THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2021-000177
Case No. 2018-CP-18-1505

Summerville Retail Investment, LLC, ... Appellant,

v.

Dorchester County, A Political Subdivision of the State of South Carolina, Cindy Chitty as Treasurer of Dorchester County, Ex Officio, and Montebello JTA Group, LLC, ... Defendants,

Of which Montebello JTA Group, LLC, is the ..... Respondent.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

This is a declaratory judgment action. It arises from competing claims by the Appellant and Respondent over the return of a development impact fee assessed and collected by Dorchester County (County) under its Ordinance 10-24 (the Ordinance). At the time of the assessment and payment of the fee, the Appellant owned the development property. A non-party (SK Investments) paid the impact fee, and the Appellant (Seller) thereafter sold the property to the Respondent (Buyer). The County determined that it should return all impact fees collected but not yet expended and, pursuant to the Ordinance, the County determined that it should return the fee at issue here to the Buyer.

The Seller commenced this action for a declaratory judgment against the Buyer and the County, contending that it was entitled to receive the impact fee under the Ordinance. (R. 98-137). The Buyer answered and counterclaimed that it was entitled to receive the impact fee under the Ordinance. (R. 145-158). The County answered, interplead the funds into the court, and, with the consent of the parties, the circuit court dismissed the County from the case. (R. 10).

The Seller and Buyer filed motions for summary judgment. The trial court granted the Buyer's motion and denied the Seller's motion. The Seller made a 59(e) motion, which the trial court denied. The Seller timely appealed.[1]

[1] In its Statement of the Case and its Designation of Matter to be Included in the Record on Appeal, the Appellant references, cites, and designates numerous matters that are irrelevant to this appeal. To the extent necessary, the Respondent objects to these matters, objects to their inclusion in the Record on Appeal, and objects to any attempted use of these materials by the Appellant to pursue this appeal. (See Init. App. Br. at 2-3 and Designation of Matter, *passim*, referencing and designating the following materials: Motion to Dismiss; Memorandum in Support of Motion to Dismiss; Order Denying Motion to Dismiss; 59(e) Motion, re: Motion to Dismiss; Amended Order Denying Motion to Dismiss; Scheduling Orders; and Consent Motion for Order of Protection).

STANDARD OF REVIEW

The Seller correctly recites the general standard of review for appeals from orders granting a motion for summary judgment. (Init. App. Br. 8). The Buyer would further submit that the fundamental issue in this case is the meaning of the Ordinance and the application of the Ordinance to the undisputed facts in this case. These are questions of law for this Court under *de novo* review.[2] The ordinary statutory construction rules apply to ordinances, and the primary rule is to ascertain and effectuate the intent of the legislative body that adopted the ordinance.[3]

STATEMENT OF FACTS & PROCEDURAL HISTORY

In 1999, the General Assembly enacted the South Carolina Development Impact Fee Act (the Act).[4] This Act authorized counties and municipalities to impose and collect a "development impact fee" as a condition of approving the development of property. In 2010, the County adopted Ordinance 10-24 (the Ordinance). The purpose of this Ordinance was to assess and collect development impact fees to meet a development's impact on the transportation system. (Ordinance at R. 224-244, *passim*). The Ordinance included a process for returning any un-used impact fees to the "current owner" of the property. (*Id.*).

The Seller is a property development company. After the 2011 effective date of the Ordinance, the Seller sought to develop property that was subject to the Ordinance. The County assessed an impact fee of $326,848.00 as a condition of approval for the Seller's development plans. A non-party (SK Investments, LLC) paid the impact fee by check

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[2] *Staubes v. City of Folly Beach*, 529 S.E.2d 543, 546 (S.C. 2000) (meaning of ordinance); *Crusader Servicing Corp. v. County of Laurens*, 674 S.E.2d 495, 497 (S.C. App. 2009) (applying law to undisputed facts).

[3] *Helicopter Solutions, Inc. v. Hinde*, 776 S.E.2d 753, 758 (S.C. App. 2015).

[4] S.C. Code Ann. §§ 6-1-910 to -2010 (2018 & Supp. 2021).

dated October 31, 2016. (R. 198). Thereafter, by Limited Warranty Deed dated January 11, 2017, and filed on January 26, 2017, the Seller conveyed the property to the Buyer together with "all and singular, the rights, members, hereditaments, and appurtenances to the said premises belonging *or in anywise incident* or appertaining." (R. 200) (emphasis added). The deed included exceptions attached to the deed, but there was no exception regarding the impact fee or any return of that fee. (R. 204-205, *passim*).

