

**Haynsworth
Sinkler Boyd, P.A.**

ATTORNEYS AND COUNSELORS AT LAW

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH
WASHINGTON, DC

75 BEATTIE PLACE, 11TH FLOOR (29601-2119)
POST OFFICE BOX 2048 (29602-2048)
GREENVILLE, SOUTH CAROLINA
TELEPHONE 864.240.3200
FACSIMILE 864.240.3300
www.hsblawfirm.com

SARAH P. SPRUILL
ATTORNEY
DIRECT DIAL NUMBER 864.240.3220
sspruill@hsblawfirm.com

February 24, 2012

BY HAND DELIVERY

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: The Home Builders Association of South Carolina, et. al v. School District No. 2 of Dorchester
County, et. Al, Case No. 2009-CP-18-2674
Tracking Number: 2011195208

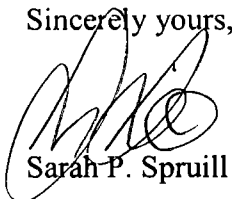
Dear Tanya:

Enclosed please find the following the original and seventeen (17) copies of the following. As required, the original of Respondents' Final Brief remains unbound.

1. Respondents' Final Brief;
2. Certificate of Compliance; and
3. Proof of Service

Please file the originals and return two clocked copies of each document via my courier.

Sincerely yours,



Sarah P. Spruill

SPS/jlc
Enclosures

cc: (w/enclosures, via U.S. Mail)
Frederick A. Gertz, Esq.
Phong T. Nguyen, Esq.

RECEIVED
FEB 24 2012
SC Court of Appeals

GERTZ & MOORE

ATTORNEYS AND COUNSELORS AT LAW

1416 LAUREL STREET

P. O. BOX 456

COLUMBIA, SOUTH CAROLINA 29202

FREDERICK A. GERTZ*
ALICE S. MOORE

PHONG T. NGUYEN
*ALSO ADMITTED IN N.Y. & GA.

TELEPHONE
(803) 252-1524

TELECOPIER
(803) 799-6946

February 21, 2012

Sarah P. Spruill, Atty.
Haynsworth Sinkler Boyd, P.A.
PO Box 2048
Greenville SC 29602

Charlton deSaussure, Jr., Esq.
Haynsworth Sinkler Boyd, P.A.
P.O. Box 340
Charleston, SC 29402-0340

Home Builders, et al v. School District No. 2 of Dorchester County , et al.
2009-CP-18-2674

Dear Sarah and Charlton:

By copy of this letter I am transmitting three (3) bound copies of the Record on Appeal with the revised cover sheet to Sarah and three (3) copies of the revised cover sheet to Charlton. I hope this will be acceptable to you.

I apologize for any inconvenience this may have caused.

With kind regards, I am

Yours very truly,

Alice S. Moore

Enc.
cc: V. Claire Allen, Deputy Clerk

RECEIVED
FEB 22 2012
SC Court of Appeals



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

February 13, 2012

Frederick A. Gertz, Esquire
Phong T. Nguyen, Esq.
Gertz & Moore
P O Box 456
Columbia, SC 29202

Re: Home Builders Assoc. v. SD No. 2
2011195208

Dear Counsel:

We have received the Record on Appeal in the above case. However, the addresses for the respondents' counsel should show on the cover of the record as:

Charlton de Saussure, Jr., Esquire
Haynsworth Sinkler Boyd, P.A.
P O Box 340
Charleston, SC 29402

Sarah P. Spruill, Esquire
Haynsworth Sinkler Boyd, P.A.
PO Box 2048
Greenville, SC 29602

Additionally, the unbound original does not show the page numbers.

Within ten days from the date of this letter, please arrange for a representative from your office to come to the Court of Appeals filing desk on the 1st floor of the Edgar A. Brown Building to make the required corrections. **We request that you notify this office when someone will be arriving to make the corrections so the documents will be available without delay.**

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: Charlton de Saussure, Jr., Esquire
Sarah P. Spruill, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

January 19, 2012

Frederick A. Gertz, Esquire
Phong T. Nguyen, Esq.
Gertz & Moore
P O Box 456
Columbia, SC 29202

Charlton de Saussure, Jr., Esquire
Haynsworth Sinkler Boyd, P.A.
P O Box 340
Charleston, SC 29402

Sarah P. Spruill, Esquire
Haynsworth Sinkler Boyd, P.A.
PO Box 2048
Greenville, SC 29602

Re: Home Builders Assoc. v. SD No. 2
2011195208

Dear Counsel:

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1205 Pendleton Street, Columbia, S.C. 29201. Thank you for your attention to this.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-18-2674

The Home Builders Association of South Carolina
and the Charleston-Trident Home Builders
Association, Inc.....Appellants,

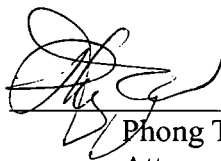
v.

School District No. 2 of Dorchester County
and the Board of Trustees for Dorchester
School District No.2.....Respondents.

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the within Initial Reply Brief was duly served upon the following on the 10th day of January, 2012 with first class postage duly affixed and a return address clearly indicated on the envelope by depositing said papers in the United States Mail, Columbia, South Carolina, addressed as follows:

Charlton deSaussure, Jr., Esq.
Haynsworth Sinkler Boyd, P.A.
P.O. Box 340
Charleston, SC 29402-0340



Phong T. Nguyen
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-18-2674

The Home Builders Association of South Carolina and
the Charleston-Trident Home Builders Association, Inc.....Appellants,

v.

School District No. 2 of Dorchester County and
the Board of Trustees for Dorchester School District No. 2.....Respondents.

INITIAL REPLY BRIEF

Frederick A. Gertz
Phong T. Nguyen
GERTZ & MOORE
1416 Laurel St.
P.O. Box 456
(803) 252-1522
Attorney for Appellant

RECEIVED

JAN 12 2012

SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
ARGUMENTS.....	1
I. The Lower Court’s Application of Bradley is Unjustified.....	1
II. Respondent’s Reliance on the Dissenting Opinion in <u>Fairfield County</u> Lacks Sound Basis.....	2
III. The Lower Court Failed to Apply the Correct Rule 12(c), SCRC Standard to Dismiss the Complaint.....	3

TABLE OF AUTHORITIES

CASES	PAGE NO.
<u>Bradley v. Cherokee Cnty. Sch. Dist. No. 1,</u> 322 S.C. 181, 470 S.E.2d 570 (1996).....	1, 4
<u>Charleston Cnty. Sch. Dis. v. Harrell, et al.,</u> 393 S.C. 552, 713 S.E. 2d 604 (2011)	1, 2, 3, 4
<u>Med. Soc’y of S.C. v. Med. Univ. of S.C.,</u> 334 S.C. 270, 513 S.E.2d 352 (1999).....	3
<u>McElveen v. Stokes,</u> 240 S.C. 1, 124 S.E.2d 352 (1962).....	2, 3
<u>Rosenthal v. Unarco Indus., Inc.,</u> 278 S.C. 420, 297 S.E.2d 638 (1982).....	4
<u>Russell v. Columbia,</u> 305 S.C. 86, 406 S.E.2d 338, (1991).....	4
<u>Sch. Dist.of Fairfield County v. State,</u> Op. No. 27035 (S.C. Sup. Ct. filed August 29, 2011) (Shearouse Adv. Sh. No. 29 at 48).....	2, 3
CONSTITUTION	
S.C. Const. art. III, §34(IX).....	2
ACTS	
2009 S.C. Act No. 99.....	1, 2, 3
S. C. Development Impact Fee Act, S.C. Code Ann. §§ 6-1-910, et seq. (1999).....	1, 3

ARGUMENT

I. The Lower Court's Application of Bradley Is Misplaced.

Respondents argue that the lower court was correct in its application of Bradley v. Cherokee, 322 S.C. 181, 470 S.E.2d 570 (1996) to the facts at hand (Respondents' Initial Brief, at 4-8). Respondents and the lower court fail to recognize significant differences between the Act in Bradley and Act No. 99, 2009 S.C. Acts 1024 ("Act 99") which render their proposition untenable. In applying the facts of Bradley, the lower court disregarded the fact that the Bradley decision is specifically limited to local taxation—a local option sales tax, which, as the Bradley court discussed at length, had been approved by voters in a referendum. 322 S.C. 181, at 184, 470 S.E.2d 570, at 571. No such referendum took place in the current case.

Act 99 does not contemplate taxation; rather the Act expressly imposes a development impact fee. Development impact fees are comprehensively governed by the regime under the Development Impact Fee Act, S.C. Code Ann. §§ 6-1-910, et seq. (1999) ("Impact Fee Act"), an Act of statewide applicability from which the legislature has deliberately excluded school districts. Finally, the lower court ignored that the local option sales tax, once approved by voters, is a legally viable option for funding education, whereas school districts have no authority to impose impact fees.

Charleston County School District v. Harrell, 393 S.C. 552, 713 S.E.2d 604 (2011) is more on point than Bradley on one crucial principle. In both Harrell and the current case, a general existing statute precluded Respondents from achieving their desired relief; thus, special legislation was enacted to circumvent the general law and provide an exclusive exemption for one school district. This is not to say that our

legislature cannot create exceptions to a general law; but again, our constitution and case law require the existence of unique circumstances to validate the exception.

Respondents correctly point out that the Supreme Court in Harrell overturned the lower court's decision partly based on the latter's reliance on facts not alleged in the complaint (Respondents' Initial Brief, at 2). However, one needs to consider why the trial court in Harrell introduced the extraneous facts at all. It did so in an attempt to distinguish Charleston County from other counties and thereby provide a rational basis for the special legislation. As previously stated, no distinguishing factor has been introduced by Respondents, nor can any be found within Act 99 itself (Appellants Initial Brief, at 7-9).

II. Respondents' Reliance on the Dissenting Opinion in Fairfield County Lacks Sound Basis.

Respondents also cite the dissent in Sch. Dist. of Fairfield County v. State, Op. No. 27035 (S.C. Sup. Ct. filed August 29, 2011) (Shearouse Adv. Sh. No. 29 at 48, 63) for the proposition that Acts involving education enjoys special protection from constitutional scrutiny because of the legislative duty to fund education (Respondents' Initial Brief, at 4). However, McElveen v. Stokes, 240 S.C. 1, 124 S.E.2d 352 (1962), the foundation of the dissent's position, provides Respondents no support. On the contrary, McElveen explicitly refutes this argument and warns, "*not even in school cases* is the power of the General Assembly always broad enough to insure that an act pertaining to school matters is not in contravention of Article, Section 34, Subsection IX." Id at 10, emphasis added.

Indeed, Respondents' position is repudiated in all respects by McElveen. The McElveen court found the Act before it unconstitutional, "clear[ly] and beyond a reasonable doubt... There being, in effect, an applicable general law and there being no showing in the ...record before us of any sufficient distinction." Id., at 597. McElveen, Med. Soc'y of S.C. v. Med. Univ. of S.C., 334 S.C. 270, 513 S.E. 2d 352 (1999) and Harrell, 392 S.C. 552, 713 S.E.2d 604 all stand for one principle—the legislature has numerous constitutional duties and if, in carrying out those responsibilities, it creates conflicting legislation for the sole benefit of one educational institution it must have a sufficiently unique reason for doing so.

The concurring opinion in Fairfield County specifically rejects the Act before it as unjustified special legislation, stating, "there is no evidence in the record of this case that distinguishes the Board of Trustees of the School District of Fairfield County from the majority of school district governing bodies in this state; all are susceptible to fiscal mismanagement... Assuming that Act 308 is efficacious, its tenets could prove beneficial to the entire state, not just Fairfield County." Op. No. 27035 (Shearouse Adv. Sh. No. 29, at 48, 58). The same could be said of the case at hand; an amendment to the Impact Fee Act could provide relief statewide since many South Carolina school districts face identical fiscal constraints described in Act 99.

III. The Lower Court Failed to Apply the Correct Rule 12(c), SCRCF Standard to Dismiss the Complaint.

The lower court did not attempt to reconcile the body of case law demanding a detailed analysis of unique exigencies; instead, it relied primarily on one precedent, distinguishable on issues of fact and law, as the basis for dismissing the complaint at the

pretrial stage. Respondents argue that the lower court had applied the proper standard (Respondents' Initial Brief, at 1-2). However, the constitutional presumption and the "clear and beyond reasonable doubt" standard of review advanced by Respondents properly belong to the judgment of the court at the trial level. None of the cases challenging special legislation cited by Respondents involve a SCRCF Rule 12(c) or Rule 12(b) dismissal. In all of these instances, including Bradley, the merits of the constitutional challenge had already been fully adjudicated by a lower court.

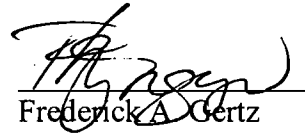
While Rosenthal v. Unarco Indus., Inc., 278 S.C. 420, 297 S.E.2d 638 (1982) (Respondents' Initial Brief, at 1-2) involved a constitutional challenge, that court dismissed the complaint under Rule 12(c) on the preliminary issues of jurisdiction and standing. The Rosenthal court specifically found the defendants were "entitled to judgment [on these issues] *regardless of the outcome of any disputed facts.*" Id at 422, 423, emphasis added. In the case at hand, the factual determination of Respondents' uniqueness is pivotal to the outcome. Here Appellants contend, as did the appellants in Harrell, that they have been wrongfully denied a significant procedural right to trial. Under the standards established by Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) for a SCRCF Rule 12(c) dismissal (Appellants Initial Brief, at 3, 4, 13, 15), it is improper to dismiss the complaint at the preliminary stage, especially when compelling issues of fact and law remain unresolved.

CONCLUSION

In light of the facts at hand, judgment for Respondents under Rule 12(c) SCRPC was inappropriate and the lower court's decision should be reversed.

January 10, 2012
Columbia, SC

Respectfully Submitted,



Frederick A. Gertz
Phong T. Nguyen
GERTZ & MOORE
1416 Laurel St.
P.O. Box 456
Columbia, SC 29202
(803) 252-1524

The South Carolina Court of Appeals

The Home Builders Association of
South Carolina and the Charleston-
Trident Home Builders Association,
Inc.,

Appellants,

v.

School District No. 2 of Dorchester
County and the Board of Trustees for
Dorchester School District No. 2,

Respondents.

The Honorable Edgar W. Dickson
Dorchester County
Trial Court Case No. 2009-CP-18-02674

ORDER

For good cause having been shown, the time for the Appellants' Initial Reply Brief to be served and filed in the above entitled matter is hereby extended until January 10, 2012.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc: Frederick A. Gertz, Esquire
Phong T. Nguyen, Esq.
Charlton de Saussure, Jr., Esquire
Sarah P. Spruill, Esquire

FILED
12/28/11 *VF*

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-18-2674

RECEIVED

DEC 21 2011

SC Court of Appeals

The Home Builders Association of South Carolina
and the Charleston-Trident Home Builders
Association, Inc.....Appellants,

v.

School District No. 2 of Dorchester County
and the Board of Trustees for Dorchester
School District No.2.....Respondents.

APPELLANTS' MOTION FOR EXTENSION OF TIME

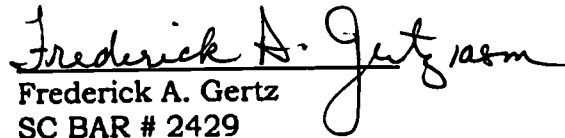
Appellants hereby move the Court for an extension of time in which to file and serve an Initial Reply Brief and Designation of Record in this matter. Respondents' Initial Brief and Designation of Record were served December 14, 2011. Due to the holidays and scheduled medical appointments, Appellants request an extension until January 10, 2012. Appellants have previously received one extension of time in which to file and serve their Initial Brief and Designation of Record.

12/28/11

1st mot

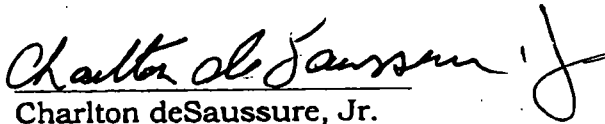
1/10/12

Respondents have consented to this extension.



Frederick A. Gertz
SC BAR # 2429
GERTZ & MOORE
1416 Laurel Street
Post Office Box 456
Columbia, South Carolina 29202
(803) 252-1524
Attorneys for Appellants

We Consent:



Charlton deSaussure, Jr.
HAYNSWORTH SINKLER BOYD, P.A.
134 Meeting Street, 3rd Floor
Charleston, SC 29401
(843) 722-3366
Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-18-2674

The Home Builders Association of South Carolina
and the Charleston-Trident Home Builders
Association, Inc.....Appellants,

v.

School District No. 2 of Dorchester County
and the Board of Trustees for Dorchester
School District No.2.....Respondents.

AFFIDAVIT IN SUPPORT OF APPELLANTS' MOTION
FOR EXTENSION OF TIME

PERSONALLY APPEARED BEFORE ME Frederick A. Gertz who,
being duly sworn, deposes and says that:

1. He is the lead attorney for the Appellants, the Home Builders Association of South Carolina and the Charleston-Trident Home Builders Association, Inc.

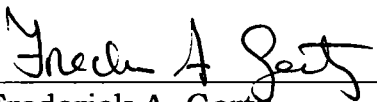
2. Pursuant to their Certificate of Service, the Respondents served their Initial Brief and Designation of Record on December 14, 2011,

making Respondents' Initial Reply Brief due on December 27, 2011 (allowing for Christmas closings).

3. Appellants received Respondents' Initial Brief on December 16, 2011, the day before attorney Phong Nguyen left for an extended trip out of the State.

4. Appellants and appellants' attorneys have numerous personnel out of town for the holidays, and affiant has several medical appointments scheduled over the holidays and during the first part of January.

5. Appellants are requesting this extension until January 10th to afford them time to thoughtfully confer with their attorneys and to give their attorneys time to concentrate on properly formulating an Initial Reply Brief.


Frederick A. Gertz

SWORN to before me this
20th day of December 2011

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 8/26/19

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-18-2674

The Home Builders Association of South Carolina
and the Charleston-Trident Home Builders
Association, Inc.....Appellants,

v.

School District No. 2 of Dorchester County
and the Board of Trustees for Dorchester
School District No.2.....Respondents.

MEMORANDUM IN SUPPORT OF APPELLANTS' MOTION
FOR EXTENSION OF TIME

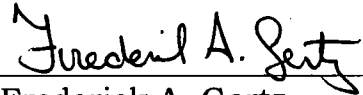
Rule 263(b) SCACR provides that the time prescribed for performing any act other than for serving the notice of appeal may be extended by the appellate court or any judge or justice thereof.

Respondents' initial brief was served on December 14, 2011, making Appellant's brief due December 24, 2011 which is Christmas Eve and a Saturday. Pursuant to the Rules of Appellate Practice Rule 263, the last day of the computation of time is included unless a Saturday,

Sunday or a state or federal holiday. This provision moves the due date for the initial Reply Brief to Tuesday, December 27, 2011. Appellants request an additional fourteen (14) days in which to file and serve their initial reply brief and accompanying designation of record, if applicable. Respondents have consented. The affidavit of Frederick A. Gertz, lead attorney for Appellants, supports this request. Rule 263(b) allows the court or any judge or justice to grant this request.

The requested extension to January 10, 2012 will not prejudice any party and has been timely made.

Respectfully submitted



Frederick A. Gertz
SC BAR # 2429
GERTZ & MOORE
1416 Laurel Street
Post Office Box 456
Columbia, South Carolina 29202
(803) 252-1524
Attorneys for Appellants

Columbia, SC
December 20, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-18-2674

RECEIVED
DEC 21 2011
SC Court of Appeals

The Home Builders Association of South Carolina
and the Charleston-Trident Home Builders
Association, Inc.....Appellants,

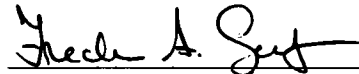
v.

School District No. 2 of Dorchester County
and the Board of Trustees for Dorchester
School District No.2.....Respondents.

PROOF OF SERVICE

I certify that I have served the attached APPELLANTS' MOTION FOR
EXTENSION OF TIME, AFFIDAVIT IN SUPPORT OF APPELLANTS' MOTION FOR
EXTENSION OF TIME and MEMORANDUM IN SUPPORT OF APPELLANTS'
MOTION FOR EXTENSION OF TIME on Respondents by depositing a copy in
the United States Mail, postage prepaid, on December 20, 2011, addressed as
follows:

Charlton deSaussure, Jr., Esq.
Haynesworth Sinkler Boyd, P.A.
PO Box 340
Charleston, SC 29402-0340


Frederick A. Gertz
Gertz & Moore
PO Box 456
Columbia, SC 29202
(803) 252-1524
Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-18-2674

RECEIVED

DEC 15 2011

SC Court of Appeals

The Home Builders Association of South Carolina and
the Charleston-Trident Home Builders Association, Inc.....Appellants,

v.

School District No. 2 of Dorchester County and
the Board of Trustees for Dorchester School District No. 2.....Respondents.

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Respondents propose no further matter to be included in the Record on Appeal in addition to those materials previously designated by the Appellants. I certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,

Charlton deSaussure, Jr.

HAYNSWORTH SINKLER BOYD, P.A.

Charlton deSaussure, Jr.
134 Meeting Street, 3rd Floor
Charleston, SC 29401
(843) 722-3366

Sarah P. Spruill
75 Beattie Place, 11th Floor
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3220

Attorneys for the Respondents

December 14, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-18-2674

RECEIVED

DEC 15 2011

SC Court of Appeals

The Home Builders Association of South Carolina and
the Charleston-Trident Home Builders Association, Inc.....Appellants,

v.

School District No. 2 of Dorchester County and
the Board of Trustees for Dorchester School District No. 2.....Respondents.

PROOF OF SERVICE

I certify that I have served Respondents' Initial Brief on Appellants by depositing
a copy of it on December 14, 2011, addressed to their attorneys of record, Frederick A.
Gertz, Phong T. Nguyen, Gertz & Moore, P. O. Box 456, Columbia, SC 29202

Charlton deSaussure Jr.

Charlton deSaussure, Jr.

HAYNSWORTH SINKLER BOYD, P.A.

134 Meeting Street, 3rd Floor

Charleston, SC 29401

(843) 722-3366

Attorneys for the Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-18-2674

RECEIVED

DEC 15 2011

SC Court of Appeals

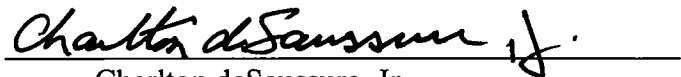
The Home Builders Association of South Carolina and
the Charleston-Trident Home Builders Association, Inc.....Appellants,

v.

School District No. 2 of Dorchester County and
the Board of Trustees for Dorchester School District No. 2.....Respondents.

PROOF OF SERVICE

I certify that I have served Respondents' Designation of Matter to be Included in the Record on Appeal on Appellants by depositing a copy of it on December 14, 2011, addressed to their attorneys of record, Frederick A. Gertz, Phong T. Nguyen, Gertz & Moore, P. O. Box 456, Columbia, SC 29202



Charlton deSaussure, Jr.
HAYNSWORTH SINKLER BOYD, P.A.
134 Meeting Street, 3rd Floor
Charleston, SC 29401
(843) 722-3366
Attorneys for the Respondents

CHARLESTON

COLUMBIA

FLORENCE

GREENVILLE

Haynsworth
Sinkler Boyd, PA

ATTORNEYS AND COUNSELORS AT LAW

134 MEETING STREET, THIRD FLOOR (29401)
POST OFFICE BOX 340 (29402-0340)
CHARLESTON, SOUTH CAROLINA
TELEPHONE 843.722.3366
FACSIMILE 843.722.2266
WEBSITE www.hsblawfirm.com

Charlton deSaussure, Jr.
DIRECT DIAL NUMBER 843-720-4420
EMAIL cdesaussure@hsblawfirm.com

December 14, 2011

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RECEIVED
DEC 15 2011
SC Court of Appeals

Re: *The Home Builders Association of South Carolina, et. al v. School District No. 2 of
Dorchester County, et. al*
2009-CP-18-2674

Dear Ms. Gee:

Enclosed are the originals and one copy each of Respondents' Initial Brief and Designation of Matter to be Included in the Record on Appeal. Please file the originals and return clocked copies to me in the enclosed stamped, self-addressed envelope. Thank you for your assistance.

Sincerely yours,



Charlton deSaussure, Jr.

CdeS/jcm

cc: Frederick A. Gertz, Esq. (w/encls.)
Phong T. Nguyen, Esq. (w/encls.)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-18-2674

RECEIVED

DEC 15 2011

SC Court of Appeals

The Home Builders Association of South Carolina and
the Charleston-Trident Home Builders Association, Inc.....Appellants,

v.

School District No. 2 of Dorchester County and
the Board of Trustees for Dorchester School District No. 2.....Respondents.

INITIAL BRIEF OF RESPONDENTS

HAYNSWORTH SINKLER BOYD, P.A.

Charlton deSaussure, Jr.
134 Meeting Street, 3rd Floor
Charleston, SC 29401
(843) 722-3366

Sarah P. Spruill
75 Beattie Place, 11th Floor
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3220

Attorneys for the Respondents

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT	1
I. The trial court correctly applied the Rule 12(c), SCRCP standard to the allegations of the complaint in dismissing this action.	1
II. The General Assembly properly authorized the School District to impose an impact fee on new residential construction.....	3
CONCLUSION.....	8

TABLE OF AUTHORITIES

CASES

<i>Bauer v. South Carolina State Housing Authority</i> , 271 S.C. 219, 246 S.E.2d 869 (1978)	3
<i>Bradley v. Cherokee Sch. Dist. No. 1</i> , 322 S.C. 181, 470 S.E.2d 570 (1996)	4- 8
<i>Charleston County School District v. Harrell</i> , 393 S.C. 552, 713 S.E.2d 604 (2011)	2, 6-8
<i>Crow v. McAlpine</i> , 277 S.C. 240, 242, 285 S.E.2d 355 (1981)	3
<i>Foster v. S.C.D.H.P.T.</i> , 306 S.C. 519, 413 S.E.2d 31 (1992)	4
<i>Hambrick v. GMAC Mortgage Corp.</i> , 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006)	1
<i>McElveen v. Stokes</i> , 240 S.C. 1, 124 S.E.2d 592 (1962)	4
<i>Medical Society of South Carolina v. Medical University of South Carolina</i> , 334 S.C. 270, 513 S.E.2d 352 (1999)	3, 6
<i>Moseley v. Welch</i> , 209 S.C. 19, 39 S.E.2d 133 (1946)	4
<i>Rosenthal v. Unarco Indus., Inc.</i> , 278 S.C. 420, 297 S.E.2d 638 (1982)	1, 2
<i>Sapp v. Ford Motor Co.</i> , 386 S.C. 143, 687 S.E.2d 47 (2009)	1
<i>Sch. Dist. of Fairfield County v. State</i> , Op. No. 27035 (S.C. Sup. Ct. filed August 29, 2011) (Shearouse Adv. Sh. No. 29 at 48)	4
<i>Smythe v. Stroman</i> , 251 S.C. 277, 162 S.E.2d 168 (1968)	4
<i>State v. Bray</i> , 342 S.C. 23, 535 S.E.2d 636 (2000)	3
<i>Stroud v. Riddle</i> , 260 S.C. 99, 194 S.E.2d 235 (1973)	2
<i>Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue</i> , 342 S.C. 34, 535 S.E.2d 642 (2000)	3
<i>Walker v. Bennett</i> , 125 S.C. 389, 118 S.E. 779 (1923)	4

STATUTES

Act No. 588, 1994 S.C. Acts 6039	4-8
Act No. 189, 2005 S.C. Acts 1923	6
Act No. 99, 2009 S.C. Acts 1024	1-8
S.C. Const. art. III, § 34(IX)	3, 4
S.C. Const. art. VIII, § 17	4
S.C. Const. art. VIII, § 19(6)	3

RULES

Rule 12(c), SCRCP	1, 2, 7
Rule 208(b)(1)(B), SCACR	3

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court apply the correct standard in its order dismissing this challenge to the constitutionality of an impact fee authorized by legislation?
2. Did the trial court correctly dismiss this action based on its determination that the legislation authorizing the impact fee in question was constitutional?

STATEMENT OF THE CASE AND FACTS

Respondents School District No. 2 of Dorchester County and the Board of Trustees for Dorchester School District No. 2 (collectively, “School District”) hereby adopt the statements of the case and facts presented by the Appellants Home Builders Association of South Carolina and Charleston-Trident Home Builders Association, Inc. (collectively, “Home Builders”).

ARGUMENT

This is an appeal from an order dismissing this action pursuant to Rule 12(c), SCRPC. As such, the question is whether there is any issue of fact in the complaint that could entitle Home Builders to judgment. *Sapp v. Ford Motor Co.*, 386 S.C. 143, 146, 687 S.E.2d 47, 49 (2009). On appeal, this Court “applies the same standard of review implemented by the circuit court.” *Hambrick v. GMAC Mortgage Corp.*, 370 S.C. 118, 122, 634 S.E.2d 5, 7 (Ct. App. 2006). Courts may exercise their discretion and dismiss an action if “the pleadings disclose all facts necessary or where the pleadings present no issue of fact. . . .” *Rosenthal v. Unarco Indus., Inc.*, 278 S.C. 420, 422, 297 S.E.2d 638, 640 (1982) (upholding the dismissal pursuant to Rule 12(C), SCRPC of an action challenging the constitutionality of a state statute). As argued below, the pleadings disclose all of the necessary facts, and Home Builders have failed to state a claim.

I. The trial court correctly applied the Rule 12(c), SCRPC standard to the allegations of the complaint in dismissing this action.

In their complaint, Home Builders provide the full text of Act No. 99, 2009 S.C. Acts 1024 (“Act 99”). (Complaint, ¶ 7, R. at ____). Act 99 authorizes the School District to impose an impact fee on new residential construction within the School District’s boundaries. Following the passage of Act 99, the School District passed a

resolution implementing the permitted fee, which is also quoted in full in the complaint. (Complaint, ¶ 8, R. at ____). Home Builders allege they have been charged the fee as a condition precedent to being issued a certificate of occupancy on new homes built in the School District since June 23, 2009. (Complaint, ¶ 11, R. at ____). These are the factual allegations of the complaint.¹

The trial court limited its ruling to the factual allegations of the complaint and found that based on those allegations Home Builders had failed to state a claim. The trial court did not weigh evidence, nor did it consider matters falling outside the allegations of the complaint. Accordingly, the trial court applied the correct standard and acted within its discretion in dismissing this action pursuant to Rule 12(c), SCRPC. *See Rosenthal*, 278 S.C. at 422, 297 S.E.2d at 640. This adherence to the allegations in the complaint is one factor distinguishing this case from *Charleston County School District v. Harrell*, 393 S.C. 552, 713 S.E.2d 604 (2011) in which the South Carolina Supreme Court reversed an order dismissing a case challenging a provision relating to Charleston County Charter Schools because it found the trial court went outside the four corners of the complaint.

¹ In addition to the factual allegations found in the “*Facts*” section of the complaint, the complaint includes a section titled “**FOR A CAUSE OF ACTION**” which contains conclusory allegations stating that general legislation would have accomplished the same funding goals as Act 99. (Complaint, ¶¶ 21-23, R. at ____). These conclusory statements should be disregarded when ruling on a motion to dismiss. *Stroud v. Riddle*, 260 S.C. 99, 102, 194 S.E.2d 235, 237 (1973).

II. The General Assembly properly authorized the School District to impose an impact fee on new residential construction.

Home Builders have challenged Act 99 as impermissible special legislation in violation of S.C. Const. art. III, § 34(IX).² In assessing Act 99, the trial court acknowledged the South Carolina Supreme Court's respect for the legislative function of the General Assembly, citing *Medical Society of South Carolina v. Medical University of South Carolina*, 334 S.C. 270, 513 S.E.2d 352 (1999). (Trial Court Order at 5, R. at ____). There, the South Carolina Supreme Court held it "will not declare a statute unconstitutional as a special law unless its repugnance to the Constitution is clear beyond a reasonable doubt." *Id.*, 334 S.C. at 279, 513 S.E.2d at 357. Moreover, "[the Court] will not overrule the legislature's judgment that a special law is necessary unless there has been a clear and palpable abuse of legislative discretion." *Id.*

In addition to the standards set forth in *Medical Society*, the trial court employed further guidance provided by the South Carolina Supreme Court as follows:

In construing an act of the General Assembly, "all reasonable doubt must be resolved in favor of the constitutionality of the act. If a constitutional construction of a statute is possible, that construction should be followed in lieu of an unconstitutional construction." *Crow v. McAlpine*, 277 S.C. 240, 242, 285 S.E.2d 355 (1981) (quoting *Bauer v. South Carolina State Housing Authority*, 271 S.C. 219, 226, 246, 246 S.E.2d 869 (1978)). The Constitution and all laws concerning local governments are to be liberally construed in the local entity's favor. S.C.

² The complaint also alleged Act 99 was in violation of S.C. Const. art. VIII, § 19(6), and the trial court's order addressed that argument in its order dismissing this action. Home Builders have not raised that ruling here; therefore, any claim that Act 99 violates S.C. Const. art. VIII, § 19(6) has been abandoned. Rule 208(b)(1)(B), SCACR; *Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 42 n. 7, 535 S.E.2d 642, 646 n. 7 (2000) (finding appellant abandoned issue not argued in brief); *State v. Bray*, 342 S.C. 23, 27 n. 2, 535 S.E.2d 636, 639 n. 2 (2000) (holding appellate court may not consider issues not raised to it).

Constitution, Article VIII, § 17. In addition, the Court must give great deference to the legislatively created classifications in the statute and must sustain them if they are not plainly arbitrary or if any reasonable hypothesis can be found to support them. *Foster v. S.C.D.H.P.T.*, 306 S.C. 519, 413 S.E.2d 31 (1992).

(Trial Court Order at 4, R. at ____). Based on the application of these standards, the trial court held that Act 99 “ is constitutional under South Carolina Supreme Court precedent regardless of the outcome of any disputed facts.” (Trial Court Order at 4, R. at ____).

Moreover, “the scope of the legislative power is much broader in dealing with school matters than is the scope in dealing with various other subjects.” *McElveen v. Stokes*, 240 S.C. 1, 11, 124 S.E.2d 592, 596 (1962). “Accordingly, this Court traditionally sustains local laws relating to the state’s public education system.” *Sch. Dist. of Fairfield County v. State*, Op. No. 27035 (S.C. Sup. Ct. filed August 29, 2011) (Shearouse Adv. Sh. No. 29 at 48, 63) (Toal, C.J., dissenting and citing *Bradley v. Cherokee Sch. Dist. No. 1*, 322 S.C. 181, 470 S.E.2d 570 (1996); *Smythe v. Stroman*, 251 S.C. 277, 289, 162 S.E.2d 168, 173 (1968); *Moseley v. Welch*, 209 S.C. 19, 33, 39 S.E.2d 133, 140 (1946); *Walker v. Bennett*, 125 S.C. 389, 118 S.E. 779 (1923)).

Given this framework, the trial court’s ruling is consistent with the prior holdings of the South Carolina Supreme Court. In *Bradley*, the South Carolina Supreme Court considered Act No. 588, 1994 S.C. Acts 6039 (“Act 588”), permitting Cherokee School District No. 1 to impose a sales tax. It was challenged as unconstitutional special legislation pursuant to S.C. Const. art. III, § 34(IX). The Supreme Court concluded otherwise:

A law that is special only in the sense that it imposes a lawful tax limited in application and incidence to persons or property within a certain school district does not

contravene the provisions of Article III, § 34(IX). *Hay v. Leonard*, 212 S.C. 81, 46 S.E.2d 653 (1948). Individual districts may impose a legal tax limited in application and incidence to persons or property within the prescribed area. *Shillito v. Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948).

Id., 322 S.C. at 186, 470 S.E.2d at 573-74.

In the present case, Act 99 authorizes the School District to impose an impact fee on any developer for each new residential dwelling unit constructed within the School District. The funds may only be used for the benefit of public education facilities within the district, i.e., (1) for the construction of public education facilities for grades K-12 within the district, and (2) for the payment of principal and interest on existing or new bonds issued by the district.

Home Builders argue that *Bradley* is distinguishable from this case because the goals of Act 588 were not appropriate for general legislation. However, the school district there had similar funding concerns to the School District here and similar abilities to raise funds absent special legislation. Both acts permit a school district to implement a district-specific funding mechanism to repay bonded indebtedness. Substitution of the sales tax in *Bradley* with the impact fee here provides a fact situation identical to that approved by the South Carolina Supreme Court. The controlling legal principle in *Bradley* applies in this case because the impact fee permitted by Act 99 is limited to persons or property within the School District for the benefit of all persons residing within the School District just as the sales tax permitted by Act 588 was so limited to Cherokee School District No. 1.

Although Home Builders assert the “bonds issued by the Cherokee School District are unique to that district and provisions for their repayment would not lend

themselves to statewide legislation,” they offer nothing to support this statement and fail to explain why bonds issued by the School District here are not equally unique. This assertion alone will not distinguish the instant case from *Bradley* given the obvious factual similarities and the preference for finding legislation constitutional as held in *Medical Society*.

Home Builders further rely on *Charleston County School District*. In that case, plaintiffs alleged Act No. 189, 2005 S.C. Acts 1024 (“Act 189”) “was special legislation in violation of Article III, § 34 and Article XIII, § 7 of the South Carolina Constitution.” An analysis of Act 189 as compared to Act 99 demonstrates that such reliance is misplaced.

Unlike Act 99 here and Act 588 in *Bradley*, Act 189 was limited to charter schools within the district and specifically whether charter schools could be charged rent by the school district. *Charleston County School District*, 393 S.C. at 555-56, 713 S.E.2d at 606-07. The thrust of Charleston County School District’s complaint was that the subject of charter schools was addressed by existing statewide legislation and therefore Act 189 was special legislation in conflict with general legislation. As observed by the Supreme Court, “[t]he complaint alleged that Act 189 was special legislation in violation of Article III, § 34 and Article VIII, § 7 of the South Carolina Constitution because the subject of charter schools was already comprehensively addressed by the Charter Schools Act and Act 189 only applied to Charleston County’s charter schools without any reasonable basis for doing so.” *Id.* After determining the trial court had erroneously considered evidence outside the complaint, the majority concluded that the complaint stated “a sufficient cause of action challenging the constitutionality of Act 189 to

withstand a Rule 12(b)(6) motion to dismiss” and “has stated a sufficient prima facie case that Act 189 is unconstitutional special legislation.” *Id.*, 393 S.C. at 560, 713 S.E.2d at 609. As a result, the court remanded the case without addressing the substance of the constitutional challenge.

The complaint in the present matter does not allege that Act 99 addresses a subject already addressed by statewide legislation. Rather the complaint alleges that the “purpose to be served by the Act can be equally fulfilled by general legislation applicable to all school districts within the State of South Carolina.” (Complaint at ¶ 22, R. at ____). Whether the subject of Act 99 could be addressed by statewide legislation is not determinative of the Rule 12(c), SCRCF analysis. The fact of the matter is that there is no general legislation addressing the subject and there is no actual conflict with general legislation. Moreover, the court in *Bradley* considered whether the provisions of Act 588 could be addressed by statewide legislation and found in the negative, as follows:

Individual districts may impose a legal tax limited in application and incidence to persons or property within the prescribed area. Statutes upheld as constitutional were not only applied uniformly to all persons and property within the area affected, but the specific taxes were used for the benefit of all persons residing within the area. The funds in this case are not confined to the sole use and benefit of any particular class but would benefit the entire county of Cherokee. Accordingly, the trial court did not err in concluding that Act 588 imposes a lawful tax limited in application and incidence to persons or property in Cherokee County and as such is not a special law in violation of Article III, § 34(IX).

Bradley, 322 S.C. at 186, 470 S.E.2d at 573 (citations omitted). The same is true here.

In further support of their contention that Act 99 is unconstitutional, Home Builders cite a July 7, 2009 Attorney General Opinion. As an initial matter, “Attorney

General opinions, while persuasive, are not binding upon this Court.” *Charleston County School District*, 393 S.C. at 560-61, 713 S.E.2d at 609. Further, the July 7, 2009 opinion is based on the following: “The legislation [Act 99] itself is devoid of any findings as to why Dorchester School District No. 2 in particular should be granted such authority.” However, this reasoning ignores the fact that Act 588 in *Bradley* contained no findings as to whether the school district should be granted authority to impose a sales tax, a circumstance that did not prevent the Supreme Court from finding Act 588 constitutional. Moreover, the implementing resolution passed by the School District and quoted in full in the complaint provides a more detailed explanation of why the legislation was necessary. (Complaint at ¶ 8, R. at ____).

CONCLUSION

For all of the above reasons and those found by the trial court, the allegations in the complaint do not present any legally viable claim which could entitle Home Builders to the relief requested regardless of the outcome or construction of any of the facts presented. Accordingly, this Court must affirm the order of the trial court dismissing this action.

Respectfully submitted,

Charlton deSaussure, Jr.

HAYNSWORTH SINKLER BOYD, P.A.

Charlton deSaussure, Jr.
134 Meeting Street, 3rd Floor
Charleston, SC 29401
(843) 722-3366

Sarah P. Spruill
75 Beattie Place, 11th Floor
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3220

Attorneys for the Respondents

December 14, 2011

DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-18-2674

RECEIVED
NOV 18 2011
SC Court of Appeals

The Home Builders Association of South Carolina and
The Charleston-Trident Home Builders Association, Inc.....Appellants,

v.

School District No. 2 of Dorchester County
and the Board of Trustees for Dorchester School District No.2.....Respondents.

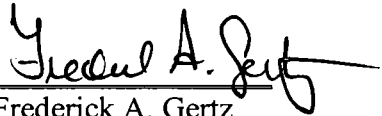
DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD OF APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Order Granting Rule 12(c) Motion
2. Order Denying Rule 59(e) Motion
3. Complaint of HBA
4. Answer of School District
5. School District's Rule 12(c) Motion
6. Memorandum in Opposition to Motion on the Judgments on the Pleadings
7. HBA's Rule 59(e) Motion
8. Act 99
9. Resolution of Act 99
10. Act 588

I certify that this designation contains no matter which is irrelevant to this appeal.

November 18, 2011
Columbia, SC


Frederick A. Gertz
Phong T. Nguyen
GERTZ & MOORE
1416 Laurel St.
P.O. Box 456
Columbia, SC 29202
(803) 252-1524

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

RECEIVED

NOV 18 2011

Case No. 2009-CP-18-2674

SC Court of Appeals

The Home Builders Association of South Carolina
and the Charleston-Trident Home Builders
Association, Inc.....Appellants,

v.

School District No. 2 of Dorchester County
and the Board of Trustees for Dorchester
School District No.2.....Respondents.

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the within Initial Brief of Appellant was duly served upon the following on the 18th day of November, 2011 with first class postage duly affixed and a return address clearly indicated on the envelope by depositing said papers in the United States Mail, Columbia, South Carolina, addressed as follows:

Charlton deSaussure, Jr., Esq.
Haynsworth Sinkler Boyd, P.A.
P.O. Box 340
Charleston, SC 29402-0340



Phong T. Nguyen
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-18-2674

The Home Builders Association of South Carolina
and the Charleston-Trident Home Builders
Association, Inc.....Appellants,

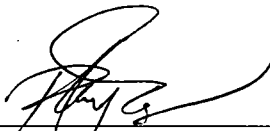
v.

School District No. 2 of Dorchester County
and the Board of Trustees for Dorchester
School District No.2.....Respondents.

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the within Appellant's Designation of Records was duly served upon the following on the 18th day of November, 2011 with first class postage duly affixed and a return address clearly indicated on the envelope by depositing said papers in the United States Mail, Columbia, South Carolina, addressed as follows:

Charlton deSaussure, Jr., Esq.
Haynsworth Sinkler Boyd, P.A.
P.O. Box 340
Charleston, SC 29402-0340



Rhong T. Nguyen
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-18-2674

RECEIVED
NOV 18 2011
SC Court of Appeals

The Home Builders Association of South Carolina and
the Charleston-Trident Home Builders Association, Inc.....Appellants,

v.

School District No. 2 of Dorchester County and
the Board of Trustees for Dorchester School District No. 2.....Respondents.

[INITIAL] BRIEF OF APPELLANT

Frederick A. Gertz
Phong T. Nguyen
GERTZ & MOORE
1416 Laurel St.
P.O. Box 456
(803) 252-1522
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
FACTS.....	3
STANDARD OF REVIEW.....	3
ARGUMENTS.....	4
I. ACT 99 AUTHORIZING AN EDUCATION IMPACT FEE SOLELY FOR SCHOOL DISTRICT IS UNCONSTITUTIONAL SPECIAL LEGISLATION.....	4
A. The Constitution Specifically Prohibits Special Laws Where a General Law Can Be Enacted.....	4
B. Special Laws Involving Education Are Not Exempt From the Constitutional Prohibition Against Special Laws Where a General Law Can Be Enacted.....	7
i. Act 99 Is a Special Law.....	7
ii. School District Is Not Unique.....	7
iii. A General Law Can Be Made Applicable	9
II. <u>BRADLEY</u> IS NOT CONTROLLING.....	10
III. THE COURT ERRED IN GRANTING SCHOOL DISTRICT JUDGMENT PURSUANT TO RULE 12(c) SCRCP.....	12
A. HBA Has Stated a Sufficient Cause of Action Challenging the Constitutionality of Act 99 to Preclude Dismissal at this Stage.....	12
B. HBA Has Alleged That School District's Situation Is Not Sufficiently Unique To Justify Special Legislation.....	14
C. The Lower Court Imposes an Improper Pleading Standard.....	15
CONCLUSION.....	15

TABLE OF AUTHORITIES

CASES	PAGE NO.
<u>Bradley v. Cherokee Cnty. Sch. Dist. No. 1</u> , 322 S.C. 181, 470 S.E.2d 570 (1996).....	10, 11, 12
<u>Charleston Cnty. Sch. Dis. v. Harrell, et al.</u> , 393 S.C. 552, 713 S.E. 2d 604 (2011)	6, 7
<u>Duke Power Co. v. S.C. Pub. Serv. Comm'n</u> , 284 S.C. 81, 90, 326 S.E.2d 395.....	8
<u>Falk v. Sadler</u> 341 S.C. 281, 533 S.E.2d 350 (Ct.App. 2000).....	4
<u>Hambrick v. GMAC Mortg. Corp.</u> , 370 S.C.118, 634 S.E.2d 5 (Ct.App. 2006).....	4
<u>Horry Cnty. v. Horry Cnty. Higher Educ. Comm'n</u> , 306 S.C. 416, 412 S.E.2d 421 (1991).....	7
<u>Med. Soc'y of S.C. v. Med. Univ. of S.C.</u> , 334 S.C. 270, 513 S.E.2d 352 (1999).....	5, 6, 8, 9
<u>Russell v. Columbia</u> , 305 S.C. 86, 406 S.E.2d 338, (1991).....	3, 4, 13, 15
<u>Sapp v. Ford</u> , 386 S.C. 143, 687 S.E.2d 47 (2009).....	4
<u>Shillito v. Spartanburg</u> , 214 S.C. 11, 51 S.E.2d 95 (1948).....	5
<u>S.C. Pub. Serv. Auth. v. Citizens & S. Nat'l Bank</u> , 300 S.C. 142, 386 S.E.2d 775 (1989).....	8

CONSTITUTION

S.C. Const. art. III, §34(IX).....4, 5

ACTS

2009 S.C. Act No. 99.....3, 12

S. C. Development Impact Fee Act, S.C. Code Ann. §§ 6-1-910, et seq.
(1999).....9

Cherokee County School District 1 School Bond-Property Tax Relief Act
(1994 S.C. Act No. 588).....10, 11

OTHER AUTHORITIES

S.C. A.G. Op., dated July 7, 2009, Requested by Rep. Tracy R. Edge..... 14

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT COMMIT ERROR IN FAILING TO FIND ACT 99 CONSTITUTES IMPERMISSIBLE SPECIAL LEGISLATION WHEN A GENERAL LEGISLATION COULD HAVE PROVIDED SIMILAR RELIEF STATEWIDE?
2. DID THE TRIAL COURT COMMIT ERROR IN FAILING TO FIND DISTINGUISHING ISSUES IN BRADLEY PRECEDENT?
3. DID THE TRIAL COURT IMPROPERLY GRANT JUDGMENT ON THE MOTION WHEN ISSUES OF FACT AND LAW EXIST ENTITLING PLAINTIFFS TO PREVAIL?

STATEMENT OF THE CASE

This action commenced on March 29, 2009 with the filing of a Complaint, by Home Builders Association of South Carolina and the Trident Home Builders Association (collectively, "HBA") seeking a declaratory judgment and injunctive relief preventing School District 2 of Dorchester County and the Board of Trustees for Dorchester School District No. 2 (collectively, "School District") from imposing and collecting impact fees on new residential construction pursuant to 2009 S.C. Acts 99 ("Act 99") and its attendant Resolution. (Resolution___).

School District timely answered alleging the validity of Act 99. (Answer___). Subsequently, School District moved for judgment on the pleadings, pursuant to Rule 12(c), SCRCF. (School District's Rule 12(c) Motion___). On September 9, 2010, a hearing was held before the Hon. Edgar W. Dickson. (Transcript___). On March 11, 2011 School District's motion was granted. (Order Granting Rule 12(c) Motion___). HBA timely filed a Motion to Amend or Reconsider Judgment, pursuant to Rule 59(e), SCRCF, (HBA's Rule 59(e) Motion___) which was denied on June 22, 2011. (Order Denying Rule 59(e) Motion___). On July 11, 2011 HBA timely filed a Notice of Appeal (Notice of Appeal___).

FACTS

On or about February 11, 2009, the General Assembly of the State of South Carolina passed and enrolled Senate Bill 235 which became law on February 26, 2009 as 2009 S.C. Acts 99 (“Act 99”) summarized as:

SYNOPSIS: AN ACT TO AUTHORIZE THE BOARD OF TRUSTEES FOR DORCHESTER SCHOOL DISTRICT NO. 2 TO IMPOSE AN IMPACT FEE ON ANY DEVELOPER FOR EACH NEW RESIDENTIAL DWELLING UNIT CONSTRUCTED BY THE DEVELOPER WITHIN THE SCHOOL DISTRICT, TO PROVIDE THAT THE FUNDS ONLY MAY BE USED FOR THE CONSTRUCTION OF PUBLIC EDUCATION FACILITIES FOR GRADES K-12 WITHIN THE DISTRICT AND FOR THE PAYMENT OF PRINCIPAL AND INTEREST ON EXISTING OR NEW BONDS ISSUED BY THE DISTRICT, AND TO PROVIDE THAT THE IMPACT FEE SHALL BE SET AT AN AMOUNT NOT TO EXCEED THE COST THAT EACH ADDITIONAL DWELLING UNIT IMPOSES ON THE SCHOOL DISTRICT FOR PUBLIC EDUCATION FACILITIES.

On June 23, 2009, School District adopted the Resolution imposing the impact fee.
(Complaint, p. 2).

Appellants (“HBA”) are associations whose members include builders engaged in home construction and residential development, doing business in School District, who are now obligated to pay the impact fee before receiving a certificate of occupancy. Applicable fees were charged to members of both Associations who paid under protest, reserving rights to contest the validity of Act 99 and the authority of School District to impose an impact fee. (Complaint, pp. 16-17).

STANDARD OF REVIEW

The standards controlling a judgment on the pleadings are set forth in Russell v. Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991), as follows:

A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment....A judgment on the pleadings is in the nature of a demurrer...All properly pleaded factual allegations are

deemed admitted for purposes of the consideration of a demurrer...When a fact is well pleaded, any inferences of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment. Moreover, a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever.

(internal citations omitted).

Additionally, judgment on the pleadings against the plaintiff is “a drastic procedure,” Falk v. Sadler, 341 S.C. 281, 287, 533 S.E.2d 350, 353 (Ct.App. 2000), to be applied only “where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment.” Sapp v. Ford, 386 S.C. 143, 146, 687 S.E.2d 47, 49 (2009). Thus, the procedural issue before the court at this point is not whether Act 99 is ultimately unconstitutional but only whether the HBA’s Complaint raises any legally viable claims.

In reviewing the propriety of granting judgment on the pleadings, pursuant to Rule 12(c), SCRCF, the appellate court applies the same *de novo* standard of review employed by the circuit court. Hambrick v. GMAC Mortg. Corp., 370 S.C.118, 634 S.E.2d 5 (Ct.App. 2006).

ARGUMENT

I. ACT 99 AUTHORIZING AN EDUCATION IMPACT FEE SOLELY FOR SCHOOL DISTRICT IS UNCONSTITUTIONAL SPECIAL LEGISLATION.

A. The Constitution Specifically Prohibits Special Laws Where a General Law Can Be Enacted.

South Carolina’s Constitution expressly prohibits special legislation in Article III, §34 which provides in pertinent part:

Special laws prohibited.

The General Assembly of this State shall not enact local or special laws concerning any of the following subjects or for any of the following purposes, to wit: (none of the specified subjects are applicable to this case)

IX. In all other cases, where a general law can be made applicable, no special law shall be enacted....

(Memorandum in Opposition to the Rule 12(c) Motion, p. 4). "The purpose of the prohibition is to make uniform where possible the statutory laws of this State in order to avoid duplicative or conflicting laws on the same subject." Med. Soc'y of S.C. v. Med. Univ. of S.C., 334 S.C. 270, 279, 513 S.E. 2d 352, 357 (1999).

Not all local or special legislation is prohibited. Valid special or local legislation, however, requires a showing that the law in question contains a substantial distinction between the persons or subject matter to which it applies and the persons and subject matter to which it does not apply. In other words, the legislation demonstrates one or more unique classifications that justify it. As stated in Shillito v. City of Spartanburg, 214 S.C. 11, 20, 51 S.E.2d 95, 98 (1948):

The language of the Constitution which prohibits a special law where a general law can be made applicable, plainly implies that there are or may be cases where a special Act *will best meet the exigencies of a particular case*, and in no wise be promotive of those evils which result from a general and indiscriminate resort to local and special legislation. There must, however, be a substantial distinction having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded. The marks of distinction upon which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation.

(emphasis added).

For the prohibition not to apply a special exigency or unique circumstance must exist rendering general legislation inapplicable. Med. Soc'y, 334 S.C. 270, 279.

The Supreme Court has recently reaffirmed its prior decisions and set forth a clear statement of the standards to be applied in determining the constitutionality of special or local legislation in Charleston County School District v. Harrell, 393 S.C. 552, 558, 713 S.E. 2d 604, 608 (2011):

We outlined the framework to determine whether special legislation exists in *Kizer v. Clark*, 360 S.C. 86, 600 S.E.2d 529 (2004). "A law is general when it applies uniformly to all persons or things within a proper class, and special when it applies to only one or more individuals or things belonging to that same class." *Id.* at 92, 600 S.E.2d at 532. If the legislation does not apply uniformly, the inquiry then becomes whether the legislation creates an unlawful classification. *Id.* at 93, 600 S.E.2d at 532. However, the mere fact that a law creates a classification does not render it unlawful. *Id.* Instead, the constitutional prohibition against special legislation operates similarly to our equal protection guarantee in that it prohibits unreasonable and arbitrary classifications. *Id.* at 93, 600 S.E.2d at 533. "A classification is arbitrary, and therefore unconstitutional, if there is no reasonable hypothesis to support it." *Id.* Accordingly, special legislation is not unconstitutional where there is "a substantial distinction having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded." *Horry County*, 306 S.C. at 419, 412 S.E.2d at 423. Thus, where a special law will best meet the exigencies of a particular situation, it is not unconstitutional. *Med. Soc. of S.C. v. Med. Univ. of S.C.*, 334 S.C. 270, 279, 513 S.E.2d 352, 357 (1999). "In other words, the General Assembly must have a logical basis and sound reason for resorting to special legislation." *Horry County*, 306 S.C. at 419, 412 S.E.2d at 423 (citation omitted).

Act 99 is special legislation which does not distinguish between School District and other school districts in the state and shows no unique exigency justifying special authority unavailable to school districts generally.

B. Special Laws Involving Education Are Not Exempt From the Constitutional Prohibition Against Special Laws Where a General Law Can Be Enacted.

Prior to Harrell, some had argued that special laws involving educational matters were exempt from the constitutional prohibition of Art. III, §34(IX). This argument was soundly rejected in Harrell which held that, while the legislative power may be broader in dealing with school matters than with other matters, it is not outside the limitation imposed by the South Carolina Constitution that no special law shall be enacted where a general law can be made applicable. 393 S.C. at 559-560. See also Horry Cnty. v. Horry Cnty. Higher Educ. Comm'n, 306 S.C. 416, 412 S.E.2d 421 (1991).

Act 99's application to a single school district, without any peculiar or unique conditions, results in special treatment and violates the constitutional limitation that no special law shall be enacted where a general law can be made applicable.

Applying the principles for testing special legislation embodied in Harrell to Act 99 mandates a finding of unconstitutionality.

i. Act 99 is a Special Law

Act 99's application to a single school district makes it a special law in that it applies only to one member of the class of school districts within the state.

ii. School District is Not Unique

Act 99 neither embodies a substantial distinction among school districts, between those embraced within it those excluded, nor is reasonably necessary to best meet the exigencies of the School District's situation. The Complaint alleges that the financial needs of the School District are not limited to the School District but are the same as those of other school districts faced with a growing population requiring the additional

facilities. (Complaint, p. 17). There is no reason to single the school District granting it a funding vehicle unavailable to other districts.

The requisites for finding a special law sufficiently unique to survive a constitutional challenge are established in Medical Society, 334 S.C. 270. To resolve the constitutionality of the act before it the court reviewed two prior cases which established the standards for uniqueness. The court cited S.C. Public Service Authority v. Citizens & Southern National Bank, 300 S.C. 142, 386 S.E.2d 775 (1989), which upheld:

... special legislation relating only to the Santee Cooper electric utility allowing it to change its fiscal year to the calendar year. We noted that Santee Cooper was unique since it was the only State agency involved in the production, sale, and distribution of electricity, and that the Act in question was enacted to address a special condition facing this unique agency. Accordingly, we concluded the Act before us was not prohibited special legislation.

Med. Soc’y, 334 S.C. at 280 (internal citations omitted).

In the second case, Duke Power Co. v. S.C. Public Service Commission, 284 S.C. 81, 90, 326 S.E.2d 395, 400-401 (1985), special legislation had been upheld:

... allowing voters to approve a referendum granting the Greenwood County Power Commission approval to sell its electric utility to Duke. Duke challenged the Act on the ground of special legislation. We noted the Greenwood County Power Commission had no power to sell its facility without legislative authorization, and the proposed transaction was unique. Accordingly, the challenged Act was not prohibited special legislation.

Med. Soc’y, 334 S.C. at 280 (internal citations omitted).

Using the standards set out above, the Court found the act at issue constitutional due to the unique position of MUSC:

In this case, MUSC is a unique State agency because it is the only one that owns and operates an acute-care teaching hospital. Further, the proposed

transaction regarding hospital services is one unique to MUSC. Moreover, the fact that MUSC has no authority to enter the proposed transaction without legislative approval indicates such legislation is necessary. Since the legislature had a "logical reason and sound basis" for enacting a special law authorizing the proposed transaction, Act No. 390 is not unconstitutional special legislation.

Id.

Unlike Santee Cooper, the only state run electric provider; the Greenwood Power Commission, where a transaction required legislative approval; or MUSC, a provider of unique hospital services, the School District has no rational need for special treatment distinguishing it from other school districts. The School District is not the only district in the State; it is not involved in a transaction requiring legislative approval; and it is not the only provider of educational services in the State.

iii. A General Law Can Be Made Applicable

As many school districts are faced with growing populations requiring additional facilities, the Legislature could easily craft a law applicable to all school districts in the State providing an additional funding stream extracted from new residential construction. In fact, such a law already exists covering impact fees. South Carolina Development Impact Fee Act, S.C. Code Ann. §§ 6-1-910, et seq. (1999) ("Impact Fee Act") grants counties, municipalities and certain other governmental service providers the option of imposing development impact fees on new development requiring additional or expanded facilities. The Impact Fee Act does not apply to school districts. The Legislature, if it were so inclined, could enact a law similar to the Impact Fee Act for school districts or it could expand the entities covered by the Impact Fee Act to include school districts. Either approach would result in a general law which would afford not only School

District, but all school districts, the powers provided to School District under Act 99. That it has not done so further underscores the special nature of Act 99.

