

DISTRICT COURT, ARCHULETA COUNTY, COLORADO Court Address: 109 Harman Park Dr Pagosa Springs, CO 81147 Phone Number : (970) 264-8160 Plaintiff(s): CLINTON JAMES ALLEY, et. al., Defendant(s): THE TOWN OF PAGOSA SPRINGS	DATE FILED: January 2, 2023 COURT USE ONLY
	Case Number: 22CV30035 Division: 3
ORDER GRANTING MOTION FOR SUMMARY JUDGMENT	

This case comes before the Court upon a motion for summary judgment filed by the plaintiffs who are the owners of short-term rental properties (hereinafter STR) challenging a voter approved municipal initiative and the implementing regulations that requires STR owners who do not reside in the STR at least nine months out of a year to pay an impact fee of \$150 per bedroom in the property. The plaintiffs challenged the initiative and implementing on multiple grounds, including arguments that the ballot initiative that created the STR fee is an administrative, not a legislative action, in violation of Article V of the Colorado Constitution and that the fee is really a tax that was approved in violation of the Taxpayer Bill of Rights, (hereinafter "TABOR").

The Court shall enter summary judgment when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987); C.R.C.P. 56(c). However, "all doubts concerning summary judgment should be resolved against the moving

party.” *Dominguez v. Babcock*, 727 P.2d 362, 365 (Colo. 1986). Additionally, the moving party bears the initial responsibility to inform the court of its basis for summary judgment and to identify those portions of the record which demonstrate the absence of a genuine factual issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323; *Continental Airlines, Inc.*, p. 712.

In this case the parties have stipulated to all the material facts regarding the initiative and resulting regulations. See the Stipulation of Facts filed on September 20, 2022, (Hereinafter the “stipulation”). Thus, the issue is appropriate for determination via a motion for summary judgment.

The Town Council of Pagosa Springs initially implemented STR regulations in 2021 to limit the density of STR units and imposed application and renewal application fees for all STR units within the town. The fees were set to cover the cost of the town’s administration of its STR program, and the council determined that 50% of the \$350.00 application and application renewal fees would be dedicated to workforce housing. Stipulation pp 3, 5-6. The regulations imposed by the town on STR properties was based upon the town’s study and analysis of the impacts of STR properties to the town. Stipulation, p. 4. When the application and application renewal fees were first imposed by the town, all STR units paid the same fees. Stipulation, p. 6. In 2022 a citizen initiative was approved by the voters of the town requiring that all STR units pay an administrative fee of \$150 per month per bedroom unless the owner of the STR unit resided full-time on the STR property for at least nine months of the year. The purpose of the fee was to fund sustainable workforce housing for households beneath at certain income level. Stipulation p. 11.

Article V of the Colorado Constitution

Article V, section (1) of the Colorado Constitution states:

The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives . . . but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly. . .

The Colorado Supreme Court has ruled that Section 1 of Article V while allowing for citizen initiatives, limits the direct power of citizens to govern via the initiative process to the proposing and enactment of laws. The initiative powers of Section 1 do not allow citizens to directly take administrative action. *City of Aurora v. Zwerdinger*, 571 P.2d 1074, 1076 (Colo. 1977). To determine whether the initiative is a legislative or administrative action, the Court needs to look at the purpose of the initiative, whether it declares or carries out a legislative policy. *Zwerdinger*, p. 1077.

According to the stipulation, the Town of Pagosa Springs had already established a policy prior to the adoption of the initiative to provide for workforce housing within the town. While the planning commission of Pagosa Springs had recommended to the town council that to better fund workforce housing, non-owner occupied STR units should pay a license fee that was significantly higher than owner occupied units, the council decided not to do so when the STR regulations were first adopted in 2021. Stipulation, p. 7. The initiative did not declare a new legislative policy, it simply increased the funding for an already declared goal of the town to provide for workforce housing. Because the purpose of the initiative was to increase the funding for an already declared legislative policy, the Court finds that the initiative constitutes an administrative and not a legislative action.

[A]cts that are necessary to carry out existing legislative policies and purposes or which are properly characterized as executive are deemed to be

administrative, while acts constituting a declaration of public policy are deemed to be legislative.

Zwerdinger, p. 1077. See also *City of Colorado Springs v. Bull*, 143 P.3d 1127, 1133 (Colo. App. 2006). Because the Court finds the initiative to be an administrative action, the Court finds the initiative to be in violation of Article V of the Constitution of the State of Colorado.

Tabor

Even if the Court found the initiative to be a legislative action, the Court would find the non-owner-occupied fee imposed by the initiative to be a tax, subject to the provisions of TABOR. The parties stipulated that the 2021 STR regulations established a comprehensive regulatory scheme to govern short-term rental units. Stipulation, p. 8. The amount of the per bedroom fee imposed by the initiative is to be paid monthly without regard to whether the STR unit is being rented, Stipulation, p. 20, is intended to offset the effect STR rentals have on affordable housing in Pagosa Springs, Stipulation, p. 22, and is a recurring fee that is not related to new development, Stipulation, p. 24. The Town has not completed any study to determine if STR units that are not owner occupied for at least nine months of the year have any impacts on workforce housing and is in the process of conducting such a study. Stipulation, pp. 25-27. In its request for proposals to conduct the study, the town admits that there may be no impact on workforce housing that is caused by non-owner occupied STR units. Stipulation, p. 27.

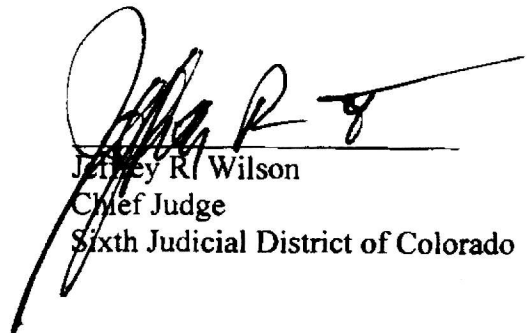
To determine if the per bedroom charge is a tax or an administrative fee not subject to TABOR requirements, the Court again needs to determine the primary purpose of the fee.

If the primary purpose is to raise revenue for general governmental use, it is a tax. Conversely, if a charge is imposed as part of a comprehensive regulatory scheme, and if the primary purpose of the charge is to defray the reasonable direct and indirect costs of providing a service or regulating an activity under that scheme, then the charge is not raising revenue for the general expenses of government, and therefore, not a tax.

Colorado Union of Taxpayers Found. v. City of Aspen, 418 P.3d 506, 513, (Colo. 2018), *internal citations omitted*. While “[m]athematical exactitude. . . is not required, the amount of an administrative fee must be reasonably related to the overall cost of the service.” *Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1989), *internal citations omitted*. In this case, the amount of the fee cannot be found to be reasonably related to the effects non-owner occupied STR units have on workforce housing. It therefor is not a valid administrative fee. While the fee is being used for a specific governmental purpose, that purpose is not related to the costs of administering the town’s STR program and the Town of Pagosa Springs has no evidence that that purpose is related in any way to short-term rentals that are non-owner occupied. The Court therefore finds the fee assessed upon non-owner occupied STR units is a tax. The parties have stipulated if the per bedroom fee is a tax, it was adopted in violation of the TABOR amendment to the Colorado Constitution. Stipulation, p. 31.

For the foregoing reasons, the Court grants the plaintiffs’ motion for summary judgment and declares the Charter Amendment and the 2022 STR regulations imposing the \$150 per bedroom per month fee to be invalid.

Done and signed this 2nd day of January 2023.



Jeffrey R. Wilson
Chief Judge
Sixth Judicial District of Colorado