

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Home Builders Association of South)
Carolina, Home Builders Association)
Of York County, Soni Homes, Inc.,)
Shea Investment Fund 2, LLC, and)
Shea Investment Fund 3, LLC.)

Case No.: 2018-CP-46-02684
DECISION OF THE COURT

Plaintiff,)

v.)

State of South Carolina and)
York County,)

Defendant.)
_____)

RECEIVED
APR 09 2020
SC Court of Appeals

PRESIDING JUDGE:
DATE OF TRIAL:

The Honorable William A. McKinnon
October 9, 2019

This matter came before the Court on December 9, 2019 for a bench trial seeking a declaratory judgment from the Court on several matters concerning the passage of school impact fees in Fort Mill School District No. 4. The Court finds in favor of defendants on all counts.

Introduction

Plaintiffs, two home builder’s associations and two individual home builders, alleged at trial that:

- 1) the South Carolina Development Fee Act (“Act”) is unconstitutionally vague and violates due process;
- 2) that both the Act and the District’s ordinances impose an exaction or taking; and

3) even if the Act is not unconstitutional, the ordinances at issue setting an impact fee for school construction in the Fort Mill School District No. 4 of York County (“the District”) do not substantially comply with the Act.

Plaintiffs seek a declaratory judgment from the Court that the statute and the ordinances are invalid, such that the impact fee cannot be charged.

Pre-Trial Motions

As a preliminary matter the parties made several Motions in Limine that must be addressed. First, the Plaintiff’s Motion in Limine to Amend their Complaint in order to substitute Soni Homes as a Plaintiff for Soni Construction, a subsidiary owned by the same owner as Soni Homes, is GRANTED. Plaintiffs argued that Defendants learned both companies were owned by the same individual before that individual’s deposition, but that only Soni Homes had paid the impact fee in question. As such, the Defense cannot establish any prejudice in allowing Soni Homes to be substituted for Soni Construction. *Curry v. Carolina Ins. Grp. of SC, Inc.*, 428 S.C. 60, 76, 832 S.E.2d 760, 768 (Ct. App. 2019) (“A motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice.”)

Secondly, the Defendants made a Motion in Limine asking the Court to find that the Plaintiffs did not have standing to maintain the suit at issue. *Sea Pines Ass’n for Prot. of Wildlife, Inc. v. S.C. Dep’t of Nat. Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (stating that an individual must have a particularized, cognizable, actual or imminent harm to maintain a suit, and that one or more of the members of an organization must establish they have suffered, or will suffer, a cognizable and individualized harm as a result of the contested act.). As the Court finds for Defendants on all counts on the merits, the Court declines to address the standing issue.

Lastly, the Defendant's Motion to exclude the testimony of Jennifer Gooch on the grounds of relevancy is DENIED. The South Carolina Rules of Evidence define relevant evidence as any evidence that has "any tendency to make the existence of any fact this is of consequence to the determination of the action more or less probable than it would be without the evidence." SCRE 401. Mrs. Gooch's testimony concerning a decline in residential building in the area after the passage of the District's fee has a tendency to make the imminent injury of the Plaintiffs, their inability to build and sell homes, more or less probable.

Factual Basis:

Fort Mill School District (York County District No. 4) covers approximately 50 miles of land including portions of the town of Fort Mill and the town of Tega Cay in York County, South Carolina. The County imposed an impact fee of \$2,500 for the benefit of the District in 1996.

On June 3, 2016, the South Carolina Development Impact Fee Act was amended to add "public education facilities for grades K-12 including, but not limited to, schools, offices, classrooms, parking areas, playgrounds, libraries, cafeterias, gymnasiums, health and music rooms, computer and science laboratories, and other facilities considered necessary for the proper public education of the state's children" to the definition of "public facilities" under the Act. S.C. Code Ann. § 6-1-920.

