

DISTRICT COURT, GUNNISON COUNTY, 200 E. Virginia Avenue, Gunnison, Co. 81230	FILED Document CO Gunnison County District Court 7th JD Filing Date: Mar 10 2009 4:10PM MDT Filing ID: 24149757 Review Clerk: Susan Piloni
GUNNISON COUNTY CONTRACTORS ASSOCIATION, JAMIE WATT CONSTRUCTION, INC., d/b/a/ ALPINE CONSTRUCTION, NICHOLAS MIROLI, SARA MIROLI, and all similarly situated residents, businesses and property in Gunnison County, Plaintiffs, v. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF GUNNISON, COLORADO, and GUNNISON COUNTY HOUSING AUTHORITY, Defendants.	COURT USE ONLY
	Case Number: 08 CV 59 Division:
ORDER ON PENDING MOTIONS	

This matter is before the Court on Defendants Board of County Commissioners of the County of Gunnison, Colorado & Gunnison County Housing Authority's ("County") Motion for Summary Judgment. This matter is also before the Court on Plaintiffs' Motion for Class Certification. Having reviewed the motions, responses, replies, the file and relevant authorities, the Court enters this order.

I.

Plaintiffs have filed this action in an effort to invalidate Resolution 2006-44 which calls for the creation of a “workforce housing fee.” The fee at issue applies to all construction, additions or remodels of residential property in Gunnison County of more than 1000 square feet and is calculated on a sliding scale based upon the square footage of each construction project. The stated purpose of the fee is to remedy the need for essential workforce housing generated by new construction projects.

Plaintiff Gunnison County Contractors Association (“GCCA”) is a chapter of the Housing and Building Association of Northwestern Colorado, a not for profit trade organization whose membership comprises of residents and contractors who have been required to pay the fee in connection with the development of residential property in Gunnison County. Similarly, Plaintiffs Jamie Watt Construction, Inc. (“Alpine Construction”) and Nicholas and Sara Mirolli (“Mirolli”) have directly paid the fee while developing property in Gunnison County. In the Amended Complaint, Plaintiffs seek a declaratory judgment invalidating the workforce housing fee as an unconstitutional tax under the Colorado Taxpayers’ Bill of Rights (“TABOR”), COLO. CONST. art. X, § 20, on the grounds that it was enacted without voter approval. In addition, Alpine Construction and the Mirollis have filed a claim for damages under TABOR. Alternatively, Plaintiffs have also filed for a declaration that the workforce housing fee is not a proper impact fee under C.R.S. § 29-20-101, *et seq.*

The County has now moved for summary judgment dismissing the entire complaint and for an award for attorney fees and costs. As grounds thereof, the County contends that the TABOR claims fail as a matter of law because the workforce housing fee is not a “tax” as defined under

Colorado law. As to the statutory claim, the County's argument is twofold: (1) that the fee complies with the requirements of the impact fee statute; and (2) even if it does not satisfy the statute, the fee was properly enacted pursuant to several other statutory grants of authority that have not been challenged by Plaintiffs.

II.

A party is entitled to summary judgment if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). Any reasonable inferences should be construed in a light most favorable to the non-moving party, and the court should deny the motion "unless the file and the affidavits accompanying the motion clearly disclose that there is no genuine issue of a material fact." *Schold v. Sawyer*, 944 P.2d 683, 684 (Colo. App. 1997). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. However, once that burden has been met, the non-moving party "may not rest on the mere allegations of his pleadings, but must by affidavit or otherwise set forth specific facts showing there is a genuine issue for trial." *Reisig v. Resolution Trust Corp.*, 806 P.2d 397, 400 (Colo. App. 1991).

III.

As an initial matter, the Court agrees with the County that the TABOR claims must be dismissed because the workforce housing fee is not a tax. TABOR is not applicable unless the charge at issue can be properly classified as a "tax." *Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1190 (Colo. App. 2005), *cert. denied*, 2006 WL 1601671 (Colo. 2006). The manner in which a particular charge is labeled is not dispositive because Colorado courts have adopted a

functional approach to determine “the purpose and use of the charge in question.” *Westrac, Inc. v. Walker Field, Colo., Public Airport Authority*, 812 P.2d 714, 716 (Colo. App. 1991).

