

June 29, 2015

The Honorable Laina Fetherolf
Hocking County Prosecuting Attorney
88 South Market Street
Logan, Ohio 43138

SYLLABUS:

2015-020

1. Whether a charge imposed by a municipal corporation is a fee or a tax is a fact-based inquiry that is dependent for its resolution upon the specific context and characteristics of the charge.
2. A stormwater utility charge imposed by a municipal corporation will be classified as a fee provided the charge is reasonable, just, and equitable, and the revenue derived therefrom is used exclusively for the conduct and operation of the stormwater utility.



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

Opinions Section
Office 614-752-6417
Fax 614-466-0013
30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

June 29, 2015

OPINION NO. 2015-020

The Honorable Laina Fetherolf
Hocking County Prosecuting Attorney
88 South Market Street
Logan, Ohio 43138

Dear Prosecutor Fetherolf:

We have received your request for an opinion regarding charges imposed upon a county as an owner of real property by the terms of a stormwater system ordinance enacted by a municipal corporation. City of Logan Ordinance No. 2014-13, codified in §§ 54.01-54.10 of the Logan Code of Ordinances, “sets and establishes a system of fees ... intended to assess [property owners or lessees] their fair and equitable share of the costs for” the property’s use of the city’s stormwater system. Logan Code of Ordinances § 54.04(B). The fee assessed against “owners or lessees of real property in the city shall be charged ... based on an estimate of the amount of stormwater ... that is projected to discharge into the city stormwater system from the property.” Logan Code of Ordinances § 54.04(A). The ordinance creates a Stormwater Utility Fund in which all the stormwater fees are deposited. *See* Logan Code of Ordinances § 54.06. Section 54.06(A) of the Logan Code of Ordinances states that the fees shall be “used exclusively for the stormwater management program.” *See also* Logan Code of Ordinances § 54.06(C) (“revenues from the city’s stormwater utility shall not be utilized for non-stormwater drainage expenses”).

You question whether the fees charged under the ordinance may be an attempt by the city to levy taxes. Accordingly, you ask us to explain the distinction between a fee and a tax and determine whether the city’s stormwater utility fee is one or the other.

The Distinction between a Fee and a Tax

Your first question asks us to explain the differences between a fee and a tax. Fees may be imposed by a variety of public entities for many purposes. A municipal corporation may impose license fees pursuant to Ohio Const. art. XVIII, § 3 to cover the costs the municipal corporation incurs in regulating a particular area or to compensate the municipal corporation for providing services to its residents. *See, e.g., Mayer v. Ames*, 133 Ohio St. 458, 14 N.E.2d 617 (1938) (a municipal corporation may impose license fees upon city residents to cover the costs of

motor vehicle inspections performed by the municipal corporation pursuant to its police powers under Ohio Const. art. XVIII, § 3); *Thompson v. Green*, 12 Ohio Supp. 1, 3 (C.P. Franklin County 1943) (recognizing a municipal corporation's authority under Ohio Const. art. XVIII, § 3 to charge fees for the collection and disposal of garbage). A municipal corporation may also exercise its powers under Ohio Const. art. XVIII, § 3 to impose impact fees upon property developers to defray the expenses the new developments create for the local community.¹ See, e.g., *Bldg. Indus. Ass'n of Cleveland & Suburban Counties v. City of Westlake*, 103 Ohio App. 3d 546, 550-51, 660 N.E.2d 501 (Cuyahoga County 1995) (impact fees may be imposed by a municipal corporation pursuant to its police powers under Ohio Const. art. XVIII, § 3 provided the fees are not imposed by the municipal corporation in a covert attempt to levy taxes). Pursuant to Ohio Const. art. XVIII, § 4, a municipal corporation may also impose fees for public utility services. See, e.g., *City of Wooster v. Graines*, 52 Ohio St. 3d 180, 182, 556 N.E.2d 1163 (1990) (a municipal corporation may, under Ohio Const. art. XVIII, § 4, "establish and maintain a public utility and charge the public for" the use of the utility, "provided that the rates are just and equitable"); *State ex rel. Waterbury Dev. Co. v. Witten*, 58 Ohio App. 2d 17, 21, 387 N.E.2d 1380 (Lucas County 1977) (citing Ohio Const. art. XVIII, § 4 for the proposition that a village may finance its public utilities through rates and charges).

