IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

FILED
MAY 24 2004
JOE W. MARTIN, JR., CLERK
By D.C.

HOME BUILDERS ASSOCIATION OF MISSISSIPPI, INC., HOME BUILDERS ASSOCIATION OF THE MISSISSIPPI COAST, INC., SOUTHEAST MISSISSIPPI HOME BUILDERS ASSOCIATION, INC., MISSISSIPPI ASSOCIATION OF REALTORS, INC., GULF PROPERTIES, SOLE PROPRIETORSHIP, GREG WILLIAMS, KIM WILLIAMS, GULF COAST ASSOCIATION OF REALTORS, INC., WRH PROPERTIES, INC., SINGLETON DEVELOPMENT, CARL B. HAMILTON, INC., LOUIS W. BRELAND, ADAMS HOMES, LLC, COVE PARTNERS, LLC, TROY VINCENT HOMES, LLC, L.H.F., INC., RANDALL CORP. OF MS, JAMES E. PLATT, PIERCE BLAKENSHIP, GULF COAST PROPERTIES, INC./SECURED MINI STORAGE, LIFESTYLES 2000, INC., ANCHOR REALTY & DEVELOPMENT, INC., MAGNUM ONE, LLC, CHARLES CARR, and MAGNOLIA STATE DEVELOPMENT GROUP, LLC — APPELLANTS

VERSUS — CIVIL ACTION NO. 2003-00,093(3)

MAYOR and BOARD OF ALDERMAN, CITY OF OCEAN SPRINGS, MISSISSIPPI — APPELLEES

**MEMORANDUM DECISION AND ORDER**

On January 7, 2003, the City of Ocean Springs, Mississippi, (hereafter "the City") adopted Ordinance Nos. 1-2003, 2-2003, 3-2003, 4-2003, 5-2003, 6-2003, and 7-2003, implementing a comprehensive system for the imposition, assessment and collection of "impact fees." The various fees are imposed as a prerequisite to obtaining municipal approval for new development of any kind and are calculated "to defray all or a portion of the costs of capital improvements required to accommodate new land development"[1] within the City.

Attacking the ordinances as unlawful, unconstitutional, improper, abusive, arbitrary,

[1] §9(K), Ordinance No. 1-2003, Development Impact Fee Procedures Ordinance (Exhibit 11, Bill of Exceptions).

capricious, unreasonable and/or discriminatory, Appellants (collectively hereafter "Home Builders") timely filed a Bill of Exceptions appealing the ordinance adoption to this Court pursuant to **Miss. Code Ann. §11-51-75.** Following a review of the record submitted herein, consideration of the briefs of the parties and various amici, and after receiving truly outstanding argument of counsel, the Court concludes that the impact fees constitute an unlawful exaction or tax which the City is without authority to impose and must therefore be set aside.

I.

Pursuant to the legislative grant of authority the City adopted it's Comprehensive Plan on June 19, 2001, the plan being "a statement of public policy for the physical development of the entire municipality." **Miss. Code Ann. §17-1-1(c)**(as amended). The Plan's comprehensive analysis of population trends and future infrastructure needs included recommendations for the implementation and administration of the City's identified goals and objectives. One such recommendation to the City was to "develop a defensible impact fee program" as an integral part of the Plan implementation process.[2] The City identified its policy justifying such fees as being that "developers should be financially responsible for the costs of extending [municipal] services to new development[s]."[3] And the Plan requires any such fees to be calculated as a pro rata share of the costs of infrastructure and services in proportion to the increased demand created by the new development.[4]

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[2] Part X, Comprehensive Plan, Plan Implementation and Administration, p. 118. (Exhibit 2, Bill of Exceptions).

[3] Id.

[4] Id., p. 119.