In September 2017, County Council voted to return all impact fees collected through June 2017 to the "current owners of record." The County issued a check on September 17, 2017, jointly payable to the Buyer and a third-party (Wal-Mart). This triggered a series of events that led to this check being returned to the County, the Seller and Buyer making demands upon the County for the fee, and the commencement of the present action. (See R. 35, ¶¶ 25-31).

In its complaint, the Seller sought a declaratory judgment that it was entitled to the impact fee under Ordinance 10-24 and no other basis. (R. 98-106., *passim.*). In its motion for summary judgment, the Seller sought recovery of the impact fee under Ordinance 10-24 and no other basis. (R. 69-70, *passim*). At the hearing, the Seller based its entire argument on the Ordinance, including the following assertions:

1. It paid the impact fee under Ordinance 10-24, and "that money *is governed by that ordinance*." (R. 187) (emphasis added).

2. Both parties claimed the fee under the Ordinance. (R. 187-188).

3. The ordinance contains "conflicting" sections on entitlement to the impact fee, and the court must resolve this conflict. (R. 188).

The Buyer argued that it was entitled to the impact fee under the Ordinance and, alternatively, that the Seller had conveyed any and all rights to the impact fee to the Buyer

by selling the property to it and by the terms of the limited warranty deed that transferred the property from the Seller to the Buyer. (R. 190-194, *passim*; see also R. 74; 78-80). **Note:** Throughout the hearing and its Brief of Appellant, the Seller uses the terms "statute" and "ordinance" interchangeably in reference to the Ordinance.

The circuit court took the matter under advisement, stating that it was going "to read the statute [*i.e.*, the ordinance]." (R. 195). Thereafter, the circuit court issued the appealed order, denying the Seller's summary judgment motion and granting judgment to the Buyer on two separate and independent grounds. First, the circuit court ruled that the Buyer was entitled to the impact fee under the terms of the Ordinance. (*E.g.*, R. 36). Second, the circuit court ruled that the deed from the Seller to the Buyer "transferred all right and interest of [the Seller] in the Property to [the Buyer], including any right to receive the Impact Fee Refund." (R. 34, ¶ 23; see also *id.* at 36). Notably, the circuit court did not mention or rule upon any other issues, questions, or arguments. (R. 29-36, *passim*).

The Seller made a timely 59(e) motion wherein it asserted the following challenges to the appealed order:

1. The Seller is the "rightful owner" of the impact fee under the Ordinance.

2. The order makes "findings of undisputed material fact that are not part of the record and are not correct including a transfer of rights to the refund in this matter *that contradict the plain meaning of the Ordinance at issue*."

3. The order gives the Buyer a "windfall," because it did not pay the impact fee and it was not entitled to the fee under the terms of the Ordinance.

4. The order "references a sale that has *no impact on the clear meaning of the Ordinance* and results in an inequitable windfall and an unjust conversion of funds paid by the [Seller]."

(R. 81-82) (emphasis added). The trial court denied the motion. The Seller appealed.

ARGUMENT

I. The Seller's "windfall" and "equity" arguments are based on a false premise and ignore the business realities in developing and selling property.

Throughout its brief, and in support of all arguments, the Seller invokes equity to argue that Buyer received a windfall from the trial court because the Seller, not the Buyer, paid the impact fee. This argument has no basis in fact, because the Seller did not pay the impact fee. In any event, and assuming the Seller paid the fee or that it was paid on the Seller behalf, its arguments ignores the real world of developing and selling real property.

The Seller is a developer of real property. As part of its development business, it incurs and pays numerous types of development costs. The impact fee at issue here is one of those development costs. A priori, when a developer sells a development, it recovers its costs of developing the property. Those costs are passed on to the purchaser in the purchase price, *i.e.*, the seller is reimbursed for its costs by the sales price. Thus, as a result of the sale to the Buyer for $12 Million Dollars, the Seller recovered any assumed prior payment of the impact fees by transferring that cost to the Buyer in the sales price, *i.e.*, as a result of the sale, the Buyer ultimately paid the impact fee.

