2016 IL App (1st) 152471-U

FIRST DIVISION
May 31, 2016

No. 1-15-2471

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARK GREEN, individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. THE VILLAGE OF WINNETKA, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 15 CH 2430 Honorable Kathleen G. Kennedy, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Cunningham concurred in the judgment.
Justice Connors dissented.

ORDER

¶ 1 ***Held*:** The circuit court's dismissal of Plaintiff's first amended complaint pursuant to 735 ILCS 5/2-615 is reversed. Plaintiff's first amended complaint properly alleges the Stormwater Utility Fee at issue is an unconstitutional tax.

¶ 2 Plaintiff-appellant Mark Green brought a declaratory judgment action alleging the Stormwater Utility Fee imposed by defendant-appellee Village of Winnetka violated both the Illinois Constitution and the Illinois Municipal Code. After plaintiff-appellant amended his complaint, defendant-appellee brought a motion to dismiss pursuant to 735 ILCS 5/2-615 of the Illinois Code of Civil Procedure. Defendant-appellee contended that the Stormwater Utility Fee was a valid fee and not an unconstitutional tax. The defendant-appellee relied extensively on *Church of Peace v. City of Rock Island*, 357 Ill. App. 3d 471 (2005), where the third district upheld the City of Rock Island's stormwater fee. After a hearing, the court found no set of facts could be pled in support of plaintiff-appellant's complaint and granted defendant-appellee's motion to dismiss.

¶ 3 On appeal, plaintiff-appellant argues the circuit court erred in granting defendant-appellee's section 2-615 motion to dismiss. Plaintiff-appellant argues that taking the facts alleged in the complaint in a light most favorable to him, the first amended complaint alleges sufficient facts that if proven would establish the Stormwater Utility Fee is an unconstitutional tax. For the reasons stated below, we agree that at this stage of the litigation, taking all well-pled facts as true and construing them in a light most favorable to him, the first amended complaint states a cause of action that the Stormwater Utility Fee bears no relationship to the stormwater service being provided. Accordingly, we reverse the order of the circuit court dismissing the first amended complaint, and remand for further proceedings.

¶ 4 JURISDICTION

¶ 5 On August 19, 2015, the circuit court entered an order dismissing plaintiff-appellee's first amended complaint pursuant to 735 ILCS 5/2-615 (West 2012). Plaintiff-appellee timely filed his Notice of Appeal on August 28, 2015. Accordingly, this court has jurisdiction over this

matter pursuant to Article VI, Section 6 of the Illinois Constitution, and Illinois Supreme Court Rules 301 and 303. Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 304(a) (eff. May 1, 2007).

¶ 6 BACKGROUND

¶ 7 The defendant-appellee, Village of Winnetka (hereinafter the Village), is a municipal corporation organized under the laws of the state of Illinois. Plaintiff-appellant, Mark Green (hereinafter Green), is a resident and owner of property within the Village and has at all relevant times been subject to the Stormwater Utility Fee (hereinafter SUF), which he has paid under protest since the SUF came into force. On February 13, 2015, Green filed a declaratory judgment action in the circuit court alleging the SUF was actually a tax disguised as a fee. The original complaint and then the first amended complaint alleged the SUF was an unconstitutional tax in violation of the uniformity in taxation clause found at Article IX, Section 4 of the Illinois Constitution and Section 5/8-3-1 of the Illinois Municipal Code. Ill. Const. 1970, art. IX, §4; 65 ILCS 5/8-3-1 (West 2012).

¶ 8 The Village is a suburb on Chicago's north shore. Situated along a large floodplain, the Village boasts a network of storm and sewers and pumping stations to alleviate flooding. Following severe floods in 2008, Winnetka's Village Council (hereinafter the Council) sought improvements to its existing stormwater system that could further alleviate flooding. In 2011, however, the Village experienced massive rainfall that led to a "100 year flood," meaning a flood event that has a one percent chance of occurring in a given year. The Council scrapped its plan to compensate for a moderate flood event, and instead sought to design a system sufficient to withstand a 100 year flood.

¶ 9 The Council's efforts culminated in the "Stormwater Master Plan." The centerpiece of the Plan called for the construction of a 7,900 foot long storm sewer running underneath Willow Road (hereinafter the Tunnel). Originally projected to cost $34.5 million, the Tunnel was intended to provide flood relief to roughly half of the Village. Apart from the Tunnel, the Plan also called for an additional $8 million in improvements to the Village's existing stormwater system in three other drainage areas.[1]

¶ 10 In order to finance the Plan, the Council allocated $8.2 million in reserve funds, which were more than sufficient to cover the $8 million of improvements to the existing stormwater system. The Council opted to finance the $34.5 million Tunnel by issuing 30-year municipal bonds, at a cost to the Village of $61.5 million in principle and interest over the next 30 years. The Council decided to service the bonds issued to finance the costs of constructing the Tunnel by enacting the SUF.

¶ 11 On March 4, 2014, the Village Council adopted the Stormwater ordinance, which was codified as Chapter 13.16 of the Village Code. First, the legislative findings section of the ordinance acknowledges that all real property in the Village contributes to runoff and either uses or benefits from the maintenance of the stormwater system. It further states that it is in the best interest of the health, welfare, safety, and general welfare that the stormwater system be operated as a municipal utility that is funded through user fees. The ordinance states that is the policy of the Village to provide a dedicated funding source for the construction, maintenance, operation, and improvement of stormwater facilities in the Village. It also explains that it is the policy of

[1] After the first amended complaint was dismissed and while this appeal was pending, the Village decided to abandon the Willow Road Tunnel project. Since this is a matter of public record, we may take judicial notice of this fact. *Am. Nat. Bank & Trust Co. of Chicago v. City of Chicago*, 4 Ill. App. 3d 127, 130 (1971) citing *Nordine v. Illinois Power Co.*, 32 Ill. 2d 421, 428 (1965).

the Village that any owner of real property in the Village that uses or benefits from the stormwater system be charged a stormwater utility fee.

¶ 12 A later section of the ordinance then imposes the SUF on the owners of property in the Village. The SUF uses a billing unit known as the "Equivalent Runoff Unit" (hereinafter ERU) of 3,400 square feet of impervious surface. Impervious surfaces are defined as those surfaces that do not allow water to penetrate the ground, such as driveways, concrete patios, sidewalks and roofs. Thus, all owners of developed property are subject to the SUF. Accordingly, while acknowledging all real property benefits or uses the stormwater system, only those with developed property are subject to the SUF.

¶ 13 The SUF is defined as having two components: the "base fee" and "other rates fees, and charges." The ordinance defines the base fee as "the amount to be charged each month per ERU in order to produce the amount of principal and interest on any outstanding stormwater utility system debt that is due and payable during the fiscal year for which the Base Fee is calculated." The ordinance defines the second component of the SUF as "other rates, fees, and charges the Village determines are necessary to recover all costs related to operating, maintaining, and improving the stormwater utility." The ordinance provides that "all unpaid amounts of rates, fees and charges for stormwater utility service shall constitute a lien against the property to which service was provided, to the extent authorized by law." Finally, the ordinance provides that "all revenues from the stormwater utility fee be deposited in a stormwater utility enterprise fund to be used solely for the operation, maintenance, expansion, and rehabilitation of the stormwater infrastructure."

¶ 14 Green alleges in the first amended complaint that to ensure the Village receives enough funds to finance the $61.5 million in principle and interest payments over the next 30 years, the

Council set an initial base rate of $262 per ERU, which would then climb steadily to $362 per ERU by 2018. The fee is assessed only on property owners, calculated by multiplying the total ERUs on their property by the applicable base rate. Accordingly, the first amended complaint alleges since the SUF is designed to cover the debt issuance needed to finance the Tunnel, it bears no relation to a property owner's actual use of the existing stormwater system. Furthermore, Green alleges, and the Village concedes, no attempt is made to measure the actual stormwater discharged into the system by any property owner.

¶ 15 On June 11, 2015, the Village filed a "Memorandum in support of 2-615 motion to dismiss and for judgment on the pleadings," though it sought only relief pursuant to 735 ILCS 5/2-615 (West 2012). The basis for the Village's motion was the SUF is a valid user fee and not a tax under Illinois law. The Village argued the SUF is a fee because (1) it compensates the Village for property owner's use of the stormwater system, (2) the proceeds are segregated into a special fund for the stormwater system, and (3) the SUF is based on the cost of constructing, maintaining, and operating the stormwater system. Furthermore, the Village argued that SUF is directly and proportionately related to a property owner's use of the system and the ordinance allows for the SUF to be adjusted as the impervious surface on a property changes. Finally, the Village relied extensively on *Church of Peace v. City of Rock Island*, 357 Ill. App. 3d 471 (2005), a third district case where the appellate court upheld a stormwater utility fee.

¶ 16 In response to the Village's section 2-615 motion, Green argued he had sufficiently alleged the SUF was an invalid tax and not a valid user fee. First, Green argued that the Village's motion and supporting memorandum improperly sought to contradict the facts stated in the first amended complaint. He further argued the fee imposed to finance future construction, like the Tunnel, are not fees imposed based on actual use. Finally, he argued the reliance on *Church of*

Peace was misplaced because that case was decided on summary judgment and this case was only in the pleading stage.

¶ 17 In reply, the Village maintained that the SUF was a valid user fee that did not violate the Illinois Constitution or the Illinois Municipal Code.

¶ 18 After a hearing, the circuit court granted the Village's motion to dismiss. The circuit court found that pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)), plaintiff could set forth no facts which would support his claim that the SUF was an invalid tax.

¶ 19 Green timely appealed.

¶ 20 ANALYSIS

¶ 21 On appeal, Green argues the first amended complaint did set forth enough facts that taken as true demonstrated the SUF charged by the Village is an unconstitutional tax. He argues the first amended complaint alleged no relationship between the SUF and a property owner's use of the system. The Village maintains the SUF is a fee and not a tax, which the Village may impose on its residents without a vote. We agree with Green that the first amended complaint states a cause of action that the SUF is an unconstitutional tax levied without voter approval.

¶ 22 A motion to dismiss brought pursuant to section 2-615 of the Code attacks the legal sufficiency of the complaint. *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 348 (2003). The motion does not raise affirmative factual defenses, but rather alleges defects apparent on the face of the complaint. *Id.* Illinois is a fact pleading jurisdiction. *Weiss v. Waterhouse Securities, Inc.*, 208 Ill. 2d 439, 451(2004). Under section 2-615, the only question presented "is whether sufficient facts are contained in the pleadings which, if proved, would entitle plaintiff to relief." *Urbaitis v. Commonwealth Edison,* 143 Ill. 2d 458, 471(1991).

¶ 23 When ruling on a motion to dismiss pursuant to section 2-615, "only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered." *K. Miller Construction Co. v. McGinnis*, 238 Ill. 2d 284, 291 (2010). All well-pleaded facts in the complaint are accepted as true as well as all reasonable inferences drawn from those well-pleaded facts. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 9 (1992). The allegations in the complaint are to be construed in the light most favorable to plaintiff. *Id.* A plaintiff is not required to set forth evidence in the complaint. *Chandler*, 207 Ill. 2d at 348. A plaintiff, however, cannot simply allege conclusions when opposing a motion to dismiss. *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 408 (1996). A cause of action should be dismissed "if it is clearly apparent that no set of facts can be proven which will entitle the plaintiff to recovery." *Chandler*, 207 Ill. 2d at 349. Review of a motion to dismiss pursuant to section 2-615 is *de novo*. *Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997).

¶ 24 At the outset we note that Green's action against the Village is framed as a facial challenge to the constitutional validity of the ordinance which brought the SUF into existence. "A facial challenge to the constitutionality of a legislative enactment is the most difficult challenge to mount successfully, because an enactment is facially invalid only if no set of circumstances exists under which it would be valid." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 306 (2008) (internal citations omitted). Contrast this with an "as-applied" challenge where a plaintiff protests against how an enactment was applied in the particular context in which the plaintiff acted or proposed to act, and the facts surrounding the plaintiff's particular circumstances become relevant. *Id.* citing *Lamar Whiteco Outdoor Corp. v. City of West Chicago*, 355 Ill. App. 3d 352, 365 (2005). A successful facial attack voids the subject legislation in its entirety and in all applications. *Lamar*, 355 Ill. App. 3d at 365.

¶ 25 Under Illinois law, "a tax is a charge having no relation to the service rendered and is assessed to provide general revenue rather than compensation. A fee, on the other hand, is proportional to a benefit or service rendered." *Church of Peace*, 357 Ill. App. 3d at 457 (quoting *Crocker v. Finely*, 99 Ill. 2d 444, 452 (1984)). Fees are paid pursuant to a contractual relationship, either express or implied, with a unit of government in exchange for such services, property, or improvements. *People ex rel. County of DuPage v. Smith*, 21 Ill. 2d 572, 583 (1961). As compensation, fees are based on the value or cost of the services, property, or improvements provided. *Cook v. Fairbank*, 222 Ill. 578, 582-86 (1906) (services); *People ex rel. Curren v. Schommer*, 392 Ill. 17, 22-23 (1945) (property). Under Illinois law, the amount of a fee need not be the precise or "actual" value or cost of the services, property, or improvements. *Kough v. Hoehler*, 413 Ill. 409, 417-18 (1952). Rather, a fee is valid so long as the amount bears a reasonable relationship to that cost. *A & H Vending Service, Inc. v. Village of Schaumburg*, 168 Ill. App. 3d. 61, 64 (1988).

¶ 26 In contrast to a fee, a tax is "a charge having no relation to the services rendered, assessed to provide general revenue rather than compensation" for the receipt of services or the use of property and improvements. *Crocker*, 99 Ill. 2d 444, 452. A tax is levied by government through its sovereign power for the general "support of government, and for all public needs." *Wagner*, 146 Ill. at 152. As such, the amount of tax is determined by the cost of all public needs at the time the tax is levied, not the cost of providing a particular service, property or improvement. *Curren*, 392 Ill. at 22-23.

¶ 27 Based on the well-pled facts contained within Green's complaint, and taking all reasonable inferences there from as true, the first amended complaint properly alleges the SUF is an unconstitutional tax being levied on the property owners of the Village. The first amended

complaint alleges that the SUF has no relationship to the actual use of the Village's stormwater system. Green alleges the SUF is incurred regardless of whether a property owner actually discharges storm runoff into the system. Furthermore, despite an acknowledgement by the Village that all property within the Village, both developed and undeveloped, discharge water into the stormwater utility system, only owners of developed property are assessed the SUF.

¶ 28 Green further alleges that the SUF is being used not to provide any service to the property owners, but to retire the bonds issued to fund the construction of the Tunnel, which the Village has recently decided not to construct. The first amended complaint further alleges as the payments due on the bonds increase the SUF climbs in an equal percentage to ensure the SUF can cover the debt payment. The ordinance confirms the "base fee" being charged as part of the SUF "shall be the amount to be charged each month per ERU in order to produce the amount of principal and interest on any outstanding stormwater utility system debt that is due and payable during the fiscal year for which the Base Fee is calculated."

¶ 29 Taking such allegations as true at this stage of the proceeding, Green successfully alleges the SUF bears no relationship to a property owner's use of the storm water system. See *Smith*, 21 Ill. 2d 572, 583 (finding fees are paid pursuant to a contractual relationship, either express or implied, with a unit of government in exchange for such services, property, or improvements); *Crocker*, 99 Ill. 2d at 452 ("a charge having no relation to the services rendered, assessed to provide general revenue rather than compensation, is a tax."). Based on the allegations of the first amended complaint it cannot be said that the SUF is a charge for the use of the Village's property or improvement rather than a contribution for the support of the government. *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 165 Ill. 2d 25, 43 (1995).

¶ 30 The Village argues that the ordinance creating the SUF provides for a facially-valid stormwater fee. It argues that property owners in the Village pay the SUF in exchange for use of the Village's services, property, and improvements (i.e. the stormwater system). It argues that the SUF is compensatory in nature because it is based on the value or cost of the services, property, and improvements provided by the Village: constructing, maintaining, and operating the stormwater system. However, such a claim is contradicted by the plain wording of the ordinance itself.

¶ 31 The "base fee" being charged as part of the SUF "shall be the amount to be charged each month per ERU in order to produce the amount of principal and interest on any outstanding stormwater utility system debt that is due and payable during the fiscal year for which the Base Fee is calculated." By the plain language of the ordinance the base fee bears no relation to the construction, maintenance, or operation of the stormwater system. The "base fee" is being used to service debt, not compensate the Village for the use of the stormwater system. See *Crocker*, 99 Ill. 2d at 452 (stating a charge having no relation to the services rendered, assessed to provide general revenue rather than compensation, is a tax); *Boyton v. Kusper*, 112 Ill. 2d 356, 364 (affirming the definition of tax laid out in *Crocker*).

¶ 32 The Village's reliance on cases like *Church of Peace* at this stage of the litigation is misplaced. First, while *Church of Peace* dealt with a similar ordinance that imposed a stormwater fee on the residents of Rock Island, Illinois; the Rock Island ordinance is not before us and it would be inappropriate to conclude the ordinances are the same for the purposes of imposing a stormwater fee. Second and equally important, *Church of Peace* was decided on summary judgment, after each party stipulated there was no genuine issue of material fact and summary judgment for one side or the other would be appropriate as a matter of law. *Church of*

Peace, 357 Ill. App. 3d at 474. Unlike *Church of Peace*, this litigation is only at the pleading stage. The Village argues that the distinction between the pleading stage and summary judgment is immaterial, it is not.

¶ 33 On a section 2-615 motion to dismiss, our analysis is confined solely to the well-pled facts in the complaint, which we must take as true, and all reasonable inferences there from. *Cwikla v Sheir*, 345 Ill. App. 3d 23, 29 (2003). In *Church of Peace*, cross motions for summary judgment were filed. *Church of Peace*, 357 Ill. App. 3d at 474.

¶ 34 When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. Summary judgment motions are governed by section 2–1005 of the Code of Civil Procedure (735 ILCS 5/2–1005 (West 2012)). Pursuant to that statute, summary judgment should be granted only where the pleadings, depositions, admissions and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2006).

¶ 35 Governed solely by the allegations of the first amended complaint, we have determined it states a cause of action by alleging that the SUF is in no way related to stormwater services or use of Village property, but the servicing of debt. The resolution of this case requires a factual determination as to the extent the SUF is actually used to construct, maintain, operate or improve the stormwater system in the village of Winnetka. For this reason, resolution of the matter at the pleading stage is not appropriate.

¶ 36 In closing, we note that we express no opinion as to the ultimate question of whether the SUF charged by the ordinance are reasonably related to the costs the use of the stormwater system. We hold only that the circuit court erred in dismissing this matter at the pleading stage.

¶ 37 CONCLUSION

¶ 38 Based on the well-pled allegations of the first amended complaint, we find that it does set forth facts that if proven would demonstrate the SUF is a tax and not a fee under Illinois law. Accordingly, we reverse the order of the circuit court dismissing Green's first amended complaint and remand for further proceedings.

¶ 39 Reverse and remanded.

¶ 40 JUSTICE CONNORS, dissenting.

¶ 41 I respectfully dissent. All counts of Green's first amended complaint depend on the legal conclusion that the SUF is a tax and not a fee. As the majority notes, because Illinois is a fact-pleading jurisdiction, a plaintiff must allege facts, not mere conclusions, to establish his claim as a viable cause of action. *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305 (2008). In considering the sufficiency of a complaint under section 2-615, courts must disregard allegations which are contrary to facts of which the court takes judicial notice. See *Island Lake Water Company, Inc. v. LaSalle Development Corp*., 143 Ill. App. 3d 310, 320 (1986) (court properly took judicial notice of ordinances adopted by village; to the extent that the ordinances were inconsistent with water company's allegations, court must disregard those allegations). If, after disregarding the conclusions and contrary facts that are plead, there are not sufficient allegations of fact which state a cause of action against the defendant, the motion to dismiss must be granted. *Knox College v. Celotex Corp*., 88 Ill. 2d 407, 426 (1981).

¶ 42 Here, Green's action against the Village is solely a facial challenge to the constitutional validity of the ordinance. As the majority also recognizes, a challenge to the facial validity of a statute is the most difficult challenge to mount successfully because an enactment is invalid on its face only if "no set of circumstances exists under which it would be valid." *People v. One 1998 GMC*, 2011 IL 110236, ¶ 20. "The fact that the enactment could be found unconstitutional under some set of circumstances does not establish its facial invalidity." *Napleton*, 229 Ill. 2d at 306.

¶ 43 I believe that after disregarding Green's legal conclusions and allegations that contradict the ordinance, there are not sufficient allegations of fact establishing a cause of action for a facial challenge to the constitutional validity of the ordinance. The majority finds that Green successfully alleges that SUF bears no relationship to a property owner's use of the storm water system, stating "[b]ased on the allegations of the first amended complaint it cannot be said that the SUF is a charge for the use of the Village's property or improvement rather than a contribution for the support of the government." I disagree.

¶ 44 The ordinance specifically states that the SUF is "based on the extent to which each parcel creates a need for stormwater management; the amount of impervious area on each parcel; and the cost of operating and maintaining, and improving the stormwater system." Winnetka Village Code § 13.16.060. The ordinance defines "impervious area" as the area that does not allow water to penetrate the ground and therefore causes stormwater runoff. Winnetka Village Code § 13.16.20. Parcels that have an impervious area of less than 170 square feet are not subject to the SUF, and property owners that do not use the Village's stormwater system because their parcels do not contribute stormwater into the system may obtain a 100 percent credit of the

SUF. Winnetka Village Code §§ 13.16.70, 13.16.140. Accordingly, because the ordinance specifically contradicts Green's allegations, such allegations should be disregarded.

¶ 45 The majority also finds that the "base fee" being charged as part of the SUF is being used to service a debt, and not to compensate the Village for the use of the stormwater system, and presumably is therefore a tax and not a fee. However, the ordinance specifically states that the SUF is "sum" of both the base fee as well as "[s]uch other rates, fees and charges that the Village Council determines are necessary to recover all costs related to operating, maintaining and improving the stormwater system utility." Winnetka Village Code § 13.16.70(c)(1), (2). Moreover, the ordinance states that the clear purpose of the ordinance is to:

¶ 46 "establish a stormwater utility to protect the public health, safety and welfare of the residents of the Village of Winnetka from damage to property and local waterways from stormwater runoff and floods, through the construction and operation of flood reduction and control facilities, and through water quality management. It is also the purpose of this chapter to provide an effective and long term approach to stormwater management within the Village by identifying and providing an adequate and stable funding source for stormwater management." Winnetka Village Code § 13.16.010(c).

¶ 47 Accordingly, I disagree with the majority's conclusion that the SUF is a tax, having no relation to the services rendered, rather than a fee that is paid pursuant to a contractual relationship with a unit of government in exchange for such services, property, or improvements. See *Smith*, 21 Ill. 2d at 583; *Crocker*, 99 Ill. 2d at 452.

¶ 48 The law on this subject in Illinois is set forth in *Church of Peace v. City of Rock Island*, 357 Ill. App. 3d 471, 476 (2005), which clearly states that stormwater service charges are a fee

and not a tax. *Church of Peace* was decided by mainly relying on the content of the fee ordinance, and it has not been overturned. In that case, the court found that the stormwater service charge was clearly a fee because the record established that there was a direct and proportional relationship between imperviousness and stormwater run-off, thus creating a rational relationship between the amount of the fee and the contribution of a parcel to the use of the stormwater system. *Id*. at 475. The court reviewed cases from Oregon (*Dennehy v. City of Gresham*, 12 Or. Tax 194 (1992)), California (*Howard Jarvis Taxpayers Association v. City of Salinas*, 98 Cal. App. 4th 1351 (6th Dist. 2002)), and Georgia (*McLeod v. Columbia County*, 278 Ga. 242 (2004)), and found that the most recent cases held that similar service charges constituted a fee. The court further noted that the court in *McLeod* found that a storm drainage assessment based proportionately upon the size of developed run-off surface was a fee, not a tax. *McLeod*, 278 G. at 244. Moreover, there are other jurisdictions that have more recently found a similar service charge to be a fee rather than a tax. See *City of Lewiston v. Gladu*, 40 A. 3d 964 (Me. 2012) (city's stormwater assessment was a fee, rather than a tax), and *Homewood Village, LLC v. United Government of Athens-Clarke County*, 739 S.E. 2d 316 (Ga. 2013) (stormwater utility ordinance imposed a permissible fee, rather than an unconstitutional tax).

¶ 49 Accordingly, after disregarding the legal conclusions and allegations that conflict with the ordinance in Green's complaint, I would find that Green did not successfully allege facts which state a cause of action for a facial challenge to the constitutional validity of the ordinance. I would find that Green failed to allege that "no set of circumstances exist under which [the ordinance] would be valid," because the SUF constitutes a fee and not a tax. *One 1998 GMC*, 2011 IL 110236 at ¶ 20.