IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

SOUTHERN ARIZONA HOME BUILDERS ASSOCIATION,
Plaintiff/Appellant,

v.

TOWN OF MARANA,
Defendant/Appellee.

No. 2 CA-CV 2020-0087
Filed August 16, 2021

Appeal from the Superior Court in Pima County
No. C20184411
The Honorable Paul E. Tang, Judge

AFFIRMED

COUNSEL

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By Andrew J. Petersen

and

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By Frank Cassidy
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OPINION

Presiding Judge Espinosa authored the opinion of the Court, in which Judge Eppich and Judge Eckerstrom concurred.

E S P I N O S A, Presiding Judge:

¶1 Southern Arizona Home Builders Association (SAHBA) appeals from the trial court's entry of summary judgment in favor of the Town of Marana, arising from the Town's imposition of water and sewer impact fees on new development. SAHBA argues the fees are in violation of Arizona's statutory requirements and limitations on municipalities' authority to assess such fees, A.R.S. § 9-463.05, and even if permitted here, the Town has flouted the statute by disproportionately assessing the fees on home builders. For the following reasons, we affirm.

Factual and Procedural Background

¶2 A clear understanding of the issues involved in this case requires a detailed account of its factual history, which is essentially undisputed. On review of a summary judgment, we view the facts in the light most favorable to the party opposing the motion. *In re Gen. Adjudication of All Rts. to Use Water In Gila River Sys. & Source*, 231 Ariz. 8, ¶ 12 (2012). In 2012, the Town took possession of the Marana Water Reclamation Facility (WRF) from Pima County in exchange for assuming the County's debt on the WRF of approximately $16.4 million. In June 2013, the Town officially acquired title to the WRF, including the infrastructure, underlying land, and exclusive rights to the WRF's effluent.

¶3 During its stewardship, the County had constructed a 3,500,000 gallons-per-day "tertiary treatment component"[1] but could not operate at that capacity because of limitations associated with the existing secondary treatment system, which operated at a functional capacity of only 380,000 gallons per day. When the Town acquired the WRF, its secondary treatment system was operating at near physical capacity for existing customers. In 2013, the Town made improvements to increase the

[1]For the tertiary treatment stage, additional filtering equipment is used to further treat the wastewater following the secondary treatment.

secondary treatment system to 500,000 gallons per day and planned future expansions to 1,500,000 gallons per day. The Town also replaced other equipment to enhance effluent purity levels, aiming to recharge reclaimed water to accrue reclaimed water storage credits under Arizona groundwater management provisions. *See* A.R.S. § 45-576(B), (L). Obtaining such credits would allow the Town to plan for new development, which requires a 100-year water supply. *Id.*

¶4 In 2013, the Town issued bonds to fund the acquisition and expansion of the WRF, resulting in an annual $1.8 million debt service commencing in 2016. The Town also commissioned a pair of infrastructure improvement plans (IIPs) related to acquisition costs and expanding or improving the WRF "to determine the capital improvements that are required to meet the next ten year's growth for each benefit area." One IIP addressed sewer impact fees ("2013 Sewer Impact Fee") and one addressed water impact fees ("2013 Water Impact Fee") (collectively, "2013 Fees"). In accordance with § 9-463.05(E), the 2013 IIPs projected ten years of future use by equivalent dwelling units, a unit measuring the amount of water used or wastewater produced by one residential dwelling unit. In the adopted 2013 Fees, the Town collected assessments to fund necessary public water and sewer services. The IIPs explained that because "the Marana WRF was acquired primarily for the source water resource, future water customers will pay for one-half the cost of the acquisition annuity, and future sewer customers will pay for one-half the acquisition annuity."

¶5 In 2016, the Town commissioned the Master Plan, describing the multi-phase expansion and upgrades to the WRF, outlined above. Phase 1 was "implemented immediately" and increased capacity to 1,500,000 gallons daily by replacing several pieces of equipment and installing a new secondary treatment system. That system was "to ensure that the water quality of the effluent produced by the Marana WRF would meet its aquifer protection permit water quality limits."