To deal with the current rapid expansion the York County Council ("the Council") employed Tischler-Bise, an economic development company, to conduct a study concerning the current impact fees and whether an increase in those fees would be appropriate. After considering several drafts of Mr. Bise's report, the Council passed an ordinance to increase the impact fee on residential buildings to \$18,958.00 for each new single family dwelling and \$12,535.00 for a multi-

family dwelling unit. This was the maximum amount that Mr. Bise's report had suggested. The Plaintiffs then brought this suit alleging that the South Carolina Development Fee Act was void for vagueness, violating their right to due process. They also alleged that the Act, and the District's ordinance implementing the impact fee at issue, were violations of the taking clause. Lastly, they alleged that even if the Act was valid, the ordinance instating the fee at issue did not substantially comply with the Act. As most of these claims are claims of constitutionality, and therefore are legal claims, there was not testimony at trial to support or contradict them and they must be determined by looking to the faces and insitution of the Act and the Ordinance.

On the fourth issue, whether the ordinance substantially complied with the Act, the Court did hear testimony from several witnesses. Several of the homebuilders in the Fort Mill area testified that they did not believe their homes would sell as well as a result of the new impact fee, and as a result they would sustain a loss. The homebuilders, Mr. Patel and Mr. Shea testified that, though impact fees can normally be passed to the buyers, the large amount of this fee could not be passed on if the builders wanted to maintain competitive pricing. They also testified that, as a result of this fee, they have not bought more land in the District. Mr. Nix, a representative of the Home Builders Associations, echoed Mr. Patel and Mr. Shea's testimony. He also testified that the only other area with an impact fee as large as the District's fee is in Maryland.

The Court also heard testimony from Jennifer Gooch, a market research analyst, who was qualified as an expert in new market studies and home development in the Charlotte metro area. She testified that home development in the area, in subdivisions with more than ten homes, was down after the institution of the fee. She believed that the fee had a negative impact on new home development in the District.

To end their case in chief the Plaintiffs presented the testimony of Mr. Jonathan Von Nesssen, a research economist from the University of South Carolina. He testified that he believed that the study done by Mr. Bise made incorrect assumptions regarding affordable housing: as to the amount each family would pay in a down payment, the interest rate families would receive on their loans, and the median household income in the District. He testified that these assumptions skewed Mr. Bise's data. However, he did not offer an opinion on other components of Mr. Bise's report, on his use of the U.S. Department of Housing and Urban Development's criteria, or any suggestion as to what amount the District should charge as an impact fee.

In the Defense's case in chief, Mr. Bise testified that he conducted a comprehensive study and released a detailed report outlining the maximum amounts that would be allowable under the requirements of the South Carolina Developmental Impact Fee Act and the demographics of the area. He also testified that he considered the U.S. Department of Housing and Urban Development's cost-burden benchmarks in his study to ensure that the impact fee outlined in his study would not exceed 30% of the homeowner's housing burden. Mr. Bise walked the Court through his calculations and how he complied with the factors required to be considered under the Act. He also walked the Court through the assumptions concerning down payments, household income, and loan rates for the Fort Mill and Tega Cay areas that were made in the report and laid out in the summary. Lastly, Mr. Bise testified that he used current land deals the District had entered into in order to predict the land and engineering costs to build the required schools in the district. He consulted with the District's engineering contractor and considered their current spending on the schools being built in order to estimate the cost of the required development within the District. The Court finds Mr. Bise's testimony credible and finds that he used both sound

engineering studies and generally accepted accounting principles in generating his report, as required by the Act.

Legal Standard:

The South Carolina Declaratory Judgment Act provides that “any person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.” S.C. Code Ann. § 15-53-30.

Discussion of Law:

Under S.C. Code Ann. §§ 6-1-910-1000, the South Carolina Development Fee Act governmental entities are given the authority to pass impact fees in order to provide capital improvements, such as new schools or school renovations, for their residents. These fees may only be implemented by an entity if a comprehensive plan is presented concerning the need for, and projected use of, the capital improvement and the fees to be charged. S.C. Code Ann. § 6-1-930. The fee ordinance must include information to support the explanation and calculation of the fee. § 6-1-940. Before imposing a fee, a governmental entity is required to prepare reports concerning the effect of recovering capital costs through such fees. § 9-1-960. The amount of an impact fee passed under this act must be based on “actual improvement costs or reasonable estimates of the costs, supported by sound engineering studies.” § 6-1-930(B)(2). It may not “exceed the amount determined by dividing the costs of the capital improvements by the total number of projected service units that could use the capital improvement.” § 6-1-980. The implemented fee must be

calculated in accordance with generally accepted accounting principles and it must be limited to the proportionate share of the costs of the projects that are attributable to new development. §§ 6-1-980-990,1000. In considering the proportionate share, a government entity must consider factors such as the cost of existing improvements in the service area, availability of other funding sources, and the extent to which the new development is required to provide system improvements. § 6-1-990(B). Additionally, the fee must undergo three readings and a duly advertised hearing before it can be implemented. S.C. Code Ann. § 6-1-960.