In some circumstances, charges nominally designated as fees by the public entity imposing them are more appropriately classified as taxes.² See, e.g., *Bldg. Indus. Ass'n of*

¹ Home rule townships derive authority to impose similar fees from R.C. 504.04(A)(1), which authorizes these townships, with limitations, to exercise powers of local self-government. See, e.g., *Drees Co. v. Hamilton Twp.*, 132 Ohio St. 3d 186, 2012-Ohio-2370, 970 N.E.2d 916, at ¶¶13-14 (analyzing whether a home rule township's impact fee constituted a tax).

² Classifying an assessment as a fee or a tax is important in determining whether the entity, in imposing the charge, has complied with applicable constitutional or statutory provisions. For example, Ohio Const. art. XII, § 2 requires a municipal corporation to submit a proposed tax levy to electors for a vote when the taxes, if imposed, would exceed one per cent of the taxed property's monetary value. See Ohio Const. art. XII, § 2 ("[n]o property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district ... or when provided for by the charter of a municipal corporation"); see also *Bldg. Indus. Ass'n of Cleveland & Suburban Counties v. City of Westlake*, 103 Ohio App. 3d 546, 551, 660 N.E.2d 501 (Cuyahoga County 1995) (recognizing the applicability of Ohio Const. art. XII, § 2 to a municipal corporation's impact fee when the fee constitutes a tax).

Similarly, R.C. 504.04(A)(1), which authorizes a home rule township to "[e]xercise all powers of local self-government within the unincorporated area of the township," prohibits a home rule township from enacting "taxes other than those authorized by general law."

Cleveland, 103 Ohio App. 3d at 551 (concluding, upon reviewing the relevant ordinance, that the city's impact fee was "in operation a tax"). Identifying the exact point of the spectrum at which a fee becomes a tax, however, is not an easy endeavor. *See generally State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 62 Ohio St. 3d 111, 117, 579 N.E.2d 705 (1991) ("[i]t is not possible to come up with a single test that will correctly distinguish a tax from a fee in all situations where the words 'tax' and 'fee' arise. What is a tax for one inquiry is not necessarily a tax under other circumstances").

As observed by the Ohio Supreme Court, "[t]he classic 'tax' is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community." *Drees Co. v. Hamilton Twp.*, 132 Ohio St. 3d 186, 2012-Ohio-2370, 970 N.E.2d 916, at ¶28 (quoting *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992)). In contrast, the classic fee "is imposed by an agency upon those subject to its regulation.... It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive ... [or] indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses." *Id.* An assessment may split the difference, possessing the characteristics of both a fee and a tax. *See id.* at ¶30 ("[m]ost assessments fall somewhere near the middle of the spectrum between a fee and a tax"). As a result, the determination of whether an assessment is a fee or a tax is a fact-based inquiry, dependent upon the specific facts and circumstances of the particular charge. *See Withrow*, 62 Ohio St. 3d at 115 ("[d]etermining whether an assessment is a fee or a tax must be done on a case-by-case basis dependent upon the facts and circumstances surrounding each assessment").

When faced with distinguishing a fee from a tax, Ohio courts consider a combination of the following factors: (1) the legal character of the entity imposing the charge, (2) the persons or entities subject to the charge, (3) the extent to which the moneys collected from the assessed charges exceed an amount necessary to cover the cost of rendering services or to fulfill the purpose for which the charges are imposed, (4) whether the collected moneys are deposited into a special, segregated fund, and (5) for what purposes those moneys are actually used. *See generally Drees*, 2012-Ohio-2370 (recognizing these factors and applying all of them in considering whether a home rule township's impact fee was a fee or a tax).