Endeavoring to enact a defensible impact fee program, the City embarked on an exhaustive investigation, conducted numerous public hearings and ultimately adopted the ordinances at issue here. In summary, each ordinance authorizes the assessment and imposition of fees upon six separate categories of zoning classifications: single family, multi-family, office/general, commercial/retail, light industrial and heavy industrial/manufacturing. The municipal services for the which the appropriations are made, and for which a separate impact fee is assessed, are: 1) general municipal services (Ordinance No. 2-2003); 2) fire facilities (Ordinance No. 3-2003); 3) park and recreational facilities (Ordinance 4-2003); 4) police facilities (Ordinance 5-2003); 5) major roadways (Ordinance No. 6-2003); and 6) water facilities (Ordinance No. 7-2003).[5] In the end, any new construction falling into one of the zoning classifications would be required to pay six (6) separate fees for municipal services described by the ordinances, with the exception of non-residential development which is exempt from the fees imposed for park and recreational facilities.

For instance, to obtain approval for the construction of a new single-family, detached residence the owner or developer would be required to pay $1,066.00 for general municipal services, $292.00 for fire facilities, $497.00 for park and recreational facilities, $193.00 for police services, $643.00 for roadways and $1,907.00 for water, a total of $4,598.00.

In the Preamble of each of the Ordinances, the City identified its purpose as desiring "to fix, impose and provide for the collection of ... fees to finance, in whole or in part, the capital costs of additional or expanded [services] required to accommodate new construction or

[5] Ordinance No. 1-2003, entitled Development Impact Fee Procedures Ordinance, does not impose any fees but establishes "uniform procedures for the imposition, calculation, collection, expenditure, and administration of development impact fees." Id., §5 (Exhibit 11, Bill of Exceptions).

development."[6]

Finally, the City provided in §2 of each of the fee-imposing ordinances that the "service area" for imposition of the fees would be the entire incorporated area and any municipal planning area of the City. §5 of the fee-imposing ordinances provide that expenditure of fees are to be made pursuant to City's capital improvements plan and the Development Impact Fee Report (2002), and under Ordinance No. 1-2003 expenditures are generally to be made in the service area were collected, but may be expended outside the area collected if "the demand for the public facility is generated *in whole or in part* by the new development or if the public facility will actually serve the new development."[7] (Italics added).

II.

The appeal here being perfected under Section 11-51-75, Mississippi Code of 1972, the scope of judicial review is limited to the testimony and the record made before the City. ***Riley v. Jefferson County***, 669 So.2d 748, 750 (Miss.1996); ***Mathis v. City of Greenville***, 724 So.2d 1109 (Miss.Ct.App.1998). A decision of a local governing body which appears "fairly debatable" will not be disturbed on appeal, and will be set aside only if it clearly appears the decision is arbitrary, capricious, discriminatory, illegal or is not supported by substantial evidence. ***Hollywood Cemetery Ass'n. v. City of McComb***, 760 So.2d 715 (Miss.2000); ***City of Biloxi v. Hilbert***, 597 So.2d at 1276 (Miss.1992); ***Barnes v. Board of Supervisors, DeSoto County***, 553 So.2d 508 (Miss.1989). If "fairly debatable," then the decision of the City cannot be classified as

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[6] Ordinance Nos. 1- through 7-2003 (Exhibits 11-18, Bill of Exceptions).

[7] §21(C), Ordinance 1-2003, Development Impact Fee Procedures Ordinance (Exhibit 11, Bill of Exception).

arbitrary or capricious. ***Saunders v. City of Jackson***, 511 So.2d 902, 906 (Miss.1987); ***Mayor and Aldermen of Clinton v. Hudson***, 774 So.2d 448, 451 (Miss.Ct.App.2000).

Home Builders principal contention is that the City is without authority to adopt the impact fee ordinances, on constitutional as well as statutory grounds. Home Builders further argues that deficiencies in the process of enactment, formulation, calculation, and enforcement render the ordinances constitutionally invalid. The threshold question of the authority of the City is crucial. If there is no authority to enact impact fees whether the ordinances have been carefully tailored to comply with other constitutional requirements, e.g., ***Dolan v. City of Tiggard***, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), is immaterial.

The City defends its enactment by reference to **Miss. Code Ann. §21-17-5** (1992), commonly referred to as the "Home Rule Statute." Prior to adoption of home rule, municipal authority was limited: cities could only exercise those powers expressly granted by the Legislature. See, e.g., ***Seward v. City of Jackson***, 165 Miss. 478, 144 So. 686, 688 (1932). Originally adopted in 1985 and expanded by later amendments, this statute confers broad powers of governance upon municipalities. Generally, the statute allows a municipality to adopt any ordinance with respect to "the care, management and control of municipal affairs and its property and finances," and such powers "are complete without the existence of or reference to any specific authority." **Miss. Code Ann. §21-17-5(1).**

The City continues by arguing that it has been expressly empowered to adopt a comprehensive, city-wide plan of development pursuant to **Miss. Code Ann. §17-1-1**, et. seq., and has done so. Since **Miss. Code Ann. §17-1-9** provides that "zoning regulations shall be ... designed ...to facilitate the adequate provision of transportation, water, sewage, schools, parks

and other public requirements," all reasonable modes of implementing this authority are necessarily implied. ***Peterson v. City of McComb***, 504 So.2d 208, 209 (Miss.1987). Claiming the exaction of monetary contributions from owners and developers subject to its zoning laws to be a reasonable mode of accomplishing its regulatory purpose, the City argues it has been granted all the authority it requires. ***Maynard v. City of Tupelo***, 691 So.2d 385 (Miss.1997).

**III.**

There is no express grant of authority empowering the City to exact from its citizens monies in the form of "impact fees," either under the State Constitution or any statutory enactment of the Legislature. In particular, neither the zoning laws codified at **Miss. Code Ann. §17-1-1**, et. seq., nor the Home Rule Statute, **Miss. Code Ann. §21-17-5**, bestows explicit authority upon municipalities to exact such fees in order to implement its Comprehensive Plan. Although the Home Rule statute does confer extensive powers upon municipalities, the statute prohibits any enactment which is "inconsistent with the Mississippi Constitution of 1890, the Mississippi Code of 1972, or any other statute or law of the State of Mississippi." **Miss. Code Ann. §21-17-5(1)**. See, also, ***Maynard v. City of Tupelo***, 691 So.2d at 387. Art. 4, §80, of the State Constitution provides:

> Provision shall be made by general laws to prevent the abuse by cities, towns, and other municipal corporations of their powers of assessment, taxation, borrowing money, and contracting debts.

Recognizing the fact that this mandate is not self-executing but requires legislative pronouncements to curb abuse, ***Turner v. City of Hattiesburg***, 98 Miss. 337, 53 So. 681, 683-4 (1910), the Legislature expressly limited municipal authority by providing, through the Home

Rule Statute itself, as follows:

> (2) Unless such actions are *specifically* authorized by another statute or law of the State of Mississippi, this section shall not authorize the governing authorities of a municipality to (a) *levy taxes* of any kind or increase the levy of any authorized tax, ....

**Miss. Code Ann. §21-17-5(2)**(Italics added).

These provisions impose limitations upon the City's ability to enact certain ordinances under the guise of it's police powers. The essential question before the court is whether the exactions are classified as regulatory fees, which are considered to be within the police power of a municipality, or whether they represent the City's venture into the realm of taxation, a power clearly outside the scope of a municipality's authority. The Federal Courts have answered this question adversely to the City in ***Home Builders Association of Mississippi, Inc., v. City of Madison***, 143 F.3d 1006 (5th Cir.1998). There the Fifth Circuit Court of Appeals affirmed a District Court's finding that for purposes of the Tax Injunction Act, **Title 28 U.S.C. §1341**, an impact fee imposed by the City of Madison, Mississippi, was clearly a tax enacted for general revenue purposes and barred federal jurisdiction over a civil rights suit brought under **42 U.S.C. §1983**.

The City distinguishes ***City of Madison*** by arguing that the criteria for determining whether an exaction is a fee or a tax under the Tax Injunction Act is significantly broader than is required, or which should be adopted, for the issues presented here. In ***City of Madison*** the 5th Circuit applied federal law in deciding what constitutes a tax, summarized as follows:

> Distinguishing a tax from a fee often is a difficult task. Indeed, the line between a 'tax' and a 'fee' can be a blurry one. Workable distinctions emerge from the relevant case law, however: the classic tax sustains the essential flow of revenue to the government, while

> the classic fee is linked to some regulatory scheme. The classic tax is imposed by a state or a municipal legislature, while the classic fee is imposed by an agency upon those it regulates. The classic tax is designed to provide a benefit for the entire community, while the classic fee is designed to raise money to help defray an agency's regulatory expenses. 143 F.3d at 1011.