Analysis:

I. The Act is Not Void for Vagueness for Failing to Provide a Set Dollar Limit for Impact Fees and Does Not Violate Due Process as a Result.

In order to challenge an Act as unconstitutional the Plaintiff must prove that its “repugnance to the constitution is clear and beyond a reasonable doubt.” *Robinson v. Richland Cnty. Council*, 293 S.C. 27, 30, 358 S.E.2d 392, 394 (1987). Additionally, if a constitutional construction of a statute is possible, that construction should be applied. *Crow v. McAlpine*, 277 S.C. 240, 242, 285 S.E.2d 355, 356 (1981). Here, Plaintiffs argue the Act is unconstitutionally vague because it does not provide a specific monetary cap on impact fees, and as a result, violates due process. The Court disagrees.

“The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication.” *City of Beaufort v. Baker*, 315 S.C. 146, 152, 432 S.E.2d 470, 473 (1993). As a result, a law is only unconstitutionally vague if a person of common intelligence would be “left to guess as to its meaning and differ to its application” *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598

(2001). The established test for vagueness is whether the statute provides “fair notice to those to whom the law applies.” *Id.* at 571-72, 549 S.E.2d at 598.

The Act at issue is clear on its face. It clearly delineates that governmental entities, such as the District, can implement impact fees in order to provide funding for capital projects, such as the building of new schools. Though the Act does not provide a certain monetary cap on impact fees, it does provide guidance on how impact fees must be determined. The Act provides a specific set of criteria that must be considered by the District in setting a fee amount, and certain procedures that must be complied with when implementing an impact fee, including requiring a comprehensive plan that complies with generally accepted accounting principles. Additionally, the Act requires that the fees be limited to the family and the builder’s proportionate share of the costs of the project attributable to the new development. The Court finds that the Act is clear in its requirements to establish an impact fee, even if it does not provide a specific cap on the amount that can be charged. As such, the Court finds that the Act is not void for vagueness and does not violate due process.

II. Neither the Act nor the District’s Ordinance are a taking.

The Plaintiffs allege that both the Act itself, and the District’s ordinance under the Act, constitute unconstitutional takings. On both counts the Court disagrees.

Defendants cite *Koontz v. St. Johns River Water Mgmt. Dist.*, for the proposition that an impact fee can never be a taking. 570 U.S. 595 (2013). This, Defendants argue, is required because the Supreme Court held: “It is beyond dispute that [t]axes and user fees ... are not takings.” *Id.* At 615 (internal quotation omitted). This argument, of course, assumes an impact fee is a “tax” or a “user fee.” Later in the opinion, the Supreme Court approvingly cites *N.*

Illinois Home Builders Ass'n, Inc. v. Cty. of Du Page, a case applying the *Nollan/Dolan* takings analysis to an impact fee. 649 N.E.2d 384, 387 (Ill. 1995). This would be a very odd citation indeed citation if *Koontz* were in fact holding impact fees are not subject to takings claims. The Court therefore finds an impact fee can be a taking in at least some circumstances.

Nevertheless, the impact fee here is not a taking. In *Dolan v. City of Tigard*, the Supreme Court wrote: A land use regulation does not effect a taking if it “substantially advance[s] legitimate state interests” and does not “den[y] an owner economically viable use of his land.” 512 U.S. 374, 385 (1994) (internal citation omitted). Further, there must be an “essential nexus” between the impact fee and the state interest. *Id.* at 386. Plainly, public school education is a “legitimate state interest.” There is no claim there is a denial of any economically viable use of the land. Finally, the formula set out by the legislature, limiting the fee to “actual improvement costs or reasonable estimates of the costs, supported by sound engineering studies” provides the necessary essential nexus between the fee and the State’s interest in public education. S.C. Code Ann. § 6-1-930(B)(2). Thus, there is no taking.

