FILED IN OFFICE
HENRY COUNTY
SUPERIOR COURT

FEB 05 2025

CLERK OF SUPERIOR COURT

IN THE SUPERIOR COURT OF HENRY COUNTY
STATE OF GEORGIA

GREATER ATLANTA HOME BUILDERS ASSOCIATION, INC., RESIBUILT HOMES, LLC, and PEACHTREE BUILDING GROUP, LLC,

Plaintiffs,

v.

HENRY COUNTY, GEORGIA,

Defendant.

CIVIL ACTION
FILE NO. SUCV2023001497 BA

ORDER ON PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter is presently before the Court on Plaintiffs'[1] Motion for Partial Summary Judgment and Defendant Henry County Georgia's Motion for Summary Judgment. The Court held a hearing on the Motions on December 16, 2024, and all parties were represented by counsel. After considering the parties' written submissions on the Motions and the arguments and presentations of counsel at the hearing, the Court enters the following order.

I. Factual Background

A. Development Impact Fees Under Georgia Law

A development impact fee is "a payment of money imposed upon development as a condition of development approval to pay for a proportionate share of the cost of system improvements needed to serve new growth and development." O.C.G.A. § 36-71-2(8). The Georgia Development Impact Fee Act ("DIFA") allows municipalities and

[1] Plaintiffs in this case are Greater Atlanta Home Builders Association, Inc. ("GAHBA"), ResiBuilt Homes, LLC ("ResiBuilt"), and Peachtree Building Group, LLC ("Peachtree").

counties such as Defendant Henry County ("Defendant" or the "County") to charge developers a one-time fee to compensate the County for the "impact" new development has on the services the County provides. DIFA establishes "minimum standards," that if followed, allow local governments to collect from new growth and development, "a proportionate share of the cost of new public facilities needed to serve new growth and development." O.C.G.A. § 36-71-1(b)(2)-(3); O.C.G.A. § 36-71-3(a); O.C.G.A. § 36-71-4.

In no event shall a development impact fee exceed a "proportionate share" of the cost of system improvements, because DIFA explicitly intends to "prevent duplicate and ad hoc development exactions." O.C.G.A. § 36-71-1(b)(4); O.C.G.A. § 36-71-4(a). As such, DIFA's minimum standards require that "development impact fees shall be calculated on the basis of levels of service for public facilities that are adopted in the municipal or county comprehensive plan that are applicable to existing development as well as the new growth and development" which "shall not exceed a proportionate share of the cost of system improvements." O.C.G.A. § 36-71-4(a)&(c) (emphasis added).

B. Henry County's Impact Fee Ordinances

The County first implemented development impact fees in 2003, charging $1,661 for each residential start. In 2020, the County's Board of Commissioners decided to update each of the County's existing impact fees and to add several new categories of impact fees. To assist with updating its impact fees, the County solicited proposals for "Consulting Services for an Impact Fee Study" in February 2020 and ultimately hired Bill Ross of Ross+associates, the same consultant who helped the County prepare its 2003 impact fee ordinance.

As part of his work, Mr. Ross prepared a Methodology Report, including "updated forecasts of population, housing and employment for the county, capital

improvement projects to serve new growth, based on Level of Service standards, for each public facility category, [and] the impact cost of new growth and development," and establishing the maximum impact fees that the County could assess. The Methodology Report was finalized as of September 21, 2021, and established a "maximum impact fee schedule" of $10,442.08 for single-family detached housing, apartments, and residential condominiums/townhouses. Mr. Ross also prepared a capital improvements element ("CIE") to set out projected needs for system improvements during a planning horizon established in the comprehensive plan, a schedule of capital improvements that will meet the anticipated need for system improvements, and a description of anticipated funding sources for each required improvement." O.C.G.A. § 36-71-2(2). The County finalized the CIE as of November 4, 2021.

Plaintiffs formally expressed their concerns about the legality of the County's proposed new impact fees in a letter to the County's Board of Commissioners on August 1, 2022. Plaintiffs told the County that its proposed impact fees potentially violated numerous aspects of DIFA, to include failing to establish an advisory committee before enacting new categories of fees, failing to provide revenue credit where due, using impact fees to remedy existing deficiencies, and failing to establish level of service standards for certain impact fee facilities. The County, however, enacted its new impact fee ordinance on August 2, 2022. Ordinance No. 22-05 went into effect on February 2, 2023, and implemented an impact fee of $3,544.46 for single-family detached housing, apartments, and residential condominiums/townhouses. On July 23, 2024, the County enacted Ordinance No. 24-06 (collectively with Ordinance No. 22-05, "the

Ordinances"), which increased the impact fee for single-family detached housing, apartments, and residential condominiums/townhouses to $7,085.90.