To the extent equity or windfall are relevant, the Buyer, not the Seller, paid the impact fee as part of the $12 Million purchase price. At the very least, given the economic realities of developing and selling property, and given that the Seller did not pay the impact fee, the parties stand on equal footing with regard to any equity or windfall issues.

In addition, to the extent that equity is relevant here, it is axiomatic that equity aids the vigilant. If the Seller intended that it would receive any refund of the impact fee, despite having passed that cost to the Buyer in the sale, then it could have provided for that in the sales contract or deed. Having failed to do so, it cannot now cry equity or windfall.

II. The Seller's Argument A regarding the meaning and application of the Act is not properly before this Court for appellate review and has no merit.

In Argument A, the Seller argues that the Act preempts the Ordinance through field preemption, that the Ordinance impermissibly conflicts with the Act, and the Act requires that the impact fee be paid to the Seller. (Init. App. Br. 9-11). This argument is not preserved for appeal and has no merit.

A. Argument A is not properly before this Court for appellate review.

The Seller never made any Act-related argument to the trial court, including any claim of preemption, any claim of conflict between the Act and the Ordinance, or any claim of entitlement to the impact fee under the Act. Throughout this entire case, until the filing of its Initial Brief of Appellant with this Court, the Seller has relied solely on the Ordinance to claim any entitlement to the impact fee.[5] Indeed, at the hearing, the Seller expressly stated that entitlement to the impact fee was "governed by [the] ordinance." (R. 187). Even if the Seller had made these arguments to the trial court (and it did not), the trial court did not mention them or rule on them in the appealed order. (R. 29-40, *passim*). The Seller made a Rule 59(e) motion, but the motion did not mention or otherwise request a ruling on anything pertaining to the Act, the meaning or application of the Act, or any preemption by the Act – the motion relied solely upon the Ordinance. (R. 81-82, *passim*). Argument A is therefore not properly before this Court for appellate review under the following axiomatic principles of appellate law: an argument cannot be made for the first time on appeal[6]; a party cannot take one position at trial (fee controlled by the Ordinance) and, after

[5] See Complaint at R. 96-106, Plaintiff's Summary Judgment Motion at R.69-70, and Hearing Transcript at R. 184-197, all *passim*).

[6] *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, 737 S.E.2d 601, 613 n.11 (S.C. 2013).

losing at trial, take a different position on appeal (fee controlled by the Act)[7]; an issue not raised to the trial court cannot be raised on appeal[8]; and when an issue is raised to the trial court but not ruled upon in the appealed order, the issue is not preserved for appeal unless the appellant sought a ruling in a 59(e) motion.[9] In any event, as shown below, the Seller was not entitled to the fee under the Act.

B. Argument A has no merit.

The Seller argues that the Act reflects "field preemption" by the General Assembly in the subject matter of development impact fees. (Init. App. Br. 9-11). Preemption is not implicated here. The Act is enabling legislation that grants counties and municipalities the power to impose impact fees.[10] The Act requires them to exercise this power through the adoption of an ordinance.[11] The Act further requires that the ordinance comply with the terms and requirements of the Act.[12] Were any issue under the Act properly before this

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[7] *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, 737 S.E.2d 601, 613 n.11 (S.C. 2013).

[8] *Staubes v. City of Folly Beach*, 529 S.E.2d 543, 546 (S.C. 2000).

[9] *Chastain v. Hiltabidle*, 673 S.E.2d 826, 829 (S.C. App. 2009).

[10] See S.C. Code Ann. § 6-1-930(A)(1), which provides in pertinent part as follows:

> *Only 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.* If a governmental entity has not adopted a comprehensive plan, but has adopted a capital improvements plan which substantially complies with the requirements of Section 6-1-960(B), then it may impose a development impact fee. A governmental entity *may not impose an impact fee*, regardless of how it is designated, *except as provided in this article.*

(Emphasis added). A "governmental entity" is defined as "a county, as provided in Chapter 9, Title 4, and a municipality, as defined in Section 5-1-20." S.C. Code Ann. § 6-1-920(11).

[11] S.C. Code Ann. § 6-1-930(B)(1) ("An impact fee may be imposed and collected by the governmental entity *only upon the passage of an ordinance* approved by a positive majority, as defined in Article 3 of this chapter.") (emphasis added).

[12] See generally S.C. Code Ann. § 6-1-930(A)(1), quoted *supra* n.10. Specific requirements are imposed throughout the Act.

