ALAN WILSON
ATTORNEY GENERAL

January 21, 2020

The Honorable Micajah P. "Micah" Caskey, IV
Member
South Carolina House of Representatives
District No. 89
P.O. Box 5875
West Columbia, SC 29171

Dear Representative Caskey:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter asks the following:

> On behalf of my constituents I am requesting an opinion by your office regarding the legality of several aspects of the Town of Lexington Development Impact Fee Study, Housing Affordability Study, Capital Improvements Plan and Development Impact Fee Ordinance, (EXHIBIT A - Town of Lexington, SC Development Fee Ordinance) with the South Carolina Development Impact Fee Act (Code of Laws of South Carolina, Section 6-1-910) as adopted by Town Council on December 2, 2019.
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> As per my understanding, the South Carolina Development Impact Fee Act states that impact fees must be expended on public facilities, which include:
> - Water and sewer facilities;
> - Solid waste and recycling facilities;
> - Roads, streets and bridges;
> - Stormwater facilities;
> - Police, fire, EMS facilities;
> - Parks, libraries and recreational facilities;
> - Equipment costing in excess of $100,000 for public safety, emergency preparedness, solid waste and storm water control.
>
> Questions have been raised regarding the ordinance's parks and recreation impact fee and the projects to be funded by the impact fee which include system

improvements to upgrade and or expand existing public facilities as listed in attached EXHIBIT B Impact Fee Capital Improvements Plan- Virginia Hylton Park; Ice House Pavilion, Mill Pond Park.

Your opinion is requested as to whether the South Carolina Development Impact Fee Act allows for existing system and capital improvements/expansions for these projects to be funded by an impact fee.

Furthermore, concerns have been raised that the Town's ordinance does not meet case law under the Equal Protection Clause nor the Development Impact Fee Act. Your opinion is requested as to whether the South Carolina Development Impact Fee Act can allow for a proportionate share different for residential and commercial development as it relates to the parks and recreation impact fee. See attached Exhibit C Town of Lexington Development Impact Fee Ordinance General Development Impact Fee Schedule.

Law/Analysis

I. Developmental impact fees may fund projects that upgrade or expand existing public facilities if they increase the service capacity to serve new growth within the service area where the fee was imposed.

It is this Office's opinion that a court likely would hold developmental impact fee revenue may fund projects that upgrade or expand existing public facilities if they increase service capacity to serve new growth within the service area where the fee was imposed. S.C. Code Ann. § 6-1-1010(B). This Office cannot opine whether the specific projects named in the request letter comply with the requirements of the South Carolina Development Impact Fee Act (the "Impact Fee Act"), S.C. Code Ann. § 6-1-910 *et seq.*, as that would require factual determinations beyond the scope of this Office's opinions. See Op. S.C. Att'y Gen., 1989 WL 508567, at 6 (July 17, 1989) (Fact-finding is beyond the scope of an opinion and is more appropriately reserved to "the province of the courts."). However, this opinion will provide relevant authorities which may assist in evaluating whether the named projects are in compliance with the Act.

This Office has not identified a decision of our state courts or a prior opinion of this Office addressing whether projects funded the Impact Fee Act may upgrade or expand existing public facilities. Therefore, this opinion will apply the rules of statutory construction as a matter of first impression. Statutory construction of the South Carolina Code of Laws requires a

determination of the General Assembly's intent. Mitchell v. City of Greenville, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015) ("The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible."). Where a statute's language is plain and unambiguous, "the text of a statute is considered the best evidence of the legislative intent or will." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers." State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015), *reh'g denied* (Aug. 5, 2015). This Opinion will next examine the statutory language of the Impact Fee Act to ascertain legislative intent regarding what projects may be funded with impact fee revenue.

The Impact Fee Act was enacted "to provide for the imposition of a developmental impact fee by a county or municipality by ordinance; ... to provide for computation for the proportionate share of costs of new public facilities needed to serve new growth; and to limit the uses of the revenue collected from a development impact fee to application toward the increased cost of serving new growth and development." 1999 Act No. 118.[1] A "development impact fee" or "impact fee" is defined as "a payment of money imposed as a condition of development approval to pay a proportionate share of the cost of system improvements needed to serve the people utilizing the improvements." S.C. Code Ann. § 6-1-920(8).

