STATE OF SOUTH CAROLINA
In the Supreme Court

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

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S.C. SUPREME COURT

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 APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the lower court err in finding that the South Carolina Development Fee Impact Act is not unconstitutionally vague or violative of due process where it fails to define affordability, fails to provide any consequence for a negative effect on housing affordability and contains no limitation on the amount of the fee?

2. Did the lower court err in finding that neither the South Carolina Development Fee Impact Act nor the York County Ordinances passed thereunder impose an exaction or taking where the impact fee was increased over 700 percent?

3. Did the lower court err in finding that the York County Ordinances substantially complied with the requirements of the Act where the Ordinances used faulty assumptions, was not properly supported by sound engineering studies, and manipulated data to meet self-selected affordability benchmarks?

STATEMENT OF THE CASE

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, filed this case in 2019 against the State, York County, and the York County Council members.[1] (R.p. 28). The Amended Complaint set forth causes of action for a declaratory judgment that S.C. Code Ann. § 9-1-910, et seq., and the York County Ordinances passed July 16, 2018 were unconstitutional and effected a a taking in violation of South Carolina Const. art. 1, § 13 and the Fifth and Fourteenth Amendments of the United States Constitution. (R.pp.35-46). On May 23, 2019, the parties entered into a Consent Order which bifurcated the declaratory judgment claim and set forth the procedure for discovery and trial of that cause of action. (R.p. 21).

The matter was tried before the Honorable William A. McKinnon on December 9-10, 2019. (R.p. 96). At the beginning of the trial, the Court heard Appellants' motion seeking to substitute Soni Homes, Inc. for Soni Construction and that motion was granted. (R.p. 99, line 22-p.104, line 12). After a two-day non-jury trial, the Court issued a Decision of the Court in which Judge McKinnon ruled in favor of the Respondents (R.p. 4). Appellants filed a Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP, which was heard on March 11, 2020. (R.p. 2119; R.p. 1910). The Order denying Appellants' motion to alter or amend was filed on April 6, 2020. (R.p. 1). This appeal followed.

STATEMENT OF THE FACTS

The South Carolina Development Impact Fee Act., S.C. Code Ann. § 9-1-910, et seq.

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[1] The individual council members were later dismissed by consent of the parties.

("the Act"), states that a "governmental entity that has a comprehensive plan, as provided in Chapter 29 of this title, and which complies with the requirements of this article may impose a development impact fee." S.C. Code Ann. § 6-1-930. For years, the Act (first passed in 1999) did not include schools as one of the "public facilities" for which an impact fee could be imposed. Under the Act, impact fees could be imposed for other services; for example, in Fort Mill, there were impact fees of a $1,280 for parks and recreation; $152 for fire protection; and $390 for municipal fees (R.p. 282, line 8-p. 283, line 1).

In 2016, a bill was introduced to amend S.C. Code Ann. § 9-1-970 that would exempt the school itself from paying a developmental impact fee when constructing a new school. An amendment to that bill altered the definition of "public facilities" in S.C. Code Ann. § 9-1-920, thereby allowing construction costs for new schools to be passed to homebuilders and/or homebuyers. This bill passed in the waning days of that legislative session with, apparently, very little debate or explanation. *See*, Legislative History of H.4416, S.C. General Assembly Session 121 (2015-2016), https://www.scstatehouse.gov/billsearch.php.

The Act enables governmental entities to impose a development impact fee (in this case for schools) for each unit of housing in a development where an individual building permit or certificate of occupancy is issued. S.C. Code Ann. § 6-1-940(A)(1). However:

> Before 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 <u>on the availability of affordable housing</u>** within the political jurisdiction of the governmental entity.

S.C. Code Ann. § 6-1-930(A)(2) (emphasis added). The Act does not specify what constitutes "affordable housing."

The Act provides that "the amount of the development impact fee must be based on actual improvement costs or reasonably estimates of the costs, **supported by sound engineering**

studies." S.C. Code Ann. § 6-1-930(B)(2) (emphasis added). Such studies are required before an impact fee goes into effect. *See* S.C. Code Ann. §6-1-950(A). To begin the process for adopting an impact fee ordinance, the governmental entity must direct the local planning commission to conduct studies and recommend an impact fee ordinance. S.C. Code Ann. § 6-1-950(A). The only limitation on the amount of the fee is that the amount imposed on the payor "may not exceed a proportionate share of the costs incurred by the governmental entity in providing the system improvements to serve the new development." S.C. Code Ann. § 6-1-990(A). The proportionate share is the cost attributable to the development after the governmental entity reduced the amount to be imposed by:

> (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.

