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CITY OF CAMBRIDGE
Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

October 10, 2000

Robert W. Healy
City Manager
City Hall
Cambridge, MA 02139

Re: ***City Council Order No. 6c, dated June 5, 2000 Requesting a Report on Whether Impact Fees May Be Applied to all Development, Including As-of-Right Development***

Dear Mr. Healy:

I am providing the following analysis in response to the City Council's request for advice in the referenced order regarding whether or not the City has legal authority to impose so-called impact fees on all development, including as-of-right projects.

The short answer to the question is that the City may impose impact fees on all projects, including as-of-right projects. However, there are strict legal limitations governing the imposition of impact fees. Massachusetts Courts are traditionally aggressive in striking down fees that do not meet strict legal criteria and are really illegal taxes masquerading as impact fees.

DISCUSSION

A) The Power of the City To Impose Fees. Under Massachusetts law, cities and towns do not have the power to tax unless expressly authorized by statute to do so. The Home Rule Amendment, which authorizes municipalities to exercise any powers not inconsistent with state statutes, expressly provides that cities and towns do not have the authority to levy taxes pursuant to the Home Rule Amendment.[1] Real estate taxes and personal property taxes and excise taxes are all expressly authorized by specific statutes. While cities and towns may not assess additional taxes without legislative authority, they

[1] See Art. 89, § 7, of the Amendments to the Massachusetts Constitution ("Nothing in this article shall be deemed to grant to any city or town the power to . . . levy, assess and collect taxes . . . ."); See also *Commonwealth v. Caldwell*, 25 Mass. App. Ct. 91, 92, (1987).

may, however, exact fees.[2] It has not been uncommon for affected parties to challenge fees assessed by municipalities on the ground that they are not actually fees but rather taxes disguised as fees. If the exaction is a fee it may stand, if it is a tax it will fall. Whether or not a monetary exaction is a tax or a fee is determined by examining its operation, not by whether the municipality calls it a fee or a tax.[3]

A tax is a revenue-raising exaction imposed through generally applicable rates to defray public expense.[4] Impact fees, on the other hand, tend to fall into one of two principal categories: (a) user fees, based on the rights of the entity as owner of the services used, or (b) regulatory fees (including licensing and inspection fees), founded on the police power to regulate particular businesses or activities.[5] Impact fees are legitimate to the extent that the services for which they are imposed are sufficiently **particularized** to justify distribution of the costs among a **limited** group of beneficiaries or users of the services, rather than the general public.[6]

In the seminal case of *Emerson College v. Boston*, the Supreme Judicial Court set forth three common traits that distinguish fees from taxes:

> 1) Fees are charged in exchange for a particular governmental service, which benefits the party paying the fee in a manner not shared by other members of society;
>
> 2) Fees are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; and
>
> 3) Fees are collected not to raise revenue generally but to compensate the governmental entity providing the services for its expenses.[7]

Impact fees are legitimate to the extent that the services for which they are imposed are sufficiently particularized to justify distribution of the costs among a limited group of beneficiaries or users of the services, rather than the general public.[8]

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[2] See G. L. c. 40, § 22F.
[3] *Thomson Elec. Welding Co. v. Commonwealth*, 275 Mass. 426, 429, (1931); *Emerson College v. Boston*, 391 Mass. 415, 424 (1984); *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Management Board*, 421 Mass. 196, 201 (1995).
[4] *Opinion of the Justices*, 393 Mass. 1209, 1216 (1984); *German v. Commonwealth*, 410 Mass. 445, 448 (1991).
[5] *Opinion of the Justices*, 250 Mass. 591, 602 (1924); See *Boston v. Schaffer*, 9 Pick. 415, 419 (1830); *P. Nichols*, Taxation in Massachusetts 6-9 (3d ed. 1938).
[6] See *Emerson College* at 425.
[7] See *Emerson College* 424-25; *Nuclear Metals*, at 202.
[8] *Emerson College* at 425.

The analysis of whether the operation of a particular municipal fee meets the *Emerson College* test is intensely fact specific. Traditionally, courts will inquire into:

(a) Whether the earmarked expenditures relate **directly** to the services provided;

(b) Whether there is a **direct** correlation to the anticipated cost of providing the services for which they are charged; and

(c) Whether the funds are kept in a segregated account separate and apart from the municipality's general fund.

Enactment of an impact fee, which really operates as a tax, is outside the scope of municipal authority provided by the Home Rule Amendment. In the absence of a specific grant of authority from the Legislature, Cambridge has no power to levy taxes.[9]

B) The Courts' View of Different "Fees". Massachusetts' courts are traditionally very aggressive in striking down a "fee" which is really a tax. Some of the cases cited below demonstrate this philosophy.

1. Fire Service Fee. In *Emerson College* the Supreme Judicial Court analyzed an "augmented fire services availability" ("AFSA") charge imposed by the City of Boston on any building for which the total fire fighting capacity necessary to extinguish a three-alarm fire exceeded 3,500 gallons per minute. The formula used by the city to determine whether a particular building met this standard included the square footage of the building, the number of stories, the fire resistance of the materials from which it was constructed, the use of the building, the combustibility of its contents, the density and hours of the building's occupancy, and whether the building contained fire detection, suppression and smoke removal equipment.