The Impact Fee Act prohibits governmental entities from imposing an impact fee except as provided therein. S.C. Code Ann. § 6-1-930(A)(1). Section 6-1-930(A)(1) permits a governmental entity to impose an impact fee if it has a comprehensive plan or a "capital improvements plan which substantially complies with the requirements of Section 6-1-960(B)." Id.; see Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville, 369 S.C. 498, 632 S.E.2d 864 (2006) (finding a capital improvements plan "substantially complie[d]" with the requirements of the Impact Fee Act). "Capital improvements" are statutorily defined as "improvements with a useful life of five years or more, by new construction or other action, which increase or increased the service capacity of a public facility." S.C. Code Ann. § 6-1-920(2) (emphasis added). "Capital improvements plan" is further defined as "a plan that identifies capital improvements for which development impact fees may be used as a funding source." S.C. Code Ann. § 6-1-920(3). The capital improvements plan must contain:

> (1) a general description of all existing public facilities, and their existing deficiencies, within the service area or areas of the governmental entity, a reasonable estimate of all costs, and a plan to develop the funding resources, including existing sources of revenues, related to curing the existing deficiencies

[1] The Impact Fee Act was amended by 2016 Act No. 229 to add exemptions for certain schools and volunteer fire departments and to amend the definition of "public facilities." These amendments do not affect this opinion's analysis.

> including, but not limited to, the upgrading, updating, improving, expanding, or replacing of these facilities to meet existing needs and usage;
> ...
>
> (4) a definitive table establishing the specific service unit for each category of system improvements and an equivalency or conversion table establishing the ratio of a service unit to various types of land uses, including residential, commercial, agricultural, and industrial, as appropriate;
>
> (5) a description of all system improvements and their costs necessitated by and attributable to new development in the service area, based on the approved land use assumptions, to provide a level of service not to exceed the level of service currently existing in the community or service area, unless a different or higher level of service is required by law, court order, or safety consideration;
> ...

S.C. Code Ann. § 6-1-960(B) (emphasis added). "System improvement costs" are defined as:

> costs incurred for construction or reconstruction of system improvements, including design, acquisition, engineering, and other costs attributable to the improvements, and also including the costs of providing additional public facilities needed to serve new growth and development. System improvement costs do not include:
>
> > (a) construction, acquisition, or expansion of public facilities other than capital improvements identified in the capital improvements plan;
> > (b) repair, operation, or maintenance of existing or new capital improvements;
> > (c) upgrading, updating, expanding, or replacing existing capital improvements to serve existing development in order to meet stricter safety, efficiency, environmental, or regulatory standards;
> > (d) upgrading, updating, expanding, or replacing existing capital improvements to provide better service to existing development;
> > (e) administrative and operating costs of the governmental entity; or
> > (f) principal payments and interest or other finance charges on bonds or other indebtedness except financial obligations issued by or on behalf of the governmental entity to finance capital improvements identified in the capital improvements plan.

S.C. Code Ann. § 6-1-920(22) (emphasis added).

After a governmental entity has imposed an impact fee, it may only spend the funds collected "for the category of system improvements and within or for the benefit of the service area for which the impact fee was imposed as shown by the capital improvements plan and as authorized in this article." S.C. Code Ann. § 6-1-1010(B). The Act further clarifies that the fees may not be used for:

> (1) a purpose other than system improvement costs to create additional improvements to serve new growth;
> (2) a category of system improvements other than that for which they were collected; or
> (3) the benefit of service areas other than the area for which they were imposed.

Id. (emphasis added).