S.C. Code Ann. § 6-1-990(A). However, as long as the statutory factors are used, there is no cap or limit on the amount of impact fee to be charged.[2] Because the Act provides no other limitations, each governmental entity passing an impact fee is, in effect, unrestrained in setting the amount of an impact fee.

Fort Mill School District No. 4 of York County (the "District") is located in northern York County (the "County") at the North Carolina line, near Charlotte (R.p. 332). The District encompasses roughly 50 square miles, and it contains the towns of Tega Cay and Fort Mill,

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[2] Statutory caps are quite typical. For example, South Carolina law provides that once every fifth year, the county or State shall appraise property in its jurisdiction for tax assessment purposes. However, the South Carolina Real Property Valuation Reform Act caps the amount of the assessment: "Any increase in the fair market value of real property attributable to the periodic countywide appraisal and equalization program...is limited to fifteen percent within a five-year period to the otherwise applicable fair market value." S.C. Code Ann. § 12-37-3140.

together with the surrounding unincorporated areas. (Id.) In 1996, prior to the Act, York County enacted an impact fee ordinance, imposing a $2,500 fee on new housing. (R.p. 332).

In 2016, York County Council member Michael Johnson proposed a moratorium on new residential building in the Fort Mill area. (R.p. 333). That proposal was voted down by the Council in May 2016. (Id.) York County Council then turned its attention to raising the impact fees for new development, which was really a pretext for a moratorium on building.

On July 16, 2018, York County Council passed two ordinances that raised the impact fee to $18,158.00 for a new single-family dwelling unit and $12,020.00 for a multi-family dwelling unit. (R.p. 337) Ordinance 2718 created the procedure to adopt the impact fee, its collection, expenditures, etc. (R.p. 763) Ordinance 2818 dictated the amount of the impact fees to be charged (hereinafter collectively referred to as "the Ordinance"). (R.p. 778)

The new impact fees constitute an increase of over 700 percent over the old fee. In addition, just a few months prior to the passage of the Ordinance, a bond referendum was passed to fund the construction of the same seven schools to be funded by the impact fee. (R.p. 159, lines 10-16). However, there is no evidence here that the bond referendum took into account the increased impact fee or vice versa. Of course, a bond spreads the cost of the schools to <u>all</u> homes while an impact fee burdens <u>new</u> construction only.

York County commissioned a study that purportedly supports the amount of the impact fee (referred to herein as "the Tischler Bise Study" or "the Study") (R.p. 334). Carson Bise, an economist with Tischler Bise, prepared the Study. (Id.) Mr. Bise testified that $18,158.00 for a new single family dwelling unit and $12,020.00 for a multi-family dwelling unit was the *maximum* impact fee that could be imposed but that York County could have chosen any amount up to the maximum. (R.p. 1241, lines 10-24).

From the minutes of York County Council meeting approving the Ordinance, it does not appear that there was any discussion or consideration of adopting an impact fee in an amount lower than the maximum amount determined in the Study.[3] Mr. Bise acknowledged that the Act does not prescribe any limit or threshold in determining the amount of the fee and its effect on housing affordability. (R.p. 1214, line 23-p. 1215, line 8; R.p. 266, lines 8-18; R.p. 267, line 20-p. 268, line 18). Because the Act does not limit the amount of fees, Mr. Bise applied his own limit based on guidelines from the U.S. Department of Housing and Urban Development ("HUD")(R.p. 267, line 28-p. 268, line 8). HUD has established a benchmark as to the percentage of income a family should pay for housing costs in order to be considered affordable. (R.p. 224, line 17-p. 225, line 6). According to this benchmark, HUD has defined cost-burdened families as those who pay more than 30 percent of their income for housing and who may have difficulty affording necessities such as food, clothing, transportation, and medical care. The Tischler Bise Study used this thirty percent benchmark when analyzing the affordability of housing, both with and without the imposition of the impact fee.