The Court found that the benefits of augmented fire protection were not limited to the owners of AFSA buildings, because the capacity to extinguish a fire in any particular building safeguards not only the private property interests of the owner, but also the safety of the building's occupants as well as that of surrounding buildings and their occupants. The Court noted that protection from fires has always been treated as a **general** function of government.

The Court thus concluded that because the benefit of the augmented fire protection provided was **not sufficiently particularized** to those property owners paying the AFSA charge, the charge was not a proper fee but rather, operated as a tax.

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[9] See *CHR General, Inc. v. Newton*, 387 Mass. 351, 358 (1982).

2. Sprinkler/Hydrant Connection Fee vs.School Impact Fee. In a different case, *Greater Franklin Developers Association, Inc. et. al. v. Town of Franklin*, 49 Mass.App.Ct. 500 (2000), the Appeals Court of Massachusetts struck down a "school impact fee."

The Court reasoned that since the residents of newly built homes are entitled to have their children join the town's school system regardless of the existing capacity, they cannot be deemed to receive a particularized benefit for the town's provision of an expanded school system in exchange for the payment of the schools impact fee. The court says "[w]e hardly need state that society as a whole gains with the education of its children and suffers at the lack."[10] Thus, it is difficult to discern how the residents of new home construction paying the schools impact fee benefit in a manner not shared by other residents of the Town with children attending the public schools.

In further applying the *Emerson College* test, the Court held that the school impact fee operates as a tax to defray the cost of a public benefit collected disproportionately from the owners of new residential construction, rather than as a proper fee payable in exchange for a benefit particularized to those building new homes in the town.

Ultimately, the Court concluded that enactment of the schools impact fee really operates as a tax and is therefore outside the scope of municipal authority provided by the Home Rule Amendment. In the absence of a grant of authority from the Legislature, Franklin had no power to impose the schools impact fee, which was therefore invalid.

It is instructive to note that the trial court in the *Franklin* case also had determined that the school impact fee was an impermissible tax as opposed to a fee, but in the same decision ruled that a "sprinkler/hydrant connection fee" did not amount to a tax and therefore could be properly imposed by the town.[11] The Court found that the "sprinkler/hydrant connection fee" was a permissible fee under the *Emerson College* test because it was charged for a particular government service that benefited only certain members of society, it was paid by choice, and the fees collected bore a direct relationship to the connection cost incurred by the town.

C) The Imposition Of Unreasonable Exactions And Impact Fees May Constitute Taking. It is axiomatic that no "private property shall be taken for private use without just compensation" being paid to the owner. U.S. Constitution, Amendment V. Pursuant to this provision, it is well-established that the taking of property by the government may occur directly through eminent domain so long as the property owner receives just compensation.[12]

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[10] *Greater Franklin Developers Assn., Inc. v. Town of Franklin*, 49 Mass.App.Ct. at 503.

[11] *Greater Franklin Developers Assn. v. Town of Franklin*, Norfolk Superior Court No. 95-02608, 1997 Mass. Super. LEXIS 152 (August 11, 1997).

[12] See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954).

In 1922, the United States Supreme Court recognized that government regulations, although not involving the physical taking of land, could nonetheless violate the takings clause. The court held that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[13]

Approximately seventy years of "regulatory takings jurisprudence" has followed. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), a sharply divided (5-4) Supreme Court restated and refined the standards for permit-related exactions. In *Nollan*, owners of beachfront property applied for a permit from the California Coastal Commission to demolish a bungalow on their property and replace it with a three-bedroom house. The commission granted the permit subject to the condition that the Nollans convey a lateral public easement across their beach. The Nollans argued that this was an uncompensated taking, and the Supreme Court agreed, holding that government authorities may attach conditions to a land use permit only when the conditions substantially advance the same public purpose that the proposed activity would adversely affect. *Nollan v. California Coastal Comm'n*, 483 U.S. at 837. The majority opinion used an "essential nexus" test, i.e., the exaction must serve "the original purpose of the building restriction." *Nollan v. California Coastal Comm'n*, 483 U.S. at 837. Thus, there must be a reasonable causal relationship between the adverse effect of the proposed development and the condition imposed. Arguably, *Nollan* imposes a "heightened scrutiny" test if the government seeks to acquire a property interest in or a license on land rather than to prevent a public harm.

Nollan was extended in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In *Dolan* a landowner sought a permit to double her building size and to pave and enlarge her gravel parking lot. The land adjoined a creek that passed through part of the business district. The City imposed two conditions on her permit: (1) dedication of land for a greenway, and (2) dedication of additional land for a pedestrian and bicycle path pursuant to a comprehensive land use plan and a master drainage plan.

