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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge
Case No. 2018-CP-46-02684
Appellate Case No. 2020-000612

_____

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

Appellants,

v.

State of South Carolina and York County,

Respondents.

APPELLANTS' BRIEF IN REPLY TO YORK COUNTY

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Appellants Home Builders Association of South Carolina, Home Builders Association of York County, Soni Construction, Inc., Shea Investment Fund 2, LLC, and Shea Investment Fund 3, LLC submit this Brief in reply to the Brief of Respondent York County ("York")

ARGUMENT[1]

I. Contrary to York's claim, the South Carolina Development Impact Fee Act does not define affordability, provide a consequence for negative effects on affordability, or limit the amount of fees and thus, is unconstitutionally vague.[2]

While vagueness often arises in the context of the criminal claims, it can also arise in civil cases. As this recently stated, "the void-for-vagueness doctrine is also applicable to civil matters where the standard is so vague and indefinite as to really be no rule or standard at all." S.C. Human Affairs Comm'n v. Zeyi Chen, Shearouse Adv.Sh. No. 29, 2020 WL 4199461 (S.C. July 22, 2020). In that case, the court held that a law was vague if it "forbids or requires the doing of an act in terms so vague a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *Id*. at 23. Here, the Act at issue does not define affordability of housing, set consequences for an impact fee that negatively affects housing affordability, or limit the amount of fees to be charged.

[1] Plaintiffs' also incorporate by reference any additional arguments made in in their Brief in Reply the State.

[2] In Footnote 4 of its Brief, York County notes that it argued to the trial court that there was no justiciable case or controversy. York asks that if this Court does not affirm on the merits, that it affirm on this ground under Rule 220, SCACR, and references its trial brief for the arguments in support. In response, Appellants incorporate by reference pages 1-5 of their Memorandum in Reply to York County (R.p. __) for the arguments setting forth the existence of a justiciable case or controversy and asks the Court to reject this alternative ground.

Respondent York claims, as it has throughout this case, that the South Carolina Development Impact Fee Act **(**"the Act") does define affordability in S.C. Code Ann. § 6-1-920(1), which states:

> "Affordable housing" means housing affordable to families whose incomes do not exceed eighty percent of the median income for the service area or areas within the jurisdiction of the governmental entity.

York fails to recognize that this provision only identifies the population for whom affordable housing must be provided—those families whose income is below a certain level. However, the statute does not define the standard for what constitutes "housing affordable to [those] families…." The Act's language is circular: Affordable housing is housing affordable to lower income families, but what actually constitutes "affordable" to lower income families is not defined. In other words, the "definition" in the statute is so vague that "a person of common intelligence must necessarily guess as to its meaning and differ as to its application." Chen at Adv. Sheet p. 23.

York's argument that the Act is not vague because it provides a formula for an impact fee also fails. Under the tenets of due process, an ordinance is unconstitutionally vague under a void-for-vagueness analysis when it does not clearly define what acts are prohibited under it. Viviano v. Sandusky, 991 N.E.2d 1263 (Ohio App. 2013).

Here, on its face, the Act does not define a maximum fee. York argues that the Act provides sufficient limits because the fee must be based on "actual improvement costs" and that the ordinance imposing the fee must provide "an explanation of the calculation of the impact fee." York Brief, p. 12. However, explanations are not the same as limitations on the actual dollar amount of a fee to be imposed. York then asserts that the Act limits the amount of an

impact fee to the proportionate share of the costs of the new project, comparing the Act to S.C. Code Ann. § 4-9-30 and § 6-1-330. York's comparisons are faulty.

Section 4-9-30(5) permits county governments to assess property and levy ad valorem property taxes. Of course, taxes are different than user fees as the United States Supreme Court recognized in Commonwealth Edison Co. v. Montana, 453 U.S. 609, 610 (1981). Moreover, an ad valorem tax is based on the value of an item. *See*, e.g., 71 Am. Jur. 2d State and Local Taxation § 18 ("The essential characteristic of an ad valorem tax is that the tax is levied according to the value of property as determined by an assessment or appraisal.") Here, the impact fee is not based on the value or price of the residential unit; in fact, the value of the residence is irrelevant as all new construction is assessed the $18,158 impact fee.

