

DISTRICT COURT, PITKIN COUNTY
STATE OF COLORADO

506 E. Main
Suite 300
Aspen, Colorado 81611
970-925-7635

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CO Pitkin County District Court 9th JD
Filing Date: Mar 21 2013 03:48PM MDT
Filing ID: 51265533
Review Clerk: Carolyn Jemison

COLORADO UNION OF TAXPAYERS FOUNDATION, a
Colorado non-profit corporation,

Plaintiff,

v.

CITY OF ASPEN; MICK IRELAND, ADAM FRISCH,
TORRE, STEVE SKADRON, and DEREK JOHNSON, all in
their official capacities as members of the Aspen City
Council,

Defendants.

COURT USE ONLY

James M. Manley (Reg. No. 40327)
Steven J. Lechner (Reg. No. 19853)
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
jmanley@mountainstateslegal.com
lechner@mountainstateslegal.com

Attorneys for Plaintiff

Case No.: 12CV224

Division: 5

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff, Colorado Union of Taxpayers Foundation, on behalf of its members and by and through undersigned counsel, and moves, pursuant to C.R.C.P. 56, for summary judgment because there is no genuine issue as to any material fact and Plaintiff is entitled to judgment as a matter of law. Pursuant to C.R.C.P. 121, 1-15(8), counsel for Plaintiff in good faith conferred with opposing counsel about this Motion prior to filing. Support for this Motion is provided in a Memorandum in Support of Plaintiff's Motion for Summary Judgment, filed concurrently herewith.

WHEREFORE, Plaintiff respectfully requests that summary judgment be entered in its favor.

DATED this 21st day of March 2013.

Respectfully submitted,

/s/ James M. Manley
James M. Manley
Steven J. Lechner
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
jmanley@mountainstateslegal.com
lechner@mountainstateslegal.com

Attorneys for Plaintiff

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MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
jmanley@mountainstateslegal.com
lechner@mountainstateslegal.com

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**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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Rule

C.R.C.P. 56 7, 8

Colorado Union of Taxpayers Foundation (“CUT”), on behalf of its members and by and through undersigned counsel, hereby moves for summary judgment as to its claim that Defendants have engaged in unconstitutional taxation.

INTRODUCTION

Through this lawsuit, CUT seeks enforcement of the Taxpayer’s Bill of Rights of the Colorado Constitution (“TABOR”). Colo. Const. art. X, § 20. In 1992, Colorado voters adopted TABOR, limiting the power of the State and local governments to levy taxes or create debt without voter approval. Colo. Const. art. X, § 20; *City of Aurora v. Acosta*, 892 P.2d 264, 268 (Colo. 1995). TABOR “was designed to protect citizens from unwarranted tax increases.” *Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 4 (Colo. 1993). Accordingly, TABOR requires voters to approve “any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district.” Colo. Const. art. X, § 20(4)(a).

In October 2011, the Defendants enacted Aspen Municipal Code § 13.24, banning plastic grocery bags and levying a tax on paper grocery bags; the ordinance went into effect on May 1, 2012. The bag tax is imposed on and required to be paid by customers making a purchase from a grocer for each disposable paper bag supplied at check out. Aspen Mun. Code § 13.24.050(e). Like a sales tax, grocers must collect the bag tax from customers and remit the proceeds to the City. *Id.* (“A Grocer shall pay and the City of Aspen shall collect this fee at the same time as the City Sales Tax.”). Revenue generated from the bag tax funds general expenses of government previously funded through general fund revenue, including, *inter alia*, public educational

campaigns, infrastructure, pollution-reduction equipment, and community cleanup events. *Id.* § 13.24.050(g). No public vote seeking approval of the bag tax was held before Defendants levied the tax. By levying the bag tax without a vote of the people, Defendants have violated the rights of CUT's members to vote on the imposition of new taxes, as guaranteed by TABOR.

On August 21, 2012, CUT, on behalf of its members, filed the instant action seeking declaratory and injunctive relief to remedy Defendants' unconstitutional taxation. On September 10, 2012, Defendants filed an Answer, denying that the bag tax is a tax subject to TABOR's voter approval requirements.

PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

For purposes of Plaintiff's Motion for Summary Judgment only, Plaintiff submits that the following facts are undisputed:¹

1. Defendants have levied a \$0.20 charge on customers making a purchase from a grocer for each disposable paper bag supplied by the grocer during the purchase. Aspen Mun. Code § 13.24;² Defendants' Answer ("Answer") ¶ 4.