Although it was clear that traffic congestion and flood control were proper police power objectives, *Dolan* was remanded to the Supreme Court of Oregon because the relationship of these objectives to the limitations placed on Dolan's property was not established. The majority set two requirements. First, the city had to formally determine that there was some "rough proportionality" between the use of the property and the need for the particular exactions. Generalized statements, taken from the language of the two city plans, were insufficient. Even more importantly, the Court in *Dolan* clarified the issue of burden of proof that had been raised in *Nollan* by the inference of "heightened scrutiny." In *Dolan*, the burden was imposed on the government in both senses--risk of nonproduction of evidence and risk of nonpersuasion. There are, of course, state court precedents that impose a stricter standard when reviewing administrative decisions than

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[13] See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

when reviewing legislative enactments. The majority analyzed *Dolan* under what it called an adjudicative rather than a legislative standard, thus shifting to a more intensive level of review. The standard reflects a constitutional doctrine that exactions, particularly those that require a shift in property interests from owner to regulator, will be reviewed on strict and narrow grounds. Cities and towns requiring or imposing exactions will have to clearly identify the police power need and the satisfaction of that need by the imposition of the exactions.[14]

D. Administrative Requirements and Cost/Benefit Analysis. During its analysis of whether an impact fee is really a tax, the court will examine how the fee was calculated, whether it is held in a segregated account or mixed in with the municipality's general revenues, and whether it is dedicated to providing the particular service for which it was collected.

The fact that funds obtained from a particular fee are not used exclusively to provide the particular service at issue but instead are used for a broader range of services or for a general fund, while not decisive, is of substantial weight in indicating that the charge is a tax rather than a fee.[15] Thus, where a sewer connection charge was deposited into a general fund and made available for use in sewer projects other than improvements and capacity expansion to accommodate new connections, the charge operated as a tax rather than a fee.[16] In the *Franklin* case, a key consideration for the court in determining that the sprinkler/hydrant fee was a fee and not a tax was that the sprinkler/hydrant fees collected by the town were credited to and kept in a separate Water Special Revenue Fund which was not part of the town's general fund. The court commented that such earmarking of funds is indicative of a proper fee rather than the general revenue raising operation of a tax.

In addition to being earmarked for expenditures related to the services provided, fees are distinguishable from taxes in that fees are reasonably related to the anticipated cost of providing the services for which they are charged.[17]

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[14] Massachusetts Zoning Manual, *LOW- AND MODERATE-INCOME HOUSING: THE ANTI-SNOB ZONING ACT, LINKAGE, INCLUSIONARY ZONING AND INCENTIVE ZONINGRICHARD G. HUBER, ESQ.* Professor of Law Emeritus, Boston College Law School *MARYANN CIVITELLO*, ESQ. Copyright (c) 1999 by Massachusetts Continuing Legal Education, Inc.

[15] *United States v. Tax Comm'n*, 421 U.S. 599, 606 (1975); *Emerson College* at 427.

[16] *Berry v. Danvers* at 513.

[17] See *Southview Co-operative Housing Corp. v. Rent Control Board of Cambridge*, at 402 (concluding that a petition charge was a valid fee where it only covered the board's reasonably anticipated costs of providing rent adjustments); *Bertone v. Department of Public Utilities* at 550 (concluding that an electrical connection charge was a fee where the charge covered the incremental costs of general system improvements attributable to the provision of service to new customers and the cost of connecting new customers); *Aiello v. Commissioners of Duke County*, supra at 153-54 (concluding that a charge by an alarm company was a fee where the charge assessed represented an approximation of the costs of providing the particular services rendered); *Baker v. Department of Environmental Protection*, 39 Mass. App. Ct. 444, 447, 657 N.E.2d 480 (1995) (concluding that filing charge for a notice of intent to alter wetlands was

Prior to imposing any impact fees a municipality must calculate the actual cost of the individual service to a particular landowner as well as estimate the additional costs to the municipality to assess, collect, manage, and disperse and account for the funds expended.

In conclusion, impact fees in Massachusetts are possible, but must be very carefully designed and implemented to withstand a challenge that they are in actuality an impermissible tax as opposed to a legitimate fee. It is also important that any proposed impact fee or exaction from a particular landowner be carefully analyzed to determine if the fee or exaction might be held by a court to amount to a taking of a private property interest that requires compensation to the landowner. Such a takings analysis might identify a significant cost factor not otherwise apparent in such a proposal.

Please let me know if I can be of further assistance in this matter.

Very truly yours,

Russell B. Higley

Russell B. Higley

a fee where the record showed that the money raised by the charge did not cover the government's actual costs associated with that service).

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CITY OF CAMBRIDGE • EXECUTIVE DEPARTMENT

Robert W. Healy, City Manager *Richard C. Rossi, Deputy City Manager*

October 16, 2000

To The Honorable, The City Council:

Please find attached a response to Awaiting Report Item No. 00-31, regarding a report on whether impact fees can apply to all development, including as-of-right development, received from City Solicitor Russell B. Higley.

Very truly yours,

Robert W. Healy
City Manager

RWH/mec
Attachment

S 336

Consent Agenda # 11

Relative to Awaiting Report Item Number 00-31, regarding a report on Whether impact fees can apply to all development, including as-of-right development

In the City Council October 16, 2000

Referred to Finance Committee