Therefore, upon levying a tax, a home rule township must comply with the procedures set forth in whichever statute authorizes the tax. *See, e.g.*, R.C. 511.27 (requiring a board of park commissioners that desires to levy a tax in excess of the ten-mill limitation to submit the proposed levy to a vote); *see generally Drees*, 2012-Ohio-2370, at ¶14 (acknowledging that if a home rule township's impact fee constituted a tax, it would violate R.C. 504.04 for not meeting the requirements set forth in the statutes authorizing the levy of taxes for roads, parks, and police and fire services).

A charge imposed by the legislative authority of a governmental entity “upon a broad class of parties,” for example, is characteristic of a tax. *Id.* at ¶29 (quoting *Bidart Bros. v. Cal. Apple Comm’n*, 73 F.3d 925, 931 (9th Cir. 1996)). Depositing the moneys generated by the charge into a special fund that is segregated from the public entity’s other sources of revenue, on the other hand, is suggestive of a fee. *See, e.g., Withrow*, 62 Ohio St. 3d at 116-17. Nevertheless, the Ohio Supreme Court has recognized that the substance of the charge is a critical element in evaluating whether the charge is a fee or a tax. *See Drees*, 2012-Ohio-2370, at ¶15 (“[i]n order to determine whether certain assessments are taxes, we must analyze ‘the substance of the assessments and not merely their form’” (quoting *Withrow*, 62 Ohio St. 3d at 116 n.5)). Consequently, of the foregoing factors, the use of the revenues produced by the charge in question often emerges as controlling. *Id.* at ¶30 (“the use of the funds becomes the predominant factor in making the ultimate determination” whether the assessment is a true fee or a tax).

In *Drees*, a limited home rule township purported to impose impact fees on developers applying for zoning certificates for new construction and property redevelopment. *Id.* at ¶3. The resolution adopted by the board of township trustees stated that the fees would be used to cover expenses incurred by the township (and attributable to the new construction and property redevelopment) to maintain township roads and parks and to provide adequate fire and police protection. *Id.* The township created special, segregated funds in which the impact fees were deposited: a road-impact fund, a park-impact fund, a fire-impact fund, and a police-impact fund. *Id.* at ¶6. Once deposited, however, the fee moneys collected were not earmarked and restricted to uses related to the new construction or redevelopment, but instead were available to be used for any road, park, fire, or police-related expenditure. *See id.* at ¶22.

The court observed that the fees were imposed on a specific group, *i.e.*, applicants for zoning certificates, as opposed to more broadly on all township residents. *Id.* at ¶32. This, the court reasoned, “pushe[d] the needle” toward a classic fee. *Id.* Nevertheless, the township’s “ultimate use” of the fees led the court to classify the fees as taxes. *Id.* The township was free to spend the “money ... in a general way, all toward the normal expenditures of government.” *Id.* at ¶22. The township was not required to use the money to improve the roads, parks, or police and fire protection in the area of the new construction or redevelopment. *See id.* Rather, the township was free to spend the money for any purposes related to those general township services. *See id.*

The *Drees* court analogized the township’s impact fee to a tax, stating: “Taxation refers to those general burdens imposed for the purpose of supporting the government, and more especially the method of providing the revenues which are expended for the equal benefit of all the people.” *Id.* at ¶40 (quoting *City of Cincinnati v. Roettinger*, 105 Ohio St. 145, 153-54, 137 N.E. 6 (1922)). The court recognized that the revenues raised through the township’s impact fee benefitted the entire community by contributing generally to the township’s roads, parks, and fire and police departments, as opposed to providing a “special benefit inuring to the targets of the

fee.” *Id.* at ¶33, ¶22. Therefore, the court concluded that the township’s use of the funds placed the impact fee squarely within the “realm of taxation.” *Id.* at ¶32.

