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Winnetka Man Gets New Chance to Press Case Village Stormwater Fee is Unconstitutional Tax.

A Winnetka resident, whose lawsuit challenged whether the stormwater utility fee slapped on property owners by the north suburban village is actually a tax, has clearance to sail on, after a state appeals panel said the legal arguments in the challenge hold enough water to survive the village's attempt to sink it via motion to dismiss.

The Illinois First District Appellate Court on May 31 issued an unpublished order overturning the decision of Cook County Circuit Court Judge Kathleen G. Kennedy, who had dismissed the complaint brought against the village by Mark Green. That declaratory judgment action, filed Feb. 13, 2015, alleged Winnetka's stormwater fee actually is a tax. The lawsuit argued the fee violated the uniformity in taxation clause of the Illinois Constitution and Illinois Municipal Code.

Justice Sheldon A. Harris wrote the order, with Justice Joy V. Cunningham concurring. Justice Maureen E. Connors dissented. The order was issued under Supreme Court Rule 23, which restricts its use as precedent, except under very limited circumstances permitted by the Supreme Court rule.

Winnetka's motion to dismiss relied heavily on the 2005 Illinois Third District Appellate Court ruling in Church of Peace v. City of Rock Island, in which the court upheld Rock Island's stormwater fee. Kennedy granted the motion to dismiss on Aug. 19; Green appealed Aug. 28.

Winnetka responded to severe flooding in 2008 by seeking infrastructure improvements, then scuttled those plans after a 100-year flood in 2011 instilled a need for a more significant solution. The result was a stormwater master plan that, among other components, "called for the construction of a 7,900 foot long storm sewer running underneath Willow Road." The tunnel was to cost $34.5 million and would provide flood relief to half the village. Another $8 million in improvements would affect three other drainage areas.

The village, however, opted not to construct the Willow Road tunnel in mid-2015, after projected costs soared to more than $80 million, according to published reports.

A year earlier, however, the village had issued 30-year municipal bonds worth $61.5 million to pay for the stormwater management work. And to cover the debt service on those bonds, the village enacted the stormwater utility fee in March 2014.

In examining the ordinance, Harris noted the village "acknowledges that all real property in the village contributes to runoff and either uses or benefits from the maintenance of the stormwater system." However, the fee is based on the amount of impervious surfaces in the village, such as driveways, sidewalks and roofs. As such, "only those with developed property are subject to the" stormwater fee.

Green alleged the way the village structured the fee scale to cover the debt issuance "bears no relation to a property owner's actual use of the existing stormwater system." He further alleged, "and the Village concedes, no attempt is made to measure the actual stormwater discharged into the

system by any property owner," the court documents said.

Harris and Cunnigham agreed with Green's assertion that his complaint states a valid cause of action. Specifically, Green argued the fee is incurred regardless of "whether a property owner actually discharges storm runoff into the system," and further that the fee does not provide a service to property owners, but rather to retire bonds to fund building the tunnel, "which the village has recently decided not to construct."

The order also notes the village's ordinance contradicts its claims the fee is compensatory, since the ordinance directly references the bond debt. The reliance on Church of Peace was misplaced, Harris noted, because that case was decided on summary judgment, whereas Green's complaint remains at litigation.

Ultimately, Harris wrote the court does not have an opinion on the ultimate question of whether the stormwater fee is indeed a tax, "only that the circuit court erred in dismissing this matter at the pleading stage." As such, Kennedy's ruling is reversed and the case remanded for further proceedings.

In her dissent, Connors contended Winnetka's "ordinance specifically contradicts Green's allegations" and said the Church of Peace decision "clearly states that stormwater service charges are a fee and not a tax."

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