Because the Complaint alleges that a general law could be made applicable, HBA has established a *prima facie* case that Act 99 violates the constitutional prohibition against special legislation.

II. BRADLEY IS NOT CONTROLLING

The court below relied primarily on the Supreme Court's decision in Bradley v. Cherokee School District No. One of Cherokee County, 322 S.C. 181, 470 S.E.2d 570 (1996), finding that a sales tax for the benefit of a single Spartanburg County school district did not violate Art. III, §34(IX). The Act in Bradley, is distinguishable from Act 99 in several aspects, not the least of which is that Act 588 was not appropriate for general legislation.

The Cherokee School District was faced with repaying bonds issued pursuant to the School Bond Act, S.C. Code §§ 59-71-10, et seq., an act of general legislation applicable to all school districts. In order to afford the district some relief, the Legislature enacted Act 588, Acts and Joint Resolutions, 1994, aptly entitled the "Cherokee School District No. One School Bond-Property Tax Relief Act," ("Act 588") which specifically authorized the imposition of a sales tax for a limited purpose and time:

Subject to the requirements of this act, the governing body of Cherokee County School District 1 may by resolution impose a one percent sales and use tax within Cherokee County for a specific purpose and for a specified period of time to collect funds to be used to pay debt service on general obligation bonds issued pursuant to Article 1 of Chapter 71, Title 59 of the 1976 Code (School Bond Act).

(Act 588, p. ____)

Act 588 also imposed other requirements, including that the tax only be imposed after an approving referendum, based upon a resolution specifying “the improvements to be financed through the issuance of” of the bond, “the maximum time ...for which the tax may be imposed,” and “the maximum principal amount of ... [the] bonds to be issued and repaid with the proceeds of the tax.” (Act 588, p.____.)

Based on and in compliance with the terms of Act 588 the Cherokee School District passed the appropriate resolution and the residents of the County approved the tax by referendum. Thereafter, the Bradley plaintiffs challenged the tax on several grounds, including that it violated Article III, §34(IX) of the S.C. Constitution.

In addressing the application of Article III, §34(IX) to Act 588 the Supreme Court held that while education is not immune to the constitutional strictures of Article III, §34(IX) “[a] law which is special only in the sense that it imposes a lawful tax limited in application and incidence to persons or property within a certain school district does not contravene the provisions of Article III, §34(IX).” 322 S.C. at 186 (citation omitted). However, Act 99 differs from Act 588 to such a degree that it is constitutionally defective.

First, the sales tax under Act 588 was authorized for the purpose of assisting the Cherokee School District in repaying specific revenue bonds authorized by the School Bond Act, which grants the power to-issue bonds to all districts. The bonds issued by the Cherokee School District are unique to that district and provisions for their repayment would not lend themselves to statewide legislation.

Second, in Act 99, unlike Act 588, there is no limitation on the use the funds and they may be used not only for the payment of principal and interest on past and future

bonds, but also for un-bonded construction. (Act 99, p.____) There is no requirement that the fees be limited to any particular project or that they be limited in time.

Third, in Bradley the Supreme Court found it critical that the tax must be “applied uniformly to all persons and property within the area affected.” 322 S.C. at 186. The impact fee authorized by Act 99 fails on both sides of this equation. It fails to treat all property within the district equally as it only applies to property subject to new residential construction and it does not apply to all persons within the district, but only to a “developer” constructing “residential dwelling unit[s].” (Act 99, p.____). Alternatively, if the impact fee is viewed as a tax on new home buyers it fails to be applied uniformly to all persons within the district as it is only exacted from those moving into new construction.

Fourth, the sales tax permitted by Act 588 is a form of taxation common throughout the State. In contrast, the school impact fee authorized by Act 99 is limited to a single school district. Other school districts may not benefit from this source of revenue.

Fifth, Act 588 allowed imposition of the tax only after a referendum which afforded all those most likely to be subjected to the tax an opportunity to vote. Act 99, on the other hand, allowed for implementation solely by a resolution of the Trustees, (Act 99, p.____), effectively barring any consideration by those most likely to be burdened with the impact fee, those persons moving into new residential construction.

The present facts before the court are sufficiently different such that they cannot be construed as falling within the purview of Bradley.

III. THE COURT ERRED IN GRANTING SCHOOL DISTRICT JUDGMENT PURSUANT TO RULE 12(c) SCRPC.

A. HBA Has Stated a Sufficient Cause of Action Challenging the Constitutionality of Act 99 to Preclude Dismissal at this Stage.

Taking the allegations of the HBA's Complaint as true, as required under Russell, 305 S.C. 86, for a proper analysis under SCRPC Rule 12(c), HBA has sufficiently stated a cause of action to survive a motion to dismiss pursuant to SCRPC Rule 12(c). The Complaint alleges that the funding needs of School District are not unique, equally applying to many, if not all, other school districts within the State of South Carolina. (Complaint, p.17). Other school districts within the State are similarly situated in that they are required to construct or expand facilities in order to meet the demands of a growing population. The Complaint further alleges that the purposes of Act 99 can be equally fulfilled by general legislation applicable to all school districts within the State of South Carolina. (Complaint, p.18). As argued *supra*, these two elements form the lynchpins of determining the constitutionality of the Act 99.

The standards for reviewing a judgment on the pleadings established in Russell, 305 S.C. 86, are that:

A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment...[A] complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever.

(internal citations omitted). School District has been improperly granted judgment on the pleadings pursuant to SCRPC Rule 12(c).

B. HBA Has Alleged That School District's Situation Is Not Sufficiently Unique To Justify Special Legislation.

The Office of the South Carolina Attorney General in considering the constitutional validity of Act 99 opined:

In order to determine whether a general law may be made applicable, we must gain an understanding of the Legislature's reasoning for specifically allowing Dorchester County School District No. 2 to impose an impact fee when to our knowledge, the Legislature has not granted such authority to any other school district in the State. **The legislation itself is devoid of any findings as to why Dorchester School District No. 2 in particular should be granted such authority.** Thus, we would have to gain knowledge of facts surrounding the passage of the legislation to make this determination. This Office, unlike a court, does not have the authority to investigate and make factual determinations. Op. S.C. Atty. Gen., August 13, 2008. Therefore, we are not in a position to determine whether a special circumstance exists with regard to Dorchester School District No. 2 to make it impossible to create a general law and require the Legislature to enact special legislation. This determination must ultimately be made by a court.

S.C. A.G. Op., dated July 7, 2009, Requested by Rep. Tracy R. Edge (emphasis added).

The Attorney General's Opinion concludes with respect to the constitutionality of Act 99 pursuant to provisions of Article III, §34(IX):

However, after making factual determinations as to whether a general law can be made applicable to the imposition of impact fees by school districts, we believe a court could find that the legislation violates the prohibition on special legislation pursuant to article III, section 34.

Id.

HBA has pled sufficient facts to establish that Act 99 lacks the requisite level of uniqueness justifying special legislation, thus rendering the Act unconstitutional. HBA has presented a *prima facie* case sufficient to defeat a Rule 12(c) challenge and should be permitted to develop the factual basis to prove its case at trial.

C. The Lower Court Imposes an Improper Pleading Standard

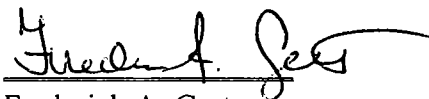
The lower court held, “[t]hose attacking the validity of the legislation have the burden to negate every conceivable basis which might support it.” (Order Granting Rule 12(c) Motion, p. 4) (internal citation omitted). In contrast, Russell holds that, “a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever.” 305 S.C. at 89.

CONCLUSION

Taking the allegations alleged in the Complaint as true, HBA has made a *prima facie* case that Act 99 is constitutionally defective in that it is a special law without a unique basis where a general law could have been enacted. HBA has demonstrated that the Complaint alleged sufficient issues of fact which, if resolved in their favor, would entitle them to a prevailing judgment thereby precluding judgment on the pleadings pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure requiring a reversal of the lower court.

November 18, 2011
Columbia, SC

Respectfully Submitted,



Frederick A. Gertz
Phong T. Nguyen
GERTZ & MOORE
1416 Laurel St.
P.O. Box 456
Columbia, SC 29202
(803) 252-1524

The South Carolina Court of Appeals

The Home Builders Association of
South Carolina and the Charleston-
Trident Home Builders Association,
Inc.,

Appellants,

v.

School District No. 2 of Dorchester
County and the Board of Trustees for
Dorchester School District No. 2,

Respondents.

The Honorable Edgar W. Dickson
Dorchester County
Trial Court Case No. 2009-CP-18-02674

ORDER

For good cause having been shown, the time for the Appellants' Initial Brief and Designation of Matter to be served and filed in the above entitled matter is hereby extended until November 18, 2011.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina
cc: Frederick A. Gertz, Esquire
Charlton de Saussure, Jr., Esquire

FILED
01/19/11

GERTZ & MOORE

ATTORNEYS AND COUNSELORS AT LAW

1416 LAUREL STREET

P. O. BOX 456

COLUMBIA, SOUTH CAROLINA 29202

FREDERICK A. GERTZ*

ALICE S. MOORE

*ALSO ADMITTED IN N.Y. & GA.

TELEPHONE
(803) 252-1524

TELECOPIER
(803) 799-6946

October 17, 2011

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

RECEIVED
OCT 18 2011
SC Court of Appeals

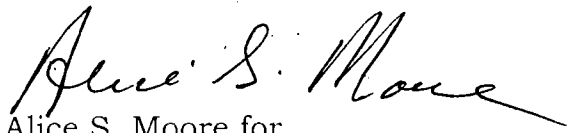
The Home Builders Association of South Carolina, et al v. School
District No.2 of Dorchester County, et al.
Case No 2009-CP-18-2674
Tracking Number 2011195208

Dear Ms. Gee:

On October 12, 2011 we wrote the Court requesting an extension of time to file and serve Appellants' Brief and Designation of Record until November 18, 2011. I have now spoken with Respondents' Counsel, Charlton deSaussure, and he has consented to this extension.

With kind regards, I am

Yours very truly,



Alice S. Moore for
Frederick A. Gertz

cc: Charlton deSaussure, Jr., Esq.

On October 12, 2011 we wrote the Court requesting an extension of time to file and serve Appellants' Brief and Designation of Record until November 18, 2011. I have now spoken with Respondents' Counsel, Charlton deSaussure, and he has consented to this extension.

Very truly yours,

GERTZ & MOORE

ATTORNEYS AND COUNSELORS AT LAW

1416 LAUREL STREET

P. O. BOX 456

COLUMBIA, SOUTH CAROLINA 29202

FREDERICK A. GERTZ*

ALICE S. MOORE

*ALSO ADMITTED IN N.Y. & GA.

TELEPHONE

(803) 252-1524

TELECOPIER

(803) 799-6946

October 12, 2011

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

The Home Builders Association of South Carolina, et al v. School
District No.2 of Dorchester County, et al.
Case No 2009-CP-18-2674
Tracking Number 2011195208

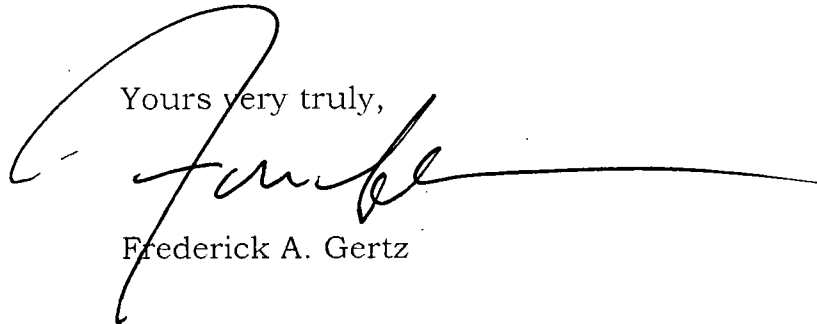
Dear Ms. Gee:

According to our calculations the Appellants' Brief and Designation of Record in this matter will be due on or before October 19, 2011. We have been out of the office much of the last thirty days and a lightening strike seriously compromised our computers and internet connection resulting in several days of lost time and data. Therefore, we respectfully request that the Court grant the Appellant an additional thirty (30) days to file and serve its Brief and Designation of Record, making the due date November 18, 2011.

Our motion fee check in the amount of \$25.00 is enclosed.

With kind regards, I am

Yours very truly,



Frederick A. Gertz

cc: Charlton deSaussure, Jr., Esq.

10/19/11

11/18/11

1st Est

RECEIVED

OCT 12 2011

SC Court of Appeals

GERTZ & MOORE

ATTORNEYS AND COUNSELORS AT LAW

1416 LAUREL STREET

P. O. BOX 456

COLUMBIA, SOUTH CAROLINA 29202

FREDERICK A. GERTZ*

ALICE S. MOORE

*ALSO ADMITTED IN N.Y. & GA.

TELEPHONE
(803) 252-1524

TELECOPIER
(803) 799-6946

October 11, 2011

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

The Home Builders Association of South Carolina, et al v. School
District No.2 of Dorchester County, et al.
Case No 2009-CP-18-2674
Tracking Number 2011195208

Dear Ms. Gee:

Please be advised that the appellant received a copy of the transcript in this matter from the Court Reporter on September 19, 2011.

With kind regards, I am

Yours very truly,

Frederick A. Gertz
Frederick A. Gertz

cc: Charlton deSaussure, Jr., Esq.

RECEIVED
OCT 12 2011
SC Court of Appeals



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 11, 2011

Frederick A. Gertz, Esquire
Gertz & Moore
P O Box 456
Columbia, SC 29202

Re: Home Builders Assoc. v. SD No. 2
2011195208

Dear Counsel:

Our records indicate that the transcript in the above matter should have been delivered by September 19, 2011. As of today's date, we have received no information that the court reporter has been granted an extension, nor have we received your initial brief.

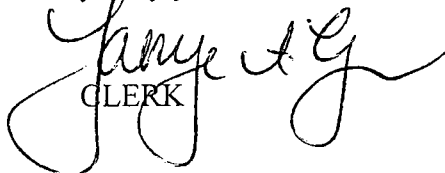
If you have not yet received the transcript, you must contact the Office of Court Administration per Rule 207 of the South Carolina Appellate Court Rules. The address for Court Administration is as follows:

South Carolina Office of Court Administration
1015 Sumter Street, Suite 201
Columbia, SC 29201

Be sure to copy the Court and opposing counsel with all correspondence concerning the transcript.

Please advise the Court of the status of the transcript with ten (10) days of the date of this letter, or your appeal may be dismissed.

Very truly yours,


CLERK

TAG/laf

cc: Charlton de Saussure, Jr., Esquire

GERTZ & MOORE

ATTORNEYS AND COUNSELORS AT LAW

1416 LAUREL STREET

P. O. BOX 456

COLUMBIA, SOUTH CAROLINA 29202

FREDERICK A. GERTZ*

ALICE S. MOORE

*ALSO ADMITTED IN N.Y. & GA.

TELEPHONE
(803) 252-1524

TELECOPIER
(803) 799-6946

RECEIVED

JUL 27 2011

SC Court of Appeals

July 26, 2011

The Honorable Harry A. Walker
Court Reporter
PO Box 127
Rowesville, SC 29133-0127

The Home Builders Association of South Carolina, et al v. School
District No.2 of Dorchester County, et al.
Case No 2009-CP-18-2674
Court of Appeals Tracking Number 2011195208

Dear Ms. Walker:

We previously wrote you on July 20, 2011 requesting the transcript of the September 9, 2010 hearing in this matter before the Honorable Edgar Warren Dickson. That correspondence failed to make the necessary financial arrangements. If you will give us an estimate of the costs of transcribing that hearing, we will be glad to promptly send you payment as may be satisfactory to you.

With kind regards, I am

Yours very truly,

Frederick A. Gertz

cc: The Honorable Tanya A. Gee
Charlton deSaussure, Jr., Esq.
SC Court Administration



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 22, 2011

Frederick A. Gertz, Esquire
Gertz & Moore
P O Box 456
Columbia, SC 29202

Re: Home Builders Assoc. v. SD No. 2
2011195208

Dear Counsel:

We have received a copy of your request for the transcript in the above matter. However, this request did not include an agreement regarding payment for the transcript as required in Rule 207 of the South Carolina Appellate Court Rules. Please provide proof that the payment arrangements have been made within ten (10) days of the date of this letter.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: Charlton de Saussure, Jr., Esquire

GERTZ & MOORE

ATTORNEYS AND COUNSELORS AT LAW

1416 LAUREL STREET

P. O. BOX 456

COLUMBIA, SOUTH CAROLINA 29202

FREDERICK A. GERTZ*
ALICE S. MOORE
*ALSO ADMITTED IN N.Y. & GA.

TELEPHONE
(803) 252-1524

TELECOPIER
(803) 799-6946

July 20, 2011

RECEIVED

JUL 22 2011

SC Court of Appeals

The Honorable Harry A. Walker
Court Reporter
PO Box 127
Rowesville, SC 29133-0127

The Home Builders Association of South Carolina, et al v. School
District No.2 of Dorchester County, et al.
Case No 2009-CP-18-2674
Court of Appeals Tracking Number 2011195208

Dear Ms. Walker:

A hearing in this case on defendant's Motion for Judgment on the Pleadings was held on September 9, 2010 before the Honorable Edgar Warren Dickson. The plaintiff is appealing Judge Dickson's decision and hereby requests a transcript of that hearing.

With kind regards, I am

Yours very truly,

Frederick A. Gertz

cc: The Honorable Tanya A. Gee
Charlton deSaussure, Jr., Esq.
SC Court Administration

GERTZ & MOORE

ATTORNEYS AND COUNSELORS AT LAW

1416 LAUREL STREET

P. O. BOX 456

COLUMBIA, SOUTH CAROLINA 29202

FREDERICK A. GERTZ*

ALICE S. MOORE

*ALSO ADMITTED IN N.Y. & GA.

TELEPHONE
(803) 252-1524

TELECOPIER
(803) 799-6946

July 19, 2011

RECEIVED

JUL 20 2011

SC Court of Appeals

The Honorable V. Claire Allen
Deputy Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

The Home Builders Association of South Carolina, et al v. School
District No.2 of Dorchester County, et al.
Case No 2009-CP-18-2674
Tracking Number 2011195208

Dear Ms. Allen:

Enclosed please find page 2 of the Order Denying Plaintiff's Motion to Amend or Reconsider as requested in your letter of July 18, 2011. My apologies for omitting it previously.

With kind regards, I am

Yours very truly,

Alice S. Moore Jr
Frederick A. Gertz

Enc.

cc: Charlton deSaussure, Jr., Esq.



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 18, 2011

Frederick A. Gertz, Esquire
Gertz & Moore
P O Box 456
Columbia, SC 29202

Re: Home Builders Assoc. v. SD No. 2
2011195208
2009-CP-18-02674

Dear Counsel:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

Upon review, you must provide page 2 of the Order Denying Plaintiffs' Motion to Amend or Reconsider, within ten days of the date of this letter.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1015 Sumter Street, Columbia, S.C. 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

NOTE: If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S.C. Code Ann. Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases:

- 1) any final judgment from the circuit court which includes a sentence of death;
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58;
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance;
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state;
- 5) any final judgment from the circuit court pertaining to elections and election procedure;
- 6) any order limiting an investigation by a State Grand Jury under S.C. Code Ann. Section 14-7-1630;
- 7) any order of the family court relating to an abortion by a minor under S.C. Code Ann. Section 44-41-33.

Very truly yours,

V. Claire Allen, Deputy
Tanya A. Gee
CLERK

TAG/laf

cc: Charlton de Saussure, Jr., Esquire
The Honorable Cheryl L. Graham



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 18, 2011

Frederick A. Gertz, Esquire
Gertz & Moore
P O Box 456
Columbia, SC 29202

Re: Home Builders Assoc. v. SD No. 2
2011195208
2009-CP-18-02674

Dear Counsel:

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: Charlton de Saussure, Jr., Esquire
The Honorable Cheryl L. Graham

The Supreme Court of South Carolina

RE: Interim Guidance Regarding Personal Data Identifiers and
Other Sensitive Information in Appellate Court Filings

ORDER

Under the Federal Constitution, our State Constitution, and our common law, court records are presumptively open to the public, and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006); Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991). Therefore, with some few exceptions,¹ documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending.

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future. The ready availability of these documents raises significant privacy concerns. While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts.

Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court:²

1. Social Security Numbers. If a social security number must be included, only the last four digits of that number should be used.
2. Names of Minor Children. If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used. In all other cases, only the minor's first name and first initial of the last name (i.e., John S.) should be used.
3. Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used.
4. Home Addresses. If a home address must be included, only the city and state should be used.

Parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file. The sealed unredacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed." No order of the appellate court will be required to file this sealed Appendix. The number of copies of the Appendix to be served and filed shall be the same as that required for the brief, record on appeal, motion or other filing that includes the redacted documents.

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e., In the Interest of John S., a Juvenile.)

A party seeking to seal material beyond those personal identifiers listed above, must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings, *supra*, must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed; the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

August 13, 2007

¹ See, e.g., Rule 12 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR; Rule 12 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502, SCACR; Rule 402(n), SCACR; and Rule 403(l), SCACR.

² This restriction shall not apply when this information is required or requested by the appellate court. For example, the application for admission to practice law under Rule 402, SCACR, requires many of these personal identifiers to be disclosed.

PM NONE
POS 7-11-11

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-18-2674

The Home Builders Association of South Carolina
and the Charleston-Trident Home Builders
Association, Inc.....Appellants,

v.

School District No. 2 of Dorchester County
and the Board of Trustees for Dorchester
School District No.2.....Respondents.

NOTICE OF APPEAL

The Home Builders Association of South Carolina and the Charleston-Trident Home Builders Association, Inc. appeal the orders of the Honorable Edgar W. Dickson, dated March 11, 2011 and June 9, 2011. Appellants received written notice of entry of the March 11th Order Granting Defendants' Motion for Judgment on the Pleadings on March 30, 2011 and moved to amend or reconsider pursuant to SCRCF Rule 59(e) on April 6, 2011. Appellants received notice of the June 9th Order Denying Plaintiff's Motion to Amend or Reconsider on June 13, 2011.

July 11, 2011

RECEIVED

JUL 11 2011

SC Court of Appeals

Frederick A. Gertz
Frederick A. Gertz
Gertz & Moore
PO Box 456
Columbia, SC 29202
(803) 252-1524
Attorney for Appellants

Other Counsel of Record:

Charlton deSaussure, Jr.
Haynesworth Sinkler Boyd, P.A.
PO Box 340
Charleston, SC 29402-0340
(843) 720-4420
Attorney for Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-18-2674

The Home Builders Association of South Carolina
and the Charleston-Trident Home Builders
Association, Inc.....Appellants,

v.

School District No. 2 of Dorchester County
and the Board of Trustees for Dorchester
School District No.2.....Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondents by
depositing a copy in the United States Mail, postage prepaid, on July 11,
2011, addressed as follows:

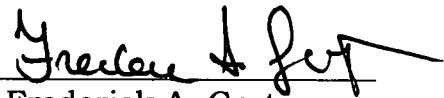
Charlton deSaussure, Jr., Esq.
Haynesworth Sinkler Boyd, P.A.
PO Box 340
Charleston, SC 29402-0340

July 11, 2011

RECEIVED

JUL 11 2011

STATE COURT OF APPEALS



Frederick A. Gertz
Gertz & Moore
PO Box 456
Columbia, SC 29202
(803) 252-1524
Attorney for Appellants

GERTZ & MOORE

ATTORNEYS AND COUNSELORS AT LAW

1416 LAUREL STREET

P. O. BOX 456

COLUMBIA, SOUTH CAROLINA 29202

FREDERICK A. GERTZ*

ALICE S. MOORE

*ALSO ADMITTED IN N.Y. & GA.

TELEPHONE
(803) 252-1524

TELECOPIER
(803) 799-6946

July 11, 2011

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

The Home Builders Association of South Carolina, et al v. School
District No.2 of Dorchester County, et al.
Case No 2009-CP-18-2674

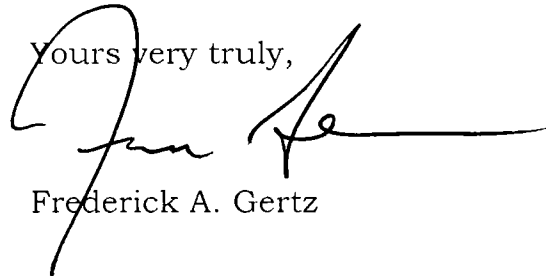
Dear Ms. Gee:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Proof of service of the notice of appeal on respondents,
- (2) A copy of the orders which are to be challenged on appeal and
- (3) A filing fee of \$100.

With kind regards, I am

Yours very truly,



Frederick A. Gertz

Enc.

cc: Charlton deSaussure, Jr., Esq.

RECEIVED

JUL 11 2011

SC Court of Appeals

CERTIFIED COPY
STATE OF SOUTH CAROLINA
2011 JUN 10 PM 2:11
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS

2009-CP-18-2674

Charles R. ...
CLERK OF COURT
DORCHESTER COUNTY

The Home Builders Association of South
Carolina and the Charleston-Trident Home
Builders Association, Inc.,

Plaintiffs,

v.

School District No. 2 of Dorchester County
and the Board of Trustees for Dorchester
School District No. 2,

Defendants.

**ORDER DENYING PLAINTIFFS'
MOTION TO AMEND OR RECONSIDER**

RECEIVED

JUL 11 2011

Court of Appeals

This matter came before the court initially by way of Defendants' Motion for Judgment on the Pleadings. The Court held a hearing on Defendants' Motion on September 9, 2010. Charlton deSaussure appeared for Defendants, and Frederick A. Gertz appeared for Plaintiffs.

Following review of the memoranda submitted by both parties, case law, exhibits and arguments of counsel, the Court issued an Order granting Defendants' Motion for Judgment on the Pleadings dated March 11, 2011. Subsequently, Plaintiffs filed a Motion to Amend or Reconsider Judgment pursuant to Rule 59(e), SCRCP. Plaintiffs state in their motion that the Court's March 11, 2011, Order granting the Defendants' Motion "fails to address the numerous distinguishing legal and factual issues enumerated in Plaintiffs' Memorandum in Opposition to Motion for Judgment on the Pleadings." See Plaintiffs' Motion, pp.1-2. Plaintiffs then quote several pages from their previous Memorandum, and ask this Court to "rule upon the distinguishing issues," specifically related to the *Bradley v. Cherokee School District No. One of*

Cherokee County, 322 S.C. 181, 470 S.E.2d 570 (1996) case, which were raised in Plaintiffs' Memorandum.

This Court has reviewed Plaintiffs' Motion to Alter or Reconsider its Judgment as well as Defendants' opposing memorandum, and has considered each of the points raised in Plaintiffs' Motion. The points raised by Plaintiffs were presented to the Court previously in the Plaintiffs' original memorandum in opposition to the Defendants' Motion. The Court does not find any of these points persuasive and declines to modify its Order dated March 11, 2011, in which it granted Defendants' Motion for Judgment on the Pleadings.

CONCLUSION

Based on the foregoing, Plaintiffs' Motion to Amend or Reconsider is **DENIED**, and the Court's March 11, 2011 Order **GRANTING** the Defendants' Motion for Judgment on the Pleadings stands. Accordingly, Plaintiffs' Complaint is **DISMISSED with prejudice**. **IT IS SO ORDERED.**



The Honorable Edgar W. Dickson

June 7, 2011

RECEIVED

JUL 20 2011

SC Court of Appeals

CHARLESTON

COLUMBIA

FLORENCE

GREENVILLE

Haynsworth
Sinkler Boyd, PA.

ATTORNEYS AND COUNSELORS AT LAW

134 MEETING STREET, THIRD FLOOR (29401)
POST OFFICE BOX 340 (29402-0340)
CHARLESTON, SOUTH CAROLINA
TELEPHONE 843.722.3366
FACSIMILE 843.722.2266
WEBSITE www.hsblawfirm.com

Charlton deSaussure, Jr.
DIRECT DIAL NUMBER 843-720-4420
EMAIL cdesaussure@hsblawfirm.com

June 10, 2011

BY HAND

The Honorable Cheryl L. Graham
Clerk of Court of Common Pleas
5200 East Jim Bilton Boulevard
St. George, SC 29477

Re: The Home Builders Association of South Carolina, et. al v. School District No. 2
of Dorchester County, et. al
2009-CP-18-2674)

Dear Ms. Graham:

I deliver herewith the Order signed by Judge Dickson in connection with the captioned case for filing in your office. Thank you for providing me the clocked-in copy for my file.

Sincerely yours,



Charlton deSaussure, Jr.

CdeS/tas

cc: Frederick A. Gertz

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

The Home Builders Association of South
Carolina and the Charleston-Trident Home
Builders Association, Inc.,

Plaintiffs,

v.

School District No. 2 of Dorchester County
and the Board of Trustees for Dorchester
School District No. 2,

Defendants.

IN THE COURT OF COMMON PLEAS

2009-CP-18-2674

**ORDER GRANTING
DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS**

This matter is before the court by way of Defendants' Motion for Judgment on the Pleadings. Defendants filed this motion and memorandum in support, pursuant to Rule 12(c), South Carolina Rules of Civil Procedure, on the grounds that 2009 S.C. Acts 99 violates neither South Carolina Constitution, Art. III, § 34 (IX) nor Art. VIII, § 14 (6), on January 29, 2010. The Court held a hearing on Defendants' motion on September 9, 2010, with the Honorable Edgar Warren Dickson presiding. Charlton deSaussure appeared for Defendants, and Frederick A. Gertz appeared for Plaintiffs. Plaintiffs presented a Memorandum in Opposition to Motion for Judgment on the Pleadings at the hearing.

Following a review of the memoranda submitted by both parties, case law, exhibits and arguments of counsel, the Court issues this Order **GRANTING** Defendants' Motion for Judgment on the Pleadings.

