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IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

Larry V. Faircloth Realty, Inc.,
a corporation,
Plaintiff,

vs.

Civil Action No. 09-C-826

Berkeley County Public Service Water District,
et al.,
Defendants.

BERKELEY COUNTY
CIRCUIT CLERK
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VIRGINIA SINE-CLERK

DECLARATORY JUDGMENT ORDER

This civil action came on for decision upon the Complaint for a declaratory judgment by the Plaintiff, Motions to Dismiss by the Defendants', Plaintiff's Objection to the Motions, issuance of a preliminary injunction restraining Defendants, Defendants' Supplemental Memoranda of Law, Plaintiff's Omnibus Reply to Defendants' Supplemental Memoranda and Motion for Summary Judgment, as well as the papers, pleadings and testimony herein.

The court FINDS from the record that the Plaintiff is a residential land developer in Berkeley County, West Virginia, and the Defendants are public service districts respectively providing water and sewer service in Berkeley County. Both districts are public utilities as defined in West Virginia Code §§ 24-1-1 *et seq.*

The Court FINDS that Defendants have filed and served a Rule 12(b)(1) Motion to Dismiss Plaintiff's Complaint for this Court's lack of subject-matter jurisdiction. The Court FINDS that neither of the Defendants have filed a Rule 12(a) Answer to the Complaint.

However, the Court FINDS and CONCLUDES that Defendants have asserted defenses that include: (1) the authority for, amount, and reasonableness of public utility rates is the province of the Public Service Commission; (2) the Defendants are not agencies of the County Commission of Berkeley County; (3) capacity improvement fees ("CIF's") are not "impact fees" as described under the Local Powers Act; and (4) that, since the CIF's have been approved by the West Virginia Public Service Commission, they must be presumed to be valid.

Therefore, the Court CONCLUDES that the issues in this action have been sufficiently

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L. Faircloth B.L.
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joined, as if an Answer had been filed, as to enable this Court to make a final judgment on the relief requested by the parties.

The Court FINDS and CONCLUDES that there are no factual issues in dispute and that all issues to be decided by this Court are issues of law.

The Court notes that the Plaintiff has made a Motion for Summary Judgment which is proper under Rule 56(a) of the West Virginia Rules of Civil Procedure, but the Court CONCLUDES that the Plaintiff's motion is, in effect, a request that the Court proceed to decide the case in the form of a final judgment.

The Court FINDS and CONCLUDES that the case is now ripe for decision and there is no just reason to delay a final decision on Plaintiff's requests for relief and Defendants' motions and defenses.

(a) Propriety of a declaratory judgment in this action.

The record in this action shows that the Complaint, ¶¶ 20 and 22, requests this Court to declare: (1) that the Defendants have no statutory authority to assess CIF's and: (2) that the regulatory authority of the West Virginia Public Service Commission may not be utilized to impose CIF's.

The Court notes that, in the recent decision by the West Virginia Supreme Court of Appeals in *City of Bridgeport v Matheny*, 223 W Va 445, 675 SE2d 921, 926 (2009), the Court explained that a declaratory judgment is a proper procedural means for adjudicating the legal rights of parties to an existing controversy that involves the construction and application of a statute. Thus, the principal purpose of a declaratory judgment action is to resolve legal questions.

The Court further notes that West Virginia Code § 55-13-1 (the Uniform Declaratory Judgments Act) authorizes courts of record to exercise the power to declare rights, status and other legal relations of the parties.

Because this action concerns the legal relations between the parties, this Court CONCLUDES that it has jurisdiction to declare the construction and application of the statutes that the Plaintiff challenges.

(b) Subject-matter jurisdiction.

Defendants assert, in their Motions To Dismiss, two grounds. First, the Plaintiff has not

exhausted its administrative remedies; and second, the application of the primary jurisdiction doctrine precludes this Court's consideration of case.

(1) Exhaustion of administrative remedies.

The Court is unable to find in the record where the Plaintiff and the Defendants are parties to any administrative proceeding. The Court FINDS, from the record, that two Complaints to the West Virginia Public Service Commission had been filed, prior to the filing of this action, by the Plaintiff and Larry V. Faircloth regarding the reasonableness of the CIF's approved by that Commission and its authority to assess CIF's. However, the record shows that the Plaintiff's Complaints were dismissed.