In general, a fee is defined as “a charge imposed on persons or property to defray costs of a particular government service,” whereas a tax is “a means of distributing the general burden of the cost of government, rather than an assessment of benefits.” *Bruce*, 131 P.3d at 1190. Impact fees are commonly imposed by counties as a condition of receiving a building permit as a means of defraying the capital expenses created by new development projects. *Bd. Of County Com'rs v. Bainbridge, Inc.*, 929 P.2d 691, 698 (Colo. 1996). An impact fee is a type of special fee that is “not designed to raise revenues to defray the general expenses of government,” but is simply imposed “for the purpose of defraying the cost of a particular governmental service.” *Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1989). As long as the charge in question is “reasonably designed to meet the overall cost of the service for which the [charge] is imposed,” it will be treated as a fee and will not be invalidated as an unconstitutional tax. *Id.* at 310.

Ultimately, a court must determine whether a particular charge is a fee or a tax by looking primarily to the language of the enabling statute or ordinance. *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008). If the language of the ordinance discloses a primary intent to defray the cost of a particular government service, the charge will be treated as a fee regardless of how the revenue collected was actually spent. *Id.* at 249. In essence, Plaintiffs’ argument that the workforce housing fee must be treated as a tax is based on the following factors: (1) the charge imposed on developers and landowners is not used to finance a particular service utilized by those who are responsible for paying the charge; (2) those who pay the charge will derive no benefit from the revenue generated; (3) the revenues collected are to be used to fund a

government program which benefits the entire county; and (4) the amounts collected are not reasonably related to the overall cost of the service for which the charge is imposed. In response, the County contends that the workforce housing fee is not a tax because its sole purpose is to defray the impact that new construction has upon the availability of affordable housing and all revenue collected is placed in a special trust fund created for the exclusive purpose of creating affordable housing.

Although the Court has not found any Colorado cases that are directly on point, the relevant caselaw does provide some general principles to be applied in this case. For example, in *Bloom*, *supra*, a landowner challenged the imposition of a “transportation utility fee” as an illegal tax. The fee was imposed upon all owners of developed property and provided revenue for the maintenance of local streets. The amount imposed upon each property was based upon the lot’s street frontage and estimated street usage. Because the charge imposed on each parcel was not based upon the assessed valuation of the property but only upon its relative frontage size and impact on traffic generation, the court deemed the charge to be a fee and not a tax. *Bloom*, 784 P.2d at 309. Subsequently, the court in *Barber* expanded the analysis in *Bloom* by declaring that a fee is not transformed into a tax even if the proceeds are eventually transferred into a city’s general fund and used to defray the general costs of government. *Barber*, 196 P.3d at 250.

Likewise, in *Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1190-1 (Colo. App. 2005), the court held that a “street light service charge” was not a tax for purposes of TABOR. The charge in question was imposed upon property owners in order to finance the operation and maintenance of city street lights. Because the revenues collected were placed into a special fund segregated from the general fund and the manner in which the charge was calculated was not

inherently unreasonable, the court found that the charge was more properly characterized as a fee than as a tax. *Bruce*, 131 P.3d at 1190-1. Finally, in *Westrac, Inc. v. Walker Field, Colo., Public Airport Authority*, 812 P.2d 714, 717 (Colo. App. 1991), an airport authority imposed a 10% surcharge upon off-site rental car companies arising out of revenues derived from customers picked-up at the airport. Since the surcharge was used to defray the airport's operating expenses and was reasonably related to a company's use of the facility, the court held the surcharge to be a valid user fee. In sum, the aforementioned authorities illustrate the general unwillingness of Colorado courts to characterize a purported fee as a tax if a county or municipality provides a plausible finding that the intent behind the charge is to defray the capital cost of a specific government service and not to fund general governmental operations.

Moreover, courts in other jurisdictions have specifically addressed the authority of local governments to impose impact fees and other surcharges on certain landowners for the purpose of defraying the cost of building affordable housing units. In *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990), the court examined several municipal ordinances that imposed fees on developers as a condition of development approval and required the proceeds to be placed in an affordable housing trust fund. In concluding that the putative fees were not taxes, the court rejected the argument that the general public must bear the entire burden of providing affordable housing for the local workforce. Rather, the court found that the ordinances did not impose an illegal tax on developers because "the provision of affordable housing is not a municipal obligation that must be supported through general taxation." *Holmdel*, 583 A.2d at 293-4.