RECEIVED

JUL 11 2011

SC Court of Appeals

PROCEDURAL/FACTUAL BACKGROUND

On February 26, 2009, the South Carolina General Assembly passed Senate Bill 235 which became 2009 S.C. Acts 99 (the "Act"). The Act, which is quoted in its entirety in Plaintiffs' Complaint, provides the following synopsis:

SYNOPSIS: AN ACT TO AUTHORIZE THE BOARD OF TRUSTEES FOR DORCHESTER SCHOOL DISTRICT NO. 2 TO IMPOSE AN IMPACT FEE ON ANY DEVELOPER FOR EACH NEW RESIDENTIAL DWELLING UNIT CONSTRUCTED BY THE DEVELOPER WITHIN THE SCHOOL DISTRICT, TO PROVIDE THAT THE FUNDS ONLY MAY BE USED FOR THE CONSTRUCTION OF PUBLIC EDUCATION FACILITIES FOR GRADES K-12 WITHIN THE DISTRICT AND FOR THE PAYMENT OF PRINCIPAL AND INTEREST ON EXISTING OR NEW BONDS ISSUED BY THE DISTRICT, AND TO PROVIDE THAT THE IMPACT FEE SHALL BE SET AT AN AMOUNT NOT TO EXCEED THE COST THAT EACH ADDITIONAL DWELLING UNIT IMPOSES ON THE SCHOOL DISTRICT FOR PUBLIC EDUCATION FACILITIES.

(Plaintiffs' Complaint, ¶ 7).

As indicated in the synopsis, the Act authorizes the Board of Trustees for School District No. 2 of Dorchester County (the "Board") to impose an impact fee on developers of new residential dwelling units within School District No. 2 of Dorchester County (the "School District") for residential construction. The Act provides that funds so collected must be held in a separate interest bearing account and must be appropriated only for (1) the construction, including preparation costs, of new public education facilities for grades K-12 within the School District; and (2) the payment of principal and interest on existing or new bonds issued by Dorchester School District No. 2 for the construction of public education facilities for grades K-12. Section I, Paragraph G of the Act limits the impact fee to an amount not to exceed \$2,500 per dwelling unit.

On June 23, 2009, the Board enacted a resolution (the "Resolution") on behalf of the School District establishing and adopting a public facilities impact fee of \$2,500 per dwelling

unit. Thus, the Resolution is consistent with the Act which, as stated above, limits the impact fee to an amount "not to exceed the cost that each additional dwelling unit imposes on the school district for public education" and specifically imposes a \$2,500 limit per dwelling unit. As stated in the Resolution, a study by In Re Financial, LLC determined that new residential development on average (Dwelling Units) generates a demand for Public Education Facilities of .5 students per Dwelling unit. The Resolution explains as follows:

Thus, a residential development of 1,600 Dwelling Units is expected to result in 800 students. At the \$2,500 Impact Fee per Dwelling Unit, a total of 1,600 Dwelling Units would produce total Impact Fees of \$4,000,000. The cost of a single Public Education Facility for 800 students is estimated to be \$22,870,000 which is the product of the 90,000 square feet required for such a facility multiplied by the now prevailing construction/equipping cost per square foot. Thus, the amount of the Impact Fee authorized herein is significantly less than the cost of the Public Education Facilities the School District might be expected to provide by virtue of new residential development.

Resolution, Section IV, B. 1.

In addition to limiting the fee imposed on developers of new residential construction in the School District, the Act provides for an appeal process and limits the Act's application to new residential construction which has not been issued a certificate of occupancy.

On September 29, 2009, the Home Builders Association of South Carolina and the Charleston-Trident Home Builders Association, Inc. ("Plaintiffs") filed a Complaint, asserting that the Act's application "to a single school district without any peculiar or unique conditions, resulting in special treatment, violates Article III, § 34 (limiting "special legislation") and Article VIII, § 14(6) (requiring statewide uniformity)." (Complaint, ¶ 23). Contrary to Plaintiffs' allegations, the Court finds that the Act and its application are authorized by South Carolina Supreme Court precedent, which leaves no legally viable claim which could entitle Plaintiffs to the relief requested.

STANDARD OF REVIEW

Pursuant to South Carolina Civil Procedure Rule 12(c), SCRCP, "any party may move for judgment on the pleadings." A motion for judgment on the pleadings tests not whether Plaintiffs will prevail on the merits, but whether Plaintiffs have stated a legally viable claim. Where the pleadings are fatally deficient in substance or fail to state a cause of action in favor of the plaintiff and against the defendant, judgment on the pleadings is proper. *Rosenthal v. Unarco Industries, Inc.*, 278 S.C. 420, 297 S.E.2d 638 (1982) (holding that judgment on the pleadings was proper in dismissing plaintiff's challenge to constitutionality of state door closing statute).

In construing an act of the General Assembly, "all reasonable doubt must be resolved in favor of the constitutionality of the act. If a constitutional construction of a statute is possible, that construction should be followed in lieu of an unconstitutional construction." *Crow v. McAlphine*, 277 S.C. 240, 242, 285 S.E.2d 355 (1981) (quoting *Bauer v. South Carolina State Housing Authority*, 271 S.C. 219, 226, 246, 246 S.E.2d 869 (1978)). The Constitution and all laws concerning local governments are to be liberally construed in the local entity's favor. S.C. Constitution, Article VIII, § 17. In addition, the Court must give great deference to the legislatively created classifications in the statute and must sustain them if they are not plainly arbitrary or if any reasonable hypothesis can be found to support them. *Foster v. S.C.D.H.P.T.*, 306 S.C. 519, 413 S.E.2d 31 (1992). Indeed, "[t]hose attacking the validity of the legislation have the burden to negate every conceivable basis which might support it" not just those believed to be in the minds of the General Assembly at the time of its passage. *Lee v. Dept. of Natural Resources*, 339 S.C. 463, 530 S.E.2d 112, note4(2000)(citing *Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307 (1993)).

"[The Court] will not declare a statute unconstitutional as a special law unless its repugnance to the Constitutional is clear beyond a reasonable doubt." *Medical Society of South Carolina v. Medical University of South Carolina*, 334 S.C. 270, 279, 513 S.E.2d 352, 357 (1999). "[The Court] will not overrule the legislature's judgment that a special law is necessary unless there has been a clear and palpable abuse of legislative discretion." *Id.*, 513 S.E.2d at 357.

ANALYSIS

I. THE ACT DOES NOT VIOLATE ARTICLE III, § 34(IX).

Article III, § 34(IX) of the South Carolina Constitution prohibits the South Carolina General Assembly from passing a special law where a general law can be made applicable. The Supreme Court of South Carolina has explained that Article III, § 34(IX) does not prohibit all special legislation. In *Bradley v. Cherokee School District No. One of Cherokee County*, 322 S.C. 181, 470 S.E.2d 570 (1996), the South Carolina Supreme Court considered whether an act allowing a particular school district to impose a sales tax was unconstitutional special legislation pursuant to Article III, § 34(IX). The Supreme Court concluded:

A law that is special only in the sense that it imposes a lawful tax limited in application and incidence to persons or property within a certain school district does not contravene the provisions of Article III, § 34(IX). *Hay v. Leornard*, 212 S.C. 81, 46 S.E.2d 653 (1948). Individual districts may impose a legal tax limited in application and incidence to persons or property within the prescribed area. *Shillito v. Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948).

In the present case, the Act authorizes the Board to impose an impact fee on any developer for each new residential dwelling unit constructed by the developer within the school district. The funds may only be used for the benefit of public education facilities within the district, i.e., (1) for the construction of public education facilities for grades K-12 within the district, and (2) for the payment of principal and interest on existing or new bonds issued by the

district. In *Cherokee School District No. One*, the General Assembly authorized imposition of a sales tax. In the present case, the General Assembly authorized imposition of an impact fee. The substitution of the sales tax in the *Cherokee School District No. One* case with the impact fee here provides a fact situation identical to that approved by the South Carolina Supreme Court in its 1996 decision quoted above. The controlling legal principle is equally applicable in that the impact fee is limited to persons or property within the School District for the benefit of all persons residing within the School District just as the sales tax was so prescribed in the *Cherokee School District No. One* case.

The decision in that case clarifies the holding of the South Carolina Supreme Court in *Horry County v. Horry County Higher Educ. Comm'n*, 306 S.C. 416, 412 S.E.2d 431 (1991). In *Horry County*, the Court addressed the constitutionality of an act allowing the Horry County Higher Education Commission to levy an *ad valorem* tax which benefited only one institution of higher learning, Coastal Carolina University. The Court determined that because the legislation in question applied to only one county and benefited only one institution, the legislation violated Article III, § 34(IX). The *Cherokee School District No. One* decision explained that in the *Horry County* case "the funds collected from the tax were not used for the benefit of all persons residing within the area." *Cherokee School District No. One*, 470 S.E.2d at 572. Applying that explanation to the holding in *Horry County* demonstrates the Court's concern that Coastal Carolina University, an institution of higher learning, was singled out for "special treatment."

Similar facts are not present here. The proceeds of the impact fee are used exclusively for the School District just as the proceeds of the sales tax are used exclusively for Cherokee School District No. One. What distinguishes the *Horry County* decision is the fact that Coastal Carolina University, an institution of higher learning, was the beneficiary of the *ad valorem* tax

levied there. The facts presented in this case are on point with those in *Cherokee School District No. One* in which the Court cited with approval the language in *Horry County* that "Article III, § 34 (IX)...does not prohibit all special legislation." *Cherokee School District No. One*, 470 S.E.2d at 572. The distinguishing characteristics of the present Act with the one considered by the Court in the *Horry County* case informs that the present Act passes constitutional muster and the one in *Horry County* could not.

Unlike the legislation in the *Horry County* case and consistent with that approved by the Court in *Cherokee School District No. One*, the Act in the present case is tailored to benefit the entire School District and all its schools, as opposed to one particular educational institution. Moreover, the sales tax in *Cherokee School District No. One* and the impact fee here is limited - in this instance to residential dwellings within the School District for the benefit of the residents of the School District. Unlike the *Horry County* case, the sales tax in *Cherokee School District No. One* and the impact fee at issue here are imposed exclusively for their respective school districts and not for a singular institution of higher education.

The public education improvements necessitated by rapid population growth which the impact fee is designed to facilitate necessarily benefit those who are obliged to pay because the proceeds are for the benefit of the entire School District. For the reasons stated above, the Act is constitutional under South Carolina Supreme Court precedent regardless of the outcome of any disputed facts.

II. THE ACT DOES NOT VIOLATE ART. VIII, § 14(6).

Article VIII of the South Carolina Constitution deals generally with the creation of local government. *Davis v. County of Greenville*, 322 S.C. 73, 470 S.E.2d 94 (1996). Article VIII, Section 14 limits the powers local governments may be granted by State law by providing that

among other things, that local governments may not set aside "the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity." Art. III, § 14(6).

Article VIII, Section 6 does not withdraw administration of public education from the field of local concern. Public education has generally been deemed a State function and the South Carolina Supreme Court has held "the legislature has wide discretion in determining how to go about accomplishing its duty to 'provide for the maintenance and support of a system of free public schools.'" *Horry County School District v. Horry County*, 346 S.C. 621, 552 S.E.2d 737 (2001) (finding no violation of Article VIII, § 14 in noting the constitutionality of shared funding of public schools by local and state revenues). South Carolina Supreme Court precedent instructs that Article VIII, § 14 does not require uniformity in the funding of public education by foreclosing local revenue streams. *See Horry County School District*, 522 S.E.2d at 743 citing *Richland County v. Campbell*, 294 S.C. 346, 349, 364 S.E.2d 470, 471-72 (1988) (upholding constitutionality of shared funding of public schools by local and state revenues as set forth in the Education Finance Act). As noted above, the Supreme Court has recognized the authority of the Legislature to enact legislation that allows local governing bodies, including school districts to impose fees for the benefit of public education. *See Cherokee School District No. One*, 470 S.E.2d at 570. As also noted above, the Supreme Court has long recognized the authority of the Legislature to enact special legislation for school districts in areas beyond finance. Article VIII, § 14 does not foreclose the funding of public education from local concern and any such construction of this constitutional provision as advocated by Plaintiffs would contravene the longstanding law of this State. *See Horry County School District*, 552 S.E.2d at 737 (2001).

Plaintiffs have failed to allege facts sufficient to show any constitutional infirmity of the present Act under Article VIII, § 14. "A legislative enactment will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt." *University of South Carolina v. Mehlman*, 245 S.C. 180, 139 S.E.2d 771 (1964). Plaintiffs cannot meet this stringent standard under any construction of the facts presented.

CONCLUSION

Based on the foregoing, Defendants' Motion for Judgment on the Pleadings is **GRANTED** and Plaintiffs' Complaint is **DISMISSED. IT IS SO ORDERED.**



The Honorable Edgar W. Dickson

March 11, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

RECEIVED

FEB 09 2012

SC Court of Appeals

Case No. 2009-CP-18-2674

The Home Builders Association of South Carolina and
the Charleston-Trident Home Builders Association, Inc.....Appellants,

v.

School District No. 2 of Dorchester County and
the Board of Trustees for Dorchester School District No. 2.....Respondents.

RECORD ON APPEAL

Frederick A. Gertz
Phong T. Nguyen
GERTZ & MOORE
1416 Laurel St.
P.O. Box 456
(803) 252-1522
Attorneys for Appellants

Charlton deSaussure, Jr.
Sarah P. Spruill
Haynsworth Sinkler Boyd, P.A.
P.O. Box 340
Charleston, SC 29402
Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-18-2674

The Home Builders Association of South Carolina and
the Charleston-Trident Home Builders Association, Inc.....Appellants,

v.

School District No. 2 of Dorchester County and
the Board of Trustees for Dorchester School District No. 2.....Respondents.

RECORD ON APPEAL

Frederick A. Gertz
Phong T. Nguyen
GERTZ & MOORE
1416 Laurel St.
P.O. Box 456
(803) 252-1522
Attorneys for Appellants

Charlton deSaussure, Jr.
Sarah P. Spruill
Haynsworth Sinkler Boyd, P.A.
P.O. Box 340
Charleston, SC 29402
Attorneys for Respondents

INDEX

Page No.

1.	Order Granting Defendant's Motion for Granting Judgment on the Pleadings.....	2
2.	Order Denying Plaintiff's Motion to Amend Or Reconsider.....	11
3.	Complaint.....	13
4.	Answer.....	31
5.	Defendant's Motion for Judgment on the Pleadings and Memorandum in Support.....	46
6.	Memorandum in Opposition to Motion for Judgment on the Pleadings SCRCRCP Rule 12(c).....	55
7.	Plaintiffs' Motion to Amend or Reconsider Judgment SCRCRCP Rule 59(e).....	75
8.	Act 588.....	79
9.	Act 99	83
10.	Act 99 Resolution	34
11.	Certificate of Counsel.....	85

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

The Home Builders Association of South
Carolina and the Charleston-Trident Home
Builders Association, Inc.,

Plaintiffs,

v.

School District No. 2 of Dorchester County
and the Board of Trustees for Dorchester
School District No. 2,

Defendants.

IN THE COURT OF COMMON PLEAS

2009-CP-18-2674

**ORDER GRANTING
DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS**

FILED-RECORDED
2011 MAR 22 PM 3:07
CHERIL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

This matter is before the court by way of Defendants' Motion for Judgment on the Pleadings. Defendants filed this motion and memorandum in support, pursuant to Rule 12(c), South Carolina Rules of Civil Procedure, on the grounds that 2009 S.C. Acts 99 violates neither South Carolina Constitution, Art. III, § 34 (IX) nor Art. VIII, § 14 (6), on January 29, 2010. The Court held a hearing on Defendants' motion on September 9, 2010, with the Honorable Edgar Warren Dickson presiding. Charlton deSaussure appeared for Defendants, and Frederick A. Gertz appeared for Plaintiffs. Plaintiffs presented a Memorandum in Opposition to Motion for Judgment on the Pleadings at the hearing.

Following a review of the memoranda submitted by both parties, case law, exhibits and arguments of counsel, the Court issues this Order **GRANTING** Defendants' Motion for Judgment on the Pleadings.

PROCEDURAL/FACTUAL BACKGROUND

On February 26, 2009, the South Carolina General Assembly passed Senate Bill 235 which became 2009 S.C. Acts 99 (the "Act"). The Act, which is quoted in its entirety in Plaintiffs' Complaint, provides the following synopsis:

SYNOPSIS: AN ACT TO AUTHORIZE THE BOARD OF TRUSTEES FOR DORCHESTER SCHOOL DISTRICT NO. 2 TO IMPOSE AN IMPACT FEE ON ANY DEVELOPER FOR EACH NEW RESIDENTIAL DWELLING UNIT CONSTRUCTED BY THE DEVELOPER WITHIN THE SCHOOL DISTRICT, TO PROVIDE THAT THE FUNDS ONLY MAY BE USED FOR THE CONSTRUCTION OF PUBLIC EDUCATION FACILITIES FOR GRADES K-12 WITHIN THE DISTRICT AND FOR THE PAYMENT OF PRINCIPAL AND INTEREST ON EXISTING OR NEW BONDS ISSUED BY THE DISTRICT, AND TO PROVIDE THAT THE IMPACT FEE SHALL BE SET AT AN AMOUNT NOT TO EXCEED THE COST THAT EACH ADDITIONAL DWELLING UNIT IMPOSES ON THE SCHOOL DISTRICT FOR PUBLIC EDUCATION FACILITIES.

(Plaintiffs' Complaint, ¶ 7).

As indicated in the synopsis, the Act authorizes the Board of Trustees for School District No. 2 of Dorchester County (the "Board") to impose an impact fee on developers of new residential dwelling units within School District No. 2 of Dorchester County (the "School District") for residential construction. The Act provides that funds so collected must be held in a separate interest bearing account and must be appropriated only for (1) the construction, including preparation costs, of new public education facilities for grades K-12 within the School District; and (2) the payment of principal and interest on existing or new bonds issued by Dorchester School District No. 2 for the construction of public education facilities for grades K-12. Section I, Paragraph G of the Act limits the impact fee to an amount not to exceed \$2,500 per dwelling unit.

On June 23, 2009, the Board enacted a resolution (the "Resolution") on behalf of the School District establishing and adopting a public facilities impact fee of \$2,500 per dwelling

unit. Thus, the Resolution is consistent with the Act which, as stated above, limits the impact fee to an amount "not to exceed the cost that each additional dwelling unit imposes on the school district for public education" and specifically imposes a \$2,500 limit per dwelling unit. As stated in the Resolution, a study by In Rc Financial, LLC determined that new residential development on average (Dwelling Units) generates a demand for Public Education Facilities of .5 students per Dwelling unit. The Resolution explains as follows:

Thus, a residential development of 1,600 Dwelling Units is expected to result in 800 students. At the \$2,500 Impact Fee per Dwelling Unit, a total of 1,600 Dwelling Units would produce total Impact Fees of \$4,000,000. The cost of a single Public Education Facility for 800 students is estimated to be \$22,870,000 which is the product of the 90,000 square feet required for such a facility multiplied by the now prevailing construction/equipping cost per square foot. Thus, the amount of the Impact Fee authorized herein is significantly less than the cost of the Public Education Facilities the School District might be expected to provide by virtue of new residential development.

Resolution, Section IV, B. 1.

In addition to limiting the fee imposed on developers of new residential construction in the School District, the Act provides for an appeal process and limits the Act's application to new residential construction which has not been issued a certificate of occupancy.

On September 29, 2009, the Home Builders Association of South Carolina and the Charleston-Trident Home Builders Association, Inc. ("Plaintiffs") filed a Complaint, asserting that the Act's application "to a single school district without any peculiar or unique conditions, resulting in special treatment, violates Article III, § 34 (limiting "special legislation") and Article VIII, § 14(6) (requiring statewide uniformity)." (Complaint, ¶ 23). Contrary to Plaintiffs' allegations, the Court finds that the Act and its application are authorized by South Carolina Supreme Court precedent, which leaves no legally viable claim which could entitle Plaintiffs to the relief requested.

STANDARD OF REVIEW

Pursuant to South Carolina Civil Procedure Rule 12(c), SCRPC, "any party may move for judgment on the pleadings." A motion for judgment on the pleadings tests not whether Plaintiffs will prevail on the merits, but whether Plaintiffs have stated a legally viable claim. Where the pleadings are fatally deficient in substance or fail to state a cause of action in favor of the plaintiff and against the defendant, judgment on the pleadings is proper. *Rosenthal v. Unarco Industries, Inc.*, 278 S.C. 420, 297 S.E.2d 638 (1982) (holding that judgment on the pleadings was proper in dismissing plaintiff's challenge to constitutionality of state door closing statute).

In construing an act of the General Assembly, "all reasonable doubt must be resolved in favor of the constitutionality of the act. If a constitutional construction of a statute is possible, that construction should be followed in lieu of an unconstitutional construction." *Crow v. McAlphine*, 277 S.C. 240, 242, 285 S.E.2d 355 (1981) (quoting *Bauer v. South Carolina State Housing Authority*, 271 S.C. 219, 226, 246, 246 S.E.2d 869 (1978)). The Constitution and all laws concerning local governments are to be liberally construed in the local entity's favor. S.C. Constitution, Article VIII, § 17. In addition, the Court must give great deference to the legislatively created classifications in the statute and must sustain them if they are not plainly arbitrary or if any reasonable hypothesis can be found to support them. *Foster v. S.C.D.H.P.T.*, 306 S.C. 519, 413 S.E.2d 31 (1992). Indeed, "[t]hose attacking the validity of the legislation have the burden to negate every conceivable basis which might support it" not just those believed to be in the minds of the General Assembly at the time of its passage. *Lee v. Dept. of Natural Resources*, 339 S.C. 463, 530 S.E.2d 112, note4(2000)(citing *Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307 (1993)).

"[The Court] will not declare a statute unconstitutional as a special law unless its repugnance to the Constitutional is clear beyond a reasonable doubt." *Medical Society of South Carolina v. Medical University of South Carolina*, 334 S.C. 270, 279, 513 S.E.2d 352, 357 (1999). "[The Court] will not overrule the legislature's judgment that a special law is necessary unless there has been a clear and palpable abuse of legislative discretion." *Id.*, 513 S.E.2d at 357.

ANALYSIS

I. THE ACT DOES NOT VIOLATE ARTICLE III, § 34(IX).

Article III, § 34(IX) of the South Carolina Constitution prohibits the South Carolina General Assembly from passing a special law where a general law can be made applicable. The Supreme Court of South Carolina has explained that Article III, § 34(IX) does not prohibit all special legislation. In *Bradley v. Cherokee School District No. One of Cherokee County*, 322 S.C. 181, 470 S.E.2d 570 (1996), the South Carolina Supreme Court considered whether an act allowing a particular school district to impose a sales tax was unconstitutional special legislation pursuant to Article III, § 34(IX). The Supreme Court concluded:

A law that is special only in the sense that it imposes a lawful tax limited in application and incidence to persons or property within a certain school district does not contravene the provisions of Article III, § 34(IX). *Hay v. Leornard*, 212 S.C. 81, 46 S.E.2d 653 (1948). Individual districts may impose a legal tax limited in application and incidence to persons or property within the prescribed area. *Shillito v. Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948).

In the present case, the Act authorizes the Board to impose an impact fee on any developer for each new residential dwelling unit constructed by the developer within the school district. The funds may only be used for the benefit of public education facilities within the district, i.e., (1) for the construction of public education facilities for grades K-12 within the district, and (2) for the payment of principal and interest on existing or new bonds issued by the

district. In *Cherokee School District No. One*, the General Assembly authorized imposition of a sales tax. In the present case, the General Assembly authorized imposition of an impact fee. The substitution of the sales tax in the *Cherokee School District No. One* case with the impact fee here provides a fact situation identical to that approved by the South Carolina Supreme Court in its 1996 decision quoted above. The controlling legal principle is equally applicable in that the impact fee is limited to persons or property within the School District for the benefit of all persons residing within the School District just as the sales tax was so prescribed in the *Cherokee School District No. One* case.

The decision in that case clarifies the holding of the South Carolina Supreme Court in *Horry County v. Horry County Higher Educ. Comm'n*, 306 S.C. 416, 412 S.E.2d 431 (1991). In *Horry County*, the Court addressed the constitutionality of an act allowing the Horry County Higher Education Commission to levy an *ad valorem* tax which benefited only one institution of higher learning, Coastal Carolina University. The Court determined that because the legislation in question applied to only one county and benefited only one institution, the legislation violated Article III, § 34(IX). The *Cherokee School District No. One* decision explained that in the *Horry County* case "the funds collected from the tax were not used for the benefit of all persons residing within the area." *Cherokee School District No. One*, 470 S.E.2d at 572. Applying that explanation to the holding in *Horry County* demonstrates the Court's concern that Coastal Carolina University, an institution of higher learning, was singled out for "special treatment."

Similar facts are not present here. The proceeds of the impact fee are used exclusively for the School District just as the proceeds of the sales tax are used exclusively for Cherokee School District No. One. What distinguishes the *Horry County* decision is the fact that Coastal Carolina University, an institution of higher learning, was the beneficiary of the *ad valorem* tax

levied there. The facts presented in this case are on point with those in *Cherokee School District No. One* in which the Court cited with approval the language in *Horry County* that "Article III, § 34 (IX)...does not prohibit all special legislation." *Cherokee School District No. One*, 470 S.E.2d at 572. The distinguishing characteristics of the present Act with the one considered by the Court in the *Horry County* case informs that the present Act passes constitutional muster and the one in *Horry County* could not.

Unlike the legislation in the *Horry County* case and consistent with that approved by the Court in *Cherokee School District No. One*, the Act in the present case is tailored to benefit the entire School District and all its schools, as opposed to one particular educational institution. Moreover, the sales tax in *Cherokee School District No. One* and the impact fee here is limited - in this instance to residential dwellings within the School District for the benefit of the residents of the School District. Unlike the *Horry County* case, the sales tax in *Cherokee School District No. One* and the impact fee at issue here are imposed exclusively for their respective school districts and not for a singular institution of higher education.

The public education improvements necessitated by rapid population growth which the impact fee is designed to facilitate necessarily benefit those who are obliged to pay because the proceeds are for the benefit of the entire School District. For the reasons stated above, the Act is constitutional under South Carolina Supreme Court precedent regardless of the outcome of any disputed facts.

II. THE ACT DOES NOT VIOLATE ART. VIII, § 14(6).

Article VIII of the South Carolina Constitution deals generally with the creation of local government. *Davis v. County of Greenville*, 322 S.C. 73, 470 S.E.2d 94 (1996). Article VIII, Section 14 limits the powers local governments may be granted by State law by providing that

among other things, that local governments may not set aside "the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity." Art. III, § 14(6).

Article VIII, Section 6 does not withdraw administration of public education from the field of local concern. Public education has generally been deemed a State function and the South Carolina Supreme Court has held "the legislature has wide discretion in determining how to go about accomplishing its duty to 'provide for the maintenance and support of a system of free public schools.'" *Horry County School District v. Horry County*, 346 S.C. 621, 552 S.E.2d 737 (2001) (finding no violation of Article VIII, § 14 in noting the constitutionality of shared funding of public schools by local and state revenues). South Carolina Supreme Court precedent instructs that Article VIII, § 14 does not require uniformity in the funding of public education by foreclosing local revenue streams. *See Horry County School District*, 522 S.E.2d at 743 citing *Richland County v. Campbell*, 294 S.C. 346, 349, 364 S.E.2d 470, 471-72 (1988) (upholding constitutionality of shared funding of public schools by local and state revenues as set forth in the Education Finance Act). As noted above, the Supreme Court has recognized the authority of the Legislature to enact legislation that allows local governing bodies, including school districts to impose fees for the benefit of public education. *See Cherokee School District No. One*, 470 S.E.2d at 570. As also noted above, the Supreme Court has long recognized the authority of the Legislature to enact special legislation for school districts in areas beyond finance. Article VIII, § 14 does not foreclose the funding of public education from local concern and any such construction of this constitutional provision as advocated by Plaintiffs would contravene the longstanding law of this State. *See Horry County School District*, 552 S.E.2d at 737 (2001).

Plaintiffs have failed to allege facts sufficient to show any constitutional infirmity of the present Act under Article VIII, § 14. "A legislative enactment will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt." *University of South Carolina v. Mehlman*, 245 S.C. 180, 139 S.E.2d 771 (1964). Plaintiffs cannot meet this stringent standard under any construction of the facts presented.

CONCLUSION

Based on the foregoing, Defendants' Motion for Judgment on the Pleadings is **GRANTED** and Plaintiffs' Complaint is **DISMISSED. IT IS SO ORDERED.**



The Honorable Edgar W. Dickson

March 11, 2011

CERTIFIED COPY
STATE OF SOUTH CAROLINA
2011 JUN 10 PM 2:11
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS

2009-CP-18-2674

Cheryl R. [Signature]
CLERK OF COURT
DORCHESTER COUNTY

The Home Builders Association of South
Carolina and the Charleston-Trident Home
Builders Association, Inc.,

Plaintiffs,

v.

School District No. 2 of Dorchester County
and the Board of Trustees for Dorchester
School District No. 2,

Defendants.

**ORDER DENYING PLAINTIFFS'
MOTION TO AMEND OR RECONSIDER**

This matter came before the court initially by way of Defendants' Motion for Judgment on the Pleadings. The Court held a hearing on Defendants' Motion on September 9, 2010. Charlton deSaussure appeared for Defendants, and Frederick A. Gertz appeared for Plaintiffs.

Following review of the memoranda submitted by both parties, case law, exhibits and arguments of counsel, the Court issued an Order granting Defendants' Motion for Judgment on the Pleadings dated March 11, 2011. Subsequently, Plaintiffs filed a Motion to Amend or Reconsider Judgment pursuant to Rule 59(e), SCRPC. Plaintiffs state in their motion that the Court's March 11, 2011, Order granting the Defendants' Motion "fails to address the numerous distinguishing legal and factual issues enumerated in Plaintiffs' Memorandum in Opposition to Motion for Judgment on the Pleadings." See Plaintiffs' Motion, pp.1-2. Plaintiffs then quote several pages from their previous Memorandum, and ask this Court to "rule upon the distinguishing issues," specifically related to the *Bradley v. Cherokee School District No. One of*

Cherokee County, 322 S.C. 181, 470 S.E.2d 570 (1996) case, which were raised in Plaintiffs' Memorandum.

This Court has reviewed Plaintiffs' Motion to Alter or Reconsider its Judgment as well as Defendants' opposing memorandum, and has considered each of the points raised in Plaintiffs' Motion. The points raised by Plaintiffs were presented to the Court previously in the Plaintiffs' original memorandum in opposition to the Defendants' Motion. The Court does not find any of these points persuasive and declines to modify its Order dated March 11, 2011, in which it granted Defendants' Motion for Judgment on the Pleadings.

