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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 STATE OF SOUTH CAROLINA

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

ARGUMENT

I. The South Carolina Development Impact Fee Act the Act does not define affordability, provide a consequence for negative effects on affordability, or limit the amount of fees and thus, is unconstitutionally vague.

Like York County, the State asserts that the South Carolina Development Impact Fee Act, S.C. Code Ann. § 6-1-910 et seq. is not vague as to the lack of limitation on the amount of an impact fee or the definition of affordability as to housing. Appellants have addressed all of these arguments in their Brief in Reply to York County and all such arguments are incorporated herein by reference.

II. The impact fee constitutes a taking or exaction.

A. The South Carolina Development Impact Fee Act is the enabling legislation that effects the taking.

The Act creates the taking by enabling counties to impose excessive and capricious impact fees. The State tries to distance itself from the taking, claiming that it did not require counties to impose impact fees, but that it only allowed them to do so. However, permissive legislation can still be unconstitutional. Cf., Williams v. Blue Cross Blue Shield of N. Carolina, 357 N.C. 170, 190, 581 S.E.2d 415, 429 (2003) (court rejected claim that because the legislation merely gave county the option of adopting an ordinance, it was valid). Without the Act, York County ("York") would not have been able to impose a school impact fee. Thus, as the mechanism by which a taking has been effected, the Act itself is unconstitutional.

B. The impact fee is subject to a takings analysis.

Citing Koontz v. St Johns River Water Mgmt. Dist., 570 U.S. 595 (2013), the State claims that impact fees are not subject to a takings analysis. (State's Brief, p. 6). The State claims that impact fees fall into the category of "similar laws and regulations that may impose financial burdens on property owners" for which governments have unfettered power. The State's argument is based on a Maryland case that stated *Nollan/Dolan*[1] scrutiny did not apply to an impact fee and the opinion of author of a law review article. However, in Koontz v. St Johns River Water Mgmt. Dist., 570 U.S. 595 (2013) – the case upon which the Maryland case relied- did not necessarily go that far. In fact, the court in Koontz stated: "The government's demand for property from a land-use permit applicant must satisfy the *Nollan*/*Dolan* requirements even when its demand is for money." Koontz, 570 U.S. at 597. That case also noted:

> Finally, we disagree with the dissent's forecast that our decision will work a revolution in land use law by depriving local governments of the ability to charge reasonable permitting fees. Numerous courts—including courts in many of our Nation's most populous States—have confronted constitutional challenges to monetary exactions over the last two decades and applied the standard from *Nollan* and *Dolan* or something like it.

Id. at 618 (internal citations omitted). The majority in Koontz did not address the issue of whether legislatively applied exactions were also governed by Nollan/Dolan. Professor John Echeverria notes: "The majority opinion in Koontz is pointedly silent as to whether the ruling

[1] Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994) are cases involving takings or extractions which held that the government may not condition the approval of a land use permit on the surrender of a portion of property unless the government can show there is both a "nexus" and "rough proportionality." Because they are well-known in takings matter, often the abbreviated reference to "Nollan/Dolan" is used.

applies only to *ad hoc* fees or applies to fees imposed through general rules as well." John D. Echeverria, Koontz: The Very Worst Takings Decision Ever?, 22 N.Y.U. Envtl. L.J. 1, 54 (2014). Thus, the State's argument should be rejected; a legislatively imposed impact fee can be considered a taking.

The State also tries to distinguish this case from other takings cases in several other ways, noting, for example, that this case is different than where a government conditions a land-use permit on an owner's relinquishment of a portion of his property. However, the majority in Koontz stated: "The government's demand for property from a land-use permit applicant must satisfy the *Nollan*/*Dolan* requirements even when its demand is for money." Id. at 570. Therefore, even though the Appellants' real property is not being taken, a monetary exaction can also qualify as a taking.

While the State claims the necessary "nexus" and "rough proportionality" requirements under *Nollan/Dolan* are present, it ignores the fact that the new impact fee, with a 700% increase over the old fee, will constrain the supply of new housing by pricing Appellants out of the market. This increase is so egregious it shocks the conscience and by its obvious unreasonableness cannot comply with the *Nollan/Dolan* standards. As Appellants argued in their opening Brief, an assessment, fee or tax may be a taking if:

> [T]he exaction is a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property. **The abuse might also arise from unreasonable or excessive fees**.

Beechwood Devp., LLC, a Wisconsin limited liability company v. Olympus Terrace Sewer Dist., No. C05-0745-MJP, 2005 WL 1950255, at *3 (W.D. Wash. Aug. 15, 2005) (internal citations omitted, emphasis added).

At trail, Mr. Shea testified that in just over a year since the new impact fee was imposed, his companies paid approximately $500,000.00 in fees. (Tr. Transcript 86: 7-24). In effect, the home builders have "captive land," purchased at the time of the old fee but which is now subject to the new fee. In addition, the home builders have provided infrastructure to the properties bought under the expectation of the old impact fee. As Mr. Shea testified, the impact fee cannot just be added on to the price of the house because the price is set by the market. (Trial Tr. 87:24-25). By forcing home builders (who already owned property at the time the impact fee) to pay an impact fee of $18,158.00 is exactly the unreasonable, excessive fee that constitutes a taking or extraction.

CONCLUSION

For the reasons set forth in their opening Brief and herein, Appellants respectfully request that this Court reverse the decision of the lower court.

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