STATE OF WISCONSIN | CIRCUIT COURT BRANCH II | LA CROSSE COUNTY

DIOCESE OF LA CROSSE, et al.,

Plaintiffs,

vs.

CITY OF LA CROSSE,

Defendant.

DECISION AND ORDER

Case No.: **13-CV-685**

The parties have filed what are essentially competing motions for summary judgment.[1] Both parties ask the court to find in their favor as a matter of law based on the undisputed facts of the case. The court has reviewed the file as currently constituted, including all briefs and affidavits submitted by counsel, and has considered the arguments presented by both parties at the motion hearing held on May 5, 2014. The Plaintiffs' first claim must fail as a matter of law, and the Plaintiffs waived their second remaining claim, Claim Three. Therefore, the Plaintiffs' motion for summary judgment is DENIED, and the Defendant's motion for summary judgment is GRANTED.

SUMMARY OF THE CASE

The following facts are undisputed.

The City of La Crosse (hereinafter "the City") established a stormwater utility effective January 1, 2012, pursuant to its authority to do so under Wis. Stat. § 66.0821. The creation of the stormwater utility as an entity was largely in name only, as much of the stormwater management infrastructure was in place before the utility's[2] creation. The utility imposes

[1] The City's motion was initially filed as one for judgment on the pleadings, but it is being treated as one for summary judgment. *See* Wis. Stat. § 802.06(3).

[2] All references simply to "the utility" refer to the City's stormwater utility, unless otherwise specified.

stormwater utility service charges[3] "on all developed property with impervious area in the City." City of La Crosse Municipal Code § 23.04. The purpose of the utility's charges is to "[a]cquire, construct, lease, own, operate, maintain, extend, expand, replace, clean, dredge, repair, manage, and finance such facilities and equipment as are deemed by the City to be proper and necessary for stormwater and surface water management." City of La Crosse Municipal Code § 23.02.

The utility's charges are not based on a property's actual runoff contribution to the stormwater system, as metering or otherwise precisely measuring each property's runoff would be prohibitively expensive and difficult, if not impossible. Instead, they are based on Equivalent Runoff Units ("ERUs"). One ERU is equal to "the statistical average impervious area of a residential housing unit within the City," which is 2,841 square feet. City of La Crosse Municipal Code § 23.03(F). According to the City's Director of Public Works, the use of impervious surface area is the "universally accepted" method for calculating stormwater service charges. (T. Deposition of Hexom at 43:22)

Residential property owners are charged for one ERU, regardless of the actual impervious surface area on the property. City of La Crosse Municipal Code § 23.04(A). Non-residential property owners are charged for the actual number of ERUs of impervious surface area on their property. The impervious surface area is calculated based on photogrammetric techniques, using aerial photography that takes into account the property's topography. The photogrammetric calculations are "field verified" by comparing some of them with calculations based on actual ground survey techniques.

[3] All subsequent references to "stormwater utility charges," "stormwater service charges," "the utility's charges," "the service charges," "the charges," etc. refer to these charges, unless otherwise specified.

What renders a surface impervious – e.g., concrete, asphalt, a building or other structure, etc. – does not matter. The ERU calculation is based solely on total amount of impervious surface area, of any type, on a given property. However, property owners may earn credits against their stormwater utility charges by implementing their own stormwater management practices on their property, such as the use of bioretention cells.

The stormwater utility's charges are set by the City's Common Council and are collected by the City Treasurer, but they are not put in the City's general fund or used for general City projects. The stormwater charges are used only to fund stormwater utility projects. If a property owner fails to pay the stormwater charges, the charges are added to the property owner's property tax bill, as is allowed with other delinquent service charges such as water and sewer utility charges and charges for snow and ice removal. The money collected on property tax bills for stormwater charges is still directed to the stormwater utility.

