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State of Louisiana
DEPARTMENT OF JUSTICE
P.O. BOX 94005
BATON ROUGE
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OPINION 15-0039

The Honorable Erich Ponti
State Representative, District 69
7341 Jefferson Highway, Suite J
Baton Rouge, LA 70806

90-A-1 PUBLIC FUNDS & CONTRACTS
La. Const. Art. VI, Sec.5
La. R.S. 33:2806
La. R.S. 33:1236(7)

Taken as a whole, the water impact fee proposed by Ascension Parish would be classified as a fee and not a tax. Pursuant to the Charter of Ascension Parish, the Parish has the requisite authority to levy the proposed water impact fee by ordinance.

Dear Representative Ponti,

You have requested an opinion of this office to determine the authority of Ascension Parish ("Parish") to establish a water impact fee. Specifically, you ask:

1. Whether a water impact fee constitutes a tax;
2. Whether the Parish has authority under its home rule charter to levy or collect a water impact fee; and
3. Whether the Parish must conduct a study prior to implementing a water impact fee.

Your request indicates that the Ascension Parish Planning Commission has discussed implementing a water impact fee on new residential and commercial developments. The impact fees are to be imposed on the developer of any new subdivision or commercial development prior to approval of the final plat and/or the issuance of a building permit, whichever comes first. They are likely to be assessed for each individual residential lot or commercial unit.

Initially relevant to your inquiry is a determination whether a water impact fee is properly classified as a fee or whether it constitutes a tax. The distinction is relevant because fees collected for the purpose of promoting public order are an exercise of the police power and may be levied without legislative action or electoral approval.

In *Safety Net For Abused Persons v. Segura*, 96-1978 (La. 4/8/97), 692 So.2d 1038, the Louisiana Supreme Court analyzed the differences between a "fee" and a "tax." In *Safety Net*, the court held that "the nature of a charge is determined not by its title, but

by its incidents, attributes and operational effect. Thus, the nature of a charge must be determined by its substance and realities, not its form..." Further, the court stated "a charge that has as its primary purpose the raising of revenue, as opposed to the regulation of public order, is a tax. Moreover, a tax is a charge that is unrelated to or materially exceeds the special benefits conferred upon those assessed."

The United States Fifth Circuit Court of Appeals has created an "ultimate use test" which requires looking at the particular charge as a whole to determine whether it is properly classified as a fee or a tax. Several factors may be considered in order to accomplish the difficult task of distinguishing a fee from a tax. In articulating the test, the court stated "the classic tax sustains the essential flow of revenue into the government while the classic fee is linked to some regulatory scheme. The classic tax is imposed by a state or municipal legislature, while the classic fee is imposed by an agency upon those it regulates." Additionally, a compelling factor in the analysis is whether the assessment defrays the cost of the program, indicating that it is a fee, or whether it provides a general benefit to the community, indicating that it is a tax. *Home Builders Ass'n of Mississippi, Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1011 (5th Cir. 1998), *Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000).

On numerous occasions, our office has applied a similar analysis to determine whether a proposed service charge is properly classified as a fee or a tax.

In La. Atty. Gen. Op. No. 08-0293, we opined that the proposed monthly garbage and trash collection and disposal service charged was properly classified as a fee because the charge did not materially exceed the cost of regulation or providing the indicated services and it appeared the proposed fee was commensurate with the benefits conferred or actual services rendered. In La. Atty. Gen. Op. No. 08-0266, we opined that a fee that would apply across the board indiscriminately to all projects, and in which persons to whom the fee would apply would receive benefits shared by all members of the parish was properly classified as a tax. In La. Atty. Gen. Op. No. 07-0024, we opined that the pro-rata fee contemplated by the Town of Abita Springs was properly classified as a fee and not a tax because the primary purpose of the pro-rata fee appeared to be a reasonable and commensurate charge for the actual cost of service rendered directly on behalf of future utility users and the funds received were to be used exclusively to provide a direct benefit to the persons who were charged the fee. In La. Atty. Gen. Op. No. 05-0177 we opined that charges from public waterworks are not taxes; rather, they are the price paid for a commodity sold. However, if the primary purpose for the fee is revenue and regulation is "merely incidental," or if the fee "clearly and materially exceeds the cost of regulation or conferring special benefits upon those assessed," then the fee is considered an illegal tax. In La. Atty. Gen. Op. No. 04-0381, we opined that a documentary transaction tax or immovable property transaction fee imposed as "a means of defraying the cost of providing general parochial services to the citizens of Livingston Parish, such as police and fire protection, infrastructure, etc." was a tax, because its primary purpose was to raise parish revenues.

As stated in your request, "an impact fee is a one-time assessment by local governments on new developments for the stated purpose of satisfying the cost of the infrastructure improvements that are necessary to serve that new development." You have additionally indicated that the discussions addressing an impact fee in the Parish have centered on the need to help with costs created by attracting new residents. However, the impact fee appears to be a one-time charge that is reasonable and commensurate with the service to be rendered (i.e. the funding of the infrastructure necessary to support a new development) and distribution of the commodity or service. Furthermore, it does not appear to provide a benefit to the citizens of the Parish as a whole, but rather defrays the cost of the infrastructure improvements. We acknowledge that the proposed impact fee will be levied by the Parish governing authority, which would support a classification of a tax. Nonetheless, in applying the "ultimate use test" we are required to look at the charge as a whole in order to determine whether it constitutes a fee or a tax. As such, it appears the proposed water impact fee would properly be classified as a fee. Consequently, such a fee may be enacted by the Parish without constitutional implications as long as the authority to do so is granted to the Parish by their charter or the legislature.

Pursuant to La. Const. art. 6, sec. 5, a home rule charter can provide for the structure and organization, powers, and functions of the government of the local governmental subdivision, which may include the exercise of any power and performance of any function necessary, requisite, or proper for the management of its affairs, not denied by general law or inconsistent with the constitution.

Section 4-12 of the Charter of Ascension Parish provides that the governing authority may "levy and collect taxes, special assessments, service charges, license charges, fees, and other revenues, borrow money in such manner and subject to such limitations may be provided by law."

Section 6-01 of the Charter requires that an act of the governing authority which is to have the force of law be enacted by ordinance.

Additionally, La. R.S. 33:4163 permits a parish which provides a public utility to "establish rates, rules, and regulations with respect to the sale and distribution" of the commodity or service. This provision would give the Parish the authority to levy a water impact fee in the event the authority to do so was not specifically granted by the charter.

Therefore, because both La. R.S. 33:4163 and Section 4-12 of the Charter expressly grant the Parish the ability to establish rates, rules, and regulations in regard to public utilities, it is the opinion of this office that the Parish has the requisite authority to levy the proposed water impact fee if it chooses to do so. Any such impact fee must be levied by Parish ordinance.

You have additionally asked whether the Parish must conduct a study prior to implementing a water impact fee. Our office is not aware of any requirement to conduct a study prior to implementing the fee. However, it should be noted that one of the characteristics of a fee is that the charge should be reasonable and commensurate with the actual cost of service. It necessarily follows that a determination should to be made of the estimated cost of the service in order to ensure the charge does not materially exceed the special benefits conferred upon those assessed.

We hope this sufficiently answers your inquiry; however, if we may be of further assistance, please do not hesitate to contact our office.

Yours very truly,

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