The rationale in *Holmdel* was later adopted in an unpublished decision in *Gagne v. City of Hartford*, 1994 WL 16841 (Conn. Super. 1994). The ordinance in *Gagne* required developers who convert residential property into non-residential uses to replace the diminished housing stock with similar housing units or to contribute money to a municipal low income housing fund. In sum, the court held that the ordinance did not create a tax based on the following factors: (1) the ordinance was not compulsory because it applied only to landowners who chose to convert their property to non-residential uses; (2) the ordinance was not intended to increase the general revenue of the city because the funds were segregated into a special fund for affordable housing; and (3) the ordinance was reasonably related to the city's financial obligation to provide affordable housing because converting residential property into a non-residential use consumed the available source of affordable housing within the city. *Gagne*, 1994 WL 16841 at *4. Indeed, the holdings in *Holmdel* and *Gagne* are consistent with California caselaw that has generally refused to categorize fees imposed to alleviate the collateral impacts of land development as taxes. *Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal. App. 3d 892, 905-7, 223 Cal. Rptr. 379, 386-7 (1986) (holding that an ordinance imposing a special fee on owners of residential hotel units who convert those units for non-residential use was not a tax); *Trent Merideth, Inc. v. City of Oxnard*, 114 Cal. App. 3d 317, 327-8, 170 Cal. Rptr. 685, 691 (1981) (holding that a fee imposed on land developers to relieve conditions of school overcrowding caused by development was not a tax).

Conversely, there are some cases in which courts have struck down development impact fees as imposing an illegal tax. For example, in *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 686-7 (Minn. 1997), the court invalidated a "road unit connection charge" imposed on new

developments because the charge was not a purely regulatory or license fee but instead a revenue measure benefiting the general public. Specifically, the court in *Country Joe* reached its conclusion on the grounds that “revenues collected from the road unit connection charge are not earmarked in any way to fund projects necessitated by new development, but instead fund all major street construction, as well as repairs of existing streets.” *Country Joe*, 560 N.W.2d at 686. In addition, the court found that the charge could not be treated as an impact fee because there was insufficient evidence showing that “the charge was proportionate to the need created by the development upon which the burden of payment fell.” *Id.*

In addition, the court in *Home Builders Ass'n of Greater Des Moines v. City of West Des Moines*, 644 N.W.2d 339, 348 (Iowa 2002), also declared a development impact fee to be an illegal tax. The ordinance in *Home Builders* imposed a special charge upon all commercial and residential builders to be used to fund a neighborhood park system. As an initial matter, the court determined that Iowa did not have enabling legislation authorizing local governments to charge impact fees and that a city could only impose regulatory fees to cover its administrative expenses or as compensation for a direct service rendered to the person or entity paying the fee. *Home Builders*, 644 N.W.2d at 345, 347. As such, because the charge at issue was not related to the cost of regulating development and the revenue collected conferred no special benefits upon the developers who paid it, the court held that the ordinance imposed a tax and not a fee. *Id.* at 349-50. Likewise, the court in *Mayor and Bd. of Aldermen, City of Ocean Springs v. Homebuilders Ass'n*, 932 So. 2d 44, 59 (Miss. 2006), declared a series of development impact fees to be an illegal tax because Mississippi law did not provide localities with the statutory authority to impose impact fees.

In light of the foregoing, the Court finds the holdings in *Holmdel* and *Gagne* to be most persuasive and that the workforce housing fee is not a tax. In particular, the holdings in *Home Builders* and *City of Ocean Springs* cannot be applied in this case because Colorado law expressly authorizes local governments to impose impact fees as a condition of approval of development permits. C.R.S. § 29-20-104.5. In addition, the express language of Resolution 2006-44 shows that the County did not intend to enact the workforce housing fee as a way to generate revenue for general government spending. In relevant part, the Resolution states that its purpose is to alleviate the impact of increased residential and commercial development on the affordable housing market and specifically segregates the collected revenue into a special fund reserved for the sole purpose of providing essential workforce housing. *Gunnison County's Motion for Summary Judgment*, Exhibit A. These factors distinguish this case from the holding in *Country Joe* and strongly suggest that the workforce housing fee should be treated as a fee and not a tax.

