DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA, an Arizona corporation,	1 CA-CV 09-0349
	DEPARTMENT C
Plaintiff/Appellant,	**MEMORANDUM DECISION**
v.	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
CITY OF PRESCOTT, an Arizona municipal corporation; TOWN OF PRESCOTT VALLEY, an Arizona municipal corporation,	
Defendants/Appellees.	

Appeal from the Superior Court in Yavapai County

Cause No. P-1300-CV-0020061259

The Honorable Michael R. Bluff, Judge

AFFIRMED

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K E S S L E R, Judge

¶1 Home Builders Association of Central Arizona ("HBA") appeals from the entry of summary judgment in favor of the City of Prescott ("Prescott") and the Town of Prescott Valley ("Prescott Valley"). For the reasons that follow, we affirm the superior court's entry of summary judgment.

FACTUAL AND PROCEDURAL HISTORY

¶2 HBA filed a complaint seeking a declaratory judgment that Prescott and Prescott Valley imposed development impact fees in a discriminatory manner in violation of Arizona Revised Statutes ("A.R.S.") section 9-463.05 (2008). HBA also alleged that the development impact fees on residential development property owners did not bear a reasonable relationship to the burden imposed upon the municipalities by residential development in violation of A.R.S. § 9-463.05. HBA sought a declaratory judgment that the development impact fees were invalid, an injunction against collecting impact fees until such time as fair and legal fees were imposed on all developers, and a writ of mandamus compelling Prescott and Prescott Valley to impose nondiscriminatory development impact fees. Prescott and Prescott Valley moved for summary judgment arguing that the decision not to impose development impact fees on nonresidential

development was rationally based on their legitimate goal of promoting economic development and was in compliance with A.R.S. section 9-463.05(B)(4) and (5). HBA filed a cross-motion for summary judgment.

¶3 The evidence attached to the motions revealed that Prescott historically imposed development impact fees[1] on new residential development property owners. It has never imposed development impact fees on nonresidential development property owners. Prescott Valley initially imposed development impact fees on all new residential and nonresidential development property owners. In 2003, the Prescott Valley Town Council suspended these fees on nonresidential development. This suspension was continued through August 2008.[2]

¶4 The court concluded that neither municipality violated § 9-463.05 because the municipalities properly considered the additional tax contributions of the nonresidential development property owners and the determination that these contributions

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[1] "Development or impact fees are designed to assist in raising the capital necessary to meet needs that surely will arise in the foreseeable future but whose precise details may not at the outset be quite clear." *Home Builders Ass'n of Central Ariz. v. City of Scottsdale (Scottsdale III),* 187 Ariz. 479, 483, 930 P.2d 993, 997 (1997).

[2] The record does not indicate whether this suspension was extended beyond August 6, 2008.

outweighed the amount of the development impact fees that would otherwise be imposed was not clearly erroneous, arbitrary, or wholly unwarranted. The court granted summary judgment in favor of Prescott and Prescott Valley.

¶5 HBA filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

¶6 In reviewing the superior court's ruling on cross-motions for summary judgment, we review questions of law *de novo*, but view the facts in the light most favorable to the nonmoving party. *See Nelson v. Phoenix Resort Corp.,* 181 Ariz. 188, 191, 888 P.2d 1375, 1378 (App. 1994) *disagreed with on other grounds by Shoen v. Shoen*, 191 Ariz. 64, 65-66, 952 P.2d 302, 303-04 (App. 1997). If the undisputed facts would allow reasonable minds to differ, summary judgment should be denied. *Id.* (citing *Orme School v. Reeves,* 166 Ariz. 301, 310, 888 P.2d 1000, 1009 (1990)).

¶7 Municipalities are authorized to impose development impact fees pursuant to A.R.S. § 9-463.05. This statute provides, in relevant part:

> B. Development fees assessed by a municipality under this section are subject to the following requirements:
> . . .

> 4. The amount of any development fees assessed pursuant to this section must bear a reasonable relationship to the burden imposed upon the municipality to provide additional necessary public services to the development. The municipality, in determining the extent of the burden imposed by the development, shall consider, among other things, the contribution made or to be made in the future in cash or by taxes, fees or assessments by the property owner towards the capital costs of the necessary public service covered by the development fee.
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> 5. If development fees are assessed by a municipality, such fees shall be assessed in a nondiscriminatory manner.
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> . . .

A.R.S. § 9-463.05(B).[3]

I. The Distinction Between Residential and Nonresidential Development is Not Illegal Discrimination

¶8 HBA contends that the assessment of development impact fees against residential but not nonresidential development is discriminatory in violation of A.R.S. § 9-463.05(B)(5). We disagree. Local governments have a rational basis to

[3] Subsection 9-463.05(B)(4) was amended in 2009 to read, "The amount of any development fees assessed pursuant to this section must bear a reasonable relationship to the burden imposed on the municipality to provide additional necessary public services to the development. The municipality shall forecast the contribution to be made in the future in cash or by taxes, fees, assessments or other sources of revenue derived from the property owner towards the capital costs of the necessary public service covered by the development fee and shall include these contributions in determining the extent of the burden imposed by the development." A.R.S. § 9-463.05(B)(4) (Supp. 2009). This amendment was not effective until January 1, 2010; therefore we base our decision on the previous language of A.R.S. § 9-463.05(B)(4) (2008).

distinguish residential from nonresidential development and the decision to impose fees on one group does not necessarily render the decision not to impose fees on the other discriminatory. The statute specifically directs the municipality to set fees based on a "reasonable relationship" with the burden imposed by the development. A.R.S. § 9-463.05(B)(4). In doing so, a municipality must "consider, among other things, the contribution made or to be made in the future in cash or by taxes, fees or assessments by the property owner towards the capital costs of the necessary public service covered by the development fee." *Id.* A municipality's determination that different types of development generate different amounts of other tax revenue must be accepted unless it has no factual basis. *See Scottsdale III*, 187 Ariz. at 482, 930 P.2d at 996 (holding that the factual underpinning of a city's decision is presumed valid unless shown to be without factual support).

¶9 Prescott and Prescott Valley determined that the transaction privilege tax revenue generated by nonresidential development is a substantial source of revenue justifying nonimposition of development impact fees. The transaction privilege tax revenue generated by nonresidential development is a rational basis for distinguishing between nonresidential and

residential developments in the assessment of impact fees. *Id.* ("Land use regulations of general application will be overturned by the courts only if a challenger shows the restrictions to be arbitrary and without a rational relation to a legitimate state interest.") (citation omitted). Under Arizona law, transaction privilege tax revenue is attributable to the seller. *J.C. Penney Co. v. Ariz. Dep't of Revenue,* 125 Ariz. 469, 472, 610 P.2d 471, 474 (App. 1980) ("The legal incidence of the transaction privilege tax is on the seller."). Thus, residential development does not generate transaction privilege tax revenue while many non-residential developments generate substantial privilege tax revenue.

¶10 Prescott had a rational basis for determining that transaction privilege tax revenues could adequately offset foregone development impact fees. Prescott based its conclusion on the cost difference between a nonresidential structure's typical transaction privilege tax generation and the typical cost of providing services to a nonresidential development. When the council debated whether to impose impact fees on nonresidential development, one councilmember pointed out that for every dollar of revenue the City received from non-residential development, it spent only between thirty and forty

cents providing services. By contrast, the council determined that residential development generates more expenses than revenue. The amount of transaction privilege tax revenue generated is within the scope of factors the City is required by statute to consider when setting impact fees. Prescott had a rational basis for determining that the transaction privilege taxes generated by nonresidential development justified treating residential and nonresidential development as distinct categories.

