1983

Utah Restaurant Association, a Utah Non-Profit Corporation And Anthony's, Inc., a Utah Corporation, Dba Anthony's Restaurant : Brief of Respondent

IN THE SUPREME COURT OF THE

STATE OF UTAH

UTAH RESTAURANT ASSOCIATION, a Utah non-profit corporation, and ANTHONY'S INC., a Utah corporation, dba Anthony's Restaurant,

Plaintiffs and Respondents

-vs-

DAVIS COUNTY BOARD OF HEALTH,

Defendant and Appellant.

Case No. 19213

BRIEF OF RESPONDENT

Appeal from the Judgment of the Second Judicial District Court of Davis County, State of Utah
THE HONORABLE DOUGLAS L. CORNABY
DISTRICT COURT JUDGE

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Plaintiffs and Respondents	:	
-vs-	:	
DAVIS COUNTY BOARD OF HEALTH,	:	
Defendant and Appellant.	:	

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an appeal from the final judgment of the District Court of Davis County.

DISPOSITION OF CASE IN LOWER COURT

The District Court of Davis County ruled that the "Food Services Establishment Permit Fee Schedule" imposed by the Appellant was invalid, restrained the Appellant from attempting to impose any charges pursuant to that Schedule, and Ordered the Appellant to return any payments theretofore received from any persons pursuant to that Schedule (R. 250).

NATURE OF RELIEF SOUGHT ON APPEAL

Appellant does not challenge the determination of the Court that the Schedule and the fees imposed thereunder are invalid, but seeks a declaration from this Court that the

Appellant has the authority to impose an inspection fee if such inspection fee is subsequently adopted pursuant to the procedures set forth in Section 26-24-20, Utah Code Annotated (1953), as amended.

STATEMENT OF FACTS

As reflected above, the Appellant failed to make any Findings of Fact as required by Section 26-24-20, Utah Code Annotated (1953), as amended. The record failed to establish any basis for the establishment of the Fees set forth in the Fee Schedule, even as "informal" findings. However, at the September 7, 1982 meeting, it was reflected that Mr. Harvey stated that the cost of administering the entire food service program (not just inspections) of the Appellant was approximately $53,000 and that the Fee Schedule proposed would generate approximately $16,000. It was further reflected that the health department collects about $6,000 per year from food handlers' tests, that one-fourth of the budget was covered by mill levy, and that there were various other programs that bring in revenue to supplement the costs of the program (R. 133).

In its Findings of Fact and Conclusions of Law, after determining that the Appellant had failed to comply with the statutory requirements in attempting to impose the aforesaid Fee Schedule, the lower Court further found that the Appellant

was acting in excess of its statutory authority in attempting to impose the type of fees involved in this matter. Additionally, the Court found that the Fee Schedule, in reality, amounted to the attempted imposition of a tax, rather than a "fee", thereby rendering the attempted imposition of the charges under that Schedule invalid. Finally, the lower Court determined that the Davis County Board of Health did not have the authority to assess a "fee schedule" such as the one in this case (R. 243-247).

ARGUMENT

POINT I

THE JUDGMENT OF THE DISTRICT COURT IS NOT CONTESTED BY THE APPELLANT AND, THEREFORE, THIS APPEAL SHOULD BE DISMISSED.

The Appellant has taken a rather unique approach on this matter in that it is now seeking only an advisory opinion from this Court. As earlier reflected, the Judgment of the lower Court merely found that the "Fee Schedule" of the Appellant was invalid and that no charges could validly be imposed thereunder. That Judgment is properly supported by unchallenged Findings of Fact and Conclusions of Law. The Appellant is now attempting to appeal, not from that final Judgment but, rather, from certain of the lower Court's findings and conclusions which Appellant feels were erroneous, but which would not affect the Judgment. Notwithstanding the

fact that the issues reflected in the Appellant's Brief are ones which the Respondent would also wish to see put to rest, it is respectfully submitted that such advisory opinions are not the function of this Court and, since the Judgment of the lower Court is not challenged, this appeal should properly be dismissed or the Judgment of the lower Court summarily affirmed.

As hereinafter reflected, the Respondents contend that the Court not only entered a correct Judgment but also entered findings and conclusions relative to this matter, all of which were correct.

