District Court, Pitkin County, Colorado 506 E. Main St., Suite 300 Aspen, CO 81611	DATE FILED: August 11, 2014 1:45 PM CASE NUMBER: 2012CV224
Plaintiff(s): **COLORADO UNION OF TAXPAYERS FOUNDATION** vs Defendant(s): **CITY OF ASPEN; MICK IRELAND, ADAM FRISH, TORRE, STEVE SKADRON, and DEREK JOHNSON, all in their official capacities as members of the Aspen City Council**	**▲COURT USE ONLY▲**
	Case No.: 12CV224 Div.: F
FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CROSS-MOTIONS FOR SUMMARY JUDGMENT	

I.
PROCEDURAL SUMMARY

This matter is before the Court on the parties' cross-motions for summary judgment. The motions have been fully briefed, and the Court heard oral argument on the motions on August 6, 2014. The parties agree on the material facts and legal issues in the case. To the extent the parties do not agree on certain facts, the Court finds those facts are not material to the issues decided here. The matter is therefore ripe for summary judgment.

The Plaintiff, Colorado Union of Taxpayers Foundation, ("CUTF") challenges the constitutionality of Waste Reduction Ordinance, No. 24 ("Ordinance") adopted by the City of Aspen ("City") in October 2011. The Ordinance relates to the regulation of disposable grocery bags and became effective in May 2012. The Ordinance bans plastic grocery bags and imposes a twenty cent charge on paper grocery bags. CUTF argues that the Ordinance violates the

Taxpayer's Bill of Rights ("TABOR"), Colo. Const. art. X, § 20, because the charge imposed for the paper bags is a "tax" which requires compliance with TABOR's voting requirements prior to implementation. CUTF seeks injunctive and declaratory relief to abate and correct the City's actions.

The City counters that the bag charge is a "fee" and not a "tax" and therefore free from the limitations imposed by TABOR. The City denies the pertinent allegations in the Complaint. Both parties seek summary judgment on the specific question of whether the twenty cent paper bag charge is a "tax" or a "fee" for purposes of TABOR. Having considered the arguments and statements of counsel, both in the written briefs and at oral argument, and being otherwise fully advised, the Court now makes the following findings of fact and conclusions of law:

II.
UNDISPUTED FACTS

Based on the pleadings, motions, affidavits, deposition transcripts, and other materials submitted by the parties, the Court finds that the following facts are not in dispute:

1. CUTF is a non-profit corporation based in Denver with a primary mission of educating members of the public on "the dangers of excessive taxation, regulation, and government spending." *CUTF Motion* ¶ 2.

2. The City is a home rule municipal corporation, and the named individual Defendants were members of the City Council when the Ordinance was adopted. Some of the individual Defendants are no longer on City Council. Their absence does not affect the Court's ability to consider the issues in the case.

3. In October 2011, the City adopted the Ordinance after a series of public meetings and hearings on the issue. CUTF does not allege, and the facts do not indicate, that there was

any procedural defect in the manner in which the Ordinance was adopted other than the failure to hold a public vote on the bag charge.

4. In summary, the Ordinance accomplishes the following: It imposes an outright ban on the "Disposable Plastic Bags" that grocers have traditionally provided to their customers free of charge. The Ordinance applies only to "Grocers" and defines that term to apply to conventional grocery stores and supermarkets. The Ordinance excludes certain small or temporary food vendors and businesses that do not sell foodstuffs as a majority of their sales. It also excludes from the ban certain types of more durable plastic bags (exceeding 2.25 mils in thickness), non-handled plastic bags used for containing produce and similar items, and reusable plastic bags.

5. CUTF does not challenge the City's power to outright ban Disposable Plastic Bags and has raised no issue concerning the Ordinance's disproportionate impact on grocers as opposed to other merchants and businesses.

6. In addition to banning plastic grocery bags, the Ordinance imposes a twenty cent per bag charge on "Disposable Paper Bags." This charge is designated as the "Waste Reduction Fee." For purposes of this Order, the Court refers to the Waste Reduction Fee as the "bag charge."

7. Disposable Paper Bags are defined in the Ordinance. They are those paper bags that grocers traditionally provide for free to their customers for transporting their groceries. Neither party asserts there is any ambiguity about the types of paper bags that are subject to the Ordinance. The paper grocery bag is ubiquitous. It is a safe bet that anyone who has ever entered a grocery store in the last 50 years would recognize one on sight.

8. As with the ban on Disposable Plastic Bags, the Ordinance's bag charge applies only to paper bags provided by Grocers. The Ordinance requires the Grocer to assess and collect the twenty cent bag charge on every paper bag that it provides to a customer in connection with a sale. The Ordinance then requires the Grocer to remit a portion of the bag charge to the City at the same time the Grocer pays its sales tax.

9. The City provides a separate form for the remittance of the bag charge, and the Grocer is tasked with compliance and accounting functions in connection with the collection and remittance of the bag charge. In the first year of the Ordinance, Grocers were allowed to keep up to $1,000 per month of the bag charges collected to offset the compliance, training and education costs of the Ordinance. In subsequent years, Grocers are allowed to retain a maximum of $100 per month.

