Court of Appeals, State of Michigan

ORDER

Legacy Five LLC v City of Jackson

Docket No. 318137

Peter D. O'Connell
Presiding Judge

Kathleen Jansen

E. Thomas Fitzgerald
Judges

Pursuant to MCR 7.206(E)(3)(b), the Court orders that the complaint for relief under Const 1963, art 9, § § 31 and 32 is DENIED. The rental property inspection charge, imposed pursuant to Ordinance No. 2012-03 and authorized by MCL 125.526(12), constitutes a regulatory fee that is not subject to the constraints of § 31 of the Headlee Amendment. The inspection charge clearly serves a regulatory purpose, i.e., the funding of measures to ensure a supply of sanitary, safe, and habitable rental housing within the city's borders. Title, 1917 PA 167; MCL 125.528(1); *Merrelli v City of St. Clair Shores*, 355 Mich 575, 582; 96 NW2d 144 (1959); *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 664; 697 NW2d 180 (2005). The inspection charge does not lose its regulatory character merely because it generates revenue. "As long as the primary purpose is regulatory in nature, the fee can also raise money provided that it is in support of the underlying regulatory purpose." *Westlake Transportation, Inc v Public Service Comm'n*, 255 Mich App 589, 613; 662 NW2d 784 (2003). A review of the budgetary documents supplied by the city discloses that the projected revenue from the inspection charge is less than the operational costs of the inspection program. This shortfall indicates that the charge is proportionate to the cost of the regulatory measures. *Saginaw Co v John Sexton Corp of Michigan*, 232 Mich App 202, 211-212; 59 NW2d 52 (1998). The compulsory nature of the charge does not render the charge a tax where the charge is proportionate to the costs of the inspection service and serves a regulatory purpose. *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998); *Wheeler, supra*, 666.

Jansen, J., dissents. Plaintiff alleges that the city of Jackson's rental-property inspection charge violates Const 1963, art 9, § 31 because it constitutes a tax on the owners of non-owner-occupied residential rental properties and was imposed without a vote of the eligible electors. "Any taxpayer of the state" may bring an original action in this Court to enforce the provisions of the Headlee Amendment. Const 1963, art 9, § 32. Although a local tax that is imposed without voter approval "unquestionably violates the Headlee Amendment," a charge that constitutes a user fee "is not affected by the Headlee Amendment." *Bolt v Lansing*, 459 Mich 152, 158-159; 587 NW2d 264 (1998). However, "[t]here is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Id.* at 160. Instead, "determining whether [a] . . . charge is properly

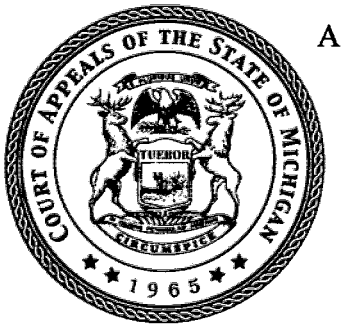
characterized as a fee or a tax involves consideration of several factors." *Id.* at 161. In general, while a tax is designed to raise revenue, a user fee is a charge for a service rendered or benefit conferred and must bear "some reasonable relationship" to the value of the service or benefit. *Id.* In other words, it is necessary to consider the reasonableness of a charge in determining whether the charge constitutes a fee or tax. See *id.* at 161-162.

The majority concludes, on the basis of the pleadings alone, that the City of Jackson's rental-property inspection charge is a reasonable and proportionate regulatory fee and not a tax within the meaning of the Headlee Amendment. I cannot join the majority's reasoning. I fully acknowledge that § 126(12) of the Michigan Housing Law, MCL 125.526(12), authorizes municipalities to charge "a reasonable fee for inspections conducted under this act," which "shall not exceed the actual, reasonable cost of providing the inspection for which the fee is charged." I further acknowledge the Legislature's declaration that the inspection procedures set forth in the Michigan Housing Law "are established in the public interest, to secure the health and safety of the occupants of dwellings and of the general public." MCL 125.528(1). However, the fact that the Legislature has authorized municipalities to charge reasonable inspection fees does not answer the question whether such charges are constitutionally permissible under the Headlee Amendment. Nor do these charges automatically constitute "fees" rather than taxes simply because the statute describes them as such.

Apart from the allegations made in the City of Jackson's pleadings and other submissions, there has been no showing that the rental-property inspection charge is reasonable and proportionate. To reiterate, the mere fact that the charge is authorized by MCL 125.526(12) does not make it reasonable. Instead, it must be affirmatively shown that the rental-property inspection charge is "proportionate to the necessary costs of the [inspection] service." *Bolt*, 459 Mich 161-162. There must also be evidence tending to prove that the charge imposed corresponds to the benefits conferred. *Id.* at 165. In my opinion, this requires a hearing—a hearing to which I believe plaintiff is entitled. I concede that municipal fees are generally presumed to be reasonable and proportionate. However, in view of the extensive use and substantial amount of the charge at issue here, I believe that there is at least a question of fact concerning whether it is being used as a guise or subterfuge to obtain increased revenue. See *Kircher v Ypsilanti*, 269 Mich App 224, 232; 712 NW2d 738 (2005).

Lastly, I note that the City of Jackson's rental-property inspection charge is effectively compulsory. As our Supreme Court has noted, "[o]ne of the distinguishing factors of a tax is that it is compulsory by law . . . ." *Bolt*, 459 Mich 167. In this case, the owner of a residential rental property has no choice but to incur the charge. See *id.* at 167-168.

In sum, I believe that there is a genuine issue of material fact concerning whether the City of Jackson's rental-property inspection charge constitutes a tax. Little or no discovery has been conducted in this case and no evidence has been taken. In my opinion, there is simply no basis for the majority to determine that the inspection charge is a reasonable, regulatory user fee. I would appoint the Jackson Circuit Court to serve as special master in this case and remand the matter to the special master for a full hearing on the merits of plaintiff's claims.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

NOV 26 2013
Date

Chief Clerk