

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF DORCHESTER) CASE NO. 2018-CP-18-1505

SUMMERVILLE RETAIL INVESTMENT,)
LLC,)

Plaintiff,)

vs.)

DORCHESTER COUNTY, A POLITICAL)
SUBDIVISION OF THE STATE OF)
SOUTH CAROLINA, CINDY CHITTY AS)
TREASURER OF DORCHESTER)
COUNTY, EX OFFICIO, AND)
MONTEBELLO JTA GROUP, LLC,)

Defendants.)

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT OF
DEFENDANT MONTEBELLO JTA
GROUP, LLC AND DENYING MOTION
FOR SUMMARY JUDGMENT OF
PLAINTIFF SUMMERVILLE RETAIL
INVESTMENT, LLC**

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SC Court of Appeals

THIS MATTER CAME BEFORE THE COURT on January 19, 2021 for a hearing on the respective motions for summary judgment filed by Plaintiff Summerville Retail Investment, LLC and Defendant Montebello JTA Group, LLC. Present at the hearing were G. Hamlin O’Kelley, III, attorney for Plaintiff Summerville Retail Investment, LLC, and Erik P. Doerring, attorney for Defendant Montebello JTA Group, LLC. For the reasons stated herein, the motion for summary judgment filed by Defendant Montebello JTA Group, LLC is GRANTED and the motion for summary judgment filed by Plaintiff Summerville Retail Investment, LLC is DENIED.

Procedural History of Case

This case involves a dispute over a Dorchester County transportation impact fee refund related to property sold by Plaintiff Summerville Retail Investment, LLC (“Summerville Retail”) to Defendant Montebello JTA Group, LLC (“Montebello”). Summerville Retail filed its complaint seeking a declaratory judgment that it should receive the impact fee refund. Defendants filed

answers to the complaint, including related counterclaims, and where Montebello also sought declaratory judgment that it was entitled to the impact fee refund. Summerville Retail denied the counterclaims. Defendants filed a motion to dismiss. The motion was granted as to all defendants except for Montebello, and where the Court ordered the interpleader of the impact fee refund and the dismissal of the Dorchester County defendants. The impact fee refund at issue was interpled with the Court. Summerville Retail and Montebello have now each filed a motion for summary judgment.

Issues for Decision

- A. Whether Dorchester County is required to refund the impact fee to Summerville Retail or Montebello based on the language of the ordinance?
- B. Alternatively, is Montebello nevertheless entitled to the impact fee refund because Summerville Retail sold the property to Montebello including any right of Summerville Retail to receive a refund of the impact fee?

Undisputed Material Facts

The Court finds the following material facts are not in dispute:

1. Dorchester County, South Carolina is political subdivision of the State of South Carolina.
2. As a county political subdivision of the State of South Carolina, Dorchester County is empowered to adopt ordinances and resolutions to sue and be sued; to purchase and hold, for the use of Dorchester County, lands and personalty with the limits thereof; to make contracts; and to do all acts in relation to the property and concerns related thereto. This includes the adoption of

ordinances and resolutions implementing plans, and fees to be paid and collected, in order to benefit Dorchester County and its residents.

3. Dorchester County operates under a Council-Administrator form of local government pursuant to S.C. Code Ann. § 4-9-610, et seq.

4. The governing body of Dorchester County is Dorchester County Council (“Council”).

5. Pursuant to its authority, Council adopted Ordinance Number 10-23 on December 6, 2010, and which was entitled “AN ORDINANCE TO ADOPT A CAPITAL IMPROVEMENTS PLAN FOR PUBLIC FACILITIES, SUCH PUBLIC FACILITIES BEING LIMITED TO ROADS, STREETS AND BRIDGES, INCLUDING, BUT NOT LIMITED TO RIGHTS-OF-WAY AND TRAFFIC SIGNALS AS THE TERM PUBLIC FACILITIES IS MORE SPECIFICALLY DEFINED IN SECTION 6-1-920(18)(d), CODE OF LAWS OF SOUTH CAROLINA (1976), AS AMENDED”. (“Ordinance 10-23”).