10. Once the bag charge is collected by the City, the Ordinance requires that the funds be paid to the City Finance Department and deposited in the "Waste Reduction and Recycling Account" administered by the City Environmental Health Department. The Ordinance mandates that the funds collected "shall not be used to supplant funds appropriated as part of an approved annual budget" and that none of the funds "shall revert to the General Fund at the end of the fiscal year, or at any other time, but shall be continually available for the uses and purposes set forth" in the Ordinance. The uses are limited to the "Waste Reduction Program."

11. The uses and purposes of the Waste Reduction Program are defined in section (g) of the Ordinance. They include the purchase and distribution of reusable shopping bags to residents and visitors, the implementation of education programs regarding the impacts of trash and disposable bags on the environment and the City's waste stream, the funding of waste reduction and recycling programs, purchasing and installing recycling containers and waste

receptacles, maintaining a website to update residents on waste reduction efforts, and paying for the cost of administering the program.

12. It is undisputed that most of these services were provided to City residents and visitors prior to the adoption of the Ordinance and paid for with general fund revenues. It is also undisputed that these services are available to all City residents and visitors regardless of whether one pays the bag charge.

13. The City determined the amount of the bag charge primarily by relying on a study conducted by the City of San Francisco. That study estimated that the taxpayer cost to subsidize the recycling, collection, and disposal of disposable bags was seventeen cents per bag. The City adjusted that number upwards to twenty cents per bag based on Aspen's distance from recycling markets, the smaller size of the City's waste stream, and "community consensus."

14. It is undisputed that the City did not perform any independent cost analysis relating to the actual costs incurred by the City in dealing with disposable bags in its waste stream.

15. Because the bag charge is levied only on paper bags, the revenue stream from the Ordinance is significantly lower than if plastic bags had also been subject to the bag charge rather than banned.

16. The initial revenue numbers from the bag charge indicate that the revenues may not be sufficient to cover the overall program expenditures. Additional funds from the City general funds have been allocated to Waste Reduction Program to cover its expenses. It is currently unknown whether future bag charge revenues will increase to the point of covering the program's expenses and the repayment of the general funds advanced to cover the program's costs. If paper bag use diminishes as the City hopes, bag charge revenues will likewise diminish.

17. After the Ordinance was implemented, two CUTF members, Maurice Emmer and Elizabeth Milias, paid the required bag charge. Emmer and Milias are Aspen residents and claim to have received no specific or particularized benefits from the City as a direct result of paying the bag charge.

18. The City does not dispute that the services provided through the Waste Reduction Program (reusable bags, education, website, etc.) inure to the benefit of all City residents generally and are not targeted or limited to just those individuals who pay the bag charge.

19. Finally, it is undisputed that the City did not put the issue of the bag charge or the Ordinance to a public vote under TABOR prior to implementing the charge.

III.
SUBJECT MATTER JURISDICTION

CUTF alleges in its Complaint that the Court has subject matter jurisdiction to consider the constitutionality of the Ordinance. The City's Answer denied CUTF's allegation of subject matter jurisdiction. At oral argument, the City acknowledged that the Court has subject matter jurisdiction. Regardless, subject matter jurisdiction is a threshold matter that cannot be conferred by stipulation or agreement. *Peabody v. Thatcher,* 3 Colo. 275 (1877). If the Court lacks subject matter jurisdiction, any judgment it renders is void. *SR Condominiums, LLC v. K.C. Const., Inc.*, 176 P.3d 866 (Colo. App. 2007).

The Colorado Constitution vests district courts with general subject matter jurisdiction in civil cases, which may be limited by the legislature only when that limitation is explicit. Colo. Const. art. VI, § 9; *Currier v. Sutherland,* 215 P.3d 1155, 1159 (Colo. App. 2008) *aff'd,* 218 P.3d 709 (Colo. 2009). C.R.C.P. 12(b)(1) permits a trial court to make its own factual findings in determining subject matter jurisdiction. *Medina v. State,* 35 P.3d 443, 452 (Colo. 2001). Where the matter can be resolved on undisputed facts a hearing is unnecessary. *Podboy v. Fraternal*

Order of Police, Denver Sheriff Lodge 27, 94 P.3d 1226, 1229 (Colo. App. 2004) ("If all relevant evidence is presented to the trial court and the underlying facts are undisputed, the trial court may decide the jurisdictional issue as a matter of law without conducting an evidentiary hearing.") Under the circumstances and undisputed facts of this case, the Court finds it does not need to conduct a hearing on subject matter jurisdiction.