The plain language of the statutes cited above demonstrates that the legislature intended impact fee revenue to be collected to benefit "new growth" within the service area where it is collected. Id. When the General Assembly enacted the Impact Fee Act, it understood that development comes with an "increased cost of serving new growth" for municipalities and counties. 1999 Act No. 118. The Act authorizes governmental entities to adopt impact fees by ordinance to offset the cost of system improvements necessitated by new growth. S.C. Code Ann. § 6-1-960(B). The Act expressly excludes system costs undertaken "to provide better service to existing development." S.C. Code Ann. § 6-1-920(22). It seems clear, therefore, the legislature intended the Impact Fee Act to provide a mechanism for local governments to raise revenue from new development for the purpose of maintaining a level of service in the face of increased demand attributable to such growth. The Impact Fee Act's plain language also demonstrates legislative intent to limit what projects may receive impact fee revenue. See 1999 Act No. 118 ("An Act... to limit the uses of the revenue collected from a development impact fee to application toward the increased cost of serving new growth and development."); S.C. Code Ann. § 6-1-1010 ("Impact fees may not be used for: (1) a purpose other than system improvement costs to create additional improvements to serve new growth").

While it seems clear that impact fees cannot be used to serve existing development, the request letter raises a separate issue of whether impact fees may be expended on existing public facilities. The Impact Fee Act does not categorically prohibit using impact fee revenue on existing public facilities. Rather, it removes "existing capital improvements" from the definition of system improvement costs when those costs are designed "to serve existing development."

S.C. Code Ann. § 6-1-920(22)(C)&(D). Consequently, under S.C. Code Ann. § 6-1-1010(1), this exclusion from "system improvement costs" prohibits expending impact fees on existing capital improvements for existing development. Id. ("Impact fees may not be used for: (1) a purpose other than system improvement costs to create additional improvements to serve new growth").

Still, the Impact Fee Act does not require impact fee revenue be spent only on new construction projects. In fact, the very same definition of "system improvement costs" includes "costs incurred for construction or reconstruction of system improvements." S.C. Code Ann. § 6-1-920 (emphasis added). Moreover, the Act defines "capital improvements" to include improvements to public facilities with a useful life of five years or more "by new construction or other action." S.C. Code Ann. § 6-1-920(2)(emphasis added). Finally, the Act requires a capital improvements plan include "a general description of all existing public facilities and their existing deficiencies, within the service area ... and a plan to develop the funding resources, related to curing the existing deficiencies including, but not limited to, the upgrading, updating, improving, expanding, or replacing of these facilities ..." S.C. Code Ann. § 6-1-960(B)(1) (emphasis added). Based on these definitions and the capital improvements plan requirements, it would be reasonable to interpret legislative intent to not merely permit impact fee revenue to be spent on new construction projects. It is this Office's opinion that a court would likely hold impact fee revenue may fund projects that upgrade or expand existing public facilities if they increase service capacity to serve new growth within the service area where the fee was imposed.

II. Does a different proportionate share impact fee for commercial and residential development violate the Equal Protection Clauses in the South Carolina and federal constitutions?

This Office understands the question regarding the Equal Protection Clause relates to the distinction between the impact fee calculations for residential uses as opposed to all other land use categories in Exhibit A to the Town of Lexington Developmental Impact Fee Ordinance. While all land use categories have varying amounts calculated for a Municipal Facilities and Equipment impact fee and a Transportation impact fee, the residential uses category is the only land use category that includes a Parks and Recreation impact fee. This Office further notes that the question does not appear to challenge that the Impact Fee Act allows developers to pay proportionate shares. See S.C. Code Ann. §§ 6-1-980, -990, 1000 (describing impact fee calculations on a service unit basis and limiting a developer's impact fee payments to no more than "his proportionate share of the costs of the project"); see also Charleston Trident Home Builders, Inc., 369 S.C. at 507-509, 632 S.E.2d at 869-870 (analysis of impact fee calculation). Rather, it challenges the ordinance's disparate treatment as applied to residential developers.

Because an impact fee must be adopted by ordinance, it is a legislative act which "is presumed to be constitutional." Eli Witt Co. v. City of W. Columbia, 309 S.C. 555, 558, 425 S.E.2d 16, 17 (1992). This opinion cannot declare an ordinance unconstitutional, but will instead highlight relevant authorities a court may use to analyze whether the ordinance complies with equal protection. See Op. S.C. Att'y Gen., 1988 WL 485247, at 3 (March 17, 1988) ("[T]his Office possessed no authority to declare a[n] ... ordinance unconstitutional; only a court would have such authority.").

