience.	Impact fees, as an augmentation to general taxation, are fair because, when viewed from the perspective of others, everyone would choose them.
Nozick	Fairness is minimal involuntary interaction with society.	Impact fees are fair because they are voluntary to the extent that households do not have to purchase new residences in counties with school impact fees.

Table 3-1 Continued.

Philosopher or Discipline	Parameter of Fairness	Element of Impact Fees
Courts of Equity	Fairness avoids unjust enrichment.	Impact fees are fair because they prevent windfall to existing and new households.
Psychology	Fairness is thinking from other's perspective.	Supports Kant and Rawls.
Sociology	Fairness is rational and relatively proportionate.	Impact fees, as an augmentation to existing general taxes, are fair because they are relatively proportional.
Judeo-Christian Theology	Fairness is thinking of others equally with one's self.	Roots of Kant and Rawls.

CHAPTER 4 SUMMARY AND CONCLUSION

Are the Orange County and Hillsborough County school impact fees fair? The Introduction provided the philosophical and historical context for public education finance in the United States and Florida. Next, the evolution of the impact fee was explained. Thereafter, a survey of philosophies and disciplines were examined to understand fundamental facets of fairness and scrutinize impact fees against the facets of fairness. Impact fees were determined fair under the philosophies and disciplines. However, the determination that the fees are fair is qualified to include only those fees that create a financing combination that falls significantly far from the extremes to distinguish the combination from a general taxation only or impact fees only on the public school finance continuum (See Figure 3-1).

Where do the Orange County and Hillsborough County school impact fees fall on the public school finance continuum and are these specific county's fees fair? The philosophies and disciplines examined establish that it is not fair to have public schools financed only through general taxes as they had prior to school impact fees. In a general tax only scheme, purchasers on new residences become unjustly enriched because they necessitate increased school construction but are only required to pay a share of the cost equal to that of existing residences in the county that did not necessitate the additional school construction. Unjust enrichment is contrary to courts of equity. Further, a general tax-only scheme fails to incorporate the proportionality found in sociology, psychology and Judeo-Christian theology because those creating the need for additional school infrastructure are not paying a proportion of that cost any different from those existing residential occupants who did not create any additional need.

Likewise, the philosophies and disciplines examined establish that it is not fair to have public schools financed only through impact fees. In an impact fee only scheme, new public

schools and augmentations to existing schools are financed only through impact fees. Further, because of the nexus requirements impact fees are only to be paid by those residences producing public school aged children. In turn, the newly built schools would only benefit those residences that necessitated the same schools. Therefore, an impact fee-only school financing scheme is tantamount to a user-only school financing scheme.

Under a user-only public school financing scheme, Plato's allegory of physician to patient is not in effect because households more equipped to educate are not acting in the interest of households that are less equipped to educate. Also, Aristotle's picture of virtue as a mean between extremes is not constructed. Social contract theory does not support a user-only scheme because, under the Categorical Imperative, nobody would chose that scheme because it would deny his or her opportunity for education if they did not come from a household that could afford an education. Further, the intergenerational cost/benefit linkage that general taxation provides is removed in that seniors and households without public school aged children do not pay for the cost but who benefit from an educated citizenry.

A user-only scheme is contrary to psychologist Piaget's findings of fairness in thinking of the needs of others in that it is fair for those households without school-aged children to think of those households that do. This view is also supported by the ultimatum game in sociology and in Judeo-Christian theology. All three of these require the thinker to place the needs of others on equal footing with the thinker's needs. Therefore, the household without children is required to see merit in other in the education of other household's children.

Combined, the philosophies and disciplines prevent a determination of fairness if a local government's public school financing scheme lies on the extremes of general tax only or impact fees only. Therefore, a fair scheme must be a combination of the two. However, determining a

precise mathematical fair combination might not be possible because the philosophies and disciplines are non-discrete sciences. Whereas discrete sciences such as physics generally produce discrete solutions, the philosophies and disciplines studied here have no discrete solutions and include variables discussed *infra* in the Limitations. That being said, however, it is assumed that a combination that lies close to an extreme cannot be determined fair. Under this assumption, we will now look at Orange County and Hillsborough County impact fees in the context of the public school financing continuum.