The Court FINDS from the record that, subsequently, the West Virginia Public Service Commission, *sua sponte*, and *ex parte*, instituted a general investigation into the reasonableness of the CIF's.

The Court further FINDS that the Plaintiff is not seeking, as part of its relief in this action, a refund of the CIF's or any portion, thereof.

The Court CONCLUDES that, since the only the only time that the jurisdiction of the West Virginia Public Service Commission and the jurisdiction of a circuit court are mutually exclusive is when the Plaintiff seeks a refund of a fee (per *Hedrick v. Grant County Public Service*, 500 S.E. 2d 381 (W.Va. 2001), there is no basis for this Court to defer its jurisdiction to the West Virginia Public Service Commission.

The Court further CONCLUDES that any decision by the West Virginia Public Service Commission, from its investigation, would be the determination of facts, that is determining "reasonableness" and not a legal determination.

The Court therefore CONCLUDES that there are no administrative remedies to be exhausted and, therefore, that part of Defendants' motions to dismiss on the basis that the Plaintiff has failed to exhaust its administrative remedies is DENIED.

(2) Primary jurisdiction issue.

The Court CONCLUDES that it has concurrent jurisdiction with the West Virginia Public Service Commission regarding issues of fact and primary jurisdiction when this Court is requested to decide issues of law. See *Mounts v Chafin*, 186 W Va 156, 411 SE2d 481 (1991).

The Court CONCLUDES that the issues of law presented by the Plaintiff are within the conventional experience of this Court and further CONCLUDES that this Court does not require the “special expertise” of an administrative agency to assist it in deciding the legal issues presented. See *State Ex Rel. Bell Atlantic v Ranson*, 201 W Va 402, 497 SE2d 755 (1997).

Accordingly, the Court further CONCLUDES that the doctrine of primary jurisdiction in favor of the West Virginia Public Service Commission does not apply in this action, and therefore Defendants’ motions to dismiss on the basis that the Public Service Commission has primary jurisdiction in this action are DENIED.

(c) The Local Powers Act.

The Court FINDS that a “capacity improvement fee” as defined and used by the Defendants in this case is substantially the same concept and fee as an “impact fee.”

The Court FINDS that the Legislature of West Virginia, in 1990, enacted the “Local Powers Act”, Chapter 124, Acts, 1990, codified at West Virginia Code §§ 7-20-1 *et seq.* The Court FINDS that West Virginia Code § 7-20-7 authorizes county commissions and their agencies to assess an “impact fee” on land development projects in their counties to fund capital improvements and public services, upon certain specific terms and conditions.

The Court CONCLUDES that there is a presumption that the Legislature had knowledge of all of its prior enactments on the issue of authority to impose impact fees. See *Stamper v Kanawha County Bd. of Educ.*, 191 W.Va. 297, 445 SE2d 238 (1994).

The Court therefore FINDS and CONCLUDES there is a presumption that prior to the enactment of the Local Powers Act, no governmental body or administrative agency had statutory authority to authorize or impose impact fees or by another name, capacity improvement fees.

The Court CONCLUDES that, because the Legislature recognized in 1990 the absence of any prior authority to impose impact fees and the need for authority to impose such fees, it remedied this situation by enacting the Local Powers Act.

(1) The “agency” issue.

The court FINDS that, on page 19 of the Sewer District’s Amended Memorandum of Law, dated December 1, 2009, it makes the assertion that:

“Although a public service district is formed by a county commission, a public service

district is a separate political subdivision of the state and is subject to separate statutory provisions. The rules [sic] applicable to county commissions do not apply to public service districts any more than the enabling statute of one government agency applies to an unrelated agency.”

The court CONCLUDES that this assertion has no basis in law.

First, West Virginia Code § 7-20-3(a) makes the Local Powers Act applicable to water treatment and distribution facilities, wastewater treatment and disposal facilities, and sanitary sewers, “owned, supported or established by county government.” Further, West Virginia Code 7-1-3t authorizes the county commission to make grants from general revenues to their public service districts to establish and improve water and sewer systems. The Court FINDS that Defendant Sewer District admits, in its Amended Memorandum (see above), that it was established by the county commission. The Court therefore CONCLUDES that Defendants are subject to the provisions of the Local Powers Act.