II. Discussion

A. Summary Judgment Standard and Construction of Impact Fees

In Georgia, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." O.C.G.A. § 9-11-56(c). A party moving for summary judgment must show that there is no genuine issue of material fact, and that the undisputed facts, viewed in the light most favorable to the nonmoving party, entitle the moving party to judgment as a matter of law. Smith v. Lewis, 259 Ga. App. 548 (2003).

The construction of impact fee ordinances is governed by the "well-established general rule that counties and municipal corporations can exercise only such powers as are conferred on them by law," with such powers to be "**strictly construed**," such that "if there is a reasonable doubt of the existence of a particular power, the doubt is to be resolved in the negative." Beazley v. De Kalb Cnty., 210 Ga. 41, 43 (1953) (emphasis added). Impact fees are subject to constitutional scrutiny, and any statute that allows them must be strictly construed. Sheetz v. Cnty. of El Dorado, California, 601 U.S. 267, 270 (2024).

B. Failure to Establish Advisory Committee

DIFA requires that "[p]rior to the adoption of a development impact fee ordinance, a municipality or county adopting an impact fee program ***shall*** establish a Development Impact Fee Advisory Committee." O.C.G.A. § 36-71-5(a) (emphasis

added). The advisory committee "shall be composed of not less than five nor more than ten members appointed by the governing authority of the municipality or county and at least 50 percent of the membership shall be representatives from the development, building, or real estate industries." O.C.G.A. § 36-71-5(b). The procedural requirements of DIFA apply whenever a local government adds "new impact fee service areas or change[s] the boundaries of existing impact fee service areas," or changes "service levels established for an existing impact fee service area." Ga. Comp. R. & Regs. 110-12-2-.03(d); 110-12-2-.04. Here, the County's Ordinances added numerous new impact fees, most notably for "greenspace," "transportation," and "parks and recreation."

The County admits it had no knowledge of the advisory committee requirement and simply deferred to Mr. Ross as its hired impact fees consultant. Mr. Ross himself testified that the County did not establish an advisory committee before passing the Ordinances because, in his view, the advisory committee requirement only applies to the "original" impact fee ordinance, and not subsequent amendments to the same. The County argued at the hearing that it had communicated with the development community, including GAHBA, before enacting the Ordinances and that the spirit of the advisory committee had been satisfied. However, DIFA requires that the advisory committee be appointed by the governing authority of the county, which undisputedly did not happen here.

The County also argues that because the Ordinances merely amended its 2003 Ordinance, an advisory committee was not required. However, DIFA plainly says an advisory committee is required "[p]rior to the adoption of a development impact fee ordinance,"—the advisory committee requirement is not qualified by "first," "original,"

or "initial," and the Court is "not permitted to add language to the statute." O.C.G.A. § 36-71-5(a); Wilson v. Inthachak, 372 Ga. App. 341, 346 (2024).

Moreover, the County's approach could lead to absurd results, because if the advisory committee requirement only applied to the first adoption of an impact fee scheme, a local government could easily avoid public scrutiny by adopting an uncontroversial impact fee for a singular facility, and then tacking on additional facilities through later amendments while skirting the advisory committee requirement. For example, a local government could enact its first impact fee ordinance for the singular and uncontroversial purpose of building a park bench, resulting in an impact fee of $1.00 per new resident in the community. So long as the local government established an advisory committee for the park bench impact fee, the local government could then later amend the original "park bench" impact fee ordinance to add impact fees for water, sewer, stormwater, fire, police, libraries, roads, and new park facilities such as ball fields, and recreation centers.

The County's Ordinances in fact take this exact approach by adding new facilities that were not subject to the advisory committee process in 2003. The result of the County's violation is that nearly half of impact fees collected under the Ordinances for Parks and Recreation are illegal, the Greenspace impact fees are illegal, and the Transportation impact fees are illegal for failing to comply with the advisory committee requirement of O.C.G.A. § 36-71-5(a).

C. No Proper Level of Service for Transportation Fees

1. Level of Service Improperly Calculated

"Level of service means a measure of the relationship between service capacity and service demand for public facilities in terms of demand to capacity ratios, the

comfort and convenience of use or service of public facilities, or both." O.C.G.A. § 36-71-2(12) (internal quotations marks omitted). DIFA *only* allows local governments to charge "a proportionate share of the cost of new public facilities needed to serve new growth and development," and no more, such that impact fees can only be imposed by (i) first calculating costs divided by capacity added, (ii) then apportioning capacity to new growth and development, (iii) resulting in impact fees based on new capacity needed to serve new growth and development. O.C.G.A. § 36-71-1(b)(2) & (4); O.C.G.A. § 36-71-2(1), (8), (16), (19); O.C.G.A. § 36-71-4(a) & (c). As Mr. Ross explained, DIFA requires that local governments "establish what the current level of service is" for a specific facility, and once that level of service is established, it "is then applied to the future projected population and employment to determine how much it would cost in the future for new development to be served at the same level of service that's being enjoyed by the existing citizens and businesses in the jurisdiction."