Ohio courts are likely to classify a charge as a tax, rather than a fee, when the revenues generated by the charge are used for purposes that benefit the community as a whole and are not reasonably related to the service or product for which the charge is imposed. *See, e.g., Bldg. Indus. Ass’n of Cleveland*, 103 Ohio App. 3d at 552 (recognizing, in determining the city’s impact fee was a tax, that “it [was] impossible to ascertain whether the relationship [was] substantial between the charge and the burden to the recreation system of existing parks caused by new development”); *City of Cincinnati v. Roettinger*, 105 Ohio St. 145, 153-54, 137 N.E. 6 (1922) (reasoning that when used for general municipal purposes, surplus funds in a city’s waterworks utility fund constitute taxes). Contrarily, a charge will likely be found to be a fee when tailored to benefit the persons upon whom the charge is imposed and when the revenues resulting from the charge are used for purposes reasonably related to the corresponding service or product. *See, e.g., Graines*, 52 Ohio St. 3d at 183 (concluding that moneys retained in a city’s storm drainage utility fund were fees, not taxes, because there was no evidence that the moneys would be used for purposes unrelated to the utility).

Notwithstanding these principles, how a court weighs the aforementioned factors, including how revenues raised by fees are used, depends upon the facts presented in any given case. *See Withrow*, 62 Ohio St. 3d at 115. The determination of whether a charge is a fee or a tax is a fact-based inquiry, dependent on the unique characteristics of the particular charge in question.

Whether the City of Logan’s Stormwater Utility Charge is a Fee or a Tax

Article XVIII, Section 4 of the Ohio Constitution confers plenary powers upon a municipal corporation to “acquire, construct, own, lease and operate within or without its corporate limits, any public utility.” *See also Roettinger*, 105 Ohio St. at 157 (“[i]t has been repeatedly held by this court that those sections of article XVIII of the Ohio Constitution relating to municipal ownership and operation of utilities confer plenary powers”); *Priest v. City of Wapakoneta*, 24 Ohio Law Abs. 214, 221, 32 N.E.2d 869 (Ct. App. Auglaize County 1937) (“[u]nder the provisions of Section 4, Article XVIII, plenary power is conferred upon each and every municipal corporation, whether having a home rule charter or not, to acquire public utilities”). The powers provided to a municipal corporation under Ohio Const. art. XVIII, § 4 are self-executing, and may not be restricted or limited by the General Assembly. *See City of Columbus v. Pub. Utilities Comm’n of Ohio*, 58 Ohio St. 2d 427, 431, 390 N.E.2d 1201 (1979) (“[a] municipality’s power to own and operate a public utility is ‘*** derived directly from the people, pursuant to the provisions of Sections 4 and 6 of Article XVIII of the Ohio Constitution, and not from the General Assembly’” (quoting *State ex rel. McCann v. City of Defiance*, 167 Ohio St. 313, 316, 148 N.E.2d 221 (1958))); *Swank v. Vill. of Shiloh*, 166 Ohio St. 415, 143 N.E.2d 586 (1957) (syllabus, paragraph 1) (“[t]he power to acquire, construct, own or lease and to operate a utility, the product of which is to be supplied to a municipality or its inhabitants, is

derived from Section 4, Article XVIII of the Constitution, and the General Assembly is without authority to impose restrictions or limitations upon that power”); *State ex rel. City of Toledo v. Weiler*, 101 Ohio St. 123, 127, 128 N.E. 88 (1920) (“[t]he provisions conferring such power are clearly self-executing”); *Shoemaker v. Vill. of Granville*, 79 Ohio Law Abs. 573, 575, 156 N.E.2d 757 (C.P. Licking County 1958) (“[s]ubstantial limitation by acts of the legislature upon a municipality’s power regarding public utilities since the adoption of the home rule amendments of the Ohio Constitution has been frowned upon by the Ohio courts”). A stormwater drainage system is a type of sewer system that qualifies as a public utility for purposes of Ohio Const. art. XVIII, § 4. *See Graines*, 52 Ohio St. 3d at 180 and 182 (treating the city’s storm drainage utility as a sewer utility for purposes of Ohio Const. art. XVIII, § 4); 2009 Op. Att’y Gen. No. 2009-012, at 2-100 (“[a] storm drainage or sewer system is a public utility for purposes of § 4”).