Moreover, the Court finds that the Resolution is reasonably designed to meet the overall cost incurred by the County in alleviating the impact of residential and commercial development on the availability of workforce housing. The findings in the Resolution are based in large part upon a commissioned study entitled "Nexus/Proportionality Analysis for Commercial and Residential Linkage Programs" ("Analysis"). In relevant part, the Analysis relies upon the most recent census data showing that 45.9% of the county's households earn incomes at or below 80% of the county's median income. *Id.* at Exhibit B, pg. 3. The Analysis further shows that the rental vacancy rate was just under 3%, that rental rates had increased nearly 80% since 2000, and that the median price for a single family home exceeded twice the median income level for a

family of four within Gunnison County. *Id.* at 13-5. Based on these factors and other data, the Analysis concludes that the development of residential and commercial property increases the overall demand for workforce housing, that job generation increases with the size of a development, and that at least 46% of the housing generated by new development should be affordable for households at or below 80% of the county's adjusted median income. *Id.* at 3-7.

A putative fee must be upheld if its methodology is not inherently unsound and is presumed to be constitutional unless the challenging party can prove it to be unconstitutional beyond a reasonable doubt. *Bruce*, 131 P.3d at 1190. In responding to the County's summary judgment motion, Plaintiffs have not submitted any evidence or exhibits to rebut the findings within the Resolution or conclusions stated within the Analysis. Rather, the most compelling argument advanced by Plaintiffs is that the fee must be treated as a tax because it is not used "to finance a particular service utilized by those who must pay the charge." *Barber*, 196 P.3d at 249.

Although the workforce housing fee does not directly benefit the landowners who must pay it, this factor alone is not dispositive due to the inherent distinction between an impact fee and other special fees. By its nature, an impact fee is designed to compensate for the burdens caused by increased land development regardless of whether the revenue from the fee directly benefits those who must pay it. *See* FRONA M. POWELL, CHALLENGING AUTHORITY FOR MUNICIPAL SUBDIVISION EXATIONS: THE ULTRA VIRES ATTACK, 39 DEPAUL L. REV. 635, 642 (Spring, 1990). Thus, the mere fact that the revenue from the workforce housing fee does not directly fund a service that benefits Plaintiffs and other payers does not, by itself, transform the fee into a tax.

In sum, based upon the data in the Analysis, the County made a legislative finding that an impact fee should be imposed as a condition of issuance of a development permit in order to compensate for the loss of affordable workforce housing that is specifically caused by increased land development. In particular, the fee is imposed on a sliding scale depending upon the size of the development or improvement and excludes additions to preexisting structures less than 1000 sq. feet.¹ The fee schedule is based upon the residential job generation data from the Analysis which approximates the amount of increased job generation created by larger sized projects. *Gunnison County's Motion for Summary Judgment*, Exhibit A, pg. 7. The fee schedule seems reasonable in light of the data in the Analysis showing that larger projects tend to generate a greater demand for affordable workforce housing. Moreover, the exclusion of projects less than 1000 sq. feet ensures that smaller projects with little or no impact upon the affordable housing market will not be subject to the fee. As such, the Court finds nothing inherently unsound in the methodology used by the County in imposing the fee. Accordingly, because Plaintiffs cannot satisfy their burden of proving beyond a reasonable doubt that the fee is an unconstitutional tax, the Court finds as a matter of law that Resolution 2006-44 imposes a fee and not a tax and that the TABOR claims must be dismissed.

IV.

The County further seeks summary judgment on Plaintiffs' First and Third Claims for Relief on the grounds that the workforce housing fee was properly enacted pursuant to C.R.S. § 29-20-104.5. As noted above, Plaintiffs bear the burden of proving the invalidity of the workforce housing fee beyond a reasonable doubt. *See Coleman v. Gormley*, 748 P.2d 361, 364 (Colo. App.

¹ The Resolution originally exempted additions under 500 sq. feet, but was later amended on March 4, 2008 to exempt additions under 1000 sq. feet.

1987). The statute provides that “a local government may impose an impact fee or other similar development charge to fund expenditures by such local government on capital facilities needed to serve new development.” C.R.S. § 29-20-104.5(1). All impact fees must be enacted pursuant to a schedule that is: (a) legislatively adopted; (b) generally applicable to a broad class of property; and (c) intended to defray the projected impacts on capital facilities caused by proposed development. *Id.* Furthermore, an impact fee must be established “at a level no greater than necessary to defray such impacts directly related to proposed development,” and a fee shall not be imposed “to remedy any deficiency in capital facilities that exists without regard to the proposed development. C.R.S. § 29-20-104.5(2).