Aspen is a home rule municipality. Under certain circumstances, home rule municipalities may have exclusive jurisdiction over the enforcement of their ordinances. Facially, CUTF's challenge could be considered to arise under the City Code and City ordinances and thus fall within the subject matter jurisdiction of the municipal court; however, the constitution limits the authority of municipal courts to purely local and municipal matters as described in the municipal charter and ordinances. Colo. Const. art. XX, § 6. When a municipal court attempts to exercise jurisdiction over matters outside of those categories, it has exceeded its authority. *Hardamon v. Municipal Court,* 497 P.2d 1000, 1002 (Colo. 1972) (broad powers granted to home rule cities to define the jurisdiction of municipal courts are limited to matters which are local and municipal in nature; consequently, home rule cities may not deny substantive rights granted to all citizens of the state). Municipal courts must define their jurisdiction so that it is within the sphere of purely local and municipal matters. *Town of Frisco v. Baum*, 90 P.3d 845, 848-49 (Colo. 2004). Waste control is an inherently local matter, but TABOR is a matter of statewide concern.

TABOR is part of our state constitution and not a state statute. Therefore, its passage directly modified the powers of home rule cities. *Four-County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs,* 369 P.2d 67, 72 (Colo. 1962). TABOR has been found to be a matter of statewide concern because it expressly includes any local

government within its scope. "Thus, to the extent that a home rule city's ordinances conflict with TABOR's requirements, the ordinances are invalid." *HCA-Healthone, LLC v. City of Lone Tree*, 197 P.3d 236, 241 (Colo. App. 2008). Accordingly, the Court finds as a matter of law that it has subject matter jurisdiction over this case.

IV.
STANDING

Standing is another threshold issue that cannot be conferred by agreement and must be satisfied in order for a court to decide a case on the merits. *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008). To establish standing under Colorado law, a plaintiff must establish that it has, (1) suffered injury in fact, and (2) that the injury was to a legally protected interest as contemplated by statutory or constitutional provisions. *Wimberly v. Ettenberg*, 570 P.2d 535, 538 (Colo. 1977). The standing requirement is readily satisfied in TABOR cases if the plaintiff can assert "taxpayer standing" by either alleging that a public entity is engaging in an illegal expenditure of public funds or that the public entity has violated a specific constitutional provision. *Barber v. Ritter*, 196 P.3d at 245.

The Colorado Supreme Court has construed the law to provide "broad taxpayer standing in the trial and appellate courts" because taxpayers have an economic interest in having general tax dollars spent in a constitutional manner. *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004). In addition, TABOR includes specific language that confers upon private parties a legally protected interest to enforce its provisions: "Individual or class action enforcement suits may be filed and shall have the highest civil priority of resolution." Colo. Const. art. X, § 20(1). This language has been interpreted to satisfy the legally protected interest requirement. *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 866 (Colo. 1995). Regardless of the liberal standing afforded plaintiffs in taxpayer cases, there must still be "some nexus between the plaintiff's

status as a taxpayer and the challenged governmental action." *Hotaling v. Hickenlooper*, 275 P.3d 723, 727 (Colo. App. 2011).

In the present case, the Plaintiff is a non-profit public interest organization with its principal place of business in Denver. Plaintiff asserts a standing nexus solely because two of its members have paid the charges assessed under the Ordinance. These members are registered to vote in Aspen, shop in Aspen grocery stores, and have been required to pay the bag charge. Although the City has denied the allegations in the Complaint that the members personally suffered the effects of the Ordinance, the City has not rebutted or disputed their deposition testimony. Therefore, the Court accepts their testimony as an undisputed fact. *Ginter v. Palmer & Co.*, 585 P.2d 583, 585 (Colo. 1978) (on summary judgment, reliance upon allegations or denials in the pleadings will not suffice when faced with an affidavit affirmatively showing the absence of a triable issue of material fact.) Accordingly, the Court finds that Mr. Emmer and Ms. Milias have sufficiently alleged a nexus between the Ordinance and the alleged injury to their legally protected interest. The question is whether CUTF has standing as a third party to assert their claims.

It has long been settled law that an organization may assert standing "solely as the representative of its members." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Brock*, 477 U.S. 274, 281 (1986). Associational standing "recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *Id.* at 290. "An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the

lawsuit." *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 343 (1977). This three pronged test has been adopted in Colorado. *Denver Classroom Teachers Ass'n v. Denver Sch. Dist. No. 1*, 738 P.2d 414 (Colo. App. 1987); *Conestoga Pines Homeowners' Ass'n, Inc. v. Black*, 689 P.2d 1176, 1177 (Colo. App. 1984).

The test's first prong requires that the organization has at least one member with standing capable of presenting, in his or her own right, the claim pleaded by the association. *John Roe # 2 v. Ogden,* 253 F.3d 1225, 1230 (10th Cir. 2001) (finding that an organization had standing because one of its members had standing to sue in his own right). The first prong encompasses "the Article III requirements of injury in fact, causal connection to the defendant's conduct, and redressability." *Am. Forest & Paper Ass'n v. EPA*, 154 F.3d 1155, 1159 (10th Cir. 1998). As stated above, CUTF has met this requirement because both of its members have taxpayer standing.