Article XVIII, Section 4 of the Ohio Constitution also empowers a municipal corporation to establish rates and charges to fund the operation of its public utilities. *See Graines*, 52 Ohio St. 3d at 182 (a municipal corporation may, under Ohio Const. art. XVIII, § 4 “establish and maintain a public utility and charge the public for” the use of the utility, “provided that the rates are just and equitable”); *Witten*, 58 Ohio App. 2d at 21 (citing Ohio Const. art. XVIII, § 4 for the proposition that a village may finance its public utilities through rates and charges); 1981 Op. Att’y Gen. No. 81-084, at 2-330 (“[m]unicipalities are empowered by Ohio Const. art. XVIII, § 4 to set rates for public utilities they own and operate”). *But see Roettinger*, 105 Ohio St. at 153-54 (when used for purposes unrelated to a municipal corporation’s waterworks utility, surplus revenues derived from fees charged for that utility constitute taxes). Your second question asks us to determine whether the City of Logan’s stormwater utility fee is a fee or a tax.

“The Attorney General has no authority to interpret or determine the constitutionality of specific municipal ordinances, and cannot opine on the legality” of charges imposed by a municipal ordinance. 2009 Op. Att’y Gen. No. 2009-012, at 2-98. Furthermore, the determination of whether a public utility charge is a fee or a tax is a fact-based inquiry that is not amenable to a conclusive resolution by an opinion of the Attorney General. *See* 2006 Op. Att’y Gen. No. 2006-006, at 2-61 n.6 (determinations that “require[] findings of fact ... exceed the capacity of the opinions function”); 1990 Op. Att’y Gen. No. 90-020, at 2-78 (“[i]t is inappropriate to use the opinion-rendering function of the Attorney General as a means for making findings of fact”). Fact-based inquiries are to be referred to a court or another fact-finding forum. *See* 2006 Op. Att’y Gen. No. 2006-006, at 2-61 n.6 (determinations that “require[] findings of fact ... are appropriately left to ... the judiciary” or other appropriate fact-finding body). *Cf.* 1990 Op. Att’y Gen. No. 90-020, at 2-78 (recognizing that determining whether a nuisance exists for purposes of R.C. 505.87 rests with a board of township trustees).

Rather, we will review for you decisions of the courts in contexts similar to this situation for the purpose of identifying the standards by which a court would evaluate the City of Logan’s stormwater utility fee. The City of Logan’s stormwater utility fee is a fee charged for a municipal public utility. *See* Logan Code of Ordinances § 54.04. *See also Graines*, 52 Ohio St. 3d at 180, 182 (treating the city’s storm drainage utility as a sewer utility for purposes of Ohio

Const. art. XVIII, § 4); 2009 Op. Att’y Gen. No. 2009-012, at 2-100 (“[a] storm drainage or sewer system is a public utility for purposes of § 4”). Therefore, we will focus our analysis on cases that have evaluated fees in the public utility context.³

The Ohio Supreme Court rendered a pivotal decision in this area of the law in the early 1900s with its ruling in *City of Cincinnati v. Roettinger*, 105 Ohio St. 145, 137 N.E. 6 (1922). In *Roettinger*, the City of Cincinnati owned and operated a waterworks utility and charged a fee to property owners for their use of that utility. *Id.* at 146. When the waterworks fund accumulated an amount that exceeded the cost of conducting and managing the waterworks, the city sought to transfer the surplus moneys to the general fund, and thereafter expend those moneys for purposes unrelated to the waterworks utility. *Id.* at 146-47. A city taxpayer sought to enjoin the city’s transfer, arguing, among other things, that G.C. 3959, predecessor to R.C. 743.05, prohibited the city from using the surplus moneys for purposes other than those authorized in the statute. *Id.* at 149.