The Diocese of La Crosse, six Parishes associated with the Diocese, and Aquinas Catholic Schools, Inc. (hereinafter collectively referred to as "the Plaintiffs") are all religiously-based, non-stock, not-for-profit corporations. As such, they are exempt from many federal, state, and local taxes. The Plaintiffs all own property in the City of La Crosse and have been charged stormwater utility charges based on their respective ERUs as calculated by the City. The Plaintiffs have paid the stormwater charges under protest. One Plaintiff, Blessed Sacrament Parish, became delinquent in its payment of the stormwater charges for 2013 and received a property tax bill from the City reflecting the stormwater charges as the only balance owed, demanding payment by January 31, 2014.

The Plaintiffs have filed suit against the City, alleging that the City has unlawfully imposed the stormwater utility service charge on them. After voluntarily dismissing one of their

claims, the Plaintiffs' remaining causes of action allege that (1) they are exempt, under Wisconsin Statute section 70.11(4), from imposition of the stormwater utility service charge; and (2) imposition of the stormwater utility service charge on them violates Article I, Section 18 of the Wisconsin Constitution.

DECISION

Summary judgment standard

"If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." Wis. Stat. § 802.06(3). The first step in deciding a motion for summary judgment requires the Court to examine the pleadings to determine whether a claim for relief has been stated and whether any factual issues exist. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). When two parties have filed competing motions for summary judgment, and neither argues that factual disputes bar the other's motion, the facts are deemed stipulated, leaving the court with issues of law. ***Hussey v. Outagamie County***, 201 Wis. 2d 14, 18, 548 N.W.2d 848 (Ct. App. 1996). When the facts are undisputed, summary judgment will be granted to the party that is entitled to a judgment as a matter of law. *See* Wis. Stat. § 802.08(2).

The Plaintiffs' exemption claim under Wis. Stat. § 70.11(4)

All property owned by the Plaintiffs is exempt from "general property taxes" by virtue of the Plaintiffs' status as a religious association, churches, and a school system, respectively. Wis. Stat. § 70.11(4)(a). The Plaintiffs argue that the City's use of the terms "charge" or "fee" to refer to the money collected on behalf of the stormwater utility is really just meant to hide the fact that is actually a "tax." The Plaintiffs argue that, as a tax, the stormwater utility "charge"

cannot be imposed on them pursuant to Wis. Stat. § 70.11(4). The Plaintiffs cite to a host of federal case law in support of their argument that the stormwater utility charge is really a tax, relying in particular on ***San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico***, 967 F.2d 683 (1st Cir. 1992) and ***Oneida Tribe of Indians of Wisconsin v. Village of Hobart***, 891 F. Supp. 2d 1058 (E.D. Wis. 2012).

The court agrees with the City, however, that the federal cases cited by the Plaintiffs are inapplicable here. The cases cited by the Plaintiffs all involve interpretation of federal law. Indeed, the ***Oneida*** court, for example, made it clear that it was basing its decision on federal law relating to the taxation of Indian tribes. 891 F. Supp. 2d at 1064. The court intimated that a different result might be reached under a state law analysis, owing in part to the fact that Indian tribe tax exemptions are liberally construed, whereas other tax exemptions are generally construed more narrowly. ***Id.***

Furthermore, the thrust of the Plaintiffs' argument is to use federal precedent to try to establish that the City's stormwater utility charge is really a tax. However, the Plaintiffs' claim is that they are exempt from paying it because of Wis. Stat. § 70.11(4), which, by its plain terms, exempts them from paying *general property* taxes, not *any and all* taxes. The authorities cited by the Plaintiffs do not show how the City's stormwater utility charge is a general property tax, because it is not.

General property taxes are defined and covered by Chapter 70 of the Wisconsin Statutes. They are, by their very definition, "levied, *under [Chapter 70]*, upon all general property in this state except property that is exempt from taxation." Wis. Stat. § 70.01 (emphasis added). The amount of general property taxes levied on a property is based on the assessed value of the property, including all improvements to the property. Wis. Stat. §§ 70.05, 70.03.

The City's stormwater utility charge, on the other hand, is not levied under Chapter 70. It is collected pursuant to Chapter 66, specifically Wis. Stat. §§ 66.0821 and 66.0627. Chapter 66 allows a municipality to fund its stormwater system

> from the municipality's general fund, by taxation, special assessment or sewerage service charges, by municipal obligations or revenue bonds or from any combination of these sources.

