DISTRICT COURT, PITKIN COUNTY, STATE OF COLORADO Court Address: 506 E. Main St., #E Aspen, CO 81611	
COLORADO UNION OF TAXPAYERS FOUNDATION, Plaintiff, vs. **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 ▲** Case No.: 12 CV 224 Courtroom:
ATTORNEYS FOR DEFENDANTS CITY OF ASPEN: James R. True, Esq., #9528 Deborah Quinn, Esq., #7685 City of Aspen 130 S. Galena Street Aspen, Colorado 81611 Telephone: (970) 920-5055 Facsimile: (970) 920-5119	
MUNICIPAL DEFENDANTS' COMBINED MOTION FOR SUMMARY JUDGMENT, MEMORANDUM IN SUPPORT AND RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT	

Defendants, CITY OF ASPEN, and MICK IRELAND, ADAM FRISCH, TORRE, STEVE SKADRON AND DEREK JOHNSON, all in their official capacities as members of the Aspen City Council, (all hereinafter collectively referred to as the ("Municipal Defendants") by and through their undersigned counsel, submit this Combined Motion for Summary Judgment and Memorandum in Support together with their Response to Plaintiff's Motion for Summary Judgment (the "Combined Motion"). Defendants submit the Affidavits of Kathleen Strickland and Ashley Perl in support of their Combined Motion.

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INTRODUCTION

The City of Aspen enacted its Waste Reduction Ordinance, Ordinance 24, Series of 2011, as an environmental and public health protection measure to incentivize shoppers to use reusable bags in order to reduce the environmental impacts and waste generated by single use paper and plastic bags. The legislation was enacted only after unsuccessful outreach efforts to have shoppers voluntarily reduce the use of paper and plastic bags, after coordination with other ski towns and communities in the Roaring Fork Valley and after extensive research and subsequent education of Council by City staff and the Community Office for Resource Efficiency ("CORE"). The Waste Reduction Ordinance bans single use plastic bags in Aspen's grocery stores and imposes a $0.20 fee per paper bag used by most shoppers in Aspen's grocery stores. Plaintiff has challenged the constitutionality of the Ordinance, claiming that $0.20 per bag fee is really a tax that should have been submitted to a vote of the people.

The Ordinance itself and its record of adoption indicate that general revenue generation, the key aspect distinguishing a tax from a fee, was not the goal of the Ordinance, but rather the goal was waste reduction, through the ban on plastic bags and the fee on paper bags, which fees to be used in part to fund the program of awareness of the environmental costs of single use bags. The ideal effect of the Ordinance would result in less revenue over time from fees being generated as consumers in Aspen's grocery stores became aware of such environmental costs and stopped using paper bags, thus reducing the need for the City to conduct educational outreach and to provide free reusable bags. The Waste Reduction Ordinance shifts the costs of the waste reduction

program, *i.e.* the free reusable bags and ongoing education, from City taxpayers generally to those grocery shoppers who continue to add to the problem for the community by making the choice to use a paper bag. Plaintiff has not established beyond a reasonable doubt that the fee one pays as a result of that choice is a tax.

UNDISPUTED FACTS

The material facts in this case are not in dispute. The Affidavits of Kathy Strickland and Ashley Perl (referred to hereinafter as "Strickland" and "Perl") provide the history of the legislation, including the official records kept by the City Clerk's office, and will be referred to by reference to paragraphs in each affidavit, exhibit number, and/or the bates numbers from the Municipal Defendants' disclosures.

The Municipal Defendants adopted Ordinance No. 24, Series of 2011, in October of 2011, after conducting a public meeting and first reading on August 22, 2011 and a second reading and public hearing, first on September 12 and continued to October 11, 2011. Strickland ¶4, Exh. 1, hereinafter referred to as the "Waste Reduction Ordinance." It includes numerous factual findings and policy statements set out in the "whereas" clauses, Strickland Exh. 1, 838-39. City staff presented extensive information to Council on the widespread and numerous environmental impacts of single use bags, Strickland Exh. 2, 4 and 6. Information had also been provided to Council in work sessions as well, beginning with an extensive report to council from CORE and by staff and representatives from CORE at a Council work session in 2009, Strickland Exh. 12, Perl ¶3, Exh. 1, and a subsequent work session in January of 2011, Strickland ¶ 5, Exh.13. All of this information supports the specific findings included in the "whereas" clauses of

the Waste Reduction Ordinance. The terms of the Waste Reduction Ordinance, including the "whereas clauses" are not ambiguous and are not disputed.