POINT II

THE DISTRICT COURT CORRECTLY DETERMINED THAT THE APPELLANT HAS NO STATUTORY AUTHORITY TO ESTABLISH AN INSPECTION FEE REGULATING FOOD SERVICE ESTABLISHMENTS.

The Appellant relies, for its power to assess the fees involved in this matter, on Section 26-24-14, Utah Code Annotated (1953), as amended, which merely provides:

> "A local health department, shall have in addition to all other powers and duties imposed on it, the following powers and duties:
> * * *
> (14) Establish and collect appropriate fees, to accept, use and administer all federal, state , or private donations or grants of funds. .. (emphasis addred).

The Appellant maintains that, under this section, combined with Sections 26-24-3 and 26-24-8, Utah Code Annotated (1953), as amended, it has been granted jurisdiction for sanitation and health matters throughout the incorporated and unincorporated areas of the County and has been authorized and directed by the legislature to impose such "user fees" as it may desire on businesses, such as the restaurants or food service establishments. (Appellant's Brief, p. 5). However, while the legislature has specifically authorized some agencies to assess "user fees", it has, at the same time, placed guarded restrictions upon the imposition of those fees. Even in the same act as that which established the local health departments, the legislature allowed the State Department of Health to impose such fees only after providing, at Section 26-1-6, Utah Code Annotated (1953), as amended, as follows:

> "The department may adopt a schedule of fees that may be assessed for services rendered by the department, provided that such fees shall be reasonable and fair and shall be submitted to and approved by the legislature as part of the department's annual appropriations request. . ."

It is respectfully submitted that it would be patently unreasonable to presume that the legislature would have intended to give the local department of health carte blanche for the imposition of user fees at the same time they were being so careful to limit the powers of the State Department of

Health to impose such fees. Rather, it is much more reasonable to assume that the provision regarding the imposition of fees by the local department was merely intended to grant powers similar to those granted to other governmental bodies to impose the usual types of fees such as for the cost of preparing certificates, copying fees, and other unusual services which may be specifically requested by a given party and which do not benefit the public in general.

There is no question but that, under the Local Health Department Act, the legislature gave certain responsibilities to the local departments of health to make investigations and inspections for the health and welfare of the general populace of the county, including the power to formulate rules and regulations for the promotion of public health, which are necessary and consistent with the legislation and its intent, and which, once properly adopted, would then have the effect of law. This does not change, however, the fact that there is no specific statutory authority for the type of "fees" the Appellant sought to impose in this matter for the purpose of transfering those costs of protecting the public health to a limited class of taxpayers.

The lower Court, contrary to the contentions of the Appellant, did not state that the Appellant did not have the authority to pass a law assessing a fee (Appellant's Brief,

p. 9). The Court merely determined that the Appellant did not have the authority to assess a "Fee Schedule" such as that in this case for food service inspections. (R. 247). It did not deny its right to impose fees for minor items such as preparing certificates, copying fees, and other similar fees for specific services rendered to particular persons for their specific benefit, such as have been traditionally imposed by governmental bodies, as reflected in Section 26-24-14, Utah Code Annotated (1953), as amended. (R. 245-246).

Appellant argues that the power to assess such fees may be properly delegated to the Appellant since boards now play such an important part in the administration of our laws.(Appellant's Brief, p. 9). However, the lower Court found that the legislature did not delegate the power to assess such fees to the Appellant (R. 245-246), so the question of whether the legislature could delegate such power was not involved in that particular determination. Thus, whether or not there is "ample protection for any aggrieved person if the Board of Health should impose an unreasonable or arbitrary or inappropriate fee" (Appellant's Brief, p. 11) is not the question. The legislature simply did not give the Board the power to impose such fees.

POINT III

THE DISTRICT COURT PROPERLY DETERMINED THAT THE APPELLANT DID NOT HAVE ANY IMPLIED AUTHORITY TO ESTABLISH AN INSPECTION FEE REGULATING FOOD SERVICE ESTABLISHMENTS.

