IN THE SUPERIOR COURT OF BRYAN COUNTY
STATE OF GEORGIA

HOME BUILDERS ASSOCIATION OF SAVANNAH, INC. d/b/a HOME BUILDERS ASSOCIATION OF GREATER SAVANNAH, Plaintiff, v. BRYAN COUNTY, GEORGIA, a political subdivision of the State of Georgia; and CARTER INFINGER, NOAH COVINGTON, WADE PRICE, STEVE MYERS, BRAD BROOKSHIRE, and GENE WALLACE, individually in their official capacities as current Bryan County Commissioners, and constituting the Board of Commissioners of Bryan County, Georgia, Defendants.	)	CIVIL ACTION FILE NO. SUV2019000044

PROPOSED ORDER DENYING PLAINTIFF'S MOTION TO ENJOIN THE COLLECTION OF IMPACT FEES BY DEFENDANT BRYAN COUNTY

After consideration of the evidence presented at the hearing on Plaintiff's motion to enjoin Bryan County from collection of impact fees under its development impact fee ordinance and argument of counsel, the court hereby denies Plaintiff's motion for the following reasons:

On January 8, 2019, Defendant Bryan County adopted its impact fee ordinance (DIFO) with an effective date of April 1, 2019. (Defendant's Exh 6, TT. Vol. I, p.1142) The Georgia Impact Fee Statute found at O.C.G.A. § 33-71-1 et seq. states as its purpose is to "ensure the adequate public facilities are available to serve new growth and development" and to set "uniform standards by which municipalities and counties may require that new growth and

development pay a proportionate share of the costs of new public facilities needed to serve new growth and development." O.C.G.A. § 33-71-1(a)(1) and (2). Bryan County adopted its DIFO to require that a proportionate share of the cost of certain road improvements to be paid for by new growth in the county through collection of an impact fees on new development. The county also adopted an amended Capital Improvement Element which sets forth the methodology for calculating the per trip costs for new growth and the calculation of maximum impact fees for different land use developments. (Defendant's Exh 8, TT. Vol. I, p. 1171). The evidence presented in this case was consistent with the mandate of the state statute authorizing counties to adopt impact fees to provide that new growth in the county would pay a proportionate share of the cost of road improvements relative to the service demands in the county to accommodate new growth. As authorized by the state statute and the DIFO, the county is collecting a proportionate share of the cost as a condition to issuance of a building permit for new construction in the county. The Plaintiff seeks an injunction against the county to enjoin the county from collecting impact fees as provided under its ordinance. The court must consider several criteria on whether to grant an interlocutory injunction as requested by the Plaintiff. The court is required to consider whether:

> (1) there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted; (2) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined; (3) there is a substantial likelihood that the moving party will prevail on the merits of her claims at trial; and (4) granting the interlocutory injunction will not disserve the public interest.[1]

The evidence in this record shows that the county in its amended Capital Improvement Element has identified five road improvement projects to be paid in part by collected impact fees. (CIE, TT. Vol. I, p. 1171, Table 6, p. 26) The county projects that 74% of the cost of the

[1] SRB Inc. Services, LLLP v. Branch Banking & Trust Co., 289 Ga. 1, 5 (2011).

road improvement projects will be paid for under the impact fees collected as a reasonable allocation of cost to projected new growth in the county. (Testimony, Barry Hall, TT. Vol. II, p. 185). The projected cost to the county for the five road improvement projects have been budgeted by the county and part of those costs required to pay for designated road improvement projects will be paid by impact fees collected by the county. Two of those projects which are partially funded by impact fees are already underway. One is the proposed road improvements at the Belfast River and Harris Trail Roundabout which is projected to cost approximately $1.9 million. That project is expected to be completed August 1, 2019. The second project underway is the roundabout at Belfast River and Belfast-Keller, which is already under construction and is expected to cost $1.3 million in total. Part of the cost of that project has been budgeted for payment by collected impact fees. A third project is the Harris Trail widening as provided in the county's capital improvement element, and that has already incurred some expenses to be paid in part by impact fees for preliminary plans for construction at a later date. (Testimony Ben Taylor, TT. Vol. II, p. 281).

