

CITY OF BALTIMORE

SHEILA DIXON, Mayor

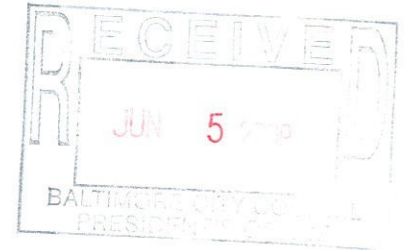


DEPARTMENT OF LAW

GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

June 5, 2009

The Honorable President and Members
of the Baltimore City Council
Attn: Karen Randle, Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202



Re: City Council Bill 08-0208 – Plastic Bags - Surcharge

Dear Madame President and City Council Members:

The Law Department has reviewed City Council Bill 08-0208 for form and legal sufficiency. It would require every retailer in the City to impose a 25 cent surcharge on every plastic bag given to a customer except those used for certain fresh produce or food, and then remit that surcharge to the Director of Finance monthly, along with a report on the number of bags the retailer considered exempt and the number upon which the surcharge was imposed. The bill also provides a late fee of 10% of the total amount overdue and 1% for every month, or part thereof, that the surcharge is not paid. In addition, any retailer violating the surcharge remission requirement is guilty of a misdemeanor and upon conviction is subject to a fine of not more than \$1,000 or imprisonment of not more than six months or both.

Although other cities in the United States have considered a total ban on the distribution of plastic bags, like San Francisco, or have encouraged a voluntary effort by retailers to eliminate plastic bags, like Austin, this bill is dissimilar in that it does not ban the bags outright but rather imposes a surcharge upon their distribution. The state of Florida is considering all types of plastic bag legislation (<http://www.dep.state.fl.us/waste/retailbags/default.htm>) but has not yet determined its course of action. The state of Texas has a proposed bill to place a seven cent fee on the use of plastic bags that cannot be composted, but that bill was left in committee and the state legislature is now adjourned. See Texas House Bill 1361 (2/17/09), located on-line at: <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=81R&Bill=HB1361>. New York City Mayor Bloomberg had called for a five cent tax on plastic bags, but has since backed down amid criticism and opposition from some in the New York City Council. See Michael Barbaro, *Mayor and Council Agree on 2 Sales Tax Measures*, New York Times, June 1, 2009, <http://www.nytimes.com/2009/06/02/nyregion/02tax.html?scp=3&sq=plastic+bags&st=nyt>. Connecticut is considering a five-cent statewide tax on paper and plastic shopping bags. See Connecticut House Bill 5207 (1/20/09), located on line with public hearing testimony at: http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=5207&which_year=2009; Gregory Hladky, *Lawmakers Consider Statewide Tax on Disposable Shopping Bags*, New York Times, May 17, 2009, <http://www.nytimes.com/2009/05/17/nyregion/connecticut/17bagsct.html>. The District of Columbia Council has voted a similar bill charging

F/Comments

only five cents per bag out of committee and the full council is scheduled to vote on it June 17, 2009. See District of Columbia Bill B-18-0150 (2/17/09), located on-line at: <http://www.dccouncil.washington.dc.us/images/00001/20090218163015.pdf>. Seattle is the only City that has enacted a fee on plastic bags, of twenty cents per bag, but the American Chemistry Council successfully lobbied for it to be submitted to the voters on the ballot in the fall of 2009. See Seattle Ordinance 122752 (7/30/08), codified in Seattle Municipal Code 21.40.075, located on-line at: <http://clerk.ci.seattle.wa.us/~public/code1.htm>. See also Devala A. Janardan, *Paper or Plastic*, Municipal Lawyer Magazine, March/April 2009, at 29, 39.

Baltimore City Council's Bill 08-0208 would require every retailer in the City to begin imposing the surcharge on all plastic bags that are distributed to consumers, subject to some exemptions. Then the retailers must remit those charges monthly along with a report on the number of exempt and charged bags. This burden on retailers is likely to be challenged as a violation of the Commerce Clause of the United States Constitution, which provides that the City may only regulate local aspects of interstate commerce if the regulations are not unduly burdensome. Here, a successful argument may be made that the surcharge remittance scheme is unduly burdensome on local retailers. The scheme would require every retailer to count every plastic bag used by every consumer; apparently requiring the stores to "ring-up" the purchases, bag them, and then count the number of bags used, then add the appropriate fee to the total before the consumer pays.