S.C. Code Ann. §6-1-330 permits local governments to charge and collect a service or user fee. S.C. Code Ann. § 6–1–300(6) defines a "service or user fee" as "a charge required to be paid in return for a particular government service or program made available to the payer that benefits the payer in some manner different from the members of the general public not paying the fee." The only case discussing that statute is Azar v. City of Columbia, 414 S.C. 307, 778 S.E.2d 315 (2015). In that case, this Court stated:

> The City provides water and sewer services to residents and non-residents by way of a service contract. Pursuant to the contract, the customer pays a minimum base rate plus any additional water or sewer use as measured by a meter. The rates the City charges for water and sewer services are set by ordinance.

Azar, 414 S.C. at 309, 778 S.E.2d at 316. In other words, a customer paid the user fee if the customer wanted water service and only paid the amount used, as set forth in the contract between the City and user. In addition, it is feasible that a customer would opt out of service by

using a well on his or her own property.[3] In this case, while the school impact fee may be considered a user fee, Appellants have no other option and must pay the impact fee in order to construct housing on property they owned prior to the imposition of the impact fee. This code section provides no support for York's argument.

In addition, York claims that the Act was designed to allow counties flexibility in imposing an impact fee. Yet the Act actually permits counties to have an impact fee in an unlimited amount, regardless of the impact on the affordability of housing. This "design" is actually the cause of the vagueness.

York next claims that the Act is not vague because the federal Department of Housing and Urban Design uses a benchmark that housing costs should be less than 30% of a household's income. While York argues that criteria from HUD was applied here, that criteria is not referenced by or incorporated into the Act. Moreover, the Act provides no consequences if the affordability analysis exceeds the HUD amount (or any other benchmark). York contends that consideration of the negative effect on housing affordability is sufficient under the S.C. Code Ann. § 6-1-930(A)(2). However, requiring a county to consider the affordability but providing no consequence for a negative affordability analysis renders this statutory provision meaningless and only deepens the vagueness of the Act.

[3] Another example of a user fee that is voluntary is a toll road where the driver could take a non-toll road. "Various court opinions around the country have considered that assertion and have found that tolls are user fees, not taxes." C. Brian Cassidy & Brian O'Reilly, The Road Ahead Examining Transportation Infrastructure Funding, 79 Tex. B.J. 528, 529 (2016). As that analysis noted, when both tolled and non-tolled alternatives are available, motorists have a clear choice of whether or not to pay to use a toll road and receive its benefits. Here, there are no other options and the impact fee is not voluntary.

II. The Act and the Ordinance effect a taking on the home builders.

The impact fee does impose a taking and/or an extraction in violation of the state and federal Constitutions. Contrary to York's claim, the home builders have been deprived of the economically viable use of their property due to the economic impact of the Ordinance and interference with their investment-based expectations. Dunes W. Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 315, 737 S.E.2d 601, 619 (2013).

As they testified at trial, Mr. Patel and Mr. Shea purchased land with the expectation of a $2,500 impact, made improvements to the infrastructure, and now those "captive" lots are subject to an impact fee of $18,158. (Trial Tr. 72:16-25; 74:20-75:5; 86:7-87:25). The costs are so excessive, they cannot be passed on to the buyers. (Trial Tr. 73:19-23; 75: 7-12; 87:3-25).

York claims that because an impact fee has been in existence since 1999, Appellants could not have had a reasonable expectation that it would not increase. However, as York had not even made incremental increases over the years, Appellants had a reasonable objective belief that the impact fee would not increase 700% virtually overnight. Their investments in property and infrastructure were based on that reasonable belief. The severe economic impact of York's impact fee Ordinance imposes a taking on the home builders.

III. Home rule does not allow a county to impose excessive and arbitrary fees that effect a taking.

While the Home Rule Act may give counties broad powers, it does not permit a county to impose an arbitrary and excessive fee or effect a taking. In fact, one of the cases York cites as affirming a county road maintenance fee notes that the fee is permitted "***where it is a fair and reasonable alternative*** to increasing the general property tax…." Brown v. Cty. of Horry, 308

S.C. 180, 181, 417 S.E.2d 565, 566 (1992). Here, the impact fee (one of the highest in the nation[4]) increased 700% and is clear not a "fair and reasonable" fee.

