

THE 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

S.C. SUPREME COURT

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.

FINAL BRIEF OF RESPONDENT STATE OF SOUTH CAROLINA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 1

ARGUMENT 1

 Introduction..... 1

 I THE ACT IS NOT VAGUE 4

 II THE ACT DOES NOT EFFECT A TAKING OR EXACTION..... 6

 A The Act Does Not Effect A Taking Because It Does Not Direct
 That Impact Fee Ordinances Be Adopted 6

 B Impact Fees Are Not Subject to Takings Analysis 7

 C The Act Does Not Effect A Taking Under *Nollan / Dolan* Scrutiny 11

 III THE STATE OF SOUTH CAROLINA DID NOT ENACT THE
 ORDINANCE AT ISSUE AND DOES NOT IMPLEMENT OR
 ENFORCE IT 12

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

<i>Beechwood Dev., LLC v. Olympus Terrace Sewer Dist</i> , 2005 WL 1950255 (W.D. Wash. Aug. 15, 2005)	10
<i>BellSouth Telecommunications, Inc. v. City of Orangeburg</i> , 337 S.C. 35, 522 S.E.2d 804 (1999).....	10
<i>Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville</i> , 369 S.C. 498, 632 S.E.2d 864 (2006).....	5
<i>Dabbs v. Anne Arundel Cty.</i> , 232 Md. App. 314, 157 A.3d 381 (2017).....	8
<i>Dabbs v. Anne Arundel Cty.</i> , 458 Md. 331, 182 A.3d 798	8, 11
<i>Dane v. Jackson</i> , 256 U.S. 589 (1921)	7
<i>Danforth v. United States</i> , 308 U.S. 271 (1939)	7
<i>Distin v. Bolding</i> , 240 S.C. 545, 126 S.E.2d 649	9
<i>Dolan v. City of Tigard</i> , 512 U.S. 374.....	8, 11
<i>Evans v. Beattie</i> , 137 S.C. 496, 135 S.E. 538	9
<i>Gorham v. Pub. Bldg. Auth. of City of Providence</i> , 612 A.2d 708 (R.I. 1992)	7
<i>Gould v. Barton</i> , 256 S.C. 175, 181 S.E.2d 662 (1971).....	6
<i>Hedeman v. Postell</i> , 250 S.C. 515, 159 S.E.2d 230 (1968).....	9
<i>Henderson Bridge Co. v. Henderson City</i> , 173 U.S. 592 (1899)	7
<i>Koontz v. St. Johns River Water Mgmt. Dist.</i> , 570 U.S. 595, (2013)	7, 8, 11, 12
<i>Long Cove Club Assoc. v. Town of Hilton Head Island</i> , 319 S.C. 30, 458 S.E.2d 757 (1995).....	10
<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S. 1003 (1992)	10
<i>Newton v. Hanlon</i> , 248 S.C. 251, 149 S.E.2d 606 (1966).....	9
<i>Nollan v. California Coastal Comm'n</i> , 483 U.S. 825 (1987)	8, 11
<i>Rutledge v. Greater Greenville Sewer District</i> , 139 S.C. 188, 137 S.E. 597	9

<i>S.C. Dep't of Soc. Servs. v. Michelle G.</i> , 407 S.C. 499, 757 S.E.2d 388 (2014).....	4
<i>Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach</i> , 345 S.C. 418, 548 S.E.2d 595 (2001).....	10
<i>State v. Neuman</i> , 384 S.C. 395, 683 S.E.2d 268 (2009).....	1
<i>Town of Mount Pleasant v. Chimento</i> , 401 S.C. 522, 737 S.E.2d 830 (2012).....	4, 5, 6

Statutes

S.C. Code Ann. §6-1-910, <i>et seq.</i>	1, <i>passim</i>
§6-1-920	5
§6-1-930	2
§6-1-960	2
§6-1-980	2
§6-1-990	3, 11
§6-1-1000	4
§6-1-1030	4