Satisfaction of the second prong ensures that "the association's litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant's natural adversary." *United Food & Commer. Workers Union Local 751 v. Brown Group,* 517 U.S. at 555-56 (1996). CUTF meets this requirement because its stated purpose, according to its bylaws and the Complaint, is to educate the public about "the dangers of excessive taxation, regulation and government spending" and to "protect citizens' rights to petition government." CUTF has a cognizable stake in the outcome.

Finally, under the third prong, individual member participation is not required when an association is seeking prospective or injunctive relief for its members because "the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth v. Seldin,* 422 U.S. 490, 515 (1975). The relief sought by CUTF is a court order declaring the

Ordinance unconstitutional, setting it aside, and compelling a refund of any charges improperly collected. CUTF therefore satisfies the third prong as well.

Accepting the allegations in the Complaint as true, applying the broad taxpayer standing standard articulated by our supreme court, and considering the test for associational standing, the Court concludes that CUTF has associational standing to challenge the constitutionality of the Ordinance on behalf of its members. This standing exists because CUTF's members have an interest in ensuring that the Ordinance complies with TABOR or is otherwise exempt and have allegedly suffered an injury in fact from the adoption and implementation of the Ordinance.

V.
SUMMARY JUDGMENT STANDARD OF REVIEW

The matter is before the Court on cross motions for summary judgment. Summary judgment under C.R.C.P. 56(c) is a drastic remedy. *Smith v. Boyett*, 908 P.2d 508, 514 (Colo. 1995). The Court cannot grant summary judgment unless there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. C.R.C.P. 56(c); *KN Energy, Inc. v. Great Western Sugar Co*., 698 P.2d 769 (Colo. 1985). The purpose of summary judgment is to expedite the litigation where the facts are undisputed or so certain as not to be subject to dispute, and the court can determine the issue strictly as a matter of law. The parties here have agreed on all of the material facts and agree that the issue of whether the Ordinance is a "tax" or a "fee" is a legal question ripe for consideration by the Court.

VI.
PRESUMPTIONS AND BURDEN OF PROOF IN REVIEWING THE CONSTITUTIONALITY OF A MUNICIPAL ORDINANCE

The long-established rule in Colorado is that statutes and municipal ordinances are presumed to be constitutional, and unless the ordinance adversely affects a fundamental constitutional right, the party challenging an ordinance bears the burden to prove

unconstitutionality beyond a reasonable doubt. *People ex rel. City of Arvada v. Nissen,* 650 P.2d 547, 550 (Colo. 1982); *City of Leadville v. Rood,* 600 P.2d 62, 63 (Colo. 1979); *Love v. Bell,* 465 P.2d 118, 121 (Colo. 1970). If the constitutionality of an ordinance is debatable, the ordinance should be upheld. *Haney v. City Court,* 779 P.2d 1312 (Colo. 1989). If a statute is susceptible of both constitutional and unconstitutional interpretations, the court will construe it to avoid constitutional infirmities. *Colorado State Bd. of Med. Examiners v. Jorgensen*, 599 P.2d 869, 871 (Colo. 1979). There is a presumption that the municipal governing body intended a just and reasonable result. *Steamboat Springs Rental & Leasing, Inc. v. City & Cnty. Of Denver*, 15 P.3d 785, 787 (Colo. App. 2000).

Under the forgoing standards, the City's bag charge is presumed to be constitutional. CUTF has the burden of proving beyond a reasonable doubt that the bag charge is a tax rather than a fee. All reasonable doubts as to whether the bag charge is a tax or a fee must be resolved in the City's favor, and if the question is reasonably debatable, the ordinance must be upheld.

VII.
CANONS OF STATUTORY INTERPRETATION

When interpreting a statute or ordinance:

> we look first to the language of the statute, giving words their plain and ordinary meaning; if the plain language of the statute demonstrates a clear legislative intent, we look no further. A commonly accepted meaning is preferred over a strained or forced interpretation. We will not adopt statutory constructions that defeat legislative intent or that lead to unreasonable or absurd results. Additionally, we read the statutory design as a whole, giving consistent, harmonious, and sensible effect to all of its parts. *Young v. Brighton Sch. Dist. 27J*, 2014 CO 32, ¶ 11 (internal citations omitted).

The rules of statutory construction apply in the interpretation of local government resolutions and ordinances. *City of Colorado Springs v. Securcare Self Storage, Inc.,* 10 P.3d 1244, 1248 (Colo. 2000). "The plainness or ambiguity of statutory language is determined by

reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

With regard to the interpretation of TABOR, CUTF argues that the Court should interpret the amendment in a manner that would "reasonably restrain most the growth of government." Colo. Const. art. X, § 20(1). However, the Supreme Court has held that this principle of TABOR construction applies only where the text of the amendment supports multiple interpretations equally. *Barber v. Ritter*, 196 P.3d 238, 247-48 (Colo. 2008); *Havens v. Board of County Comm'rs*, 924 P.2d 517, 521 (Colo. 1996). In *Barber*, the court analyzed how to distinguish a tax from a fee and decided the interpretive framework of § 20(1) was not applicable. The Court also reasoned that it had consistently rejected readings of TABOR that would hinder basic government functions or cripple the government's ability to provide services. Since the Court in *Barber* expressly declined to apply § 20(1) in the context of defining a tax and a fee, the Court will not adopt the § 20(1) framework here.