Appellant next contends, even if the statute did not specifically grant the Appellant the power to impose a fee for its inspections, that the power to impose such inspections carries with it the power to impose a fee to cover the costs thereof. (Appellant's Brief, p. 12). Admittedly, some of the cases have indicated the existence of such implied fee assessment powers. However, those cases have dealt with elected governmental bodies which may be given the power to tax by the legislature. The Appellant in this matter is merely an administrative body, established pursuant to Sections 26-24-4 and 26-24-5, Utah Code Annotated (1953), as amended. (R. 73-74). It is not a municipal body whose members are elected by the people or whose membership is established by election by the people. As such, it has no power, and may be granted no power, to impose taxes such as a municipality may be granted. It has no implied taxing or police powers and is not a corporate authority within the meaning of Article XIII, Sec. 5 of the Constitution of Utah. See State ex. rel. Wright v. Standiford, 24 Utah 148, 66 P. 1061 (1901).

While the legislature may provide for the execution of its legislative policy though administrative bodies and grant those bodies certain powers to determine the existence of facts upon which the execution of the legislative policy may depend, it may not transfer the essential legislative functions such as determining taxes. In Western Leather and Finding Company v. State Tax Commission, 87 Utah 227, 48 P. 2d 526 (1935), the Court explained:

> The legislature is not permitted to abdicate or transfer to others the essential legislative function with which it is thus vested. . . 48 P. 2d at 528.

Thus, while a city may argue that its fees imposed are taxes, police powers, or merely charges to offset particular expenses, the Appellant's imposition of charges may not legally fall within that taxing category. Under these circumstances, the distinction between a city or local governing board and a non-governmental appointed body becomes very important. In Provo City v. Provo Meat Packing Company, 49 Utah 528, 165 P. 477 (1917), for instance, the court found that the power to impose a "license fee or a license tax" is within the police powers of the state to regulate or prohibit a business and that, inherent in those powers, is the power to tax for the cost of such regulation. However, the Court also made it clear that such powers arise out of the taxing powers of the governmental body, which taxing powers do not exist as to the

Appellant in this matter. Bennion Gas & Coal cited by the Appellant at page 12 of its Brief is simply in line with the foregoing cases.

Therefore, unless the imposition of the assessments set forth in the Appellant's "Fee Schedule" in this matter come within the traditional concept of a fee, rather than a "license" fee or tax, it is invalid.

POINT IV

THE DISTRICT COURT PROPERLY DETERMINED THAT THE "FEE SCHEDULE" SOUGHT TO BE IMPOSED BY THE APPELLANT CONSTITUTED A TAX RATHER THAN A FEE.

As earlier reflected, the Appellant does not challenge the determination of the Court that there were no Findings of Fact or Conclusions of Law upon which the Court could reasonably determine the basis used by the Appellant in establishing the "Fee Schedule" involved herein, although Section 26-24-20, Utah Code Annotated (1953), as amended, , clearly requires the same, wherein it specifies:

> The hearings may be conducted by the board at a regular or special meeting, or the board may appoint hearing officers, who shall have power and authority to conduct hearings in the name of the board at a designated time and place. A record or summary of the proceedings of any hearing shall be taken and filed with the board, together with findings of fact and conclusions of law, and the order of the board or hearing officer.

Although that section further mandates, in subsection (5), that copies of those Findings of Fact, Conclusions of Law, and the Order be filed along with the Answer to the Petition on appeal to the District Court, no such Findings or Conclusions were filed with the Answer of the Appellant herein, and the Stipulation confirms the non-existence of these crucial items in this matter. (R. 74-75) These Findings and Conclusions are for the purpose of establishing the bases of the Board in enacting the regulation, along with reflecting the existence of the constitutional and statutory bases for its enactment. The lower Court, in its "Ruling" explained the problem that such a failure created. The Court explained:

> The purpose for findings and conclusions are so the basis for the board's order can be clearly established. While it is true that this court can read the documents and records and make an assumption as to what the board's basis for its order was, this court does not believe that is sufficient. The plaintiff is entitled to have the board follow the statutory procedures which includes making formal findings of fact and conclusions of law. (R. 228)