The Tischler Bise Study had eight drafts before the final one. (R.p. 265, line 10-p. 266, line 1). 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 analyzed both Fort Mill and Tega Cay together. (R.pp. 515-521; R.pp. 1279-1285). Tega Cay has a higher median income than Fort Mill, as Mr. Bise eventually acknowledged when he separated the entities in a June 4 draft of the Study (R.p. 227, lines 5-14; R.p. 276, line 22-p. 277, line 8;

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[3] This is particularly important in light of the Planning Commission's initial recommendations that the impact fee for single family dwellings only be raised to $5,038, and multi-family to only be raised to $2,500 (and even though the school district had only initially sought a fee of $10,000.00. (Rp. 334; R.p. 395).

R.p. 1194, lines 6-16). Thus, using a combined average median income to evaluate the cost burden of the fee on the affordability of housing is not appropriate. Moreover, none of the eight drafts which determined the maximum amount of impact fees were based on or supported "by sound engineering studies," which is required by S.C. Code Ann. § 6-1-930(B)(2). The absence of these required studies was brought to the attention of York County Council in a May 4, 2018 letter by Richard Unger, Esquire. (R.pp. 336-337; R.p. 654; R.p. 1640). York County disregarded these concerns. (R.pp. 689-691).

Dr. Joseph Von Nessen, a Research Economist from the University of South Carolina, appeared at the June 27, 2018 Special Meeting of the York County Council to address the April 2018 draft of the Study. (R.p. 547). Dr. Von Nessen's report, which was submitted to the York County Council for the Special Meeting on June 27, 2018, noted that the Study combined the communities of Fort Mill and Tega Cay (and omitted unincorporated York County), thereby masking the cost burden imposed on Fort Mill, which has a significantly lower median income than Tega Cay. (R.p. 658).

After Dr. Von Nessen's report was provided to Mr. Bise, he separated out the housing affordability analysis into three separate sections – Fort Mill, Tega Cay, and unincorporated York County--in a draft of the Study dated June 4, 2018. (R.p. 1389). When analyzed individually, the household income decreased for Fort Mill. In addition, the cost burden for both owner-occupied housing and renter-occupied housing significantly increased for Fort Mill. In fact, the owner-occupied housing cost burden for Fort Mill increased to 31.9% *before* the imposition of impact fees and increased to 33.5% after the imposition of impact fees. (R.p. 1420) This increase exceeds the 30% HUD benchmark established by Mr. Bise to determine the appropriateness of the amount of the impact fees. (Id.) Mr. Bise admitted that he issued the June

4, 2018 draft of the Study with the cost burden exceeding 30% (the limit he had set) (R.p. 1214, line 23-p. 1216, line 19; R.p. 294, line 4-p. 295, line 14). However, he testified that he was not bothered that it exceeded the limit because the Act does not prohibit an impact fee that exceeds the 30 percent cost burden set by HUD. (Id.).

In later drafts of the Study, the three areas of Fort Mill, Tega Cay, and unincorporated York County were again combined into one affordability analysis, which was apparently done to lower the housing affordability cost burden to less than 30 percent (the cost burden established by HUD and the one that Mr. Bise admitted was the benchmark in order for a buyer to obtain a mortgage). (R.p. 281, lines 2-9)

The Tischler Bise Study was also based on incorrect assumptions. For example, at the June 27, 2018 Special Meeting of the York County Council Dr. Von Nessen explained that:

> [T]he TischlerBise Study [commissioned by School District] makes unrealistic assumptions that do not reflect the realities of York County, South Carolina. Assumption 1 - 20% down payment. Assumption 2- 4.25% interest rate. Assumption 3 - $78,652 median household income.

(R.p. 547). With regard to Dr. Von Nessen's criticism that many/most homes buyers in South Carolina did not pay 20% down for a mortgage, Mr. Bise testified that he used the 20% figure in determining the impact fees "[b]ecause most mortgages require a 20 percent down" but admitted he had no other basis for that assumption. (R.p. 1190, line 10-p. 1191, line 22; R.p. 272, line12-p. 273, line 15). According to Dr. Von Nessen, an expert in economics and housing in South Carolina, the average down payment for mortgages is closer to 11 percent. (R.p. 225, lines 7-25). The Tischler Bise Study also did not consider the fact that mortgage interest rates could rise. (R.p. 226, line 5-p. 227, line 4). Obviously, a lower down payment and increased mortgage rates would affect the affordability analysis and cost burden of housing.