Court, it would be one of authority under enabling legislation, not preemption. Assuming this Court nevertheless reaches this issue of authority, the Seller's arguments have no merit.

Under the Act, a "developer" is one that undertakes a "development," which includes *inter alia* construction of or use of a building or structure that "creates additional demand and need for public facilities."[13] A "development impact fee" or "impact fee" is a payment of money imposed as a condition of "development approval," which is a document from the government authorizing the commencement of the development.[14] The entity that pays the impact fee is the "fee payor."[15]

Throughout the Act, the General Assembly repeatedly used the defined terms of "developer" and "fee payor" to describe the rights and obligations of the entities that were developing the property and paying a development impact fee.[16] Despite this, when the General Assembly addressed the issue of returning unused impact fees, it did not use the term "fee payor." Rather, it used an "owner of record term: "An impact fee must be refunded *to the owner of record of property on which a development impact fee has been paid* if . . . the impact fees have not been expended within three years of the date they were scheduled to be expended on a first-in, first-out basis . . .."[17] The Seller argues that the above-emphasized language means the party that paid the fee, but the Seller is not that

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[13] S.C. Code Ann. § 6-1-920(5), (6).

[14] S.C. Code Ann. § 6-1-920(7), (8).

[15] S.C. Code Ann. § 6-1-920(10) ("'Fee payor' means the individual or legal entity that pays or is required to pay a development impact fee.").

[16] As to "fee payor," see S.C. Code Ann. §§ 6-1-930(D), -940(4), -990(A), -1030(A-C), and -1050. As to developer, see S.C. Code Ann. §§ 6-1-930(D), -940(3), -950(A), -1000, -1030(A), -1050, and -1060.

[17] S.C. Code Ann. § 61-1-1020(A) (emphasis added).

party – it did not pay the impact fee. In any event, had the General Assembly's intended that the payor receive any refund of the fee, it surely would have used the term "fee payor" as it did throughout the Act to describe all other rights and obligations of the party paying the impact fee. By using "owner of record," the General Assembly clearly intended something different.

The Seller also ignores the grammatical structure of the "owner of record" phrase. The Act directs the refund to "the owner of record of property *on which* a development impact fee has been paid."[18] The Seller silently but necessarily strikes "on which" and replaces it with "when" to claim entitlement to the refund. When parsed with its actual language, however, the phrase "impact fee has been paid" modifies "property," not "owner of record." It is thus clear that the General Assembly used the property as the means to identify which fee had to be refunded, and it then used "owner of record" to identify the recipient of the refund.

The Act does not define "owner of record," so it must be given its plain and ordinary meaning. Absent some indication to the contrary, and there is none here, the plain and ordinary meaning of "owner of record" includes a temporal element, to-wit: the owner as shown by the public record at the time in question.

Here, the time in question is the time of the refund, *i.e.,* when the refund becomes payable under the Act. This makes sense, because doing otherwise would result in a nightmare for the county, *i.e.*, having to identify and then track down the entity that paid the impact fee, which likely no longer has any interest in or connection to the property. Here, the nightmare would be even worse. SK Investments, not the Seller, paid the impact

[18] S.C. Code Ann. § 61-1-1020(A) (emphasis added).

fee. Under the Seller's theory, therefore, the County owes the fee to SK Investments, and the Seller has no standing under this theory, because it is not the entity that paid the fee.

By using "owner of record," the General Assembly avoids this nightmare and logically treats the fee and the refund as being connected to the property rather than the payor of the fee. It is therefore logical that "owner of record" means the owner at the time of the refund. For this reason, and for the other reasons set forth above, the General Assembly did not mandate in the Act that any "refund" of the "impact fee" must be paid to the person or entity that paid the fee in the first instance.

C. This Court should affirm upon the additional sustaining ground that the Seller has no standing under its theory of the case.

The Seller's fundamental theory is that the fee should be returned to the entity that paid the fee. The Seller, however, is not that entity. Rather, it is undisputed that SK Investments, LLC, not the Seller, paid the impact fee. Therefore, under the Seller's own theory, only SK Investments is entitled to the fee and, therefore, the Seller has no standing to claim any interest in the fee or to challenge the payment of that fee to the Buyer.