Initially, a person who challenges an ordinance on equal protection grounds must "prove its unconstitutionality beyond a reasonable doubt." Eli Witt Co., supra. In an October 18, 2010 opinion, this Office opined that exemptions from impact fees do not involve a fundamental right or a suspect classification and challenges thereto are subject to rational basis analysis.

> Under our federal and State constitutions, no person shall be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 (2009). Because an exemption of schools from impact fees does not involve a fundamental right or a suspect class, we employ a rational basis analysis to determine whether such an exemption violates the equal protection clauses. See City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.").

Op. S.C. Att'y Gen., 2010 WL 4391638, at 5 (October 18, 2010). The South Carolina Supreme Court articulated the elements of the rational basis test as follows:

> Under the rational basis test, the Court must determine: (1) whether the law treats similarly situated entities differently; (2) if so, whether the legislative body has a rational basis for the disparate treatment; and (3) whether the disparate treatment bears a rational relationship to a legitimate government purpose.

Joseph v. S.C. Dep't of Labor, Licensing & Regulation, 417 S.C. 436, 451, 790 S.E.2d 763, 771 (2016) (citations omitted). The rational basis test presents a particularly high hurdle as the Court has repeatedly stated, "A legislatively created classification will not be set aside as violative of the equal protection clause unless it is plainly arbitrary and there is no reasonable hypothesis to support the classification." Brown v. Cty. of Horry, 308 S.C. 180, 168, 417 S.E.2d 565, 568-569 (1992); see also Eli Witt Co., supra ("An ordinance violates the equal protection clause if it is arbitrary and there is no hypothesis to support the classification."); Robinson v. Richland Cty. Council, 293 S.C. 27, 32, 358 S.E.2d 392, 395 (1987) ("The determination whether a classification is reasonable is initially one for the legislative body and will be sustained if it is not plainly arbitrary and there is any reasonable hypothesis to support it.").

It is the Office's opinion that a court would similarly employ the rational basis test to analyze impact fee calculations because they likely do not implicate a fundamental right or a suspect classification. The Court has previously applied the rational basis test when considering whether a county ordinance that imposed a road maintenance fee violated the equal protection clause. See Brown, supra.[2] The economic interests tied to the use or development of property affected by the impact fee calculations and the road maintenance are sufficiently analogous to expect a court would not find a fundamental right or a suspect classification at issue.

Under the rational basis test in Joseph, the first step is to demonstrate that the impact fee calculations treat residential development differently from "similarly situated entities," namely all other types of development: hotel/motel uses, recreation uses, institutional uses, medical uses, office uses, retail uses, service uses, and industrial uses. Based on the impact fee calculations in Exhibit A, it appears a court would find residential uses are treated differently from all other land uses because they are the only ones which pay a Parks and Recreation impact fee. A court would then look to whether the Town has a rational basis for only charging residential uses a Parks and Recreation impact fee, and whether that bears a rational relationship to a legitimate government purpose. While arguments can be made that the other land use categories derive benefits from parks and recreation infrastructure such as an increased demand for lodging at hotels and nearby businesses may have increased customer traffic, the Town would be given the opportunity to present its reasons for the impact fee calculations and why they vary across land use categories.

Determining whether the Town ultimately demonstrates adequate reasons for the disparate Parks and Recreation impact fee and a legitimate government purpose requires findings which are beyond the scope of this Office's opinions. Once again, this Office notes that because

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[2] In Brown, the Court articulated its equal protection test differently:

> If a classification is reasonably related to a proper legislative purpose and the members of each class are treated equally, any challenge under the equal protection clause fails. Robinson v. Richland County Council, supra; Medlock v. S.C. Fam. Farm Dev., 279 S.C. 316, 306 S.E.2d 605 (1983). The requirements of equal protection are satisfied if: (1) the classification bears a reasonable relation to the legislative purpose; (2) the members of the class are treated alike under similar circumstances; and (3) the classification rests on some reasonable basis. Medlock, supra. In addition, the burden is upon those challenging the legislation to prove lack of rational basis. Ex parte Yeargin, 295 S.C. 521, 369 S.E.2d 844 (1988).