6. Under Ordinance 10-23, Council adopted a “Capital Improvements Plan” for Dorchester County, as defined therein, and which consists of, and incorporates, the “Transportation Impact Fee Study Report” developed by Kimley-Horne & Associates, Inc., Final Report dated June 10, 2010, as revised and updated by Final Report dated November 22, 2010 (the “County Transportation Impact Fee Study Report”).

7. The Capital Improvements Plan adopted under Ordinance 10-23, and incorporating the County Transportation Impact Fee Study Report, required certain capital improvements in the Capital Improvements Plan to be funded through a transportation impact fee to be implemented by Dorchester County.

8. On December 6, 2010, Council also adopted a separate ordinance, Ordinance Number 10-24, effective February 1, 2011, titled and referred to as the “Transportation Impact Fee Ordinance for Unincorporated Dorchester County.”

9. Article III(b) of the Transportation Impact Fee Ordinance, titled “Findings”, contains a declaration of Council “[t]o the extent that future growth and new construction in Dorchester County place demands on the road system, those demands and needs should be met by shifting a portion of the capital cost for providing new capacity in the road system to new developments, which create, in whole or in part, these demands and needs.”

10. Article IV(r) of the Transportation Impact Fee Ordinance defines “Transportation Impact Fee” as “[a] payment of money imposed as a condition of approval to pay a proportionate share of the costs for improvements to the transportation system identified to serve new developments.”

11. Article IX, Section 9.1(a), of the Transportation Impact Fee Ordinance provides that “transportation impact fees shall be charged to new development in accordance with the procedures set forth in this ordinance. The fees to be collected for a development will be determined at the time of application for a building permit and collected prior to the issuance of a certificate of occupancy.”

12. The amount of the transportation impact fee to be paid under the Transportation Impact Fee Ordinance is generally determined under Sections 9.3, 9.4, and 9.5 of the Transportation Impact Fee Ordinance.

13. Section 11.4 of the Transportation Impact Fee Ordinance, titled “Reimbursement”, provides that “[i]mpact fee funds not obligated for expenditure within three (3) years of the date

that they are scheduled to be expended in the *Dorchester County Capital Improvement Plan* shall be returned, with accrual interest earned, to the record owner of property for which the fees were collected, on a first-in, first-out basis.”

14. Article XV of the Transportation Impact Fee Ordinance is titled “REFUNDS”. Article XV, Section 15.1(a) of the Transportation Impact Fee Ordinance, titled “General Provisions”, provides “[f]unds not obligated for expenditures within three (3) years of the date that they are scheduled to be expended in the *Dorchester County Capital Improvements Plan* shall be refunded to the record owner of the property for which the impact fees were paid, with actual interest earned, on a first-in, first out basis. For the purpose of determining whether fees have been spent or encumbered, the first money placed in a trust fund account shall be deemed to the first money taken out of that account when withdrawals have been made.”

15. Article XV, Section 15.2 of the Transportation Impact Fee Ordinance, is titled “Refund Process”, and Section 15.2(a) therein provides, in part, that the “[t]he owner of property eligible for a refund of transportation impact fee payment ... is the current owner of the property for which a refund is due”. [emphasis added].

16. Section 15.2(b) of the Transportation Impact Fee Ordinance provides that “[w]hen a right to a refund exists, the County shall send a refund to the current owner of record within ninety (90) days after it is determined by County Council that a refund is due.” [emphasis added].

17. Summerville Retail owned and developed certain property in Dorchester County, South Carolina located at 1616 Central Avenue, Summerville, South Carolina (the “Property”).

18. Summerville Retail and Montebello entered into an Agreement of Sale and Purchase related to the Property, with an effective date of October 20, 2016, as amended (the "Purchase Agreement").

19. Under the Purchase Agreement, Summerville Retail agreed to sell the Property, as improved and including certain personal property, to Montebello for a purchase price of \$12,136,000.