The County relies on the 2016 Henry Joint City/County Transportation Plan as the starting point for Transportation level of service ("LOS"). Under that plan, the performance metric used for the future congestion LOS "is the modeled volume-to-capacity ration (V/C)." LOS provides an indication of traffic conditions, which range from A, representing unrestricted flow, to F, representing the heaviest congestion. Page 101 of the Methodology Report states that the LOS is calculated as road improvement costs divided by population growth. DIFA, however, only allows local governments to charge "a proportionate share of the cost of new public facilities needed to serve new growth and development," and no more. O.C.G.A. § 36-71-4(a) & (c). The County's approach improperly calculates transportation impact fees based on road costs per new resident, which does not involve *any* capacity analysis, which means the County cannot

apportion impact fees based on the cost of additional capacity added, as DIFA requires it to do. The result of this violation is that all Transportation impact fees (33% of the total being collected by the County under the Ordinances) are illegal.

2. LOS Based on Improper Starting Point

As noted above, Transportation fees are based on an LOS in the 2016 Henry Joint City/County Transportation Plan. Page 97 of the Methodology Report states that the County identified road projects that were derived from the 2016 report for inclusion in the impact fee program "because the specific improvements proposed will increase traffic capacity and reduce congestion to some extent... The cost figures ... are the project cost figures taken directly from the 2016 Joint Transportation Plan, which are as of May 2016."

The problem with this approach is that the 2016 LOS and accompanying data were not current in 2021, when the CIE and Methodology Report were being prepared. Mr. Ross admitted that the 2016 Plan was based on traffic conditions from 2015 or 2016, and traffic data from those years was not current in the year 2021 or 2022. Thus, the LOS was not based on the actual existing level of service at that time and is improper, which also makes the Transportation impact fees illegal.

3. LOS Allows Transportation Fees to Remedy Existing Deficiencies

The Methodology Report and CIE both explain that the County "has set its Level of Service for road improvements at LOS 'D', a level to which it will strive ultimately. However, interim road improvement projects that do not result in a LOS of 'D' will still provide traffic relief to current and future traffic alike and are thus eligible for impact fee funding." In other words, the County's transportation impact fees are used to

remedy deficiencies, which plainly violates DIFA's mandate that "new growth and development is required to pay no more than its proportionate share of the cost of public facilities needed to serve new growth and development." O.C.G.A. § 36-71-1(b)(4).

Mr. Ross testified that impact fees "can be used that improve traffic conditions, although they may or may not achieve the Level of Service, in this case, 'D,' but they do, in fact, allow additional traffic to use the roads or the intersections..." Mr. Ross stated that all projects in an impact fee program do not have to reach the LOS stated, but that approach allows charging impact fees for projects to remedy existing deficiencies, which is improper.

D. Improper Use of Net Present Value Calculations

1. Net present value only permitted in certain situations

DIFA requires that "[d]evelopment impact fees shall be based on ***actual system improvement costs*** or ***reasonable estimates*** of such costs." O.C.G.A. § 36-71-4(q) (emphasis added). While DIFA is silent as to the definition of "actual system improvement costs," actual costs generally mean "the actual costs of the project." Haugen v. Henry Cnty., 277 Ga. 743, 745 (2004) (addressing actual costs of the project versus estimated costs of the project in the context of SPLOST collections). Further, the State Accounting Office of Georgia defines "actual cost" as the "amount that would be paid if all equipment, facilities, and services included in the estimate were acquired at the end of the current period" (GASB Cod. § 1300.102), where the current period is not something in the future but is the current calendar year, fiscal year, or equivalent.

The County's Methodology Report, on the other hand, provides that:

> Calculations related to impact fees are ***required by law*** to be made in terms of the 'present value' of past and future costs in current (2021) dollars. For future expenditures, the current cost estimate is inflated to the year when the

> expenditure will be made, and then is 'discounted' back to 2021 to account for the current value of future money.

(Methodology Report at 2). The Methodology Report is simply incorrect, as DIFA defines present value calculations as "the current value of past, present, or future payments, contributions or dedications of goods, services, materials, construction, or money." O.C.G.A. § 36-71-2(13). DIFA then applies the term "present value" to just three specific contexts, two of which address credits for feepayers under specific circumstances. The third addresses revenue credits relating to past and future taxes and non-tax revenue paid by new growth and development that help pay for the very facilities financed in part by impact fees. Because "present value" is permitted only when the three specific provisions of O.C.G.A. § 36-71-4(n), O.C.G.A. § 36-71-4(r) and O.C.G.A. § 36-71-7(a) apply, its application to any other provision of DIFA is not allowed. E.g., Grimes v. Catoosa Cnty. Sheriff's Office, 307 Ga. App. 481, 483-84 (2010) ("All parts of a statute should be harmonized and given sensible and intelligent effect, because it is not presumed that the legislature intended to enact meaningless language.").