Prior to formal consideration of the Waste Reduction Ordinance, the City had been working more than three years at an unsuccessful effort to have consumers voluntarily reduce their use of single use bags, Strickland Exh. 3, 869. The "goal of this ordinance is not to raise money but to reduce single use bags and give customers a choice," *id*. at 870. The first draft of the Waste Reduction Ordinance would have imposed a fee on both paper and plastic bags used by grocery store customers, Strickland Exh. 2, 863-66, and would have generated an estimated $434,000.00 in revenue for the City, conservatively based on estimated usage of single use bags per year for residents, but not including visitor use. Strickland Exh. 2, 852. At first reading on August 22, 2011, Councilmember Skadron expressed his concern with this amount of revenue, saying the point "is not to create a windfall," Strickland Exh. 3, 870; Mayor Ireland stated "the city is not trying to create a revenue source," *id.* at 871. During public comment on the proposal, Council was reminded of the importance of the environment and that people move to and visit Aspen for its clean, beautiful surroundings, *ibid.*

At the second reading and public hearing on September 12, 2011, staff again presented an ordinance that imposed a fee on both paper and plastic bags, Strickland, Exh. 4, 1082, 1089-94, and indicated that the purpose of the fee was to "create awareness of unsustainable behaviors by consumers," *id.* at 1085. While community consensus was part of the determination for a $0.20 fee, staff also indicated that the community conversation focused on a San Francisco study estimating a taxpayer cost for subsidizing

the recycling, collection and disposal of plastic and paper bags at $0.17 per bag, *ibid.* In addition, there was discussion about having a fee sufficient to get the attention of those paying it, and Council was advised that only 10% of paper bags used to carry groceries are recycled, *ibid*.

Council's concerns about creating a windfall were addressed in the staff memo for the September 12, 2011 second reading, Strickland Exh. 4, 1087 and included a budget with various revenues based on different reduction scenarios and included estimated costs of the services to be provided by the fees (still proposed for paper and plastic), *id*. at 1103-04. The staff presentation at the public hearing on September 12, 2011 included a summary of additional staff investigation and research that provided confidence that "the 20 cents/bag fee meets the costs of disposal of single use bags; bags will go into the landfill, get recycled or be litter and all those ends have costs for the city and the taxpayer. The fee will make users be more aware of the true costs of bags," Strickland Exh. 5, 1108. Council and public discussion on the September 12, 2011 second reading again focused on Aspen's leadership role on environmental issues with emphasis on the goal of reducing waste and educating the community; Councilman Frisch suggested that the ordinance be revised to ban plastic bags to reach the goal of reducing bags. Council then continued the second reading, Strickland Ex. 5, 1109-1110.

At the continued second reading and public hearing on October 11, 2011, staff presented the revised ordinance with the ban on plastic bags and a $0.20 fee on each paper bag distributed to customers of Aspen's grocery stores, Strickland Exh. 6, 874, 896-902. It was a challenge for staff to estimate the number of bags used by shoppers at

Aspen's grocery stores, the reduction in the use of bags, and thus the projected revenues to be generated by the fees, Strickland Exh. 4 at 1087, Exh. 6 at 879. Nevertheless, an estimated revenue calculation and an implementation budget based on the plastic bag ban and the paper bag fee were included with staff's Memorandum, *id.* at 890-892, together with a discussion of staff's concerns that the fees generated may not be sufficient even to cover costs of the initial services to be provided by the Waste Reduction Ordinance, the education and outreach program and provision of free reusable bags, *id*. at 876, 879-80. Staff emphasized that at $0.20 per bag, the people who actually use the bags would bear the costs of using them rather than the taxpayers bearing all or some of the costs, *ibid.*, and staff reiterated that the "goal is to create so much incentive for use of reusable bags that no revenues are generated," *id.* at 879.

During Council and public discussion on October 11, 2011, Councilman Skadron stated that the ordinance directly correlates the bag fee with a corresponding benefit and addresses his policy goals of raising awareness of excessive consumption and decreasing waste, Strickland Exh. 7, 904. The ordinance passed by a vote of 4-1, *id*. at 907.

The fee on the use of paper bags is voluntary, in that only those grocery store customers who choose not to use a Reusable bag, as defined in the Waste Reduction Ordinance, and instead request a paper bag, are charged the mandatory per bag fee, Waste Reduction Ordinance, Section 13.24.030, Strickland Exh. 1, 841. The revenue generated by the fees are to be kept in a separate account, the Waste Reduction and Recycling Account, are to be used only for the specific waste reduction and recycling

projects listed, and the revenue will never revert to the General Fund, Section 13.24.050, *id.* at 841-42.