20. The Property included, or was to include, a Wal-Mart Neighborhood Market store and which the subject of a "Build to Suite Lease Agreement", as amended, between Wal-Mart Stores East, LP and Summerville Retail (the "Walmart Lease").

21. A Transportation Impact Fee under the Transportation Impact Fee Ordinance was received by Dorchester County in the amount of \$326,848 on or about November 7, 2016 and applicable to the Property.

22. Pursuant to the Purchase Agreement, Summerville Retail transferred title to the Property to Montebello, as improved and including personal property and the Walmart Lease, through a Warranty Deed and Bill of Sale. The Warranty Deed was recorded January 27, 2017.

23. The Warranty Deed and related Bill of Sale for the Property transferred all right and interest of Summerville Retail in the Property to Montebello, including any right to receive the Impact Fee Refund.

24. Dorchester County did not fund expenditures within three (3) years of the date they were scheduled to be expended in the *Dorchester County Capital Improvements Plan*.

25. On September 5, 2017, at its regularly-scheduled and noticed meeting for that date, Council voted unanimously pursuant to Ordinance 10-23 and Section 6-1-1020 of the South Carolina Code of Laws that all transportation impact fee funds collected pursuant to Ordinance 10-24 through June 30, 2017 shall be refunded with interest to the current owners of record within ninety days.

26. At this time, and as of September 5, 2017, Montebello was the deeded and current owner of the Property, and the owner of the Property according to the property tax and other records of Dorchester County.

27. Dorchester County determined that Montebello was the current record owner of the Property and therefore entitled to the refund of the Transportation Impact Fee related to the Property.

28. Dorchester County caused a refund of the Transportation Impact Fee for the Property in the amount of \$326,895.15 to be issued on September 17, 2017, through its check payable to "Montebello JTA Group, LLC Walmart Stores LP Attn Prop Mgmt 2001 SE 1th St (Store #5279) Bentonville AR 72716" (the "Impact Fee Refund").

29. Dorchester County mailed the Impact Fee Refund to Walmart Store LP in Bentonville, AR.

30. The Impact Fee Refund was returned by Wal-Mart to Dorchester County.

31. Dorchester County adopted Ordinance Number 18-02, effective February 20, 2018, which repealed Ordinance 10-23 and Ordinance 10-24. Ordinance Number 18-2 also ordained that any monies collected pursuant to Ordinance 10-23 and Ordinance 10-24 since July 1, 2017 and until February 20, 2018 were to be immediately processed for refund to the persons entitled thereto.

Conclusion

Summerville Retail owned and developed the Property. A Transportation Impact Fee of \$326,895.15 was paid for the Property in connection with its development. Summerville Retail then sold the Property to Montebello for over \$12 million, and transferred all right and interest in the Property to Montebello, including any potential Impact Fee Refund.

Dorchester County determined that an impact fee refund for the Property should be paid to Montebello. Montebello is the current record owner of the property and has been since Montebello's purchase of the Property from Summerville Retail back in 2017. Although the ordinance uses the term "refund" and "returned" in explaining the repayment policies, this Court is of the opinion that the owner of the property at the time the refund is due is the person to whom those development impact fees are to be paid.

Montebello is entitled to the Impact Fee Refund under the Dorchester County Transportation Impact Fee ordinance.

IT IS THEREFORE ORDERED that the motion for summary judgment of Defendant Montebello JTA Group, LLC is GRANTED;

IT IS FURHTER ORDERED that the motion for summary judgment of Plaintiff Summerville Retail Investment, LLC is DENIED.

IT IS SO ORDERED.

January 25, 2021

Edgar W. Dickson
Presiding Judge of the First Judicial Circuit



Dorchester Common Pleas

Case Caption: Summerville Retail Investment Llc VS Dorchester County ,
defendant, et al
Case Number: 2018CP1801505
Type: Order/Summary Judgment

- So Ordered

s/ Edgar W. Dickson #2153

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