MEMORANDUM

TO: Jill Duson, Chair and City of Portland Housing Committee
FROM: Jennifer Thompson, Associate Corporation Counsel
DATE: August 29, 2018
RE: Overview of Legal Framework for Municipal fees, Land Use Controls and Exactions

---

In connection with this Committee's consideration of a number of initiatives aimed at addressing the City's goals around affordable housing, I send along materials primarily authored by Maine Municipal Association providing a general overview of municipal authority in Maine to impose fees, levy taxes, and regulate land use. *Sections I-III of this memorandum are comprised of excerpts taken verbatim from Maine Municipal Association's website and all authorship credit is MMA's.*

I. Fees v. Tax

Generally speaking, a "fee" is a payment by an individual for the voluntary use of municipal property or services or pursuant to a regulatory scheme (*Strater v. Town of York*, 541 A.2d 938 (Me. 1988)). A fee must be proportionate or reasonably related to the actual cost of providing the service; its purpose cannot be to raise revenue for other services or general government (*State v. Brown*, 135 Me. 36, 188 A. 713 (1936)). By contrast, a "tax" is a compulsory payment that is payable by all members of a particular class and is generally based on the amount or value of something owned by the taxpayer, regardless of any service provided. Taxes are generally levied to raise revenue for the general operation of government.

The distinction between a fee and a tax is critical because the power of taxation rests *exclusively* with the State Legislature (see Maine Constitution, Art. IX, § 9, linked above). This means that municipalities cannot assess or collect a tax unless expressly authorized by law to do so. Currently, State law authorizes (and directs) municipalities to impose only two types of general taxes: property taxes and excise taxes. Thus, if a "fee" established by a municipality turns out to be an unauthorized "tax" instead, it will be invalid.

While courts will generally defer to the legislature's characterization, whether a charge or assessment is called a "fee" or a "tax" is not determinative of its legality. A charge or assessment will be judged on the basis of its characteristics and upheld or invalidated accordingly. Courts generally consider four factors when determining whether a "fee" is actually an unauthorized "tax":

(1) whether primary purpose of the fee is to raise revenue or to further regulatory goals,

(2) whether the fee is paid in exchange for exclusive benefits not received by the general public,

(3) whether the fee is voluntary, and

(4) whether the fee is a fair approximation of the cost to the municipality and the benefit to the individual for the services provided.[1]

II. Statutory Fees

State law authorizes a wide variety of municipal fees, including the following (among others):

- Various license and permit fees (see MMA's *Municipal Licensing and Permitting Handbook*);
- Public records search, retrieval, compilation and copying fees (1 M.R.S.A. § 408);
- Clerk's fees, including vital record fees (30-A M.R.S.A. § 2652);
- Sewer service charges (30-A M.R.S.A. § 3406);
- Junkyard and automobile graveyard fees (30-A M.R.S.A. § 3756);
- Development impact fees (30-A M.R.S.A. § 4354);
- Land use application fees (30-A M.R.S.A. § 4355);
- Service charges on certain tax-exempt properties (36 M.R.S.A. § 508); and
- Tax lien fees (see 36 M.R.S.A. §§ 942, 943).

Some of these fees are fixed by statute, (i.e. the clerk's fee schedule (30-A M.R.S.A. § 2652), tax lien fees (36 M.R.S.A. §§ 942, 943)). Others must be established by ordinance or order. Generally, the statutes authorizing fees require that the fee be reasonably related to the municipality's cost to provide the service, (i.e. processing application fees (30-A M.R.S.A. § 4355), infrastructure improvements (30-A M.R.S.A. § 4354)), or be the actual cost for providing municipal services (i.e. for service charges on tax exempt property 36 M.R.S.A. § 508, fees to compile public records 1 M.R.S.A. § 408-A).

III. Non-statutory Fees

Because municipalities in Maine have "home rule" power (see 30-A M.R.S.A. § 3001), they are not dependent on the existence of specific State enabling laws for authority to establish fees. For example, municipalities can charge a fee for solid waste collection and/or disposal or a fee for ambulance response without express statutory authority.