Orange County has been increasing the role of impact fees over the past years. In 1992, the school impact fee for a single family home in Orange County was \$1,400.00. Thereafter, in 1998, this amount was increased to \$2,828.00. Finally, in May of 2005, the same fee was raised to \$7,000.00. Therefore, Orange County is moving towards a greater role for impact fees in the general taxation/impact fee combination and is trending to the right on the public school finance continuum (See Figure 4-1). The placement of the fees on the public school finance continuum are relative and do not follow any precise mathematical formula or structure. The public school finance continuum figure is for demonstrative purposes only. But, while not based upon a discrete mathematical foundation, the diagram is none-the-less descriptive for determining if impact fees are fair.

At a level of \$7,000 per single family home, the Orange County fee is far enough from the value of zero dollars to distinguish Orange County's financing combination from a general tax-only scheme. Following, the Orange County public school financing combination contains a significant portion of impact fees and therefore embodies the fundamental fairness that impact fees bring to a general taxation/impact fee combination. Therefore, Orange County's school impact fees are ultimately determined fair.

Hillsborough County is considering increasing the role of impact fees. While the County is vigorously debating a significant increase, the current fees are only \$195.95 for a three-bedroom single-family home. Therefore, while Hillsborough County is considering an increase in the role of impact fees in its general taxation/impact fee combination, the current fee sits far to the left on the public school finance continuum (Figure 4-2).

At a level of \$195.95 per single family home, the Hillsborough County fee is close to the value of zero dollars, therefore, Hillsborough County's financing combination cannot be distinguished from a general tax-only scheme. Following, Hillsborough's combination does not embody the fundamental fairness that impact fees bring to a general taxation/impact fee combination. Hence, Hillsborough County's school impact fees lie somewhere in the gray area and cannot be determined fair.

Figure 4-3 shows the average Florida school impact fee on the public school finance continuum. At \$3,286, the average fee is far enough from the value of zero dollars to distinguish the financing combination from a general tax-only scheme. Therefore, the average Florida fee lies within the zone of fairness and is considered fair. Should Hillsborough County increase its school impact fee to an amount at least commensurate with the state average, the fee would lie in the zone of fairness and the fee would be determined fair.

Conclusion

In conclusion, the objective was to determine if Orange and Hillsborough County school impact fees are fair. At \$7,000 per single family home, Orange County's current school impact fee is determined fair. Conversely, at \$195.95 per three-bedroom single family home, Hillsborough County's current school impact fee is determined unfair. Should Hillsborough County increase its school impact fee to an amount at least concurrent with the Florida average school impact fee, the fee would be determined fair. Following, the objective has been met:

impact fees are a fair form of public school financing but impact fees must be a significant portion of the public school financing combination. Orange County's fee of \$7,000 is determined fair while Hillsborough County's fee of \$195.95 is determined unfair.

Limitations

There are a number of limitations. A primary limitation is that the question that this paper asks might not ultimately have an answer. Justice Potter Stewart encountered a similar when the Supreme Court struggled with defining obscenity. In *Jacobellis v. Ohio*, Justice Potter acknowledged that the Court might be trying to define the not definable.¹ In his opinion, he conceded that he might not be able to offer a precise definition but he could affirm that he knows obscenity when he sees it. Similarly, Justice Holmes' opines in *Pennsylvania Coal v. Mahon* that he is unable to arrive at a bright-line definition of a regulatory land use taking.² Rather, he asserts that if a regulation goes too far it is considered a taking. Even significant camps of philosophy uphold no positive truths but rather find that everything is relative.

The term Education refers to formal education. In its broadest sense, education can be defined as any activity by which a human group transmits to its descendants a body of knowledge and skills and a moral code which enable that group to subsist. Alternatively, formal education can be thought of as the school systems set up by local school districts with the express purpose of the systematic teaching of children.

School impact fees are limited to only the construction of new school facilities. Costs of providing education consist of building costs and operating costs. School impact fees in Florida are allocated to the cost of constructing new educational facilities or renovating used facilities.

¹ See *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

² See *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).