CONCLUSION

Based on the foregoing, Plaintiffs' Motion to Amend or Reconsider is **DENIED**, and the Court's March 11, 2011 Order **GRANTING** the Defendants' Motion for Judgment on the Pleadings stands. Accordingly, Plaintiffs' Complaint is **DISMISSED with prejudice**. **IT IS SO ORDERED.**



The Honorable Edgar W. Dickson

June 9, 2011

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

The Home Builders Association of
South Carolina and the
Charleston-Trident Home Builders
Association, Inc.,

Plaintiffs,

vs.

School District No. 2 of Dorchester
County and the Board of
Trustees for Dorchester School
District No. 2,

Defendants.

2009-CP-18-

2674

COMPLAINT

(Declaratory Judgment and Injunction)
(Non-Jury)

CERTIFIED COPY

2009 SEP 29 AM 10:02

CLERK OF COURT
DORCHESTER COUNTY

The Plaintiffs, The Home Builders Association of South Carolina and the Charleston-Trident Home Builders Association, Inc. for their Complaint against the Defendants School District No. 2 of Dorchester County and the Board of Trustees for Dorchester School District No. 2, respectfully allege:

Parties

1. The Home Builders Association of South Carolina ("SCHBA") is a not-for-profit eleemosynary corporation organized and existing under the laws of the State of South Carolina with its principal office in the City of Columbia, County of Richland and State of South Carolina.

2. The Charleston-Trident Home Builders Association, Inc. ("CTHBA") is a not-for-profit corporation organized and existing under the laws of the State of South

Carolina with its principal office in the City and County of Charleston and State of South Carolina.

3. School District No. 2 of Dorchester County (the "School District") is a body politic and political subdivision of the State of South Carolina, with its principal office in the County of Dorchester and State of South Carolina.

4. The Board of Trustees for Dorchester School District No. 2 (the "Trustees") is the governing body of the School District.

Jurisdiction and Venue

5. This Court has jurisdiction over the matters alleged herein pursuant to the laws and constitutions of the United States and the State of South Carolina, including, without limitation, S.C. Code Ann. §§ 15-53-10, *et seq.* and Rule 57 of the South Carolina Rules of Civil Procedure.

6. Venue is proper in Dorchester County based on the domicile of the Defendants.

Facts

7. On or about February 11, 2009, the General Assembly of the State of South Carolina passed and enrolled Senate Bill 235 which became law without the Governor's signature February 26, 2009 as 2009 S.C. Acts 99 (the "Act"), as follows:

SYNOPSIS: AN ACT TO AUTHORIZE THE BOARD OF TRUSTEES FOR DORCHESTER SCHOOL DISTRICT NO. 2 TO IMPOSE AN IMPACT FEE ON ANY DEVELOPER FOR EACH NEW RESIDENTIAL DWELLING UNIT CONSTRUCTED BY THE DEVELOPER WITHIN THE SCHOOL DISTRICT, TO PROVIDE THAT THE FUNDS ONLY MAY BE USED FOR THE CONSTRUCTION OF PUBLIC EDUCATION FACILITIES FOR GRADES K-12 WITHIN THE DISTRICT AND FOR THE PAYMENT OF PRINCIPAL AND INTEREST ON EXISTING OR NEW BONDS ISSUED BY THE DISTRICT, AND TO PROVIDE THAT THE IMPACT FEE SHALL BE SET AT AN AMOUNT NOT TO EXCEED THE COST THAT EACH

*ADDITIONAL DWELLING UNIT IMPOSES ON THE SCHOOL DISTRICT
FOR PUBLIC EDUCATION FACILITIES.*

*Be it enacted by the General Assembly of the State of South Carolina:
Impact fee authorized*

SECTION 1. (A) The Board of Trustees for Dorchester School District No. 2 may impose an impact fee on any developer for each new residential dwelling unit constructed by the developer within the school district. The fees must be paid to Dorchester School District No. 2 or, pursuant to an agreement, to a county or municipality that pays the fees to Dorchester School District No. 2, prior to or at the issuance of a certificate of occupancy for a dwelling unit.

(B) Dorchester School District No. 2 must maintain the impact fee funds in a separate interest bearing account. All interest earned and accruing to the account shall become funds of the account and must be subject to all restrictions placed on the use of impact fees pursuant to the provisions of this article. Accounting records must be maintained for each category of system improvements for which the fee is collected.

(C) The Board of Trustees for Dorchester School District No. 2 only may appropriate funds from the account for:

(1) the construction, including preparation costs, of new public education facilities for grades K-12 within Dorchester School District No. 2; and

(2) the payment of principal and interest on existing or new bonds issued by Dorchester School District No. 2 for the construction of public education facilities for grades K-12.

(D) The impact fee may be offset by any other cash payment paid by the developer and obtained by Dorchester School District No. 2 as a result of an agreement between the developer and another governmental entity.

(E) The Board of Trustees of Dorchester School District No. 2 will reexamine the amount of an impact fee being charged a developer upon receipt of a notice of appeal from the developer. If the notice of appeal is accompanied by a letter of credit in a form satisfactory to the board of trustees in an amount equal to the amount of impact fees owed, the new residential development may receive its certificate of occupancy while the appeal is pending.

(F) For purposes of this section, 'dwelling unit' means all residential units, including, but not limited to, single family attached, single family detached,

duplex, condominium, townhouse, multifamily, apartment, and mobile home, but excluding hotels and motels.

(G) The district's board of trustees shall set the impact fee at an amount not to exceed two thousand five hundred dollars per dwelling unit.

Time effective

SECTION 2. This act takes effect upon approval by the Governor and applies to any new residential construction which has not been issued a certificate of occupancy.

8. Thereafter, the Trustees adopted the following resolution on behalf of the School District having an effective date of June 23, 2009 (the "Resolution"):

A RESOLUTION ESTABLISHING AND ADOPTING A PUBLIC FACILITIES IMPACT FEE TO BE IMPOSED ON ALL NEW RESIDENTIAL DWELLING UNITS AND PROCEDURES FOR THE IMPOSITION, CALCULATION, COLLECTION, EXPENDITURE AND ADMINISTRATION OF SUCH IMPACT FEES.

WHEREAS, School District No. 2 of Dorchester County (the "School District"), South Carolina is authorized, under Act bearing Ratification Number 2 of the Acts and Joint Resolutions of the General Assembly of South Carolina enacted February 26, 2009 (the "Act"), to establish and impose impact fees on new Dwelling Units to finance new Public Education Facilities for grades K- 12 within the School District necessitated by such development and for the payment of principal and interest on existing or new bonds issued by the School District for the construction of Public Education Facilities for grades K-12; and

WHEREAS, the School District has experienced rapid population growth and development during the past decade and it is expected that growth will continue; and

WHEREAS, the School District has recently experienced the impacts on Public Education Facilities resulting from such growth and development; and

WHEREAS, the School District has certain standards by grade level such as these relating to school site sizes, school population, instructional classroom size and teacher-student ratio; and

WHEREAS, these standards and the projected residential development effect future school needs; and

WHEREAS, the cost of land acquisition and construction and equipping of new schools occasioned in part by growth and development is significant; and

WHEREAS, it is appropriate that bonds used to finance new schools needed to meet the demand generated by new residential development be backed not only by property taxes but also by the impact fee permitted by the Act in order that the bonds be paid by taxpayers who have paid for the School District's current facilities but also by those who contribute to the demand for the new schools because of such growth and development; and

WHEREAS, the School District therefore finds that it is fair and equitable for new Dwelling Units to fund, in whole or in part, the cost of new school facilities whose need will result from such new residential development; and

WHEREAS, a 2005 study by In Re Financial, LLC indicates that new residential development on average (Dwelling Units) generates a demand for Public Education Facilities of .5 students per Dwelling Unit, be it for elementary, middle or high school, as a result of which the Public Education Facilities Impact Fee (as defined herein, the "Impact Fee") shall be imposed uniformly on all new Dwelling Units, regardless of size, type or density; and

WHEREAS, the Impact Fee as authorized by the Act shall be imposed uniformly on all new Dwelling Units within the School District, regardless of the location of the residential development within the School District; and

WHEREAS, the use of uniform procedures for the imposition, calculation, collection, expenditure and administration of the Impact Fee will best ensure that the Impact Fee is collected solely for and expended for the Public Education Facilities for which it was imposed and collected; and

WHEREAS, any moneys collected from the Impact Fee shall be deposited in an interest-bearing account which clearly identifies the category, account, fund and Public Education Facility for which such fee was imposed; and

WHEREAS, the fund or account and each category of system improvements shall be accounted for separately; provided, however, that the determination as to whether the accounting requirement shall be by category, account or fund and whether by aggregate or individual

residential development shall be within the discretion of the School District; and

WHEREAS, any interest or other income earned on moneys deposited in said interest-bearing account shall be credited to the account; and

WHEREAS, the Board has found and determined that the Impact Fee is appropriate for funding Public Education Facilities within the School District; and

NOW, THEREFORE, BE IT RESOLVED by the Board of Trustees of School District No. 2 of Dorchester County, South Carolina that the following Impact Fee and Impact Fee procedures and requirements are set forth and are applicable to all new Dwelling Units:

SECTION I.

ADOPTION AND IMPOSITION OF THE IMPACT FEE AND PURPOSE AND INTENT OF IMPACT FEE PROCEDURES.

- A. Pursuant to the Impact Fee Procedures, this Resolution, and the Act, the Impact Fee shall be adopted and imposed on all new Dwelling Units in the School District.
- B. The purposes and intent of the Impact Fee Procedures are:
 1. To establish uniform procedures for the imposition, calculation, collection, expenditure and administration of the Impact Fee imposed on new residential development;
 2. To implement the goals, objectives and policies of the School District relating to assuring that new residential development contributes towards the costs of Public Education Facilities reasonably necessitated by such new residential development;
 3. To ensure that new residential development is reasonably benefited by the provision of the Public Education Facilities provided with the proceeds of the Impact Fee;
 4. To ensure that all applicable legal standards and criteria are properly incorporated in these procedures.

SECTION II.
DEFINITIONS.

- A. *Adopted Level of Service (LOS) Standard* - the adequacy of Public Education Facilities to accommodate the students from new residential development at the School District's level of service standards.
- B. *Applicant* - any person who files an application for a certificate of occupancy.
- C. *Appropriation or to appropriate* - an action by the Board to identify specific Public Education Facilities for which Impact Fee funds may be utilized. Appropriation shall include, but shall not necessarily be limited to: inclusion of a Public Education Facility in the adopted School District budget or capital improvements program; execution of a contract or other legal encumbrance for construction of a Public Education Facility using Impact Fee funds in whole or in part; and actual expenditure of Impact Fee funds through payments made from an Impact Fee account.
- D. *Board* - the Board of Trustees of School District No. 2 of Dorchester County.
- E. *Demand* - the increment of Public Education Facilities that a new Dwelling Unit requires and utilizes, measured by the applicable student generation rate.
- F. *Director* - the Director of Finance for the School District or her designee.
- G. *Dwelling Unit* — all residential units, including, but not limited to, single family attached, single family detached, duplex, condominium, townhouse, multifamily, apartment, and mobile home, but excluding hotels and motels, pursuant to the Act.
- H. *Impact Fee* - a fee related to a Public Education Facility which is imposed on new Dwelling Units in connection with and as a condition of the issuance of a certificate of occupancy and which is calculated to defray all or a portion of the costs of the Public Education Facilities required to accommodate new Dwelling Units and which reasonably benefit the new Dwelling Units.
- I. *Intergovernmental Agreement* — an agreement executed by the School District and other Local Government responsible for the issuance of a certificate of occupancy for the collection of the Impact Fee by the School District or such other Local Government, for the transfer of all

Impact Fee revenues to the School District, and for the expenditure of said revenues by the School District for Public Education Facilities, as herein defined, to accommodate new residential development at the School District's level of service standards.

J. Local Government - a county, city, municipality, town, township, authority, school district, improvement district, or other special district, any other kind of municipal, quasi-municipal, or public corporation, or any agency or instrumentality of the State of South Carolina properly organized pursuant to applicable law.

K. Low Income Housing - a Dwelling Unit with deed restrictions which require that it be sold exclusively to owners or rented exclusively to lessees earning not more than 50% of the median household income in Dorchester County. Median household income shall be based upon the most recent data available from the United States Bureau of the Census as of the date of the application for a certificate of occupancy.

L. Multiple Uses - a new development consisting of both residential and nonresidential uses or one or more different types of non-residential uses on the same site or part of the same new development.

M. Non-Residential Development means and refers to all development other than Dwelling Units.

N. Public Education Facilities - elementary, middle, high schools and special schools and/or classrooms designed to provide capacity for students generated by new residential development in the School District including, but not necessarily limited to, the following: the planning, design, engineering and construction of the school buildings and associated playgrounds and recreation areas, parking, lighting, landscaping, sidewalks, internal streets, access roads and driveways; legal appraisal and all other costs associated with the acquisition of land; financing and development costs; site preparation costs; and costs associated with the construction of new, or additions to or expansions of existing school facilities including elementary, middle and high schools, special schools and special classrooms which add capacity to the school system.

O. Residential Development - the development of one or more Dwelling Units.

P. Retiree Housing - a Dwelling Unit with deed restrictions which require that it constitutes "housing for older persons" as defined in the Fair Housing Act (42 U.S.C. § 3607(b)(1) and 24 C.F.R § 100.304, as such may be amended from time to time), or a home which pursuant to

such deed restrictions or which is otherwise restricted for occupancy through codes, covenants, or binding restrictions by persons of at least 62 years of age provided, however, that "Retiree Housing" does not include any Dwelling Unit for which said codes, covenants or restrictions have been invalidated by any court of competent jurisdiction.

Q. Student Generation Rate (SGR) - the number of elementary, middle and high school students generated by a typical Dwelling Unit in the School District, and used for planning and capital improvements programming purposes.

SECTION III.

GENERAL PROVISIONS; APPLICABILITY.

A. Term. These Procedures shall remain in effect unless and until repealed, amended or modified by the Board.

B. Annual Review.

1. At least once every year not later than January 1st of each year, beginning January 1, 2010 and prior to Board adoption of the Annual Budget and capital improvements program, the Director or her designee shall coordinate the preparation and submission of a report on the subject of the Impact Fee.

2. The report shall include the following:

a. recommendations on amendments, if appropriate, to these procedures or to this Resolution adopting the Impact Fee;

b. proposed changes to an applicable capital improvements program, including the identification of Public Education Facility projects anticipated to be funded wholly or partially with the Impact Fee;

c. proposed changes to Impact Fee schedules as set forth in this Resolution imposing and setting the Impact Fee;

d. proposed changes to level of service standards;

e. proposed changes in the Impact Fee calculation methodology;

f. other data, analysis or recommendations as the Director or her designee may deem appropriate, or as may be requested by the Board.

3. Submission of Impact Fee Annual Report and Board Action. The Director or her designee shall submit the Impact Fee Annual Report to the

Board, which shall receive the Report and take such actions as it deems appropriate, including, but not limited to, requesting additional data or analyses and holding public workshops and/or public hearings.

C. *Affected Area.*

1. *Geographic Area.* The Impact Fee shall be imposed on new Dwelling Units within the School District.

2. *Local Government.* The Impact Fee adopted by the School District shall, if necessary and appropriate, be collected by the Local Government on new Dwelling Units within the Local Government pursuant to an Intergovernmental Agreement with the School District which provides that the Impact Fee collected by the Local Government be transferred to the School District for expenditure in accordance with the terms of these Procedures.

D. *Type of Development Affected.* These Procedures shall apply to all new Dwelling Units as herein defined.

E. *Type of Development Not Affected.* These Procedures shall not apply to:

1. *Certificates of Occupancy.* No Impact Fee shall be imposed on any new Dwelling Unit for which a certificate of occupancy has been issued prior to the effective date of these Procedures.

2. *Previous Payment of Impact Fees.* Subject to the requirements of Section W.D.2 of this Resolution, no Impact Fee shall be due at a later stage of the certificate of occupancy or approval process if such Impact Fee has been paid for Public Education Facilities at an earlier stage in the certificate of occupancy or approval process.

3. *Public Education Facilities Provided By the State of South Carolina or the Federal Government.* No Impact Fee shall be imposed on the development of Public Education Facilities by the State of South Carolina or the Federal government.

4. *Other Uses.* Regarding structures other than Dwelling Units, no Impact Fee shall be imposed on a use, development, project, structure, building, fence, sign or other activity which does not result in an increase in the demand for Public Education Facilities.

5. *Waivers for Low Income Housing and Retiree Housing.* In order to further the established policy of Dorchester County to promote developments for affordable housing and retirees, no Impact Fee shall be

imposed on Low Income Housing or Retiree Housing as defined in Section II of this Resolution, unless or until the deed or other restriction related to such use is ever changed; at that time, the Impact Fee shall be imposed.

F. *Amendments.* This Resolution may be amended from time to time by the Board provided, however, that no resolution shall be approved which raises any impact fee to an amount that exceeds \$2,500 per Dwelling Unit.

SECTION IV.

PROCEDURES FOR IMPOSITION, CALCULATION AND COLLECTION OF THE IMPACT FEE.

A. *In General.* Pursuant to any Intergovernmental Agreement, an Applicant shall be notified of the Impact Fee requirements at the time of application for a certificate of occupancy. The Impact Fee shall be calculated by the School District and shall be paid by the Applicant prior to the issuance of a certificate of occupancy.

B. *Calculation.*

1. An Impact Fee of \$2,500 per Dwelling Unit shall be imposed which sum is the maximum sum permitted by the Act and which sum is supported by the following methodology. As mentioned on page 1 herein, new residential development generates an average demand for Public Education Facilities of .5 students per Dwelling Unit. Thus, a residential development of 1,600 Dwelling Units is expected to result in 800 students. At the \$2,500 Impact Fee per Dwelling Unit, a total of 1,600 Dwelling Units would produce total Impact Fees of \$4,000,000. The cost of a single Public Education Facility for 800 students is estimated to be \$22,870,000 which is the product of the 90,000 square feet required for such a facility multiplied by the now prevailing construction/equipping cost per square foot. Thus, the amount of the Impact Fee authorized herein is significantly less than the cost of the Public Education Facilities the School District might be expected to provide by virtue of new residential development.

C. *Offsets.*

1. According to the Act, offsets against the amount of the Impact Fee due from a new Dwelling Unit shall be provided by any other cash payment paid by the Applicant and obtained by the School District as a result of an agreement between the Applicant and another Local Government. Such cash payment is determined by the Director to be a reasonable substitute for the cost of Public Education Facilities which are included in the Impact Fee calculation methodology.

2. Applications for offsets shall be made on forms provided by the School District and shall be submitted at or before the time of filing the certificate of occupancy application. The application for an offset shall be accompanied by relevant documentary evidence establishing the eligibility of the Applicant for the offset. When an application for an offset accompanies an application for a certificate of occupancy or approval, the Director shall calculate the Impact Fee without the offset and shall then determine whether an offset is due and, if so, the amount of the offset. The offset shall be applied against the Impact Fee calculated to be due; provided, however, that in no event shall an offset be granted in an amount exceeding the Impact Fee due.

D. Collection.

1. The Director or other Local Government shall collect the Impact Fee at the time of issuance of a certificate of occupancy unless:

a. the Applicant is determined to be entitled to a full offset; or

b. the Applicant has been determined to be not subject to the payment of the Impact Fee; or

c. the Applicant has taken an appeal and a letter of credit in a form satisfactory to the Board in the amount of the Impact Fee, as calculated by the Director, has been posted with the School District.

2. The Director or other Local Government shall collect the Impact Fee at the time of issuance of a certificate of occupancy even if the Impact Fee was paid by the Applicant at an earlier time in the certificate of occupancy or approval process if the amount of the Impact Fee has increased since such prior approval. The Applicant shall only be liable for the difference between the Impact Fee paid earlier and the Impact Fee in effect at the time of issuance of a certificate of occupancy.

SECTION V. ESTABLISHMENT OF AN IMPACT
FEE ACCOUNT; APPROPRIATION OF IMPACT
FEE FUNDS; AND REFUNDS.

A. Impact Fee Account. An Impact Fee account shall be established by the School District for the Public Education Facilities for which the Impact Fee is imposed. Such account shall clearly identify the category, account, or fund for which the Impact Fee has been imposed. The Impact Fee collected by the School District shall be deposited into the Impact Fee account which shall be interest bearing. All interest earned or monies deposited to such account shall be credited to and shall be considered funds of the account. The funds of such account shall not be commingled

with other funds or revenues of the School District. The Director shall establish and implement necessary accounting controls to ensure that the Impact Fee funds are properly deposited, accounted for and appropriated in accordance with these Procedures, the Act and any other applicable legal requirements.

B. Appropriation of Impact Fee Funds.

1. *In General.* Impact Fee funds may be appropriated for Public Education Facilities and for the payment of principal, interest and other financing costs on new or existing bonds, notes or other obligations issued by or on behalf of the School District to finance such Public Education Facilities.

2. *Restrictions on Appropriations.* The Impact Fee shall be appropriated only (a) for Public Education Facility for which it was imposed, calculated and collected; (b) within the School District where collected unless the Impact Fee funds will be appropriated for a Public Education Facility necessitated by or serving the new Dwelling Unit as provided herein; and (c) within six years of the beginning of the Fiscal Year immediately succeeding the date of collection, unless such time period is extended as provided herein. The Impact Fee shall not be appropriated for funding maintenance or repair of Public Education Facilities nor for operational or personnel expenses associated with the provision of the Public Education Facility.

3. *Appropriation of Impact Fee Funds Beyond Six Years of Collection.* Notwithstanding Section V.D.l.b., *infra*, Impact Fee funds may be appropriated beyond six years from the beginning of the Fiscal Year immediately succeeding the date of collection if the appropriation is for a Public Education Facility which requires more than six years to plan, design and construct and the demand for the Public Education Facility is generated in whole or in part by the new development, or if the Public Education Facility will serve the new Dwelling Unit.

C. Procedure for Appropriation of Impact Fee Funds.

1. *The School District shall each year identify Public Education Facility projects anticipated to be funded in whole or in part with the Impact Fee. The Public Education Facility recommendations shall be based upon the Impact Fee annual review set forth in Section III.B. and such other information as may be relevant, but shall not be part of the annual budget and capital improvements programming process.*

2. The recommendations shall be consistent with the provisions of these Procedures, this Resolution, applicable legal requirements and any guidelines adopted by the Board.

3. The Board may include Impact Fee-funded Public Education Facilities in the School District's annual budget and capital improvements program. If included, the description of the Public Education Facility shall specify the nature of the facility, the location of the Public Education Facility, the capacity to be added by the Public Education Facility the service area of the Public Education Facility, the need/demand for the Public Education Facility and the anticipated timing of completion of the Public Education Facility.

4. The Board shall verify that adequate Impact Fee funds are or will be available from the Impact Fee account for the specified Public Education Facility.

D. Refunds.

1. Eligibility for Refund.

a. Expiration or Revocation of Certificate of Occupancy or Approval. An Applicant who has paid the Impact Fee for a new Dwelling Unit for which the necessary certificate of occupancy approval has expired or for which the certificate of occupancy approval has been revoked shall be eligible to apply for a refund of the Impact Fee paid.

b. Failure of School District to Appropriate Impact Fee Funds Within Time Limit. The current property owner may apply for a refund of the Impact Fee paid by an Applicant if the School District has failed to appropriate the Impact Fee collected from the Applicant within the time limits established in Sections V.B.2. and V.B.3.

c. Decrease in Applicable Impact Fee. The current property owner may apply for a partial refund of the Impact Fee paid by an Applicant if the School District reduces the amount of the Impact Fee for a Public Education Facility within 120 days of the effective date of this Resolution. The amount of the refund shall be the difference between the original fee and the reduced fee.

2. Except as provided in Sections V.D.1.a. and V.D.5., refunds shall be made only to the current owner of property on which the new Dwelling Unit was proposed or occurred.

3. Processing of Applications for a Refund. Applications for a refund shall include all information required in Sections V.D.4. or 5., as

appropriate. Upon receipt of a complete application for a refund, the Director shall review the application and documentary evidence submitted by the Applicant as well as such other information and evidence as may be deemed relevant, and make a determination of whether a refund is due. Refunds by direct payment shall be made following an affirmative determination by the Director.

4. Applications for refunds due to the failure of the School District to appropriate the Impact Fee collected from the Applicant within the time limits established in Section V.B.2. shall be made on forms provided by the School District and shall be made within one year following the expiration of such time limit. The Applicant shall submit (a) evidence that the Applicant is the property owner or the duly designated agent of the property owner, (b) the amount of the Impact Fee paid by the Applicant and receipt evidencing such payment, and (c) description and documentation of the School District's failure to appropriate Impact Fee funds for relevant Public Education Facilities. Refunds shall include a pro rata share of interest earned by the Impact Fee account calculated at the average annual rate of interest for each of the years during which the Applicant's Impact Fee was in the account divided by the number of years in which the Impact Fee was in the account.

SECTION VI. APPEALS.

A. An appeal from any decision of the Director pursuant to these Procedures shall be made to the Board; provided, however, that if the notice of appeal is accompanied by a letter of credit in a form satisfactory to the Board in an amount equal to the Impact Fee calculated by the Director to be due, the new Dwelling Unit may be permitted or approved.

B. The burden of proof shall be on the appellant to demonstrate that the decision of the Director is erroneous.

SECTION VII. EXEMPTIONS/WAIVERS.

A. Filing of Application. Petitions for exemptions to the application of these Procedures or waivers from the Impact Fee shall be filed with the Board.

B. Effect of Grant of Exemption/Waiver. If the Board grants an exemption or waiver in whole or in part of the Impact Fee otherwise due, the amount of the Impact Fee exempted or waived shall be provided by the School District or other appropriate body as may be provided in this Resolution.

C. *Timing of Provision of Waived/Exempted Impact Fees. The provision of the amount of exempted or waived Impact Fee by the School District or other appropriate body to the Impact Fee account shall be made within a reasonable period of time consistent with the School District's capital improvements program.*

**SECTION VIII.
CONFLICT.**

To the extent of any conflict between other School District resolutions and these Procedures, these Procedures shall be deemed to be controlling; provided, however, that these Procedures are not intended to amend or repeal any existing School District resolution or regulation.

**SECTION IX.
SEVERABILITY.**

A. *If any section, subsection, sentence, clause, phrase or portion of these Procedures is, for any reason, held invalid or unconstitutional by any court of competent jurisdiction such section, subsection, sentence, clause, phrase or portion of these Procedures shall be deemed to be a separate, distinct and independent provision and such holding shall not affect the validity of the remaining provisions of these Procedures nor impair or nullify the remainder of such Procedures which shall continue in full force and effect.*

B. *If the application of any provision of these Procedures to any new Dwelling Unit is declared to be invalid by a decision of any court of competent jurisdiction, the intent of the Board is that such decision shall be limited to the specific new Dwelling Unit immediately involved in the controversy, action or proceeding in which such decision of invalidity was rendered. Such decision shall not affect, impair, or nullify these Procedures as a whole or the application of any provision of these Procedures to any other new Dwelling Unit.*

9. Plaintiffs CTHBA and SCHBA are associations of residential homebuilders whose members are actively engaged in the development of residential subdivisions and the construction of single and multi-family residential buildings within the geographic boundaries of School District No.2 of Dorchester County.

10. All residential homebuilder members of the CTHBA are also members of the SCHBA.

11. Since June 23, 2009, residential homebuilder members of CTHBA and SCHBA constructing homes within the geographic boundaries of School District No.2 of Dorchester County have been charged the impact fee imposed pursuant to the Resolution ("School District Impact Fees") as a condition precedent to being issued a Certificate of Occupancy for newly constructed residential dwellings. At least one (1) member of both the TCHBA and the SCHBA have been charged a School District Impact Fee.

12. School District Impact Fees imposed upon the members of the TCHBA and SCHBA have been paid under protest reserving all rights and remedies to contest the validity of the Resolution and the power of the School District to impose an impact fee and to seek a refund in the event it is determined that the School District Impact Fees are invalid or improper.

FOR A CAUSE OF ACTION

19. The foregoing allegations are incorporated herein as if set forth verbatim herein.

20. The Act applies only to the School District and not to other school districts within the State of South Carolina.

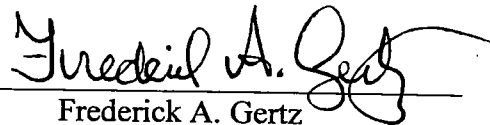
21. The needs for funding of the School District apply equally to many, if not all, other school districts within the State of South Carolina. The School District does not have unique funding requirements. Other school districts within the State are similarly situated in that they are required to construct or expand facilities in order to meet the demands of a growing population within the district.

22. The purpose sought to be served by the Act can be equally fulfilled by general legislation applicable to all school districts within the State of South Carolina.

23. The Act's application to a single school district without any peculiar or unique conditions, resulting in special treatment, violates the provisions of the South Carolina Constitution, in particular Art. III, § 34 (limiting "special legislation") and Art. VIII, § 14(6) (requiring statewide uniformity).

WHEREFORE, Plaintiff prays that this Court (1) inquire fully into the matters alleged herein; (2) issue its temporary injunction during the pendency of this action enjoining the Defendants from collecting or imposing the School District Impact Fee; (3) declare the School District Impact Fee invalid and unenforceable; (4) permanently enjoining the Defendants from collecting or imposing the School District Impact Fee; and (5) grant such other and further relief as be just, equitable, lawful and proper.

Columbia, South Carolina
September 28, 2009



Frederick A. Gertz
SC Bar # 2429
Gertz & Moore
1416 Laurel Street
Post Office Box 456
Columbia, South Carolina 29202
(803) 252-1524
Attorneys for Plaintiffs

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

The Home Builders Association of South
Carolina and the Charleston-Trident Home
Builders Association, Inc.,

Plaintiffs,

v.

School District No. 2 of Dorchester County
and the Board of Trustees for Dorchester
School District No. 2,

Defendants.

