

IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

KAREN SHANAHAN, et al.,)	Case No. CI08-2348
)	
Plaintiffs,)	
)	Judge Charles Doneghy
v.)	
)	PLAINTIFF'S MOTION TO STAY
CITY OF TOLEDO,)	THE DECISION ON CLASS
)	CERTIFICATION AND FOR
Defendant.)	PARTIAL SUMMARY JUDGMENT
)	WITH MEMORANDUM IN SUPPORT
)	
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)	
)	
)	
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Now comes Plaintiff, by and through her counsel, and respectfully moves this Court to stay any briefing or decision on the issue of class certification until first determ-

ining whether or not the collection of funds by the city pursuant to its ordinance and administrative actions constitute a fee or a tax. The defenses and legal analysis involving this distinction are diverse and cannot be rationally pursued without a decision on this pivotal issue first. Plaintiff respectfully moves this Court to grant her partial Summary Judgment on the issue of whether the ordinance and administrative actions in question constitute a fee or a tax and after that ruling is made, Plaintiff can respond to the issue of class certification if it still remains, or amend its Complaint so as to conform to the law set forth by this court. In sum, Plaintiff moves this Court to find that the ordinance and administrative actions in question are, for the purposes of class certification, a fee, and that Defendant's newly asserted defense to class certification embodied in R.C. 2723.03 only applies to taxes and assessments, not to fees.

MEMORANDUM

I. INTRODUCTION

The Defendant challenges class certification by now raising (after pleadings are closed) a defense based upon R.C. 2723.03. While Plaintiff does not waive its right to challenge this tardy defense, it creates an issue that sets the path for the remaining course of this litigation and must be resolved before any further proceedings can be had. Pursuant to R.C. 2723.03, an action may be brought to enjoin the collection of **taxes and assessments** (emphasis added). It does not apply to fees.

In order to maintain an action for the recovery of taxes or assessments, R.C.2723.03 requires a plaintiff to allege and prove that he filed a written protest and notice of intention to sue at the time of paying the tax or assessment. It is this defect which defendant claims destroys the commonality of the class and makes this matter

unfit for class certification. The Ohio Supreme Court has held that these requirements are mandatory. Ryan v. Tracy (1983), 6 Ohio St.3d 363.

The Defendant has been a moving target throughout this litigation first calling the Ordinance and Administrative Action a **fee** for legislative purposes, and now calls these actions a **tax** so that it can raise this defense for litigation purposes. Defendant cannot have it both ways, and this fact alone demonstrates the need for the Court to determine whether these actions constitute a fee or a tax for purposes of the city's taking of private property from its citizens. Therefore, Plaintiff respectfully requests this Court to stay all briefing, decisions and proceedings regarding class certification until this Court resolves whether Defendant's actions are a fee or a tax and thus whether or not R.C. 2723.03 is applicable as a defense to class certification. Plaintiff respectfully requests this Court to follow the abundance of authority presented herein and determine the collection of funds for refuse collection is a "**fee**". Upon making this initial determination the parties can proceed as appropriate given the outcome of the decision.

II. FACTS

A. The Parties

Plaintiff, Karen Shanahan, is a citizen of Toledo, Ohio, and resides at 3633 Denise Drive. Plaintiff owns property in the City of Toledo and has paid \$5.50 a month since the administrative action was enacted in May of 2007 and \$3.00 since the Ordinance was enacted in May of 2008.

Defendant, the City of Toledo, is a municipal corporation located within Lucas County, Ohio. By administrative rule, the city of Toledo enacted a "refuse fee" that was

not approved by the Toledo City Council or by a public vote. This refuse fee later expired, only to be replaced by an ordinance of a very similar nature.