2. CUT is a nonprofit, public-interest, membership organization with its principal place of business in Denver, Colorado. CUT was formed to educate the public as to the dangers of excessive taxation, regulation, and government spending. Among the goals of CUT is to protect citizens' rights to petition government. CUT Bylaws.³

3. CUT has members who are registered to vote in the City of Aspen. These members shop in Aspen grocery stores and have been required to pay, pursuant to Aspen Mun.

¹ Hereinafter "PSOF ¶ __."

² Attached hereto as Exhibit A.

³ Attached hereto as Exhibit B.

Code § 13.24, the bag tax levied by Defendants. Deposition of Maurice Emmer at 21–23;⁴
Deposition of Elizabeth Milias at 31–32.⁵

4. These CUT members have received no specific benefits because of the bag taxes they have paid. Emmer Dep. at 23; Milias Dep. at 32.

5. These CUT members have changed their shopping practices in response to the bag tax. Emmer Dep. at 23; Milias Dep. at 7.

6. Colo. Const. art. X, § 20(4)(a) guarantees these CUT members’ right to vote before Defendants may: levy new taxes, increase tax rates, or institute tax policy changes directly causing a net tax revenue gain. Colo. Const. art. X, § 20(4)(a).

7. Defendant City of Aspen is a municipal corporation, organized to provide local governance for the City of Aspen. It is a local government as defined by Colo. Const. art. X, § 20(2)(b). Answer ¶ 4; Colo. Const. art. X, § 20(2)(b).

8. Defendant City of Aspen is subject to the voting requirements of Colo. Const. art. X, § 20(4)(a). Colo. Const. art. X, § 20(2)(b).

9. Defendants Mick Ireland, Adam Frisch, Torre, Steve Skadron, and Derek Johnson are members of the Aspen City Council and are responsible for governing the City of Aspen. In that capacity they approved and are currently enforcing the policies complained of in this action.

Answer ¶ 4.

10. No public vote seeking approval of the bag tax was held before Defendants levied the tax. Answer ¶ 8.

⁴ Relevant portions attached hereto as Exhibit C.

⁵ Relevant portions attached hereto as Exhibit D.

11. All customers of Aspen grocery stores pay the same bag tax rates, regardless of any individual customer's actual use of any of the government services provided by Defendants. Deposition of Alice Hackney at 30;⁶ Deposition of Ashley Cantrell at 37–38.⁷

12. Customers who pay the bag tax are entitled to no specific benefits because of the bag taxes they have paid. Hackney Dep. at 29–30; Cantrell Dep. at 37–38.

13. The City of Aspen has distributed reusable shopping bags, regardless of whether a bag recipient has paid the bag tax. Cantrell Dep. at 38; Hackney Dep. at 29–30.

14. The bag tax is not assessed to defray the cost of a product, service, or regulation provided only to those who pay the charge. Ordinance No. 24 at bates nos. 838–39;⁸ Cantrell Dep. at 30–31; Cantrell Memorandum re: Second Reading of Waste Reduction Ordinance (Oct. 3, 2011) at bates nos. 436–37.⁹

15. The rate of the bag tax is not based on the proportionate cost of any City services. Ordinance No. 24 at bates nos. 838–39; Cantrell Dep. at 30–31; Cantrell Memo at bates no. 436–37.

16. The bag tax was imposed in order to raise revenue. Ordinance No. 24 at bates no. 839; Minutes of Aspen City Council Regular Meeting (Oct. 11, 2011) at bates no. 906;¹⁰ Cantrell Dep. at Ex. 3, bates nos. 749, 751.

⁶ Relevant portions attached hereto as Exhibit E.

⁷ Relevant portions attached hereto as Exhibit F.

⁸ Attached hereto as Exhibit G.

⁹ Attached hereto as Exhibit H.

¹⁰ Relevant portions attached hereto as Exhibit I.

17. Bag tax revenue is available for a wide variety of projects, only tangentially related to paper grocery bag use. Hackney Dep. at 19, 23–24.

18. Prior to levying the bag tax, the City of Aspen used General Fund monies to pay for reusable shopping bags for residents and visitors; public educational campaigns to raise awareness about waste reduction and recycling; programs and infrastructure intended to reduce waste and recycling; recycling containers and waste receptacles; community events intended to reduce trash; and a public website that educates residents about waste reduction efforts. Cantrell Dep. at 19–23, Ex. 1, Ex. 5.