To enter an interlocutory injunction at this time would greatly impair the ability of the county to make the road improvements identified in the DIFO. One of the criteria to be considered by the court on whether to grant an injunction is the extent of harm to the public interest. Since the construction of roads to accommodate growth and population is a matter of public interest, the court finds that an injunction entered at this time would adversely impact the public interest in road improvements projected for south Brian County. Thus, an injunction would result in loss of significant revenue to the county earmarked for road improvements as outlined in its capital improvement element. That revenue would be lost forever since enjoining collection at or near the time a building permit is requested would prevent the county from ever

collecting those fees since an impact fee under the statute must be collected before the issuance of a development permit. Yet, on the other hand, the evidence presented showed that the county was complying with the state statute and its own impact fee ordinance to account strictly for payments of impact fees, including the party making the payment, the amount paid, and the date of payment. Those fees are placed in an interest-bearing account until encumbered for payment of the road construction projects outlined in its capital improvement element. (DIFO, Exh 6, TT. Vol. I, p. 1142, § 7, p. 1157). If therefore, upon final judgment in this case, should the Plaintiff prevail, it would at least have available a strict accounting of payments made to which it could resort in making its claim to recover any impact fees that were improperly collected by law. Thus in considering the criteria for granting an interlocutory injunction, the harm to the county would greatly outweigh the harm, if any, to the Plaintiff

The Plaintiff requested appointment of a receiver to receive impact fees collected by the county, but for the reasons just stated, that would not be necessary. A receiver should not be appointed to take possession of property unless it's clearly made to appear that it's required to protect the rights of those interested in the property. Jones v. Wilson, 195 Ga. 310 (1943). It requires immediate and present necessity and that in this case should not be taken out of the hands of the county except to prevent manifest wrong imminently impending. See Byelick v. Michel Herbelin USA, Inc., 275 Ga. 505 (2002). That necessity is not shown by the evidence in this case for the reasons stated above. Thus, the court will not designate a receiver to collect impact fees paid to the county.

The Plaintiff challenges the county's DIFO on the grounds that it violates due process and equal protection because the right to seek an exemption from payment of impact fees is available to non-residential development only and not for residential development. Under

O.C.G.A. § 36-71-4, Bryan County is entitled by statute to identify development projects which will be exempt from impact fees. The impact fee statute at OCGA § 36-71-4(l) provides that an ". . .impact fee ordinance may exempt all or part of particular development projects from development impact fees if: (1) Such project are determined to create extraordinary economic development and employment growth . . ." Since the impact fee ordinance does not infringe upon a fundamental right or the party complaining is not a member of a suspect class, the county's ordinance is examined under the rational basis test. The state's enabling act thus provides that the county may exempt all or part of particular development projects and in its directive confers upon the county broad discretion to determine what projects will be entitled to exemption and the criteria for determining what projects identified by the county in its legislative discretion will create extraordinary economic development and employment growth in the county. The county has provided that exemptions are available to those non-residential development projects which have a capital investment of at least $1 million, create 10 or more jobs that exceed the average wage level of the county, create a gathering place with capacity with 100 or more persons, or create public recreation of cultural opportunity for the citizens. The exemption and criteria established by the county is a matter of broad legislative discretion. In Cherokee County v. Greater Atlanta Home Builders Ass'n, Inc., 255 Ga. App. 264 (2002), a case in which the court approved Cherokee County's impact fee ordinance, the court adopted the following rationale in its decision:

> "The constitutional guaranty of equal protection requires that all persons shall be treated alike under like circumstances and conditions. However, it does not prevent a reasonable classification relating to the purpose of the legislation." (Citations omitted.) Reed v. Hopper, 235 Ga. 298, 300(5), 219 S.E.2d 409 (1975). Indeed, a statutory classification, such as the one at issue here, that neither proceeds along suspect lines nor infringes fundamental constitutional rights, "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (Citations omitted.) Fed. Communications Comm. &c. v. Beach