B. The “Refuse Fee” -- Administrative Action

On or about April 28, 2007, William H. Franklin, P.E., Director of the Department of Public Service for the City of Toledo, issued a new rule for refuse collection, which was then approved by Hon. Carleton S. Finkbeiner, the mayor of the City of Toledo – it was not approved by Toledo City Council or by voter referendum. T.M.C. Appendix B, Rules and Regulations Issued by the Director of Public Service, Regulations Governing Refuse Collection. This rule went into effect on May 28, 2007. Id. The sections of this rule that are in question are sections 208, 209, and 210.

Section 208, entitled “**Fees,**”¹ states the following:

For the collection of refuse from **any dwelling, building or other property permitted** her within these regulations, **the property owner** shall pay a **refuse fee**² of \$5.50 per month. If the structure consists of multiple units, the fee shall be \$5.50 per month per unit. Property owners who return a signed pledge card or electronically register to participate in the City of Toledo Curbside Recycling Program shall pay a **refuse fee**³ of \$3.00 per month. Where the structure consists of multiple units and the property owner recycles at each unit, the fee shall be \$3.00 per month per unit.

(emphasis added).

Section 209, entitled “Collection of Fees,” states the following:

The City shall include the monthly refuse fee on the property owner’s City water & sewer bill and the property owner shall pay the fee in the manner and amount specified on the bill. A property

1 The City refers to these collections as "fees" itself yet now asks this court to allow this deception upon its citizens.
2 Again the city calls it a "refuse fee".
3 The collection is never called a tax but always a "refuse fee".

owner may, by agreement, require a tenant or lawful occupant to pay to the City the monthly refuse fee; however, in the event of nonpayment, the property owner remains responsible for paying the fee. If any fees or miscellaneous charges relating to refuse service are not paid in full on or before the due date noted on the bill provided by the City, an amount equal to five percent (5%) of the amount billed shall be added to the total amount owed by the customer.

(emphasis added).

Section 210, entitled “Delinquent Fees,” states the following:

When charges for refuse service are not paid when due, the City may:

(a) **Terminate water service to the property pursuant to existing written policy;**

(b) Forward the account for collection by an outside collection agency;

(c) Transfer the delinquency to any other property owned by the account holder that receives service from the Department of Public Utilities;

(d) Bring an action at law for the collection of the delinquent amount; or

(e) Certify the charges, together with any penalties, to the County Auditor, who shall **place the certified amount on the real property tax duplicate** of the property receiving, directly or indirectly, refuse services from the City. The amount certified shall be a lien on the property served from the date placed on the list and duplicate and shall be collected in the same manner as other taxes, except that, notwithstanding section 323.15 of the Ohio Revised Code, a county treasurer shall accept a payment in such amount when separately tendered as payment for the full amount of such unpaid refuse fees and associated penalties.

(emphasis added).

Upon information and belief, Defendant used the water and sewage bill as a vehicle to collect this “refuse fee,” and then placed it into the city’s general fund to be spent how the city deems fit. Plaintiff asserts that the fact that Defendant required every property owner in the city to pay this “refuse fee” (with limited exceptions) combined with the fact that the money collected from the “refuse fee” is not specifically designated

for refuse collection, made this “refuse fee” operate as a tax based on property ownership. Defendant did not use the proper means to enact a tax based on property ownership.

Recognizing this, the Toledo City Council allowed the refuse fee to expire, effectively ending the tax created by administrative fiat. However, the city of Toledo had no right to collect the money it did from May 28, 2007, to April 30, 2008. Furthermore, Toledo City Council then amended T.M.C. § 963.03 to codify the refuse fee only different with respect to the amount to be collected.