Wis. Stat. § 66.0821(3)(a). Additional authority for a municipality's use of service charges is provided by Wis. Stat. § 66.0627. Specifically,

> the governing body of a city, village or town may impose a special charge against real property for current services[, including stormwater management,] rendered by allocating all or part of the cost of the service to the property served.

Wis. Stat. §§ 66.0627(2), 66.0627(1)(c).

The mechanism for determining how a property is "served" by the stormwater management system and the amount of any stormwater service charges is also laid out in Wis. Stat. § 66.0821:

> For the purpose of making equitable charges for all services rendered by a storm water and surface water sewerage system to users, the property served may be classified, taking into consideration the volume or peaking of storm water or surface water discharge that is caused by the area of impervious surfaces, topography, impervious surfaces and other surface characteristics, extent and reliability of mitigation or treatment measures available to service the property, apart from measures provided by the storm water and surface water sewerage system, and any other considerations that are reasonably relevant to a use made of the storm water and surface water sewerage system.

Wis. Stat. § 66.0821(4)(c).

By Chapter 66's plain terms, municipalities clearly have their choice of how to fund their stormwater management systems. The City has elected to fund its stormwater system by stormwater service charges, instead of by taxation. It is not a tax under Chapter 66, and it is clearly not a general property tax under Chapter 70. Unlike general property taxes, the

stormwater service charge is not levied on all property, and the amount of the service charge is in no way tied to a property's value. The service charge is only assessed on property with impervious surface area, and the amount of the charge is determined based on the amount of impervious surface area on the property.

The fact that delinquent stormwater service charges are added to the property tax bill or, in the case of a property tax-exempt organization such as Blessed Sacrament Parish, a property tax bill is generated solely for the purpose of collecting a delinquent stormwater service charge, does not render the service charge a general property tax under Chapter 70. The City is authorized by Chapter 66 to place the stormwater service charge, along with numerous other delinquent service charges and utility charges such as water and sewer, on property tax bills. Wis. Stat. § 66.0627(4); *see also* Wis. Stat. § 71.11(12). Water utility service charges do not become general property taxes if they become delinquent and end up on a property owner's tax bill.

The fact that the amount of the stormwater service charge is set by the City's Common Council, the fact that the charge is collected by the City Treasurer, and the fact that the City's Stormwater Utility exists mostly in name only all likewise do not change the service charge into a general property tax. None of these facts run afoul of the authority granted to municipalities by Chapter 66. The Plaintiffs have not pointed to any authority in Chapter 66 that requires a stormwater utility board with officers and regular meetings in order for a stormwater utility service charge not to be a general property tax. The more telling aspect in this regard is that all money collected via the City's stormwater utility charges are used solely to fund stormwater utility projects and are not shared with any other part of the City's budget.

The Court of Appeals addressed service charges under the predecessor statute to Wis. Stat. § 66.0627[4] and their relation to general property taxes in ***Grace Episcopal Church v. City of Madison***, 129 Wis. 2d 331, 385 N.W.2d 200 (Ct. App. 1986). While ***Grace Episcopal*** dealt with service charges related to "lawn, tree and shrub care; snow removal from walks and crosswalks; trash clean-up and removal; and bus shelter and fixture maintenance," those services are enumerated in the same subsection as stormwater service charges in the current statute, Wis. Stat. § 66.0627(1)(c). The Court of Appeals held that, because the services provided were authorized by the Legislature by the predecessor to Wis. Stat. § 66.0627, the service charges were not general property taxes and Wis. Stat. § 70.11(4) did not apply. ***Grace Episcopal***, 129 Wis. 2d at 335.

The court in ***Grace Episcopal*** went on to examine what it means for a property to be "served" under Wis. Stat. § 66.0627(2)'s predecessor. The court held that a city need not show a special benefit specifically to an individual property, which is normally a showing required for special *assessments*. ***Id.***, at 336-337. The court held that the service charges could be imposed on all properties within the *district*, not just the properties on the pedestrian mall/concourse in question. ***Id.*** Essentially, the services in question were not even being rendered directly to properties being assessed the service charge, yet the court held that the charges were still not general property taxes.