The County's illegal use of net present value ("NPV") calculations results in an impact fee schedule that is systemically flawed for every category of impact fees. For example, the police protection facility costs attributable to impact fees are increased from the actual costs or reasonable estimates thereof from $15,420,931.05 to $18.586,784.77, which is $3,165,853.72 more than allowed by DIFA. (Methodology Report at 81). Similarly, the library services facility increases actual costs from $8,480,000 to $10,324,192—a $1,844,192 delta. (Id. at 29). The parks and recreation

facility does the same, unlawfully inflating actual costs from $104,840,193.72 to $123,901,702.05, a difference of $19,061,508.33. (Id. at 40).

The use of NPV calculations results in an overcharge in impact fees of $147,482,040.34. Because the County's unlawful use of NPV calculations affects every category of impact fee collection, the Ordinances are unlawful and must be struck.

2. The Methodology Report Shows the Wrong Discount Rate Was Used in the Net Present Value Calculations

The Methodology Report states on page 2 that "a current interest rate equivalent to the rate of return on bank savings accounts is used as the 'discount rate' for Net Present Value calculations" and identifies the discount rate used as 0.005% in the accompanying chart. This discount rate is blatantly incorrect because it is much too low and causes the NPV calculation to dramatically overcalculate the total amount of impact fees required.

The Methodology Report discusses the way in which the improper NPV calculation is conducted on page 16: "In this section, two important adjustments are discussed that are required to convert current costs into future cost figures, and then back into current dollars. First, an appropriate cost inflator is identified. This adjustment factor is important in determining the future cost of a project, based on current cost estimates." The Report then goes on to discuss the importance of the discount rate on page 17 (emphasis added):

> The second cost adjustment is a deflator – the Net Discount Rate. Essentially, *the Net Discount Rate is the interest rate that accrues to monies being held in escrow*. That is, as impact fees are collected and 'saved up' over the years for future expenditure, they increase at the rate that the account is accruing interest. Having determined the inflated cost of a project at some future date, *the cost in today's dollars can be reduced to the extent that interest will increase the funds on hand as they build up*. This calculation determines how much money

> needs to be added to the account so that, with interest, it will grow to the amount needed for that future expenditure at that time. This is the Net Present Value of that future expenditure.

The Methodology Report further states on page 21 that in conducting the NPV calculation for a project, once the future cost is determined, it "is then deflated back to the present using the Net Discount Rate (currently 0.005%) since this reflects the present value of a future amount of money."

In reality, a discount rate of 0.005% is basically no discount at all. Use of this tiny discount rate, which is nowhere close to the interest rate that the County's money could actually earn, causes the entire second part of the NPV calculation to be flawed and to allow the county to charge impact fees based only on the inflated future cost of its projects without the corresponding reduction to current dollars.

For example, the net present value of transportation projects is $317,813,444 under Mr. Ross's NPV calculation. However, if this was calculated using the local government borrowing rate, which was listed at 1.57% in Henry County's 2021 financial report, the new NPV result would be $251,071,768. This represents a reduction of $66,000,000 in the amount of impact fees that the County would need to collect. In short, the County's NPV calculations are all wildly incorrect due to this math error.

Defendant argued at the hearing that the references to the 0.005% net discount rate in the Methodology Report were merely typographical errors and that Mr. Ross did not actually apply this discount rate in his impact fee calculations. However, Mr. Ross produced his Excel workbooks to Plaintiffs during discovery, and Plaintiffs showed the relevant spreadsheets regarding Mr. Ross's NPV calculations during the summary judgment hearing. The spreadsheets for the various impact fee facilities reviewed during the hearing showed that Mr. Ross did in fact use the 0.005% discount rate in his

NPV calculations as stated in the Methodology Report. The error made was in the calculations that supported the impact fees actually adopted by the County, and this was no mere typographical mistake as Defendant falsely represented to the Court.