C. T.M.C. § 963.03

On or about March 25, 2008, Toledo City Council amended T.M.C. § 963.03, to include a new “disposal fee” on property owners to go into effect after April 30, 2008. On April 4, 2008, Mayor Carleton S. Finkbeiner approved T.M.C. § 963.03. T.M.C. § 963.03(2)(b) states:

After April 30, 2008 for the periodic disposal of garbage and rubbish from any dwelling, restaurant, retail store, apartment house or office building, the property owner shall pay a monthly **refuse fee**⁴ based on the following schedule, provided that where the structure consists of multiple units, the monthly fee shall be per unit:

	Non-recycle	Recycle
May 1, 2008 – April 30, 2009	\$7.00	\$2.00
May 1, 2009 – April 30, 2010	\$8.50	\$1.00
Beginning May 1, 2010	\$10.00	- 0 -

For those property owners who pledge to recycle, the Director of Public Service may establish regulations governing how recycling pledges are made and enforced. The Director of Public Service is also authorized to establish a fine for those property owners who break pledges to recycle. The Director of Public Service may establish regulations governing waivers of the fee for owners of structures who have in force a contract with a commercial hauler to collect garbage and rubbish from their premises.

4 The City still calls it a "refuse fee"

T.M.C. § 963.03(2)(c) states:

The City shall include the monthly refuse fee on the property owner's City water and sewer bill and the property owner shall pay the fee in the manner and amount specified on the bill. A property owner may, by agreement, require a tenant or lawful occupant to pay to the City the monthly refuse fee; however, in the event of nonpayment, the property owner remains responsible for paying the fee. If any fees or miscellaneous charges relating to refuse service are not paid in full on or before the due date noted on the bill provided by the City, an amount equal to five percent (5%) of the amount billed shall be added to the total amount owed by the customer.

T.M.C. § 963.03(2)(d) states:

When charges for garbage and rubbish disposal service are not paid when due, the City may:

- (1) Terminate water service to the property pursuant to existing written policy;
- (2) Forward the account for collection by an outside collection agency;
- (3) Transfer the delinquency to any other property owned by the account holder that receives service from the Department of Public Utilities.
- (4) Bring an action at law for the collection of the delinquent amount;
- (5) Certify the charges, together with any penalties, to the County Auditor, who shall place the certified amount on the real property tax duplicate of the property receiving, directly or indirectly, the garbage and rubbish disposal services of the City. The amount certified shall be a lien on the property served from the date placed on the list and duplicate and shall be collected in the same manner as other taxes, except that, notwithstanding section 323.15 of the Revised Code, a county treasurer shall accept a payment in such amount when separately tendered as payment for the full amount of such unpaid refuse fees and associated penalties.

The language of the above amendments to T.M.C. § 963.03 is exactly the same as the "refuse fee" language with the exception of different rates. Also like the "refuse fee," the money collected by this ordinance goes directly into the city's general fund, the money is collected via the city's water and sewage bill, and the money collected is not set

aside to be used for refuse collection. The question presented before this Court is whether the above Ordinance and Administrative Action are a fee or a tax. It should be noted that at all times prior to this litigation, Defendant has referred to these actions as a fee. Defendant, to this point, has only referred to these actions as a tax for the purposes of denying class certification and raising a defense that only applies to taxes and assessments.⁵ Plaintiff urges this Court to find that this is a fee as further set forth below.

I. DISCUSSION

A. The Summary Judgment Standard

The standard for granting summary judgment is well established. Civ. R. 56(C) states that summary judgment is proper if: “(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.”

Harless v. Willis Day Warehouse Co. (1978), 54 Ohio St.2d 64, 375 N.E.2d 46.

The moving party bears the initial burden of proving the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. The moving party must support the motion by pointing to some evidence in the record of the type listed in Civ. R. 56(C). *Id.* Once the moving party satisfies this burden, the burden

⁵ In raising its defense under R.C. 2723.03, Defendant has admitted that the true purpose of these actions is to levy a fixed rate property tax upon the citizens of Toledo. By doing this, Defendant is admitting that its actions are illegal and did not follow the proper steps to create a tax. Instead, Defendant called its actions a fee so that it could avoid the necessary legislative steps to create a tax (the necessary steps to create a tax can be briefed at a later date). Defendant, however, should be estopped from raising this defense. At all times prior to this litigation, Defendant's actions were self-described as fees. By calling it a fee, Defendant did not put Plaintiff or any potential members of this class on notice that R.C. 2723.03 need be satisfied since fees are not taxes or assessments.