G.C. 3959 authorized a municipal corporation to apply the surplus moneys in the waterworks fund to the repair, enlargement, or extension of the waterworks, and “payment of the interest of any loan made for their construction or for the creation of a sinking fund for the liquidation of the debt.” *Id.* at 150 (quoting G.C. 3959). The city challenged the statute’s constitutionality, arguing that in restricting the use of surplus moneys in the waterworks fund, G.C. 3959 impermissibly infringed upon the city’s constitutional power to own and operate its waterworks utility. *Id.* at 152-53.

The court rejected the city’s argument and upheld the constitutionality of G.C. 3959. *Id.* at 153-54. The court reasoned that a surplus of moneys in the city’s waterworks fund constituted

³ We also confine our focus to court decisions that have evaluated charges in the public utility context because the courts weigh certain facts differently when evaluating rates charged for municipal public utilities as opposed to other municipal services. You suggest that many property owners in the City of Logan are being charged the stormwater utility fee, “in spite of not being served by the city storm water system.” Outside the context of municipal public utilities, it is true that courts are inclined to classify a charge as a tax, not a fee, when a municipal corporation imposes the charge upon all municipal residents regardless of whether those residents receive tangible benefits from the service for which the charge is imposed. *See, e.g., Thompson v. Green*, 12 Ohio Supp. 1, 5 (C.P. Franklin County 1943) (a municipal corporation may not charge property owners for garbage collection services when those property owners do “not require the service”). The same is not necessarily true in the context of municipal public utility services. *See Colley v. Vill. of Englewood*, 80 Ohio App. 540, 543, 71 N.E.2d 524 (Montgomery County 1947) (distinguishing *Thompson* in holding that a village’s sewer fees were proper even when the village imposed fees on real property not served by connections to the sewer system; unlike other municipal services, a public utility benefits all property within a municipal corporation, even when a property is not connected to the utility).

a tax when it exceeded “an amount sufficient to pay the cost of the operation of the waterworks and to make provision for repairs, renewals, extensions, new construction, and interest and principal of debt arising out of construction.” *Id.* at 153. Therefore, G.C. 3959, by prohibiting the surplus moneys from being applied to any other purposes, was a constitutional limitation on the city’s taxing power. *Id.* at 154 (“[i]f the ordinance under consideration in this case amounts to an effort to levy taxes for general municipal purposes, and if the taxing power is legislative in its nature, then the Legislature has the power to place such restrictions thereon as have in fact been provided in section 3959, General Code”).

Ohio courts have relied on *Roettinger* in the course of determining whether a charge imposed for municipal public utility services is a fee or a tax. *See, e.g., Graines*, 52 Ohio St. 3d at 182-83; *City of Franklin v. Harrison, Jr.*, 171 Ohio St. 329, 333, 170 N.E.2d 739 (1960) (relying on *Roettinger* and its progeny to state “it is clear that the constitutional validity of [R.C. 743.05] was ... sustained only upon the theory ... that a municipality that is furnishing water ... services shall not levy a tax on the use of such services for the purpose of providing money for general municipal purposes”); *State ex rel. McCann v. City of Defiance*, 167 Ohio St. 313, 318, 148 N.E.2d 221 (1958) (reiterating the principle in *Roettinger* that surplus revenues derived from waterworks funds would be classified as taxes if they exceeded an amount sufficient to pay for the operation and maintenance of the waterworks and for those purposes authorized in R.C. 743.05); *Swank*, 166 Ohio St. at 416-17 (recognizing that *Roettinger* and subsequent decisions established as a rule of law that the use of waterworks revenues for general municipal purposes is an unwarranted exercise of the municipal taxing power); *Shoemaker*, 79 Ohio Law Abs. at 575. These cases, spanning nearly a century, have developed a relatively fixed and uniform standard for evaluating the character of charges for municipal public utility services. Pursuant to this standard, charges levied by a municipal corporation for public utility services will be found to be a fee so long as the charges are reasonable, “just and equitable,” and the revenues those charges produce for the municipal corporation are spent for purposes related to the conduct and operation of the public utility.⁴ *Graines*, 52 Ohio St. 3d at 182; *see also Shoemaker*, 79 Ohio Law Abs. at

