

Are Impact Fees a Regulatory Taking?

FACTS:

Salt Run develops properties for residential use. It buys land, puts the infrastructure in place, and sells units to homebuilders. Salt Run bought a stretch of land in Hamilton Township and began developing it into two subdivisions. The township passed a resolution imposing fees on developers of residential property in the area. Salt Run tried to avoid the fees by convincing the village of Maineville to annex the land. The resolution assessed “impact fees” for new developments. Under the resolution, once Salt Run sold a lot to a builder, the builder would have to pay \$2,100 per lot when it applied to the township for a zoning certificate. The fees were intended as compensation for the cost of providing roads, police, fire protection, and parks. Under Ohio law, the annexation resulted in a form of governmental joint tenancy that subjected the properties to some regulations from each of the governmental units.

The township countered by placing a lien on the property. Salt Run responded by suing the township, raising federal and state law claims, including the claim that the lien amounted to an unconstitutional taking. Meanwhile, the Ohio Supreme Court ruled that the township lacked authority under state law to collect the fees in the first place.

The Fifth Amendment to the U.S. Constitution, through the Fourteenth Amendment, prevents states from “tak[ing]” “private property...for public use, without just compensation.” The guarantee applies to a variety of government takings, including the regulatory taking to which the township allegedly subjected Salt Run through its lien and impact fees. If a government’s appropriation of property, however, is directed to a public use and if the government pays fair value, it has not offended the Fifth Amendment. A litigant must, however, “seek compensation through the procedures the State has provided” before bringing a takings claim. Salt Run did not invoke the procedure to request compensation for a regulatory taking under Ohio law.

QUESTION:

Has the litigant followed the necessary procedure to raise the question of whether the assessment of impact fees is an unconstitutional taking under the Fifth and Fourteenth Amendments to the U.S. Constitution?

Answer according to the Federal District Court:

No. The United States District Court for the Southern District of Ohio denied the takings claim. On appeal to the Sixth Circuit Court of Appeals, Salt Run also argued that the district court should have awarded it attorney’s fees under the Code of Federal Regulations section 1988, even though it had not asked for attorney’s fees.

Answer according to the 6th Circuit of Appeals:

No. The Court held that Salt Run failed to ask for compensation and failed to make any argument that the impact fees did not serve a public use. As a result, Salt Run’s claim was not ripe. Salt Run’s attempt to classify the request-compensation-first rule as inapplicable in this case also failed. In addition, Salt Run’s failure to ask for legal fees in the lower court resulted in a forfeiture of that issue as well. Furthermore, section 1988 allows for attorney’s fees to vindicate federal constitutional and statutory rights, not state law claims.

Salt Run v Hamilton Township, No. 12-4379 (Sixth Circuit Court of Appeals) Aug. 9, 2013

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