Communications, 508 U.S. 307, 313(II), 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). Similarly, under substantive due process, "[w]here ... it is not a fundamental right that is infringed and the person complaining is not a member of a suspect class, the government action is examined under the rational basis test, the least rigorous level of constitutional scrutiny. [Cit.]" Old South Duck Tours v. Mayor &c. of Savannah, 272 Ga. 869, 872(2), 535 S.E.2d 751 (2000). The rational basis test requires that the classification drawn by the legislation be reasonable and not arbitrary, and rest upon some ground of difference having a fair and rational relationship to the legislation's objective, so that all similarly situated persons are treated alike." (Citation omitted.) Old South Duck Tours, supra, 272 Ga. at 873(3), 535 S.E.2d 751. Parties challenging legislation on these grounds must show that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decisionmaker." (Citations and punctuation omitted.) Id. "This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. Such action by a legislature is presumed to be valid." (Citation and footnote omitted.) Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314(II), 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976)."

Ben Taylor, the county administrator testified that exemptions were designed for non-residential development because of the paucity of non-residential development in the county since 2012 and that the county residents will be served by the development of commercial and retail development for several reasons, including convenience to residents, such as better access to grocery stores and the like and reduction of travel time by residents to retail and commercial establishments. The county intended to encourage such non-residential development by affording such developments the opportunity to qualify for an exemption from the impact fees, but provided only if a non-residential development meets certain minimal criteria. (Ben Taylor Testimony, TT., Vol. II, p. 288-290). "Employment growth" is one criteria under the enabling Act, and it is the county's prerogative to determine the type of employment growth beneficial to the county's economic interests. This court therefore cannot say that the county proffered reasons for the exemptions are without a rational basis or are not authorized under the state's enabling Act.

The county's evidence showed that the methodology used in assessing impact fees was based on vehicle trips generated by new developments. (Barry Hall Testimony, TT., Vol. II, pp. 165-6) The county in its calculation of new trips and ultimately the cost of a new trip has a rational basis and a reasonable way of assessing the proportionate share that new growth must pay for road improvements. The traffic study prepared by Thomas and Hut of Savannah was reasonable, and no evidence challenged or undermined the validity of the traffic study relied upon by the county in its methodology. (Thomas and Hutton, Traffic Study, Exh 4, TT., Vol I, p. 931).

The record showed that the county impact fee ordinance authorized a development applicant to challenge any scheduled impact fee by an individual assessment procedure and thus seek a reduction in the impact fee. (DIFO, Exh. 6, TT., Vol. I, p. 1142 § 5.3). No evidence was presented by Plaintiff that any of its members had applied for a development permit or sought an individualized assessment as provided under the ordinance or that any of the applicants who was a member of the Plaintiff's association had been denied an individual assessment for reduction of scheduled impact fees. If a development applicant questioned the methodology applied to a specific development company, evidence may be presented under the administrative procedure provided by the ordinance to seek reduction of that impact fee.

The court finds that the county presented persuasive evidence that its ordinance achieved the mandate of the state enabling act and that the fees scheduled constituted a proportionate share of the cost of road improvement made necessary to accommodate new growth in south Bryan County. The county impact fee ordinance is presumed valid under the law, and any challenge must be made by clear and convincing evidence. That was not the case here in Plaintiff's motion for injunctive relief.

Collection of impact fees by local governments in Georgia is now a commonly employed method to fund capital improvements, including road improvements. No evidence was presented by the Plaintiff that any member of Plaintiff's association would suffer a loss of opportunity to build residential units in south Bryan County or that the county's impact fee schedule would impair the ability of a developer to construct new residential units. Thus, there was no evidence of an unconstitutional taking of property as a result of the adoption by the county of its impact fee ordinance. See, Fifth Amendment of the United States Constitution and Ga. Const. Art. 1, Section 3, Paragraph 1.

For the foregoing reasons, the court denies the Plaintiff's application for interlocutory injunction to enjoin Bryan County's implementation of its impact fee ordinance or bar its collection of impact fees during the pendency of this litigation.

SO ORDERED, this 31 day of July, 2019.

Robert L. Russell, III, Chief Judge
Superior Court of Bryan County, Georgia