Revenue has been generated since implementation of the Waste Reduction Ordinance on May 1, 2012 , PSOF ¶21. The expenditure of fees for costs of reusable bags and the initial public outreach, summarized at PSOF ¶29, was authorized in the Ordinance itself, Section 13.24.050(g)(1) and by the supplemental budget approved subsequent to the adoption but before implementation of the Waste Reduction Ordinance, Strickland Exh. 8, 9, 10 and 11.

The Waste Reduction Ordinance includes a severance clause, Section 2, which states:

> Severability. If any section, subsection, sentence, clause, phase or portion of this ordinance is for any reason held invalid or unconstitutional in a court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and shall not affect the validity of the remaining portions thereof.

Strickland Exh. 1, 844.

ARGUMENT

A. Standard of Review.

Both parties agree that summary judgment is proper in this case, because there are no genuine issues as to any material fact. Both parties agree that a material fact is one which will affect the outcome of the case**.** In the instant case, summary judgment is particularly appropriate as the issue before the court is one of interpretation and statutory construction of a municipal ordinance. Plaintiff's sole challenge to the ordinance is that the $0.20 fee imposed is a tax, and that the failure to submit the "tax" to a vote renders

the ordinance unconstitutional. If the fee is not a tax, the Complaint must be dismissed.

The Taxpayer Bill of Rights, *Colo. Const.* art. X, section 20 (TABOR" is not at issue, rather, the issue here is one of statutory construction, whether Aspen's Waste Reduction Ordinance violates TABOR, which depends on the determination of whether the $0.20 per bag charge is a fee or a tax. In this context, the Ordinance carries a presumption of constitutionality, and Plaintiff has the burden of proving its unconstitutionality beyond a reasonable doubt, *Bruce v. City of Colorado Springs,* 131 P.3d 1187, 1190 (Colo. App), *cert. denied* 2006; *see also Barber v. Ritter*, 196 P.3d 238, 247 (Colo. 2008), also rejecting Plaintiff's argument concerning construction that most reasonably restrains the growth of government.

II. THE WASTE REDUCTION ORDINANCE IMPOSES A FEE AND IS NOT SUBJECT TO TABOR'S VOTING REQUIREMENT.

A. The Waste Reduction Ordinance must be interpreted to give effect to its stated purpose.

Under the rules of statutory construction, the primary task of the court in construing an ordinance is to give effect to its purpose; Council's own declaration of the purpose of the ordinance is the best means of arriving at its correct construction, *Town of Erie v. Eason*, 18 P.3d 812, 822 (2009); *St. Luke's Hospital v. Industrial Commission*, 142 Colo. 28, 32, 349 P.2d 995, 997 (1960). Here, the stated purposes include the reduction of waste from single use bags by banning plastic bags and imposing a fee on paper bags, such fees to fund educational outreach as to the harmful effects of those bags and the provision of free re-useable bags as an alternative, Strickland Exh. 1, 838-39.

B. The purpose of the Waste Reduction Ordinance is to reduce waste, not to generate revenue, and the fee imposed is related to that purpose.

The use of fees by government entities has long been recognized in Colorado as a legitimate means of generating revenue, *Bloom v. City of Fort Collins,* 784 P.2d 304 (Colo. 1989). Fees differ from taxes in that their primary purpose is not to defray general expenses of government, and they are upheld so long as the amount of the fee is reasonably related to the overall cost of the service. As stated in *Bloom*,

> Unlike a tax, a special fee is not designed to raise revenues to defray the general expenses of government, but rather is a charge imposed upon persons or property for the purpose of defraying the cost of a particular governmental service. The amount of a special fee must be reasonably related to the overall cost of the service. Mathematical exactitude, however, is not required, and the particular mode adopted by the city in assessing the fee is generally a matter of legislative discretion. An ordinance will be upheld as long as the ordinance is reasonably designed to defray the cost of the particular service rendered by the municipality.

784 P.2d at 309. The Municipal Defendants, in determining the amount of the paper bag fee, considered not only the estimated costs of the particular services to be provided in relation to the revenues to be generated, but also the approximate waste/life cycle cost of each paper bag to the taxpayers and the incentive effect of the fee, Statement of Facts, *supra*. Under the *Bloom* test set out above and under general principals of statutory construction, the Ordinance is valid.