In addition, contrary to its claims, York failed to substantially comply with the requirements of the Act, and thus the Ordinance cannot stand. York argues that the Act merely requires an affordability study be conducted and that one was included in the final version of the Study by Tischler Bise. However, as shown the testimony of Carson Bise (and the multiple drafts of the Study), Tischler Bise manipulated the data on affordability. The Study had eight drafts before the final one. In the first two drafts, the Study included an analysis of housing affordability (both with and without the imposition of an impact fee), but the analysis was skewed because it included both Fort Mill and Tega Cay, and Tega Cay has, *inter alia*, a higher income than Fort Mill. In the draft of the Study that carved out the housing affordability analysis into three separate sections – Fort Mill, Tega Cay, and unincorporated York County—the cost burden for both owner-occupied housing and renter-occupied housing significantly increased. York claimed that the analysis was altered to address concerns raised at public hearings. However, after the separate analysis increased the burden on housing to more than 30% for owner-occupied housing in Fort Mill and Tega Cay, the affordability analysis was then combined in the later drafts – a change that Mr. Bise could not adequately explain, thus giving the impression that the affordability analysis was manipulated to have a lower cost burden.[5] Trial Tr.

[4] At trial Mark Nix testified that he had researched school impact fees across the country and that only one, in Maryland, was higher than the York County impact fee. [Trial Tr. 62:2-64:1].

[5] York also notes that the while affordability must be considered under the Act, it "does not prohibit impact fees that have a negative effect on housing affordability"…which leads back to Appellants' argument that the Act is unconstitutionally vague.

184:3-185:9; 186:7-13; 186:23-187:7. As a result, York County Council did not have the true picture of the impact fee's effect on housing affordability.

"Substantial compliance requires compliance in respect to the essential matters necessary to assure every reasonable objective of the statute." Sabatini v. Jayhawk Const. Co., Inc., 520 P.2d 1230, 1234 (Kan.1974), cited with favor in Responsible Econ. Dev. v. Florence Consol. Mun. Planning Comm'n, No. 2005-UP-584, 2005 WL 7084861, at *4 (S.C. Ct. App. Nov. 16, 2005). It is apodictic that substantial compliance cannot meet the objectives of the Act when it includes a study in which data has been manipulated.

York also asserts that it has substantially complied with the Act's requirement that the report/fee be based on "sound engineering studies." York relies on Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville, 369 S.C. 498, 632 S.E.2d 864 (2006). However, in that case, it was clearly stated that the cost estimates were provided by "the Town engineer." Id., 369 S.C. at 510. Here, York asserts that studies done in 1996 and estimates done by Cumming Construction for the bond referendum (and not for the impact fee) are sufficient. However, neither the 1996 studies nor the bond referendum analysis are sufficient to comply with the Act's requirement of "sound engineering studies." For example, one school that was included for the bond referendum was already under construction by the time the impact fee was passed, yet it was included in the impact fee analysis. York's failure to comply with state law in passing the ordinance constitutes a violation of procedural due process. *Cf.* Effect of procedural rules, Michigan Administrative Law § 4:22 *("…*the concept that it is unlawful for an agency to fail to follow its own rules is basically rooted in procedural due process…").

Finally, the Study's treatment of the bond does allow for double dipping. The debt service credit in the Study does not take into account both the principal and interest payments on the bond. Prior to trial, Mr. Bise acknowledged that "we need to offset the fees so that you're not paying twice, once through the development fee, and again, through future stream of revenue." Bise Dep. 22:23-23:2. At trial, Mr. Bise testified that buyers of new construction would pay property taxes that included principal and interest payments on the bond but he failed to provide a reasonable explanation as to why a credit should not be given for both. Because the residential buyers that pay the impact fee will also contribute principal and interest on the bond debt, a credit for both must be given in the computation of the impact fee.

CONCLUSION

For the reasons set forth in their opening Brief and herein, Appellant respectfully request that this Court reverse the lower court's ruling.

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