shifts to the nonmoving party to show that a genuine issue of material fact exists for trial. *Id.*

In Ohio, the issue of whether an item is a fee or a tax is decided as a matter of law. To determine whether a government action such as the “refuse fee” is a fee or a tax, courts must determine its character by its incidents, operations, and effect. *City of Franklin v. Harrison* (1957), 79 Ohio Law Abs. 399, 153 N.E.2d.

B. The Factors which Determine a Fee or a Tax.

Numerous courts in the 50 states have examined the issue of when collected funds are a fee or a tax. Fees, unlike taxes, confer a special benefit on fee payers in a manner not shared by those not paying the fee. like the Toledo Refuse Fee. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2000); *Shea v. Boston Edison Co.*, 431 Mass. 251, 727 N.E.2d 41 (2000). Charges like the Toledo Refuse Fee reasonably calculated to do nothing more than compensate a governmental agency for its services are fees, not taxes, even though they must be paid in order that the right may be enjoyed. *Southview Co-op. Housing Corp. v. Rent Control Bd. of Cambridge*, 396 Mass. 395, 486 N.E.2d 700 (1985). A fee is also imposed in the government's exercise of its police powers. *City of Marion v. Baioni*, 312 Ark. 423, 850 S.W.2d 1 (1993).

To determine whether a particular charge is a "fee" or a "tax," the general inquiry is to assess whether the charge is for revenue raising purposes, making it a "tax," or for regulatory or punitive purposes, making it a "fee." *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130 (4th Cir. 2000); *State of S.C. ex rel. Tindal v. Block*, 717 F.2d 874 (4th Cir. 1983); *City of Jefferson v. Missouri Dept. of Natural Resources*, 863 S.W.2d 844 (Mo. 1993); *City of Tullahoma v. Bedford County*, 938 S.W.2d 408 (Tenn. 1997); *Franks &*

Son, Inc. v. State, 136 Wash. 2d 737, 966 P.2d 1232 (1998), cert. denied, 526 U.S. 1066, 119 S. Ct. 1458, 143 L. Ed. 2D 544 (1999).

The Kansas Supreme Court provided that the difference between a tax and a fee is as follows:

“[A] tax is a forced contribution to raise revenue for the maintenance of governmental services offered to the general public. In contrast, a fee is paid in exchange for a special service, benefit, or privilege not automatically conferred upon the general public. A fee is not a revenue measure, but a means of compensating the government for the cost of offering and regulating the special service, benefit, or privilege. Payment of a fee is voluntary--an individual can avoid the charge by choosing not to take advantage of the service, benefit, or privilege offered.”cites McCarthy v. City of Leawood (Kan. 1995), 894 P.2d 836; at 845.

Washington uses the following three part test for distinguishing the difference between a fee and a tax: (1) The purpose of the charge; (2) Where the money raised is spent; and (3) Whether people pay the cost because they use the service. *Lane v. City of Seattle* (Wash., 2008), 194 P.3d 977. Under this standard, the stated purpose of the charge is to defray the cost of trash service, however the money raised is from property owners within the city of Toledo regardless of if they use the service, and Defendant spends the money however it likes since it comes from the general fund. Defendant’s actions fail the last two prongs of the above test. .

Massachusetts sets forth the following standard to determine whether a charge is a legitimate fee: (1) Legitimate fees are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society; (2) Legitimate fees are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service thereby avoiding the charge; and (3) Legitimate fees are collected to to raise revenues but to compensate the govern-

mental entity providing the services for its expenses. *Silva v. City of Attleboro* (Mass., 2008), 2008 WL 3906314.

Ohio courts have had numerous opportunities to determine whether or not funds collected by a municipality or considered to be a "tax" or a "fee" and follow the same analysis used by other states.