The City's stormwater utility provides a far more direct, tangible benefit to the Plaintiffs in this case, and it is far more tailored to their actual use of the services than the charges were in ***Grace Episcopal***. There is no reasonable way for the City to precisely measure an individual property's contribution to the stormwater system, so the City uses

[4] Wis. Stat. § 66.0627(2) was renumbered from Wis. Stat. § 66.60(16) in 1999.

what it calls the "universally accepted" method for approximating each property's contribution. Other than residential properties, the City's stormwater service charge is tailored to each property based on the amount of impervious surface area on the property, calculated using the most accurate methods possible. Undeveloped properties are not assessed the charge at all. More importantly, property owners can receive a credit for taking positive steps to reduce their contribution to the stormwater system. None of these distinctions between properties were made in ***Grace Episcopal***, yet the Court of Appeals found that the service charges were not general property taxes.

This court sees no reason why Wisconsin state law should not control in this case. Under a state law analysis, it is clear that the City's stormwater utility charges are not general property taxes, and Wis. Stat. § 70.11(4) does not apply to the stormwater utility charges. Therefore, the City is entitled to judgment as a matter of law on the Plaintiffs' first claim.

The Plaintiffs' claim under Article I, Section 18 of the Wisconsin Constitution

The court was unable to find any mention of Article I, Section 18 of the Wisconsin Constitution in the Plaintiffs' brief, which was in opposition to the City's motion for judgment on the pleadings and in support of the Plaintiffs' motion for summary judgment. The brief focuses exclusively on why the Plaintiffs believe the stormwater service charges are really a tax. The Plaintiffs' brief did not provide the court with any source of authority to support, or conduct any analysis of, their claim that imposition of the City's stormwater service charges on them violates the Wisconsin Constitution.

The Plaintiffs' first mention of any authority to support their constitutional claim came partway into the motion hearing. The Plaintiffs' counsel referenced "the Hosanna-Tabor case" and "the Coulee case" without citation or giving the cases' full names. These references and arguments caught the court completely by surprise. More importantly, the City was not given a chance to properly respond to the Plaintiffs' arguments, because it was not put on notice that such arguments would be raised.

Furthermore, the argument the Plaintiffs did raise in oral argument was undeveloped. The Plaintiffs made references to a balancing test and a burden. They never actually stated for the court what they believe the applicable legal standard to be or argued how it would apply to this case, other than to state generally that

> the Court always has to engage in a balancing test. You establish a burden and then the Court has to balance that burden against whatever action the government is taking, and then determining whether or not which wins in that balance. [*sic*]

(May 5, 2014, Motion Hearing Transcript, 9:16-21). The Plaintiffs never stated how they are burdened or how that burden should be balanced against the governmental interest in question.

Therefore, the court deems the Plaintiffs' argument regarding its claim under Article I, Section 18 of the Wisconsin Constitution to be waived. The City was not given a meaningful opportunity to respond to the Plaintiffs' arguments, because it was not put on notice of the case law the Plaintiffs would be citing or the arguments they would be making. The City is thus entitled to judgment in its favor as a matter of law on the Plaintiffs' second remaining claim, Claim Three.

ORDER

THEREFORE, IT IS ORDERED:

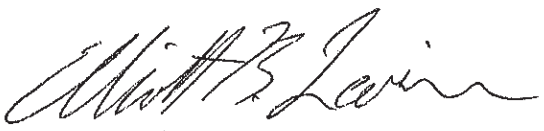
For the reasons stated above, the Defendant's motion for summary judgment is GRANTED.

For the reasons stated above, the Plaintiffs' motion for summary judgment is DENIED.

The Defendant is hereby granted judgment in its favor as a matter of law on the Plaintiffs' remaining causes of action, Claims One and Three, and those claims are therefore dismissed.

Dated at La Crosse, Wisconsin, this 1st day of August, 2014.

BY THE COURT:



ELLIOTT M. LEVINE
Circuit Court Judge, Branch II

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