Applying this standard the 5th Circuit had no difficulty in determining for it's purposes the fee enacted by Madison was a tax. In this case the City suggests that a more focused articulation should be applied similar to that found in other state courts addressing impact fees, and formulates that standard as follows: A charge will be upheld as a valid regulatory fee and not a tax if its primary purpose is regulatory in nature, it bestows upon the payor a benefit not shared by other members of society and is paid voluntarily.[8] There is little substantive difference between these formulations in the view of this court, and Home Builders appears in agreement as to the factors that should be considered.[9] Acknowledging the sometime difficult task of distinguishing a tax from a fee, reference is also made to that colloquial axiom identified by the esteemed jurist, Justice James Robertson, when considering the constitutionality of a tax rebate adopted by the City of Jackson, "[I]f it looks like a duck, and walks like a duck, and quacks like a duck, it usually is a duck." ***City of Jackson v. Pittman***, 484 So.2d 998, 1000 (1986). This duck is a tax.

The fact that the City labeled this exaction "fee" rather than "tax" is not important; the purpose of the enactment governs over terminology. The policy of the City served by the imposition of impact fees is that new development should bear the costs, in whole or in part, of

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[8] Br. of Appellee, p. 19.

[9] Br. of Appellant, p.17-18.

additional services and facilities the demand for which is created by such development.[10] Therefore the "regulatory" scheme identified as being served by the assessment is raising money to supply "the adequate provision of transportation, water, sewage, schools, parks and other public requirements" as provided in **Miss. Code Ann. §17-1-9**. Other than raising money to carry out its policy, it is hard to determine exactly what is being regulated. When a building permit is applied for the fee is assessed; there are no other conditions that must be met. ***Eastern Diversified Properties, Inc., v. Montgomery County,*** 319 Md. 45, 570 A.2d 850 (1990). And the ordinances do exactly that: raise money for provision of roads, parks, water, fire and police protection - traditional, general municipal services and facilities normally funded by tax revenues raised by legislatively authorized schemes. If the rationale of the City were sufficient to impliedly vest municipalities with revenue-raising authority by implication, there would cease to be a need for exercising the taxing power of the State. A municipality could classify any exaction as a "fee" for the provision of services or facilities and evade the constitutional and legislative limitations placed upon governing authorities in regard to taxation. The taxing power of the sovereign is vested solely in the State and its relinquishment is never to be inferred. ***Adams v. Kuykendall,*** 35 So. 830, 835, 83 Miss. 571 (1904). The City cannot do indirectly what it is prohibited from doing directly. ***City of Jackson v. Pittman,*** 484 So.2d at 999.

The argument advanced that because the funds raised are specifically earmarked for specific uses, i.e., fire or police protection, parks, etc., the owner or developer receives a benefit not shared by others in the community is unpersuasive. As noted, revenues raised through this program may be utilized anywhere throughout the City if it is determined that "the demand for

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[10] Development Impact Fee Report, p. 2 (Exhibit 1, Bill of Exceptions). Also, fn. 6, infra.

the public facility is generated in whole or in part by the new development or if the public facility will actually serve the new development."[11] This is a self-fulfilling prophecy: the purpose for charging the fee in the first place is the "demand" created by the new development, which purpose, if conceded, would also empower the City to dedicate such monies for facilities anywhere within its boundaries regardless of benefit to the payor, direct or indirect. This is little, if any, assurance that such funds provide a special benefit to the class upon whom the burden is imposed. Simply opening a special account earmarked for particular city services or facilities is insufficient to provide a "special" benefit to those utilizing the service or facility. And the plain fact is that the provision of fire and police protection, of water treatment facilities or parks, and the expense of that provision, represent general benefits to an entire municipal community rather than a special benefit to those assessed the costs. ***Home Builders Association of Greater Des Moines v. City of Des Moines***, 644 N.W.2d 339, 349 (Iowa 2002).