The critical nature of these items is further reflected in this Court's opinion in Banberry Development Corp. v. South Jordan City, 631 P. 2d 899 (Utah, 1981). That matter involved one of several cases involving "impact fees," "building permit fees," and other charges imposed by various cities to help offset the massive "growing pains" they were suffering due to high population growth in low population

areas. The issues as to the validity of these various fee imposing regulations hinged on the same constructional and Constitutional standards which must be considered in the matter currently before this Court. In Banberry, the Court explained:

> Since the information that must be used to assure that subdivision fees are within the standard of reasonableness is most accessible to the municipality, that body should disclose the basis of its calculations to whoever challenges the reasonableness of its subdivision or hookup fees. Once that is done, the burden of showing failure to comply with the constitutional standard of reasonableness in this matter is on the challenger. 631 P. 2d at 904.

See also Lafferty v. Payson City, 642 P. 2d 375 (Utah, 1982) and Home Builders Association of Greater Salt Lake v. Provo City, 28 Utah 2d 402, 503 P. 2d 451 (1972).

Although no such findings or conclusions were prepared, the Appellant contends that, "The record is without dispute that the cost of the food service inspection program is approximately $53,000 and that the inspection fee imposed by the Appellant would offset only a portion of the cost of the total program." (Appellant's Brief, p. 7). It is respectfully submitted that this statement is not accurate. The record, as referred to by the Appellant, establishes, at most, that the cost of the entire food service program is approximately $53,000 (R. 133). Nowhere in the record is there any reflection regarding the cost of the food service inspection program. Also, as reflected therein, the particular schedule involved

herein would have produced $16,000, which may have been more or less than the cost of the food service inspection program.

Throughout the entire record, there is a distinct and glaring absence of any findings or conclusions regarding any of the following vital matters:

(1) The costs of the inspections, as opposed to the other food service programs;

(2) The effects of cash registers, drive-up windows, or other points where food is dispensed, upon the costs of inspections;

(3) Ihe effects of increased numbers of seats upon the costs of inspections;

(4) The proportionate benefit from the inspection program to the public in general, as opposed to restaurants and other food service establishments; or even

(5) The means, if any, of dedicating funds obtained for the purpose of the inspection program;

Thus, although purportedly based on costs of inspections, no facts appear on the record which would justify the imposition of the Fees specified under the "Fee Schedule" even if the record before the Board had been properly established with Findings of Fact and Conclusions of Law. There existed no basis, therefore, on which it could be concluded that the "Fee Schedule" was anything other than a "tax" and could not be imposed by the Board.

The general concept that an administrative body simply has no power to impose a "tax", and the factors to be considered in distinguising between a "tax" and a "fee" was well set forth by the United States' Supreme Court in National Cable Televisions Association v. United States, 94 S. Ct. 1146, 415 U.S. 336, 39 L. Ed. 2d 370 (1974). There, Congress had required in its Independent Offices Appropriation Act of 1952, 31 U. S. C. Sec. 483a:

> "It is the sense of the Congress that any work, service . . benefit, . . .license, . . . or similar thing of value or utility performed, furnished, provided, granted . . . by an Federal agency . . . to or for any person (including . . . corporations . . .) . . . shall be self-sutaining to the full extent possible, and the head of each Federal agency is authorized by regulation . . to prescribe therefor . . . such fee, charge, or price therefor . . . such fee, charge, or price, if any, as he shall determine . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . ."

Based thereon, the FCC sought to impose a revised fee schedule for CATV systems by estimating its direct and indirect costs for CATV regulation and then, while retaining its earlier imposed filing fees, added an annual fee for each CATV system at $0.30 per subscriber, on the basis that this would meet its annual costs and approximate the "value to the recipient" as used in the foregoing Act.

The Court, with two dissenting votes, explained the distinction between taxation and fee levying powers, as follows:

> "Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, e. g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society."
>
> * * * * *
>
> "There is no doubt that the main function of the Commission is to safeguard the public interest in the broadcasting activities of members of the industry. If assessments are made by the Commission which are sufficient to recoup costs to the Commission for its oversight, the CATV's and other broadcasters would be paying not only for benefits they received but for the protective services rendered the public by the Commission."
>
> * * * * *
>
> "While those who operate CATV's may receive special benefits, we cannot be sure that the Commission used the correct standard in setting the fee. It is not enough to figure the total cost (direct and indirect) to the Commission for operating a CATV unit of supervision and then to contrive a formula that reimburses the Commission for that amount. Certainly some of the costs inured to the benefit of the public, unless the entire regulatory scheme is a failure, which we refuse to assume." 94 S. Ct. at 1147-1148.