19. Prior to the implementation of the bag tax, the City of Aspen used at least \$2,370.00 of General Fund monies to pay for at least 700 reusable shopping bags distributed for free to residents and visitors of the City of Aspen. Cantrell Dep. at 16–17, Ex. 1; Invoice for Reusable Bags (Dec. 15, 2008).¹¹

20. From May 2012 to November 2012, the bag tax was assessed on approximately 100,000 disposable bags. Waste Reduction Fee Forms.¹²

21. From May 2012 to November 2012, the gross revenue from the bag tax was approximately \$20,000. *Id.*

22. City of Aspen Environmental Health Specialist Ashley Cantrell was the primary drafter of Aspen Mun. Code § 13.24. Cantrell Dep. at 27.

23. City of Aspen Controller Alice Hackney contributed to the drafting of Aspen Mun. Code § 13.24. Hackney Dep. at 17.

¹¹ Attached hereto as Exhibit J.

¹² Attached hereto as Exhibit K.

24. Possible bag tax rates that were considered varied from \$0.05 to \$0.25 per bag. Cantrell Dep. at Ex. 3, bates no. 751.

25. Ms. Cantrell suggested that the bag tax should be remitted by retailers on a form separate from the City sales tax form, because “The extra line on the tax form made it seem way too much like a tax.” Email from Ashley Cantrell to Catherine Carson (Sept. 12, 2011).¹³

26. Portions of Aspen Mun. Code § 13.24 were modeled after other City tax provisions. Hackney Dep. at 12–14, 17–19.

27. In 2011, the City of Aspen granted its Environmental Health Department a supplemental budget request of \$60,000 in General Fund monies to spend pursuant to Aspen Mun. Code § 13.24. Hackney Dep. at 38–40, Ex. 4.

28. The City of Aspen has budgeted \$59,940 to spend pursuant to Aspen Mun. Code § 13.24, including: \$31,000 for reusable bags; \$6,000 for radio ads; \$8,000 for newspaper ads; \$2,000 for bag distribution and collection bins; \$2,000 for signs for parking lots and stores; \$1,500 for stickers, hanger cards, magnets, etc.; \$2,640 for a mail campaign; and \$6,800 for staff time at \$17/hour. *Id.* at Ex. 4, bates no. 912.

29. As of December 14, 2012, the City of Aspen had spent \$22,356 of the 2011 supplementary budget request, including: \$6,511 for reusable bags; \$4,599 for radio ads; \$2,003 for newspaper ads; \$1,090 for materials and supplies; and \$8,153 for staff time at \$17/hour. Hackney Dep. at 41–48, Ex. 5, bates no. 1067.

¹³ Attached hereto as Exhibit L.

30. If expenditures pursuant to Aspen Mun. Code § 13.24 exceed bag tax revenues, the City of Aspen Environmental Health Department would pay for those expenditures with General Fund monies from its operating budget. Hackney Dep. at 36–38, 40, Ex. 3.

31. Prior to the passage of the bag tax, the Aspen City Council was advised that a majority of the Aspen Chamber Resort Association (“ACRA”) members responding to an ACRA survey opposed an ordinance by the Aspen City Council to charge consumers when they use plastic or paper bags at grocery stores, retail stores, and other business establishments. Email from Greg Fitzsimmons to ACRA Board Members (Feb. 11, 2011);¹⁴ Cantrell Dep. at Ex. 3, bates no. 749.

32. The amount of the bag tax was “decided on by a community consensus resulting from a valley wide conversation.” Cantrell Memo at bates no. 437.

ARGUMENT

I. STANDARD OF REVIEW.

Summary judgment is appropriate under C.R.C.P. 56(c) if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). A material fact is one that will affect the outcome of the case. *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 239 (Colo. 1984). When reviewing a motion for summary judgment, courts review the pleadings and the documentary evidence in the light most favorable to the nonmoving party. *Peterson*, 829 P.2d at 376. “[W]here multiple interpretations of [TABOR] are equally supported by the text . . .

¹⁴ Relevant portions attached hereto as Exhibit M.

a court should choose that interpretation which it concludes would create the greatest restraint on the growth of government.” *Bickel v. City of Boulder*, 885 P.2d 215, 229 (Colo. 1994); Colo. Const. art. X, § 20(1).

There is no genuine issue of material fact regarding whether the bag tax is subject to TABOR’s voting requirement. It is undisputed that the bag tax is not assessed to finance a particular service utilized by those who must pay the charge, in proportion to the cost of the particular service. For the reasons demonstrated herein, CUT is therefore entitled to entry of summary judgment as a matter of law pursuant to C.R.C.P. 56.

II. THE BAG TAX IS A TAX SUBJECT TO TABOR’S VOTING REQUIREMENTS.

A. TABOR Requires Defendants To Receive Voter Approval In Advance For New Taxes.

TABOR requires voters to approve “any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district.” Colo. Const. art. X, § 20(4)(a). The City of Aspen is a municipal corporation, organized to provide local governance for the City of Aspen. It is a local government as defined by Colo. Const. art. X, § 20(2)(b). The City is subject to the voting requirements of Colo. Const. art. X, § 20(4)(a).

TABOR’s voting requirements have been held to apply to taxes, but not fees. *Barber v. Ritter*, 196 P.3d 238, 249 (Colo. 2008). The bag tax is labeled a “fee” in an attempt to avoid the voter approval requirements of TABOR. *See* Ex. L. Unfortunately for Defendants, the distinction between a tax and a fee is not a matter of legislative declaration. *See Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1190 (Colo. Ct. App. 2005) (“The distinction between a fee and a tax depends on the nature and function of the charge, not on its label.”); *Cherry Hills*

Farms, Inc. v. City of Cherry Hills Village, 670 P.2d 779, 782 (Colo. 1983) (“The [Service Expansion Fee], regardless of its label, is a tax.”). As demonstrated herein, the bag tax shares none of the characteristics of a fee as defined by the Colorado Supreme Court. The bag tax is therefore a tax subject to TABOR, and not a TABOR-exempt fee. Accordingly, Defendants’ ongoing collection of the bag tax without prior voter approval is unconstitutional and must be enjoined.

B. The Bag Tax Has None Of The Characteristics Of A TABOR-Exempt Fee.

The essential distinction between a fee and a general tax is whether there is a direct connection between the charge and a government service:

If . . . the primary purpose for the charge is to finance a particular service *utilized by those who must pay the charge*, then the charge is a “fee.” On the other hand, if the language states that a primary purpose for the charge is to raise revenues for general governmental spending, then it is a tax.

Barber, 196 P.3d at 249 (emphasis added); *Campbell v. Orchard Mesa Irr. Dist.*, 972 P.2d 1037, 1040 (Colo. 1998) (“While general taxes exact revenue from the public at large for general governmental purposes, an irrigation district’s special assessment benefits specific landowners whose land the district supplies with water.”); *see also Board of Cnty. Comm’rs v. Fixed Base Operators, Inc.*, 939 P.2d 464, 469 (Colo. Ct. App. 1997) (“The [passenger facility charges] are akin to user fees assessed and collected from users of airport facilities.”); *Westrac, Inc. v. Walker Field*, 812 P.2d 714, 716 (Colo. Ct. App. 1991) (“Rates charged for use of a public facility . . . are not considered taxes because . . . they are imposed only upon those using the service provided.”). The amount of a fee “must be reasonably related to the overall cost of the service[,] [though] [m]athematical exactitude . . . is not required.” *Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1989).

The United States Supreme Court applies a similar direct connection test to distinguish between fees and taxes: “A fee . . . is incident to a voluntary act, . . . which, presumably, bestows a benefit on the applicant, not shared by other members of society.” *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336, 340–41 (1974); *see also Federal Power Comm’n v. New England Power Co.*, 415 U.S. 345, 350 (1974) (a charge will most often be a tax “when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefiting broadly the general public.”). Accordingly, a fee must be: (1) assessed to finance a particular service utilized by those who must pay the charge, (2) in proportion to the cost of the particular service. The bag tax has neither of these characteristics.

1. The bag tax does not finance a particular service utilized by those who must pay the charge.

On its face, the bag tax does not finance a particular service utilized by those who must pay the charge. Like a sales tax, grocers must collect the bag tax from customers and remit the proceeds to the City. Aspen Mun. Code § 13.24.050(e) (“A Grocer shall pay and the City of Aspen shall collect this fee at the same time as the City Sales Tax.”). Indeed, portions of the bag tax ordinance were modeled after City sales tax provisions. PSOF ¶ 26. However, in an attempt to obscure its true nature, the bag tax is collected separately from the City sales tax. *Id.* ¶ 25 (“The extra line on the [sales] tax form made it seem way too much like a tax.”).

