LAND USE LAW UPDATE

South Carolina Chapter
American Planning Association
Fall Planning Conference
October 15, 2021
Panelists

Melinda Lucka Kelley, Esq. (*Finkel Law, N. Chas*)
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South Carolina Experience

- Charleston County
- North Augusta
- **Anderson County**
- Aiken County
- BCD Council of Governments
- Lancaster County
- Lowcountry COG
- Horry County
- **Forest Acres**
- **Historic Charleston Foundation**
- **Aiken**
- Sumter City-County Planning Commission
- Waccamaw Regional COG
- Georgetown
- Fort Mill

- Atlantic Beach
- Property Owner Representation
- Greenville County
- York County
- **Georgetown County**
- Mount Pleasant
In just 20 minutes:

- The law on S.C. Impact Fees (the Act and Trident case)
- Myth v. Fact (York County case)
- Whether impact fees may make sense for your jurisdictions.
Are Impact Fees getting more common in South Carolina?
IMPACT FEES IN SOUTH CAROLINA

- Summerville
- Goose Creek
- Clemson
- Mount Pleasant
- Georgetown
- Fort Mill
- Charleston
- Rock Hill
- Bluffton
- Hilton Head Island
- Georgetown County
- Dorchester County
- Berkeley County
- Beaufort County
- Tega Cay
- York County
- Horry County (eff. 10-15-21)
- Lancaster County (eff. 10-1-21)

“Who am I missing?”
“Isn’t ‘impact fee’ just another name for a ‘tax’?”
IMPACT FEES AND TAXES ARE DISTINCT (IN EVERY WAY)

“Local governing bodies have turned to impact fees in recent years as funds from the federal government dried up, mandates from state and federal governments increased, and local residents fought property tax hikes.

The purpose of an impact fee is ‘to fairly distribute the capital improvement costs of growth and development among those who are generating the need for the improvements’.”

JK CONST. v. REGIONAL SEWER AUTHORITY, 336 S.C. 162, 519 S.E.2d 561 (S.C. 1999)
New Development

Need

Benefit

Capital Improvement Program
“I’ve heard the Impact Fee Act is hard to comply with.”
“Well…..”

- State Representatives Introducing the DIFA in 1999
  - Sen. McConnell (Charleston)
  - Rep. Harrison (Richland County)
  - Rep. Seithel (Charleston)
  - Rep. Altman (Charleston)
  - Rep. Wilkins (Greenville)
  - Rep. Edge (Horry)
S.C. Code Ann. Sec. 6-1-920(8)

• “... 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 improvement.”
S.C. Dev. Imp. Fee Act

• Authorizes Impact Fees for:
  • Water
  • Wastewater
  • Solid Waste and Recycling
  • Roads, Streets, and Bridges
  • Storm Water
  • Parks and Recreation
  • Libraries
  • Public Safety
    • Law Enforcement
    • Fire/EMS
  • Public Education (as of 2016)
“But won’t we get sued?!”
• Capital Improvement Plan:
  • Clarifies its relationship to the Study and the adopting Fee Ordinance
  • “Substantial compliance” with the Act is sufficient
  • Deference given to the study and reasonable, straight-forward decisions of consultants and staff

“although the capital improvements plan … does not comport with every criterion of the Act, we find it substantially complies with the statutory requirements.”
Fee Calculation (costs and LOS)

Fee calculations were sufficient:

“Trident failed to offer any analysis of the various factors challenged that would actually result in different fees.”
Supreme Court of South Carolina

HBA OF SOUTH CAROLINA, ET AL.

V.

YORK CO. & STATE OF SOUTH CAROLINA (2021)
York County hikes residential growth fees for Fort Mill schools. Here’s how much.

BY JOHN MARKS
JULY 16, 2018 07:44 PM. UPDATED AUGUST 13, 2018 02:49 PM.

Construction crews worked on several homes Monday afternoon in the Massey subdivision in Fort Mill. JOHN MARKS
JAHKRESS@FORTMILLTIMES.COM

York

The cost of new homes and apartments in the Fort Mill area is going up. So, too, is funding for Fort Mill schools.

York County Council voted earlier this month night to increase fees for new development within the Fort Mill School District to $18,358 for each new home and $12,020 per new apartment. The costs, called an impact fee, will help the school district offset growth costs.
HBA of S.C., et al. v. State & York County
Allegations

• Not legal requirements:
  • Fee was out of proportion to the national average
  • New fees are an increase of 700%

• Not related to legality of the fees:
  • Housing Affordability Study is based on wrong data/assumptions
  • The study “admitted” the recommended fee was the “maximum allowed”
  • Planning Commission recommended less than the “maximum allowed”
**HBA of S.C. v. State & York County Claims**

- S.C. Impact Fee Act is "overbroad and vague" (for not capping the fees)
- Not supported by "sound engineering studies" as required by the Act (settled by Trident)
HBA of S.C. v. State & York County
Claims (cont’d)

- Impact Fees are a Taking:
  - Deprivation of (all?) economically viable use
    - Will price (all?) plaintiffs out of (all?) the markets
  - (Un)Reasonable Investment Backed Expectations
    - That current fee amounts wouldn’t change?
    - “of residential sales of affordable housing”?
  - Illegal, unconstitutional exaction
    - Not reasonably related to plaintiff’s developments (though plaintiffs didn’t say in what way)

- Koontz:
  - Circuit Court offer yet another reading of Koontz
  - Dolan applies, “at least in some circumstances”
“It’s starting to sound like impact fees are safe to use.”
They are. But …

- Some counties have had to refunded impact fees collected but not spent within 3 years of the date they were scheduled to in the CIP.
- Others have revised impact fees downward when significant changes to the CIP occurred.
- Some “head-scratchers” remain in the Act.
- Advice for the unseasoned:
  - Go simple and conservative;
  - Negotiate for broad support up front.
Final Thoughts

• Are impact fees right for every jurisdiction?
  No, but for those with high growth and reasonable staffing they are a good option.

• Is it harder to have impact fees in South Carolina than other places?
  No. Thanks to the courts, it’s about the same.

• Are there alternatives to Impacts Fees.
  Of course! (But they are no less painful)
Read:
• the Act and Trident to understand the law
• York County to see through the rhetoric
• Instances of refunds of unspent fees for avoiding pitfalls