E. <u>Failure to Credit T-SPLOST Revenue</u>

DIFA's revenue credit provision provides that "[d]evelopment impact fees ***shall*** be calculated on a basis which is ***net of credits*** for the present value of ***revenues that will be generated by new growth and development*** based on historical funding patterns and that are anticipated to be available to pay for system improvements, ***including taxes, assessments, user fees, and intergovernmental transfers***." O.C.G.A. § 36-71-4(r) (emphasis added). The County entirely ignored T-SPLOST collections, which, according to the County's website, are "expected to generate $204 million through 2025," from the time of enactment in 2022. The County's T-SPLOST Project Map shows that T-SPLOST collections fund "major construction projects" in Henry County, including "Hwy 81 E Widening - Phase I - $28,000,000, Rock Quarry Rd - $27,000,000, Fairview Rd - $12,000,000."

The CIE at page 57 lists multiple "Road Projects" that are funded by both impact fees (42.48%) and SPLOST V (57.55%), including "SR 81 Widening," "Rock Quarry Road Widening," and "Fairview Road Widening," the very same projects that receive T-SPLOST funding. Again, the County's failure to provide T-SPLOST revenue credits results in "duplicate and ad hoc development exactions," which DIFA was enacted to prevent. O.C.G.A. § 36-71-1(b)(3) & (4).

Mr. Ross's excuse for not including any credits for T-SPLOST was that T-SPLOST was adopted after the Methodology Report and CIE were finalized in September and November 2021, respectively. The County had already approved the T-SPLOST ballot

measure on July 20, 2021, however, and T-SPLOST was ratified by the voters on November 4, 2021, the same date as the final CIE. T-SPLOST collections then took effect in 2022, prior to the County Commission enacting Ordinance No. 22-05 on August 2, 2022. The County began collecting the new impact fees on February 2, 2023. On July 23, 2024, the County Commission passed Ordinance No. 24-06, increasing the residential impact fees to $7,085.90, with $2,338.35 being earmarked for the Transportation facility.

Throughout that entire time, the County made no mention of T-SPLOST and made no effort to revise the Transportation impact fees to take T-SPLOST collections into account. This is despite the fact that Mr. Ross admitted that the entire impact fee program would need to be updated to take note of T-SPLOST fees "to the extent that impact-fee eligible projects are actually included" in T-SPLOST, which, as set forth above, is certainly the case.[2] (See CIE at pp. 54, 57).

Given the County's failure to provide any credits whatsoever for T-SPLOST as required by DIFA, the Transportation facility fees that have been collected under the Ordinances are all illegal and must be returned to the fee-payers.

F. Failure to Credit all SPLOST Revenue

The County acknowledged, but did not meet, its obligation to provide revenue credits for its SPLOST collections. "SPLOST," as the County explained in its 30(b)(6) deposition, "is Special Purpose Local Option Sales Tax," which, when passed by the voters, is used to fund the County's "latest projects." The County enacted SPLOST V on

[2] Page 15 of the Methodology Report also requires that the "impact fee methodologies should be reviewed from time to time, and should reflect changes in the growth and development of the county."

June 18, 2019, with collections to commence on April 1, 2020, and continue for six years, and approved a list of projects to be funded by SPLOST V collections. In total, the County projected its six-year SPLOST V collections would result in a whopping $245,000,000 in revenue. The project list to be funded by SPLOST V contributions included "Fire Station (District 2), Fire Station (District 3), Fire Station (District 4), Police Precinct District 2, Police Precinct District 3, Police Precinct District 4," and, with respect to the Sheriff's Office, a "Jail Pod Addition."

When the County enacted its impact fee ordinances, SPLOST V collections were in full force and effect, meaning, to the extent the County collected impact fees to fund projects that were also being funded by SPLOST V collections, revenue credits to feepayers were required pursuant to O.C.G.A. § 36-71-4(r). The County failed to give any such credits. For example, the County lists "District 2 Fire Station, District 3 Fire Station, District 4 Fire Station, Police Precinct District 2, Police Precinct District 3, Police Precinct District 4," in addition to the Sheriff's Office's "Jail Pod Addition," as being financed by "100% Impact Fees."

The County points to deposition testimony from its SPLOST administrator, Roque Romero, that County projects are not funded by both impact fees and SPLOST. A closer look at Mr. Romero's testimony, however, shows that he and the County have no idea where impact fee money and SPLOST money are going. For example, when asked whether the County's fire stations funded by impact fees were the same as the fire stations funded by SPLOST V collections, he testified "[w]ell, it could be a yes, and it could be a no. ... you know, I cannot tell you this list is the same because this is SPLOST, and we're paying those for SPLOST. Are these more fire protection than they need in those areas? It could be. ... So I cannot tell you that they're the same." In the face of the

County's own CIE and SPLOST V project lists, this equivocal testimony is not enough to create a dispute of fact on this issue.

The County's failure to provide SPLOST credits is double dipping and violates DIFA. See O.C.G.A. § 36-71-4(r). The Transportation facility fees are therefore illegal and must be struck.