III. The District’s Ordinance substantially complies with the Act.

Plaintiffs argue that even if the Act itself is constitutional, the District’s ordinance itself does not substantially comply with the requirements of the Act with respect to the affordability analysis and the cost assumptions. The Court notes first that strict compliance is not required. *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 369 S.C. 498, 507 (2006). Under *Charleston Trident Home Builders, Inc.*, the Study must substantially comply

With respect to affordability, the Act merely requires that there be a report “which estimates the effect of recovering capital costs through impact fees on the availability of affordable housing

within the political jurisdiction of the governmental entity.” S.C. Code Ann. § 6-1-930(A)(2). Plaintiffs concede that this analysis was included in the Study, which was incorporated into the 2018 Fee Ordinance. In addition, the affordability analysis was revised in direct response to the concerns raised at the public hearing stage. Plaintiffs’ claims about the affect on the availability of affordable housing are unavailing -- the Act does not prohibit impact fees that have a negative effect on housing affordability; it merely requires that Council consider that effect in assessing a new fee. That was done.

With respect to cost assumptions, the Act requires that “[t]he amount of the development impact fee must be based on actual improvement costs or reasonable estimates of the costs, supported by sound engineering studies.” Mr. Bise testified that he consulted with the District’s engineers and builders in order to project the cost of future development, and that those projections were made based on the costs of the building projects within the district that were currently under way. Further, Mr. Bise testified that the proportionate share of the costs of these new and projected building projects was determined using generally accepted accounting principles, and that calculation was included within his report. This calculation took into account the actual costs of the developments being built when the fee was being considered, and the actual projected costs for the projects that had not begun, as well as the amount of funding already raised by the District. Here, Tischler Bise relied on the District’s actual cost information where available and estimates provided by the Cumming Corporation. Since the Study “used [the District’s] current facilities upon which to base estimated costs, engineering estimates are adequate” to satisfy the sound engineering study requirement under the rule set forth in *Charleston Trident Home Builders, Inc.* Thus, the Study and the 2018 Fee Ordinance are based on “actual improvement costs or reasonable

estimates of the costs, supported by sound engineering studies” as required by S.C. Code Ann. § 6-1-930.

. In addition, the District provided evidence to show that the ordinance enacting the fee had been discussed at length by the Council at several different meetings, and had undergone the required three readings and a hearing before it took effect. Taking into consideration Mr. Bise’s testimony concerning his calculations and the evidence provided detailing the Council’s discussion of the fee, the Court finds that the ordinance at issue substantially complies with the requirements of the Act.

Plaintiffs argue that the imposition of the fee was motivated by bad faith, and that the amount of the fee was arbitrarily selected; however, the Court finds no evidence to support either of these contentions. The District provided substantial evidence concerning the need for the fees in order to support the growing number of schools required within the District as a result of the rapid residential growth. Mr. Bise provided substantial evidence to support his calculation of the maximum allowable impact fee that could be charged by the District, and this was the amount that was chosen. Plaintiffs also argue that the amount of the fee is unreasonable because the District chose to use the maximum allowable fee suggested by Mr. Bise’s report rather than the smaller fee suggested by a member of the Council. The Court disagrees. The Act does not prohibit the District from instituting the maximum fee suggested by the study, it simply requires that the fee not exceed the new resident’s proportional share and comply with the additional requirements within the act. Here, though the fee is a substantial increase, it meets the requirements of the act and, according to Mr. Bise’s study, does not exceed the proportional share of the costs of the required school development for each new residential home. As such, the Court finds that the ordinance at issue substantially complies with the Act.

Conclusion:

There are many ways to fund public schools. The South Carolina General Assembly offered an impact fee as one option, and the York County Council accepted the offer and implemented the highest impact fee their report justified. The only question for this Court is whether these actions are unconstitutional. The Court finds they are not.

For the reasons set forth above, the Court finds The Court finds in favor of DEFENDANTS on ALL COUNTS.

IT IS SO ORDERED.

THIS THE ____ DAY OF _____, 2020.

THE HONORABLE WILLIAM A. MCKINNON



York Common Pleas

Case Caption: Home Builders Association Of South Carolina , plaintiff, et al VS
South Carolina State Of , defendant, et al
Case Number: 2018CP4602684
Type: Order/Other

So Ordered

/s William A. McKinnon, #2761, Circuit Judge