III. The Seller's Argument B on the meaning and application of the Ordinance is barred by the law of the case doctrine and has no merit

In Argument B, the Seller makes a passing reference to the Act, but the only argument actually made is whether the Ordinance is ambiguous and, if so, what it means. The Seller argues that the Ordinance is not ambiguous and requires that the impact fee be returned to it. In the alternative, and assuming any ambiguity, the Seller relies upon two statutory construction rules to argue that the Ordinance should be construed as meaning the fee should be returned to it, because it paid the fee (but it did not), and any other interpretation would be inequitable or absurd. To support this argument, the Seller assumes

away the use of "current owner" in the Ordinance, by relying on its unpreserved and meritless argument that the Act preempts the Ordinance and therefore excises "current owner" from the Ordinance.

The Ordinance tracks the Act. Similar to the Act, the Ordinance defines the terms "developer" and "fee payor" and uses them throughout the Ordinance to delineate the rights and obligations of the party that pays the impact fee.[19] Also similar to the Act, the Ordinance uses "record owner of the property for which the impact fees were collected" and "record owner of property for which the impact fees were paid" to describe the recipient of any return or refund of an impact fee.[20] In detailing the refund process, the Ordinance plainly states that the "current owner" of the property is the party entitled to receive any return or refund of the impact fee.[21]

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[19] The Ordinance defines "developer" as "[a]n individual, corporation, partnership, or other legal entity undertaking new development." (Ord. at Art. IV(g), R. 226). The Ordinance defines "fee payor" as "[a] developer that pays or is required to pay a transportation impact fee." (Ord. at Art. IV(i), R. 226). The Ordinance uses these terms in defining all rights and obligations of the party that paid the impact fee. (For example, see the following sections and articles of Ordinance 10-24 pertaining to the rights and obligations associated with the payment of the impact fee: Art. IX, § 9.1(e) at R. 231; Art. IX, § 9.4 at R. 234; Art. XII, § 12.1 at R. 238; Art. XIII, *passim* at R. 240; Art. XIV, *passim* at R. 241-242).

[20] Section 11.4 of the Ordinance provides: "Impact fee funds not obligated for expenditure within three (3) years of the date that they are scheduled to be expended in the Dorchester County Capital Improvement Plan shall be returned, with actual interest earned, to the *record owner of the property for which the fees were collected*, on a first-in, first-out basis." R. 238 (emphasis added). Section 15.1(a) of the Ordinance provides: "Funds not obligated for expenditure within three (3) years of the date that they are scheduled to be expended in the Dorchester County Capital Improvement Plan shall be refunded to the *record owner of property for which the impact fees were paid*, with actual interest earned, on a first-in, first-out basis." R. 242 (emphasis added). These statements are slightly different from the Act's phrase of "owner of record of property on which a development impact fee has been paid," but they are of the same import.

[21] Section 15.2 of the Ordinance is entitled "Refund Process" and it provides in full as follows:

> (a) The *owner of property eligible for a refund of transportation impact fee payment* shall submit to the County Planning and Zoning Manager a notarized sworn statement that the person *is the current owner of the property for which a refund is due*, a certified copy of the latest recorded deed, and a copy of the most recent ad valorem tax bill for the property.

Absent some conflict with the Act, an issue that is not properly before this Court and has no merit, the question is "who" County Council intended to receive the return or refund of the impact fee: the "current owner" of the property, the "record owner" when the fee was paid, or whoever paid the fee? The trial court found that the "current owner" was entitled to the fee under the following analysis:

> The question is "[w]hether Dorchester County is required to refund the impact fee to [the Seller] or [the Buyer] based on the language of the ordinance?" (R. 30).[22]
>
> "Dorchester County determined that an impact fee refund for the Property should be paid to [the Buyer]. [The Buyer] is the *current record owner* of the property and has been since [the Buyer's] purchase of the Property from [the Seller] in 2017. Although the ordinance uses the term "refund" and "returned" in explaining the repayment policies, this Court is of the opinion that the *owner of the property at the time the refund is due* is the person to whom those development impact fees are to be paid. (R. 36) (emphasis added).

In short, after considering all relevant sections of the Ordinance (R. 32-33, ¶¶ 13-16), the trial court concluded that the "current owner" is the proper recipient under the Ordinance and, therefore, the trial court granted judgment to the Buyer.