VIII.
CONCLUSIONS OF LAW

TABOR requires advance voter approval for any "new tax, tax rate increase…. or a tax policy change directly causing a net tax revenue gain to any district." Colo. Const. art. X, § 20. The City is a "district" and therefore subject to TABOR. By its terms, TABOR applies in this case only if the bag charge can be characterized as a tax. If the bag charge is a fee, TABOR's voting requirements do not apply. Neither term is specifically defined in TABOR; however the battle over what is a tax and what is a fee has been long fought in Colorado's courts. The terrain upon which these skirmishes have occurred includes TABOR as well as other constitutional and statutory provisions. Out of these disputes, a body of case law has emerged that generally sets the definitional parameters and rules of engagement for the issue.

First, labels do not matter. The distinction between a fee and a tax depends on the nature and function of the charge imposed, not on what the government chooses to call it. *Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1190 (Colo. App. 2005); *Westrac, Inc. v. Walker Field,* 812 P.2d 714 (Colo. App. 1991). Whether the charge is voluntary or mandatory is also irrelevant. *Bloom v. City of Fort Collins*, 784 P.2d 304, 310 (Colo. 1989) ("We have never held, however, that a service fee must be voluntary."); *Bruce,* 131 P.3d at 1190.

The classic hallmark of a tax is that its sole or principal object is intended to raise revenue to defray the general expenses of government. *Bloom,* 784 P.2d 308. "A tax is a means of distributing the general burden of the cost of government, rather than an assessment of benefits." *Bruce,* 131 P.3d at 1190. "[T]he classic tax sustains the essential flow of revenue to the government, while the classic fee is linked to some regulatory scheme….The classic tax is designed to provide a benefit for the entire community, while the classic fee is designed to raise money to help defray an agency's regulatory expenses." *Marcus v. Kansas Dep't of Revenue,* 170 F.3d 1305, 1311 (10th Cir. 1999) (citing *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1011 (5th Cir.1998) (court concluded an assessment was not a tax where the "essential character" of the charge was regulatory). Generally speaking, taxes are not based upon the amount of use of any particular government service, and the proceeds are used to defray general municipal expenses. *Westrac, Inc.,* 812 P.2d at 716.

In contrast to taxes, fees have several distinguishing traits, none of which is singularly dispositive, but all of which must be considered in the analysis. A fee is "not imposed to defray the general expenses of government, but rather to defray the cost of a particular governmental service." *Bruce,* 131 P.3d at 1190; *E–470 Pub. Highway Auth. v. 455 Co.,* 3 P.3d 18 (Colo. 2000). The fee must be "reasonably designed to offset or defray the overall cost of the services"

for which the fee is imposed. *Bloom*, 784 P.2d at 310-11. "[T]he amount of the fee must be reasonably related to the overall cost of the service," however, "mathematical exactitude" is not required. *Bruce*, 131 P.3d at 1190. Colorado courts have recognized that the amount of a user fee does not need to be "precisely calibrated" to the use that a party makes of government services. *Kirk v. Denver Pub. Co.*, 818 P.2d 262, 269 (Colo. 1991) (quoting *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989).

The particular mode adopted by a city in assessing the fee is generally a matter of legislative discretion. *Bloom*, 784 P.2d at 308. Fees generally come in one of three forms: (1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power. *See Schmeer v. Cnty. of Los Angeles*, 153 Cal. Rptr. 3d 352, 360 (Cal. App. 2013) (upholding county bag charge on the grounds that it was not a tax retained by the government). In each instance, the fee bears some direct relationship to the benefit conferred or the regulatory action imposed upon the person paying the fee. This type of nexus is a strong indicator that a charge is a fee as opposed to a tax. [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." *Barber*, 196 P.3d at 241.

How the charge is ultimately spent is not a determinative factor. "[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*, not the manner in which it was ultimately *spent." Barber*, 196 P.3d at 249 (emphasis in original). Whether the fee is segregated from the government's general fund monies and designated for a specific spending purpose is also a strong indication that the charge is intended as a fee and not a tax. *Zelinger v. City & Cnty. of Denver*, 724 P.2d 1356, 1359 (Colo.

1986); *Bruce*, 131 P.3d at 1191; *Bloom*, 784 P.2d at 308 (holding that the ordinance's explicit authority to transfer the charge to the general fund rendered it a tax); *Cf., Barber* (distinguishing *Bloom* on this basis).

The bag charge at issue here has characteristics of both a tax and a fee. The Court's analysis necessarily begins with a determination of purpose and intent of the Ordinance when it was passed. "To determine whether a government mandated financial imposition is a 'fee' or a 'tax,' the dispositive criteria [sic] is the primary or dominant purpose of such imposition at the time the enactment calling for its collection is passed." *Barber*, 196 P.3d at 248. To determine how the City intended to use the monies generated by the bag charge, the Court first looks "to the language of the enabling statute for its expression of the primary purpose for the original imposition of that charge." *Id.* at 249. If the language discloses that the primary purpose for the charge is to raise revenues for general governmental spending, then it is a tax. If the language shows the charge is to finance a particular service that is reasonably related to charge assessed and that the charge is not intended for general government services, then the charge is a fee.

A. The Language of the Ordinance Indicates Its Primary Purpose is Not to Raise Revenues for General Government Spending.

The stated purposes of the Ordinance, as expressed in its "Whereas" provisions, are as follows: "to protect the natural environment and the health of its citizens"; "to conserve resources, reduce greenhouse gas emissions, waste and litter, and to protect the public health and welfare, including wildlife"; to "dramatically reduce the use of both types of bags [plastic and paper]"; "to reduce the cost to the City of solid waste disposal, and to protect our environment and our natural resources by banning the use of disposable single use plastic bags and to mandate a fee for the use of paper bags at grocery stores." These objectives are stated in conjunction with the various societal and environmental harms posed by single use bags which are described in

great detail in the Ordinance and which form the factual underpinnings for the implementation of the Ordinance.

The "Whereas" provisions of the Ordinance describe the purposes for which the bag charge is collected as follows: "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" and to "dramatically reduce the use of both types of bags." Section (g) of the Ordinance goes into greater detail concerning the specific services to be provided pursuant to the bag charge, including providing reusable carryout bags to the public, creating educational campaigns to raise awareness about waste and recycling, funding programs and infrastructure to reduce waste and encourage recycling, purchasing equipment to minimize pollution, funding cleanup events, maintaining a public website on waste reduction efforts, and paying for administration of the waste reduction program.

The Court finds that the language of the Ordinance is clear and unambiguous. Giving the words in the Ordinance their plain and ordinary meaning, it is apparent the *primary* goal of the bag charge is not to raise revenue for general government spending. The word "revenue" never appears in the Ordinance. Instead, the bag charge is intended as a deterrent to the use of disposable bags, (a behavior the City finds objectionable), and as a means to reduce the impacts and costs of that behavior on the City. The fact that the Ordinance incidentally generates some revenue is not determinative; the salient inquiry is whether that is the primary goal of the Ordinance and whether that revenue is intended for general government spending. The fact that a fee incidentally or indirectly raises revenue does not alter its essential character as a fee, transforming it into a tax. *Western Heights Land Corp. v. City of Fort Collins*, 362 P.2d 155, 158

(Colo. 1961). The Court finds that the primary goal and intent of the Ordinance is to deter the use of disposable bags, not generate revenue. The bag charge is therefore not a tax.

In making this determination, the Court also considered the fact that the Ordinance not only levies a charge on paper bags, but also bans plastic bags outright. The City's stated rationale for banning plastic bags is the same as the imposition of the bag charge; namely the protection of public health, safety and welfare and the protection of the natural environment. Accordingly, the Ordinance's plastic bag ban is predicated on the City's police power rather than its power to tax. Section 31-15-103, C.R.S.; *City of Colorado Springs v. Grueskin*, 422 P.2d 384 (Colo. 1966) (It is a proper exercise of police power to enact ordinances which promote the health, welfare, and safety of the people.) In this respect, the Ordinance springs from an entirely different branch of the constitutional tree.

The distinction between a municipality's regulatory police power and its tax power "is thoroughly established, and with few exceptions, universally recognized." *Post v. City of Grand Junction*, 195 P.2d 958, 959-60 (Colo. 1948). The Court cannot ignore the regulatory aspect of the Ordinance when analyzing the City's intent. The Court must read ordinances as a whole, giving consistent, harmonious, and sensible effect to all parts. *Crow v. Penrose–St. Francis Healthcare Sys.*, 169 P.3d 158, 165 (Colo. 2007). If the City's primary intent was to raise revenue, it could have also assessed a bag charge on plastic bags and significantly increased its revenue stream. Instead, the City banned plastic bags which substantially *decreased* the funds generated by the Ordinance. Furthermore, if the Ordinance achieves its stated objectives, the bag charge from paper bags will likewise diminish over time. The Court finds that this is compelling evidence that the primary intent of the Ordinance, when read as a whole, is to regulate disposable bag usage rather than generate revenue for general governmental purposes. The bag charge is

therefore not a tax. Having determined that the bag charge is not a tax, the Court must now consider whether it meets the definition of a fee.

B. The Bag Charge Defrays the Cost of a Particular Governmental Service.

The Ordinance defines the purposes for which the bag charge may be spent: the acquisition and distribution of reusable grocery bags, educational campaigns, programs and infrastructure to reduce waste, equipment and infrastructure to minimize pollution, cleanup events, a public website on waste reduction efforts, and administration of the waste reduction program. These objectives are all administered through the City Environmental Health Department, and the Ordinance restricts spending the bag charges to only these purposes. These are clearly "government services," and CUTF makes no argument that they are not. CUTF's objection is that the services are not "particularized" but rather general government services that are not specifically "utilized by those who must pay the charge." *Barber,* 196 P.3d at 249. CUTF argues that the payer of the fee must receive a specific benefit or service in exchange that is not available to those who do not pay the fee. Admittedly, the Court in *Barber* did state the fee is characterized by a service being utilized by the one who pays the fee; however the Court finds that *Barber* is distinguishable and not controlling on this specific point.

The central issue in *Barber* was whether the State Legislature could transfer special cash funds to the general fund without transforming those "fees" into "taxes." The issue was not whether the special cash funds were fees in the first place. In fact, it was undisputed that the monies contained in the special cash funds were fees. *See Barber,* 196 P.3d at 249. The characterization of the special cash funds as "fees" was not central to the Court's decision in *Barber* except to the extent that the Court determined they did not become taxes after the transfer to the general fund. Therefore, to the extent *Barber* states that fees must pay for services utilized

by the one paying the charge, the Court considers that dictum and not controlling here. *Wheeler v. Wilkin*, 58 P.2d 1223 (Colo. 1936).

Moreover, the holding in *Barber* refutes CUTF's position. Under *Barber*, the critical inquiry is the "purpose for which the money was *raised*, not the manner in which it was ultimately *spent*." *Barber*, 196 P.3d at 249 (emphasis in original). CUTF's objection is essentially that the bag charge is being *spent* on a program that benefits the public at large rather than the limited group of individuals who pay the charge. If *Barber* stands for the proposition that the State Legislature can transfer fees to the general fund and then spend them on anything it chooses without creating a tax, the City can presumably spend the bag charge on a specific waste reduction program that benefits more people than just those who pay the twenty cent fee.

The Court also finds that CUTF's argument is refuted by the holding in *Bloom*, 784 P.2d 304, which was discussed extensively in *Barber*. In *Bloom*, the court upheld a City ordinance establishing a transportation utility fee to maintain and repair the City's roads. The fee was assessed against all developed properties in the City using a formula based on street frontage, the nature of the property, and other factors. Undeveloped properties were not subject to the fee and thus did not bear the cost of road maintenance yet still benefitted from the services provided by the City. The court found that the fee was valid[1] and specifically stated as follows:

> [T]here is nothing in the ordinance requiring that the amount of the fee be utilized to pay for improvements benefiting the particular property on which the fee is imposed. On the contrary, all fees collected by the city are to be used for the purpose of maintaining the network of city streets without regard to whether the city's expenditures "specifically relate to any particular property from which the fees for said purposes were collected." (quoting the City Ordinance).

This quote makes it obvious that the *Bloom* Court was fully aware that the City services were being provided to the general public and not just the fee payers. Had the Court believed that

[1] With the exception of its general fund "pour over" provisions.

the services generated by the fee had to be limited only to those properties that paid the fee, it certainly would have said so. CUTF's argument also overlooks the fact that the charge here is intended to *deter* conduct rather than provide a specific *quid pro quo* service to those who pay the bag charge. One of the purposes of the bag charge is to create a disincentive for people to use paper bags and to encourage a shift to reusable bags. As such, the charge is akin to a fine which, by definition, imposes a penalty rather conferring a direct benefit on the payer.

Based on the forgoing analysis, the Court rejects CUTF's argument that the bag charge in this case must provide services that are specifically limited to the individuals who actually pay the charge. The City bag charge funds a particular City service related to waste reduction. It is not necessary that the service be provided only to those persons paying the bag charge.

C. The Bag Charge is Reasonably Related to the Overall Cost of the Service.

CUTF next argues that the City performed no specific cost analysis to determine whether the bag charge is reasonably related to the costs of the waste reduction program. The City admits that no detailed cost analysis was performed but argues that it based its twenty cent fee on the San Francisco study that found the cost of subsidizing the recycling, collection, and disposal of disposable bags was seventeen cents per bag. The City adjusted that number to twenty cents per bag due to the City's distance from recycling markets, the smaller size of its waste stream, and input from the community. CUTF does not dispute that the City based its cost analysis on the San Francisco study, but argues that this is inadequate to establish a reasonable relationship to the charge.

Although a detailed cost analysis by the City might have been preferable to relying on another city's study, it is not the Court's function to second guess the City's calculation of the appropriate fee. "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." *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687 (Colo. 2001). The facts demonstrate that the City based its bag charge on facts and evidence that was presented to it by its staff and consultants. The Court finds that the City exercised reasonable discretion in that analysis and that CUTF has not shown beyond a reasonable doubt that the City's analysis was unreasonable or inherently unsound.

D. The Bag Charge Bears Some Direct Relationship to the Benefit Conferred or the Regulatory Action Imposed Upon the Person Paying the Charge.

The bag charge is paid only by individuals who purchase paper bags. The funds generated by the bag charge are used only for those purposes identified in the Ordinance. These facts are not in dispute. Since the charge pays for the services provided, it is axiomatic that there is a direct relationship between the charge and the service. It is equally axiomatic that there is a direct relationship between the charge and the individuals who actually pay it. Only paper bag users pay the charge. The primary objective of the Ordinance is to target those individuals for the purpose of modifying their behavior and forcing them to contribute to the City's costs in managing bag waste. The City's bag fee satisfies this criterion.