With the dramatic increase in impact fees, the homebuilders cannot pass on the cost to the

home buyers, as home builders Mukash Patel and John Shea explained at trial. (R.p. 168, lines 19-23; R.p. 182, lines 3-25). Because the homebuilders had already purchased lots (and begun infrastructure such as roads), prior to the passage of the Ordinance, they have no option other than to build the houses and absorb the increased cost, which is substantial. (R.p. 169, line 20-p. 170, line 18; R.p. 182, lines 3-25). In fact, 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. (R.p. 181, lines 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.[4] 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. (R.p. 182, lines 24-25). For example, buyers have choices such as buying a resale which does not have an $18,158.00 fee added to it or buying in a nearby county with good schools such as Union County, NC, that does not impose an impact fee. (R.p. 184, line 15-p. 185, line 11). Mr. Nix's testimony further explained that there is a "housing pyramid" where the lowest (and largest) level is $100,000 or less, and then as the pyramid goes up and gets smaller, the prices go up, with the top being houses of $1 million or more. (R.p. 157, lines 7-16). Obviously, a homebuyer of a $1 million house can easily afford an additional $18,158 impact fee, but the homebuyers further down the pyramid cannot.[5]

It is obvious that other homebuilders are similarly affected. Jenifer Gooch, an expert in new home construction in the Charlotte metro area, testified that new home construction significantly decreased after the imposition of the new impact fee. (R.p. 202, line 23-p. 203, line

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[4] The Ordinance could have easily exempted or "grandfathered" in land that had already been purchased by the home builders but it did not.

[5] Mr. Nix also noted that the school impact fee decreases the affordability of housing in Fort Mill, thereby pricing out the teachers at Fort Mill School District 4 from living in the area where they work. (R.p. 157, lines 17-24).

5). In fact, the new home construction was down 30% from the first quarter of 2019 to the second quarter. (Id). Other counties in the metro area without an impact fee have increased their new home construction. (R.p. 204, lines 5-9). From 2018 to 2019, Fort Mill is down 28 percent. (R.p. 203, lines 17-22). The inventory level of vacant lots also increased. (R.p. 204, lines 10-21). As Ms. Gooch explained at trial, if construction rates slow down, the inventory of available lots increase, as no houses are being built. (R.p. 204, line 14-p. 205, line 6). Ms. Gooch also testified that she evaluated the future lot development pipeline and that, from second quarter 2018 (prior to the new fee) and the second quarter of 2019, future development was down 9.8 percent. (R.p. 205, lines 7-20). She noted that if not for one large development by Lennar, development would have been down 40 percent. (R.p. 205, line 17-p. 206, line 2).

The effect of the impact fee is apparent. Appellants Shea and Patel, as owners/developers of land for residential property, must either absorb the costs themselves, which substantially lowers profit margins, or pass along the increased costs to the homebuyer, which affects the affordability for housing for homes in the lower to middle portion of the housing pyramid.[6] (R.p. 157, lines 7-16). As Mr. Shea testified, it is virtually impossible to pass on the costs to the homebuyer. Furthermore, by burdening the affordability of housing in Fort Mill, teachers, policeman, fireman and other less affluent professional people are priced out of the very area in which they work. (R.p. 182, lines 24-25; R.p. 184, line 15-p. 185, line 11; R.p 157, lines 7-16).

ARGUMENT

Standard of Review

[6] As one North Carolina court noted, a public facilities ordinance is a "revenue generation mechanism that effectively establishes a 'pay-to-build' system for developers." Lanvale Properties, LLC v. Cty. of Cabarrus, 366 N.C. 142, 731 S.E.2d 800 (2012).

This matter proceeded as a non-jury trial before the Honorable William A. McKinnon. In an action at law, tried without a jury, an order will be overturned if found to be without evidence to support the judge's findings of fact. Towns Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). In addition, "[w]hile a trial court's findings of fact in a nonjury action at law should not be disturbed on appeal unless they are without evidentiary support, a reviewing court is free to decide questions of law with no particular deference to the trial court. Hunt v. Forestry Com'm, 358 S.C. 564, 569, 595 S.E.2d 846, 848–49 (Ct. App. 2004).