⁴ In *City of Niles v. Union Ice Corporation*, 133 Ohio St. 169, 12 N.E.2d 483 (1938), the Ohio Supreme Court decided that a city could expend the surplus revenues in its electric light department fund to pay part of the city’s indebtedness to a sanitary district. The court did not classify the surplus revenues as taxes even though the city spent them for purposes unrelated to the operation of the electric light department. *Id.* at 182. The court reasoned that, “[i]n the operation of a public utility, a municipality acts, not in a governmental capacity ... but in a proprietary or business capacity.” *Id.* at 181. When acting in its proprietary capacity, a municipal corporation that assesses charges for its provision of a public utility will not be found to have imposed a tax, “regardless of how the fund derived therefrom is ultimately used.” *Id.* at 182.

In later decisions, courts do not appear to have relied upon the governmental/proprietary distinction in *Niles* in evaluating whether fees charged for municipal public utilities constitute

576 (“[t]he rule established in the *Roettinger* case ... must be restricted to the concept that where a license fee or charge for a special service is excessive, or produces excessive funds, which are applied to other, unrelated uses, then it is deemed a tax, and thus subject to legislative control”).

In *Graines*, the Ohio Supreme Court used this standard to conclude that a city’s storm drainage fee was not a tax. 52 Ohio St. 3d at 183. The city established a storm drainage utility and imposed a fee upon all of the city’s improved property to cover the cost of maintaining, repairing, and improving the utility. *Id.* at 180. The fee was charged at a “rate of \$2.90 per month for each unit of 3,050 square feet of impervious surface on all improved property located in the city.” *Id.* The revenues were placed into a special segregated fund, and, pursuant to the city’s ordinance, were “to be used only for capital expenditures related to the city-wide storm sewer projects.” *Id.*⁵

Graines, a property owner with overdue storm drainage fees, relied on *Roettinger* to argue that the city’s fee amounted to an illegal tax. *Id.* at 182. The court disagreed with the property owner’s application of *Roettinger*, recognizing that *Roettinger* “sanction[ed] the practice of accumulating surplus funds so long as those funds are maintained in a segregated account and expended for a project related to the account.” *Id.* at 183. The court stated that it was therefore “clear that retained earnings in the storm drainage enterprise fund [were] proper as long as they [were] not diverted to purposes other than those authorized in [the city’s ordinances], relating to storm drainage.” *Id.* The trial court earlier had found, as a matter of fact, that the city planned to use any money accumulated in the storm sewer fund for projects related to the storm drainage utility and that “[t]here [was] absolutely no evidence that any funds would be diverted for general governmental expenses.” *Id.* at 184. Accordingly, the court declined to classify the city’s storm drainage fee as a tax.

taxes. *But see Orr Felt Co. v. City of Piqua*, 2 Ohio St. 3d 166, 170, 443 N.E.2d 521 (1983) (parroting language in *Niles*, without further discussion, in upholding as fees rates charged for a city’s electric utility services). *See generally* 1952 Op. Att’y Gen. No. 1533, p. 446, at 455 (“[t]he court [in *Roettinger*] based its decision on the theory that any surplus or profit made on the sale of water *became a tax* which the legislature, in enacting [G.C. 3959] had forbidden; a theory which ... was completely exploded in the case of [*Niles*]”).