¶6 In 2017, the Town posted for comment the IIPs for new sewer impact fees ("2017 Sewer Impact Fee") and new water impact fees ("2017 Water Impact Fee") and adopted those fees in conjunction with a capital improvement project called for in the Master Plan. The 2017 fees effectively replaced the 2013 Fees because the Town's resolution approving the new assessments "amended" the 2013 Fees. *See* Marana Ordinance No. 2017.029 ("Water Infrastructure Development Impact Fees as adopted by Ordinance No. 2014.013 are hereby amended"; "Wastewater Facilities Development Impact Fees as adopted by ordinance No. 2014.013 are hereby amended").

¶7 In the 2017 Sewer Impact Fee IIP, the Town included the following language regarding WRF upgrades:

> New sewer customers will be responsible for one-half the debt service. To account for the contributions made by the current customer base toward the existing utilized capacity in the . . . secondary treatment system and acquisition of the WRF, the Town will contribute approximately $3.2 million toward the cost of debt to finance the expansion.

Similarly, the 2017 Water Impact Fee IIP states:

> Since the Marana WRF was acquired primarily for water resource recovery, future water customers will pay for one-half the expansion debt service, and future sewer customers will pay for one-half the expansion debt service.
>
> . . .
>
> To account for the contributions made by the current customer base toward the existing utilized capacity in the . . . secondary treatment system and acquisition of the WRF, the Town will contribute approximately $3.2 million toward the cost of debt to finance the expansion.

¶8 In June 2018, Phase 1 was completed and operational, meaning the new secondary treatment facility was in place and functioning. In August, SAHBA filed a complaint against the Town requesting declaratory judgment that the impact fees were unlawful because "imposing 100% of the WRF Acquisition Cost on new development is disproportional." Both parties filed two motions for summary judgment, the first addressing whether SAHBA's complaint was barred by a statute of limitations, and the second relating to the validity of the Town's exactions. In March 2020, the trial court issued a ruling that SAHBA's action was "not time-barred under Arizona's statute of limitations," and that the Town's "enactment of 2017 fees conforms with the requirements of" § 9-463.05. SAHBA appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶9 SAHBA contends on appeal that the Town's development fees violate § 9-463.05 "by making future development pay the entire cost of purchasing a facility that only served existing residents," "making future development . . . pay[] for improvements in Phase 1 that provide a higher level of service to all residents," and "assessing development fees that are both disproportionate and arbitrarily based on 20 year bond terms." The Town counters that the ordinances imposing development fees are valid and the fees assessed on new development comply with the statute because "[n]one of the . . . acquisition, expansion, and improvements to the WRF were necessary for existing users." We review a trial court's grant of summary judgment de novo, *Simon v. Safeway, Inc.*, 217 Ariz. 330, ¶ 13 (App. 2007), which is properly granted "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law," Ariz. R. Civ. P. 56(a).

Lawful Use of Development Fees

¶10 We first consider whether the development fees facially comply with § 9-463.05. Development or impact fees are presumed to be valid exercises of the legislative power to regulate land use. *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 187 Ariz. 479, 482 (1997).[2] SAHBA

[2]To the extent SAHBA contends the trial court improperly relied on an outdated presumption of validity for ordinances adopting development fees, we disagree. In *Home Builders Ass'n of Central Arizona*, 187 Ariz. at 482, our supreme court held that local legislation is "cloaked with a presumption of validity" and "impact fees are presumed valid as exercises by legislative bodies of the power to regulate land use." Subsection (M) of § 9-463.05 states, "all powers conferred on municipal governments in this section shall be narrowly construed to ensure that development fees are not used to impose on new residents a burden all taxpayers of a municipality should bear equally." But that does not abrogate the presumption of validity of legislative actions. Indeed, that doctrine was applied following the 2011 amendment and addition of subsection (M) to the statute. *See Am. Furniture Warehouse Co. v. Town of Gilbert*, 245 Ariz. 156, ¶ 23 (App. 2018) ("Because the traffic signal [fee] is analogous to the fee imposed in [*Home Builders Ass'n of Central Arizona v.*] *City of Scottsdale*, the superior court properly found it 'is a legislative act that carries a presumption of validity.'"). But more importantly, the trial court did not solely base its

argues the fees violate the statute because of "improvements in Phase 1 that provide a higher level of service" to existing users and because the Town did not formulate and rely on precise calculations before allocating acquisition or expansion costs to new development.