Other Authorities

48 Am.Jur., Special or Local Assessments, Section 67	9
<i>Keeping Current-Property</i> , Prob. & Prop., September/October 2016, at 14, 17–18.....	8
<i>When Local Government Misbehaves</i> , 2016 Utah L. Rev. 105 (2016).....	8

STATEMENT OF ISSUES

The State concurs in Respondent York County's Statement of the Issues and adds the following:

1. Did Appellants state facts sufficient to constitute a cause of action against the State as to the Ordinance when the State of South Carolina did not enact the ordinance at issue and does not implement or enforce it?

STATEMENT OF THE CASE

The State concurs in the Statement of the Case of Respondent York County.

STANDARD OF REVIEW

The State concurs in the Standard of Review of Respondent York County.

ARGUMENT

The State concurs in the legal arguments of Respondent York County as to the constitutionality of the Development Impact Fee Act and adds the following.

Introduction

As stated in *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009):

This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). "A 'legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.' " *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 134–35, 568 S.E.2d 338, 344 (2002) (quoting *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999)). "A possible constitutional construction must prevail over an unconstitutional interpretation." *Curtis*, 345 S.C. at 569–70, 549 S.E.2d at 597.

Plaintiffs have not and cannot meet these strict standards of proving unconstitutionality. The Act (S.C. Code Ann. §6-1-910, *et seq.*) provides a formula for the calculation of fees that is

proportional to the impact of the development, sets limits on the amount of fees that may be charged and does not in any way effect a taking or exaction under State or Federal law.

Plaintiffs' challenge to the Act is surprising because the Act does the opposite of what they allege. It is not vague and sets limits to the fees a local government may charge. It does not require local governments to impose a fee. Accordingly, it does not cause an unconstitutional taking or otherwise violate the State and Federal constitutions.

Subject to certain exceptions for special or public purpose districts not pertinent here, the Act bars any governmental entity from imposing a development impact fee unless it has adopted a comprehensive plan or capital improvements plan that is compliant with the Act. §6-1-930. Capital improvements plans are to be adopted by ordinance following public notice and a public hearing. §6-1-960. Among other provisions, §6-1-930 directs the following:

(A)(1) “[b]efore imposing a development impact fee on residential units, a governmental entity shall prepare 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” . . . [Affordable housing is defined in §6-1-920(1) to mean “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.”]

(B)(2) The amount of the development impact fee must be based on actual improvement costs or reasonable estimates of the costs, supported by sound engineering studies.

Section 6-1-980 of the Act caps the fee that may be charged as follows:

(A) The impact fee for each service unit may not exceed the amount determined by dividing the costs of the capital improvements by the total number of projected service units that potentially could use the capital improvement. If the number of new service units projected over a reasonable period of time is less than the total number of new service units shown by the approved land use assumptions at full development of the service area, the maximum impact fee for each service unit must be calculated by dividing the costs of the part of the capital improvements necessitated by and attributable to the projected new service units by the total projected new service units.

(B) An impact fee must be calculated in accordance with generally accepted accounting principles.

Section 6-1-990 also contains the following limits on the fee:

(A) The impact fee imposed upon a fee payor may not exceed a proportionate share of the costs incurred by the governmental entity in providing system improvements to serve the new development. The proportionate share is the cost attributable to the development after the governmental entity reduces the amount to be imposed by the following factors:

- (1) appropriate credit, offset, or contribution of money, dedication of land, or construction of system improvements; and
- (2) all other sources of funding the system improvements including funds obtained from economic development incentives or grants secured which are not required to be repaid.