The Court then reversed the lower Court's holding of the validity of the FCC "fees". See also Federal Power

Commission v. New England Power, 415 U. S. 345, 391 L. Ed. 2d 383, 94 S. Ct. 1151 (1974), and Stewart v. Verde River Irrigation Company, 68 P. 2d 329 (Ariz., 1937).

The New York Courts have also employed this distinction regarding such matters. In Nitkin v. Administrator of Health Service, 91 Misc. 2d 478, 399 N.Y. Supp. 2d 162 (1975), the Court examined a fee schedule imposed by the Board of Health which, in addition to the license fees otherwise imposed, imposed a fee upon various radioactive materials installations to cover the cost of its Bureau of Radiation Control. The Court explained:

> "It is necessary to distinguish between taxes levied in the form of fees and fees which are established to defray the specific function of the licensing or registration. A tax levied in the form of a fee, in order to be valid, must originate from a legislative body, be it the State Legislature or a local legislative body, pursuant to enabling legislation. The purpose of such a "fee" is concededly to raise revenue. The license "fees" for the registration of the professions are valid if enacted not under the police power, but rather under the power of taxation (People ex rel. Moskowitz v. Jenkins, 202 N.Y. 53, 94 N.E. 1065). A true fee on the other hand is a charge imposed to defray the cost of a particular service rendered by government to the individual (citing cases).
> * * *
>
> In dealing with a licensing or registration fee, imposed by an administrative agency, as in the case at bar, such a fee may not exceed the sum which will compensate the licensing or registration authority, for issuing and recording the license or registration and pay for the inspection to see to the enforcing of the licensing or registration provisions (Citing cases)
> * * *

> Furthermore, such a fee cannot include a charge for the general regulation of the industry (citing cases).
> * * *

Based thereon, that Court found the "fees" to be "taxes" and hence invalid.

Even where a governmental entity with the general power to impose a "tax" is involved, the Courts are often called upon to determine whether a particular "fee" imposed is a reasonable one or whether an unreasonable "tax" is involved. This Court has been called upon numerous times to review such matters and has established a substantial body of law which, Respondents submit, establishes that the "Fee Schedule" sought to be imposed in this matter is, indeed, a "tax", not a "fee."

In Weber Basin Home Builders Association v. Roy City, 26 Utah 2d 215, 487 P. 2d 866 (1971), the first of the often cited "impact fee" cases, the city had raised the cost of a building permit fee for the conceded purpose of obtaining additional money for the city's general fund. The Court explained:

> "If the money collected is for a license to engage in a business and the proceeds therefrom are purposed mainly to service, regulate and police such business or activity, it is regarded as a license fee. On the other hand, if the factors just stated are minimal, and the money collected is mainly for raising revenue for general municipal purposes, it is properly regarded as the imposition of a tax, and this is so regardless of the terms used to describe it. In some states, where the power granted cities does not expressly authorize the collection of a license fee for the purpose of

raising revenue generally, the courts have held that the charge for such licensing must bear some reasonable relationship to the cost of regulating the business so licensed. It is reasoned that even though license fees sufficient to cover such costs are a necessary concomitant of the police power, fees in excess thereof are in reality a form of taxation, which may not be imposed by the city without express authorization of the legislature." 487 P. 2d at 867.

The Court thereupon concluded:

> "Under the undisputed facts as presented to the trial court: where the basic flat-fee charge for a building permit was increased in one jump from $12 to $112, which increase admittedly had no relationship to increased costs of the service rendered; and more importantly, where the declared purpose was to raise general revenue for the City, it was his opinion that the increase placed a disproportionate and unfair burden on new households in Roy City, as compared to the old ones, in the maintenance of the City government; and that consequently it was discriminatory and constitutionally impermissible. We are not disposed to disagree with that conclusion."

