

MEMORANDUM

TO: Chairman Suslovic and
Members of the Green Packaging Working Group

FROM: Jennifer L. Thompson, Associate Corporation Counsel

DATE: July 1, 2013

RE: Plastic Bag User Fee v. Tax

This memo will address certain questions that have arisen in connection with the Working Group's consideration of a possible user fee associated with single-use/disposable plastic bags.

1. What makes a charge a "user fee" rather than a tax?

The distinction between "reasonable user fees" and taxes was articulated by the First Circuit in *San Juan Cellular Tel. Co. v. Public Serv. Comm'n*, 967 F.2d 683 back in 1992. According to the court in that case:

[Courts] have sketched a spectrum with a paradigmatic tax at one end and a paradigmatic fee at the other. The 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. The classic "regulatory 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 it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.

Id.

Using this distinction as a starting point, a number of courts have adopted the following three-pronged test for distinguishing between a user fee and a tax:

- who imposes the assessment?
- who pays the assessment?
- what the revenue is spent on?

If the answer to each is broad (a legislative body vs. a regulatory body; the general public vs. specific users; and general revenue vs. specific fund), then it qualifies as a tax. Typically, when the primary purpose of an enactment is to raise revenue, the enactment will be considered a tax, regardless of the name attached to the act.

See Discussion at <http://www.banthebagspdx.com/?p=485>

According to the First Circuit: “the most salient factor in the decisional mix concerns the destination of the revenues raised by the impost[.]” *Cumberland Farms v. Tax Assessor, State of Maine*, 116 F.3d 943 (1st Cir. 1997). Therefore, where the monies raised go into a general fund and the stated purpose of the impost is to garner revenue, it will most likely be considered a tax. Where, however, fees are retained by a retailer or deposited into a fund intended for a specific service (preferably related to the particular use for which it is imposed) then it will most likely be considered a user fee.

2. Is it possible to create a user fee for plastic grocery bags and, if so, what might that look like?

The short answer to this is “yes, it is possible.” Although some states or municipalities have either banned plastic bags all together or opted not to regulate their use at all, a number of others have imposed a user fee on plastic bags. Given the distinction between taxes and user fees, it makes sense that many of those states and municipalities that have opted to regulate plastic bags by charging a “user fee” have created a structure by which the proceeds of the fee are deposited into a special fund(s) aimed at litter clean up or abatement or used to help encourage citizens to use re-usable bags instead of disposable plastic bags.

One example is the ordinance recently adopted by Boulder, Colorado, attached.

Also attached is an ordinance adopted in Los Angeles, California. Although Los Angeles’s ordinance bans plastic bags, it permits the use of recyclable paper bags and charges a user fee for those. I thought the mechanism by which that fee is charged and allocated might be another helpful example.

3. Are re-usable bags eligible expenses for SNAP or GA benefits?

According to the Maine Department of Health and Human Services Office of Family Independence, SNAP benefits cannot be used to purchase any non-food item. Therefore, although I have not found an express prohibition on purchasing reusable grocery bags with SNAP benefits, it appears to me that they would not be a covered expense.

It similarly appears to me that the cost of reusable grocery bags would not be an eligible expense under the General Assistance program. That program pays only for “necessary expenses,” the definition of which includes food but expressly excludes non-food items.

Given the exclusion of non-food items, I do not have a sense that the exclusion of reusable grocery bags from SNAP and General Assistance benefits would change if a fee were imposed on the use of plastic bags. I have, however, posed that question to representatives of the State of Maine, DHHS and will update the Working Group once I have received the answer.