The Court’s conclusion is further supported by the fact that West Virginia Code § 16-13A-2 authorizes a county commission to create, enlarge, reduce, merge, dissolve or consolidate a public service district. West Virginia Code § 16-13A-2(g) prohibits public service districts from entering into any agreement that infringes or usurps the powers of county commissions. West Virginia Code § 16-13A-3 provides that the county commission shall appoint the members of the public service boards; West Virginia Code § 16-13A-3a provides that the county commission may petition to remove members of the public service district boards; West Virginia Code § 16-13A-4(f) provides that the county commission may change the name of the public service districts; and West Virginia Code § 16-13A-18(a) provides that a public service district may not sell, lease or rent its facilities without the approval of the county commission. By these statutory provisions, the Court CONCLUDES that public service districts are under the virtual, if not micro, control of the county commissions that establish them and further CONCLUDES that the Defendants to this action are agencies of the Berkeley County Commission and not separate political subdivisions. Therefore, the public service districts named as Defendants to this action are subject to the Local Powers Act.

(2) Constraints of the Local Powers Act.

The Court FINDS that West Virginia Code § 7-20-4 authorizes county commissions to

require the payment of impact fees (as defined in West Virginia § 7-20-3(g)) from new development projects. The court FINDS, however, that West Virginia Code § 7-20-6 sets forth certain criteria and requirements necessary to implement collection of the impact fees. In particular, the court FINDS that West Virginia Code § 7-20-6(a)(4) sets forth the requirement that a county draft and adopt a comprehensive zoning ordinance.

The Court FINDS from the record (and it is uncontested by the parties) that Berkeley County has not fulfilled the requirement of West Virginia Code § 7-20-6(a)(4). Therefore, the Court CONCLUDES from the plain wording of the Local Powers Act, that the County Commission of Berkeley County and its agencies are disqualified from imposing and collecting impact fees authorized by the Act.

The Court, therefore, CONCLUDES that the Defendants have no legal authority under the Local Powers Act to impose, assess, or collect “impact fees” as defined in the statute or equivalently named “capacity improvement fees” or CIF’s.

(d) The Public Service Commission approval of CIF’s

The Court FINDS, from the record, that the Public Commission of West Virginia first authorized the Defendants to impose or collect CIF’s in 2004 and 2005. The Court further FINDS, from the record, that these fees now total \$6,770, the sum of \$3,120 assessed by the Defendant Water District and \$3,650 by the Defendant Sewer District, per proposed residential building lot.

The Court FINDS that the Public Service Commission of West Virginia is authorized, but also limited, by West Virginia Code § 24-2-3 to originate and establish “tariffs” and “rates” for all public utilities.

The Court CONCLUDES that the term “tariff” is a document that lists a public utility’s services and rates for those services, while the term “rate” is the price stated or fixed for some commodity or service of general need or utility supplied to the public, measured by a specific unit or standard. See 64 Am Jur 2d *Public Utilities* §§ 60-61 (2001).

The Court CONCLUDES that a capacity improvement fee (CIF) is not a “rate” according to the above definition. The Court CONCLUDES that rates are continuous charges based on the use of water or sewer services. The Court CONCLUDES that a special assessment such a CIF is

clearly contemplated as something different from a rate. The Court CONCLUDES that a CIF as imposed here is a special kind of tax that is imposed upon only some of the properties in a governmental district because of the special benefit to those properties of a particular public improvement. See *Kirchner v Giebink*, 150 Vt 172, 552 A2d 372 (1988).

The Court is unable to find any provision in the West Virginia Code that authorizes the Public Service Commission to impose a special assessment such as the designated CIF on certain property owners for public utility services under the guise of a "rate."

The Court CONCLUDES that the CIF charge is an assessment in the nature of a tax because it is incurred only once and is collected from a landowner who is specifically benefited by the water or sewer construction. The Court is unable to find any provision of the West Virginia Code that authorizes the Public Service Commission to impose such a tax.

