STATE OF MICHIGAN

COURT OF APPEALS

TOBIN GROUP, LLP, and GATEWAY APARTMENTS OF GRAND BLANC, L.L.C.,	UNPUBLISHED December 14, 2004
Plaintiffs-Appellants,	
v	No. 248663 Genesee Circuit Court
GENESEE COUNTY,	LC No. 02-073347-CZ
Defendant-Appellee.	

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10) and (I)(2). The trial court dismissed the complaint because it found that a County Capital Improvement Fee ("CCIF") imposed by defendant Genesee County was not an illegal tax, but a regulatory fee. The county imposed the CCIF on individuals who newly connected to the county's water or sewer system in sewer districts 1, 2, 5, and 6. The CCIF consisted of a $1,000 charge on each unit for each system. We affirm because this case is indistinguishable from *Graham v Kochville Twp*, 236 Mich App 141; 599 NW2d 793 (1999).

On appeal, plaintiffs argue that the CCIF is an illegal tax imposed without voter approval, contrary to the Headlee Amendment, Const 1963, art 9, § 31. The facts of this case are essentially undisputed, including the fact that the CCIF was not submitted to the voters for approval. Therefore, if the charge is a tax, it violates the Headlee Amendment. *Bolt v Lansing*, 459 Mich 152, 158; 587 NW2d 264 (1998). However, if the charge is determined to be a user fee, it is not subject to voter approval. *Id*. at 159. Whether a charge is a "tax" or a "user fee" is a question of law that we review de novo. *Id*. at 158. Likewise, we review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

"Generally, a 'fee' is 'exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.'" *Bolt, supra* at 161, quoting *Saginaw Co v John Sexton Corp*, 232 Mich App 202, 210; 591 NW2d 52 (1998). "A 'tax,' on the other hand, is designed to raise revenue." *Bolt, supra* at 161. Therefore, whether an exaction represents a "tax" or "fee" hinges on whether it funds a

benefit for everyone or funds a benefit that exclusively inures to those who must pay. *Id*. "There is no bright-line test for distinguishing a valid user fee from a tax that violates the Headlee Amendment." *Id*. at 160. The Supreme Court has developed three basic criteria to help differentiate between a fee and a tax. "The first criterion is that a user fee must serve a regulatory purpose rather than a revenue-raising purpose." *Id*. "A second, and related, criterion is that user fees must be proportionate to the necessary costs of the service." *Id*. at 161-162.

> To be sustained [as a fee], the act . . . must be held to be one for regulation only, and not as a means primarily of producing revenue. Such a measure will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost . . . . [*Id*. at 162, quoting *Vernor v Sec of State*, 179 Mich 157, 167; 146 NW 338 (1914).]

The third criterion is "voluntariness." *Bolt*, *supra* at 162.

In the present case, property owners of new construction in Genesee County sewer districts 1, 2, 5 and 6, are charged the disputed CCIF, $1,000 per unit for connecting to the county water system and another $1,000 per unit for connecting to the county sewer system. The money raised by the CCIF is used to increase the capacity of the county's water and sewer systems which were being operated at or beyond their capacity. Without an increase in capacity, no new customers could connect to the systems, and all new development would have to stop or, where permitted, construct wells and septic systems.

Unlike *Bolt*, which struck down a storm-water rain charge as a tax, the CCIF in this case is not imposed on customers who are already being served by the existing water and sewer systems. *Id*. at 165. Only the owners of new construction in the affected districts are charged the CCIF. Connection charges such as the CCIF serve the purpose of regulating and controlling the use and distribution of water provided by the municipal system. See *Graham*, *supra* at 152. They also "pay for the regulation of a specific part of the community's access to a municipal water supply." *Id.* at 152-153.

Plaintiffs argue that although new users will pay the full cost, existing users of the sewer system will benefit from the increased capacity financed by the CCIF because the possibility of sewage backups will be reduced. As an initial matter, this argument is not relevant to the water CCIF.[1] Regarding the sewer system, new users are the only ones who will directly benefit from the newly added capacity of these systems, notwithstanding any ancillary benefits current users may reap from the expansion. *Graham*, *supra* at 153. Plaintiffs failed to demonstrate anything more than an incidental benefit to current users, so we are not persuaded that the charge is anything other than a fee. As we noted in *Westlake Transport v PSC*, 255 Mich App 589, 613; 662 NW2d 784 (2003), "a regulatory fee can have dual purposes and still maintain its regulatory

[1] Nevertheless, defendant provided evidence that existing problems in both systems are being addressed with funds reserved from the rates charged to existing customers.

characterization." Therefore, the purpose of the charge is primarily regulatory. *Graham*, *supra* at 152-153.

Regarding proportionality, defendant initially calculated the sewer CCIF by determining the actual present cost of adding the necessary capacity, plus debt service, and dividing that by the number of new hookups anticipated. This produced a cost per unit of $988, which defendant rounded up to $1,000. Using similar methods, defendant estimated the cost of water hookups at $1,157 per unit, which defendant rounded down to $1,000. Later, Victor Cooperwasser, whose company is in the business of preparing water, sewer, and stormwater rate studies, applied a calculation method that apportioned to current users the amount of the new system's debt service that they will likely pay in the future. He determined that the buy-in cost for the sewer and water systems was slightly lower than originally calculated: $1,028 for sewer and $955 for water. He therefore concluded that the $1,000 CCIF per system amount was fair and reasonable. We agree.

