COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. 10330

PAUL F. SILVA,
Plaintiff-Appellant,

v.

CITIES OF ATTLEBORO, NEW BEDFORD, and TAUNTON,
Defendants-Appellees.

ON FURTHER APPELLATE REVIEW FROM THE APPEALS COURT

BRIEF of *AMICUS CURIAE,* CITY SOLICITORS and TOWN COUNSEL ASSOCIATION

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STATEMENT OF THE ISSUE

Recognizing that the defendant cities assess local burial-permit fees of $10 or $20 to offset costs of issuing these permits -- which are required by state law -- and not to generate revenue, did the Appeals Court misapply the principles of Emerson College v. Boston to classify these charges as illegal taxes?

STATEMENT OF *AMICUS* INTEREST

The City Solicitors and Town Counsel Association ("Association") is the oldest and largest bar association dedicated to the practice of municipal law in the Commonwealth. The members of the Association are attorneys and their assistants who represent municipal governments as city solicitor, town counsel, town attorney, or corporation counsel. Members of the Association also include attorneys who represent or advise cities, towns, and other governmental agencies in other capacities. The Association's mission is to promote better local government through the advancement of municipal law.

Cities and towns across the Commonwealth of Massachusetts are under budgetary assault.

Proposition 2½ restricts local ability to raise revenue through the property tax and has led to long-term structural deficiencies in municipal budgets, while the current economic downturn is constricting the few remaining local revenue-generators, sharply curtailing state aid, and decimating the value of pension-fund investment portfolios. At the same time, communities' health-care and education costs continue to rise dramatically. Against this backdrop, the Appeals Court has now forbidden municipalities from charging modest fees to defray the cost of public-health services that they are required by law to provide. If allowed to stand, this decision will compound the serious financial concerns faced by the Association's member cities and towns.

STATEMENT OF THE CASE

A. Local Issuance of Burial Permits

Chapter 114, section 45, of the General Laws prohibits the burial, removal, or other disposition of a human body without a burial permit from local officials of the city or town in which the person has died. G.L. c. 114, § 45. Such a permit may be issued only upon the receipt of a valid death certificate signed by a physician or, if time does not permit, a

pronouncement of death made by registered nurse or other allied-health professional. Id. The death certificate and other papers necessary to compose an accurate record of the death are then filed with the clerk in the jurisdiction in which the death occurred. Id.

The process for issuing burial permits at the local level requires several steps. When someone dies, the Board of Health or the Clerk for the city or town in which the person has died receives a death certificate or pronouncement of death from a funeral director. See Record Appendix ("R.") at 22, 32, 37. A staff member of the Board of Health or the Clerk's office examines the death certificate for accuracy and completeness then issues the burial permit. R. 22, 32, 37. The death certificate must be countersigned and forwarded to the Clerk for registration. R. 22, 32, 37; G.L. 114, § 45. If the death certificate contains errors or omissions, the Clerk will not register it but will require corrections or additional information to be submitted as a condition of registration. R. 22, 32, 37; G.L. 114, § 45. After the death certificate is registered, an official copy

is forwarded to the Registrar of Vital Statistics. R. 23, 33, 38.

Additional time and effort may be required if the death certificate contains errors or erasures or is incomplete, if the death occurs on a weekend, in the case of fetal death, if disinterment is required, or if remains are to be shipped out of the country for disposition. A. 45. Other situations requiring a burial permit are cremations or when a body is transported into the Commonwealth for disposition. See G.L. c. 114, §§ 44, 46.

Without complications, it takes about 15 minutes to issue a burial permit, not including additional time related to registration of the death certificate. A. 44. For this work, all of which is required by law, some cities and towns charge a modest fee. Taunton and Attleboro charge $10.00; Fall River charges $20.00. A. 22. Funeral directors pay these fees and pass them along to decedents' families as part of burial costs. A. 43.

B. Financial Pressures on Cities and Towns

City and town governments bear responsibility for significant costs outside their control with minimal flexibility in their capacity to raise revenue to

cover those costs. Executive Summary, Local Communities at Risk: Revisiting the Fiscal Partnership Between the Commonwealth and Cities and Towns, September, 2005, Municipal Finance Task Force of the Metro Mayors Coalition (included in addendum) at v. Pension obligations, health insurance, and special education necessitate costs that have risen dramatically but that cities and towns have little to no ability to control. Id. at vi, viii, xiii. Municipal impotence pervades the revenue side as well. Proposition 2½ severely constricted allowable increases in the main source of local revenue: the property tax. Id. at x, xii. This limitation made cities and towns more reliant on state aid, which has been unpredictable in difficult economic times. Id. at xi. Even when state aid has grown in recent years, most of the increase has gone to school funding, not local government. Id. at x-xi.