To the same effect see Best Foods v. Christensen, ___ U. ___, 285 P. 1001 (1930), and Provo City v. Provo Meat Packing Company, Supra., where, although plaintiff's counsel had admitted the reasonableness of the fee or tax in question, the court acknowledged:

> "The courts, we think, all hold that where the purpose of the ordinance or statute is to regulate under the police power, the amount of the license fee or tax must be reasonable, and may not exceed the reasonable cost of preparing and issuing the license and the reasonable expenses of inspection and supervision."

Similarly, in Smith v. Carbon County, 90 Utah 560, 63 P. 2d 259 (1953), which involved a graduated fee, imposed on

... [illegible] ... wherein the Court, in determining the fee ... to be invalid, explained:

> "That fees may be charged for services rendered in private proceedings is not questioned. From what we have said, we do not wish to be understood as holding that the legislature must fix fees payable in all probate proceedings the same. What we do hold is that the amount of fees that may be exacted must bear some reasonable relation to the extent and nature of the services rendered. Otherwise such fees are, in contemplation of law, taxes." 63 P. 2d at 263.

As earlier noted, in the case at bar, such a basis does not appear. Rather, the appellant was attempting to defray the costs of its food service program through these assessments, unrelated to the costs incurred as to the particular parties paying the fees.

Equally important, however, in determining the validity of a municipal "fee" is whether it provides a "demonstrable benefit" to the party being charged the fee. This "demonstrable benefit" concept has been best expressed in the recent case of ... Utah Supreme Court regarding the validity of subdivision building permit or "impact fees", as discussed in Point I. In Bellerry, Supra., the court explained:

> "In remanding the case (Call v. City of West Jordan) for trial on the constitutionality of the ordinance as applied (i. e., the requirement that seven percent of the subdivision land be dedicated), this Court ruled that "the dedication should have some reasonable relationship to the need created by the subdivision." Id. at 1258. The Court quoted the following from Home Builders Ass'n of Greater Kansas City v. City of Kansas City, Mo., 555 S.W. 2d 832, 835 (1977):

> 'If the burden cast upon the subdivider is reasonable attributable to his activity, then the requirement (of dedication or fees in lieu thereof) is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than a reasonable regulation under the police power.'
>
> Reasonableness obviously holds the municipality to a higher standard of rationality than the requirement that its actions not be arbitrary or capricious. Under the reasonableness test in Call v. City of West Jordan, Supra., the benefits derived from the exaction need not accrue solely to the subdivision (614 P. 2d at 1259); flood control and recreation are needs that cannot be treated in isolation from the rest of the municipality. At the same time, the benefits derived from the exaction must be of "demonstrable benefit" to the subdivision (Id. at 1259) 631 P. 2d. at 905. (emphasis added).

In Call v. City of West Jordan, 606 P. 2d 271 (Utah, 1979) on reh., 614 P. 2d 1257 (Utah, 1980), in remanding the matter for further hearings (the initial case arose on a motion for summary judgment), the court explained the needs for such further proceedings, explaining:

> "In this case the rule adopted by this Court in Call I, quoted ante, cannot be applied without plaintiffs being given the opportunity to present evidence to show that the dedication required of them had no reasonable relationship to the needs for flood control or parks and recreation facilities created by their subdivision, if any. Implicit in this rule is the requirement that if the subdivision generates such needs and West Jordan exacts the fee in lieu of dedication, it is only fair that the fee so collected be used in such a way as to benefit demonstrably the subdivision in question. This is not to say that the benefit must be solely to the particular subdivision, but only that there be some demonstrable benefit to it. 614 P. 2d at 1259 (emphasis added).

Similarly to Continental Bank v. Farmington, Infra., the services provided in the case at bar are not services requested by the Restaurants but rather, are actions mandated by state and local law to protect the interests of the public at large and are, to say the least, of questionable benefit to restaurants. If the inspection were refused, the restaurant could not operate, notwithstanding its license. Although claims were made by the Appellant that the inspections involve an educational process for the restaurants (R. 29), the restaurants have no alternative but to undergo those inspections or lose their permit to operate. This "service" does not benefit the restaurant, and, in fact, may directly damage a restaurant which fails to meet the requirements imposed by those inspections, whereupon its permit to operate could be terminated. Further, the public has no way of knowing when or if a restaurant was inspected and all restaurants are not even inspected the same number of times each year. (R. 102). If any benefit is bestowed upon a restaurant by the "services" of the board of health, those benefits are only incidental to the public benefit obtained therefrom. See National Cable, Supra.