Although *Bloom* was decided before TABOR, the adoption of that constitutional amendment has not changed the legality of non-voter approved revenue-generating fees. Rather, the determination of whether particular government revenue is a tax or a fee is still to be based on the express language of the law in question. In *Barber v. Ritter*, 196 P.3d 238 (Colo. 2008), the Colorado Supreme Court stated the rule as follows, in a

challenge under *Colo. Const*. Art. X, §20, to the transfer of funds generated from various state fees to the state general fund:

> We hold that a charge is a "fee," and not a "tax," when the express language of the charge's enabling legislation explicitly contemplates that its primary purpose is to defray the cost of services provided to those charged. … the purpose for which the charge is imposed, rather than the manner in which the monies generated by the charge are ultimately spent, determines the characterization of the charge as a fee or a tax ….

196 P.3d at 241-242**.** A discussed above, the Waste Reduction Ordinance sets out the purpose of the fee, and it is not a general fund revenue-generating measure and therefore not a tax.

C. An indirect benefit to the general fund does not require the conclusion that this fee is an unconstitutional tax.

The fact that the fees are used for a program that was once a general fund expense does not require the conclusion that the fee is a tax. In the *Bruce* case, *supra*, the author of *Colo. Const*. Art. X, §20 challenged two fees imposed by ordinance by the City of Colorado Springs, claiming, as does Plaintiff in this case, that under *Colo. Const.* Art. X, §20 the fees were taxes and were unconstitutional. In rejecting that challenge, the Court of Appeals rejected Bruce's argument that the ordinance was unconstitutional because the revenue was used to pay what was previously a general fund expense, stating:

> Moreover, the revenue raised from the street light service charge was deposited into a special fund and was not used for general fund purposes. While the general fund may have received some benefit because the cost of operating and maintaining street lights is no longer taken from the general fund, this benefit is not determinative of whether the charge is a tax or a fee.

131 P.3d at 1191.

Revenue generating fees have been unsuccessfully challenged as unconstitutional taxes in Colorado for years. In *Western Heights Land Corporation v. City of Fort Collins*, 146 Colo. 464, 362 P.2d 155 (1961), disgruntled property owners challenged the City's imposition of a fee per square foot of property owned to defray the expense of operating its water and sewer services. Their argument that the fee was a tax was rejected because its purpose was not a revenue measure intended to defray general municipal expenses, but rather a measure to defray the expense of a service by those choosing to use the service, 146 Colo. at 469.

Even vehicle registration fees were initially challenged as an unconstitutional tax, *Ard v. People*, 66 Colo. 480, 182 P. 892 (1919). In that case, a motor vehicle owner convicted of violating the state vehicle registration laws challenged that law for several reasons, including that it violated the state constitution provisions requiring uniformity in taxation and that taxes be based upon a just valuation, as well as the provision that it was an illegal "revenue measure." The court reasoned that the registration fees were not property taxes, under the first argument, and were not a "revenue measure" under the second. The court defined a "revenue measure" as "one which has for its object the levying of taxes in the strict sense of the words. If the principal object is another purpose, the incidental production of revenue growing out of the enforcement of the act will not make it one for raising revenue," 66 Colo. at 483-84; 182 P. at 893.

Thus it has long been accepted in Colorado that a "tax" in the strict sense of the word is something used to raise revenue for general governmental purposes. The fee on each paper bag imposed by the Waste Reduction Ordinance to be paid by those shoppers in

Aspen's grocery stores who choose to use a paper bag is not a *tax* as that term has been interpreted by the courts in Colorado.

D. Those paying the waste reduction fee are benefitted by the services funded by the fee and the fact that the public benefits as well does not require the conclusion that the fee is a tax.

Plaintiff's argument that this bag fee is not financing a particular service utilized by those who must pay the charge totally disregards the voluntary aspect of the waste reduction fee, which is imposed only upon those who *choose* to use paper bags to carry the groceries they purchase in Aspen's grocery stores. The cost of the educational outreach and reusable bag program is borne by those who would most benefit from both the education and the free reusable bags, as they are the ones who still need to reduce the waste they themselves are generating. The practices of plaintiff's two local members, who choose to avoid paying the fee whenever possible, PSOF ¶5, emphasize the effectiveness of the Ordinance. If you don't like the fee, don't use a paper bag. It is a choice, not a tax.

