

When may a city impose fees or taxes without an election?

The general rule is that a city may not levy a tax without approval by the voters. Ark. Code Ann. § 26-73-103. On the other hand, a city may impose a fee without an election. Telling the difference between a tax and a fee is not always easy. The Arkansas Supreme Court has stated that “a ‘tax’ is imposed to raise general revenue, while a ‘fee’ is imposed in the exercise of the city’s police power.” *City of Marion v. Baioni*, 312 Ark. 423, 850 S.W.2d 1 (1993). This means that a charge for a specific service or benefit is likely to be considered a fee rather than a tax. Arkansas case law and Attorney General Opinions have differentiated between fees and taxes in a number of opinions.

In *Barnhart v. City of Fayetteville*, 321 Ark. 197, 900 S.W.2d 539 (1995) the court held that a sanitation fee was really a tax because it was not designed to provide sanitation services within the city, but rather was dedicated to paying off the debt of another governmental entity, a waste disposal authority. In another case, the court held that a “public safety fee” designed to raise the salaries of police and firefighters was actually a tax. The court stated that this was “a payment exacted by the municipality as a contribution toward the cost of maintaining the traditional governmental functions of police and fire protection.” As such, it was an invalid tax, as the voters had not approved it. *City of North Little Rock v. Graham*, 278 Ark. 547, 647 S.W.2d 452 (1983).

The Arkansas Attorney General has addressed the question of whether “municipalities, counties, or airport commissions have the power or authority to impose a gross receipts fee or tax upon the gross receipts received by a vehicle rental company operating upon airport property.”

The fee would vary according to the vehicle’s rental rate, but “the benefit would be the same on a per-vehicle basis regardless of the amount of money charged to the customer.” Therefore, the Attorney General determined that this would be a tax rather than a fee, as it was not directly related to conferring a specific benefit. Atty. Gen. Op. No. 95-100.

On the other hand, the court has upheld the validity of fees when they are charged in exchange for a specific benefit. In *Holman v. City of Dierks*, 217 Ark. 677, 233 S.W.2d 392 (1950), the court held that an annual sanitation charge of \$4 for fogging the city with an insecticide three times a year was a fee and not a tax. The court reasoned that this was “a charge for services to be rendered. The city proposes to spray the property of its citizens and to charge the cost of this operation against those who receive its benefits.”

Impact fees are now governed by Ark. Code. Ann. § 14-56-102. However the reasoning in the Baioni case may continue to be helpful in examining other situations. In Baioni, the city was allowed to impose tapping fees that exceeded the actual cost of connecting to the water and sewer system. The city intended to use the excess funds to expand the sewer system to new users. The court stated, raising such expansion capital by setting connection charges, which do not exceed a pro rata share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, if the use of the money is limited to meeting the cost of that extension. In addition, the city was able to prove that the cost per housing unit of expanding the system was less than the total fee charged and thus reasonably related to the benefits conferred.

Note that some fees are specifically authorized by statute. For example, the court has held that utility franchise fees, authorized by 14-200-101, are not an unlawful tax.

City of Little Rock v. AT&T Communications of the Southwest, Inc., 318 Ark. 616, 888 S.W.2d 290 (1994).