

## Appeals court weighs Mesa's cultural impact fees

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Three judges on the Arizona Court of Appeals are weighing whether Mesa has a right to impose impact fees on new development to pay for cultural facilities.

The fees, which add \$218 to the price of a new house, are under attack by the Home Builders Association of Central Arizona and the Goldwater Institute, a libertarian advocacy group.

They claim cultural facilities are not the kinds of "necessary" public amenities that the Arizona Legislature meant when it authorized impact fees to pay for the costs of growth. They sued Mesa in mid-2007, shortly after the City Council adopted an impact-fee schedule that reduced the cultural portion of the assessment by \$19 per home.

Last summer, Maricopa County Superior Court Judge Douglas Rayes ruled in Mesa's favor. He said the council "made legislative findings, after study, open discussion and proceedings, that museums and cultural facilities provide necessary public services. Those findings are presumed valid."

Goldwater lawyer Clint Bolick told the Appeals Court



last week that the main issue is "whether the cost of new cultural facilities should be shared by all of the residents of Mesa or

whether it falls within the city's narrow authority to concentrate that cost on new homeowners. In other words, should the cost be borne by the many or the few?"

Gary Birnbaum, a private-practice lawyer arguing for Mesa, said the court is duty-bound to give cities leeway in determining what services are necessary for their residents.

The definition of "necessary" became an issue in the nearly one-hour hearing.

"'Necessary' to me seems to be a very subjective term," Judge Donn Kessler told Bolick. "What one city may feel is necessary wouldn't include museums and cultural activity. Another city may say water isn't necessary, delegate that to a private enterprise."

After Bolick said water is essential to life, Judge Peter Swann asked him, "So is the definition you're advocating, then, one of true life necessity?"

Bolick said he wouldn't go that far, but the Legislature meant for the term to be defined narrowly.

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Under further questioning from the judges, Bolick said city parks and libraries fall into a "gray area" in terms of whether impact fees should pay for them. He noted that cultural facilities often have private philanthropic support, whereas parks and libraries do not.

Questions rained down on Birnbaum as he argued that the court's main job was to defer to a city's judgment unless it found those actions to be "clearly erroneous, arbitrary, wholly unwarranted."

The three judges used the example of a city that might want to impose impact fees to preserve tattoo parlors as cultural icons. Would that be OK?

Birnbaum didn't answer that directly, but he said there should be "a rational relationship to a reasonable, legitimate municipal goal."

He said if the court took it upon itself to define "necessary," instead of deferring to the legislative findings of a city council, two judges using their subjective personal judgments would determine the outcome of every case.

"You would be acting as a super-Legislature," he said.

Mesa City Attorney Debbie Spinner said the court's decision could come between mid-July and the end of the year.

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