Plaintiffs have presented no evidence to support their claim that their fair share of the added capacity should be a nominal fee of only $50 to $100. We note that, in *Graham*, *supra* at 143-145, 154-155, this Court upheld a water connection fee of over $9,000, finding that it was proportionate to the cost of extending the water system into rural areas. Further, the alternative proposed by plaintiffs here (spreading the cost of adding capacity among all users) would likely render the fee illegal under *Bolt*, given that current users would receive very little benefit from the project and, therefore, the cost to them would not be commensurate with the value of the benefit conferred.

Plaintiffs further claim that when calculated according to Cooperwasser's method, the CCIF assessments result in excess revenue of approximately $17 for each new customer. However, plaintiffs fail to demonstrate how this additional money changes our categorization of the charge. "The test is whether the fee is proportional, *not whether it is equal*, to the amount required to support the services it regulates." *Westlake*, *supra* at 615 (emphasis added). Further, "[a]s long as the primary purpose of a fee is regulatory in nature, the fee can also raise money provided that it is in support of the underlying regulatory purpose." *Id*. at 613; see also *Graham*, *supra* at 151. Plaintiffs failed to present any evidence to support their speculation that the additional money collected would be used for some other non-regulatory purpose. Likewise, plaintiffs' argument that they are essentially paying for a general infrastructure improvement fails. The improvement benefits only those charged, and plaintiffs failed to present any evidence indicating that the benefit to the public will substantially continue beyond the period established for financing the project. Cf. *Bolt*, *supra* at 163-164. Therefore, despite the minor discrepancy identified by plaintiffs, the CCIF charges imposed in this case are proportionate to the cost of the benefit provided.

Regarding voluntariness, defendant concedes that property owners building within three hundred feet of a new sewer line will be required to tap into the system. In *Bolt*, *supra* at 168, the Supreme Court rejected the argument that a rain runoff charge was voluntary because the plaintiffs could avoid the fee by choosing not to build on their property. The Court noted that relinquishing the right to build on one's property was not a legitimate method of controlling the amount of the fee. *Id*. Here, however, the issue is not one of development, but placement of that development. Also, plaintiffs concede that on the whole, they desire the development and primarily dispute its cost. Further, defendant points out that some of these property owners have

chosen to apply for a variance from the tap-in requirement and that about three out of every seven have been granted.

Nevertheless, plaintiffs point to the fact that failure to pay the sewer CCIF could, if unpaid, result in a lien on some of their properties. Plaintiffs note that in *Bolt, supra* at 168, such collection procedures were a factor in the Supreme Court's determination that the rainfall runoff charge was a tax rather than a fee. Nevertheless, it is undisputed that for single-family dwellings and developments of fifty units or less, defendant is requiring that connection charges be paid *before* the connections are made, and that any remaining balance be paid in full upon sale of the property. Thus, in most cases, there will be no unpaid charge or potential lien enforcement as described in *Bolt*. In light of all the facts, the potential availability of a lien to collect an unpaid CCIF does not transform the CCIF into an illegal tax. Even if the sewer CCIF is involuntary for a portion of the affected property owners, "that . . . weakness . . . [does] not necessarily mandate a finding that the charge at issue is not a fee." *Graham, supra* at 151.

The relevant criteria, considered in their totality, weigh in favor of finding that the CCIF is a fee, not a tax. The only weaknesses to this determination are the fact that new users within three hundred feet of a new sewer line are required to tap into the sewer system. Nevertheless, the three hundred-foot rule affects only some of the individuals who must pay the sewer CCIF. Further, the *Bolt* criteria are to be considered "in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee." *Graham, supra* at 151. In light of the record as a whole, we conclude that this weakness does not compel the conclusion that the CCIF is an illegal tax rather than a valid fee. We therefore hold that the trial court properly granted summary disposition to defendant.

Plaintiffs further argue that, even if the CCIF is a fee rather than a tax, it is illegal because defendant did not enact an ordinance or resolution authorizing it. We disagree. None of the constitutional provisions cited by plaintiffs require defendant to enact an ordinance or resolution to authorize the CCIF. The trial court applied the County Public Improvement Act ("CPIA"), MCL 46.171 *et seq*., which independently authorizes defendant to create, maintain, improve, and extend water and sewer systems, including establishing connection fees and other rates. See MCL 46.171, MCL 46.172, and MCL 46.174. Nothing in the CPIA requires that an ordinance or resolution be adopted each time the designated county agency needs to act. Contrary to plaintiffs' arguments, the CPIA empowers the drain commissioner to construct improvements and impose charges to pay for them, including connection fees such as the CCIF, without the county having to enact an enabling ordinance or pass a resolution. MCL 46.173.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio