

STATE OF NORTH CAROLINA
COUNTY OF JOHNSTON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20-CVS-2903

GRANITE LAND AND TIMBER,
LLC, Individually and behalf of all
others similarly situated,

Plaintiff,

vs.

TOWN OF CLAYTON,

Defendant.

ORDER AND JUDGMENT

FILED
2022 NOV 21 P 3:32
JOHNSTON COUNTY C.S.C.
BY *[Signature]*

THIS CAUSE came on to be heard before the undersigned Superior Court Judge during the October 24, 2022, civil session of Johnston County Superior Court upon Plaintiff's Motion for Summary Judgment, Defendant's Motion for Partial Judgment on the Pleadings, and Defendant's Motion For Leave to Conduct Discovery With Class Plaintiffs and Continue Plaintiff's Motion for Summary Judgment. James R. DeMay, J. Hunter Bryson, and W. Mark Cumalander, Milberg Coleman Bryson Phillips Grossman, PLLC were present and appearing for Plaintiff and the Class. Dan M. Hartzog, Jr. and Katherine Barber-Jones, Hartzog Law Group LLP were present and appearing for Defendant Town of Clayton.

The Court, having considered the motions, affidavits and other materials submitted in support of and in opposition to the motions, the briefs and arguments of the parties, and other appropriate matters of record, FINDS and CONCLUDES as follows:

Background

1. Plaintiff filed a Class Action Complaint on September 21, 2020, alleging that the Town has unlawfully charged "recreation fees-in-lieu of land dedication" ("Recreation Fees") to residential subdivision developers in violation of N.C.G.S. § 160A-372 (now N.C.G.S. § 160D-804(d)), and that Plaintiff and a Class of Recreation Fee payors are entitled to the refund of the Recreation Fees, plus interest, pursuant to N.C.G.S. § 160A-363(e) (now N.C.G.S. § 160D-106).

2. The Town filed an Answer denying the material allegations of the Complaint on November 9, 2020.

3. The parties have engaged in discovery, including interrogatories, document production, and the depositions of Town Parks & Recreation Director Scott Barnard, the Town of Clayton (through Town Manager Richard Cappola, Jr. and Town Finance Director Robert McKie, Jr. as Rule 30(b)(6) deponents), and Plaintiff Granite Land & Timber, LLC (through David Stallings as Rule 30(b)(6) deponent).

4. On April 27, 2022, Plaintiff filed a Motion for Class Certification pursuant to Rule 23, seeking the certification of a Class consisting of all Recreation Fee payors from September 22, 2017 (the date three year prior to the commencement of this action) through the present.

5. Plaintiff's Motion for Class Certification was heard by the Hon. Thomas H. Lock at the May 23, 2022 session of Johnston County Superior Court. The parties submitted briefs in support of and in opposition to the motion. On June 9, 2022, Judge Lock entered an Order Allowing Plaintiff's Motion for Class Certification, which certified the following Class:

All natural persons, corporations, or other entities who (a) at any point from September 22, 2017 through the present (b) paid Recreation Fees to the Town of Clayton pursuant to the adopted schedule of rates and fees and/or policies of the Town.

6. The Class consists of the persons and entities that paid Recreation Fees to the Town, which at the time included 51 total Class Members. The Class Certification Order appoints Plaintiff Granite Land and Timber, LLC as representative of the Class, and Plaintiff's counsel as Class Counsel.

7. The Class Certification Order determined that there are common issues of fact and law that affect all Class Members in the same manner, including:

- a. Whether the Town's Recreation Fees violate N.C.G.S. § 160D-804(d) because Class Members were already required to dedicate or reserve recreation or open space areas for their subdivisions pursuant to the Town's UDO;
- b. Whether the Town's Recreation Fees violate N.C.G.S. § 160D-804(d) and/or the Town's Ordinances because the Fees are not based on the property tax value of the subdivision or otherwise exceed the value of land that would otherwise be dedicated or reserved for recreation or open space areas;
- c. Whether the Recreation Fees violate N.C.G.S. § 160D-804(d) because the Fees were not used by the Town to acquire and develop

recreation areas in the immediate area of the Class Member's subdivision;

- d. Whether the Recreation Fees are unlawful because the Fees lack any reasonable relationship to the benefit received by Class members in satisfying the requirements of N.C.G.S. § 160D-804(d);
- e. Whether Class Members are entitled to the refund of all unlawful Recreation Fees charged and collected by the Town during the Class Period, plus interest at the rate of 6% per annum from the date of payment pursuant to N.C.G.S. § 160D-106; and
- f. Whether Class Members are entitled to their costs and attorneys' fees pursuant to N.C.G.S. § 6-21.7, as the Town has violated unambiguous limits on its lawful authority.

(Class Cert. Order, ¶ 23).

8. The Town did not appeal the Class Certification Order to the North Carolina Supreme Court pursuant to N.C.G.S. § 7A-27(a)(4).

9. The Class Certification Order required the Town to provide the last-known mailing addresses of all Class Members so the Class Members could be provided notice of their right to opt-out of the Class, if desired. The Town produced the addresses for the 51 total Class Members on July 1, 2022. Notices were sent by the notice administrator, Settlement Services, Inc., on July 22, 2022. No Class Member opted out of the Class prior to the September 5, 2022 opt-out deadline.

10. Plaintiff filed a Motion for Summary Judgment on June 1, 2022¹, contending that the Recreation Fees violate N.C.G.S. § 160D-804(d) as a matter of law for any of the common issues found by Judge Lock in the Class Certification Order, and that Plaintiff and Class Members are entitled to the refund of all Recreation Fees charged and collected by the Town from September 22, 2017 through the present, plus interest, pursuant to N.C.G.S. § 160D-106.

11. On September 19, 2022, the Town filed a Motion for Partial Judgment on the Pleadings, contending that the claims of Plaintiff and Class Members are subject to a one-year statute of limitations under N.C.G.S. § 160A-393.1(b), and that the Class should therefore be limited to parties that paid Recreation Fees to the Town

¹ June 1, 2022 was the deadline for the parties to file summary judgment motions pursuant to the Case Management Order.

from September 21, 2019 (one year prior to the commencement of this action) through the present.

12. Also on September 19, 2022, the Town purported to serve, through Plaintiff's counsel, "Defendant's First Interrogatories and Requests for Production of Documents" on 17 absent Class Members.² On September 27, 2022, the Town purported to serve, through Plaintiff's counsel, a revised "First Set of Interrogatories and Requests for Production of Documents" on the same 17 absent Class Members.

13. On October 17, 2022, the Town filed its Motion for Leave to Conduct Discovery with Class Plaintiffs and Continue Plaintiff's Motion for Summary Judgment Interrogatories, seeking leave to serve its revised "First Set of Interrogatories and Requests for Production of Documents" on the 17 absent Class Members, and to continue the hearing on Plaintiff's Motion for Summary Judgment.

14. Plaintiff's Motion for Summary Judgment, Defendant's Motion for Partial Judgment on the Pleadings, and Defendant's Motion for Leave to Conduct Discovery with Class Plaintiffs and Continue Plaintiff's Motion for Summary Judgment came on for hearing before the undersigned Superior Court Judge during the October 24, 2022 civil session of Johnston County Superior Court. The parties submitted briefs and other materials in support of and in opposition to the motions, all of which have been considered by the Court.

Plaintiff's Motion for Summary Judgment

15. Plaintiff has moved for summary judgment on the grounds that there are no genuine issues of material fact as to the common issues among Class Members identified in the Class Certification Order.

16. Summary judgment is appropriate here, as the Court must decide whether the Town's Recreation Fees violate N.C.G.S. § 160D-804(d) as a matter of law. Similar actions challenging local government development fees have likewise been decided on motions for summary judgment. *See Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15, 789 S.E.2d 454 (2016); *Kidd Construction Group, LLC v. Greenville Utilities Commission*, 271 N.C. App. 392, 845 S.E.2d 797 (2020), *disc. review denied*, 377 N.C. 564 (2021); *Daedalus, LLC v. City of Charlotte*, 282 N.C. App. 452, 872 S.E.2d 105 (2022), *disc. review denied*, 876 S.E.2d 290 (2022); *Point South*

² The Town purported to serve its First Interrogatories and Requests for Production of Documents on Academy Point, LLC, Ashcroft Partners, LLC, Badgergate Development Company, Cloudbreak Investments, LLC, Creech NC, LLC, Dan Ryan Builders, Forestar, Gordon Estates, Inc., HLMRVT LLC, Mungo Homes, PoSteel, LLC, Pulte Group, Riverwild, Sam's Branch, LLC, Stone Street Builders, LLC, T.H. Clayton Development Co., and Terramor Homes.

Properties, LLC v. Cape Fear Public Utility Authority, 243 N.C. App. 508, 778 S.E.2d 284 (2015); *Lanvale Properties, LLC v. County of Cabarrus*, 366 N.C. 142, 731 S.E.2d 800 (2012); *Durham Land Owners Ass'n v. County of Durham*, 177 N.C. App. 629, 630 S.E.2d 200 (2006), *disc. review denied*, 360 N.C. 532 (2006); *Amward Homes, Inc. v. Town of Cary*, 206 N.C. App. 38, 689 S.E.2d 404 (2010), *aff'd without precedential value*, 365 N.C. 305 (2011).

17. Common issues (a), (b), and (c) in the Class Certification Order each relate to whether the Recreation Fees violate the Town's lawful powers under N.C.G.S. § 160D-804(d) (formerly N.C.G.S. § 160A-373).

18. The Town's Recreation Fees are unlawful if they violate N.C.G.S. § 160D-804(d) under any of the three grounds identified as common issues (a), (b), and (c) in the Class Certification Order.

19. N.C.G.S. § 160D-804(d) (formerly N.C.G.S. § 160A-373) authorizes the Town to require residential subdivision developers to dedicate or reserve recreation areas serving residents of the subdivision, or, alternatively, to pay funds to the Town to be used to acquire or develop recreation areas serving residents of the subdivision, as follows:

(d) Recreation Areas and Open Space. – The regulation may provide for the dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision or, alternatively, for payment of funds to be used to acquire or develop recreation areas serving residents of the development or subdivision or more than one subdivision or development within the immediate area. All funds received by cities pursuant to this subsection shall be used only for the acquisition or development of recreation, park, or open space sites. All funds received by counties pursuant to this subsection shall be used only for the acquisition of recreation, park, or open space sites. Any formula enacted to determine the amount of funds that are to be provided under this subsection shall be based on the value of the development or subdivision for property tax purposes. The regulation may allow a combination or partial payment of funds and partial dedication of land when the governing board determines that this combination is in the best interests of the citizens of the area to be served.

N.C.G.S. § 160D-804(d).

20. The legislative intent of N.C.G.S. § 160D-804(d) is to “somehow secure to the residents of the ‘immediate neighborhood within the subdivision’ the benefit of

particular recreation areas.” *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 107, 388 S.E.2d 538, 542 (1990) (citing the former N.C.G.S. § 160A-372).

21. Unlike some other municipalities, the Town has not obtained any local act authority from the North Carolina General Assembly authorizing it to deviate from the provisions of N.C.G.S. § 160D-804(d) in charging Recreation Fees.

22. As a condition of development approval, the Town requires residential subdivisions to privately dedicate or reserve land (such as through a homeowner’s association) for recreation areas serving residents of the subdivision, including playgrounds, tot lots, mini-parks, clubhouse and pool amenities, and greenways.

23. As a further condition of development approval, in addition to the private dedication or reservation of land for recreation areas serving residents of the subdivision, the Town also requires residential subdivision developers to either (1) dedicate land to the Town for public recreation areas, or (2) pay the Recreation Fee to the Town. Since September 22, 2017, the Town has not accepted any developer’s dedication of land for public recreation areas, and all developers have instead been required to pay the Recreation Fees.

24. The Recreation Fees are adopted by the Town each year as part of the Town’s annual budget ordinance and are included in the Town’s annual schedule of rate and fees. The Recreation Fees are fixed amounts that are not based on the property tax value of the developer’s subdivision and are presently \$2,000 per lot. The Recreation Fees are uniformly charged to all developers in the same fixed amount regardless of the property tax value or other circumstances of the subdivision.³

25. The Town pools all Recreation Fees into its Fund 210 and does not track how a developer’s Fees are spent. The Recreation Fees are a general revenue source for the Town and are spent by the Town on any recreation project in the Town limits, without regard to the location of the subdivision for which the Fees were paid.

26. From September 22, 2017 through June 25, 2022, the Town collected \$2,319,875 in Recreation Fees from Class Members, and has spent \$788,900 of these Fees: \$88,900 on the Sam’s Branch II Greenway project, and \$700,000 on improvements to the Clayton Community Center and for design contracts for improvements to several existing parks. The Town testified that it presently has no plan for how the remaining \$1,530,975 in Recreation Fees will be spent.

³ Other municipalities have obtained local act authority from the General Assembly authorizing them to charge per-unit Recreation Fees without regard to the property tax value of the subdivision.

27. There are no genuine issues of material fact that the Town's Recreation Fees violate the Town's lawful authority under N.C.G.S. § 160D-804(d).⁴

28. Common issue (e) in the Class Certification Order is whether the Town's Recreation Fees must be refunded, plus interest, pursuant to N.C.G.S. § 160D-106.

29. N.C.G.S. § 160D-106 provides that when a local government charges a fee for development or development approval that is not specifically authorized by law, the local government is liable to refund the fee, plus interest, to the party that paid the fee:

If a local government is found to have illegally imposed a tax, fee, or monetary contribution for development or a development approval not specifically authorized by law, the local government shall return the tax, fee, or monetary contribution plus interest of six percent (6%) per annum to the person who made the payment or as directed by a court if the person making the payment is no longer in existence.

30. Class Members are entitled to the refund of all unlawful Recreation Fees, plus interest, pursuant to N.C.G.S. § 160D-106.

The Town's Motion for Partial Judgment on the Pleadings

31. The Town has moved for partial judgment on the pleadings, contending that the claims of Plaintiff and Class Members are subject to a one-year statute of limitations under N.C.G.S. § 160A-393.1(b), and that the Class should therefore be limited to parties that paid Recreation Fees to the Town from September 21, 2019 (one year prior to the commencement of this action) through the present.