¶11 Prescott Valley also had a rational basis for finding that transaction privilege tax revenues justify distinguishing nonresidential from residential development. Prescott Valley estimated that the initial cost of deferred fees would be approximately $ 100,000 per year and that transaction privilege tax increases would eventually make up for the loss. The council had definite plans to use future transaction privilege tax revenues to repay bonds issued in connection with capital improvement projects. The town continued to monitor the amount of deferred impact fees and the town staff continued to recommend fee suspension.[4]

[4] HBA contended at oral argument that the record showed the benefit of non-residential development was difficult to ascertain. Nothing in the statute requires municipalities to

¶12 HBA contends that *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) and *Williams v. Vermont*, 472 U.S. 14 (1985) compel a different result. We disagree. These cases invalidated tax statutes that violated the Equal Protection Clause by discriminating between residents of the taxing state and residents of other states. HBA's opening brief admits that it has not raised an equal protection challenge to impact fees. Even if we entertain the assumption that equal protection jurisprudence has some relevance to our application of the statutory anti-discrimination provision, *Metro. Life* and *Williams* would not dictate the result in this case.

¶13 *Metro. Life* found that favoring domestic insurers over foreign insurers is not a legitimate state purpose to withstand an Equal Protection challenge. 470 U.S. at 882. Although the purpose of promoting domestic business by harming foreign business was illegitimate with respect to the equal protection clause, the purpose of reducing the upfront tax burden on a developer whose development will contribute substantial ongoing transaction privilege tax revenue is legitimate and mandated by A.R.S. § 9-463.05. Because the purpose of the classification is different than in *Metro. Life*, *Metro. Life's* holding that a

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meet a strict standard of proof as to their financial projections or considerations.

particular purpose was illegitimate has no bearing on the result of this case.

¶14 *Williams v. Vermont* struck down a use tax imposed on individual drivers on the grounds that discrimination between Vermont residents buying cars outside Vermont and new residents bringing cars to the state when they were purchased outside Vermont had no relation to the purpose of the tax. 472 U.S. at 24. The purpose of the tax was that users of roads should pay for road construction and maintenance. *Id.* at 23-24. Because residents importing cars from out of state and non-residents moving to Vermont and importing cars use Vermont roads equally, the Supreme Court held that the purpose of the statute is not served by distinguishing between them. *Id.* at 24. In this case, however, the purpose of the statute is served by distinguishing between residential and non-residential development. Like the tax in *Williams*, the impact fees HBA challenges are also based on the user pays principle: new developers should pay the cost of increased capital necessitated by their development. However, accounting for the amount of other taxes and fees a development is likely to pay is consistent with the user pays principle and legitimate in light

of the statutory requirement to consider the amount to be paid in other taxes and fees.

II. HBA Lacks Standing to Challenge the Amount of Fees Charged to NonResidential Developers

¶15 HBA contends that the development impact fees Prescott and Prescott Valley charge are invalid because the amount they charge nonresidential development is not reasonably related to the costs imposed by nonresidential development. We decline to consider this argument because HBA lacks standing to challenge the amount of tax assessed against nonresidential builders.

¶16 HBA's standing to challenge impact fees is limited to the standing a residential developer would have. *See Homebuilders Ass'n of Cent. Ariz. v. Kard*, 219 Ariz. 374, 377, ¶ 10, 199 P.3d 629, 632 (App. 2008) (holding court will look to see if association has a legitimate interest in an actual controversy, whether its members would have standing to sue, whether the interests involved are relevant to the organization's purpose, and whether individual members should be required to participate). Because an individual residential developer would lack standing to challenge the amount of impact fees assessed against a nonresidential developer, so does HBA.

¶17 Standing generally requires an injury in fact, economic or otherwise, caused by the complained-of conduct, and

resulting in a distinct and palpable injury giving the plaintiff a personal stake in the controversy's outcome. *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, 562-63, ¶ 18, 81 P.3d 1016, 1021-22 (App. 2003) (quotations and citations omitted). While standing in Arizona is not a constitutional issue, *Kard*, 219 Ariz. at 377, ¶ 9, 19 P.3d at 632, Arizona courts require a greater showing to establish standing to challenge the government's allegedly unlawful treatment of a person besides the plaintiff. *Karbal v. Ariz. Dep't of Revenue*, 215 Ariz. 114, 117, ¶ 13, 158 P.3d 243, 246 (App. 2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)) ("When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation . . . of *someone else,* much more is needed.") (initial brackets omitted). A plaintiff in an Arizona court generally lacks standing to challenge the legality of taxation applied to a third party. *Karbal*, 215 Ariz. at 117, ¶¶ 11-13, 158 P.3d at 246. *Accord Herron v. Mayor and City Council of Anapolis, Md.*, 388 F.Supp.2d 565, 569-70 (D.Md. 2005) (holding that subsequent purchaser of residential property lacked standing to challenge impact fee paid by builder).

