STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

John S. Shannon, Frank Lipscomb, and Robert Wyrick, Plaintiffs Below, Petitioners

vs) No. 11-0257 (Putnam County 10-C-57)

City of Hurricane, West Virginia, a West Virginia municipality, City of Hurricane Sanitary Stormwater Board, a regulatory authority of the City of Hurricane, West Virginia, Scott Edwards, Mayor, in his capacity as mayor of the City of Hurricane and in his capacity a director of the Hurricane Sanitary Stormwater Board, and Putnam Public Service District, a public service district located in Putnam County, West Virginia, Defendants Below, Respondents

FILED
February 10, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Three individuals who reside outside of the City of Hurricane, but whose properties drain stormwater into the Hurricane stormwater management system, challenge the constitutionality of a Hurricane ordinance that imposes a "stormwater service charge" upon them. Petitioners appeal the circuit court's order upholding the ordinance and denying their request for injunctive relief. Petitioners appear by counsel Michael O. Callaghan and D. Adrian Hoosier II. Respondents appear by counsel Johnnie E. Brown and James A. Muldoon.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Facts and Procedural History

The City of Hurricane enacted a "Stormwater Management, Surface Water Discharge and Erosion Control" ordinance, Hurricane Municipal Code §§ 936.01 to 936.44 (2005), *available at* http://library.municode.com/index.aspx?clientId=14172 [hereinafter "stormwater ordinance"]. This

stormwater ordinance was enacted pursuant to the authority granted in Chapter 16, Article 13 of the West Virginia Code. West Virginia Code § 16-13-1(c) (2001) and § 16-13-22 (2001) permit a municipality to engage in stormwater management in its corporate limits and in an area up to twenty miles beyond the corporate limits, provided that the stormwater in the twenty mile area beyond the corporate limits affects or drains into the municipality.

In addition, West Virginia Code § 8-13-13(a) (2009) authorizes a municipality to, *inter alia*, impose reasonable "rates, fees and charges" upon "users" of municipal services. In the stormwater ordinance, Hurricane authorized a "stormwater service charge" on "[u]sers connected to or draining into the public storm drainage system[.]" Hurricane Mun. Ord. § 936.031. This charge applies to owners and tenants of real property in the city and the city's watershed. *Id*. With this charge, users are to pay "an equitable share of the actual cost of the operation, maintenance of, improvements to, and necessary additions to, the stormwater system." *Id.* At present, the charge is $1.50 per month for occupants of residential dwellings. Hurricane Mun. Ord. § 936.05.

Petitioners John S. Shannon, Frank Lipscomb, and Robert Wyrick all reside outside, but within twenty miles, of the Hurricane corporate limits. It is undisputed that stormwater runs off of their properties into the Hurricane stormwater drainage system. Hurricane has charged them the stormwater service charge but they have refused to pay. In 2010, petitioners filed a civil complaint and request for injunctive relief in circuit court asserting that the imposition of this charge upon them is unconstitutional. Petitioners assert that the Putnam Public Service District has threatened to terminate their water service if they do not pay the stormwater service charge. The defendants below, respondents herein, are the City of Hurricane, the Hurricane Sanitary Stormwater Board, Hurricane Mayor Scott Edwards, and the Putnam Public Service District.

On cross-motions, by order entered January 10, 2011, the circuit court granted summary judgment for respondents on all issues. This Court reviews a circuit court's entry of summary judgment under a de novo standard of review. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Equal Protection

Petitioners argue that imposition of this charge upon them violates their right to equal protection under the state and federal constitutions. They argue that because they are not Hurricane residents, they cannot vote on the membership of the Hurricane City Counsel that imposed the charge. Moreover, they assert that West Virginia Code § 8-13-13(f) (2009) provides a mechanism for "qualified voters of the municipality" to seek a referendum election on municipal service ordinances, but because they are not residents or voters of Hurricane, they cannot use the referendum process. They argue that the right to vote is a fundamental right subject to a strict scrutiny review.

The United States Supreme Court rejected an almost identical equal protection challenge in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978). In *Holt Civic Club*, residents of a small, unincorporated area just outside of Tuscaloosa, Alabama, challenged the constitutionality of

Tuscaloosa's imposition of police and sanitary regulations and fees upon them because, *inter alia*, they could not vote in Tuscaloosa elections. The Supreme Court held that the non-Tuscaloosa residents did not have a right to vote in Tuscaloosa elections, even though they were governed by the city services ordinances. *Id.*, 439 U.S. at 68-69. Because there was no right to vote in the Tuscaloosa elections, there was no fundamental right at stake and the Supreme Court applied a rational basis analysis. *Id.*, 439 U.S. at 70. The Supreme Court concluded that Tuscaloosa's city services ordinances survived the equal protection challenge because they bore a rational relationship to a legitimate governmental purpose. *Id.*, 439 U.S. at 70-75.

Relying on *Holt Civic Club*, the circuit court rejected petitioners' equal protection arguments, and so do we. As nonresidents, petitioners have no right to vote in Hurricane's elections. Moreover, Hurricane's stormwater ordinance bears a rational relationship to a legitimate state purpose. As the circuit court found, the legitimate purpose is the City of Hurricane's desire to reduce the amount of sediment, bacteria, and trash that is in stormwater runoff that flows into and is treated by the city.[1] A reasonable way to meet this goal is to impose a fee upon the people who actually benefit from and use the stormwater management system.

In their briefs to this Court, petitioners attempted to distinguish *Holt Civic Club* by arguing that the plaintiffs in *Holt Civic Club* pursued a statewide class action challenge to several state statutes, while petitioners make a narrower, more limited challenge to just this stormwater ordinance's application to them. However, we fail to see how this distinction would impact the application of *Holt Civic Club* to their equal protection claim. Indeed, the Supreme Court in *Holt Civic Club* discussed the statewide nature of that challenge for purposes of deciding an *entirely different issue* raised in that appeal, i.e., whether it was proper under federal law to convene a three-judge district court panel to hear the case. *Id.*, 439 U.S. at 63-65.

Due Process

Petitioners also assert a due process violation. The Supreme Court in *Holt Civic Club* rejected a due process argument, finding that it flowed from the erroneous assumption that non-city residents have a right to vote in city elections. *Id.*, 439 U.S. at 75. As non-Hurricane residents, petitioners have no right to vote in Hurricane elections, thus they have not suffered a due process violation.

"Tax" Versus "Fee"

Finally, petitioners argue that the stormwater service charge is an impermissible "tax" as opposed to a permissible "fee." Upon a review of the parties' arguments, we conclude that the

[1] When making this finding in its final order, the circuit court cited to a "Stipulation of Facts" between the parties. The parties have failed to include their stipulation in the appendix record submitted to this Court on appeal, so we rely on the circuit court's representation on page 7 of the January 10, 2011, order.

circuit court correctly determined that this is a fee. "'[T]he primary purpose of a tax is to obtain revenue for the government, while the primary purpose of a fee is to cover the expense of providing a service or of regulation and supervision of certain activities.' *City of Huntington v. Bacon*, 196 W.Va. 457, 467 [466], 473 S.E.2d 743, 753 [752] (1996) (Citation omitted.)" *Cooper v. City of Charleston*, 218 W.Va. 279, 285, 624 S.E.2d 716, 722 (2005) (per curiam). The plain language of the ordinance makes clear that the charge is only upon "users" who pay "an equitable share of the actual cost of the operation, maintenance of, improvements to, and necessary additions to, the stormwater system." Hurricane Mun. Ord. 936.05. Petitioners do not allege that the money collected from this charge is used for purposes other than the stormwater system.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: February 10, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh