

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor



DEPARTMENT OF LAW

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

June 19, 2013

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 13-0241 – Plastic and Paper Bag Surcharge

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 13-0241 for form and legal sufficiency. The bill would impose a surcharge of 25 cents for every paper or plastic bag supplied by a dealer to a customer at the point of sale. Dealers include any sales outlets. The bill exempts bags of specified dimensions that are used solely to contain listed products like fresh fish, meal or vegetables. The bill also exempts those people purchasing the bags under several federal assistance programs or those individuals who purchase reusable bags for \$0.99 cents or more. The bill also establishes rules on collection, provides for periodic reporting and penalties for failure to pay. The bill allows the Director of Finance to make rules and regulations to carry out and enforce the subtitle.

One of the penalties in the bill is 10% surcharge on the amount due. This is in violation of Section (48) of Article II of the City Charter that caps the amount of civil and criminal fines and penalties at \$1,000. Thus, the bill should be amended on line 24 of page 4 to strike the period and insert, "NOT TO EXCEED \$1,000."

This bill should withstand any challenge under the (dormant) Commerce Clause of the United State Constitution. U.S. Const., art. I, §8, cl. 3. Although an argument may be made that the surcharge remittance scheme is unduly burdensome on local retailers, 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)). The putative environmental benefits can be seen to outweigh any burden on distributors.

F/A

Additionally, the surcharge will survive a challenge that it is 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)). However, 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 were declared a tax, it should be classified as 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 if it is significantly higher than the fees charged in other jurisdictions. However, it may be that the City can easily justify the 25 cent per bag fee as rationally related to the cost of cleaning the harbor. The Law Department defers to the Finance Department with regard to these costs.

Subject to the foregoing amendment on the amount of the penalty, the Law Department approves this bill for form and legal sufficiency.

Very truly yours,



Hilary Ruley
Assistant Solicitor

cc: George Nilson, City Solicitor
Angela C. Gibson, Mayor’s Legislative Liaison
Elena DiPietro, Chief Solicitor
Victor Tervalva, Assistant Solicitor