

Validity of Impact Fees – Three Questions

The answer to three questions typically determine the validity of impact fees. The first question is, “What are they, a tax or a regulatory fee?” In making this determination, courts follow the principal that in impact fee is what it is, not what it is called. A tax is a charge to pay for the cost of government without regard to special benefits conferred. The purpose is to provide general revenue. On the other hand, a regulatory fee is a charge to pay for the cost of regulating a governmental activity to which the fee is attached, i.e. police inspection, supervision, or regulation. In addition, the fee must be based on a special benefit conferred on the fee payer.

Once the impact fee has been determined to be a tax or regulatory fee, the second question is, “What authority has been granted to the city to impose the fee as characterized?” Regulatory fees are imposed under a City’s police power, taxes are imposed under a City’s power to tax. A city’s police power and the power of tax are typically found in State charter and/or home rule charter grants of authority to the city. In interpreting these grants of power, most courts, including Nebraska’s Supreme Court, have found that a municipality’s police powers are to be broadly construed and may include implied powers not specifically granted. However, the power to tax is strictly construed and taxes may not be imposed without an express grant of authority contained in the charter.

Because of the different restrictions on a city’s authority to tax as compared to its authority to impose regulatory fees the classification of the charge as either a tax or a fee was often critical to its validity.

Litigation across the country over the authority of cities to adopt impact fees began in most instances because cities attempted to impose the fee under their police power as the power to tax had not been specifically granted. Resolution of these cases created a split of authority as to whether or not impact fees were a regulatory fee or a tax. This was especially true with respect to street impact fees. Many states avoided this issue by passing legislation which specifically granted cities the authority to adopt impact fees. However, Nebraska is not one of those states. Therefore, in 2003, when Lincoln adopted its impact fee ordinance the City had to rely on generic grants of police power and power to tax in its State charter as a City of the primary class and in its home rule charter. Since we did not know how impact fees might be classified in Nebraska, Lincoln’s impact fee ordinance was drafted to comply with the requirements of a regulatory fee as well as an excise tax. The Home Builders Ass’n of Lincoln challenged our impact fee ordinance arguing that the City Council did not have the authority to impose the fee as it was a tax not expressly authorized by the State Legislature. The City defended the lawsuit arguing, (1) that the fee was a regulatory fee authorized by the specific grant of police power to cities of primary class and also by the City’s home rule charter. The City further argued that, if the impact fee ordinance were deemed to be a tax, the City likewise had authority under its home rule charter to impose that tax.

Generally there are two types of cities created in Nebraska. Those with State Charters created by law and those with home rule charter authorized by the Constitution. In Nebraska, state charter cities (e.g. metropolitan, primary, first and second class cities) only have the powers granted to them by the State Legislature. On the other hand, home rule charter cities fall into

two categories based upon whether the home rule charter is, a grant of powers home rule charter or a limitation of powers charter. A grant of powers charter, like a state charter, restricts the power granted to a city to those powers specifically listed in the charter. On the other hand, a limitation of powers charter gives a city all powers to engage in municipal purposes except as restricted in the charter. The City of Lincoln's charter is a limitations of power charter.

The District Court of Lancaster County found that the City's impact fees were not a regulatory fee but rather were a tax. The District Court further found that although the State Legislature had not specifically granted Lincoln the power to tax in the State charter for cities of the primary class, such authority was granted in the City's home rule charter. On appeal, the Nebraska Supreme Court upheld the City's imposition of impact fees under its home rule limitation of power charter without an express grant of statutory authority as the purpose of a limitation of power charter is to allow for the City Council to exercise every power connected with proper and efficient government and municipality including those powers so connected (e.g. power to tax) which might lawfully be delegated to it by the State Legislature without waiting for such delegation.

After an impact fee has been determined to be a regulatory fee or tax and authority to impose the impact fee as characterized has been established, the final question is, "does the impact fee comply with constitutional and/or statutory requirements for a valid regulatory fee or tax?" If the impact fee has been determined to be a regulatory fee a valid impact fee ordinance requires earmarking of the fees collected for the benefit of the properties charged, a precise formula to calculate the fee to insure a nexus between the fee charged and the infrastructure demand created by the new development. If these requirements in an impact fee ordinance are missing the fee will be classified as a tax for general revenue purposes. If the impact fee has been determined to be a tax, a valid impact fee ordinance does not require earmarking of funds or a formula to insure a nexus between the taxes charged and the impact created by the development do not require service areas for collection or expenditures. However, under Nebraska law, the City's power to tax (impose impact fees) is subject to two restrictions. Uniformity and equal protection. The Nebraska Constitution requires that taxes be uniform with respect to persons and property within the jurisdiction that the body imposing the same. No difference in the method of determining the amount of the tax or the way the tax is to be imposed can be allowed unless the separate classifications rest on some reason of public policy and/or substantial difference of situation or circumstance that would naturally suggest justice or expediency of diverse legislation with respect to the object to be classified. The equal protection clause requires similarly situated persons be treated the same. Although similar to the requirement as to uniformity, the standard is less as the city only needs to show some rational relationship between legitimate state interests when the means being selected to accomplish that purpose. Notwithstanding the freedom that may be allowed under taxation, the current ordinance places limitations on the imposition of the tax. However, those restriction could be eliminated.