In addition to its failure to bear a reasonable relationship to the costs of the "service" to be rendered, and its failure to provide a "demonstrable benefit" to those upon

whom the "fees" are imposed in the case at bar, the Appellant's "Food Service Establishment Fee Schedule" further attempts to divide the business of the restaurants into various component parts to provide additional fund raising bases. This, it is respectfully submitted, is contrary to the general rule, as expressed by McQuillan in his treatise on Municipal Corporations, cited in Provo City, Supra, at v. 3, Sec. 1003, wherein the author explains:

> "A municipal corporation cannot, by ordinance, under the delegated general power to tax privileges, segregate the several elements of right that accrue to the citizen under one taxable privilege, as recognized, defined and declared by law, and tax each of such elements as a separate and distinct privilege of its own creation, as, for example, by dividing several privileges into many and requiring separate licenses to sell special articles which necessarily belong to one legal privilege, and which the law permits to be sold under one license. To express the rule in other words, power to impose a license tax upon a business does not authorize a division of the business into its constituent elements, parts, or incidents, and levy a separate tax on each or any element, part, or incident thereof."

The restaurants, after all, are already subject to having a license to operate as a restaurant, fees for which are supposedly to cover the costs of regulating their operations of the restaurant. By charging one license "fee" to operate, where it necessarily involves the preparation and service of food, and then requiring another "permit fee" to sell the food and another "food handler fee" for persons to be authorized to handle the food, the cities and municipal governments, along

with their administrative agencies such as the Appellant herein, are attempting to break down the one privilege to operate a restaurant into a myriad of separate permits and fees, all for the purpose of securing additional revenue for their general operations. The fact that this duplicating of fees results, as Appellant notes in its Brief, at least in the unincorporated areas of the County where the food service establishments would be subject to licensing by Davis County (Appellant's Brief, p. 8) is sufficient to render the action improper under those decisions. However, the Appellant in this matter is the local board of health for the cities as well and, therefore, its "fees" would also be duplicitous in the incorporated areas of the county. Since the Court made no finding in this regard, however, the question of the lower Court's misinterpretation of this matter would not appear significant to this Appeal.

It is very significant, however, that the "Fees" imposed in the Appellant's "Food Service Establishment Permit Fee Schedule" are not even dedicated to cover the expenses of the food service program of the Appellant. In fact, this factor alone should be adequate to determine that the assessments thereunder are, in fact, "taxes" and not "fees." Although these are supposedly assessed to cover the costs of the food service program, the Appellant indicated at the hearing before the

lower Court that the "fees" are to be deposited to the county's general fund (Tr. 19-20, R. 135), and thereby become subject to the directions of the County as to whether the funds for the intended inspections will even be approved in the Budget of the Department. Under such circumstances, the Courts have indicated that, regardless of whether the fees are ultimately used for the purposes initially indicated, the validity of the imposition must be determined as of the time it is imposed.

In Lafferty v. Payson City, Supra., the court discussed Call, Banberry, and Home Builders, Supra., and noted that the distinction as to whether the fees were valid or invalid hinged on the basis that "a reasonable charge for a specific service is permissible, whereas a general fee that amounts to a revenue measure is not." The court further noted: "We reaffirm that distinction, and agree with the district court's conclusion that the impact fee deposited in the cities general revenues in this case is an illegal tax." (Citing Weber Basin, Supra.) Finally, the court explained:

> "It appears from the City's answers to interrogatories and requests for admissions that the City has collected $98,000 by its impact fee, which sum the City has allocated for capital improvements in the following areas: electrical, 20%; sewage treatment plan expansion, 60%; and water, 20%. But these allocations (some now expended and some not) do not alter our conclusion. The validity of a fee imposed to augment general revenues is determined by its legal status at the time it is exacted, without regard to how the funds are later allocated or spent. This is not a case like those

involving connection fees, where the ordinances imposing the fees designated the collections for specific uses."