> (b) When a right to a refund exists, the County shall *send a refund to the current owner of record* within ninety (90) days after it is determined by County Council that a refund is due.
>
> (c) All refunds must include the pro rata portion of the interest earned while on deposit in the specific transportation impact fee trust account.
>
> (d) A *record owner of property for which a transportation impact fee refund is due* has standing to sue for such refund pursuant to Section 6-1- 1020(D) of the Act if there has not been a good-faith effort towards a timely payment of a refund pursuant to Subparagraph (b) of this Article.

R. 242 (emphasis added).

[22] Not surprisingly, the trial court did not consider any issues under the Act, including any purported conflict between the Act and the Ordinance, because the Seller never raised any such issues to the trial court at any time before, during, or after the hearing. It impermissibly raises those issues for the first time on appeal. (See Arg. II(A), *supra*).

On appeal, the Seller challenges the trial court's actual ruling by ignoring it under the guise of excising "current owner" from the Ordinance due to preemption by the Act. The Seller's arguments regarding the Act are not properly before this Court, and the Seller does not otherwise challenge the trial court's actual analysis and ruling, which rests upon the existence and use of "current owner" in the Ordinance. There being no preserved challenge to the trial court's "current owner" ruling, it is the law of this case and, right or wrong, requires affirmance.[23]

Moreover, the trial court correctly interpreted the Ordinance under its terms. Had County Council intended that the payor of the fee should receive the refund, which is the Seller's fundamental argument, Council would have used "fee payor" or "developer" in defining this right, like it did throughout the Ordinance in defining all other rights and obligations of the party that paid the impact fee. Moreover, the Ordinance sections noted above reflect a view by Council that the impact fee and any refund is tied to the property, not the payor, and it is therefore logical to give the fee to the owner of the property at the time of the refund, *i.e.*, the "current owner."

Finally, and most importantly, County Council's use of "current owner" in defining who was to receive the refund is clear and unambiguous. The prior use of "record owner" does nothing to change this. Nothing in the "record owner" phrases precludes the concept of "current owner." Moreover, like "owner of record" under the Act, "record owner" includes a temporal element, to-wit: the owner as shown by the public record at the time in question and, here, the time in question is the time of the refund.

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[23] *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970); see also *Jones v. Lott*, 692 S.E.2d 900, 904 (S.C. 2010) (when the only appellate argument against a trial court's ruling is not preserved for appellate review, it becomes the law of the case).

In short, the Seller has not and cannot challenge the trial court's ruling, because it ignores the use of "current owner" in the Ordinance and the trial court's reliance on it in granting judgment to the Buyer. Thus, the trial court's ruling is the law of this case and, right or wrong, requires affirmance. In any event, the trial court correctly determined the meaning of the Ordinance under its own terms.[24]

IV. The Seller's Argument C regarding the trial court's ruling that the sale and deed transferred any interest in the impact fees is not preserved for appeal and, in any event, Argument C has no merit.

After SK Investments paid the impact fee, the Seller transferred its interest in the property to the Buyer by Limited Warranty Deed. (R. 199-207.). That deed described the land being conveyed and stated that this conveyance was made together with "all and singular, the rights, members, hereditaments, and appurtenances to the said premises belonging *or in anywise incident* or appertaining." (R. 200) (emphasis added). As an independent and alternative ground for its judgment, the circuit court ruled that the foregoing language in the limited warranty deed included and transferred any right to receive a refund to the Buyer.[25]

On appeal, the Seller argues that the Deed transferred only the dirt and did not transfer anything regarding the impact fee. This argument is not preserved for appeal for the following reasons:

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[24] As shown earlier, the Seller's claim that there is a conflict between the Ordinance and the Act is not properly before this Court for appellate review. (See Arg. II(A), *supra*). In any event, as also shown earlier, there is no conflict between the Act and Ordinance, because the "owner of record" language in the Act means the owner at the time of the refund. (See Arg. II(B), *supra*).

[25] The trial court ruled as follows: "The *Warranty Deed* and related Bill of Sale for the Property *transferred all right and interest* of [Seller] in the Property to [Buyer], *including any right to receive the Impact Fee Refund.* (R. 34, ¶ 23) (emphasis added). The trial court also ruled that when the Seller sold the property to the Buyer, it "*transferred all right and interest in the Property* to [Buyer], *including any potential Impact Fee Refund.* (R. 38) (emphasis added)."