E. The Bag Charge is Segregated from the City's General Fund Monies and Designated for a Specific Spending Purpose.

The Ordinance mandates that the funds collected "shall not be used to supplant funds appropriated as part of an approved annual budget" and that none of the funds "shall revert to the General Fund at the end of the fiscal year, or at any other time, but shall be continually available for the uses and purposes set forth" in the Ordinance. As stated above, *Barber* holds that how the funds are spent is not determinative of whether a charge is a fee; however, the fact that the Ordinance expressly prohibits commingling the bag charge funds with the City's general funds is further evidence that the charge is a fee and not a tax.

The Court in *Bloom* overturned a provision in the city's ordinance that allowed excess fees to be transferred to the city's general fund. That decision pre-dates *Barber*, but the Court in *Barber* cited the case extensively and was careful to distinguish *Bloom* on the basis that "the city ordinance at issue *explicitly* contemplated the transfer of excess revenue to the general municipal fund. The ordinance did not incidentally produce revenue to defray the general cost of government; instead, revenue production was one of its principal and unequivocal aims." *Barber*, 196 P.3d at 250 (emphasis in original). The infirmity in *Bloom* is absent here. Instead, the Ordinance explicitly *prohibits* such transfers. Such a prohibition was a compelling factor in upholding a storm drainage fee in *Zelinger v. City & Cnty. of Denver*, 724 P.2d 1356, 1359 (Colo. 1986). The ordinance in that case contained the following language:

> 12–1. All fees and charges paid and collected pursuant to this Article shall be segregated, credited and deposited in a special fund or funds, and shall not be transferred therefrom to any other account of the City, except to pay for expenses directly attributable to storm drainage activities.
>
> 12–2. The fees and charges paid and collected by virtue of this article shall not be used for general or other governmental or proprietary purposes of the City, except to pay for the equitable share of the costs of accounting, management, and government thereof. Instead, the fees and charges shall be used, other than as described above, solely to pay for the costs of the operation, repair, maintenance, improvement, renewal, replacement and reconstruction of storm drainage facilities in the City and the costs incidental thereto.

The Ordinance here mandates that the funds collected may not supplant other appropriated funds and may not revert to the City's general fund at any time. Language of this sort is additional evidence that the City intended the bag charge to be a fee and not a tax.

Finally, CUTF's concern that the bag charge offsets costs of the City's Waste Reduction Program that existed prior to the adoption of the Ordinance is without merit. Whether the City's general fund may receive some benefit because the cost of the Waste Reduction Program is no

longer taken from the general fund is immaterial. "[T]his benefit is not determinative of whether the charge is a tax or a fee." *Id.*

IX.
CONCLUSION AND ORDER

Reasonable minds can differ on the wisdom or propriety of the City's decision to regulate disposable bags. The issue reflects the continual tug of war between the government's desire to regulate and the citizens' right to be left alone. The Court's task in this case is not to decide what is reasonable or resolve issues that are inherently political. The Court's task is to consider only whether the bag charge is a tax or a fee under the standards set by established precedent. The Court finds that the bag charge is a fee. To the extent CUTF and others disagree with this analysis, a ballot initiative is already in the offing.[2]

The Court finds that CUTF has failed to meet its evidentiary burden of showing beyond a reasonable doubt that the Ordinance is unconstitutional in violation of TABOR. The City's bag charge is not a tax for purposes of TABOR because the primary purpose of the Ordinance is not to generate revenues for general government spending. The bag charge also meets the definition of a fee under applicable Colorado case law and is therefore not subject to TABOR. Accordingly, the Court hereby ORDERS that CUTF's Motion for Summary Judgment is DENIED.

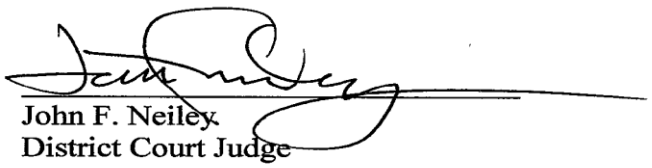
The Court further finds that the City has demonstrated by a preponderance of the evidence that the Ordinance is a fee and not a tax as a matter of law. Accordingly, the Court hereby ORDERS that the City's Motion for Summary Judgment is GRANTED. Judgment is

[2] *See Matter of Title , Ballot Title & Submission Clause for 2013-2014 #129*, 2014 CO 53 (Initiative # 129 seeks to amend the state constitution to add a provision defining "fee" as a "voluntarily incurred governmental charge in exchange for a specific benefit conferred on the payer.")

hereby entered in favor of the City and the individual Defendants and against the Plaintiff CUTF on all matters raised in the Complaint.

Dated this 11th day of August, 2014.

BY THE COURT:



John F. Neiley
District Court Judge