G. All General Fund Revenue Not Credited

DIFA requires net credit be given for revenues that will be generated by new growth and development, "including taxes, assessments, user fees, and intergovernmental transfers." O.C.G.A. § 36-71-4(r). The County recognizes in the Methodology Report that "[t]o the extent that new growth will be generating taxes that will be spent on non-eligible portions of impact fee projects (for which they are not financially responsible), a credit must be applied reflecting these tax collections to avoid new growth paying more than its 'fair share' of total costs." Yet, despite acknowledging the need to apply revenue credits based on General Fund contributions from new growth and development, the County *only* provides revenue credits for property tax contributions, according to the Methodology Report.

Indeed, Mr. Ross admitted in his deposition that to "the extent that general fund money is, in fact, being collected only from future development, we *try to use all credits that we can identify for future taxes, specifically with regard to general fund.*" When asked if his Methodology Report accurately accounts for all applicable revenue credits that should be given, he responded, "Try to, yes." Simply put, "trying to" use all credits that can be identified for future taxes is simply not good enough.

Mr. Ross, however, went on to argue that even if the Methodology Report did fail to include all new revenue that new growth and development generate for the General

Fund as the basis for calculating revenue credit, "it's ultimately a moot point, because the County Commission did not adopt the maximum level of impact fees in the first place." According to Mr. Ross, "if there was any kind of generation of taxes going into the general fund that was ignored, or left out, or whatever, they're only charging $3,544, about one-third of the maximum, if, in fact, all other applicable general fund revenue sources would have resulted in a maximum impact fee at or below [$3,544]." Mr. Ross did admit that if the County were to increase the development impact fees to the maximum charge of $10,442.08, this would require "another look at what taxes may or may not have been left out" and that all of the credits would have to be recalculated.

The correct answer is that the recalculation of credits must occur now to provide revenue credits for all sources of revenue in the County's General Fund. These sources include property taxes, sales tax, other taxes, licenses and permits, intergovernmental, charges for services, fines and forfeitures, investment income, contributions, and miscellaneous. Until that calculation is done correctly, the County's impact fees are illegal, and all prior fees collected under the faulty calculations must be disgorged.

H. <u>No Level of Service For Greenspace Fees</u>

Without establishing an existing level of service for a particular facility, the County cannot collect impact fees for that facility. O.C.G.A. § 36-71-1(b)(4); O.C.G.A. § 36-71-4(a) & (c). The Methodology Report states the "greenspace public facility category comprises an extensive network of greenway trails." As the County's adopted CIE admits, "[t]he only existing trail in the county is the Panola Mountain Greenway Trail [which] runs from Panola Mountain State Park for a short distance into Stockbridge." The CIE continues to state that "[e]ven if the trail was actually a Henry County trail, its length would bear no relationship to a level of service calculation that would relate to

the provision of future trails in the county." Mr. Ross admitted in his deposition that the existing level of service for Greenspace "would be zero" because there were no greenway trails within the County at the time the Methodology Report was drafted.

Under these undisputed facts, the County cannot collect impact fees for the Greenspace facility because doing so necessarily violates DIFA, which states that "[d]evelopment impact fees shall be calculated on the basis of levels of service for public facilities that are adopted in the . . . comprehensive plan that are applicable to existing development as well as the new growth and development." O.C.G.A. § 36-71-4(c). A level of service of "zero," projected into the future, will remain zero. The Greenspace facility, comprising 9.86% of the total impact fees being collected, is illegal.

I. Plaintiffs Have Standing to Bring This Action.

1. ResiBuilt Homes, LLC

Defendant argues that ResiBuilt lacks standing because it failed to avail itself of the County's impact fee appeal process before challenging the County's Ordinances, but this argument has been rejected by the Georgia Supreme Court in City of Atlanta v. Hotels.com, L.P., 285 Ga. 231, 233-234 (2009). There, the Court reasoned that Atlanta could not be "required to exhaust an administrative process as a prerequisite to obtaining a determination that the ordinance prescribing that process even applies in the first place." Id. at 233. Here, ResiBuilt cannot be required to utilize the County's administrative appeal process to make the argument that the County's development impact fee scheme was improperly enacted under DIFA. See id.

Second, while DIFA requires local governments have an administrative appeals procedure, DIFA's administrative appeals process is limited to the "determination of the development impact fees for a ***particular project.***" O.C.G.A. § 36-71-10(a) (emphasis

added). Therefore, the administrative appeals process does not apply to a challenge to the validity of the County's impact fee Ordinances as a whole. See id.; see also Georgia Dep't of Behavioral Health & Developmental Disabilities v. United Cerebral Palsy of Georgia, 298 Ga. 779, 787 (2016) ("Plaintiffs may bring their claims directly to court where there is no adequate administrative procedure available for challenging the type of administrative decision in question.").