Therefore, the Court CONCLUDES that the West Virginia Public Service Commission has neither explicit nor implied power to authorize public service districts to impose or assess CIF's.

Accordingly, the West Virginia Public Service Commission exceeded its authority when it authorized the Defendants to impose and assess CIF's in Berkeley County, West Virginia.

(e) Community Infrastructure Improvement Projects.

Continuing the presumption that the Legislature knows or knew of its prior enactments, the court FINDS that the Legislature of West Virginia enacted Chapter 113, Acts 2005, the Community Infrastructure Investment Project Act, codified at West Virginia Code §§ 22-28-1 *et seq.*

The court FINDS and CONCLUDES that the Legislature enacted this statute to modify or ameliorate the burdens of impact fees imposed by the Local Powers Act on developers. Under the Infrastructure Act, developers may build capacity improvements to water and sewer systems at their timing and expense and then give the improvements to the public service districts "without cost." The Court FINDS and CONCLUDES, upon the Plaintiff's unchallenged testimony at the preliminary injunction hearing had in this matter, that the Plaintiff has built (according to the Defendants' specifications) and conveyed to the Defendants thousands of dollars in both water and sewer infrastructure, at no cost to either Defendant, according to the terms and conditions of West Virginia Infrastructure Act. The Court further FINDS and CONCLUDES that the

Legislature, by its enactment of West Virginia Code § 22-28-1 et seq. continued to recognized that the sole authority to impose impact fees or CIFS was contained in the Local Powers Act, modified by the Infrastructure Act.

The thrust of the Infrastructure Act was to make CIF assessment unnecessary when a developer, such as the Plaintiff in this case, elects to construct its own improvements for donation to the public service districts, or the Defendants in this case.

The Court now FINDS and CONCLUDES that the Infrastructure Act and the Public Service Commission's orders conflict. On the one hand, the Public Service Commission authorizes public service districts to uniformly collect CIF's while on the other hand, the Legislature has eliminated the imposition of CIF's on those developers, such as the Plaintiff, who choose to build and donate the improvements under the Infrastructure Act.

The Court CONCLUDES that when the enactments of the Legislature and an administrative agency conflict, the enactments of the Legislature prevail.

THEREFORE, it is DECLARED, ORDERED and ADJUDGED:

That this Court has subject matter jurisdiction to hear and decide this case;

That the Defendant public service districts have no authority and, therefore, exceed their powers when they impose or assess capacity improvement fees on residential lots or subdivision developers in Berkeley County, West Virginia;

That the Public Service Commission of West Virginia has exceeded its statutory and rule-making authority by authorizing the Defendant public service districts to impose or assess capacity improvement fees in Berkeley County, West Virginia;

That the preliminary injunction, heretofore issued by this Court restraining the Defendants from imposing or assessing the CIF's on the Plaintiff be and is, hereby, dissolved as being no longer necessary, and that the security posted by the Plaintiff under Rule 65(c) of the West Virginia Rules of Civil Procedure be and is hereby released;

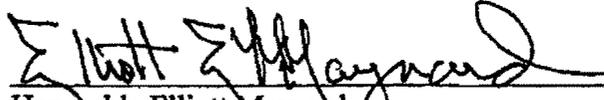
That the Plaintiff be and is, hereby, awarded its reasonable costs and attorney fees incurred in this action as provided in West Virginia Code § 55-13-10, upon submission of a verified voucher to the Court and Defendants.

It is further ORDERED that Defendants' objections and exceptions to any adverse findings

and rulings be and are, hereby, preserved.

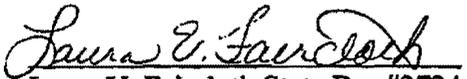
It is further ORDERED that the Clerk of this Court send an attested copy of this Order to all counsel of record.

ENTER: 1/29/2010



Honorable Elliott Maynard
By Special Appointment of the WV
Supreme Court of Appeals

Prepared by:

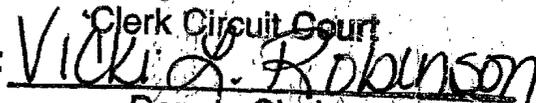


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A TRUE COPY
ATTEST

Virginia M. Sine

Clerk Circuit Court

By: 
Deputy Clerk