

Fees: Legal Issues



Leela Fireside, Assistant City Attorney
City of Austin, Law Department
2017



Overview

- General Legal Framework
- Different types of fees
- Challenges to fees
- Austin process
- Recap



General Legal Framework

- All cities assess a variety of fees and it is legal to do that.
- The Texas Constitution prohibits cities from assessing unauthorized taxes.
- Fees that generate revenue in excess of what is needed to operate the program can be found by a court to be unauthorized taxes – often called “occupation taxes.”



All Fees Must Have A Clear Legal Basis.

- In general, a city may charge a fee if the legal basis for the fee is sound and council has approved it. The legal basis for a fee is sound if it is supported by at least 1 of the following:
 - State Statute allows it.
 - It is recognized by the Court or an Attorney General Opinion.
 - Home Rule Authority supports it (if you are a home rule city – if not – use the first two bases above).



Home Rule Police Power

- A **home rule city** may do anything authorized by its charter & not specifically prohibited or preempted by the Texas Constitution, state, or federal law.
- Cities may regulate a range of local activities to promote the general welfare of the city's residents.
- Home rule police power authorizes a fee if the fee is regulatory and the amount is based on the cost of the regulation.



Fees must have a public purpose

- In general, this is a purpose that must be beneficial to the people who live in the city and directly connected with local government.
- An example of this is *City of Fort Worth v. Gulf Refining Co.* – regulating gas stations was part of the city’s police powers – gasoline is dangerous and traffic safety a reasonable concern for the residents of the city.



Fees should return only what it costs to run the program and no more

- Nearly all fees or assessments are intended to raise revenue. The critical issue is whether the assessment is intended to raise revenue **in excess** of that reasonably needed for regulation.

Sample Cases

- An inspection fee imposed on milk producers = regulatory fee, not an occupation tax. Annual cost of inspecting dairies: \$38,000; inspection fee generated only about \$30,000 annually.
- Permit fees levied against business owners = occupation tax. The evidence, a detailed accounting study, showed fees generated revenues equaling from four to ten times the cost of regulation, and thus were intended primarily to raise revenue.
- Fire protection fee for commercial buildings was an occupation tax because it was used to pay for fire service for all citizens and revenue “greatly exceeded any regulatory cost.”



Texas Courts can “carve-out” authority for fees.

- If the proposed fee lacks a statutory basis, it may still be assessed if Texas Courts (or the attorney general) have granted specific authority for the fee, sometimes known as a “carve-out.”
- Such carve-outs include:
 - Health inspection fees
 - Parking fees
 - Fees to inspect gas stations
 - Charges for city-produced compost or mulch



User Fees

- User fees are payments given in return for a government-provided benefit.
- **4 criteria:**
 - Paid in exchange for a particular government service which benefits the party paying the fee in a manner not shared by other members of society.
 - Paid by choice - the party paying the fee has the option of not utilizing the government service and can therefore avoid the charge.
 - Paid to compensate the government entity providing the services for its expenses and not to raise revenue.
 - Based on actual costs to the city for expenses funded by the fee.



User Fee Examples

- Fees for swimming, park rentals, and after-school programs at recreation centers are examples of user fees.



More User Fees

- Emergency Medical Services charges
- Pet Adoption Fees
- Convention Center Rentals



State Statutes

- If a state statute includes language that grants authority for a specified fee, and the city is following the statute, then the city may assess the fee.



Example:
SOLID WASTE DISPOSAL SERVICE FEE
(Texas Health & Safety Code Section 364.034)

- (a) A [City] . . .may:
- (1) offer solid waste disposal service to persons in its territory;
 - (2) require the use of the service by those persons;
 - (3) charge fees for the service; and
 - (4) establish the service as a utility separate from other utilities in its territory.



Example: Concession Fee

(Loc. Gov't Code Sec. 331.006)

- State statute permits the city to sell / lease concessions or privileges for amusements, stores, gas stations and other concerns consistent with the operation of a public park.
 - Example: A parks department may have concession fees for Swim, Yoga, Martial Arts instructors, personal fitness trainers, triathlon trainers, dog trainers, paddle boarding and other vendors etc.



