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COUNTY COUNCIL

MEMO TO: Elle Cochran, Chair
Infrastructure and Environmental Management Committee

F R O M: Richelle M. Thomson
Deputy Corporation Counsel

D A T E: May 26, 2017

SUBJECT: Plastic Bag Reduction (IEM-12)

This memorandum is in response to your request of May 18, 2017, that the Department of Corporation Counsel comment on questions (in bold, below) related to imposition of a fee for recyclable paper bags.

1. Does the County have the authority to impose a fee for recycled paper bags that would be retained by the businesses providing the bags?

Generally, yes. Many jurisdictions have enacted legislation mandating minimum fees that stores must charge their customers for paper checkout bags. Presently, none of the Hawaii counties currently imposes such a fee.¹ Hawaii County's ordinance provided that stores may offer plastic checkout bags for a fee for one year after the effective date (January 17, 2013), but did not mandate a minimum fee. In general, the purposes cited for imposition of a mandatory fee include offsetting stores' costs associated with regulatory compliance, provision of allowable bags, and providing consumer education.

For example, San Francisco's plastic bag reduction ordinance requires that stores and restaurants charge a minimum of 10 cents for "compliant" carryout bags. The charge does not apply to purchases made by consumers using certain food-assistance programs.² In 2016, the State of California approved, by way of a voter referendum, a similar plastic bag ban initially authorized by the state's lawmakers in 2014.³ The referendum process also involved related legislation that would have allocated part of the bag fee to a new fund administered by the state; that proposition failed to garner sufficient voter support.⁴

There are three primary categories of fees or assessments: special assessments (including impact fees); development fees exacted in return for a permit or other governmental privilege; and regulatory fees imposed under the police power (i.e., for health, safety, or welfare purposes). Legal challenges are often based on whether a "fee" is actually a "tax," an issue discussed further in this memo. A charge may also be considered by a court to be part fee and part tax, depending on the specifics of the law in question.⁵

A fee required to be charged by a vendor for provision of a paper bag would likely be viewed as a type of regulatory fee as it is imposed both to mitigate the adverse effects on the business operations and the adverse environmental effects. The legislative body is attempting to regulate behavior through deterrence; here, the intent is to encourage consumers to bring and use reusable bags, with the deterrent being the imposition of a bag fee if they do not.

In Schmeer v. County of Los Angeles, 213 Cal. App. 4th 1310 (2013), a lawsuit in California state court, plaintiffs challenged a Los Angeles County ordinance requiring stores to charge a minimum 10 cents for each recyclable paper carryout bag provided. The ordinance states that the money received for recyclable paper bags must be retained by the store and used only for (1) the costs of compliance with the ordinance; (2) the actual costs of providing recyclable paper bags; or (3) the costs of educational materials or other costs of promoting the use of reusable bags, if any. Because the fee was to be retained by the stores, the court determined that the fee was not an illegal tax (such taxes require county voter approval under the California constitution).⁶

The court also concluded that even if the charge fell within the general definition of a tax under California law requiring voter approval, the charge would satisfy an exception to that definition for "[a] charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs

to the local government of conferring the benefit or granting the privilege” (Cal. Const., art. XIII C, § 1(e)(1)).⁷

The County’s proposed mandatory fee for a recyclable paper bag should be closely linked to the purposes supporting such a fee, including the actual cost of the bag, the administrative costs to the businesses in complying with the law, and the provision of educational materials to consumers.

2. Does the County have the authority to impose a fee, which would be retained in part by the business and in part by the County to offset disposal costs (given that there is no current ability to recycle such bags on Maui). Could the County retain the entire fee?

The answer to the question again involves analysis of whether a fee meets the tests of being a regulatory fee. Further, as to whether the County could retain all or a portion of the fee, the County would need to identify the underlying operational and legal bases for imposition of the fee.

As stated, there are currently no County programs for intake and recycling of paper bags. Further, waste collection and disposal is funded through residential collection and commercial disposal fees set in the County’s annual budget ordinance, additionally subsidized by the general fund (via property taxes), so additional fees may be considered a tax (a revenue generator rather than a fee for a specific County service or benefit), unless specific County services or programs are identified.