(B) In determining the proportionate share of the cost of system improvements to be paid, the governmental entity imposing the impact fee must consider the:

- (1) cost of existing system improvements resulting from new development within the service area or areas;
- (2) means by which existing system improvements have been financed;
- (3) extent to which the new development contributes to the cost of system improvements;
- (4) extent to which the new development is required to contribute to the cost of existing system improvements in the future;
- (5) extent to which the new development is required to provide system improvements, without charge to other properties within the service area or areas;
- (6) time and price differentials inherent in a fair comparison of fees paid at different times; and
- (7) availability of other sources of funding system improvements including, but not limited to, user charges, general tax levies, intergovernmental transfers, and special taxation.

Section 6-1-1000 provides that “[a] developer required to pay a development impact fee may not be required to pay more than his proportionate share of the costs of the project, including the payment of money or contribution or dedication of land, or to oversize his facilities for use of others outside of the project without fair compensation or reimbursement.”

Section 6-1-1030 sets forth the following appeals procedure:

A) A governmental entity which adopts a development impact fee ordinance shall provide for administrative appeals by the developer or fee payor.

(B) A fee payor may pay a development impact fee under protest. A fee payor making the payment is not estopped from exercising the right of appeal provided in this article, nor is the fee payor estopped from receiving a refund of an amount considered to have been illegally collected. Instead of making a payment of an impact fee under protest, a fee payor, at his option, may post a bond or submit an irrevocable letter of credit for the amount of impact fees due, pending the outcome of an appeal.

(C) A governmental entity which adopts a development impact fee ordinance shall provide for mediation by a qualified independent party, upon voluntary agreement by both the fee payor and the governmental entity, to address a disagreement related to the impact fee for proposed development. Participation in mediation does not preclude the fee payor from pursuing other remedies provided for in this section or otherwise available by law.

I

THE ACT IS NOT VAGUE

The party seeking to invalidate the statute has the burden of proving beyond a reasonable doubt that the statute violates some provision of the constitution”. *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 541, 737 S.E.2d 830, 842 (2012). The statute is clear on its face.

“[W]hen raising a claim of unconstitutional vagueness, the litigant must demonstrate that the challenged statute is vague as applied to his own conduct, regardless of its potentially vague application to others. *S.C. Dep’t of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 507, 757 S.E.2d 388, 393 (2014). Plaintiffs do not allege that the statute is vague as to them, but even if they did, their

argument fails. As the Supreme Court has stated regarding other legislation, “a person of reasonable intelligence would understand the statute.” *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 535, 737 S.E.2d 830, 839 (2012). Although not ruling on vagueness, the Supreme Court certainly appears to have understood how the Act at issue operates as in the following:

“[t]he [Development Impact Fee] Act provides for the calculation of impact fees in several provisions. Section 6–1–940(1) requires that the ordinance include an explanation of the calculation of the fee. Section 6–1–930(B)(2) provides that the amount of the fee “must be based on actual improvement costs or reasonable estimates of the costs, supported by sound engineering studies.” Section 6–1–990 limits the impact fee to a proportionate share of the cost of improvements. Finally, § 6–1–980 provides . . . [for calculation of the impact fee including the provision that] [t]he impact fee for each service unit may not exceed the amount determined by dividing the costs of the capital improvements by the total number of projected service units that potentially could use the capital improvement.”

Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville, 369 S.C. 498, 507–08, 632 S.E.2d 864, 869 (2006).

Appellants contend that the Act is vague as to housing affordability and the absence of a fixed monetary cap on the fee. As to housing affordability, they claim that the Act fails to define how to measure the impact of the fee on affordable housing, but this argument is contradicted by the express terms of §6-1-920(1) which define “affordable housing” to mean “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.” Appellants further contend that the Act is vague because it fails to provide a consequence for a negative effect on housing affordability, but this argument does not go to vagueness. As this Court stated in its decision of January 30, 2020, and quoted in its Order denying Appellants’ Motion to Alter or Amend: “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.” R. Vol. 1, pp. 2, 13 (Order of 1.30. 20 at p. 10 and Order of 4.6.20 at p. 2). The circuit court rejected the monetary cap issue as follows:

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.