IN THE COURT OF COMMON PLEAS

2009-CP-18-2764

**DEFENDANTS'
ANSWER**

TO: FREDERICK A. GERTZ, ATTORNEY FOR THE PLAINTIFFS:

Answering the Complaint, Defendants School District No. 2 of Dorchester County and the Board of Trustees for Dorchester School District No. 2, herein allege and state as follows:

1. The allegations of Plaintiffs' Complaint, unless specifically admitted or qualified herein, are denied and strict proof thereof is demanded.
2. Defendants admit, upon information and belief, the allegations of Paragraphs 1 and 2.
3. Defendants admit the allegations of Paragraphs 3 through 6.
4. Answering the allegations of Paragraph 7, Defendants admit the General Assembly of the State of South Carolina passes and enrolled Senate Bill 235 and submit the referenced Act speaks for itself.
5. Answering the allegations of Paragraph 8, Defendants admit the Trustees adopted a Resolution effective June 23, 2009 and that Paragraph 8 putatively quotes the Resolution.

Defendants deny the allegations of Paragraph 8 to the extent inaccuracies in the quotation of the Resolution exist. Defendants attach hereto as Exhibit 1 a true and correct copy of said Resolution and crave reference to the same.

6. Paragraph 9 is admitted, upon information and belief.
7. Defendants lack sufficient information to either admit or deny the allegations of Paragraph 10.
8. Answering the allegations of Paragraph No. 11, Defendants state that the Resolution was adopted on June 22, 2009 and, upon information and belief, admit certain developers of new residential dwelling units constructed within the school district have been charged the impact fee. Defendants lack sufficient information to either admit or deny the remaining allegations of Paragraph 11.
9. Defendants lack sufficient information to either admit or deny the allegations of Paragraph No. 12.
10. No response is required to Paragraph 19 (misnumbered).
11. Paragraph 20 (misnumbered) is admitted.
12. Paragraph 21 (misnumbered) is denied.
13. The allegations of Paragraph 22 (misnumbered) contain conclusions of law to which no response is required.
14. Paragraph 23 (misnumbered) is denied.

WHEREFORE, having answered Plaintiffs' Complaint, Defendants pray for an Order dismissing the Complaint and for such other and further relief as the Court deems just and proper.

By: Charlton deSaussure Jr.

Charlton deSaussure, Jr.

Marvin D. Infinger

Anne R. Rosen

HAYNSWORTH SINKLER BOYD, P.A.

134 Meeting Street, Third Floor

Charleston, SC 29401-2240

Telephone: 843-722-3366

Facsimile: 843-722-2266

Counsel for Defendants

October 27, 2009
Charleston, South Carolina

A RESOLUTION ESTABLISHING AND ADOPTING A PUBLIC FACILITIES IMPACT FEE TO BE IMPOSED ON NEW RESIDENTIAL DWELLING UNITS AND PROCEDURES FOR THE IMPOSITION, CALCULATION, COLLECTION, EXPENDITURE AND ADMINISTRATION OF SUCH IMPACT FEES.

WHEREAS, School District No. 2 of Dorchester County (the "School District"), South Carolina is authorized, under Act bearing Ratification Number 2 of the Acts and Joint Resolutions of the General Assembly of South Carolina enacted February 26, 2009 (the "Act"), to establish and impose impact fees on new Dwelling Units to finance new Public Education Facilities for grades 4K through 12 within the School District necessitated by such development and for the payment of principal and interest on existing or new bonds issued by the School District for the construction of Public Education Facilities for grades 4K through 12; and

WHEREAS, the School District has experienced rapid population growth and development during the past decade and it is expected that growth will continue; and

WHEREAS, the School District has recently experienced the impacts on Public Education Facilities resulting from such growth and development; and

WHEREAS, the School District has certain standards by grade level such as these relating to school site sizes, school population, instructional classroom size and teacher-student ratio; and

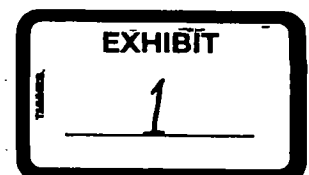
WHEREAS, these standards and the projected residential development effect future school needs; and

WHEREAS, the cost of land acquisition and construction and equipping of new schools occasioned in part by growth and development is significant; and

WHEREAS, it is appropriate that bonds used to finance new schools needed to meet the demand generated by new residential development be backed not only by property taxes but also by the impact fee permitted by the Act in order that the bonds be paid by taxpayers who have paid for the School District's current facilities but also by those who contribute to the demand for the new schools because of such growth and development; and

WHEREAS, the School District therefore finds that it is fair and equitable for new Dwelling Units to fund, in whole or in part, the cost of new school facilities whose need will result from such new residential development; and

WHEREAS, a 2005 study by InRe Financial, LLC indicates that new residential development on average (Dwelling Units) generates a demand for Public Education Facilities of .5 students per Dwelling Unit, be it for elementary, middle or high school, as a result of which the Public Education Facilities Impact Fee (as defined herein, the "Impact Fee") shall be imposed uniformly on all new Dwelling Units, regardless of size, type or density; and



WHEREAS, the Impact Fee as authorized by the Act shall be imposed uniformly on all new Dwelling Units within the School District, regardless of the location of the residential development within the School District; and

WHEREAS, the use of uniform procedures for the imposition, calculation, collection, expenditure and administration of the Impact Fee will best ensure that the Impact Fee is collected solely for and expended for the Public Education Facilities for which it was imposed and collected; and

WHEREAS, any moneys collected from the Impact Fee shall be deposited in an interest-bearing account which clearly identifies the category, account, fund and Public Education Facility for which such fee was imposed; and

WHEREAS, the fund or account and each category of system improvements shall be accounted for separately; provided, however, that the determination as to whether the accounting requirement shall be by category, account or fund and whether by aggregate or individual residential development shall be within the discretion of the School District; and

WHEREAS, any interest or other income earned on moneys deposited in said interest-bearing account shall be credited to the account; and

WHEREAS, the Board has found and determined that the Impact Fee is appropriate for funding Public Education Facilities within the School District; and

NOW, THEREFORE, BE IT RESOLVED by the Board of Trustees of School District No. 2 of Dorchester County, South Carolina that the following Impact Fee and Impact Fee Procedures and requirements are set forth and are applicable to all new Dwelling Units:

SECTION I. ADOPTION AND IMPOSITION OF THE IMPACT FEE AND PURPOSE AND INTENT OF IMPACT FEE PROCEDURES.

- A. Pursuant to the Impact Fee Procedures, this Resolution, and the Act, the Impact Fee shall be adopted and imposed on all new Dwelling Units in the School District.
- B. The purposes and intent of the Impact Fee Procedures are:
 - 1. To establish uniform procedures for the imposition, calculation, collection, expenditure and administration of the Impact Fee imposed on new residential development;
 - 2. To implement the goals, objectives and policies of the School District relating to assuring that new residential development contributes towards the costs of Public Education Facilities reasonably necessitated by such new residential development;

3. To ensure that new residential development is reasonably benefitted by the provision of the Public Education Facilities provided with the proceeds of the Impact Fee;
4. To ensure that all applicable legal standards and criteria are properly incorporated in these procedures.

SECTION II. DEFINITIONS.

- A. Adopted Level of Service (LOS) Standard - the adequacy of Public Education Facilities to accommodate the students from new residential development at the School District's level of service standards.
- B. Applicant - any person who files an application for a certificate of occupancy.
- C. Appropriation or to appropriate - an action by the Board to identify specific Public Education Facilities for which Impact Fee funds may be utilized. Appropriation shall include, but shall not necessarily be limited to: inclusion of a Public Education Facility in the adopted School District budget or capital improvements program; execution of a contract or other legal encumbrance for construction of a Public Education Facility using Impact Fee funds in whole or in part; and actual expenditure of Impact Fee funds through payments made from an Impact Fee account.
- D. Board - the Board of Trustees of School District No. 2 of Dorchester County.
- E. Demand - the increment of Public Education Facilities that a new Dwelling Unit requires and utilizes, measured by the applicable Student Generation Rate.
- F. Director - the Director of Finance for the School District or her designee.
- G. Dwelling Unit - all residential units, including, but not limited to, single family attached, single family detached, duplex, condominium, townhouse, multifamily, apartment, and mobile home, but excluding hotels and motels, pursuant to the Act.
- H. Impact Fee - a fee related to a Public Education Facility which is imposed on new Dwelling Units in connection with and as a condition of the issuance of a certificate of occupancy and which is calculated to defray all or a portion of the costs of the Public Education Facilities required to accommodate new Dwelling Units and which reasonably benefit the new Dwelling Units.
- I. Intergovernmental Agreement - an agreement executed by the School District and other Local Government responsible for the issuance of a certificate of occupancy for the collection of the Impact Fee by the School District or such other Local Government, for the transfer of all Impact Fee revenues to the School District,

and for the expenditure of said revenues by the School District for Public Education Facilities, as herein defined, to accommodate new residential development at the School District's level of service standards. The form of Intergovernmental Agreement is attached hereto as Exhibit A which may be entered into by the Director with such changes as he shall approve.

- J. Local Government - a county, city, municipality, town, township, authority, school district, improvement district, or other special district, any other kind of municipal, quasi-municipal, or public corporation, or any agency or instrumentality of the State of South Carolina properly organized pursuant to applicable law.
- K. Low Income Housing - a Dwelling Unit with deed restrictions which require that it be sold exclusively to owners or rented exclusively to lessees earning not more than 50% of the median household income in Dorchester County. Median household income shall be based upon the most recent data available from the United States Bureau of the Census as of the date of the application for a certificate of occupancy.
- L. Multiple Uses - a new development consisting of both residential and non-residential uses or one or more different types of non-residential uses on the same site or part of the same new development.
- M. Non-Residential Development means and refers to all development other than Dwelling Units.
- N. Public Education Facilities - elementary, middle, high schools and special schools and/or classrooms designed to provide capacity for students generated by new residential development in the School District including, but not necessarily limited to, the following: the planning, design, engineering and construction of the school buildings and associated playgrounds and recreation areas, parking, lighting, landscaping, sidewalks, internal streets, access roads and driveways; legal appraisal and all other costs associated with the acquisition of land; financing and development costs; site preparation costs; and costs associated with the construction of new, or additions to or expansions of existing school facilities including elementary, middle and high schools, special schools and special classrooms which add capacity to the school system.
- O. Residential Development - the development of one or more Dwelling Units.
- P. Retiree Housing - a Dwelling Unit with deed restrictions which require that it constitutes "housing for older persons" as defined in the Fair Housing Act (42 U.S.C. § 3607(b)(1) and 24 C.F.R § 100.304, as such may be amended from time to time), or a home which pursuant to such deed restrictions or which is otherwise restricted for occupancy through codes, covenants, or binding restrictions by persons of at least 62 years of age provided, however, that "Retiree Housing" does

not include any Dwelling Unit for which said codes, covenants or restrictions have been invalidated by any court of competent jurisdiction.

- Q. Student Generation Rate (SGR) - the number of elementary, middle and high school students generated by a typical Dwelling Unit in the School District, and used for planning and capital improvements programming purposes.

SECTION III. GENERAL PROVISIONS; APPLICABILITY.

- A. Term. This Resolution shall remain in effect unless and until repealed, amended or modified by the Board.
- B. Annual Review.
1. At least once every year not later than January 1st of each year, beginning January 1, 2010 and prior to Board adoption of the Annual Budget and capital improvements program, the Director or her designee shall coordinate the preparation and submission of a report on the subject of the Impact Fee.
 2. The report shall include the following:
 - a. recommendations on amendments, if appropriate, to these procedures or to this Resolution adopting the Impact Fee;
 - b. proposed changes to an applicable capital improvements program, including the identification of Public Education Facility projects anticipated to be funded wholly or partially with the Impact Fee;
 - c. proposed changes to level of service standards;
 - d. proposed changes in the Impact Fee calculation methodology; and
 - e. other data, analysis or recommendations as the Director or her designee may deem appropriate, or as may be requested by the Board.
 3. Submission of Impact Fee Annual Report and Board Action. The Director or her designee shall submit the Impact Fee Annual Report to the Board, which shall receive the Report and take such actions as it deems appropriate, including, but not limited to, requesting additional data or analyses and holding public workshops and/or public hearings.
- C. Affected Area.
1. Geographic Area. The Impact Fee shall be imposed on new Dwelling Units within the School District.

2. Local Government. The Impact Fee adopted by the School District shall, if necessary and appropriate, be collected by the Local Government on new Dwelling Units within the Local Government pursuant to an Intergovernmental Agreement with the School District which provides that the Impact Fee collected by the Local Government be transferred to the School District for expenditure in accordance with the terms of this Resolution.
- D. Type of Development Affected. This Resolution shall apply to all new Dwelling Units as herein defined.
- E. Type of Development Not Affected. This Resolution shall not apply to:
1. Certificates of Occupancy. No Impact Fee shall be imposed on any new Dwelling Unit for which a certificate of occupancy has been issued prior to the effective date of this Resolution.
 2. Previous Payment of Impact Fees. Subject to the requirements of Section IV.D.2 of this Resolution, no Impact Fee shall be due at a later stage of the certificate of occupancy or approval process if such Impact Fee has been paid for Public Education Facilities at an earlier stage in the certificate of occupancy or approval process.
 3. Public Education Facilities Provided By the State of South Carolina or the Federal Government. No Impact Fee shall be imposed on the development of Public Education Facilities by the State of South Carolina or the Federal Government.
 4. Other Uses. Regarding structures other than Dwelling Units, no Impact Fee shall be imposed on a use, development, project, structure, building, fence, sign or other activity which does not result in an increase in the Demand for Public Education Facilities.
 5. Waivers for Low Income Housing and Retiree Housing. In order to further the established policy of Dorchester County to promote developments for affordable housing and retirees, no Impact Fee shall be imposed on Low Income Housing or Retiree Housing as defined in Section II of this Resolution, unless or until the deed or other restriction related to such use is ever changed; at that time, the Impact Fee shall be imposed.
 6. Certain Replacement Dwelling Units. Consistent with § 6-1-970(3), Code of Laws of South Carolina, 1976, as amended, which addresses impact fees imposed by counties and municipalities, replacing a Dwelling Unit, including a manufactured home, with another Dwelling Unit on the same

lot, is exempt from the Impact Fee, if the number of service units does not increase.

7. Building Permits Obtained Prior to Effective Date. No Impact Fee shall be imposed on new Dwelling Units for which a building permit has been issued prior to the effective date of this Resolution.
- F. Amendments. This Resolution may be amended from time to time by the Board provided, however, that no resolution shall be approved which raises any impact fee to an amount that exceeds \$2,500 per Dwelling Unit.

SECTION IV. PROCEDURES FOR IMPOSITION, CALCULATION AND COLLECTION OF THE IMPACT FEE.

- A. In General. Pursuant to any Intergovernmental Agreement, an Applicant shall be notified of the Impact Fee requirements at the time of application for a certificate of occupancy. The Impact Fee shall be calculated by the School District and shall be paid by the Applicant prior to the issuance of a certificate of occupancy.
- B. Calculation.
 1. An Impact Fee of \$2,500 per Dwelling Unit shall be imposed which sum is the maximum sum permitted by the Act and which sum is supported by the following methodology. As mentioned on page 1 herein, new residential development generates an average Demand for Public Education Facilities of .5 students per Dwelling Unit. Thus, a residential development of 1,600 Dwelling Units is expected to result in 800 students. At the \$2,500 Impact Fee per Dwelling Unit, a total of 1,600 Dwelling Units would produce total Impact Fees of \$4,000,000. The cost of a single Public Education Facility for 800 students is estimated to be \$22,870,000 which is the product of the 90,000 square feet required for such a facility multiplied by the now prevailing construction/equipping cost per square foot. Thus, the amount of the Impact Fee authorized herein is significantly less than the cost of the Public Education Facilities the School District might be expected to provide by virtue of new residential development.
- C. Offsets.
 1. According to the Act, offsets against the amount of the Impact Fee due from a new Dwelling Unit shall be provided by any other cash payment paid by the Applicant and obtained by the School District as a result of an agreement between the Applicant and another Local Government. Such cash payment is determined by the Director to be a reasonable substitute for the cost of Public Education Facilities which are included in the Impact Fee calculation methodology.

2. Applications for offsets shall be made on forms provided by the School District and shall be submitted at or before the time of filing the certificate of occupancy application. The application for an offset shall be accompanied by relevant documentary evidence establishing the eligibility of the Applicant for the offset. When an application for an offset accompanies an application for a certificate of occupancy or approval, the Director shall calculate the Impact Fee without the offset and shall then determine whether an offset is due and, if so, the amount of the offset. The offset shall be applied against the Impact Fee calculated to be due; provided, however, that in no event shall an offset be granted in an amount exceeding the Impact Fee due.

D. Collection.

1. The Director or other Local Government shall collect the Impact Fee at the time of issuance of a certificate of occupancy unless:
 - a. the Applicant is determined to be entitled to a full offset; or
 - b. the Applicant has been determined to be not subject to the payment of the Impact Fee; or
 - c. the Applicant has taken an appeal and a letter of credit in a form satisfactory to the Board in the amount of the Impact Fee, as calculated by the Director, has been posted with the School District.
2. The Director or other Local Government shall collect the Impact Fee at the time of issuance of a certificate of occupancy even if the Impact Fee was paid by the Applicant at an earlier time in the certificate of occupancy or approval process if the amount of the Impact Fee has increased since such prior approval. The Applicant shall only be liable for the difference between the Impact Fee paid earlier and the Impact Fee in effect at the time of issuance of a certificate of occupancy.

**SECTION V. ESTABLISHMENT OF AN IMPACT FEE ACCOUNT;
APPROPRIATION OF IMPACT FEE FUNDS; AND REFUNDS.**

- A. Impact Fee Account. An Impact Fee account shall be established by the School District for the Public Education Facilities for which the Impact Fee is imposed. Such account shall clearly identify the category, account, or fund for which the Impact Fee has been imposed. The Impact Fee collected by the School District shall be deposited into the Impact Fee account which shall be interest bearing. All interest earned or monies deposited to such account shall be credited to and shall be considered funds of the account. The funds of such account shall not be commingled with other funds or revenues of the School District. The Director

shall establish and implement necessary accounting controls to ensure that the Impact Fee funds are properly deposited, accounted for and appropriated in accordance with this Resolution, the Act and any other applicable legal requirements.

B. Appropriation of Impact Fee Funds.

1. In General. Impact Fee funds may be appropriated for Public Education Facilities and for the payment of principal, interest and other financing costs on new or existing bonds, notes or other obligations issued by or on behalf of the School District to finance such Public Education Facilities.
2. Restrictions on Appropriations. The Impact Fee shall be appropriated only (a) for Public Education Facility for which it was imposed, calculated and collected; (b) within the School District where collected unless the Impact Fee funds will be appropriated for a Public Education Facility necessitated by or serving the new Dwelling Unit as provided herein; and (c) within six years of the beginning of the Fiscal Year immediately succeeding the date of collection, unless such time period is extended as provided herein. The Impact Fee shall not be appropriated for funding maintenance or repair of Public Education Facilities nor for operational or personnel expenses associated with the provision of the Public Education Facility.
3. Appropriation of Impact Fee Funds Beyond Six Years of Collection. Notwithstanding Section V.D.I.b., *infra*, Impact Fee funds may be appropriated beyond six years from the beginning of the Fiscal Year immediately succeeding the date of collection if the appropriation is for a Public Education Facility which requires more than six years to plan, design and construct and the Demand for the Public Education Facility is generated in whole or in part by the new development, or if the Public Education Facility will serve the new Dwelling Unit.

C. Procedure for Appropriation of Impact Fee Funds.

1. The School District shall each year identify Public Education Facility projects anticipated to be funded in whole or in part with the Impact Fee. The Public Education Facility recommendations shall be based upon the Impact Fee annual review set forth in Section III.B. and such other information as may be relevant, but shall not be part of the annual budget and capital improvements programming process.
2. The recommendations shall be consistent with the provisions of these procedures, this Resolution, applicable legal requirements and any guidelines adopted by the Board.

3. The Board may include Impact Fee-funded Public Education Facilities in the School District's annual budget and capital improvements program. If included, the description of the Public Education Facility shall specify the nature of the Public Education Facility, the location of the Public Education Facility, the capacity to be added by the Public Education Facility, the service area of the Public Education Facility, the Demand for the Public Education Facility, and the anticipated timing of completion of the Public Education Facility.
4. The Board shall verify that adequate Impact Fee funds are or will be available from the Impact Fee account for the specified Public Education Facility.

D. Refunds.

1. Eligibility for Refund.
 - a. Expiration or Revocation of Certificate of Occupancy or Approval. An Applicant who has paid the Impact Fee for a new Dwelling Unit for which the necessary certificate of occupancy approval has expired or for which the certificate of occupancy approval has been revoked shall be eligible to apply for a refund of the Impact Fee paid.
 - b. Failure of School District to Appropriate Impact Fee Funds Within Time Limit. The current property owner may apply for a refund of the Impact Fee paid by an Applicant if the School District has failed to appropriate the Impact Fee collected from the Applicant within the time limits established in Sections V.B.2. and V.B.3.
 - c. Decrease in Applicable Impact Fee. The current property owner may apply for a partial refund of the Impact Fee paid by an Applicant if the School District reduces the amount of the Impact Fee for a Public Education Facility within 120 days of the effective date of this Resolution. The amount of the refund shall be the difference between the original fee and the reduced fee.
2. Except as provided in Section V.D.1.a., refunds shall be made only to the current owner of property on which the new Dwelling Unit was proposed or occurred.
3. Processing of Applications for a Refund. Applications for a refund shall include all information required in Section V.D.4. Upon receipt of a complete application for a refund, the Director shall review the application and documentary evidence submitted by the Applicant as well as such other information and evidence as may be deemed relevant, and make a

determination of whether a refund is due. Refunds by direct payment shall be made following an affirmative determination by the Director.

4. Applications for refunds due to the failure of the School District to appropriate the Impact Fee collected from the Applicant within the time limits established in Section V.B.2. shall be made on forms provided by the School District and shall be made within one year following the expiration of such time limit. The Applicant shall submit (a) evidence that the Applicant is the property owner or the duly designated agent of the property owner, (b) the amount of the Impact Fee paid by the Applicant and receipt evidencing such payment, and (c) description and documentation of the School District's failure to appropriate Impact Fee funds for relevant Public Education Facilities. Refunds shall include a pro rata share of interest earned by the Impact Fee account calculated at the average annual rate of interest for each of the years during which the Applicant's Impact Fee was in the account divided by the number of years in which the Impact Fee was in the account.

SECTION VI. APPEALS.

- A. An appeal from any decision of the Director pursuant to this Resolution shall be made to the Board; provided, however, that if the notice of appeal is accompanied by a letter of credit in a form satisfactory to the Board in an amount equal to the Impact Fee calculated by the Director to be due, the new Dwelling Unit may be permitted or approved.
- B. The burden of proof shall be on the appellant to demonstrate that the decision of the Director is erroneous.

SECTION VII. EXEMPTIONS/WAIVERS.

- A. Filing of Application. Petitions for exemptions to the application of these procedures or waivers from the Impact Fee shall be filed with the Board.
- B. Effect of Grant of Exemption/Waiver. If the Board grants an exemption or waiver in whole or in part of the Impact Fee otherwise due, the amount of the Impact Fee exempted or waived shall be provided by the School District or other appropriate body as may be provided in this Resolution.
- C. Timing of Provision of Waived/Exempted Impact Fees. The provision of the amount of exempted or waived Impact Fee by the School District or other appropriate body to the Impact Fee account shall be made within a reasonable period of time consistent with the School District's capital improvements program.

SECTION VIII. CONFLICT.

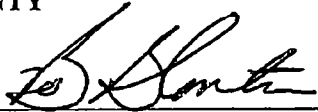
To the extent of any conflict between other School District resolutions and this Resolution, this Resolution shall be deemed to be controlling; provided, however, that this Resolution is not intended to amend or repeal any existing School District resolution or regulation.

SECTION IX. SEVERABILITY.

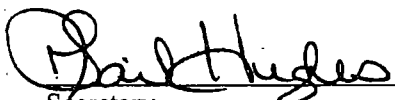
- A. If any section, subsection, sentence, clause, phrase or portion of this Resolution is, for any reason, held invalid or unconstitutional by any court of competent jurisdiction such section, subsection, sentence, clause, phrase or portion of this Resolution shall be deemed to be a separate, distinct and independent provision and such holding shall not affect the validity of the remaining provisions of this Resolution nor impair or nullify the remainder of such Resolution which shall continue in full force and effect.
- B. If the application of any provision of this Resolution to any new Dwelling Unit is declared to be invalid by a decision of any court of competent jurisdiction, the intent of the Board is that such decision shall be limited to the specific new Dwelling Unit immediately involved in the controversy, action or proceeding in which such decision of invalidity was rendered. Such decision shall not affect, impair, or nullify this Resolution as a whole or the application of any provision of this Resolution to any other new Dwelling Unit.

ADOPTED this 22nd day of June, 2009.

SCHOOL DISTRICT NO. 2 OF DORCHESTER
COUNTY

By: 
Chair

ATTEST:


Secretary

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS

2009-CP-18-2764

The Home Builders Association of South
Carolina and the Charleston-Trident Home
Builders Association, Inc.,

Plaintiffs,

v.

School District No. 2 of Dorchester County
and the Board of Trustees for Dorchester
School District No. 2,

Defendants.

**DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS AND
MEMORANDUM IN SUPPORT**

TO: PLAINTIFFS AND PLAINTIFFS' ATTORNEYS

PLEASE TAKE NOTICE that School District No. 2 of Dorchester County and the Board of Trustees for Dorchester School District No. 2 ("Defendants") hereby move pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure for judgment on the pleadings on the grounds that 2009 S.C. Acts 99 violates neither South Carolina Constitution, Art. III, § 34 (IX) nor Art. VIII, § 14 (6).

PROCEDURAL/FACTUAL BACKGROUND

On February 26, 2009, the South Carolina General Assembly passed Senate Bill 235 which became 2009 S.C. Acts 99 (the "Act"). The Act, which is quoted in its entirety in Plaintiffs' Complaint, provides the following synopsis:

SYNOPSIS: AN ACT TO AUTHORIZE THE BOARD OF TRUSTEES FOR DORCHESTER SCHOOL DISTRICT NO. 2 TO IMPOSE AN IMPACT FEE ON ANY DEVELOPER FOR EACH NEW RESIDENTIAL DWELLING UNIT CONSTRUCTED BY THE DEVELOPER WITHIN THE SCHOOL DISTRICT, TO PROVIDE THAT THE FUNDS ONLY MAY BE USED FOR

THE CONSTRUCTION OF PUBLIC EDUCATION FACILITIES FOR GRADES K-12 WITHIN THE DISTRICT AND FOR THE PAYMENT OF PRINCIPAL AND INTEREST ON EXISTING OR NEW BONDS ISSUED BY THE DISTRICT, AND TO PROVIDE THAT THE IMPACT FEE SHALL BE SET AT AN AMOUNT NOT TO EXCEED THE COST THAT EACH ADDITIONAL DWELLING UNIT IMPOSES ON THE SCHOOL DISTRICT FOR PUBLIC EDUCATION FACILITIES.

(Plaintiffs' Complaint, ¶ 7).

As indicated in the synopsis, the Act authorizes the Board of Trustees for Dorchester School District No. 2 (the "Board") to impose an impact fee on developers of new residential dwelling units within Dorchester County School District No. 2 (the "School District") for residential construction. The Act provides that funds so collected must be held in a separate interest bearing account and must be appropriated only for (1) the construction, including preparation costs, of new public education facilities for grades K-12 within the School District; and (2) the payment of principal and interest on existing or new bonds issued by Dorchester School District No. 2 for the construction of public education facilities for grades K-12. Section I, Paragraph G of the Act limits the impact fee to an amount not to exceed \$2,500 per dwelling unit.

On June 23, 2009, the Board enacted a resolution on behalf of the School District establishing and adopting a public facilities impact fee of \$2,500 per dwelling unit. Thus, the Resolution is consistent with the Act which, as stated above, limits the impact fee to an amount "not to exceed the cost that each additional dwelling unit imposes on the school district for public education" and specifically imposes a \$2,500 limit per dwelling unit. As stated in the Resolution, a study by In Re Financial, LLC determined that new residential development on average (Dwelling Units) generates a demand for Public Education Facilities of .5 students per Dwelling unit. The Resolution explains as follows:

Thus, a residential development of 1,600 Dwelling Units is expected to result in 800 students. At the \$2,500 Impact Fee per Dwelling Unit, a total of 1,600 Dwelling Units would produce total Impact Fees of \$4,000,000. The cost of a single Public Education Facility for 800 students is estimated to be \$22,870,000 which is the product of the 90,000 square feet required for such a facility multiplied by the now prevailing construction/equipping cost per square foot. Thus, the amount of the Impact Fee authorized herein is significantly less than the cost of the Public Education Facilities the School District might be expected to provide by virtue of new residential development.

Resolution, Section IV, B. 1.

In addition to limiting the fee imposed on developers of new residential construction in the School District, the Act provides for an appeal process and limits the Act's application to new residential construction which has not been issued a certificate of occupancy.

On September 29, 2009 by The Home Builders Association of South Carolina and the Charleston-Trident Home Builders Association, Inc. ("Plaintiffs") filed a Complaint in which they contend that the Act's application "to a single school district without any peculiar or unique conditions, resulting in special treatment, violates Article III, § 34 (limiting "special legislation") and Article VIII, § 14(6) (requiring statewide uniformity). " (Complaint, ¶ 23). Contrary to Plaintiffs' allegations, the Act and its application are clearly authorized by South Carolina Supreme Court precedent leaving no legally viable claim which could entitle Plaintiffs to the relief requested.

STANDARD OF REVIEW

Pursuant to South Carolina Civil Procedure Rule 12(c), SCRCP, "any party may move for judgment on the pleadings." A motion for judgment on the pleadings tests not whether Plaintiffs will prevail on the merits, but whether Plaintiffs have stated a legally viable claim. Where the pleadings are fatally deficient in substance or fail to state a cause of action in favor of the plaintiff and against the defendant, judgment on the pleadings is proper. *Rosenthal v. Unarco*

Industries, Inc., 278 S.C. 420, 297 S.E.2d 638 (1982) (judgment on the pleadings was proper in dismissing plaintiff's challenge to constitutionality of state door closing statute). The allegations of the pleadings establish that the statute is constitutional under South Carolina Supreme Court precedent and the defendants are entitled to judgment regardless of the outcome of any disputed facts.