308 S.C. at 186, 417 S.E.2d at 568-569. This Office understands that the Brown and Joseph Courts rational basis tests bear the same essential elements with Brown using language more focused on maintenance fee calculations. This opinion employs the language of the rational basis test articulated in Joseph as it is the more recent decision.

the impact fee was adopted by ordinance, it is presumed to be constitutional and only a court is authorized to hold otherwise.

Conclusion

It is this Office's opinion that a court likely would hold developmental impact fee revenue may fund projects that upgrade or expand existing public facilities if they increase service capacity to serve new growth within the service area where the fee was imposed. S.C. Code Ann. § 6-1-1010(B). This Office cannot opine whether the specific projects named in the request letter comply with the requirements of the South Carolina Development Impact Fee Act (the "Impact Fee Act"), S.C. Code Ann. § 6-1-910 *et seq.*, as that would require factual determinations beyond the scope of this Office's opinions. See Op. S.C. Att'y Gen., 1989 WL 508567, at 6 (July 17, 1989) (Fact-finding is beyond the scope of an opinion and is more appropriately reserved to "the province of the courts.").

This opinion cannot declare an ordinance unconstitutional, but instead discusses relevant authorities a court may use to analyze whether the ordinance complies with equal protection. See Op. S.C. Att'y Gen., 1988 WL 485247, at 3 (March 17, 1988) ("[T]his Office possessed no authority to declare a[n] ... ordinance unconstitutional; only a court would have such authority."). Because an impact fee must be adopted by ordinance, it is a legislative act which "is presumed to be constitutional." Eli Witt Co. v. City of W. Columbia, 309 S.C. 555, 558, 425 S.E.2d 16, 17 (1992). This Office has previously opined that exemptions from impact fees do not involve a fundamental right or a suspect classification and challenges thereto are subject to rational basis analysis. Op. S.C. Att'y Gen., 2010 WL 4391638, at 5 (October 18, 2010). It is this Office's opinion that a court would similarly employ the rational basis test to analyze impact fee calculations because they likely do not implicate a fundamental right or a suspect classification.

The rational basis test presents a particularly high hurdle as the Court has repeatedly stated, "A legislatively created classification will not be set aside as violative of the equal protection clause unless it is plainly arbitrary and there is no reasonable hypothesis to support the classification." Brown v. Cty. of Horry, 308 S.C. 180, 168, 417 S.E.2d 565, 568-569 (1992). The South Carolina Supreme Court articulated the elements of the rational basis test as follows:

> Under the rational basis test, the Court must determine: (1) whether the law treats similarly situated entities differently; (2) if so, whether the legislative body has a rational basis for the disparate treatment; and (3) whether the disparate treatment bears a rational relationship to a legitimate government purpose.

Joseph v. S.C. Dep't of Labor, Licensing & Regulation, 417 S.C. 436, 451, 790 S.E.2d 763, 771 (2016) (citations omitted). Determining whether the Town ultimately demonstrates adequate reasons for the disparate Parks and Recreation impact fee and a legitimate government purpose requires findings which are beyond the scope of this Office's opinions.

In short, while we emphasize that only a court can conclude that a statute or ordinance violates equal protection under rational basis analysis, we reiterate that the South Carolina Supreme Court has not hesitated to find a law or ordinance invalid if it deems there is no "sound basis" for a "distinct and separate class" so as to justify the unequal treatment resulting from the legislative classification. See Broome v. Truluck, 270 S.C. 227, 230, 241 S.E.2d 739, 740 (1978) ("While it is broadly stated that a vital distinction exists between architects, engineers, and contractors on the one hand, and owners and manufacturers, on the other, such vital distinction is no where pointed out such as to justify granting immunity to one group and not to the other. No rational basis appears for making such distinction."). Here, it would be up to a court to determine, as the Court did in Joseph, whether the different treatment of residential uses from all other land uses is sufficiently justified to satisfy the equal protection analysis set forth above.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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