32. The claim of Plaintiff and Class Members for the refund of the unlawful Recreation Fees is "one resting upon an alleged statutory violation that resulted in the exaction of an unlawful payment which [Plaintiff and Class Members] had an inherent right to recoup." *Quality Built Homes v. Town of Carthage*, 371 N.C. 60, 73, 813 S.E.2d 218, 228 (2018); see also *Zander v. Orange County*, 376 N.C. 513, 851 S.E.2d 883 (2020), *Bill Clark Homes of Raleigh, LLC v. Town of Fuquay-Varina*, 281 N.C. App. 1, 869 S.E.2d 1 (2021).

⁴ As a result, it is not necessary for the Court to reach common issue (d), which is an alternative claim as to whether the Recreation Fees are unlawful because the Fees lack any reasonable relationship to the benefit received by Class members in satisfying the requirements of N.C.G.S. § 160D-804(d).

33. The refund claims of Plaintiff and Class Members are subject to the three-year statute of limitations for a liability created by statute under N.C.G.S. § 1-52(2).

**The Town's Motion for Leave to Conduct Discovery with Class Plaintiffs
and Continue Plaintiff's Motion for Summary Judgment**

34. The Town has moved to continue Plaintiff's Motion for Summary Judgment to allow it additional time to conduct discovery with absent Class Members.

35. The Town's request is futile because the Class Certification Order has already determined that the common issues affect all Class Members in the same manner. Thus, any discovery relevant to the common issues could have been done by the Town through Plaintiff, as the appointed Class Representative.

36. The Town did not appeal the Class Certification Order pursuant to N.C.G.S. § 7A-27(a)(4), and the Court is bound by the Order. Judge Lock found in the Class Certification Order found that it is more appropriate to litigate this case as a class action, as opposed to 51 separate lawsuits. (Class Cert. Order, ¶¶ 44, 45). By seeking to conduct discovery on absent Class Members, the Town effectively seeks to litigate the claims of Class Members individually. This would defeat the purpose of this case as a class action.

37. Further, to allow discovery of absent Class Members would be contrary to the purpose of the class action mechanism under Rule 23, which is for a Class Representative to litigate the case on behalf of the absent Class Members, who are not required to do anything. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) ("An absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."). The Town has not cited any North Carolina authority authorizing a defendant to engage in discovery with absent Class Members, and the Court is likewise unaware of any such authority.

38. The Town has also unreasonably delayed in seeking to serve discovery on absent Class Members. The Town has always known the identity of absent Class Members pursuant to its own records, and the Town could have filed its motion seeking to obtain discovery from these Class Members at any time during this action, which has been pending since September 21, 2020. Instead, the Town waited until October 17, 2022, over four months after the June 1, 2022 summary judgment motion deadline, and one week prior to the scheduled October 24, 2022 hearing date on Plaintiff's Motion for Summary Judgment, to file its motion to conduct discovery with absent Class Members.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiff's Motion for Summary Judgment is GRANTED, as there are no genuine issues of material fact, and the Town has charged and collected Recreation Fees in violation of its lawful authority under N.C.G.S. § 160D-804(d) and Plaintiff and Class Members are entitled to the return of their Recreation Fees paid to the Town from September 22, 2017 through the present, plus 6% interest from the date of payment, pursuant to N.C.G.S. § 160D-106;

2. Defendant's Motion for Partial Judgment on the Pleadings is DENIED;

3. Defendant's Motion for Leave to Conduct Discovery with Class Plaintiffs and Continue Plaintiff's Motion for Summary Judgment is DENIED;

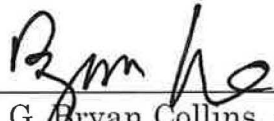
4. Judgment is hereby entered against the Town in the principal sum of \$2,319,875 for Recreation Fees collected by the Town from September 22, 2017 through June 25, 2022, plus 6% per annum interest from the date of each payment as set forth on Exhibit II in support of Plaintiff's Motion for Summary Judgment, plus all principal and 6% per annum interest for all Recreation Fees collected by the Town by June 26, 2022 through the date of judgment;

5. Either party may file a motion regarding class administration, including regarding the mechanics for the calculation and payment of the judgment to Plaintiff and Class Members, and any other class administration issues, after the conclusion of any appellate review of this Order and Judgment, or after the appeal period has expired;

6. Plaintiff's claim for costs and attorneys' fees under N.C.G.S. § 6-21.7 shall be determined by separate motion made after the conclusion of any appeal in this case (or, if no appeal is taken, after the conclusion of the appeal period);

7. This Order and Judgment is certified for immediate appeal with no just reason for delay pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

This the 21st day of November, 2022.



Hon. G. Bryan Collins, Jr.
Superior Court Judge