I. The Court erred in finding that the South Carolina Development Fee Act is not unconstitutionally vague or violative of due process.

The Act is unconstitutionally vague in several ways. First, the Act requires that the effect on the affordability of housing must be considered, but fails to define what affordability means. As noted earlier, the 30% affordability benchmark used by HUD is a generally recognized standard, but the Act failed to use it or any other. In addition, the Act is unconstitutionally vague in that it fails to provide any consequence for a negative effect on housing affordability. In addition, the Act fails to provide a cap as to the amount of a fee that can be imposed by an ordinance. This vagueness violates substantive and procedural due process as guaranteed under the Fourteenth Amendment to the U.S. Constitution and S.C. Const. art. I, § 3. This Court has explained the effect of the United States Constitutional provision that "[n]o state shall...deprive any person of life, liberty, or property without due process of law" and notes that it:

> [G]uarantees more than just fair process; it cover[s] a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them. The core of the Due Process Clause, therefore, is the protection against arbitrary governmental action.

South Carolina v. Dykes, 403 S.C. 499, 744 S.E.2d 505, 512 (J. Hearn's dissent, citing, County of Sacramento v. Lewis, 523 U.S. 833, 840 (1998)) (internal quotations omitted). Similarly,

under the South Carolina Constitution, "[t]he substantive due process guarantee ensures that legislation which deprives a person of a life, liberty, or property right have, at a minimum, **a rational basis, and not be arbitrary or overly vague.**" 19 *S.C. Juris. Constitutional Law* § 71 (1993) (emphasis added).

Here, the Act is vague as to the effect of an impact fee on housing affordability. The initial Decision of the Court failed to address Appellants' argument regarding the vagueness of affordability. In the order denying Appellants' Motion to Alter or Amend, the Court found that Act only required York County to consider the effect on affordability but that the Act does not prohibit fees that have a negative effect on affordability. (R.p. 2). That finding of the lower court actually supports Appellants' argument that the Act is the vague. S.C. Code § 6-1-930 (A)(2) states:

> Before 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.

(emphasis added). This provision is unique to South Carolina; no other state requires an affordability analysis. (R.p. 266, line 15-p. 267, line 1). However, as York County's own witness testified, the statute does not define how to measure the impact on affordable housing. (Id.)

Carson Bise testified that he had no guidance on how to make that a determination of affordability. (Id.). Ultimately, Mr. Bise used a benchmark set by U.S. Housing and Urban Development ("HUD") which has determined what percentage of income housing costs should be in order to be considered affordable. (R.p. 267, line 20-p. 268, line 18). According to this benchmark, HUD defined cost-burdened families as those who pay more than 30 percent of their income for housing. (R.p. 224, line 17-p. 225, line 6; R.p. 1214, line 23-p.1215, line 8). Mr. Bise clearly testified that he had to come up with a methodology because none is prescribed in the

Act. (R.p. 270, lines 10-25; R.p. 1644). Moreover, the Act is silent as whether the governmental entity can impose an impact fee if the effect on affordable is detrimental.[7] (Id.)

In the end, even though the affordability analysis exceeded the self-selected 30 percent benchmark in some instances, Mr. Bise disregarded this effect. Bise admitted that he issued the June 4, 2018 draft of the Study with the cost burden exceeding 30% (the limit he had set). (R.p. 1214, line 23-p. 1216, line 19; R.p. 294, line 4-p. 295, line 14). The reason for this result is because the June 4 draft correctly separated the analysis into two section – one for Fort Mill, a larger town with a lower median income, and one for Tega Cay, a smaller municipality but one that has a higher median income. (R.p. 276, line 22-p. 277, line 8; R.p. 1194, lines 6-16). Mr. Bise testified that it did not matter if the HUD cost burden was exceeded for Fort Mill because the Act does not prohibit an impact fee that exceeds that 30 percent cost burden. (R.p. 1214, line 23-p. 1216, line 19; R.p. 294, line 4-p. 295, line 14). In fact, he specifically testified the Act was "moot" as to the effect of an affordability analysis on the fees to be adopted. (R.p. 264, lines 13-19). Thus, under Act, it is possible for the cost burden of affordable housing to be even higher than the 33.5% Mr. Bise calculated in his June 4 analysis for owner-occupied housing in Fort Mill.