¶18 In *Karbal*, the plaintiff challenged the legality of a tax imposed on businesses operating hotels and providing

vehicles for rent. 215 Ariz. at 115, ¶¶ 3-4, 158 P.3d at 244. On appeal, this Court reasoned that the taxes at issue were analogous to transaction privilege taxes, the incidence of which fell upon the businesses and not the consumers who ultimately bore the economic burden of the tax. *Id.* at 116, ¶¶ 8-10, 158 P.3d at 245. Because the consumer did not pay the tax, but it might be passed on to him, he did not have standing to challenge it, regardless of any alleged economic impact it had on him. *Id.* at ¶ 11.

¶19 Like the plaintiff in *Karbal*, HBA lacks standing to challenge whether the amount of the development impact fee assessed against nonresidential development is reasonably related to the burden it creates. HBA has not argued that the fees assessed against its own members are in excess of the burden they create. Additionally, during oral argument HBA conceded that residential development creates a burden in excess of the fees assessed against it. HBA expressly stated that it does not challenge Prescott and Prescott Valley's calculation of the burdens its members place on the municipality. What it does challenge is the decision not to levy a particular tax on another party who will pay other substantial taxes. Because its members are not injured by the decision not to tax someone else,

it lacks standing to challenge whether another developer's fee is high enough.

¶20 HBA alleges that its members are injured because the decision not to burden nonresidential development with impact fees may result in an increased burden on residential developers.[5] In an Arizona tax case, the mere transfer of an economic burden to a person besides the taxpayer does not give the third person standing. *Id.* at 118, ¶ 16, 158 P.3d at 247 (declining to "engage in the 'daunting' inquiry into economic realities" when determining standing to challenge a tax) (quoting *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995)). Regardless of whether the amount of taxation paid by nonresidential developers leads to an additional burden on residential developers, they lack standing to challenge whether the tax imposed on nonresidential builders is reasonably related to the burden they impose.

[5] At oral argument, HBA conceded that residential impact fees would not decrease if impact fees were imposed on nonresidential developers. While HBA added that any shortfalls were made up from the general fund, this caveat does not show that HBA members' impact fees would decrease if impact fees were imposed on nonresidential development.

III. HBA Failed to Present Evidence on Reasonable Relationship

¶21 HBA also contends that Prescott and Prescott Valley failed to consider future tax contributions by *residential* developments. HBA argued this point only vaguely below and failed to supply sufficient evidence to withstand its burden on summary judgment. HBA's principal discussion of this argument in the trial court consisted of a paragraph in its response to Prescott Valley's motion for summary judgment. The sole evidence HBA relies on in its argument is that Prescott Valley had foregone $3,767,395.36 in development fees for nonresidential developments and had recouped all but $523,689.00 by transferring one time transaction privilege tax revenues levied on new construction into a fund used to pay for growth related capital improvement. By implication, HBA contends that the payment of impact fees equal to the total cost generated by development and one time transaction privilege tax revenue on construction in addition results in a fee that is not reasonably related to the burden created by new development as required by A.R.S. § 9-463.05(B)(4).[6] We disagree because HBA has failed to

[6] Footnote 4 to HBA's combined response to Prescott's motion for summary judgment and reply in support of its own motion for summary judgment states that transaction privilege taxes are levied against "new residents who have already picked up their

proffer sufficient evidence to withstand a summary judgment on this point.

¶22 As the challenger to a municipal ordinance, HBA bears the burden of proving its invalidity. *Homebuilders Ass'n of Cent. Ariz. v. City of Goodyear*, 223 Ariz. 193, 198-99, ¶ 20, 221 P.3d 384, 389-90 (App. 2009) (citing *Scottsdale III*, 187 Ariz. at 482, 930 P.2d at 996). If the party bearing the burden of proof on a particular claim fails to respond to a motion for summary judgment with sufficient evidence to create a genuine issue of material fact, summary judgment is appropriate. *Orme Sch. v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 328 (1986)). A mere scintilla of evidence is not sufficient to resist a properly presented motion for summary judgment. *Id.* at 310-11, 802 P.2d at 1009-10.

¶23 HBA has failed to demonstrate the unreasonableness of the amount of residential development fees in light of other contributions made by residential developers. The only evidence HBA presented in favor of its claim is a reference to the amount of money foregone in impact fees from nonresidential development

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share of the tab for new development through residential impact fees" and used to make up the deficit caused by the failure to collect impact fees from nonresidential development.

and the amount of one time transaction privilege tax revenue used to make up the shortfall. HBA presented no evidence regarding what portion of the transferred one-time transaction privilege tax revenue resulted from residential or nonresidential development. Further, HBA introduced no evidence on the amount of one time transaction privilege tax collected from residential development. Therefore, we do not know how large that amount is in relation to the total amount spent on growth related capital infrastructure. Thus, we cannot determine whether the potential excess of impact fees and other taxes over the cost of new development was large enough to render the amount of the residential impact fee not reasonably related to the costs of growth.

¶24 Additionally, the reply brief on appeal argues that the City of Phoenix offsets $3,891 against development fees for residential developers based on future taxes and fees. HBA appended a 2007 report regarding such offsets. This report was not offered in the trial court. Prescott and Prescott Valley moved to strike the appendix to HBA's reply brief and the related argument. The only possible relevance of this information to the case is as some (albeit very unpersuasive) evidence of the contribution in taxes and fees eventually made

by residential development in other jurisdictions. However, on appeal from summary judgment we will not consider evidence that was not presented to the trial court. *See GM Dev. Corp. v. Cmty. Am. Mortgage Co.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990). Therefore, we grant Prescott and Prescott Valley's motions to strike the appendix to HBA's reply brief.

¶25 HBA also makes the related argument that the impact fee is invalid because Prescott's and Prescott Valley's legislative records do not reveal that the councils expressly considered the tax contributions related to residential development. HBA did not, however, make this argument below. An argument not raised before the trial court cannot be raised for the first time on appeal. *See Dillig v. Fisher,* 142 Ariz. 47, 51, 688 P.2d 693, 697 (App. 1984). We will not consider this new argument.

IV. ATTORNEYS' FEES AND COSTS

¶26 HBA requests an award of attorneys' fees and costs on appeal pursuant to A.R.S. sections 12-341 (2003), 12-341.01 (2003), 12-348 (2003), 12-1840 (2003), Arizona Rule of Special Action Procedure 4(g), and the private attorney general doctrine. Prescott and Prescott Valley both request attorneys'

fees pursuant to A.R.S. sections 12-341.01(C), 12-1840, 12-2030 (2003), and Arizona Rule of Special Action Procedure 4(g).

¶27 None of the parties elaborate regarding why they are entitled to attorneys' fees under these statutes and rules. "Generally, the party asserting a claim for relief has the burden of proving the facts essential to his claim." *Woerth v. City of Flagstaff,* 167 Ariz. 412, 419, 808 P.2d 297, 304 (App. 1990). To be entitled to attorneys' fees under these statutes, the parties were obligated to cite to the relevant facts and legal arguments supporting their claims. *See* ARCAP 13(a)(6), (b)(1). The appellate briefs are silent regarding supporting facts and applicable legal theories to support the parties' requests for fees. Therefore, we will not consider these arguments for attorneys' fees. *Ness v. Western Sec. Life Ins. Co.*, 174 Ariz. 497, 503, 851 P.2d 122, 128 (App. 1992) (holding that "[a]rguments unsupported by any authority will not be considered on appeal.") (citation omitted). Each party shall bear its own fees on appeal. As the successful parties on appeal, Prescott and Prescott Valley are entitled to their costs pursuant to A.R.S. § 12-341 upon compliance with ARCAP 21.

CONCLUSION

¶28 For the foregoing reasons, we affirm the judgment of the superior court.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
PATRICK IRVINE, Presiding Judge

/S/
MICHAEL J. BROWN, Judge