School impact fee revenues are not spent on operating costs such as salaries, maintenance, and supplies. Therefore, conclusions about the fairness of school impact fees only apply to the construction of new schools or renovations of existing schools.

Another limitation is the scope of inquiry into fundamental fairness. Thought and debate about fairness has been documented for over five thousand years. The result is numerous theories of fairness with vigorous current debate. Were this paper to attempt to survey each one of them, the task would be overwhelming. Further, the paper would be immense and risk over-inclusion. Such a paper would be so expansive as to possibly give no direction or advancement of thought.

A further limitation is errors in the conclusions reached by the philosophers and disciplines. While the great philosophers and positions set forth in the disciplines have stood the test of time and scrutiny, there remains no ultimate authority or certification of authentic and controlling theory. Therefore, philosophers and theorists within the disciplines run the gamut from scientists to windbags. Bacon discussed philosophers whose thinking is so convoluted as to be of little explanative value. He remarked that their philosophies are, “cobwebs of learning, admirable for the fineness of thread and work but of no substance or profit.”³ This opens the possibility that many philosophers and theorists who have addressed fundamental fairness are not able to actually shed light on the subject. Nonetheless, their philosophy or positions might be studied in this paper.

The paper is also limited by the existence of conflicts between the reasoning disciplines. For instance, the Libertarian might say that a capitalistic approach is fair whereas the social scientist might disagree and say that the only fair distributive scheme is socialism. However, absent such conflicts, this paper might just state the obvious and be of no scholastic value.

³ Sir Francis Bacon, *The Advancement of Learning*, originally published in 1605 (2006) at I-IV(5).

These limitations are a function of the philosophies and disciplines studied. Unlike the physical sciences, these sciences and disciplines are more difficult to extract discreet answers from but are, none the less, elements of human inquiry that have historically been important and remain important today. Therefore, even with these limitations, they give parameters within which a financing combination that is unfair can be excluded.

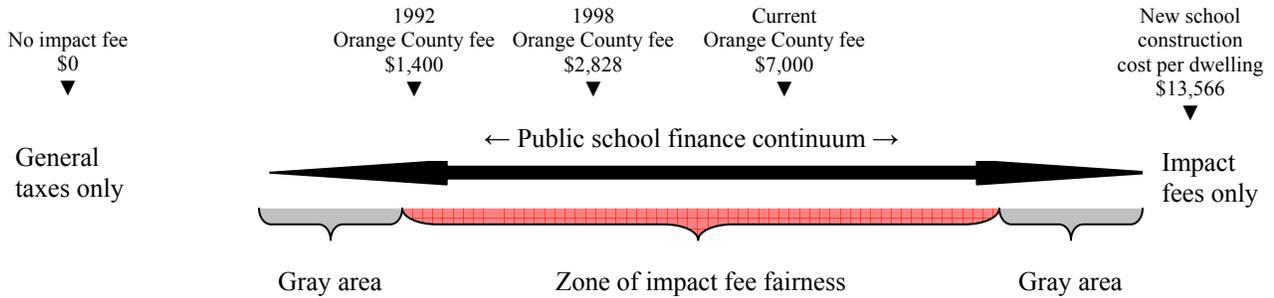


Figure 4-1. Orange County's fee on the public school finance continuum.

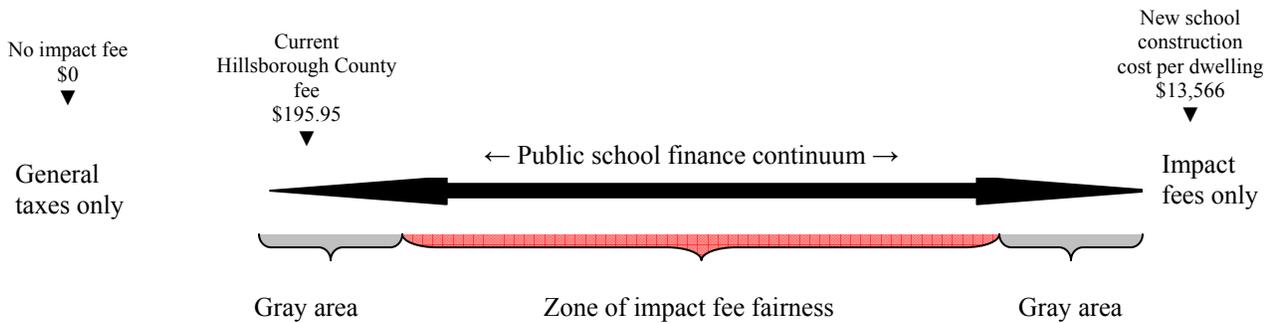


Figure 4-2. Hillsborough County's fee on the public school finance continuum.