The Supreme Court has stated that "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981)(citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). An argument could be made that a total ban on plastic bags accomplishes the same, or better, environmental goals, but with less impact on commerce because it does not require the surcharge remittance scheme. The Texas Bill appears to address some of these concerns as it allows the retailers to keep three percent of the fees collected to offset their costs for implementing the remittance procedures. See Texas House Bill 1361, §376.004(d). The District of Columbia Bill also has a provision allowing retailers to keep some of the fees collected under certain circumstances. See District of Columbia Bill B-18-0150 (2/17/09), §5(b)(1)(a).

But there is no guarantee that a court will see this as changing an unreasonable burden into a reasonable one, especially in light of the fact that the balancing test the courts generally use gives significant weight to whether there is a less restrictive way to accomplish the same goals, in this case a total ban on the bags.

Additionally, the surcharge may be seen as a tax instead of a regulatory fee. Maryland courts have cautioned that certain fees cannot be taxes in disguise. "Where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the police power; but where it is exacted solely for revenue purposes and its payment give[s] the right to carry on the business without any further conditions, it is a tax" and its validity will depend on the taxing authority of the jurisdiction imposing it. *Eastern Diversified Properties*,

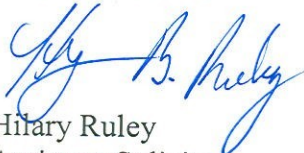
Inc. v. Montgomery Co., 319 Md. 45, 53 (1990) (quoting *Theatrical Corp. v. Brennan*, 180 Md. 377, 381-82(1942)). Obviously there is an environmental regulatory intent behind this bill. Therefore, the sole purpose of the law is not to raise revenue. “A regulatory measure may produce revenue, but in such a case the amount must be reasonable and have some definite relation to the purpose of the Act.” *Id.*

Nevertheless, the payment of the fee gives business and consumers the right to continue to use plastic bags without any further conditions. Thus, a court may hold that the surcharge is a tax despite its clear regulatory intent. If it is declared a tax, it should be considered an excise tax. *See, e.g., Weaver v. Prince George's County*, 281 Md. 349, 357 (Md. 1977) (charge on consumption of commodities is an excise tax); *accord* 71 Am. Jur. 2d State and Local Taxation § 24. As an excise tax, it would not be prohibited by Section 11-102(a) of the Tax General Article of the Maryland Code and would be within the broad taxing powers of the City under Article II, Section 40 of the City Charter. The key difference if the surcharge is seen as a tax is that the amount of a tax would not be open to review by the Courts. *Eastern Diversified Properties, Inc.*, 319 Md. at 53 (quoting *Theatrical Corp.*, 180 Md. at 381-82).

However, assuming the surcharge is characterized as a regulatory fee and not a tax, the amount of the fee “must be reasonable and have some definite relation to the purpose of the Act.” *Theatrical Corp.*, 180 Md. 377 (1942). The City may want to consider a lower fee than twenty five cents if that fee is not rationally related to the purpose of the bill, especially since it is significantly higher than the seven cents per bag fee imposed in the proposed Texas bill or the five cents per bag fee proposed by Connecticut and the District of Columbia. The Law Department defers to the Finance Department with regard to these costs.

The foregoing concerns highlight the unsettled area of the law on this topic. If enacted, this bill would be a forerunner and would be susceptible to legal challenge. *See Associated Press, D.C. Council votes to impose 5 cent grocery bag fee*, Daily Record, June 3, 2009 (quoting Darby Hoover, resource specialist with the environmental group Natural Resources Defense Council: “Anybody doing any kind of legislation on disposable bags is in the forefront of this issue.”). However, since there is no definitive prohibition against this surcharge, the Law Department approves City Council Bill 08-0208 for form and legal sufficiency.

Very truly yours,



Hilary Ruley
Assistant Solicitor

Cc: George Nilson, City Solicitor
Angela C. Gibson, Mayor's Legislative Liaison
Bill Henry, Councilmember, 4th District
Elena DiPietro, Chief Solicitor
Deepa Bhattacharyya, Assistant Solicitor
Ashlea Brown, Special Assistant Solicitor