R. Vol. 1, p. 11 (Order of 1.30.20 at p. 8).

Reasonable certainty in the enactment of statutes is required, and a statute which is so vague or indefinite that it cannot be executed will be declared void. *Gould v. Barton*, 256 S.C. 175, 185, 181 S.E.2d 662, 666 (1971). The Act clearly meets these standards of “reasonable certainty,” and Appellants have failed to meet their “burden of proving beyond a reasonable doubt that the statute violates some provision of the constitution.” *Town of Mount Pleasant, supra*.

II

THE ACT DOES NOT EFFECT A TAKING OR EXACTION

A

The Act Does Not Effect A Taking Because It Does Not Direct That Impact Fee Ordinances Be Adopted

“The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropriations may fail.” *Danforth v.*

United States, 308 U.S. 271, 286 (1939)(footnote omitted); *see also*, *Gorham v. Pub. Bldg. Auth. of City of Providence*, 612 A.2d 708, 715 (R.I. 1992).¹ Accordingly, the statute at issue does not take property. It simply sets up requirements for ordinances, but does not mandate that impact fees be adopted. Moreover, impact fees, themselves, as discussed below, are not subject to takings analysis.

B

Impact Fees Are Not Subject to Takings Analysis

As stated by the United States Supreme Court in *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615, (2013):

It is beyond dispute that “[t]axes and user fees ... are not ‘takings.’” *Brown, supra*, at 243, n. 2, 123 S.Ct. 1406 (SCALIA, J., dissenting). We said as much in *County of Mobile v. Kimball*, 102 U.S. 691, 703, (1881), and our cases have been clear on that point ever since. *United States v. Sperry Corp.*, 493 U.S. 52, 62, n. 9 (1989); *see A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934); *Dane v. Jackson*, 256 U.S. 589, 599 (1921); *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 614–615 (1899). This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners.

The parties agree that the impact fee is not a tax. Whether it is a user fee need not be decided because the impact fee should fall under the above reference to “similar laws and regulations that may impose financial burdens on property owners” which are not takings. *Koontz* was cited for this point in a Maryland case holding that “[i]mpact fees imposed by legislation applicable on an area-wide basis are not subject to *Nollan* and *Dolan* scrutiny.” *Dabbs v. Anne Arundel Cty.*, 458

¹ As stated in *Gorham, supra*: “[W]e are of the opinion that §45–50–13 did not effectuate a taking upon its enactment. Rather we construe it as conferring discretionary authority upon . . . authorities to take certain parcels. . . by eminent domain . . . Nothing contained therein mandates a taking as of the time of the statute's enactment; rather the appropriate authority is merely given the power to condemn certain parcels whenever it deems it to be necessary.”

Md. 331, 357, 182 A.3d 798, 813, *cert. denied sub nom. Dabbs v. Anne Arundel Cty., Md.*, 139 S. Ct. 230 (2018).² Some law review articles have reached similar conclusions.³ The Maryland Court of Appeals affirmed the decision of the Court of Special Appeals which held that the takings clause did not apply to the impact fee at issue in that case. *Dabbs v. Anne Arundel Cty.*, 232 Md. App. 314, 334, 157 A.3d 381, 393 (2017).⁴ Accordingly, the Act does not create a taking under Federal or State law. Although the circuit court found that “an impact fee can be a taking in at least some circumstances,” it concluded that the fee at issue did not constitute a taking. R. Vol. 1, p. 12 (Order at p. 9).

² “*Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 1994), held that “a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a ‘nexus’ and ‘rough proportionality’ between the government's demand and the effects of the proposed land use.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 [*supra*]. *Dabbs* 182 A.3d at 806.

³ “Legislatively determined impact or assessment fees, established outside the land-use permitting context, should not be subject to *Nollan/Dolan* scrutiny and should instead be tested under the applicable state law review standard” Shelley Ross Saxer, *When Local Government Misbehaves*, 2016 Utah L. Rev. 105, 166 (2016).