The lower court also stated that the test for vagueness was whether a statute provided "fair notice to those whom the law applies." (R.p. 4), citing Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001). The lower court then held that the absence of a monetary cap did not render the Act vague. According to the lower court, the Act provides certain procedures that must be complied with in instituting a fee amount. However, under the tenants of due process, an

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[7] Surely the General Assembly included this affordability provision for a reason. If a governmental entity only has to consider affordability and then discard any objections regardless of the amount of the fee or effect on affordability, the provision is meaningless.

ordinance is constitutionally 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, there is no clear delineation of what fee would be prohibited as excessive. It is undisputed that the Act has no cap as to the dollar amount or percentage of increase in the fee.[8] As such, the Act is inherently vague and allows a county to impose any fee amount as long as the county purports to have data justifying the costs--regardless of the impact on the builders and their property. The Court ignored these facts when holding that the Act was not vague for voidness, and thereby a violation of due process.

II. The Court erred in finding that neither the South Carolina Development Fee Impact Act nor the York County Ordinances passed thereunder impose an exaction or taking.

The lower court properly found that an impact fee can be a taking. (R.p. 12). However, the lower court declined to find a taking here, ruling that there was a legitimate state interest in public schools and that that the Appellants were not denied the economically viable use of his land. (Id.). However, the lower court ignored the fact that 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. Such excessive costs cannot be passed on to the buyers. (R.p. 168, lines 19-23; R.p. 182, lines 3-25). As Mr. Shea testified, the impact fee is fixed, and unlike increased cost of materials, the builders cannot seek alternative suppliers. (R.p. 182, lines 10-25). Home buyers can simply buy a resale instead of new construction or purchase in a

[8] As noted earlier, statutory caps can be found in other South Carolina statutes, such as the South Carolina Real Property Valuation Reform Act caps the amount of any assessment of real property: "Any increase in the fair market value of real property attributable to the periodic countywide appraisal and equalization program...is limited to fifteen percent within a five-year period to the otherwise applicable fair market value." S.C. Code Ann. § 12-37-3140.

nearby county without impact fees. (R.p. 184, line 15-p. 185, line 11). The home builders who have already purchased land and installed infrastructure suffer the loss.

The Act clearly effects a taking without just compensation in violation of S.C. Const. art. I, § 13, and the Fifth and Fourteenth Amendment of the United States Constitution. The impact fee imposed by the Ordinance, which is a 700% increase over the old fee, will constrain the supply of new housing by pricing Plaintiffs out of the market. As such, the Ordinance deprives Plaintiffs of the economically viable use of their property and interferes with Plaintiffs' reasonable, investment-backed expectations. 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).

The impact fee is arbitrary, unreasonable, and excessive. The impact fee is not supported by sound engineering studies and is not based on the appropriate assumptions for median income, mortgage rates, and mortgage down payments (see Section III, *infra*). The impact fee has been increased more than *seven hundred percent*. It is almost more than four times the national average. Mark Nix, the Director of the Homebuilders Association of South Carolina testified that in his research, he learned that there was only one other county (in Maryland) that had a higher school impact fee. (R.p 158, line 3-p. 159, line 1). There was no discussion by the York County Council of phasing in the fee in increasing increments, nor was there a discussion of any fee lower than the maximum fee determined by Tischler Bise.

Two of the Appellants, residential homebuilders in the Fort Mill area, testified as to the

effect of the impact fees. These impact fees are incurred by Plaintiffs in developing residential property and are either passed directly on to the purchasers, causing a significant obstacle to affordable housing, or absorbed by the Plaintiffs, causing significant monetary damage. The amount of the impact fee is not reasonably related to the Plaintiffs' developments and thus constitutes an illegal and unconstitutional exaction. Furthermore, just months before the passage of the impact fee, York County passed a bond referendum to fund the very same seven schools as the impact fee. One of those schools, Catawaba High School, was already under construction and in fact, was open by the time of trial in this case. In other words, instead of spreading the cost of new schools to all property owners, Respondents are seeking to shift the burden on the homebuilders of new construction. As such, the Ordinance, and the Act that enabled passage of the Ordinance, are an unconstitutional taking without compensation in violation of S.C. Const art. I, § 13 and the Fifth and Fourteenth Amendment of the United States Constitution.

III. The Court erred in finding that the York County Ordinances substantially complied with the requirements of the South Carolina Development Fee Act.