⁵ According to §§ 54.01 and 54.04(B)-(C) of the Logan Code of Ordinances, as well as the budget submitted to the Logan City Council by the city’s storm water committee, the City of Logan’s stormwater utility fee is charged monthly at a rate of \$3.00 for each unit of 2,300 square feet of impervious area. Section 54.06(A) of the Logan Code of Ordinances states that the city’s stormwater utility fee shall be “used exclusively for the stormwater management program,” and § 54.06(C) states that “revenues from the city’s stormwater utility shall not be utilized for non-stormwater drainage expenses.”

Thus, fees charged for municipal public utility services will not be classified as taxes so long as the fees are reasonable, just, and equitable, and the revenues thereby generated for the municipal corporation are expended for purposes related to the conduct and operation of the public utility.⁶ *See Graines*, 52 Ohio St. 3d at 183; *Shoemaker*, 79 Ohio Law Abs. at 576. A municipal corporation may collect and accumulate public utility fees in amounts that exceed what is necessary to cover the costs of operating and maintaining the public utility. *See Graines*, 52 Ohio St. 3d at 183 (*Roettinger* “sanction[ed] the practice of accumulating surplus funds so long as those funds are maintained in a segregated account and expended for a project related to the account”). Provided that amounts in excess of the utility’s cost of operation and maintenance are used for projects that are related to the public utility (such as improving or extending the utility), the surplus revenues will not be considered taxes.⁷ *Id.*

Accordingly, a municipal corporation’s stormwater utility fee will not be classified as a tax provided the fee is determined to be reasonable, just, and equitable, and the revenue derived therefrom is used exclusively for the conduct and operation of the stormwater utility. *See generally* 2006 Op. Att’y Gen. No. 2006-006, at 2-61 n.6 (determining whether proceeds of a city tax levy will be used for purposes contemplated by the tax levy are more appropriately left to courts); 1998 Op. Att’y Gen. No. 98-035, at 2-209 (“[d]eterminations of reasonableness ultimately are left to the courts”).

⁶ This principle is consistent with how Ohio courts analyze the distinction between fees and taxes outside the context of municipal public utilities, treating the purpose for which fee revenues are expended as the predominant consideration. *See generally Drees*, 2012-Ohio-2370, at ¶30 (acknowledging that in most cases, “the use of the funds becomes the predominant factor” in determining whether a fee is a tax).

⁷ R.C. 729.52 prohibits a municipal corporation from using surplus sewer revenues generated by fees charged for municipal sewer services to extend the sewer system to unsewered areas. *See* R.C. 729.52 (“[a]ny surplus in [the sewer] fund ... shall not be used for the extension of a sewerage system to serve unsewered areas”). This prohibition has been ruled to be an impermissible infringement on a municipal corporation’s power to operate public utilities under Ohio Const. art. XVIII, § 4. *See Mead-Richer v. City of Toledo*, 114 Ohio App. 369, 375, 182 N.E.2d 846 (Lucas County 1961) (if interpreted to prohibit a municipal corporation from furnishing sewage facilities to unsewered areas, R.C. 729.52 “is invalid as an encroachment on the mandate of the people for autonomy in enumerated municipal affairs,” specifically a municipal corporation’s self-executing powers under Ohio Const. art. XVIII, § 4); *Shoemaker v. Vill. of Granville*, 79 Ohio Law Abs. 573, 576, 156 N.E.2d 757 (C.P. Licking County 1958) (if construed to prohibit a village to use funds from the village’s sewer fund to extend the sewer utility, R.C. 729.52 impermissibly restricts a municipal corporation’s authority to own and operate utilities under Ohio Const. art. XVIII, § 4).

Conclusions

In sum, it is our opinion, and you are hereby advised that:

1. Whether a charge imposed by a municipal corporation is a fee or a tax is a fact-based inquiry that is dependent for its resolution upon the specific context and characteristics of the charge.
2. A stormwater utility charge imposed by a municipal corporation will be classified as a fee provided the charge is reasonable, just, and equitable, and the revenue derived therefrom is used exclusively for the conduct and operation of the stormwater utility.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General