Koontz's heightened scrutiny should apply only to “the special context of land-use exactions” during a permitting process--when there are administrative, individualized, monetary exactions, designed to replace a physical exaction--rather than extend to all regulatory monetary obligations. Legislatively determined monetary conditions (such as impact fees) are distinguishable and should be governed by state law review standards, such as deferential review, statutory review, or the dual rational nexus test. (emphasis added).

Keeping Current-Property, Prob. & Prop., September/October 2016, at 14, 17–18.

⁴ “[T]he impact fees at issue here were imposed by legislative enactment, and do not require landowners to deed portions of their property to the County. Moreover, appellants cannot claim ‘that the impact tax’ here ‘compel[s] the property owner to suffer a physical “invasion” of his property,’ or ‘denies all economically beneficial or productive use of land.’ Id. at 40–41, 650 A.2d 712. Therefore, as the Court of Appeals concluded in *Waters Landing*, we similarly hold that ‘the Takings Clause being inapplicable, *Dolan* does not affect our decision.’ Id. at 41, 650 A.2d 712.” *Dabbs v. Anne Arundel Cty.*, 157 A.3d at 393. (emphasis added).

Of further guidance here is authority regarding assessments for street improvements under State law. As stated in *Newton v. Hanlon*, 248 S.C. 251, 260, 149 S.E.2d 606, 611 (1966):

It has long been recognized that the legislature has inherent power to authorize assessment of property within a special taxing district for the purpose of defraying in whole or in part the cost of constructing local improvements. *Evans v. Beattie*, 137 S.C. 496, 135 S.E. 538; *Rutledge v. Greater Greenville Sewer District*, 139 S.C. 188, 137 S.E. 597; *Distin v. Bolding*, 240 S.C. 545, 126 S.E.2d 649. In *Evans* and *Rutledge* the challenged assessment was in the form of an ad valorem tax; in *Distin* it was a sewer service charge in addition to the ad valorem assessment. In our opinion the frontage assessment here challenged involves no different principle and presents no violation of the constitutional provisions which the appellants invoke. For, as pointed out in the circuit court's decree, the particular basis to be employed in apportioning a special assessment is a matter for determination by the legislature and is immune from attack on constitutional grounds unless it is palpably arbitrary. The general rule, as stated in 48 Am.Jur., Special or Local Assessments, Section 67, page 622, is that 'the front footage of property on a street on or in which a public improvement is constructed may be made the basis of apportionment of a special or local assessment to finance such improvement without constituting a taking of property for a public use without compensation, a deprivation of property without due process of law, or in any other respect a violation of the Fourteenth Amendment or of any other part of the Federal Constitution.' (emphasis added).

Newton v. Hanlon, 248 S.C. 251, 259–60, 149 S.E.2d 606, 611 (1966). See also, *Hedeman v. Postell*, 250 S.C. 515, 522, 159 S.E.2d 230, 233 (1968) (“Our holdings in *Newton v. Hanlon*, *supra*, are therefore equally applicable to the legislation here involved and sustain the validity of the provisions which authorize the imposition of front foot assessments against the abutting properties to defray the cost of installing the water lines.”); 48 Am.Jur., Special or Local Assessments, Section 67, page 622. When the above apportionments of street assessments are valid under State law, the statutory provisions for proportional impact fees are constitutional also.

Although Appellants alleged that they are deprived of economically viable use of their property, the allegations are made as to the Ordinance, not the statute. The statute deprives them of nothing because it does not require that any fee be adopted. Moreover, the fee statute at issue

here is not “palpably arbitrary.” *Newton*. Instead, quite to the contrary, the statute sets forth a strict set of detailed requirements for the adoption of a fee, as discussed above, from planning to proportionality. Therefore, consistently with *Koontz*, the Act does not effect a taking or exaction⁵ under State law.