The lower court found that York County had substantially complied with the Act by commissioning the Tischler Bise study, which includes an affordability analysis. However, as shown the testimony of Carson Bise (and the multiple drafts of the Study), Tischler Bise manipulated the data on affordability. The Tischler Bise 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 analyzed both Fort Mill and Tega Cay together, and Tega Cay has, *inter alia*, a higher income than Fort Mill. Moreover, none of the eight drafts which determined the maximum amount of impact fees were based on or supported "by sound engineering studies" as required by S.C. Code Ann. § 6-1-

930(B)(2). 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. (R.p. 1420). For no reason that Mr. Bise could explain, the affordability analysis was then combined in the later drafts, giving the impression that the affordability analysis was manipulated to have a lower cost burden. (R.p. 1229, line 14-p. 1230, line 15; R.p. 281, line 23-p. 282, line 5). Thus, contrary to the lower court's order, 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.

Here, the manipulation of the numbers is obvious. Dr. Joseph Von Nessen, an expert in economics, particularly regional housing economics, testified at the trial on behalf of Appellants. (R.p. 220, line 17-p. 221, line 3; R.p. 223, lines 3-18). Dr. Von Nessen had previously provided a report addressing the April 2018 draft of the Study. Dr. Von Nessen's general conclusion was that the findings in the Study were "not **robust** with respect to the assumptions made." (R.p. 224, lines 8-13) (emphasis added). As he explained, a conclusion is not "robust" when it is sensitive to small changes in the assumptions made. (Id.) In other words, the numbers can be manipulated.

For example, as Dr. Von Nessen noted, Mr. Bise assumed that home buyers would make

a 20% down payment but admitted he had no citation or basis for that assumption. (R.p. 272, line 20-p. 279, line 15). However, Dr. Von Nessen testified that according to the major sources on housing data, the down payment can vary greatly depending upon region, and that a more appropriate estimate is 11 percent. (R.p. 225, line 7-p. 226, line 4). As Mr. Bise acknowledged, when the down payment decreases, the amount of a mortgage increases. (R.p. 272, line 20-p. 275, line 7). Dr. Von Nessen explained that by using Mr. Bise's assumption of a 20% down payment, it is less likely that the 30% HUD affordability benchmark will be exceeded, even though Mr. Bise's assumption does not reflect the reality in South Carolina. (R.p. 225, lines 19-25).

One of the biggest criticisms Dr. Von Nessen had was the combining of Fort Mill and Tega Cay to determine the median household income. (R.p. 227, lines 5-24). By doing this, the Study masked the fact that Fort Mill has a lower median income than Tega Cay. (Id.) Thus, the maximum impact fee stayed below the 30% affordability threshold. However, when disaggregated, the 30% threshold is exceeded in Fort Mill. (Id.)

After Dr. Von Nessen's 2018 report was provided to Mr. Bise, the Study separated out the housing affordability analysis into three separate sections – Fort Mill, Tega Cay, and unincorporated York County--in the draft dated June 4, 2018. (R.p. 276, line 17-p. 278, line 21; Rp. 1389; R.p. 1415). When analyzed individually, the household income decreased for Fort Mill. (R.pp. 1416-1417. In addition, the cost burden for both owner-occupied housing and renter-occupied housing significantly increased. (R.p. 1420). In fact, the owner-occupied housing cost burden for Fort Mill increased to 31.9% *before* the imposition of impact fees and increased to 33.5% after the imposition of impact fees. (R.p. 279, lines 3-14; R.p. 1420). This increase exceeds the 30% HUD benchmark utilized by Mr. Bise in determining the

appropriateness of the amount of the impact fees. Bise admitted that he issued the June 4, 2018 draft of the Study with the cost burden exceeding 30% (the limit he had set), because the Act does not prohibit an impact fee that exceeds the 30 percent cost burden set by HUD. (R.p. 1214, line 23-p. 1216, line 19; R.p. 294, line4-p. 295, line 14).