Municipalities can adopt two general types of non-statutory fees: user fees, which are fees assessed for the use of municipal property or services, and regulatory fees, which are fees that are part of a regulatory scheme and are intended to cover the costs of administering a program established pursuant to the municipality's police power (*Murphy v. Massachusetts Turnpike Authority*, 462 Mass. 701, 971 N.E.2d 231 (2012)).

A municipality may distinguish between different classes of users when setting fees by ordinance. It is not an automatic constitutional violation of equal protection if one class is required to pay more than another for the same privilege or if municipal services are provided to some, but not others. However,

[1] (*City of Lewiston v. Gladu,* 2012 ME 42*,* 40 A.3d 964; *Butler v. Supreme Judicial Court*, 611 A.2d 987 (Me. 1992); and *Maine v. Biddeford Internet Corp.*, 2017 ME 204).

there must be a rational basis for the difference in treatment- the distinction must be reasonably related to a government interest (*Ace Tire Co., Inc. v. Municipal Officers of City of Waterville*, 302 A.2d 90 (Me. 1973); *McNicholas v. York Beach Village Corp.*, 394 A.2d 264 (Me. 1978); *Hefflefinger, Inc. v. City of Portland*, 1999 ME 153, 739 A.2d 844).

To be distinguishable from a tax, non-statutory fees must also be reasonably related to the cost incurred by the municipality to provide the service. For example, in terms of regulatory fees, a municipality can take into consideration the necessary and probable expenses to issue the license as well as to inspect, regulate, and supervise the licensee (*Ace Tire Co., Inc. v. Municipal Officers of City of Waterville*, 302 A.2d 90 (Me. 1973)).

IV. Zoning and Land Use Development

In addition to municipal authority to impose fees, municipalities also have authority to zone property and place restrictions on new development and land use. 30-A M.R.S. 4352. In doing so, municipalities are subject to constitutional restrictions on that authority as it relates both to restrictions on the use land owners can make of their property and to so called “exactions”, whether in the form of land dedications or financial exactions. With respect to land use restrictions, an ordinance will not be deemed to effect an unconstitutional taking unless it either deprives a property owner “of all economically beneficial uses of the property, or decreases the value of the property so substantially so as to strip the property of all practical value, *Wyer v. Bd. of Envtl. Prot.*, 2000 ME 45, P1, 747 A.2d 192, 193.

With respect to exactions (dedications to the public) imposed by municipalities, Maine’s Law Court explained in *Curtis v. Town of S. Thomaston*, 1998 ME 63, 708 A.2d 657:

> The United States and Maine Constitutions provide that private property cannot be taken for public use without just compensation. U.S. Const. amend V; Me. Const. art. 21. The general takings rule is inapplicable, however, when, as in this case, the government's physical occupation of private property constitutes a requirement imposed on the land owner as a condition for the government's approval of a land development application. *See Nollan v. California Coastal Comm'n,* 483 U.S. 825, 833, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987). We review such a dedication requirement to ensure that it constitutes a lawful exercise of the police power and not an attempt by the government to "force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960).
>
> The Supreme Court, in its decisions of *Nollan v. California Coastal Comm'n* and *Dolan v. City of Tigard*, 512 U.S. 374, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994), developed a two-part procedure to determine when a land dedication requirement is logically related in substance and scope to legitimate regulatory objectives and thus a

lawful exercise of the police power. First, we determine whether an essential nexus exists between the legitimate government interest and the permit condition required by the government entity -- whether the permit condition advances the same public aim as would the permit denial. *See Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 386. Next, we determine whether a rough proportionality exists between the conditions imposed and the effects the proposed land use will have on the community. See *Dolan*, 512 U.S. at 388. The "rough proportionality" requirement cannot be satisfied by a conclusory statement made by the government authority, id. at 396; it must be the product of a "determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id*. at 391.

I hope this general overview of municipal authority has been helpful. I look forward to talking with you and the Committee further on the ways that the various pending proposals fit into the frameworks outlined above. If, in the meantime, you or other members of the Committee have questions or concerns, please feel free to contact me.