1. In its summary judgment motion, and at the hearing, the Buyer argued that the Deed (and the sale) transferred any interest in the impact fee from the Seller to the Buyer.[26]

2. The Seller did not submit a memorandum in opposition to the Buyer's summary judgment motion. More importantly, the Seller never responded to the Buyer's arguments at the hearing. (R. 184-197, *passim*). Having failed to make any arguments to the trial court, the Seller cannot make any argument for the first time on appeal.[27]

3. The Seller made a 59(e) motion and therein made assertions that could be viewed as challenging the trial court's ruling, but the motion does not mention or address the deed and its language. (R. 81-82, *passim*).[28] Assuming the motion presented the same arguments now presented on appeal, and it did not, it is axiomatic that an argument cannot be made for the first time in a 59(e) motion.[29]

In any event, the trial court ruled correctly. As shown earlier, the Act and the Ordinance reflect legislative intent that the fee and any refund of the fee are tied to the property that

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[26] In its summary judgment motion, the Buyer presented the following question: Is the Buyer is entitled to the fee, "because [the Seller] sold the underlying property to [the Buyer] including any right of [the Seller] to receive a refund of the impact fee?"(R. 74). In answering this question in the affirmative, the Buyer argued as follows: "The Warranty Deed and related Bill of Sale for the Property transferred all right and interest of [the Seller] in the Property to [the Buyer], and including any right to receive the Impact Fee Refund." (*Id.* at R. 78, ¶ 23). The Buyer concluded with the following: "[the Seller] transferred all its right and interest in the Impact Fee Refund when [the Seller] sold the Property to [the Buyer." (*Id.* at R. 80). At the hearing, the Buyer again argued that the warranty deed and the sale transferred all of the Seller's interest in the property, including any right to the impact fee. (R. 191, 192-193).

[27] *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, 737 S.E.2d 601, 613 n.11 (S.C. 2013) (argument cannot be raised for the first time on appeal); *Staubes v. City of Folly Beach*, 529 S.E.2d 543, 546 (S.C. 2000) (argument not made to the trial court cannot be made on appeal). The only thing conceivably construable as a response is the following single sentence stated at the hearing: "The fact that [the Seller] sold this property and made $12 million is irrelevant." (R. 195). This sentence, however, does not mention or challenge the arguments made by the Buyer, including the argument on whether the Deed transferred any interest in the impact fee.

[28] The Seller's 59(e) motion made two assertions that are "relevant" here: (1) the order makes "findings of undisputed material fact that are not part of the record and are not correct including a transfer of rights to the refund in this matter *that contradict the plain meaning of the Ordinance at issue*"; and (2) the order "references a sale that has *no impact on the clear meaning of the Ordinance* and results in an inequitable windfall and an unjust conversion of funds paid by the [Seller]." (R. 81-82) (emphasis added). The trial court, however, did not use the deed (or the sale) to construe to meaning of the Ordinance and, therefore, the motion fails to challenge the actual ruling of the trial court. Thus, it cannot preserve any issue for appeal.

[29] *First Citizens Bank & Trust Co. v. Taylor*, 847 S.E.2d 249, 255-256 (S.C. App. 2020).

was being developed at the time and for which the fee was paid. Thusly tied, the sale of the property necessarily and manifestly includes the right to any refund absent a reservation of right in the sales documents or by exception by deed, contract or otherwise (which did not happen here). Moreover, even if the refund is not tied to the property by the Act or Ordinance, the Deed manifestly transferred the right to develop (for which the fee was paid), and this transfer therefore included the development right of receiving a refund of the fee paid for that development right.

V. The Seller's Argument D that neither the Act nor the Ordinance applies to this case is not properly before this Court for appellate review and has no merit.

In Argument D, the Seller argues that neither the Act nor the Ordinance applies to this case, because the "trigger" for returning the fee under the Act or Ordinance did not occur, *i.e.*, the County had not possessed the fee for at least three years before returning it. (Init. App. Br. 13-14). Thus, argues the Seller, returning the fee was a discretionary act that was controlled by a so-called "default rule" that it should be returned to the one that paid the fee. (*Id.*). This argument is not properly before this Court for appellate review and, in any event, this argument has no merit.