The lower court also found that because Mr. Bise consulted with the school district's builders to project costs of future development, there had been substantial compliance with the Act's requirement that the report/fee be based on "sound engineering studies." (Order, p. 10, citing Charleston Trident Home Builders, Inc. v. Town Council of Summerville, 369 S.C. 498, 632 S.E.2d 864 (2006). However, in the Charleston Trident case, it was clearly stated that the cost estimates were provided by "the Town engineer." Id., 369 S.C. at 510. Here, Mr. Bise provided no cost estimates by an engineer that formed the basis for the Study. In fact, he acknowledged there was no engineering study done specifically for the Study. (R.p. 1196, line 20-p. 1197, line 9). In fact, the only documents that show these cost estimates are two studies done for 1996 impact fee and some estimates from Cumming Construction[9] done in anticipation of the 2018 bond referendum, but not the impact fee. Neither the 1996 studies nor the bond referendum analysis are sufficient to comply with the Act's requirement for a government entity to obtain "sound engineering studies" before an impact fee is imposed.

In addition, the Order disregarded the bond referendum, which was passed in the spring of 2018, just a few months before the Ordinance was passed in July 2018. The same schools that were included in the bond referendum (including one that was already under construction by the time the impact fee was passed) were also used in the impact fee analysis--giving rise to potential

[9] Defendants' Ex. 4 (R.p. 1118) showed a few slides by Cumming but fall short of sound engineering studies.

double dipping. In fact, the school under construction -- Catawba Ridge High School -- was operational by the time of trial, and thus no further construction funding was needed.

Furthermore, by passing the impact fee, the burden of the schools is being shifted to the home builders and developers rather than the entire community. The repayment of a bond is borne by all property owners. Here, only home builders – who owned the land prior to the passage of Ordinance-- bear the brunt of paying for new schools. Meanwhile, York County Council can lower taxes by lowering the debt millage so that existing property owners are relieved of the burden of paying for school. (R.p. 1098, line 14-p. 1099, line 10).

Moreover, as Plaintiffs argued at trial, there is no evidence here that York County took into account the effect of bond referendum on the increased impact fee or vice versa. Mr. Bise acknowledged that he did not know of any other place in the country where an impact fee was passed within two months of a bond referendum. (R.p. 1240, lines 10-15). Mr. Bise also testified those that pay the impact fee should not also have to repay bond debt. (R.pp. 284-288). Yet, Mr. Bise admitted that while his report contained an amortization scheduling giving credit for principal payments, it gave no credit for the interest to be paid. (Id.) Thus, a person who pays the impact fee is also subject to a portion of the bond debt. Mr. Bise also admitted that his final version of the Study did not include the cost burden of other impact fees in Fort Mill (such as a $1,280 parks and recreation fee; a $152 fire protection fee; and a $390 municipal fee) which affect the affordability of housing. (R.p. 282, line 8-p. 283, line 5).

CONCLUSION

The Act (and thus the Ordinance passed thereunder) is fatally flawed due to the lack of direction as the amount of an impact fee and the effect on affordability of housing. This lack of guidance results in an arbitrary and capricious increase of over 700 percent for the impact fee.

Moreover, the Study on which the Ordinance is based used faulty assumptions, was not properly supported by sound engineering studies, and manipulated data to meet self-selected affordability benchmarks. Finally, the Act and the Ordinance impose an unconstitutional taking or exaction on the homebuilders. For the reasons set forth herein, the Act and the Ordinance should be struck down.

While Appellants maintain the Act should be struck down in its entirety, as an alternative, the offending portion of the Act could be severed. As noted previously, in the waning days of the 2015-2016 session, an amendment to the Act altered the definition of "public facility" in S.C. Code Ann. § 9-1-920 to include schools, which allowed construction costs for new schools to be passed to homebuilders and/or homebuyers and was passed with very little debate or explanation. *See*, Legislative History of H.4416, S.C. General Assembly Session 121 (2015-2016). This portion of the Act could be struck without affecting the Act as a whole.

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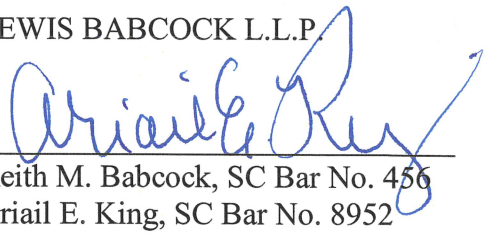

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October 5, 2020

STATE OF SOUTH CAROLINA
In the Supreme Court

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

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S.C. SUPREME COURT

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that the final Brief of Appellants complies with Rule 211(b), SCACR.

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