Samples of Muni-Court Fees Set By Statute

- **Building Security Fees**
- **Child Safety Fees**
- **Court Technology Fees**
- **Juvenile Case Manager Fees**



Impact Fee

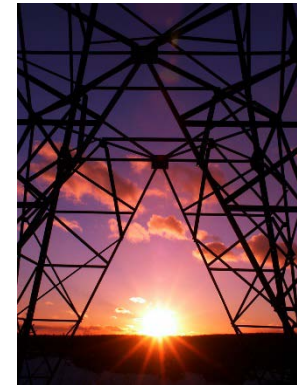
(Local Government Code Chapter 395)

- Impact Fee
 - Impact fee means a charge or assessment imposed against new development to generate revenue for funding or recouping the costs of capital improvements or facility expansions necessitated by and attributable to the new development.



Utility Rates

- Austin's utilities include:
 - Water and waste water
 - Austin Energy
 - Solid Waste
 - Drainage





Utility rates (continued)



- Austin's electric and water utility rates are set by council.
- The Public Utility Regulatory Act and the Texas Water Code allow customers who receive service, but who are outside the city limits, to appeal council's rate decision to the appropriate state agency.
- Austin's solid waste rates and drainage fees are set by council. There is no state agency that regulates these rates.



Franchise Fee (statute and home rule)

- The Texas Constitution prohibits cities from giving away city property. (See Texas Const. Art. III, Sec. 52).
- **Home rule cities** –can control the use of city streets, right-of-way, or grounds of the city by granting a franchise.
- Some franchise fees are also regulated by statutes (Federal and State)
 - A franchise is a special privilege conferred by government on an individual or organization.
 - Franchises are generally granted to utilities or other monopolies created to further the public interest.
 - Texas cities charge franchise fees for the use of city property and use of public right-of-way to deliver service to customers.



Examples of Franchise Fees

- Cable television and other video services. These fees are for the use of rights of way by cable and other video services providers.
- Gas and water. Cities may charge for the use of rights of way by gas and water utilities.
- Private ambulances and taxi services.
- Telephone (telecommunications) service. Under this fee, cities charge for the use of rights of way by telephone companies.
- Note: state and federal law preempt most city regulations for many of these areas – but we can still charge for use of right of way.



Courts can find fees to be illegal occupation taxes if:

- The fees are:
 - in excess of the amount set by state law; **or**
 - In excess of the amount needed to provide the service; **or**
 - In excess of the cost to regulate an activity.



Basis for Challenge

- City alleged to charge more than the cost of regulating – therefore generating revenue for the City.

- **Revenue**

- The word “**revenue**” means the amount of money which is **excessive** and more than reasonably necessary to cover the cost of regulation, and not that which is necessary to cover cost of inspection and regulation. Effectively, “**revenue**” is like “**profit**” and the **City is not a profit-making enterprise.**

- **Regulation**

- The word “**regulation**” means to **control, govern, or direct by rule** or to subject to guidance or restriction or to bring or reduce to order, or to correct by control or to adjust with reference to some standard or purpose. A court will apply this definition to a proposed fee to determine if it is raising excess revenue or regulating the good or service.



Remedies sought in fee challenges

- Common Remedies Sought
 - Refund:
 - If people have been paying the city without protest, the city may be able to defend against a request to refund the fees by arguing that the fees were paid voluntarily.
 - Injunction & Attorney's Fees:
 - Challengers can seek to enjoin the city from charging the fee—this means prevent the city from applying the fee.
 - Courts could also award attorney's fees to the challengers.