Everyone who shops for groceries in the City of Aspen must pay the bag tax if they receive a paper grocery bag provided by a grocer at checkout.¹⁵ Aspen Mun. Code § 13.24.030. Shoppers who require a paper bag to carry their groceries—either because they did not bring

¹⁵ The only exception to this requirement is a customer who provides evidence that she is participating in the Colorado Food Assistance Program. Aspen Mun. Code § 13.24.070.

bags to the store with them or because they underestimated their ability to carry their food—have no choice but to pay the bag tax. Consequently, over 100,000 paper bags were provided by grocers to their customers and taxed in the first seven months following Defendants’ imposition of the bag tax. PSOF ¶ 20. No service is provided by the City in exchange for the bag taxes paid. PSOF ¶¶ 12–15. The only consequence of paying the bag tax, like paying the City sales tax, is the privilege of conducting a transaction in the City of Aspen.

Rather than finance a particular service, the bag tax funds a flexible array of government projects, none of which is directed at the individuals paying the bag tax. “[W]hen determining whether a charge is a fee or a tax, courts must look to the primary or principal purpose for which the money was raised” *Barber*, 196 P.3d at 249. The purpose of the bag tax is to “exact revenue from the public at large for general governmental purposes” *Campbell*, 972 P.2d at 1040.

The ordinance creating the bag tax declares that the purpose of the tax is to “fund the City’s efforts to educate residents, businesses, and visitors about the impact of trash on the regional environmental health and to fund the use of reusable carryout bags, City cleanup events and infrastructure and programs that reduce waste in the community[.]” Ex. G. Consistent with this broad statement of purpose, bag tax revenue is available for a wide variety of projects, only tangentially related to paper grocery bag use and in no way specifically directed at payers of the bag tax, including:

- (2) Ongoing campaigns conducted by the City of Aspen to:
 - (A) Provide reusable bags to both residents and visitors; and [sic]
 - (B) Create public educational campaigns to raise awareness about waste reduction and recycling;

- (C) Funding programs and infrastructure that allows the Aspen community to reduce waste and recycle. [sic]
- (D) Purchasing and installing equipment designed to minimize trash pollution, including, recycling containers and waste receptacles;
- (E) Funding community cleanup events and other activities that reduce trash;
- (F) Maintaining a public website that educates residents on the progress of waste reduction efforts; and
- (G) Paying for the administration of this program.

Aspen Mun. Code § 13.24.050(g)(2). Thus, the bag tax revenue is available to pay for such vague projects as waste-reducing infrastructure, pollution-reduction equipment, a government website, or community cleanup events. *See* PSOF ¶ 17.

None of the approved uses for bag tax revenues is directed at the specific individuals paying the bag tax. In every case, the focus of bag tax spending is the purported benefit of the general public and any benefits that result from the activities funded by the bag tax flow to the general community; “identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefiting broadly the general public.” *Federal Power Comm’n*, 415 U.S. at 350. This is perhaps why all of these activities have been funded by the City out of the General Fund. PSOF ¶¶ 18–19, 27–29. If bag tax revenues fall short of projections—indeed even if no bag tax revenue is collected—the City could continue to fund these programs from the General Fund. *Id.* ¶ 30. This is because these programs are in no way dependent upon the use of paper bags; they are general government programs for the purported betterment of the community at large.

Thus far, Defendants have used bag tax revenues to fund a public education campaign and to purchase reusable shopping bags for public distribution. *Id.* ¶ 29. By its very nature a public education campaign is directed to the general betterment of the community, not the provision of particular services to individuals. Even the most individualized service Defendants fund with bag tax revenue—reusable shopping bag distribution—is not a service limited to those who have paid the bag tax. *Id.* ¶ 13. Defendants passed the bag tax in part to raise revenue to fund distribution of reusable bags to hotels, rather than customers who pay the bag tax; although individual distribution of bags has purportedly occurred. *Id.* ¶ 16; Ex. I at bates no. 906. However, no one who pays the bag tax is entitled to receive a reusable shopping bag because they have paid the tax; rather, the City of Aspen distributes bags indiscriminately, regardless of whether a bag recipient has paid the bag tax. PSOF ¶ 13. Indeed, the CUT members identified in this case have received no benefits from the bag taxes they have paid. PSOF ¶ 4.