2. Peachtree Building Group, LLC

Defendant argues that Peachtree has not paid impact fees under the Ordinances and that its ownership of property in the County is insufficient to grant it standing. However, when a plaintiff challenges a *county* or *city* ordinance, as Peachtree does here, there is simply no "particularized injury requirement" because "community stakeholders" have "a cognizable interest in having their government follow the law." Cobb Cnty. v. Floam, 319 Ga. 89, 91 (2024). While "the Georgia Constitution requires a more particularized injury similar to the federal Article III injury-in-fact requirement" for challenges to *state* statutes due to "principles of separation or powers," the "animating reason to require a particularized injury to challenge *state* legislative actions is not present for challenges to county or municipality legislative actions." Id. at 92-93.

Peachtree's averments that it "currently has real property under contract in Henry County that it intends to develop for single family homes" and that "improper development impact fees harm [Peachtree's] ability to develop the property after closing" are sufficient to establish standing. (First Am. Compl. ¶ 28). Peachtree, which owns property in the County, has "a cognizable interest in having [the County] follow the law," in this case, DIFA. Floam, 319 Ga. at 91.

3. Greater Atlanta Home Builders Association, Inc.

Defendant incorrectly argues that GAHBA does not have associational standing. Associational standing permits an organization that has suffered no direct injury to sue on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Aldridge v. Georgia Hosp. & Travel Ass'n, 251 Ga. 234, 236 (1983). Here, (a) GAHBA's members include "home builders transacting business in the greater Atlanta area" who have standing to sue in their own right, like ResiBuilt and Peachtree as discussed above; (b) GAHBA, which "is a professional trade association whose mission includes ensuring a economically viable building environment and promoting public policy solutions that serve both the housing industry's and community's needs," has an interest in protecting its members from the County's unlawful impact fees; and (c) the relief requested, namely a declaration that the County's Ordinances violate DIFA, does not require the participation of each of GAHBA's individual members. (First Am. Compl. ¶¶ 1-3). In short, the elements of associational standing as to Plaintiff GAHBA are satisfied.

Second, GAHBA also has dependent standing because it is "joined by an individual plaintiff who has standing." Miller v. Fulton Cnty., 258 Ga. 882, 883 (1989). This is because "dependent standing [is] preferable to (a) detailed inquiry as to the membership of the civic association to determine its independent standing, or (b) requiring those individual property owners who have standing to bear the entire burden[.]" Lindsey Creek Area Civic Ass'n v. Consol. Gov't of Columbus, 249 Ga. 488, 490 n.4 (1982). In this case, GAHBA is joined by Plaintiffs ResiBuilt and Peachtree,

each of which have individual standing as discussed above. Accordingly, GAHBA has "dependent standing" and thus is a proper party to this action. Miller, 258 Ga. at 883.

J. Plaintiffs' Request for Disgorgement of Improper Impact Fees Is Not Barred by Sovereign Immunity.

Defendant asserts that to the extent that Plaintiffs' claims are for monetary damages, they are barred by the County's sovereign immunity. "Article I, Section II, Paragraph V of the State Constitution waives sovereign immunity for certain 'actions' seeking declaratory relief for alleged constitutional violations by state entities, officials, and employees specifically listed therein." State v. SASS Grp., LLC, 315 Ga. 893, 896 (2023). "[W]here a party relies, at least partially, on Paragraph V's waiver of sovereign immunity in pursuing its action, the party's suit must be brought 'exclusively' against and 'in the name of' the State or local government." First Ctr., Inc. v. Cobb Cnty., 318 Ga. 271, 271 (2024). That is exactly what Plaintiffs have done here, as they brought this action for declaratory relief exclusively against Henry County, Georgia.

"The purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; the Act is to be liberally construed and administered." City of Atlanta v. Hotels.com, L.P., 285 Ga. 231, 234 (2009) (citing O.C.G.A. § 9-4-1). In furtherance of this goal, the Declaratory Judgment Act empowers the superior court in which a petition for declaratory judgment is filed to grant injunctive or other interlocutory extraordinary relief in connection with the petition. O.C.G.A. § 9-4-3(b). One form of "extraordinary relief" is disgorgement, which "is an exercise of the Court's power in equity . . . [that] extends only to the amount with interest by which the defendants profited from their

wrongdoing." Estate of Pidcock By & Through Pidcock v. Sunnyland Am., Inc., 726 F. Supp. 1322, 1329 n.16 (S.D. Ga. 1989).

In short, Plaintiffs do not seek "money damages" as the County contends, but rather the disgorgement of the County's improperly collected impact fees as an ancillary equitable remedy. Practically speaking, the County knows who paid the fees, and it follows that those monies can be returned to their payers, regardless of whether each individual feepayer is a party to this lawsuit.