Again, in Continental Bank and Trust Company v. Farmington City, 599 P. 2d 1242 (Utah, 1979), the Court reviewed a license fee imposed on Lagoon by the City of Farmington, ostensibly with an intent to apply the increased revenues to upgrade the services to Lagoon. However, the court noted that:

> "The trial court specifically found that the amount of revenue anticipated from license fee bore no relation to the costs of services provided Lagoon. Farmington spoke extensively for the need of upgraded services to Lagoon, indicating an intent on the part of the city to apply revenues to that end. Beyond very general reference in the preamble of the ordinance, however, no dedication of revenue funds to that purpose is made. Moreover, evidence appears in the trial transcript tending to indicate that the tax was imposed with an eye to municipal purposes of a much broader sweep." 599 P. 2d at 1246, (emphasis added).

Based upon these factors, the court found that the ordinance was invalid, explaining:

> "The effective result of the ordinance, as presently constituted, is the imposition upon a single enterprise of a tax, the revenues of which could at the discretion of the city, be devoted to any municipal corporate purpose."
>
> * * * * *
>
> "The conclusion is inescapable that a situation such as the one at hand, where a municipality imposes a potentially crippling tax on a single business for the benefit of the community as a whole, coupled with vague promises of improved services which the business has not been guaranteed, and to a large extent, does not need,

presents such a case of abuse of taxing power." 599 P. 2d at 1246.

It is respectfully submitted that, in the case at bar, that, as the lower Court determined, there is no reasonable relationship reflected in the record between the "fees" imposed and the costs of the services rendered nor of any demonstrable benefit to the restaurants in return for such "fee". In fact, the contrary directly appears. Further, since there is no dedication of the funds for use in even operating the food service program of the Appellant, there is only one sure result from the imposition of the fee. . .the increase of the general revenues of the county. As such, the "fee" is, in fact, a tax which may not be imposed by the Appellant herein and, therefore, the lower Court properly determined that the "Fee Schedule" was invalid, and would have been invalid even if the proper Findings of Fact and Conclusions of Law had been entered by the Board reflecting the factors which the Appellant now claims constituted the bases for the adoption of the "Fee Schedule."

CONCLUSION

The Respondents respectfully submit that, based upon the foregoing that this Court should dismiss this Appeal or summarily affirm the Judgment of the lower Court on the grounds that the Appellant has not appealed from the Judgment of the

lower Court herein and, in fact, has conceded that Judgment to be correct. Rather, the Appellant seeks only to have certain findings reviewed which would not affect the Judgment.

In the event the Court determines to review the questions posed as to those certain findings, the Respondents respectfully submit that the findings and conclusions of that Court were correct in each instance and that, in fact, the Board did not have the statutory, nor the implied, authority to impose the fees sought to be imposed in the Appellant's "Fee Schedule," even if it had followed all statutory procedures. Further, it is submitted that the "fee" which the Appellants sought to impose was, actually, an invalid "tax", based upon the fact that the record disclosed: (1) no reasonable relationship between the costs of the inspections to particular food service operations and the Permit Fee Schedule sought to be imposed; (2) no demonstrable benefit to the restaurants by reason of the inspections; and (3) no dedication of the funds received to cover the expenses of the inspections. Since the Appellant is not a body with the power to impose a tax, even if authorized by the legislature, the lower Court properly adjudged the Appellant's "Fee Schedule" to be invalid and restrained it from any further imposition of fees thereunder and Ordered a return of any fees collected thereunder. This Court should, therefore, affirm the Judgment of the Lower Court

and determine its Findings of Fact and Conclusions of Law to be proper in all respects.

RESPECTFULLY SUBMITTED this ___ day of August, 1983.

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CERTIFICATE OF MAILING

I hereby certify that I delivered an original and 10 true and correct copies of the foregoing Respondent's Brief the the Clerk of the Supreme Court of the State of Utah, 3rd Floor, State Capitol, Salt Lake City, Utah 84115, and mailed 2 true and correct copies of the foregoing Respondent's Brief to Gerald E. Hess, Esq., Deputy County Attorney, Attorneys for Appellant, Courthouse Building, P. O. Box 618, Farmington, Utah 84025, this ___ day of August, 1983.

Gary E. Atkin