Pursuant to Section 8.04.050(B), MCC, refuse requiring special handling may be assessed an additional fee. Materials requiring “special handling” involve those items that incur additional disposal costs and/or require the County to handle the material differently than it does other types of municipal solid waste.⁸ If recyclable paper bags continue to be part of the mixed residential and commercial municipal solid waste disposed of at the County’s landfills, it does not appear that these items would qualify as requiring special handling supporting a fee imposed under this Code section.

An Advance Disposal Fee (“ADF”) imposes a duty on retailers to collect a set fee from consumers. ADF is a charge or fee levied against the distribution, purchase, or use of a product in order to discourage its use, as well as to recover the costs associated with either recycling or disposal of the product. There are costs to the business sector to implement and administer such programs, and costs to the municipality to administer and enforce the program. The fee charged should be commensurate with the costs of recycling or disposal. An example of an ADF is Hawaii’s Glass ADF Program,

administered by the State of Hawaii, Department of Health, pursuant to Chapter 342G, Part II, Hawaii Revised Statutes. The program regulates businesses in Hawaii that manufacture or import non-deposit beverage glass containers (non-HI-5 bottles). The ADF is used to fund the operation of the counties' glass container collection programs.

The County does not currently have an ADF ordinance. From a legal standpoint, there does not appear to be a basis preventing such an ordinance from being adopted. However, the purposes, costs, and benefits of such a program should be thoroughly studied prior to implementation. Additionally, the County's administration and enforcement of the program may be costly.

3. Should the County retain the paper bag fee, would the fee be considered a tax? What are the legal implications regarding implementing a new tax?

The Hawaii Constitution, Section 3, Article VIII, provides that the taxing power shall be reserved to the State, except so much thereof as may be delegated by the legislature to the political subdivisions. The power to tax real property was delegated to the counties through the enactment of Chapter 246A, HRS.

According to the Hawaii Supreme Court in State v. Medeiros, 89 Hawaii 361, at 365 (1999): "Municipal corporations are solely the creation of the State. As such[,] they may exercise only those powers which have been delegated to them by the State legislature."⁹ According to Article VIII, § 1, of the Hawaii Constitution, "Each political subdivision shall have and exercise such powers as shall be conferred under general laws." If no provision of the Hawaii Constitution or the Hawaii Revised Statutes empowers the counties to enact and enforce the ordinance, the ordinance may be deemed invalid. If the paper bag fee is determined by a court to be a tax, there is no current provision in Hawaii laws allowing for such a tax to be imposed by the counties.

To the extent that costs (for disposal of recycled paper bags) are also shared by the public at large through real property tax revenues that subsidize disposal of solid waste in general, the assessment under an ordinance may be considered a tax. To qualify as a "service" under HRS §46-1.5(8), the governmental activity must confer some benefit, direct or indirect, to the beneficiary which is separate and apart from any benefit conferred to the public at large.¹⁰ It is possible that a charge may be considered part fee, part tax.

In State v. Medeiros, the Hawaii Supreme Court developed a three-part test analyzing whether a charge (1) applies to the direct beneficiary of a particular

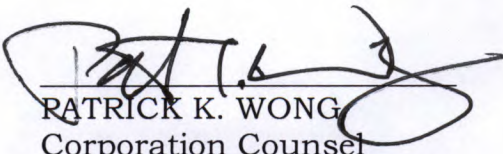
service, (2) is allocated directly to defraying the costs of providing the service, and (3) is reasonably proportionate to the benefit received, thereby qualifying as a "fee," which the county is authorized to impose under Section 46-1.5(8), HRS."¹¹

Fees imposed by a governmental entity tend to fall into one of two principal categories: user fees, based on the rights of the entity as a proprietor of the instrumentalities used, or regulatory fees (including licensing and inspection fees), founded on the police power to regulate particular businesses or activities. Such fees share common traits that distinguish them from taxes: they 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 a society," and the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses.¹²

4. If the County retains a portion of the fee, would there be any restrictions on the use of the funds from the fee?

If the County retains all or a portion of the fee, the fee should not exceed the reasonable cost of providing the County services for which the fee is charged, and it is recommended that the monies collected should be deposited into the Solid Waste Fund to support the link between the fee and the underlying services or program.

APPROVED FOR TRANSMITTAL:


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LF2017-0092

C: Stewart Stant, Director of Environmental Management
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¹ City and County of Honolulu, http://www.opala.org/solid_waste/pdfs/Article%209%20-%20Plastic%20Bag%20Ban.pdf; Kauai County, http://www.kauai.gov/Portals/0/PW_Recycling/PlasticBagReductionOrdinance885.pdf?ver=2015-04-22-155309-027; Hawaii County, <http://www.hawaii Zerowaste.org/site-content/uploads/PLASTIC-BAG-REDUCTION-ORDINANCE-12-001-2010-2012.pdf>.

² <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances12/o0033-12.pdf>; see also, http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/bosagendas/materials/bag020712_101055.pdf and http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/bosagendas/materials/bag112211_101055.pdf

³ Smith, Joshua. "Nation's first statewide plastic-bag ban now in effect across California," <http://www.sandiegouniontribune.com/news/environment/> (Nov. 13, 2016)

⁴ [https://ballotpedia.org/California_Proposition_67,_Plastic_Bag_Ban_Veto_Referendum_\(2016\)](https://ballotpedia.org/California_Proposition_67,_Plastic_Bag_Ban_Veto_Referendum_(2016))

⁵ *Territory v. Sakanashi*, 36 Haw. 661, 663 (1944)

⁶ *Schmeer v. County of Los Angeles*, 213 Cal.App.4th 1310, 1315, 153 Cal.Rptr.3d 352, 355 (2013), as modified (Mar. 11, 2013)

⁷ *Id.*

⁸ "Special Wastes" are defined in Section 11-58.1-03, Hawaii Administrative Rules ("HAR") as: "solid waste which, because of its source or physical, chemical, or biological characteristics, require special consideration for its proper processing or disposal, or both. This term includes, but is not limited to, asbestos, used oil, lead acid batteries, municipal waste combustion ash, sewage sludge that is non-hazardous, medical wastes, tires, white goods, and derelict vehicles."

⁹ *State v. Medeiros*, 89 Hawai'i 361, at 363, 973 P.2d 736, 738 (1999), citing *In Re Application of Anamizu*, 52 Haw. 550, 553, 481 P.2d 116, 118 (1971).

¹⁰ *State v. Medeiros*, *Id.* at 363.

¹¹ *In re Water Use Permit Applications*, 94 Hawai'i 97, 185, 9 P.3d 409, 497 (2000), citing *State v. Medeiros*, *Id.* at 367.

¹² *State v. Medeiros*, *Id.* at 366, citing *National Cable Television Ass'n v. United States*, 415 U.S. 336, 341, 94 S.Ct. 1146, 1149, 39 L.Ed.2d 370 (1974); they 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, *Vanceburg v. Federal Energy Regulatory Comm'n*, 571 F.2d 630, 644 n. 48 (D.C.Cir.1977), *cert. denied*, 439 U.S. 818, 99 S.Ct. 79, 58 L.Ed.2d 108 (1978). See also, *See also In re Menier*, 59 B.R. 588, 593 (Bankr.N.D.Ohio 1986); *State v. City of Port Orange*, 650 So.2d 1, 3 (Fla.1994); *Executive Aircraft Consulting, Inc. v. City of Newton*, 252 Kan. 421, 845 P.2d 57, 62 (1993) (collecting cases); *Butler v. Supreme Judicial Court*, 611 A.2d 987, 990 (Me.1992). Moreover, "[i]f the 'fee' unreasonably exceeds the value of the specific services for which it is charged[,] it will be held invalid." *Executive Aircraft Consulting, Inc.*, 845 P.2d at 62 (quoting *National Cable Television Ass'n Inc. v. F.C.C.*, 554 F.2d 1094, 1106 (D.C.Cir.1976)).