Plaintiffs contend that summary judgment should not be granted because the County has not shown that the lack of low cost housing is caused by new development. Conversely, the County argues that the Analysis draws a specific link between new construction and a diminished supply of workforce housing and that the fee is reasonably tailored to compensate for the impacts of increased construction. In particular, the Analysis recommends a mitigation formula based on a variety of factors which is designed to alleviate the demand for workforce housing specifically caused by new development. *Gunnison County’s Motion for Summary Judgment*, Exhibit B, pg. 9. The recommended fee calculation is designed to close the gap between prevailing market prices and what low-income households can afford to pay for housing. *Id.* at Exhibit B, pg. 10. The mitigation formula is narrowly tailored to provide affordable housing for 46% of housing units which roughly corresponds with the amount of housing demand generated by new development. *Id.* at Exhibit B, pg. 8.

Moreover, the Court does not agree with Plaintiffs' assertion that the fee is invalid because the County did not perform an individualized assessment of whether each construction project subject to the fee will create a greater demand for workforce housing. Plaintiffs have not cited, nor has the Court found, any authorities that require a local government to undertake individualized assessments when imposing an impact fee upon a broad class of property. To the contrary, land use conditions that apply to a broad class of property do not require individualized justification. *See Wolf Ranch, LLC v. City of Colorado Springs*, 2008 WL 4878388 at *4 (Colo. App. 2008). Accordingly, to the extent that the fee schedule in Resolution 2006-44 is based upon the findings and recommendations in the Analysis, the County has raised a rebuttable presumption that the workforce housing fee is reasonably related to the purpose of mitigating the impact of new development projects on the affordable housing supply and that the fee was not imposed to remedy a deficiency in affordable housing that would exist without regard to new development.

As noted above, Plaintiffs have produced no evidence or exhibits to rebut the County's findings or the methodology used to calculate the fee. Plaintiffs' objections are exclusively based upon their disagreement with the findings and conclusions in the Analysis, but these objections have not been supported by any expert affidavits or other competent evidence. Although Plaintiffs contend that these findings are flawed, arguments of counsel are insufficient to raise a genuine issue of material fact. *Globe Indemnity Co. v. Travelers Indem. Co. of Illinois*, 98 P.3d 971, 975 (Colo. App. 2004). Consequently, because the record supports the County's finding that the workforce housing fee is reasonably tailored to alleviate the impacts of new development on the affordable housing market, the Court finds that Resolution 2006-44 complies

with the requirements of C.R.S. § 29-20-104.5 and that the County is entitled to summary judgment on the First and Third Claims for Relief.

V.

The County has also moved for an award of attorney fees and costs. A defendant is entitled to an award for its reasonable attorney fees if the claims against it are “frivolous, substantially groundless, or substantially vexatious.” C.R.S. § 13-17-102(4). The mere fact that a party did not prevail on the merits of its claims does not render those claims frivolous if there was a rational basis in law or fact to support the claims. *Remote Switch Systems, Inc. v. Delangis*, 126 P.3d 269, 275 (Colo. App. 2005), *cert. denied*, 2006 WL 380434 (Colo. 2006). Here, the County is not entitled to its attorney fees because Plaintiffs’ claims were based upon a plausible, albeit incorrect, interpretation of the relevant statute and caselaw. Nevertheless, the County is entitled to its costs under C.R.C.P. 54(d).

In summary, the Court finds that Plaintiffs have failed to raise any genuine issues of fact and that their claims may be decided as a matter of law. Because the workforce housing fee is not a tax, the Second, Fourth and Fifth Claims for Relief under TABOR must be dismissed. Moreover, since the fee was properly enacted under the impact fee statute, the County is entitled to summary judgment on the First and Third Claims for Relief.²

Based on the foregoing, IT IS ORDERED that the County’s Motion for Summary Judgment is granted and the Amended Complaint is hereby dismissed with prejudice. The County’s request for attorney fees is denied.

² Having found that the workforce housing fee was properly enacted under the impact fees statute, the Court will not address the County’s additional arguments in favor of summary judgment.

VI.

In light of the foregoing, while the Court's initial conclusion was that class certification was appropriate, based on the foregoing, that pending motion is now moot.

DATED this 10th day of March, 2009.

BY THE COURT:

A handwritten signature in black ink, appearing to read "J. Steven Patrick", written over a horizontal line.

J. Steven Patrick
District Court Judge