In construing an act of the General Assembly, "all reasonable doubt must be resolved in favor of the constitutionality of the act. If a constitutional construction of a statute is possible, that construction should be followed in lieu of an unconstitutional construction." *Crow v. McAlphine*, 277 S.C. 240, 242, 285 S.E.2d 355 (1981) (quoting *Bauer v. South Carolina State Housing Authority*, 271 S.C. 219, 226, 246, 246 S.E.2d 869 (1978)). The Constitution and all laws concerning local governments are to be liberally construed in the local entity's favor. S.C. Constitution, Article VIII, § 17. In addition, the Court must give great deference to the legislatively created classifications in the statute and must sustain them if they are not plainly arbitrary or if any reasonable hypothesis can be found to support them. *Foster v. S.C.D.H.P.T.*, 306 S.C. 519, 413 S.E.2d 31 (1992). Indeed, "[t]hose attacking the validity of the legislation have the burden to negate every conceivable basis which might support it" not just those believed to be in the minds of the General Assembly at the time of its passage. *Lee v. Dept. of Natural Resources*, 339 S.C. 463, 530 S.E.2d 112, note4(2000)(citing *Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307 (1993)).

"[The Court] will not declare a statute unconstitutional as a special law unless its repugnance to the Constitutional is clear beyond a reasonable doubt." *Medical Society of South Carolina v. Medical University of South Carolina*, 334 S.C. 270, 279, 513 S.E.2d 352, 357 (1999) (emphasis added). "[The Court] will not overrule the legislature's judgment that a special

law is necessary unless there has been a clear and palpable abuse of legislative discretion." *Id.*, 513 S.E.2d at 357 (emphasis added).

ARGUMENT

I. THE ACT DOES NOT VIOLATE ARTICLE III, § 34(IX).

Article III, § 34(IX) of the South Carolina Constitution prohibits the South Carolina General Assembly from passing a special law where a general law can be made applicable. The Supreme Court of South Carolina has explained that Article III, § 34(IX) does not prohibit all special legislation. In *Bradley v. Cherokee School District No. One of Cherokee County*, 322 S.C. 181, 470 S.E.2d 570 (1996), the South Carolina Supreme Court considered whether an act allowing a particular school district to impose a sales tax was unconstitutional special legislation pursuant to Article III, § 34(IX). The Supreme Court concluded:

A law that is special only in the sense that it imposes a lawful tax limited in application and incidence to persons or property within a certain school district does not contravene the provisions of Article III, § 34(IX). *Hay v. Leonard*, 212 S.C. 81, 46 S.E.2d 653 (1948). Individual districts may impose a legal tax limited in application and incidence to persons or property within the prescribed area. *Shillito v. Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948).

In the present case, the Act authorizes the Board to impose an impact fee on any developer for each new residential dwelling unit constructed by the developer within the school district. The funds may only be used for the benefit of public education facilities within the district, i.e., (1) for the construction of public education facilities for grades K-12 within the district, and (2) for the payment of principal and interest on existing or new bonds issued by the district. Substitution of the sales tax in the *Cherokee School District No. One* case with the impact fee here provides a fact situation identical to that approved by the South Carolina Supreme Court in its 1996 decision quoted above. The controlling legal principle is equally applicable in that the impact fee is limited to persons or property within the school district for the

benefit of all persons residing within the school district just as the sales tax was in the *Cherokee School District No. One* case.

The decision in that case clarifies the holding of the South Carolina Supreme Court in *Horry County v. Horry County Higher Educ. Comm'n*, 306 S.C. 416, 412 S.E.2d 431 (1991). In *Horry County*, the Court addressed the constitutionality of an act allowing the Horry County Higher Education Commission to levy an ad valorem tax which benefited only one institution of higher learning, Coastal Carolina University. The Court determined that because the legislation in question applied to only one county and benefited only one institution, the legislation violated Article III, § 34(LX). The *Cherokee School District No. One* decision explained that in the *Horry County* case "the funds collected from the tax were not used for the benefit of all persons residing within the area." *Cherokee School District No. One*, 470 S.E.2d at 572. Applying that explanation to the holding in *Horry County* demonstrates the Court's concern that Coastal Carolina University, an institution of higher learning, was singled out for "special treatment."

Similar facts are not present here. The proceeds of the impact fee are used exclusively for the School District just as the proceeds of the sales tax are used exclusively for Cherokee School District No. One. What distinguishes the Horry County decision is the fact that Coastal Carolina University, an institution of higher learning, was the beneficiary of the ad valorem tax levied there. The facts presented in this case are on point with those in *Cherokee School District No. One*. In *Cherokee School District No. One*, the Court cited with approval the language in *Horry County* that "Article III, § 34 (LX)...does not prohibit all special legislation." *Cherokee School District No. One*, 470 S.E.2d at 572. The distinguishing characteristics of the present Act with the one considered by the Court in the *Horry County* case informs that the present Act passes constitutional muster and the one in Horry County could not.

Unlike the Act in the *Horry County* case and like the Act approved by the Court in *Cherokee School District No. One*, the Act in the present case is tailored to benefit the entire school district and all of the public schools within the district, as opposed to one particular educational institution. Moreover, the sales tax in *Cherokee School District No. One* and the impact fee here is limited in this instance to residential dwellings within the school district for the benefit of the residents within the school district. Unlike the *Horry County* case, the sales tax in *Cherokee School District No. One* and the impact fee at issue are imposed exclusively for their respective school districts and not for a singular institution of higher education.

The public education improvements necessitated by rapid population growth which the impact fee is designed to facilitate necessarily benefit those who are obliged to pay because the proceeds are for the benefit of the entire district. For the reasons stated above, the Act is constitutional under South Carolina Supreme Court precedent regardless of the outcome of any disputed facts.

II. THE ACT DOES NOT VIOLATE ART. VIII, § 14(6).

Article VIII of the South Carolina Constitution deals generally with the creation of local government. *Davis v. County of Greenville*, 322 S.C. 73, 470 S.E.2d 94 (1996). Article VIII, Section 14 limits the powers local governments may be granted by state law by providing that among other things, that local governments may not set aside "the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity." Art. III, § 14(6).

Article VIII, Section 6 does not withdraw administration of public education from the field of local concern. Public education has generally been deemed a state function and the South Carolina Supreme Court has held "the legislature has wide discretion in determining how

to go about accomplishing its duty to 'provide for the maintenance and support of a system of free public schools.'" *Horry County School District v. Horry County*, 346 S.C. 621, 552 S.E.2d 737 (2001) (finding no violation of Article VIII, § 14 in noting the constitutionality of shared funding of public schools by local and state revenues). South Carolina Supreme Court precedent instructs that Article VIII, § 14 does not require uniformity in the funding of public education by foreclosing local revenue streams. *See Horry County School District*, 522 S.E.2d at 743 citing *Richland County v. Campbell*, 294 S.C. 346, 349, 364 S.E.2d 470, 471-72 (1988) (upholding constitutionality of shared funding of public schools by local and state revenues as set forth in the Education Finance Act). As noted above, the Supreme Court has recognized the authority of the Legislature to enact legislation that allows local governing bodies, including school districts to impose fees for the benefit of public education. *See Cherokee School District No. One*, 470 S.E.2d at 570. As also noted above, the Supreme Court has long recognized the authority of the Legislature to enact special legislation for school districts in areas beyond finance. Article VIII, § 14 does not foreclose the funding of public education from local concern and any such construction of this Constitutional provision as advocated by Plaintiffs would contravene the longstanding law of this State. *See Horry County School District*, 552 S.E.2d at 737 (2001).

Plaintiffs have failed to allege facts sufficient to show any constitutional infirmity of the present Act under Article VIII, § 14. "A legislative enactment will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." *University of South Carolina v. Mehlman*, 245 S.C. 180, 139 S.E.2d 771 (1964).

CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court grant this Motion for Judgment on the Pleadings and dismiss Plaintiffs' Complaint.

Respectfully submitted,

Charlton deSaussure, Jr.

Charlton deSaussure, Jr.

Marvin D. Infinger

Anne R. Rosen

HAYNSWORTH SINKLER BOYD, P.A.

134 Meeting Street, Third Floor

Charleston, SC 29401-2240

Telephone: 843-722-3366

Facsimile: 843-722-2266

Attorneys for Defendants

January 28, 2010
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

The Home Builders Association of
South Carolina and the
Charleston-Trident Home Builders
Association, Inc.,

Civil Action No. 2009-CP-18-2674

Plaintiffs,

vs.

School District No. 2 of Dorchester
County and the Board of
Trustees for Dorchester School
District No. 2,

Defendants.

Memorandum

in

Opposition to Motion for Judgment
On the Pleadings
SCRCP Rule 12(c)

This Memorandum

This Memorandum is respectfully submitted on behalf of the Plaintiffs, The Home Builders Association of South Carolina and the Charleston-Trident Home Builders Association, Inc., in opposition the motion of the Defendants School District No. 2 of Dorchester County and the Board of Trustees for Dorchester School District No. 2, for judgment on the pleadings pursuant to SCRCP Rule 12(c).

Prior Pleadings

The pleadings before the Court and on which the Defendants' motion must be decided are the Complaint of the Plaintiffs, dated September 28th and filed September 29, 2009, and the Answer of the Defendants, dated October 27, 2009. Other than the motion presently before the Court, no other pleadings have been filed in this action.

The Complaint

This is an action for a declaratory judgment and injunctive relief seeking to prohibit the Defendants from imposing and collecting a school impact fee on new residential construction on the grounds that the Act of the General Assembly which became law without the Governor's signature, 2009 S.C. Acts 99 (the "Act"), authorizing such fees is unconstitutional because it is limited to a single school district in violation of the South Carolina Constitution, in particular Art. III, § 34 (limiting "special legislation") and Art. VIII, § 14(6) (requiring statewide uniformity).

The Complaint alleges the Defendants do not have unique funding requirements. Other school districts within the State are similarly situated in that they are required to construct or expand facilities in order to meet the demands of a growing population within their districts. It is further alleged that the purpose sought to be served by the Act can be equally fulfilled by general legislation allowing all school districts within the State of South Carolina to impose school impact fees.

Judgment on the Pleadings

Judgment on the pleadings against the plaintiff is “a drastic procedure,” *Falk v. Sadler*, 341 S.C. 281, 533 S.E.2d 350 (S.C. App. 2000), which is only appropriate under very limited circumstances. The principles governing judgments on the pleadings were stated by the Supreme Court in *Russell v. Columbia*, 305 S.C. 86, 406 S.E.2d 338, (1991), as follows:

A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment. *Brown v. United Insurance Company of America*, 268 S.C. 254, 233 S.E.2d 298 (1977). A judgment on the pleadings is in the nature of a demurrer. *Brown, supra*. All properly pleaded factual allegations are deemed admitted for purposes of the consideration of a demurrer. *Crowe v. Domestic Loans, Inc.*, 242 S.C. 310, 130 S.E.2d 845 (1963). When a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment. *Crowe, supra*. Moreover, a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. *Baldwin v. Sanders*, 266 S.C. 394, 223 S.E.2d 602 (1976). Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties. *Manning v. Dial*, 271 S.C. 79, 245 S.E.2d 120 (1978). Further, a judgment on the pleadings is considered to be a drastic procedure by our courts. *U. S. Casualty Company v. Hiers*, 233 S.C. 333, 104 S.E.2d 561 (1958).

The Defendants in their motion seek to have the Court erroneously go beyond the clear rule set forth in *Russell* and engage in a premature weighing of the evidence and construction of the statute at issue. The Defendants’ motion (p. 4) seeks to distract the Court from the issues at hand and asks it to delve into burden of proof imposed on the Plaintiffs which the Defendants assert is “beyond a reasonable doubt” and the rules of construction to be applied by the Court which the Defendants claim greatly favors the constitutionality of the statutes at issue. It may be at trial that Plaintiffs are unable to sustain their burden of proof as to the facts alleged in the complaint or that after

considering all the properly introduced evidence the trial court construes the statute at issue against the Plaintiffs; however, at this stage these issues are not before the Court as the alleged facts are deemed true. The sole and proper issue presently before the Court is limited to the simple question: "Have the Plaintiffs adequately pled any issue of fact which if resolved in their favor would entitle them to a prevailing judgment?"

Argument

Point 1: The Plaintiffs Have Adequately An Issue of Fact Which If Resolved In Their Favor Would Entitle Them To A Prevailing Judgment.

A. The South Carolina Constitution Prohibits Special Legislation Where a General Law Can Be Enacted.

The South Carolina Constitution specifically prohibits special legislation applicable only to part of the State in Article III, § 34, which provides in pertinent part:

§ 34. Special laws prohibited.

The General Assembly of this State shall not enact local or special laws concerning any of the following subjects or for any of the following purposes, to wit:

IX. In all other cases, where a general law can be made applicable, no special law shall be enacted....

It cannot be reasonably disputed that the Act presently before the Court only permitting a single district to impose an impact fee could have easily been enacted as general legislation allowing all school districts impose an impact fee.¹ In fact a general law, the Development Impact Fee Act, allowing counties and municipalities to impose

¹ That general legislation was not enacted is a result of the differences in the manner in which the General Assembly enacts "local" and general legislation, voting on the former being limited as a practical matter to the local legislators. The Constitutional prohibition against special legislation where general legislation may be made applicable was intended to prevent just this sort of legislation which is not fully considered by the legislature and would result in a patch work of differing legislation across the state.

impact fees has been enacted, *S.C. Code §§ 6-1-910, et seq.* The Development Impact Fee Act is not applicable to school districts. If the Legislature were so inclined, it could easily amend the Development Impact Fee Act to include school districts in addition to counties and municipalities and afford school districts the power to impose impact fees. There is no rational basis to limit school impact fees to a single school district as many districts around the State are faced with the need to expand as the result of development.

B. Education is Not Exempt From the Constitutional Prohibition Against Special Legislation

In *Horry County v. Horry County Higher Education Commission*, 306 S.C. 416, 412 S.E.2d 421 (1991), the Supreme Court struck down a special tax for the benefit of Coastal Carolina noting that “legislation regarding education is not exempt from the requirements of Article III, §34(IX).” *S.C. at 419, S.E.2d at 423.* This holding was clarified but not abandoned in *Bradley v. Cherokee School District No. One of Cherokee County*, 322 S.C. 181, 470 S.E.2d 570 (1996), discussed *infra*, which confirmed that *Horry* “... concluded that legislation regarding education is not exempt from the requirements of Article III, §34(IX), it also found that it does not prohibit all special legislation,” *S.C. at 186, S.E.2d at 572.* This is in accord with the plain language of the constitutional prohibition which also does not prohibit all special legislation, it merely prohibits special legislation “...where a general law can be made applicable.”

C. Bradley v. Cherokee School District No. One Is Not Controlling

Defendants in their motion to dismiss rely almost entirely on the Supreme Court’s decision in *Bradley v. Cherokee School District No. One of Cherokee County*, 322 S.C.

181, 470 S.E.2d 570 (1996), finding that a sales tax limited to Spartanburg County did not violate the constitutional prohibition against special legislation. The Act of the general Assembly in *Bradley* is distinguishable from the Act before the Court in several aspects, not the least of which is that the *Bradley* Act was not appropriate for general legislation.

In *Bradley* the school district was faced with repaying bonds it was issuing pursuant to the School Bond Act, S.C. Code §§ 59-71-10, *et seq.*, an act of general legislation applicable to all districts. In order afford the district some relief, the Legislature enacted Act 588, Acts and Joint Resolutions, 1994, aptly entitled the “Cherokee School District No. One School Bond-Property Tax Relief Act,” which specifically authorized the imposition of a sales tax for a limited purpose and time:

Subject to the requirements of this act, the governing body of Cherokee County School District 1 may by resolution impose a one percent sales and use tax within Cherokee County for a specific purpose and for a specified period of time to collect funds to be used to pay debt service on general obligation bonds issued pursuant to Article 1 of Chapter 71, Title 59 of the 1976 Code (School Bond Act).

Act 588 also imposed other requirements, including that the tax only be imposed after an approving referendum, based upon a resolution specifying “the improvements to be financed through the issuance of” of the bond, “the maximum time ...for which the tax may be imposed,” and “the maximum principal amount of ... [the] bonds to be issued and repaid with the proceeds of the tax.”

Based on and in compliance with the terms of Act 588 the Cherokee School District passed the appropriate resolution and the residents of the County approved the tax by referendum. Thereafter the *Bradley* plaintiffs challenged the tax on several grounds, including that it violated Article III, §34(IX) of the S.C. Constitution.

In addressing the application of Article III, §34(IX) to Act 588 the Supreme Court held that while education is not immune to the constitutional strictures of Article III, §34(IX), *see discussion above*, “[a] law which is special **only** in the sense that it imposes a lawful tax limited in application and incidence to persons or property within a certain school district does not contravene the provisions of Article III, §34(IX).”[emphasis added and citation omitted] *S.C. at 7, S.E.2d at 572*. The Act before this Court differs substantially from Act 588 to such a degree that it is constitutionally defective.

The Act before the Court is not special **only** because it imposes a lawful tax on persons or property within a single school district, it is special in several other aspects.

First, the sales tax under Act 588 was authorized for the purpose of assisting the Cherokee School District in repaying previously issued revenue bonds authorized by the School Bond Act, which grants the power to issue bonds to all districts. The bonds issued by the Cherokee School District are unique to that district and provisions for their repayment would not lend themselves to statewide legislation.

Second, in the Act before the Court, unlike Act 588, there is no limitation on the use of the funds and they may be used not only for the payment of principal and interest on past and future bonds, but for un-bonded construction. There is no requirement that the fees be limited to any particular project or that they be limited in time.

Third, in *Bradley* the Supreme Court found it critical that the tax must be “...applied uniformly to all persons and property within the area affected.” *S.C. at 8, S.E.2d at 572*. The impact fee authorized by the Act before the Court fails on both sides of this equation. It fails to treat all property within the district equally as it only applies to property subject to new residential construction. It does not apply to all persons within

the district, but only to a “developer” constructing “residential dwelling unit[s]”. Alternatively, if the impact fee is viewed as a charge or tax on the new home buyer who will ultimately bear the brunt of the impact fee as it will be passed on to the buyer by the builder as any other fee or expense, it fails to be uniformly applied to all persons within the district as it is only exacted from those moving into new construction from within or without the district.

Fourth, the sales tax permitted by Act 588 is a form of taxation common throughout the State. The school impact fee authorized by the Act before the Court is limited to a single school district. Other districts may not benefit from this source of revenue.

Fifth, Act 588 allowed imposition of the tax only after a referendum which afforded all those who might be subject to the tax an opportunity to vote. The Act before the Court, on the other hand, allowed for implementation solely by a resolution of the Trustees, effectively barring any consideration by those most likely to be burdened with the impact fee, those persons moving into the district.

Sixth, on its face, the impact fee is a “fee” and not a tax. The language of Bradley only refers to a tax, there was no determination by the Supreme Court that it holding would apply to fees. Therefore, the present case poses a novel issue as to legislation imposing special fees. Generally, fees are appropriate where the person paying the fee directly benefits, the fee is applied uniformly, the revenue is used for the specific improvement for which the fee is charged and the revenue does not exceed the cost of the improvement. *C.R. Campbell Construction Co.*, 325 S.C. 235, 481 S.E.2d 437 (1997). The impact fee before the Court is not so limited and is only available to a single district. As set forth above, making the fee state wide would have been an easier matter, the

Legislature merely had to amend the Development Impact Fee Act, *supra*, to include school districts, that it has not done so further underscores the special nature of the Act before the Court.

The Act before the Court is not special **only** because it imposes a lawful tax on persons or property within a single school district, it is special in several other regards and cannot be construed as falling within the purview of *Bradley*.

D. The Act Requires a Factual Examination to Determine Whether It Is a Special Law

Since *Bradley* is not controlling, the Act requires a factual examination by the Court as to whether or not it is a special act "...where a general law can be made applicable." This is the conclusion reached by the Office of the South Carolina Attorney General in considering the very Act presently before the Court prior to the filing of this action. *S.C. A.G. Op., dated July 7, 2009, Requested by Rep. Tracy R. Edge (a copy of which is annexed hereto)*. While an Attorney General's opinion is not binding on the Court, it does represent an unbiased opinion by one experienced in the application of the S.C. Constitution. The Attorney General's Opinion reasoned:

However, we are concerned with the constitutionality of the legislation under article III, section 34(IX). Although, the Court in Bradley found that article III, section 34(IX) does not prohibit all special legislation pertaining to school districts, it also recognized, as the court found in Horry County, that legislation involving education is not exempt from this provision. Thus, as you suggest, we must consider whether the legislation constitutes as special law "where a general law can be made applicable." S.C. Const. art. III, §34(IX).

In order to determine whether a general law may be made applicable, we must gain an understanding of the Legislature's reasoning for specifically allowing Dorchester County School District No. 2 to impose an impact fee when to our knowledge, the Legislature has not

granted such authority to any other school district in the State. The legislation itself is devoid of any findings as to why Dorchester School District No. 2 in particular should be granted such authority. Thus, we would have to gain knowledge of facts surrounding the passage of the legislation to make this determination. This Office, unlike a court, does not have the authority to investigate and make factual determinations. Op. S.C. Atty. Gen., August 13, 2008. Therefore, we are not in a position to determine whether a special circumstance exists with regard to Dorchester School District No. 2 to make it impossible to create a general law and require the Legislature to enact special legislation. This determination must ultimately be made by a court.

The Attorney General's Opinion concludes with respect to the constitutionality of the Act pursuant to provisions of Article III, §34(IX):

However, after making factual determinations as to whether a general law can be made applicable to the imposition of impact fees by school districts, we believe a court could find that the legislation violates the prohibition on special legislation pursuant to article III, section 34.

F. The Complaint Asserts An Issue of Fact Which If Resolved In Plaintiffs Favor Would Entitle Them To A Prevailing Judgment.

The Plaintiffs have pled that the funding requirements of Dorchester School District No. 2 apply equally to many, if not all, other school districts within the State of South Carolina, that Dorchester School District No. 2 does not have unique funding requirements, that other school districts within the State are similarly situated in that they are required to construct or expand facilities in order to meet the demands of a growing population within their districts, and the purpose sought to be served by the Act can be equally fulfilled by general legislation applicable to all school districts within the State of South Carolina. If these are accepted as true for the purposes of this motion, then Plaintiffs motion must be denied, pending a full examination of the facts by this Court.

Point 2. The Act Must Fail As It Violates the Constitutional Requirement of Uniformity

Art. VIII, § 14 of the South Carolina Constitution provides:

§ 14. General law provisions not to be set aside.

In enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside:

(1) The freedoms guaranteed every person; (2) election and suffrage qualifications; (3) bonded indebtedness of governmental units; (4) the structure for and the administration of the State's judicial system; (5) criminal laws and the penalties and sanctions for the transgression thereof; and (6) the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity. S.C. Const. Ann. Art. VIII, § 14 (2008)[emphasis added].

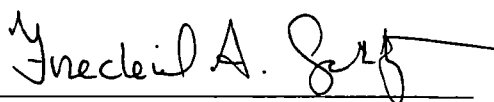
The Defendants in support of their motion to dismiss this action cite several cases for the proposition that “[p]ublic education has generally been deemed a state function...” with “...the legislature having wide discretion...” and that “...Art VIII, §14 does not require uniformity in ... funding....” *Defendants’ Motion p. 8.*

This case, however, goes beyond the various streams of funds and funding mechanisms discussed in the cited cases in that it allows an “impact fee”, a funding source wholly unavailable to other school districts, even school districts in the same County as Dorchester School District No. 2. The clear policy behind Art VIII, §14(6) mandating uniformity is so that all citizens of the State will be fairly and equally treated without regard to their geographic location within the State. While local concerns may require certain variations in public education funding, all schools should be afforded the same sources of funding from which to select. The imposition of a fee limited to a single school district flies in the face of this policy and the plain language of Art VIII, §14(6).

Conclusion

The Plaintiffs have demonstrated that there is alleged in the pleadings sufficient issues of fact which if resolved in their favor would entitle them to a prevailing judgment thereby precluding judgment on the pleadings pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure requiring a denial of Defendants' motion.

Columbia, South Carolina
September 9, 2010

A handwritten signature in black ink, appearing to read "Frederick A. Gertz", written over a horizontal line.

Frederick A. Gertz
SC Bar # 2429
Gertz & Moore
1416 Laurel Street
Post Office Box 456
Columbia, South Carolina 29202
(803) 252-1524
Attorneys for Plaintiffs



HENRY McMASTER
ATTORNEY GENERAL

July 7, 2009

The Honorable Tracy R. Edge
Member, House of Representatives
P.O. Box 2095
North Myrtle Beach, South Carolina 29577

Dear Representative Edge:

We received your letter requesting an opinion of this Office as to whether recent legislation allowing a particular school district to levy an impact fee circumvents state law. Specifically, you are concerned with a bill that passed earlier in the 2009 legislative session establishing a school impact fee in Dorchester County School District No. 2. In your letter, you provided the following information:

This new local bill strategy raises the question whether the General Assembly is procedurally correct in allowing local bills to circumvent existing state laws? The current interpretation of the law is resulting in the General Assembly granting the state's 85 school districts the ability to impose school impact fees with not restrictions as to nexus, transparency, equality, accountability, or proportionality. The local bill strategy suggests possible conflicts with the S.C. Constitution: It would appear there are several potential violations of the State Constitution, including: [i] improper delegation of taxing authority, [ii] the enactment of special legislation where a general law should be or is applicable, and [iii] imposition of a tax without the consent of the people of or their representatives.

In addition, the local option bill strategy appears to be in conflict with several S.C. statutes: Several statutes that may be applicable, include: [i] the Development Impact Fee Act, [ii] the Home Rule Act, [iii] local taxing authority, [iv] the Development Agreement Act, [v] Residential Improvement District Act, and [vi] the law governing the imposition of user fees and special taxes.

The Honorable Tracy R. Edge

Page 2

July 7, 2009

Law/Analysis

As you described in your letter, in February of this year the Legislature passed a bill authorizing the Board of Trustees for Dorchester School District No. 2 to impose impact fees on developers constructing residential dwellings within the school district. S. 235, 118th Legs. (S.C. 2009). The bill, Senate bill 235 ("Bill 235"), provides, in pertinent part: "The Board of Trustees for Dorchester School District No. 2 (the "Board") may impose an impact fee on any developer for each new residential dwelling unit constructed by the developer within the school district. The fees must be paid to Dorchester School District No. 2 or, pursuant to an agreement, to a county or municipality that pays the fees to Dorchester School District No. 2, prior to or at the issuance of a certificate of occupancy for a dwelling unit." Id. As you explained in your letter, you believe this legislation violates the South Carolina Constitution.

As stated by our Supreme Court in State v. McGrier, 378 S.C. 320, 328, 663 S.E.2d 15, 19 (2008):

"This Court has long recognized that legislative acts are to be construed in favor of constitutionality and will be presumed constitutional absent a showing to the contrary." Bailey v. State, 309 S.C. 455, 464, 424 S.E.2d 503, 508 (1992). " 'It is always to be presumed that the Legislature acted in good faith and within constitutional limits; and this declaration of the Legislature is a conclusive finding of fact and imports a verity upon its face which cannot be impugned by litigants, counsel, or the courts, but is absolutely binding upon all.' " Scroggie v. Scarborough, 162 S.C. 218, 231, 160 S.E. 596, 601 (1931) (quoting State ex rel. Weldon v. Thomason, 142 Tenn. 527, 221 S.W. 491, 495 (1920)). "Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation." Henderson v. Evans, 268 S.C. 127, 132, 232 S.E.2d 331, 333-34 (1977).

Moreover, only a court, not this Office, may declare a statute unconstitutional. Op. S.C. Atty. Gen., February 20, 2009. While this Office may comment as to the constitutionality of a statute, it is solely within the province of the courts to proclaim a statute unconstitutional. Therefore, unless and until a court finds otherwise, a statute remains valid and enforceable.

In your letter, you argue this legislation is an improper delegation of taxing authority and it imposes a tax without the consent of the people or their representatives. Both of these arguments are premised on the fact that the legislation imposes a tax rather than a fee. In C.R. Campbell Const. Co. v. City of Charleston, 325 S.C. 235, 481 S.E.2d 437 (1997), our Supreme Court stated that if the following criteria are satisfied, a fee is a valid uniform service charge rather than a tax:

(1) the revenue generated is used to the benefit of the payers, even if the general public also benefits (2) the revenue generated is used only for the specific improvement contemplated (3) the revenue generated by the fee does not exceed the cost of the improvement and (4) the fee is uniformly imposed on all the payers.

In a 2006 opinion, this Office considered the validity of a service fee or charge and determined that the resolution of such a question involves a question of fact. Op. S.C. Atty. Gen., August 24, 2006. "As we stated on numerous occasions, only a court, not this Office, may serve as a finder of fact and conclusively determine the outcome of a factual issue." *Id.* Nonetheless, we believe in this instance that a court likely would find the impact fee is a fee rather than a tax.

Bill 235 does not explain who benefits from the revenue generated by the fee. However, we presume that the developer will receive a special benefit from the construction of new schools as they will directly serve the residents of the development and could improve property values. While the construction of new schools may also benefit other residents within the school district, our courts conclude that "[a] charge does not become a tax merely because the general public obtains a benefit." Brown v. County of Horry, 308 S.C. 180, 185, 417 S.E.2d 565, 568 (1992). Thus, we believe a court could find the revenue from the fee is used to benefit the payor.

According to the legislation, the Board may only appropriate funds from the fee for:

- (1) the construction, including preparation costs, of new public education facilities for grades K-12 within Dorchester School District No. 2; and
- (2) the payment of principal and interest on existing or new bonds issued by Dorchester School District No. 2 for the construction of public education facilities for grades K-12.

Thus, Bill 235 indicates that the revenue generated may only be used for the construction and preparation of new schools and to pay down the debt issued for the construction of schools.

Bill 235 does not specify that revenue generated by the fee cannot exceed the cost of the improvements. Rather, the legislation provides that "[t]he district's board of trustees shall set the impact fee at an amount not to exceed two thousand five hundred dollars per dwelling unit." Thus, a court would have to ensure that the amount of the fee set by the Board does not exceed the cost of the construction and debt service allowed under its provisions.