Finally, the City asserts that unlike payment of a tax, payment of the impact fees are voluntary, which is a distinguishing feature of a regulatory fee. Developers have "the choice not to develop new residential units or commercial square footage and thereby avoid the charge."[12] In one sense, this is entirely correct: what an owner or developer is paying for is the privilege of engaging in residential or commercial development, which sounds suspiciously like the definition of a privilege tax. "[A] privilege tax, even though passed to raise revenue, is imposed upon the right to exercise a privilege, and its payment is made a condition to the exercise of the privilege, business or vocation involved." ***Stone v. General Contract Purchase Corporation***, 7

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[11] Fn. 7, infra.

[12] Br. of Appellee, p. 23-24.

So.2d 806, 808, 193 Miss. 301 (1943). And being a tax, license and privilege exactions require legislative authorization. Here, what an owner or developer is actually paying for is not the administrative expense of a legitimate regulatory function, i.e., inspection fees for zoning purposes or issuance of a driver's license, but the expense of constructing a new park, or purchasing a new police or fire vehicle, or the construction costs of a water treatment facility, or defraying the expense of general municipal services. The City's characterization would be appropriate if, rather than being assessed these capital expenditures, an owner or developer could "choose" to forego the service being provided: police or fire service, or entry into a city park, or decline the invitation of clean drinking water, all silly assertions to be sure but nevertheless illustrative of the true purpose of enacting these ordinances.

## CONCLUSION

This court has decided a narrow issue: whether the City of Ocean Springs has the authority to exact monies from citizens in the form of impact fees pursuant to a general police power and absent legislative authority. The principle upon which the City may have acted, that new development which adds to the already burdensome task of adequately providing municipal services should be made to pay a pro rata share of that burden, is not without a certain logic or populist appeal. The City is correct in its assertion that a majority of States have approved the use of impact fee mechanisms by governing authorities to defray expenses of capital improvements in these difficult economic times. It is also undeniable that, with few exceptions, those States have expressly empowered local authorities to adopt such measures through either legislation or constitutional provision. While it may be debated persuasively that the time has come for Mississippi to allow local governments the option of this revenue-enhancing mechanism, under

our constitutional form of government that debate should be conducted in the State Legislature.

The Home Rule Statute grants the City of Ocean Springs broad authority under its police powers. Neither this statute or the zoning statutes enacted by the Mississippi Legislature specifically grant the City the authority to levy taxes, however, and such power is not included in a general grant of police power. ***Pitts v. Mayor of Vicksburg,*** 16 So. 418, 419, 72 Miss. 181 (1894). The primary purpose, and effect, of the subject ordinances is the raising of revenue for the provision of general, although identified, municipal services. More akin to a privilege tax, or even perhaps a special or local assessment, however characterized, the ordinances constitute the levy of a tax which the City is without the authority to enact absent legislative permission. The ordinances are, therefore, unconstitutional and unenforceable.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the action of the Mayor and Board of Aldermen taken January 7, 2003, adopting Ordinance Nos. 1-2003, 2-2003, 3-2003, 4-2003, 5-2003, 6-2003, and 7-2003, providing for the implementation, assessment, collection and disposition of any funds denominated as impact fees should be, and is hereby, REVERSED, and said ordinances are set aside and rescinded in their totality.

FURTHER, IT IS ORDERED AND ADJUDGED, that within thirty (30) days from the date of this Order, the City of Ocean Springs shall submit to this Court a detailed accounting of any funds collected pursuant to the Ordinances, including the name and address of the payor, the amount paid and the date of payment, and shall develop and submit a written plan for refunding all such amounts, with accrued interest, to the parties upon whom such assessments were made.

FURTHER, IT IS ORDERED AND ADJUDGED, that the City of Ocean Springs, Mississippi, its Mayor and Board of Aldermen, are hereby and permanently enjoined from the

assessment, collection or expenditure of any monies pursuant to the Ordinances set aside hereby.

SO ORDERED AND ADJUDGED, this the 24th day of May, 2004.

Dale Harkey

DALE HARKEY, Circuit Court Judge