¶11 Development fees "shall not exceed a proportionate share of the cost of necessary public services, based on service units, needed to provide necessary public services to the development." § 9-463.05(B)(3); *see also Am. Furniture Warehouse Co. v. Town of Gilbert*, 245 Ariz. 156, ¶ 25 (App. 2018). The Town is authorized to make improvements to its systems for treating wastewater and for providing water resources. *See* § 9-463.05(A), (T)(3) (defining facility expansion as expansion of capacity of an existing facility "that serves the same function as an otherwise new necessary public service in order that the existing facility may serve new development"), (T)(7) (water and wastewater facilities necessary public services). The Town must, however, ensure that, to the extent such improvements increase the level of service to its existing residents, such increases cannot be at the expense of new development. *See* § 9-463.05(B)(5)(d), (M). As discussed below, SAHBA has not shown that occurred here.

¶12 SAHBA argues that the WRF, when purchased, "only served existing residents" and improvements in Phase 1 "provide a higher level of service to all residents." Subsection (B)(5) of § 9-463.05, mandates that development fees "may not be used" for any of the following:

> (a) Construction, acquisition or expansion of public facilities or assets other than necessary public services or facility expansions identified in the infrastructure improvements plan.
>
> (b) Repair, operation or maintenance of existing or new necessary public services or facility expansions.
>
> (c) Upgrading, updating, expanding, correcting or replacing existing necessary public services to serve existing development in

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decision on the presumption of validity, but rather evaluated whether SAHBA had demonstrated the development fees violated § 9-463.05.

> order to meet stricter safety, efficiency, environmental or regulatory standards.
>
> (d) Upgrading, updating, expanding, correcting or replacing existing necessary public services to provide a higher level of service to existing development.
>
> (e) Administrative, maintenance or operating costs of the municipality.

As the trial court noted, the restriction on municipalities from using fees for upgrading or replacing is limited to "existing" necessary public services to serve "existing development in order to meet stricter standards." § 9-463.05(B)(5)(c). The restriction on "[c]onstruction, acquisition or expansion of public facilities or assets" is applicable to public facilities or assets "other than necessary public services." § 9-463.05(B)(5)(a). Because "necessary public services" includes water and wastewater, *see* § 9-463.05(T)(7), the statute creates an exception for such services. And the statutory definition of "facility expansions" contemplates the efficiency gained by upgrading and modernizing an existing facility's capacity to serve *both* existing and future customers, so long as the improvement is not "to better serve existing development." *See* § 9-463.05(B)(5)(d), (T)(3).

¶13 SAHBA maintains that the development fees do not comply with § 9-463.05 because the Town "purchased a facility that could only serve its existing residents" and therefore cannot make new development pay for a facility that cannot provide service to that development. The undisputed evidence shows, however, that the Town did not purchase the WRF to service existing residents—it acquired it and assumed the outstanding debt entirely for purposes of new development. As the Town points out, over eighty-five percent of that debt was for the tertiary treatment component of the WRF, which was not needed at the time but was "key" to supporting future development. As acquired, the other components of the WRF had a capacity of only 380,000 gallons per day, while the tertiary component had nearly ten times that treatment capability. The Master Plan contemplates using all of that capacity when Phase 3 is implemented. Acquiring the WRF to ensure a 100-year water supply and increasing its capacity ten-fold served only to benefit new development—existing users had no need for the Town to own the WRF or increase its capacity because their existing needs were being met.

¶14 SAHBA also contends the Phase 1 expansion increased the level of service for existing users, as prohibited by § 9-463.05(B)(5)(d). SAHBA argues "a comprehensive water and wastewater system" is the provided service, and thus all improvements made to it "amount[] to an increased level of service, to the benefit of all Marana residents." The trial court determined that "by capitalizing on the existing structure to serve both existing and future customers—as opposed to building an entirely new facility to solely serve future development—the Town is providing the same level of service to future customers as that enjoyed by existing customers," which is permitted under the statute. We agree. *See* § 9-463.05(B)(4) ("Costs for necessary public services made necessary by new development shall be based on the same level of service provided to existing development in the service area."). And, although not defined in § 9-463.05, the Town addressed "level of service" for existing customers in the 2013 and 2017 IIPs, stating the levels of service for future customers "will be the same." The Town's assertion that the level of service "will remain the same—just at three times the capacity" based on the Phase 1 expansion is well supported by the record; we therefore conclude the Phase 1 expansion does not violate § 9-463.05.

¶15 SAHBA further contends the Town improved overall performance of the WRF when it made several changes in the course of expanding its capacity, including modifications to the secondary treatment system, improvement of water quality, the addition of new secondary clarifiers, and the addition of the new solids handling facility. The Town counters that "[t]he statute does not bar [it] from utilizing new technologies," and, in any event, the "level of service" "remain[s] the same—just at three times the capacity due to the Phase 1 expansion." As discussed above, in modifying and modernizing the secondary treatment system, the Town opted for changes to the WRF processes that allowed for the existing site to accommodate future growth. Regarding the Town's improved water quality, the WRF was already capable of "going beyond . . . B-plus water . . . to A-plus" through the tertiary treatment system. The WRF's capability to produce A-plus water with the new secondary treatment system was therefore not an upgrade barred by § 9-463.05(B)(5).[3]

[3] SAHBA makes much of deposition testimony taken from the Town's interim water director that upon seeking approval for replacing the secondary treatment system, the Arizona Department of Environmental Quality had required the Town to "upgrade to produce the highest quality water, Class A+." But the quoted language ignores a larger context in which he explained the tertiary treatment system, which the Town received

The secondary clarifiers were necessary for the tertiary treatment system's performance and to maintain the Town's compliance with its Aquifer Protection Permit. The costs associated with the components of the clarifiers would be the same regardless of which treatment system the Town chose. And the new solids handling facility was reasonably included in the development fee because it will accommodate sewage from residents new and existing, but saves costs from paying a third-party contractor to haul the waste.[4] *See* § 9-463.05(B)(5)(a).

¶16 Reading the statute as a whole and giving meaning to all its provisions, *see Wyatt v. Wehmueller*, 167 Ariz. 281, 284 (1991), a development fee does not violate subsection (B)(5) simply because the project, undertaken to serve new development and involving necessary public services, happens to serve existing development as well. As the trial court observed, § 9-463.05 "charges cities and towns with meeting an extensive compliance procedure so that the overriding goal of balancing the cost . . . is fair." That the upgrades and modernization to the WRF incidentally improve the processes serving existing residents does not make the development fees unlawful when such upgrades were only undertaken so that the WRF would have the capacity to provide necessary public services to new development. The resulting recharge credits directly benefit new development by providing a means to satisfy the 100-year assured water requirement necessary for authorization and construction of new development. *See* § 45-576(B), (L). Put another way, the project was not undertaken to provide a higher level of service to existing development as prohibited by § 9-463.05(B)(5)(d). Per the IIPs, the level of service for existing and future customers for both sewer and water will be the same. *See* § 9-463.05(B)(4) ("Costs for necessary public services made necessary by new development shall be based on the same level of service provided to

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upon assuming the County's debt, was already capable of producing A-plus water.

[4]Although the solids handling facility benefits existing as well as future residents, it does not amount to an improper increase in the level of service to existing residents. As the Town put it, "from the perspective of the level of service for sewer customers, existing or future, the level of service is simple—flush toilet, and the sewage goes away." The "level of service" as defined by the IIPs remains the same.

existing development in the service area."). We thus conclude the Town has not levied the fees for an improper purpose under § 9-463.05(B).