Austin Process

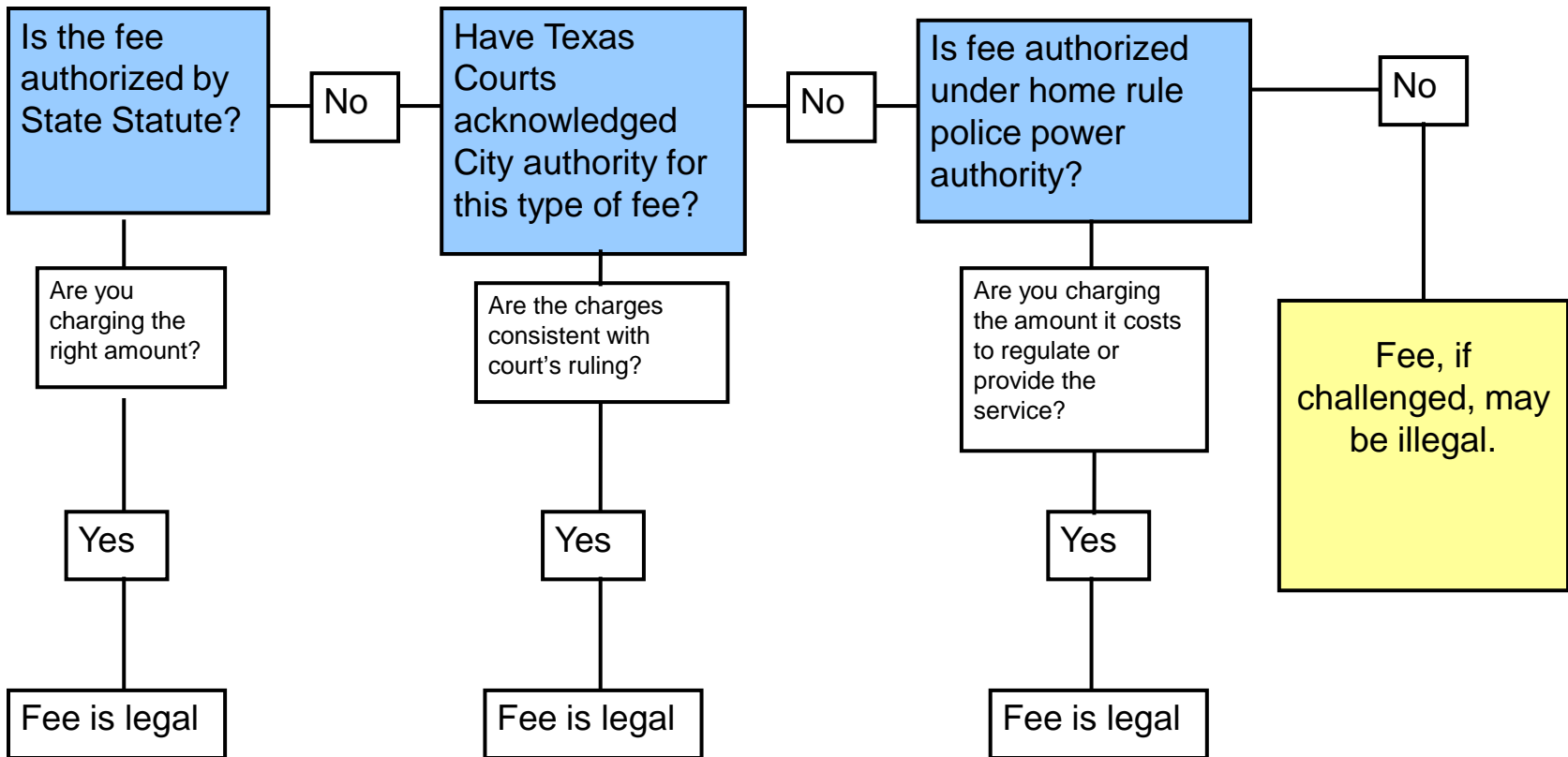
- Austin's process for setting fees: **Annual adoption of the Ordinance Setting Fees and Charges** – part of budget process.

<http://www.cityofaustin.org/edims/document.cfm?id=158460>

- If you set fees by ordinance, you can only change them by an action of equal dignity (e.g., another ordinance).



A visual way of thinking about fees



Recap

- ✓ Cities cannot charge unauthorized taxes.
- ✓ Fees that bring in more money than it costs to regulate an activity can be unauthorized taxes.
- ✓ Best Practice = figure out the cost to provide the service or regulate the activity and use that as your basis for calculating the proposed fee before council approves it.
- ✓ If your City approves fees by ordinance (with budget, or after budget adopted), then it must waive fees by ordinance.
- ✓ Check your published fees to make sure the rates are what your council has approved.
- ✓ Have a process to communicate the requirements with city staff who work with fees to make sure they understand the requirements.



Questions?