In the case of State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow (1991), 62 Ohio St.3d 111, the Ohio Supreme Court refused to adopt a general rule or specific test for determining if a collection is a fee or a tax. Instead, the Court stressed that this "must be done on a case-by-case basis dependent upon the facts and circumstances surrounding each assessment." Id. at 115, 579 N.E.2d 705. But the Withrow Court discussed 1) whether the charge is imposed for a governmental service; 2) whether the charge generates excess funds that are placed in a general fund, rather than being segregated and used for purposes related to the fee; 3) whether a direct benefit is provided to the public; and 4) whether the measure is regulatory as opposed to revenue-generating.

Using the above analysis it is clear that the City's collection of monies to support refuse collection services is a Fee. This charge meets factor one because it is imposed for a primarily a private service (refuse collection); 2) the charges are placed in the general fund, rather than being segregated and used for purposes related to the fee⁶; 3) direct benefit is provided primarily individual home owners; and 4) whether the measure is regulatory to a specific service and not created to generate general revenue for all city expenses.

⁶ In Ohio a fee assessed for refuse collection and removal is not a tax unless it "exceeds the 'cost and expense' to governments of providing the service in question." Granzow v. Bureau of Support (1990), 54 Ohio St.3d 35, 38. It is apparent from discovery responses that the city's collection of this fee does not cover the cost of refuse collection.

In A & M Builders, Inc. v. City of Highland Hghts., 2000 WL 45859 (Ohio App. 8 Dist. Jan 20, 2000) (NO. 75676), the court had to determine whether a “Park and Recreational Improvement Fee” constituted a “tax” or a “fee.” According to the Court, a ...

“fee” is a charge imposed by a government in return for a service. State ex rel. Petroleum Underground Storage Tank Release Compensation Bd. v. Withrow (1991), 62 Ohio St.3d 111, 113. “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.” Cincinnati v. Roettinger (1922), 105 Ohio St. 145, 153-54, “Determining 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.” Withrow, at 115. In addition, the Supreme Court of Ohio has held that “a ‘fee’ is in fact a ‘tax’ if it exceeds the ‘cost and expense’ to government of providing the service in question.” Granzow v. Bur. of Support of Montgomery Cty. (1990), 54 Ohio St.3d 35, 38.

In fact, of the numerous cases reviewed by Plaintiff, there has not ever been a single case found, where a refuse fee has been found to be a "tax". See Home Builders Ass'n of Dayton v. City of Beavercreek, Not Reported in N.E.2d, 1996 WL 812607, Ohio Com.Pl., February 12, 1996 (NO. 94 CV 0012, 94 CV 0062); Thompson v. Green, 12 Ohio Supp. 1, 1943 WL 6278 Ohio Com.Pl. 1943 (not a tax); City of Portsmouth v. Kinker, 1984 WL 5648 (Ohio App. 4 Dist. Sep 11, 1984) (NO. 1450)(both sides agreed it was a fee).

CONCLUSION

There does not appear to be a single case from any state that has ever found a refuse Fee to be a tax. The City's attack on class certification is based upon this fee being a tax. If the Court does not first rule on this issue then this matter could go to the supreme court , back to the trial court and back to the supreme court several times. Plaintiff's response to the alleged statutory defense completely depends on whether or not these monies are a fee or a tax. If they are a fee then the Complaint will require amendment. If they are found to be a tax the Plaintiff is entitle to attack the defense as

being waived or attack it on estoppel grounds since the city itself called it a fee. There are other legal arguments that will be appropriately briefed in that instance but Plaintiff simply cannot proceed cogently without first obtaining a ruling on whether or not the funds collected are taxes or fees.

Based upon the considerable consistency of authority set forth above, the funds should be considered a fee and Plaintiff allowed to amend so as to conform to this ruling.

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Respectfully Submitted,

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