Appellants have not alleged that its property will have no value with the assessment of an impact fee imposed in accordance with the statute. *BellSouth Telecommunications, Inc. v. City of Orangeburg*, 337 S.C. 35, 45, 522 S.E.2d 804, 809 (1999).⁶ See also, *Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 345 S.C. 418, 430, 548 S.E.2d 595, 601 (2001).⁷ Therefore, they cannot establish a taking under State as well as Federal law.

⁵ Appellants cites only the unpublished case, *Beechwood Dev., LLC v. Olympus Terrace Sewer Dist*, 2005 WL 1950255 (W.D. Wash. Aug. 15, 2005) for their use of the word “exaction.” That case stated that a fee “may be a taking if ‘the exaction is a flagrant abuse and by reason of its arbitrary character is mere confiscation of particular property.’” *Beechwood* involved a challenge to a sewer charge rather than a statute, and as noted by York in its brief, the Court found no taking in that case.

⁶ “*BellSouth* contends the forced imposition of the franchise fees constitutes a taking of property without just compensation in violation of due process. There is no evidence the imposition of these fees will force BellSouth to abandon its franchise or that its property would retain no value if the franchise is terminated. BellSouth has failed to show a taking in this case. See *Long Cove Club Assoc. v. Town of Hilton Head Island*, 319 S.C. 30, 458 S.E.2d 757 (1995) (no taking of personal property if property retains some value).” *Id.*

⁷ “[I]f state law so regulates property that it loses all economic value, there is a taking for which just compensation is due. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (taking occurs where owner of real property has been called upon to sacrifice all economically beneficial or productive use of property in the name of the common good).” *Id.*

C

The Act Does Not Effect A Taking Under *Nollan / Dolan* Scrutiny

Nollan / Dolan scrutiny does not even apply here. “*Nollan v. California Coastal Comm'n*, 483 U.S. 825(1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) held that a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a ‘nexus’ and ‘rough proportionality’ between the government's demand and the effects of the proposed land use.” *Koontz*, 570 U.S. at 599. *Koontz* held that *Nollan / Dolan* scrutiny must be applied to a Florida water management district's denial of land use permits unless the applicant either deeded a conservation easement or funded mitigation projects on public property. *Anne Arundel* distinguished generally applicable impact fees, such as those permitted by the South Carolina Act, from the application conditions for a specific piece of property at issue in *Koontz*. Citing numerous cases in its footnote 21, *Anne Arundel* concluded that “[i]mpact fees imposed by legislation applicable on an area-wide basis are not subject to *Nollan* and *Dolan* scrutiny.” 182 A. 3d at 813. Here, the Act is a decision of our General Assembly, applicable statewide, permitting the adoption of impact fees when the conditions set forth in the Act are met. As such, the statute is not subject to *Nollan / Dolan* scrutiny.

Even if, *arguendo*, *Nollan / Dolan* scrutiny applied here, the Act would more than satisfy that requirement of a “nexus” and “rough proportionality.” *Koontz*, 570 U.S. at 599. The Act expressly requires proportionality. As set forth above, §6-1-990 (A) states that “[t]he impact fee imposed upon a fee payor may not exceed a proportionate share of the costs incurred by the

governmental entity in providing system improvements to serve the new development.” Section B of that section sets forth factors that must be considered in “determining the proportionate share.” As stated in *Koontz*, “state law normally provides an independent check on excessive land use permitting fees” (570 U.S. at 618). The Development Impact Fee Act provides such a check and meets *Nollan / Dolan* standards.

III

THE STATE OF SOUTH CAROLINA DID NOT ENACT THE ORDINANCE AT ISSUE AND DOES NOT IMPLEMENT OR ENFORCE IT

Appellants failed to state facts sufficient to constitute a cause of action as to the State as to the Ordinance. The State did not enact the ordinance, require its passage or enforce it. The State did not adopt the ordinance at issue. York County did. Therefore, Appellants have stated no cause of action against the State as to the Ordinance.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Orders of the circuit court as to the State.

Respectfully submitted,

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