To the extent that Defendants use bag tax revenues in the future for other approved uses, such as infrastructure, pollution-reduction equipment, or community cleanup events, Aspen Mun. Code § 13.24.050(g), any benefit the CUT members identified in this case might receive would be shared equally by every other member of the Aspen community, “benefiting broadly the general public.” *Federal Power Comm’n*, 415 U.S. at 350. Accordingly, unlike a fee, the bag tax funds general government spending, not specific services directed at the payers of the charge.

2. The bag tax is not based on the proportionate cost of any City services.

It is self-evident that there is no relationship between the bag tax and specific government services, because no one who pays the bag tax is entitled to a “particular service,” *Barber*, 196 P.3d at 249, and bag tax revenue is available for a wide variety of general government spending.

PSOF ¶ 17. The amount of a fee, however, “must be reasonably related to the overall cost of the service[,] [though] [m]athematical exactitude . . . is not required.” *Bloom*, 784 P.2d at 308. If a person receives paper grocery bags from a grocer at checkout, she pays the bag tax for each bag; no consideration is given to any services actually provided by the City of Aspen. Aspen Mun. Code § 13.24.030. Indeed, bag tax rates from \$0.05 to \$0.25 were considered, and the final amount of \$0.20 was determined not based on the proportionate cost of any City services, but rather on “community consensus.” PSOF ¶¶ 24; 32. This is in stark contrast to fees that are calculated based on the actual cost of providing a particular service. *Cf. Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1190 (Colo. Ct. App. 2005) (“[The City] calculated the amount of charges based on the overall cost of providing streetlights. . . . Thus, the street light service charge is reasonably related to the overall cost of operating street lights.”). There was no attempt to calculate the bag tax based on the actual cost of providing any City services to the people of Aspen. PSOF ¶ 14–15; Cantrell Dep. at 31 (“Q. Was any similar study conducted with respect to the City of Aspen and its costs for the lifecycle of a paper bag? A. No.”). Indeed, the uses for which bag tax revenue may be allocated are so broad, it would be nearly impossible to calculate the per-bag cost of infrastructure improvements, community cleanup events, or a government website. Accordingly, the bag tax, unlike a fee, bears no relationship to the proportionate cost of any particular government service.

III. CUT IS ENTITLED TO DECLARATORY AND INJUNCTIVE RELIEF BECAUSE THE BAG TAX WAS NOT APPROVED BY VOTERS.

The bag tax shares none of the characteristics of a fee identified by the Colorado Supreme Court. It is not assessed to finance a particular service utilized by those who must pay the charge in proportion to the cost of the particular service. The bag tax is therefore a tax

subject to TABOR's voting requirement. Colo. Const. art. X, § 20(4)(a). Accordingly, the bag tax required voter approval pursuant to TABOR.

Perhaps due to "very negative feedback" from the Aspen business community about the economic effects of the bag tax, Defendants neither sought nor received voter approval for the bag tax. PSOF ¶ 31. Until such time as Defendants receive voter approval for the bag tax, Defendants must be enjoined against continued enforcement and maintenance of the bag tax. Colo. Const. art. X, § 20(4)(a); *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859, 866 (Colo. 1995) ("[T]axpayers have standing to seek to enjoin an unlawful expenditure of public funds."); *see also Barber v. Ritter*, 170 P.3d 763, 779 (Colo. Ct. App. 2007), *aff'd in part, rev'd in part on other grounds*, 196 P.3d 238 (Colo. 2008) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) ("a law repugnant to the constitution is void")). Additionally, TABOR requires that all "[r]evenue collected, kept, or spent illegally" be refunded. Colo. Const. art. X, § 20(1).

CONCLUSION

For the foregoing reasons, summary judgment should be entered for CUT and against Defendants.

DATED this 21st day of March 2013.

Respectfully submitted,

/s/ James M. Manley

James M. Manley
Steven J. Lechner
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

jmanley@mountainstateslegal.com
lechner@mountainstateslegal.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that on the 21st day of March 2013, the foregoing document was filed with the Court and true and accurate copies of same were served on counsel of record via LexisNexis File & Serve.

/s/ James M. Manley
James M. Manley