Lastly, Bill 235 states that the Board may impose the fee on "any developer for each new residential dwelling unit constructed by the developer within the school district." S. 235, 118th Leg. (S.C. 2009). Therefore, the fee appears to be uniformly imposed on its payors. As many of the criteria for ascertaining that a fee is a valid uniform fee appear to have been satisfied per the terms

The Honorable Tracy R. Edge

Page 4

July 7, 2009

of Bill 235, we believe a court likely will find that the fee is not a tax. However, as we explained above, the determination as to the validity of a fee requires factual determinations. As such, a court would have to ultimately resolve this issue. However, we note that on several occasions, our Supreme Court determined that impact fees imposed by local sewer districts were valid fees rather than a tax. See Ford v. Georgetown County Water & Sewer Dist., 341 S.C. 10, 532 S.E.2d 873 (2000); J.K. Const., Inc. v. Western Carolina Reg'l Sewer Auth., 336 S.C. 162, 519 S.E.2d 561 (1999).

Although we believe a court is likely to find the impact fee imposed by Bill 235 to be a fee rather than a tax, assuming the impact fee is found to be a tax, we do not believe it would constitute an improper delegation of taxing authority. Our Supreme Court recognizes that article X section 6 of our Constitution "authorizes delegation of the taxing power to political subdivisions of the State." Crow v. McAlpine, 277 S.C. 240, 243, 285 S.E.2d 355, 357 (1981). Moreover, our Supreme Court recognizes that "school districts and their governing boards are generally considered political subdivisions of the State and hence may properly be vested with the State's taxing power." Id. at 243-44, 285 S.E.2d at 357 (citing Tucker v. Kershaw County Sch. Dist., et al., 279 S.E.2d 378 276 S.C. 401, 279 S.E.2d 378 (1981); Graham v. Charleston County Sch. Bd., 262 S.C. 314, 204 S.E.2d 384 (1974); Easler v. Maybank, 191 S.C. 511, 5 S.E.2d 288 (1939)). Thus, if by Bill 235 the Legislature delegated taxing authority to the Board, we do not believe the legislation constitutes an unlawful delegation of taxing authority.

Article X section 5 of the South Carolina Constitution (Supp. 2007) provides, in pertinent part: "No tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled." Our Supreme court interprets this provision as follows:

Pursuant to S.C. Constitution art. X, § 5, the power of taxation rests with the people of South Carolina who have entrusted this power to the General Assembly. While the General Assembly can delegate its taxing authority to a subordinate agency, it can only delegate this power to a body which is either composed of persons assented to by the people or subject to the supervisory control of a body chosen by the people.

Hagley Homeowners Ass'n, Inc. v. Hagley Water, Sewer, and Fire Auth., 326 S.C. 67, 75, 485 S.E.2d 92, 96 (1997). Pursuant to act 535 of 1982, members of the Board are elected. 1982 S.C. acts 3474. Thus, Bill 235 delegates authority to levy the impact fee to a body chosen by the people. As such, assuming that the impact fee is a tax rather than a fee, we do not believe the legislation violates article X section 5.

In addition to your concerns that Bill 235 improperly delegates taxing authority and imposes a tax without the consent of the people or their representatives, you are concerned that Bill 235 constitutes special legislation. Two provisions in the South Carolina Constitution prohibit the

The Honorable Tracy R. Edge

Page 5

July 7, 2009

passage of special legislation. Article VIII, section 7 of the South Carolina Constitution (1976), enacted as part of the home rule amendments to the Constitution, prohibits the Legislature from passing laws for a specific county. Article III, section 34(IX) of the South Carolina Constitution (1976) provides that no special law shall be enacted where a general law can be made applicable.

In Moye v. Caughman, 265 S.C. 140, 217 S.E.2d 36 (1975), our Supreme Court considered the constitutionality of a statute changing the method by which the boards of trustees for a particular county school boards are elected. The Court determined:

Creation of different provisions for school districts does not impinge upon the 'home rule' amendment because public education is not the duty of the counties, but of the General Assembly. The General Assembly has not been mandated by any constitutional amendment to enact legislation to confer upon the counties the power to control the public school system. To the contrary, the command of new Article XI, Section 3, is 'The General Assembly shall provide for the maintenance and support of a system of free public schools.'

Id. at 143, 217 S.E.2d at 37. Finding that article VIII, section 7 solely deals with local government, the Court held that it is not applicable school districts. Accordingly, the Court upheld the statute as constitutional.

Subsequently, the Supreme Court addressed the constitutionality of an act allowing the Horry County Higher Education Commission to levy an ad valorem tax. Horry County v. Horry County Higher Educ. Comm'n, 306 S.C. 416, 412 S.E.2d 421 (1991). The Court acknowledged that in prior opinions it recognized the broad legislative power given to the Legislature with regard to education pursuant to article XI of the Constitution. Id. at 419, 412 S.E.2d at 423. However, the Court clarified that "legislation regarding education is not exempt from the requirements of Article III, § 34(IX)." Id. Finding the legislation in question applies to only one county and one institution, the Court concluded that it is special legislation. Id. The Court explained:

The Commission admits that it is unaware of any other institution of higher education which receives funding from ad valorem property taxes imposed on the county in which the institution is located. The problem of funding for institutions of higher education is not a problem unique to Coastal Carolina; it is a problem which applies equally to all state funded colleges and universities. A general law could be fashioned to provide ad valorem property tax funding for all of these colleges and universities. Further, the record is devoid of any peculiar local conditions which require special treatment for Coastal Carolina.

The Honorable Tracy R. Edge

Page 6

July 7, 2009

Id. at 420, 412 S.E.2d at 423-24. Thus, the Court found the legislation violates article III, section 34(IX). Id. at 420 412 S.E.2d at 424.

In Bradley v. Cherokee School District No. One of Cherokee County, 322 S.C. 181, 470 S.E.2d 570 (1996), the Supreme Court clarified its decisions in Moye and Horry County while considering whether an act allowing a particular school district to impose a sales tax constitutes unconstitutional special legislation pursuant to article III, section 34. The Court explained:

Horry County did not overrule Moye and the line of cases upholding legislation relating to school districts. In Horry County, the County was authorized to levy a tax sufficient to pay the interest and principal on bonds issued to finance the activities of the Horry County Higher Education Commission. The Horry act was found to be special legislation because while the tax was imposed on all taxable property within Horry County, the funds collected from the tax were not used for the benefit of all persons residing within the area. Additionally, the funds in Horry were used solely for the benefit of one institution of higher learning. Although the court in Horry concluded that legislation regarding education is not exempt from the requirements of Article III, § 34(IX), it also found that it does not prohibit all special legislation.

Id. at 186, 470 S.E.2d at 572. The Court held: "A law that is special only in the sense that it imposes a lawful tax limited in application and incidence to persons or property within a certain school district does not contravene the provisions of Article III, § 34(IX)." Id. Finding the tax imposed by the act to be "a lawful tax limited in application and incidence to persons or property in Cherokee County," the Court concluded it was not unconstitutional special legislation. Id. at 186, 470 S.E.2d at 573.

The Court in Moye made clear that article VIII, section 7 does not apply to school districts. Because the legislation in question deals specifically with Dorchester School District No. 2, we do not believe the legislation violates article VIII, section 7. However, we are concerned with the constitutionality of the legislation under article III, section 34(IX). Although, the Court in Bradley found that article III, section 34(IX) does not prohibit all special legislation pertaining to school districts, it also recognized, as the court found in Horry County, that legislation involving education is not exempt from this provision. Thus, as you suggest, we must consider whether the legislation constitutes as special law "where a general law can be made applicable." S.C. Const. art. III, § 34(IX).

In order to determine whether a general law may be made applicable, we must gain an understanding of the Legislature's reasoning for specifically allowing Dorchester County School District No. 2 to impose an impact fee when to our knowledge, the Legislature has not granted such authority to any other school district in the State. The legislation itself is devoid of any findings as

The Honorable Tracy R. Edge

Page 7

July 7, 2009

to why Dorchester School District No. 2 in particular should be granted such authority. Thus, we would have to gain knowledge of facts surrounding the passage of the legislation to make this determination. This Office, unlike a court, does not have the authority to investigate and make factual determinations. Op. S.C. Atty. Gen., August 13, 2008. Therefore, we are not in a position to determine whether a special circumstance exists with regard to Dorchester School District No. 2 to make it impossible to create a general law and require the Legislature to enact special legislation. This determination must ultimately be made by a court.

Nonetheless, we understand that Dorchester County has experienced a great deal of growth in recent years and this growth has produced a need to expand and add additional schools. Accordingly, the school districts in Dorchester County are faced with the problem of how to fund the construction and expansion of its schools. While this situation may support the Legislature's passage of the act with regard to Dorchester County School District No. 2, a court could find that other school districts in the State are faced with similar challenges. Accordingly, the reasons for allowing Dorchester County School District No. 2 to impose an impact fee would not be unique to that particular school district. Therefore, a Court may find that a general law could be fashioned to provide all school districts with the ability to impose impact fees in order to fund the construction and expansion of their schools.

In addition, you argue that general law not only could be, but is applicable through the South Carolina Development Impact Fee Act. S.C. Code Ann. §§ 6-1-910 et seq. (2004). This act essentially allows counties and municipalities meeting certain criteria to impose an impact fee to fund the construction of specified infrastructure projects. These provisions do not allow school districts to impose impact fees and the infrastructure projects listed do not include construction or expansion of schools. Thus, this act provides evidence that not only is it possible to create general law that is applicable to govern impact fees, but the Legislature has already taken action to provide such legislation with regard to counties and municipalities. Accordingly, based on our limited knowledge of the facts and circumstances surrounding the passage of Bill 235, we believe a court could find that it violates article III, section 34 of the South Carolina Constitution. However, as we explained above, this determination must ultimately be made by a court and the act is valid unless and until a court makes this determination.

In addition to your concerns as to Bill 235's constitutionality, you also expressed your concern that it appears to be in conflict with several South Carolina statutes. You indicate that the legislation conflicts with the Development Impact Fee Act, the Home Rule Act, local taxing authority, the Development Agreement Act, the Residential Improvement District Act, and laws governing the imposition of user fees and special taxes. On numerous occasions, our courts recognized that the Legislature has the authority to enact any law not prohibited, expressly or by clear implication, by the State or Federal Constitutions. Unisys Corp. v. South Carolina Budget and Control Bd. Div. of General Services, 346 S.C. 158, 169, 551 S.E.2d 263, 269 (2001). Moreover, the Legislature has the plenary power to amend statutes. Simmons v. Greenville Hosp. System, 355 S.C. 581, 586, 586 S.E.2d 569, 571 (2003). Thus, if the legislation in question does not violate the

The Honorable Tracy R. Edge

Page 8

July 7, 2009

Constitution, the Legislature has the authority to adopt it despite the fact that it may conflict with or amend existing law.

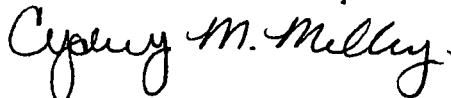
Conclusion

We understand you are concerned that recently passed legislation giving Dorchester County School District No. 2 the authority to impose an impact fee runs afoul of several constitutional provisions. Although we do not believe the impact fee allowed by Bill 235 constitutes a tax rather than a fee, if it were considered a tax, we are of the opinion that it likely does not constitute an improper delegation of taxing authority by the Legislature or an imposition of a tax without the consent of the people or their representatives. Furthermore, because our Supreme Court determined in Moye that article VIII section 7 of the Constitution, prohibiting the enactment of special legislation for counties, does not apply to school districts, we do not believe Bill 235 is unconstitutional special legislation pursuant to this provision. However, after making factual determinations as to whether a general law can be made applicable to the imposition of impact fees by school districts, we believe a court could find that the legislation violates the prohibition on special legislation pursuant to article III, section 34. Nonetheless, this determination must be made by a court and unless or until this determination is made, the legislation remains valid and enforceable.

In addition, to your concerns surrounding the constitutionality of Bill 235, we understand you are also concerned that it conflicts with State law. Because the Legislature has the authority to enact or make amendments to legislation that are not contrary to the Constitution, we do not believe the fact that the legislation conflicts with existing State law impacts its validity.

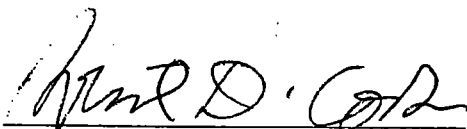
Very truly yours,

Henry McMaster
Attorney General



By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

The Home Builders Association of
South Carolina and the
Charleston-Trident Home Builders
Association, Inc.,

Civil Action No. 2009-CP-18-2674

Plaintiffs,

vs.

Plaintiffs' Motion to Amend
or Reconsider Judgment
SCRCP Rule 59(e)

School District No. 2 of Dorchester
County and the Board of
Trustees for Dorchester School
District No. 2,

Defendants.

CERTIFIED COPY
2011 APR - 8 PM 12:16
DORCHESTER COUNTY
CLERK OF COURT

TO: School District No. 2 of Dorchester and the Board of Trustees for
Dorchester School District No. 2 and their attorney:

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs hereby move
the Court pursuant to SCRCP Rule 59(e) to reconsider and amend its
Order Granting Defendants' Motion for Judgment on the Pleadings (the
"Order") upon the following ground:

The Order finds that: "The substitution of the sales tax in the
Cherokee School District No. One case with the impact fee here provides a
fact situation identical to that approved by the South Carolina Supreme
Court in its 1996 decision quoted above."¹ (Order, p.6) This finding
fails to address the numerous distinguishing legal and factual issues

¹ *Bradley v. Cherokee School District No. One of Cherokee County*, 322
S.C. 181, 470 S.E.2d 570 (1996). ("*Cherokee*")

enumerated in Plaintiffs' Memorandum in Opposition to Motion for Judgment on the Pleadings:

The Act of the general Assembly in *Bradley* is distinguishable from the Act before the Court in several aspects, not the least of which is that the *Bradley* Act was not appropriate for general legislation.

In *Bradley* the school district was faced with repaying bonds it was issuing pursuant to the School Bond Act, *S.C. Code §§ 59-71-10, et seq.*, an act of general legislation applicable to all districts. In order afford the district some relief, the Legislature enacted Act 588, Acts and Joint Resolutions, 1994, aptly entitled the "Cherokee School District No. One School Bond-Property Tax Relief Act," which specifically authorized the imposition of a sales tax for a limited purpose and time:

Subject to the requirements of this act, the governing body of Cherokee County School District 1 may by resolution impose a one percent sales and use tax within Cherokee County for a specific purpose and for a specified period of time to collect funds to be used to pay debt service on general obligation bonds issued pursuant to Article 1 of Chapter 71, Title 59 of the 1976 Code (School Bond Act).

Act 588 also imposed other requirements, including that the tax only be imposed after an approving referendum, based upon a resolution specifying "the improvements to be financed through the issuance of" of the bond, "the maximum time ...for which the tax may be imposed," and "the maximum principal amount of ... [the] bonds to be issued and repaid with the proceeds of the tax."

Based on and in compliance with the terms of Act 588 the Cherokee School District passed the appropriate resolution and the residents of the County approved the tax by referendum. Thereafter the *Bradley* plaintiffs challenged the tax on several grounds, including that it violated Article III, §34(IX) of the S.C. Constitution.

In addressing the application of Article III, §34(IX) to Act 588 the Supreme Court held that while education is not immune to the constitutional strictures of Article III, §34(IX), *see discussion above*, "[a] law which is special **only** in the sense that it imposes a lawful tax limited in application and incidence to persons or property within a certain school district does not contravene the provisions of Article III, §34(IX)."[emphasis added and citation omitted] *S.C. at 7, S.E.2d at 572*. The Act before this Court differs substantially from Act 588 to such a degree that it is constitutionally defective.

The Act before the Court is not special **only** because it imposes a lawful tax on persons or property within a single school district, it is special in several other aspects.

First, the sales tax under Act 588 was authorized for the purpose of assisting the Cherokee School District in repaying previously issued revenue bonds authorized by the School Bond Act, which grants the power to issue bonds [sic] to all districts. The bonds issued by the Cherokee School District are unique to that district and provisions for their repayment would not lend themselves to statewide legislation.

Second, in the Act before the Court, unlike Act 588, there is no limitation on the use of the funds and they may be used not only for the payment of principal and interest on past and future bonds, but for unbonded construction. There is no requirement that the fees be limited to any particular project or that they be limited in time.

Third, in *Bradley* the Supreme Court found it critical that the tax must be "...applied uniformly to all persons and property within the area affected." *S.C. at 8, S.E.2d at 572*. The impact fee authorized by the Act before the Court fails on both sides of this equation. It fails to treat all property within the district equally as it only applies to property subject to new residential construction. It does not apply to all persons within the district, but only to a "developer" constructing "residential dwelling unit[s]" Alternatively, if the impact fee is viewed as a charge or tax on the new home buyer who will ultimately bear the brunt of the impact fee as it will be passed on to the buyer by the builder as any other fee or expense, it fails to be uniformly applied to all persons within the district as it is only exacted from those moving into new construction from within or without the district.

Fourth, the sales tax permitted by Act 588 is a form of taxation common throughout the State. The school impact fee authorized by the Act before the Court is limited to a single school district. Other districts may not benefit from this source of revenue.

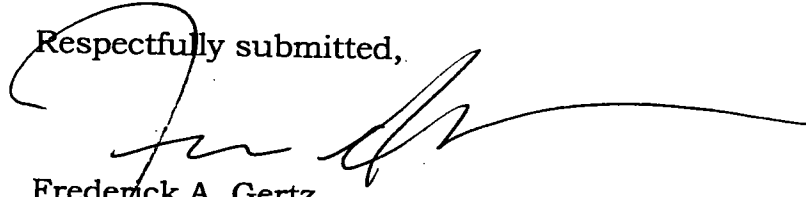
Fifth, Act 588 allowed imposition of the tax only after a referendum which afforded all those who might be subject to the tax an opportunity to vote. The Act before the Court, on the other hand, allowed for implementation solely by a resolution of the Trustees, effectively barring any consideration by those most likely to be burdened with the impact fee, those persons moving into the district.

Sixth, on its face, the impact fee is a "fee" and not a tax. The language of *Bradley* only refers to a tax, there was no determination by the

Supreme Court that it [sic] holding would apply to fees. (Plaintiffs' Memorandum, pp 5-7)

Plaintiffs respectfully move the Court to reconsider its findings and to rule upon the distinguishing issues between *Cherokee* (a/k/a *Bradley*) and the instant case and to amend its Order accordingly.

Respectfully submitted,



Frederick A. Gertz
SC BAR # 2429
GERTZ & MOORE
1416 Laurel Street
Post Office Box 456
Columbia, South Carolina 29202
(803) 252-1524
Attorney for Plaintiffs

Columbia, SC
April 6, 2011

ACT 588

AN ACT TO ENACT THE CHEROKEE COUNTY SCHOOL DISTRICT 1 SCHOOL BOND-PROPERTY TAX RELIEF ACT.

Be it enacted by the General Assembly of the State of South Carolina:

Citation of act

SECTION 1. This act may be cited as the Cherokee County School District 1 School Bond-Property Tax Relief Act.

Tax may be levied

SECTION 2. Subject to the requirements of this act, the governing body of Cherokee County School District 1 may by resolution impose a one percent sales and use tax within Cherokee County for a specific purpose and for a specified period of time to collect funds to be used to pay debt service on general obligation bonds issued pursuant to Article 1 of Chapter 71, Title 59 of the 1976 Code (School Bond Act).

Resolution

SECTION 3. (A)(1) The governing body of Cherokee County School District 1 may vote to impose the tax authorized by this act, subject to a referendum, by enacting a resolution. The resolution must specify:

(a) the improvements to be financed through the issuance of general obligation bonds of the school district together with the imposition of the tax;

(b) the maximum time, stated in calendar years or calendar quarters, or a combination of them, not to exceed twenty years, for which the tax may be imposed; and

(c) the maximum principal amount of general obligation bonds to be issued and repaid with proceeds of the tax.

(2) The findings provided in item (1) may be incorporated within a resolution of the governing body of Cherokee County School District 1 calling for a referendum upon the question of the issuance of general obligation bonds pursuant to Article 1 of Chapter 71, Title 59 of the 1976 Code, if the proposed tax will be applied to payment of debt service upon the bonds.

(B) Upon receipt of the resolution, the Cherokee County Election Commission shall conduct a referendum on the question of imposing the optional special sales and use tax in the county. Notice of the election must be provided in the manner provided by the general election law and include the question to be voted upon in the referendum. In addition, if the question of the issuance of general obligation bonds is to also be voted upon in the referendum, publication of

notice of the referendum must also be given in compliance with Article 1 of Chapter 71, Title 59 of the 1976 Code. Expenses of the referendum must be paid by the school district.

(C) The question to be voted upon in the referendum shall read substantially as follows:

"Must a special one percent sales and use tax be imposed in Cherokee County for not more than twenty years in order to raise funds which will be applied to pay debt service on general obligation bonds issued to defray the cost of (identify improvements) for Cherokee County School District 1?

Yes[]

No[]

The ballot may, in the discretion of the governing body of the school district, contain a short explanation of the question to be voted upon in this referendum.

(D) All qualified electors desiring to vote in favor of imposing the tax for a particular purpose shall vote "yes" and all qualified electors opposed to levying the tax for the particular purpose shall vote "no". Upon receipt of the returns of the referendum, the election commission shall, by resolution, declare the results of it and shall file the resolution with the Cherokee County Clerk of Court. The resolution shall also be filed with the South Carolina Department of Revenue and Taxation. The results of the referendum, as declared by resolution of the election commission and as filed with the clerk of court, is not open to question except by a civil action instituted within twenty days of the filing of it. If a majority of the votes cast are in favor of imposing the tax, then the tax is imposed as provided in this act; otherwise the tax is not imposed. A referendum on imposition of the tax authorized in this act may not be held more than once in a period of twelve consecutive months.

Imposition of tax

SECTION 4. (A) If the tax is approved in the referendum, the tax must be imposed beginning upon the first day of the third full month following the filing of the declaration of results of the referendum with the Department of Revenue and Taxation.

(B) The tax terminates:

(1) on the final day of the maximum time specified for the imposition; or

(2) if earlier, but not if later, upon payment of the final maturing installments of principal of the bonds to which application of the tax is authorized, or upon payment of the final maturing installments of principal of general obligation bonds issued to refund the bonds.

(C) When the optional sales and use tax is imposed for more than one purpose, the governing body of the school district authorizing the referendum for the tax shall determine the priority for the expenditure of the net proceeds of the tax for the purposes stated in the referendum.

Administration and collection of tax

SECTION 5. (A) The tax levied pursuant to this act must be administered and collected by the Department of Revenue and Taxation in the same manner that other sales and use taxes are collected. The department may prescribe the amounts which may be added to the sales price because of the tax.

(B) The tax authorized by this act is in addition to all other local sales and use taxes and applies to the gross proceeds of the sales in the applicable jurisdiction which are subject to the tax imposed by Chapter 36, Title 12 of the 1976 Code and the enforcement provisions of Chapter 54, Title 12 of the 1976 Code. The gross proceeds of the sale of items subject to a maximum tax in Chapter 36 of Title 12 of the 1976 Code are exempt from the tax imposed by this act. The gross proceeds of the sale of food which may lawfully be purchased with United States Department of Agriculture food stamps are exempt from the tax imposed by this act. The tax imposed by this act also applies to tangible personal property subject to the use tax in Article 13, Chapter 36 of Title 12 of the 1976 Code.

(C) Taxpayers required to remit taxes under Article 13, Chapter 36, Title 12 of the 1976 Code shall identify the county in which the tangible personal property purchased at retail is stored, used, or consumed in this State.

(D) Utilities are required to report sales in the county in which consumption of the tangible personal property occurs.

(E) A taxpayer subject to the tax imposed by Section 12-36-920 of the 1976 Code, who owns or manages rental units in more than one county shall separately report in his sales tax return the total gross proceeds from business done in each school district.

(F) The gross proceeds of sales of tangible personal property delivered after the imposition date of the tax levied under this act in Cherokee County, either under the terms of a construction contract executed before the imposition date, or a written bid submitted before the imposition date, culminating in a construction contract entered into before or after the imposition date, are exempt from the special local sales and use tax provided in this section if a verified copy of the contract is filed with the Department of Revenue and Taxation within six months after the imposition of the special local sales and use tax.

(G) Notwithstanding the imposition date of the special local sales and use tax authorized pursuant to this act, with respect to services that are regularly billed on a monthly basis, the special local sales and use tax is imposed beginning on the first day of the billing period beginning on or after the imposition date.

Bonds

SECTION 6. (A) The revenues of the tax collected in the county under this act must be remitted to the State Treasurer and credited to a fund separate and distinct from the general fund of the State. After deducting the amount of refunds made and costs to the Department of Revenue and

Taxation of administering the tax, not to exceed one percent of the revenues, the State Treasurer shall distribute the revenues quarterly to the county treasurer who holds the debt service funds established for payment of principal and interest on the bonds to which the tax is applicable. The State Treasurer may correct misallocation costs or refunds by adjusting subsequent distributions, but these adjustments must be made in the same fiscal year as the misallocation.

(B) The Cherokee County Treasurer holding taxes collected pursuant to this act must certify to the auditor of the county on July fifteenth of each calendar year as to the amount of taxes held by that county treasurer as of June thirtieth of the calendar year. The Cherokee County Auditor shall reduce the next levy of ad valorem property taxes required to pay debt service on bonds to which the tax is applicable by the amount of tax revenues certified as collected as of June thirtieth by the county treasurer. Taxes collected as of June thirtieth of a calendar year in excess of the amounts required to pay debt service due in the eighteen months following June thirtieth on bonds to which the tax is applicable must be applied to reduce the next levy of ad valorem property taxes required for payment of operational and maintenance expenses of Cherokee County School District 1.

(C) The State Treasurer, in consultation with the Department of Education, shall determine an average per pupil amount by dividing the amount of revenues generated in the county by the imposition of the tax authorized by this act by the total number of students in grades K-12 in Cherokee County. The State Treasurer shall pay any other school district located in Cherokee County an amount equal to the average per pupil amount based on the number of pupils attending schools residing in Cherokee County to be used exclusively for capital projects.

Calculations and distribution

SECTION 7. The Department of Revenue and Taxation shall furnish data to the State Treasurer and to the school districts receiving tax revenues pursuant to this act for the purpose of calculating distributions and estimating revenues. The information which must be supplied to Cherokee County School District 1 upon request includes, but is not limited to, gross receipts, net taxable sales, and tax liability by taxpayers. Information about a specific taxpayer is considered confidential and is governed by the provisions of Section 12-54-240 of the 1976 Code. A person violating this section is subject to the penalties provided in Section 12-54-240 of the 1976 Code.

Time effective

SECTION 8. This act takes effect upon approval by the Governor.

Vetoed by the Governor - 5/10/94

Veto overridden by Senate - 5/11/94

Veto overridden by House - 5/11/94

ACT 99

(A99, R2, S235)

AN ACT TO AUTHORIZE THE BOARD OF TRUSTEES FOR DORCHESTER COUNTY SCHOOL DISTRICT NUMBER TWO TO IMPOSE AN IMPACT FEE ON ANY DEVELOPER FOR EACH NEW RESIDENTIAL DWELLING UNIT CONSTRUCTED BY THE DEVELOPER WITHIN THE SCHOOL DISTRICT, TO PROVIDE THAT THE FUNDS ONLY MAY BE USED FOR THE CONSTRUCTION OF PUBLIC EDUCATION FACILITIES FOR GRADES K-12 WITHIN THE DISTRICT AND FOR THE PAYMENT OF PRINCIPAL AND INTEREST ON EXISTING OR NEW BONDS ISSUED BY THE DISTRICT, AND TO PROVIDE THAT THE IMPACT FEE SHALL BE SET AT AN AMOUNT NOT TO EXCEED THE COST THAT EACH ADDITIONAL DWELLING UNIT IMPOSES ON THE SCHOOL DISTRICT FOR PUBLIC EDUCATION FACILITIES.

Be it enacted by the General Assembly of the State of South Carolina:

Impact fee authorized

SECTION 1. (A) The Board of Trustees for Dorchester County School District Number Two may impose an impact fee on any developer for each new residential dwelling unit constructed by the developer within the school district. The fees must be paid to Dorchester County School District Number Two or, pursuant to an agreement, to a county or municipality that pays the fees to Dorchester County School District Number Two, prior to or at the issuance of a certificate of occupancy for a dwelling unit.

(B) Dorchester County School District Number Two shall maintain the impact fee funds in a separate interest bearing account. All interest earned and accruing to the account must become funds of the account and must be subject to all restrictions placed on the use of impact fees pursuant to the provisions of this article. Accounting records must be maintained for each category of system improvements for which the fee is collected.

(C) The Board of Trustees for Dorchester County School District Number Two only may appropriate funds from the account for:

(1) the construction, including preparation costs, of new public education facilities for grades K-12 within Dorchester County School District Number Two; and

(2) the payment of principal and interest on existing or new bonds issued by Dorchester County School District Number Two for the construction of public education facilities for grades K-12.

(D) The impact fee may be offset by any other cash payment paid by the developer and obtained by Dorchester County School District Number Two as a result of an agreement between the developer and another governmental entity.

(E) The Board of Trustees of Dorchester County School District Number Two will reexamine the amount of an impact fee being charged a developer upon receipt of a notice of appeal from the developer. If the notice of appeal is accompanied by a letter of credit in a form satisfactory to the board of trustees in an amount equal to the amount of impact fees owed, the new residential development may receive its certificate of occupancy while the appeal is pending.

(F) For purposes of this section, 'dwelling unit' means all residential units, including, but not limited to, single family attached, single family detached, duplex, condominium, townhouse, multifamily, apartment, and mobile home, but excluding hotels and motels.

(G) The district's board of trustees shall set the impact fee at an amount not to exceed two thousand five hundred dollars per dwelling unit.

Time effective

SECTION 2. This act takes effect upon approval by the Governor and applies to any new residential construction which has not been issued a certificate of occupancy.

Ratified the 19th day of February, 2009.

Became law without the signature of the Governor -- 2/26/09.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-18-2674

The Home Builders Association of South Carolina and
the Charleston-Trident Home Builders Association, Inc.....Appellants,

v.

School District No. 2 of Dorchester County and
the Board of Trustees for Dorchester School District No. 2.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned counsel certified that the Record on Appeal contains material
proposed to be included by any of the parties and not any other material.

February 8, 2010


Frederick A. Gertz
Phong T. Nguyen
GERTZ & MOORE
1416 Laurel St.
P.O. Box 456
(803) 252-1522
Attorneys for Appellant