Proportional Allocation of Costs

¶17 SAHBA further complains the development fees were "disproportionate" in violation of § 9-463.05(B)(3), because the Town failed "to calculate a reasonable proportionate allocation of costs between existing and future development." As demarcated by § 9-463.05(B)(3), fees charged "shall not exceed a proportionate share of the cost of necessary public services, based on service units, needed to provide necessary public services to the development." Our supreme court in *Home Builders Ass'n of Central Arizona* noted that 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." 187 Ariz. at 483. The statutory requirements of § 9-463.05(B)(1) (development fees "shall result in a beneficial use to the development") and (B)(3) (above) were met here—the ordinances adopting the development fees require new development to pay for costs associated with the WRF, a necessary public service, in preparation to meet the 100-year assured water requirement for new development—calculated by the proportionate share of the cost based on service units.[5]

¶18 In support of its argument in its briefs, and emphasized at oral argument before this court, SAHBA points to subsection (M) as providing the lens with which we must read § 9-463.05. Subsection (M) states, "In any judicial action interpreting this section, all powers conferred on municipal governments in this section shall be narrowly construed to ensure that development fees are not used to impose on new residents a burden all taxpayers of a municipality should bear equally." In parsing the various aspects of the WRF project and viewing them in isolation, SAHBA contends certain costs may not be levied on developers and the impact fees are

[5] In arguing proportionality, SAHBA appears to misconstrue a portion of the statute. Proportionality pursuant to subsection (B)(3) requires that the fee charged to each individual development is proportionate to its share of the cost of providing necessary public services to the individual developments, "based on service units." Thus, if one development were to have 100 service units and another 1000 service units, the development fees charged to those two developments would not be the same, ensuring a proportional allocation of costs based on service units.

disproportional. But that argument, once again, misses the larger context: the acquisition of the WRF and the various upgrades put in place were undertaken for the existential benefit of new development—to provide necessary public services to new development and ensure that developers could meet the 100-year assured water supply, an absolute prerequisite for any building permit. *See* § 45-576(B), (L). The cost of that project is not a burden "all taxpayers of [the] municipality should bear equally." Under a narrow construction of the Town's powers here, we find no disproportionality in the challenged impact fees.

Statutory Ten-Year Period

¶19 Finally, SAHBA claims the development fees were "unrelated to just ten years of projected growth" as required by § 9-463.05(E)(6), arguing the twenty-year bond period on the development fees is arbitrary and disproportionate because after twenty years, the fee will no longer be charged but later development will reap the benefits of the WRF. We agree with the Town, however, that while the statute requires the projected demand for the subsequent ten years be included in the IIP, the statute does not mandate that fees only be imposed during that ten-year span. Section 9-463.05(E)(6) states, "For each necessary public service that is the subject of a development fee, the [IIP] shall include . . . [t]he projected demand for necessary public services or facility expansions required by new service units for a period not to exceed ten years." SAHBA points to nothing in the statute regulating the duration of development fees and fails to suggest a more appropriate timeframe.

¶20 A municipality may issue bonds to finance utility acquisition costs, *see* § 9-522(A)(2), and the Town reconciled the statute with "real-world conditions," using the actual debt service amounts to ensure a fair allocation over the twenty years during which it would be incurring those costs. The Town's decision was reasonable and within its legislative discretion. *See* § 9-463.05(D)(3) (municipality must update improvement plan "at least every five years"), (E)(6) (municipality must project demand for necessary public services as "required by new service units for a period not to exceed ten years"); *Home Builders Ass'n of Cent. Ariz.*, 187 Ariz. at 482 (legislative acts "cloaked with a presumption of validity" and overturned only if "challenger shows the restrictions to be arbitrary and without a rational relation to a legitimate state interest"). SAHBA has not shown the twenty-year bond period was either arbitrary or unreasonable.

Disposition

¶21 For the foregoing reasons, the trial court's entry of summary judgment for the Town is affirmed.