K. Plaintiffs Are Entitled to An Award of Attorneys' Fees and Costs.

Expenses of litigation are recoverable where a "defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense[.]"[3] O.C.G.A. § 13-6-11. "[I]t is well-settled law that when warranted, attorney[s'] fees and expenses of litigation are recoverable against a municipality." City of Warner Robins v. Holt, 220 Ga. App. 794, 795 (1996) (collecting cases).

"[T]he 'bad faith' contemplated by [O.C.G.A. § 13-6-11] is bad faith connected with the transaction and dealings out of which the cause of action arose, rather than bad faith in defending or resisting the claim after the cause of action has already arisen." Brown v. Baker, 197 Ga. App. 466, 467 (1990). Here, the Court finds that the County acted in bad faith in its implementation of the Ordinances. Before the County even voted on the proposed new impact fees, GAHBA expressed its concerns through a letter to the County's Board of Commissioners, dated August 1, 2022. That letter, which

[3] Although the statute reads "jury may award," Georgia courts have held that attorneys' fees under O.C.G.A. § 13-6-11 are an appropriate subject for bench rulings including summary judgment. See, e.g., Sawgrass Builders, Inc. v. Realty Cooperative, Inc., 172 Ga. App. 324, 325 (1984) (affirming trial court's summary judgment award of attorneys' fees); Hibbard v. McMillan, 284 Ga. App. 753, 757 (2007) (affirming trial court's bench ruling of specific performance and attorneys' fees).

identified many of the problems with the Methodology Report and CIE that the Court has concluded exist, merely requested that the County's Board of Commissioners postpone the vote scheduled for August 2, 2022, to allow the opportunity for GAHBA and County officials to seek further clarification on any potential violations of DIFA. In response, the County deferred to Mr. Ross and then proceeded to vote on and approve Ordinance No. 22-05 on August 2, 2022, as scheduled. The County's bad faith failure to investigate in any meaningful fashion GAHBA's asserted violations caused Plaintiffs to have to file the instant lawsuit and incur attorneys' fees.

Further, the "stubborn litigiousness" and "unnecessary trouble and expense" elements of an O.C.G.A. § 13-6-11 claim both relate to whether a bona fide controversy exists or whether a plaintiff was required to resort to litigation to enforce a clear legal right, in this case, Plaintiffs' clear legal right to the minimum standards of protection afforded by the DIFA. Gray v. King, 270 Ga. App. 855, 857 (2004) ("A recovery for stubborn litigiousness is authorized where the evidence reveals no bona fide controversy or dispute with regard to the defendant's liability.") Here, the County's insistence on continuing this litigation despite the clear evidence that its impact fees violate DIFA, especially regarding its incorrect and unlawful NPV calculations and its failure to provide credits for SPLOST and TSPLOST tax collections, caused Plaintiffs unnecessary trouble and expense in enforcing clear legal rights. Plaintiffs are also entitled to an award of attorneys' fees and litigation expenses on this basis.

III. Conclusion

Plaintiffs' Motion for Partial Summary Judgment is GRANTED.[4] Defendant Henry County Georgia's Motion for Summary Judgment is DENIED. For the reasons set forth above, the Court hereby determines that Ordinance No. 22-05 and Ordinance No. 24-06 violate DIFA, and the County's further enforcement of these ordinances is hereby permanently ENJOINED.

Moreover, the Court concludes that the development impact fees collected by the County since February 2, 2023, when Ordinance No. 22-05 went into effect, are all fatally flawed because of the various errors in their computation and implementation as discussed herein. The County's unlawful and erroneous NPV calculations alone infect all of the subject impact fees and cause them all to have been charged and collected illegally. The Court therefore ORDERS that all development impact fees collected by the County since February 2, 2023, under Ordinance No. 22-05 and Ordinance No. 24-06 be disgorged and repaid by the County to the feepayers from which they were received within 30 days of the date of this Order.

The Court further concludes that Plaintiffs are entitled to an award of attorneys' fees and litigation expenses under O.C.G.A. § 13-6-11. Plaintiffs are hereby DIRECTED to submit evidence of their fees and expenses incurred in this matter within 14 days of the date of this Order. Defendant may then submit any response to Plaintiffs' submission within 14 days. The Court will thereafter schedule a hearing on the issue if any party requests it.

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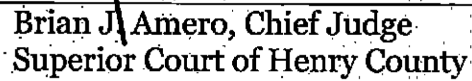
[4] Plaintiffs did not move for summary judgment as to Counts II through IV of their First Amended Complaint.

SO ORDERED, this 4 day of February, 2025.



Brian J. Amero, Chief Judge
Superior Court of Henry County

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