A. Argument D is not properly before this Court for appellate review.

The Seller never made any argument to the trial court that the return of the fee was not controlled by the Ordinance, because it was returned too soon, or that it was a discretionary return controlled by a "default rule" that it be returned to the one that paid the fee (which is not the Seller in any event). (R. 184-197, *passim*). Throughout this entire case, until the filing of its Initial Brief of Appellant with this Court, the Seller has relied

solely on the Ordinance to claim any entitlement to the impact fee.[30] Indeed, at the hearing, the Seller expressly stated that entitlement to the impact fee was "governed by [the] ordinance." (R. 187). Moreover, assuming Seller made these arguments to the trial court (and it did not), the trial court did not mention them or rule on them in the appealed order. (R. 29-37, *passim*). The Seller made a Rule 59(e) motion, but the motion did not mention or otherwise request a ruling that the Act or Ordinance did not apply, or that the return of the fee was a "discretionary" act subject to a purported "default rule" of returning the fee to the one that paid the fee. (R. 81-82, *passim*). The motion relied solely upon the Ordinance. (*Id.*). Argument D is therefore not properly before this Court for appellate review under the following axiomatic principles of appellate law: an argument cannot be made for the first time on appeal; a party cannot take one position at trial (fee controlled by the Ordinance) and, after losing at trial, take a different position on appeal (fee not controlled by the Ordinance); an issue not raised to the trial court cannot be raised on appeal; and when an issue is raised to the trial court but not ruled upon in the appealed order, the issue is not preserved for appeal unless the appellant sought a ruling in a 59(e) motion.[31] In any event, as shown below, the Seller's Argument D has no merit.

B. Argument D has no merit.

Under the Ordinance, the County must return those funds if they are "not obligated for expenditure within three (3) years of the date that they are scheduled to be expended." (*E.g.,* Ord. 10-24, § 15.1(a) at R. 242). The Act contains similar language that impact fees

[30] See Complaint at R. 98-106, Plaintiff's Summary Judgment Motion at R. 69-70, and Hearing Transcript at R. 184-197, all *passim*).

[31] See cases cited in nn. 6-8 and accompanying text, *supra*.

must be returned if they "have not been expended within three years of the date they were scheduled to be expended."[32] Here, the County received the fee from SK Investments in November 2016 but concluded in September 2017 that it did not need those fees and other collected impact fees, so Council voted to return those fees immediately.[33] On appeal, for the first time, the Seller now argues that the requirements of the Act and Ordinance on who is to receive any unexpended fees do not apply unless the funds are held for three years.

The Seller's argument has no merit. The fees were assessed and collected under the Ordinance. Manifestly, any return of those fees, including an "early" return, must comply with the law that authorized the assessment and collection. Moreover, the "three year period" touted by the Seller is not a minimum "holding" requirement – it sets the maximum time that the governmental entity can hold the fees without "spending" them. Nothing in the Act or the Ordinance precludes an earlier return of those fees, particularly if the government entity earlier decides that it does not need the fees. Returning fees in compliance with the Ordinance earlier than the three year limit after concluding the fees will not be needed is simply good government. Returning the fees without complying with the Act and Ordinance on who receives those fees would be unlawful.[34]

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[32] S.C. Code Ann. § 6-1-1020(A)(1).

[33] In Article XVII, Ordinance 10-24 provides that the impact fees shall be terminated "when sufficient fees have been collected to fund all of the projects eligible for impact fee funding." (R. 243). The County later terminated the impact fees entirely in February 2018 in Ordinance 18-02 and again directed that fees be refunded in accordance with the Ordinance. (Ord. 18-02 at R. 245).

[34] In support of his argument, the Seller claims there is a "default rule" that money should be returned to the person that paid it, citing *Asmer v. Livingston*, 82 S.E.2d 465 (S.C. 1954). The Supreme Court did not announce or apply any "default rule" in *Asmer*. Rather, it decided who should receive a refund of tax stamp money under the statute authorizing the imposition and collection of the tax money and addressing the return of those funds under specified circumstances. Based on the language of the statute, the Court determined that the General Assembly intended that the tax money be returned to the wholesaler that paid the tax, because only the wholesaler was or could be the "licensee" identified in the statute as the person entitled to a refund of the tax. Moreover, the Court found that the statute as a whole reflected a legislative intent that, with respect to these tax stamps, the state would deal with wholesalers only. Here, the language of the Act and

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm the appealed order.

Respectfully Submitted,

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the Ordinance demonstrate legislative intents that the owner of the property at the time of the refund of the impact fee is the one that should receive the refund. It is not surprising that different statutes produce different results, and this difference in results does not create or produce any so-called "default rule."

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.

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