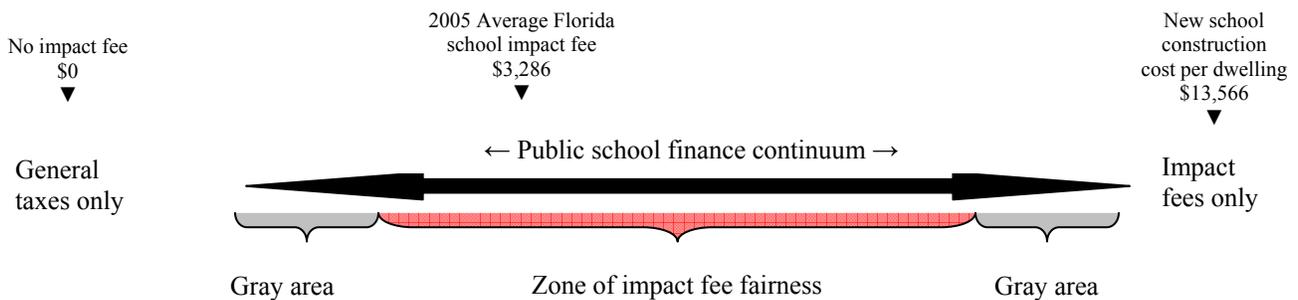


Figure 4-3. Average Florida school impact fee on the school finance continuum.

APPENDIX DATA

Population Demographics

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BIOGRAPHICAL SKETCH

The author has focused virtually his entire education and professional experience in real estate & government. Stephen was born in Cape May, NJ, raised in the Miami-Fort Lauderdale area, and then moved to Ocala, FL at the commencement of high school. He graduated from the Florida State University with a Bachelor of Science degree in real estate (College of Business). As an undergraduate, he was elected to represent the College of Business as a student senator and served for four years as the President of the Navigators Christian ministry.

Upon graduation, he immediately went on staff with United States House of Representatives Member Cliff Stearns representing Florida's Sixth Congressional District. He then returned to Florida State and graduated with a Master of Science degree in urban and regional land use planning. His master's paper studied the effect of a social NIMBY on neighboring real estate values. During the same period, he passed five Appraisal Institute MAI exams and performed over three hundred residential and commercial real estate appraisal reports for major nationwide lenders at Bell, Griffith & Associates, MAI. He also obtained a Florida real estate broker's license.

After graduate school, he returned on staff with Congressman Stearns. Thereafter, he graduated from the University of Florida, College of Law, and was awarded the Book Award in legal history. After admission to the Florida Bar, he spent a time with a national homebuilder and then entered the private practice of law.

Stephen has represented clients and tried cases in courts throughout Florida from small claims to Federal District Court. Further, he has appellate experience in both the Florida Fifth Circuit Court of Appeals and the United States Eleventh Circuit Court of Appeals and he is admitted to the United States Supreme Court. His legal experience includes real estate, land use, negligence and civil-rights actions.

Concurrently with his entrance into private practice of law, Stephen enrolled in the Ph.D. program at the University of Florida, College of Design, Planning and Construction, Department of Urban and Regional Planning. During that time he has participated in nationwide continuing legal education programs and has been appointed to the Orlando-Orange County Civic Facilities Board.

In August of 2005, Stephen was married to Melanie Moore of Greenville, SC. Stephen's base office is in Silver Springs, FL but he is making an increasing presence in Greenville, SC. After graduation, he intends to take the South Carolina Bar and remain in the fields of law and real estate in both South Carolina and Florida.