

Court hears impact fees appeal

BY BUTCH MABIN / Lincoln Journal Star

The Nebraska Supreme Court on Wednesday was asked to decide if an impact fee adopted by the city of Lincoln constituted an illegal tax.

In oral arguments before the high court, Lincoln attorney William Blake contended the fees, adopted in 2003, amounted to an illegal tax because they were not authorized by the Legislature.

“The primary issue is, what are the limits on the power of home rule cities to create and collect taxes,” said Blake, attorney for local developers challenging the fees.

Blake told the court the city overstepped its authority when it adopted the fees without approval from the Legislature.

The city adopted the impact fees as a way to help pay the costs of developments; for example, costs associated with water and sewer lines.

Ernest Peo III, chief assistant city attorney, told the court the fees were in response to the city’s “growing pains.

“The city could not keep up with the costs of development,” he said.

Peo contended the charge was more like a fee than a tax.

“Is it a revenue (generation) measure to benefit the general public, or a way to compensate the city for growth,” he said. “It’s a transfer (of costs) from the public as a whole to a limited group of people (developers).”

Developers, including the Home Builders Association of Lincoln and Hartland Homes, sued the city in Lancaster County District Court 2003 over the fees.

Judge Paul D. Merritt Jr., in a May 2004 ruling, said city government had the authority to impose the fee, which the judge called a tax.

“It is difficult to understand how the Impact Fee Ordinance relates to the promotion of the public health, safety and welfare and is not just a disguised tax,” Merritt wrote.

Attorneys for the developers appealed, arguing the ruling could create new avenues for taxation.

Blake said Wednesday the existing court record in the case made clear the fees were a revenue-raising effort and, thus, a tax. And under Merritt's ruling, he said, the city could empower itself to enact virtually any kind of tax.

"Under the city's argument, any tax they could think of would be valid, unless the Legislature" specifically said no, Blake said.

Asked Supreme Court Judge William C. Connolly: "Could the city have an income tax?"

Responded Blake: "Under their broad interpretation, yes."

Even if the city had the authority to impose the tax, Blake continued, it still amounted to an unfair tax because of its lack of uniformity.

The impact fees include a number of exemptions related to, among other things, housing incomes and a development's location.

"You could have five (identical) houses in a row with different taxes," he said.

Peo argued the Nebraska constitution does not require strict uniformity in taxation.

"Uniformity," he wrote in a brief for the case, "only requires that similarly situated persons be treated the same unless there is a rational justification for the disparate treatment."

Judge John M. Gerrard asked Peo what were the limits on cities' ability to tax.

Peo said the state Supreme Court's interpretation of a city's home rule charter was a limit. He also said the Legislature could pass a law forbidding, for example, a city from imposing an income tax.

According to papers filed in the appeal, the impact fee ordinance requires payment of fees associated with costs for water distribution, waste water, arterial streets and parks and trails.

The court will rule later on the appeal.

At the time of Merritt's ruling last year, people seeking new, single-family homes were paying at least \$2,800 in addition to construction costs.

Reach Butch Mabin at 473-7234 or at bmabin@journalstar.com.