



May 6, 2014

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 14-0372 – Plastic Bags - Surcharge

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 14-0372 for form and legal sufficiency. It would require every retailer in the City to impose a 5 cent surcharge on every plastic bag given to a customer with certain exceptions, and then remit that surcharge (less 1.5 cents per bag to offset administrative costs) to the Director of Finance monthly, along with a report on the number of bags 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 \$500 or imprisonment of not more than 60 days or both.

Since this bill would require retailers to administer a plastic bag surcharge program, it could 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. 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)). Although 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, this bill addresses the impact on retailers by allowing them to keep a portion of the surcharge to offset administrative costs.

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). 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 five cent fee appears to be in line with other jurisdictions.

The Law Department approves City Council Bill 14-0372 for form and legal sufficiency.

Very truly yours,



Hilary Ruley
Chief Solicitor

Cc: George Nilson, City Solicitor
Angela C. Gibson, Mayor's Legislative Liaison
Elena DiPietro, Chief Solicitor, General Counsel Division
Victor Tervalá, Chief Solicitor
Jenny Landis, Assistant Solicitor