In *Bloom*, *supra,* various alternatives on funding the street maintenance program were discussed, but the conclusion was that the choice of lot owners fronting streets, rather than, for example, all licensed drivers or all adult residents of the City who also benefitted from the maintenance program, was "not so limited in relation to the nature of the service as to render the ordinance invalid," 784 P.2d at 310. Similarly, the street light service at issue in *Bruce v. City of Colorado Springs, supra*, arguably benefitted the entire public, residents and visitors alike, but fees were charged only to those with residential or commercial property in the City. The fact that the public at large benefits

or that the City could have chosen a different methodology does not render the fee invalid, 131 P.3d at 1190. "Because the setting of fees is a legislative function involving many questions of judgment and discretion, we will not set aside the methodology chosen unless it is inherently unsound," *Bruce, supra* at 1190.

The fact that Plaintiff's local members do not believe that they received any benefit from the fee is also not material to the determination of the constitutionality of the Waste Reduction Ordinance. In *Anema v Transit Construction Authority,* 788 P.2d 1261 (Colo. 1990), challengers to a special fee imposed on employers within a service area for a proposed transit system argued that there was no benefit to them because there was no authority to actually construct the transit system. The court rejected that challenge as being "too narrow a view of the benefits involved," *id.* at 1266 and found that they were benefitted from the studies funded by the fee. Here, the court can also find that Plaintiff members have benefitted from the few fees they paid because they made the choice to exercise their privilege of using a paper bag, such a choice likely contributed to the waste problem, and the fees they were charged have contributed to a solution to that problem.

E. Plaintiff's arguments do not overcome the presumption that the Waste Reduction Ordinance is valid.

Plaintiff's consistent reference to the fee as a tax, is not material to the determination of the issue, just as the testimony and characterizations of the City employees deposed by Plaintiff are immaterial to the issue of constitutionality of the ordinance. In *Rancho Colorado, Inc. v. City of Broomfield,* 196 Colo. 444, 586 P.2d 659 (1978), the City's labeling of an ordinance as a regulation did not make it so. It was only because the

primary purpose of the ordinance was to raise revenue in an amount having no relation to the cost of the supposed regulation, that the fee in question there was determined to be an unconstitutional property tax. The distinction between a fee and a tax depends on the nature and function of the charge, not its label, *Thrifty Rent-a-Car System, Inc. v. City and County of Denver*, 833 P.2d 852, 855 (Colo. 1992); *Westrac, Inc. v. Walker Field*, 812 P.2d 714, 716 (Colo. 1991).

III. MUNICIPAL DEFENDANTS ARE ENTITLED TO JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT BECAUSE TABOR DOES NOT APPLY TO THE WASTE REDUCTION ORDINANCE.

Plaintiff has used select portions of statements in depositions or disclosures in its attempt to portray the Municipal Defendants and City staff as somehow ignoring community sentiment and trying to disguise a tax as a fee to generate additional revenues for the City's general fund. However, the "facts" listed by Plaintiff are not really material to a determination of the issue. As discussed above, what is material is the intent of the Waste Reduction Ordinance as determined from a reading of the Ordinance in its entirety, including its own statements of purpose. That purpose is waste reduction, not general fund revenue generation.

Similarly, Plaintiff's arguments based on the Supreme Court cases cited at pages 10,12 and 13 of Plaintiff's Motion, *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974) and *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), have no relevance to the determination of whether a municipal ordinance imposes a tax or a fee under Colorado law because both of those cases involved the interpretation of federal laws as applied to fees imposed by federal agencies. They provide no basis

under Colorado law for finding the Waste Reduction Fee unconstitutional, and Plaintiff has failed to meet its burden of establishing unconstitutionality beyond a reasonable doubt.

CONCLUSION

For the forgoing reasons, Municipal Defendants are entitled to judgment as a matter of law, dismissing Plaintiff's Complaint in its entirety.

Respectfully submitted this 11th day of April, 2013.

//s//
Deborah Quinn, Assistant City Attorney
ATTORNEY FOR MUNICIPAL DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 2013, a true and correct copy of the foregoing MUNICIPAL DEFENDANTS' COMBINED MOTION FOR SUMMARY JUDGMENT, MEMORANDUM IN SUPPORT AND RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT and the AFFIDAVITS OF KATHLEEN STRICKLAND AND ASHLEY PERL was served via LexisNexis Xpress, to the following:

James M. Manley
Steven J. Lechner
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
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//s//
Tara L. Nelson