Now, as the Commonwealth faces a significant budget shortfall, cities and towns are bracing for cuts in state assistance such as local aid and lottery payments. "Fiscal 2010 Outlook Appears Bleak," Massachusetts Municipal Association, November 20, 2008 (included in addendum). The same economic chill is

sapping the vitality of the few remaining local revenue sources. Id. For example, motor-vehicle excise revenue for Fiscal Year 2009 is likely to be at least $50 million less than two years ago, communities' investment income has fallen 28% since last year, real property assessments are dropping, and new growth (which generates not only new taxable real estate but also building-permit revenue) is slowing. DLS Commentary, City & Town, December 2008, Division of Local Services, Department of Revenue (included in addendum) at 2. In this harsh light, municipalities need more -- not less -- flexibility as they attempt to offset some of their fixed costs.[1]

ARGUMENT

CITIES AND TOWNS MAY ASSESS MODEST CHARGES TO OFFSET COSTS OF PROVIDING PUBLIC-HEALTH SERVICES REQUIRED BY STATE LAW.

A. The Emerson Cases Establish that a Regulatory Charge Can Be a Valid Fee Even if the Choice to be Regulated is not Truly Optional.

The Court is familiar with the advent of the Emerson test to distinguish between fees -- that cities and town may charge -- and taxes -- that cities and towns may not charge absent legislative

[1] The Association adopts the Statement of Proceedings Below from the brief filed by the City of Attleboro.

authorization. See Emerson College v. City of Boston, 391 Mass. 415 (1984). Emerson summarized a three-factor matrix to assist in evaluating whether a particular municipal assessment was a permissible fee or an impermissible tax. Id. at 424. Originally, these factors were not conceived as a strict checklist against which challenged assessments must be measured. Rather, the "three-part Emerson test" began as the simple observation that "fees share common traits that distinguish them from taxes." Id.[2] Among these "common traits" are:

> (1) 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) fees "are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge"; and
>
> (3) fees "are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses."

Emerson, 391 Mass. at 424-25 (citations omitted). Nowhere did the Emerson Court hold that all three

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[2] Emerson noted that there are two basic types of fee, user fees and regulatory fees, but treated both types together for purposes of the "fee-versus-tax" analysis. See Emerson, 391 Mass. at 424. For reasons discussed herein, the decision not to differentiate between the two types has led to analytical difficulties in later cases.

traits must appear before a charge could be classified as a regulatory fee. If anything, the Court highlighted the dominance of the third factor by emphasizing that, "regulatory fees are not taxes if commensurate with governmental expenditures occasioned by the regulated party." Id. at 425 n.16.

Application of the Emerson factors to regulatory fees has demonstrated the difficulty of strict adherence to a three-part test. In particular, this Court and the Appeals Court have discounted the weight to be accorded the second ("choice") factor in determining that an assessment is a valid regulatory fee. See, e.g., Boston Gas Co. v. City of Newton, 425 Mass. 697, 706 n.19 (1997) ("the element of choice is not a compelling consideration which can be used to invalidate an otherwise legitimate charge") (citing Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgmt. Bd., 421 Mass. 196, 206 (1995)); Bertone v. Department of Pub. Util., 411 Mass. 536, 549 (1992) ("fees are not taxes 'even though they must be paid in order that a right may be enjoyed'") (citing Southview Co-operative Housing Corp. v. Rent Control Bd. of Cambridge, 396 Mass. 395, 402 (1985)); Morton v. Town of Hanover, 43 Mass. App. Ct. 197, 202 (1997) ("The

fact that the plaintiffs' use of the service is not truly optional is not determinative" of whether the charge is a fee or a tax); cf. Greater Franklin Developers Ass'n v. Town of Franklin, 49 Mass. App. Ct. 500, 503 (2000) (even though developers could choose not to build in Franklin and avoid school-impact assessment, assessment was a tax not a fee).

These cases signal that the two basic types of fees -- user fees and regulatory fees -- should be evaluated differently. If the "choice" factor were strictly required for all fees, then cities and towns could never impose regulatory fees because no one ever *chooses* to be regulated. The Emerson Court's observation that fees may be voluntarily undertaken was not intended to erect an insurmountable hurdle to establishing the validity of regulatory fees. By fudging applicability of the "choice" factor to regulatory fees, cases since Emerson have edged toward a more flexible measure for such fees. Under this measure, the burial-permit fees assessed in Attleboro, Taunton, and New Bedford should not have been invalidated.

Emerson's progeny have implicitly recognized that the true measure of a regulatory fee is whether it is

assessed to offset governmental costs of providing a service. Boston Gas Co., 425 Mass. at 706 ("We have long held that a municipality required by statute to participate in a scheme established by statute is entitled to 'cover reasonable expenses incident to the enforcement of the rules.'") (citations omitted); Southview, 396 Mass. at 402 (". . . charges, if reasonably calculated to do nothing more than compensate a governmental agency for its services, are fees, not taxes . . . ."). With respect to the burial-permit fees at issue here, the Appeals Court properly concluded that, "the fees collected in the present case, although deposited in general funds of the cities, were charged not to raise revenue, but to compensate for the expenses in issuing the permits." Silva v. City of Attleboro, 72 Mass. App. 450, 453 (2008) ("Silva II"). Under a reasonable reading of the controlling cases, this fact suffices to establish the status of the burial-permit fee as a fee and not a tax. The Appeals Court erred in concluding otherwise.

B. Fees Incident to Public-Health Regulation May be Validly Assessed as a Cost of Doing Business in a Regulated Industry Even Though the Benefits of Such Regulation Flow to the General Public.

Less frequently discussed in the case law than the second Emerson factor is the first Emerson factor: whether the particular governmental service occasioning the charge benefits the party paying the charge in a manner "not shared by other members of society." 391 Mass. at 424 (citation omitted). Like the "choice" factor, the "benefit" factor is not well-suited to assess the validity of regulatory fees in the public-health arena. Public-health regulation is designed to benefit the general public. If the Emerson "benefit" factor were prerequisite to all public-health regulatory fees, then no such fees could be assessed. This Court has not ruled that way but rather has concluded that regulatory fees are a cost of doing business in a regulated industry. See Nuclear Metals, Inc., 421 Mass. at 204 n.10 (challenged assessment is a valid regulatory fee even if only benefit to regulated party is ability to continue operations).

Contrary to the Appeals Court's holding here, the validity of the burial-permit fee should not turn on

the fact that the benefits of accurate recording of death and disposition of human remains inure to the general public. See Silva II, 72 Mass. App. Ct. at 455 (concluding that "shared public benefit" secured by issuance of burial permits makes burial-permit fees more like taxes). In many areas, individuals shoulder costs aimed primarily at preserving the public health, but these costs are not taxes. Consider such mandates as auto-emissions testing, childhood vaccination, dog registration, automatic sprinkler installation, building codes, sewer connection, and storm water drainage. These requirements benefit the general public, but the costs of compliance are borne by the individual most closely aligned with the thing to be regulated: the car, the child, the dog, the building, or the lot of land. Individual contribution to maintaining the public health is an accepted part of everyday life.

That Silva's challenge arose as a consequence of universal mortality should not dictate a different outcome. Because dying is rarely voluntary, it is distasteful to think about assessing costs in connection with this event. However, in modern society, such costs do arise and routinely fall on

decedents' family and friends. Unless a decedent is destitute and alone, the public does not pay for burial or cremation, even though proper disposition of human remains is required by state law and is a general benefit to the public health. There is no principled reason that the costs associated with creating an official record of the disposition of human remains should be treated differently from the costs associated with the disposition itself.

C. If Emerson Truly Requires Invalidation of the Burial-Permit Fees Assessed by Attleboro, Taunton, and New Bedford, It Should Be Replaced With a Test That Is More Flexible and Sensitive to Local Fiscal Concerns.

As discussed above, the Emerson test does not compel invalidation of the burial-permit fees at issue. If, however, this Court disagrees with the Association's analysis, the Association urges adoption of a modified test that would support imposition of these modest and reasonable fees.

The Emerson test was created by this Court and it can be changed by this Court. As cited by the defendants, Courts in other states have adopted a modified Emerson test to take into account the facts of a particular fee and those arguments will not be repeated here. Those cases present careful arguments

and analyses of how the Emerson test can be modified to take into account the circumstances of particular fees. If this Court determines that strict application of the current Emerson test would require the invalidation of the burial-permit fees, then the Association respectfully requests this Court to reconsider and modify the Emerson test to apply a legal standard under which these fees would be upheld.

* * *

As this Court noted over 170 years ago, "[t]owns are put to expense in preserving order, and it is proper that they should be indemnified for inconveniences or injuries occasioned by employments of this nature." Southview, 395 Mass. at 400 (quoting Boston v. Schaffer, 9 Pick. 415, 419 (1830)). The Emerson Court did not intend to bar cities and towns from charging legitimate and modest fees to offset the costs of implementing statutorily required systems of regulation. To date, decisions applying Emerson have not done so either. Under Emerson and its progeny, a modest charge to offset costs of compliance with public-health regulation is a permissible fee, not an impermissible tax. If the Appeals Court's application of Emerson here remains undisturbed, it will undermine

what little remaining ability communities have to cover fixed costs. Particularly in the current economic climate, this result is untenable for the Commonwealth's cities and towns.

CONCLUSION

For the reasons stated herein and in the briefs of the appellees, the decision of the Superior Court declaring the validity of the burial-permit fees assessed by the defendant cities should be affirmed.

Respectfully submitted,

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