DISTRICT COURT, PITKIN COUNTY, STATE OF COLORADO Court Address: 506 East Main Street Aspen, Colorado 81611 970-925-7635	DATE FILED: May 16, 2013 4:46 PM FILING ID: 17A2FF14 CASE NUMBER: 2012CV224
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 ▲ Case No.: 12 CV 224 Division: 5
ATTORNEYS FOR DEFENDANTS CITY OF ASPEN: James R. True, Esq., #9528 Deborah Quinn, Esq., #7685 City of Aspen 130 South Galena Street Aspen, Colorado 81611 Telephone: (970) 920-5055 Facsimile: (970) 920-5119 Jim.True@cityofaspen.com Debbie.Quinn@cityofaspen.com	

MUNICIPAL DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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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" or "Defendants") by and through their undersigned counsel, submit this Reply in Support of Defendants' Motion for Summary Judgment. Municipal Defendants' Combined Motion for Summary Judgment, Memorandum in Support and Response to Plaintiff's Motion for Summary Judgment (filed April 11, 2013) will hereinafter be referred to as "Defendants' Motion" Plaintiff's Reply in Support of Plaintiff's Motion for Summary Judgment and Response in Opposition to Defendants' Motion (filed May 2, 2013) will hereinafter be referred to as "Plaintiff's Response"

REPLY CONCERNING THE UNDISPUTED FACTS

Plaintiff's Response begins with inaccuracies and inconsistencies concerning the undisputed facts and Municipal Defendants' response to Plaintiff's facts. First, in arguing that the legislative history submitted by Defendants is inappropriate because construction should be based on the plain text of the Ordinance, Plaintiff concedes the immateriality of the majority of Plaintiff's facts (hereinafter "PSOF"). Second, because Plaintiff has challenged the plain language of the Ordinance and the intent of Ordinance, the undisputed legislative history submitted with Defendants' Motion is material as it demonstrates that the Municipal Defendants' properly exercised their discretion in imposing a fee that is reasonably related to the overall cost of a governmental service and is not designed primarily to raise revenues to defray general expenses of government,

Bloom v. City of Fort Collins, 784 P.2d 304, 309 (1989).[1] Third, Plaintiff's objection about failing to attribute a quoted statement to staff is disingenuous, as the reference to Exhibit 3, Strickland Affidavit, is included after the quoted material, Exhibit 3 is part of the legislative history, specifically minutes of the first public meeting introducing the Ordinance, and those minutes clearly state, at p.870, "Ms. Cantrell noted the goal of this ordinance is not to raise money but to reduce single use bags and giving customers a choice." Finally, Plaintiff's Response is incorrect in stating that Defendants did not address Plaintiff's facts. Not only did Defendants submit the entire legislative history of the Ordinance in response, but Defendants specifically argued that Plaintiff's facts were immaterial to the issue to be determined, Defs.' Mot. 12-13.

Plaintiff's discussion about the Standard of Review states there is a lack of dispute about the "meaning of the ordinance." Pl.'s Resp. 3, fn1. The dispute *is* about the meaning of the ordinance, with Plaintiff challenging the plain language of the ordinance that imposes a fee, claiming that the fee is a tax. Defendants agree that the language of the ordinance, including the statements of purpose in the "whereas" clauses, is the best means of giving "effect to the intent" of the legislating body, a primary principal of statutory construction recognized in *Askew v. Industrial Claim Appeals Office,* 927 P.2d 1333, 1337 (Colo. 1996), cited by Plaintiff. *See also* Colo. Rev. Stat. §2-4-201; *Barber v. Ritter*, 196 P.3d 238, 249 (Colo. 2008). However, Plaintiff has directly challenged

[1] The entire legislative history shows that the cost of service considered by Municipal Defendants was primarily the cost of the educational outreach and free reusable bag program, Defs.' Mot. 5, and that the revenues to date have only been used for those costs, PSOF 29 and Defs.' Mot. 6. The other potential uses of the fees may never occur, as revenues thus far have only been used for these two purposes and the amount of fees generated should decrease with additional educational outreach. The plain language of the ordinance itself also specifically states that the fee on paper bags will reduce the use of bags, Defs.' Mot., Strickland Aff., Ex. 1, 838-839.

Municipal Defendants' intention and primary purpose in enacting the ordinance, which is to reduce the waste generated by disposable paper and plastic bags from grocery stores.

Plaintiff uses arguments, unsupported by any authority, e.g. that using a separate form and a collection system similar to the sales tax form and system to collect the fees somehow makes the fee a tax, "***knavishly disguised*** as a fee in a clumsy attempt to avoid TABOR's voting requirement," Pl.'s Resp. 4 (emphasis added); and that the "bag tax is labeled as a 'fee' in ***an attempt to avoid*** the voter approval requirements of TABOR," Pl.'s Resp. 8 (emphasis added). The implication is that Municipal Defendants had some evil intention to slip one over on the voters by expanding government with a general revenue-generating tax disguised as a fee. While the use of the word "fee" is not dispositive of its nature, Plaintiff's requested interpretation of Municipal Defendants' intent, in disregard of the plain and unambiguous words used in the Ordinance, justifies the use of some rules of statutory construction, including legislative history, *see* Colo. Rev. Stat. §2-4-203. The rule of construction cited by Plaintiff and applied in *Rancho Colorado, Inc. v. City of Broomfield*, 586 P. 2d 659, 661 (Colo. 1978), is used in "analyzing a tax statute or ordinance," and was used in that case in construing an actual tax enacted by a municipality, intended as a tax, called a tax, and is thus distinguishable and inapplicable to this case.

ARGUMENT

A. Standard of Review.

Plaintiff's requested standard of review, i.e. an interpretation that restrains the growth of government, is not applicable to this case. The issue here is one of

construction of a municipal ordinance, whether Aspen's Waste Reduction Ordinance imposes a fee or a tax. If it is a fee, the Taxpayer Bill of Rights, *Colo. Const.* art. X, section 20 ("TABOR"), does not apply. If it is a tax, TABOR does apply. There is no interpretation of TABOR required to make the tax vs. fee determination. As the Colorado Supreme Court stated in *Barber v. Ritter*, *supra* at 247-48, there is a heavy presumption of constitutionality of legislative enactments, a presumption that can be overcome only "if it is shown that the enactment is unconstitutional beyond a reasonable doubt." *Barber* specifically limits application of the standard of review urged by Plaintiff to those situations "only where ***the text of the Amendment*** supports multiple interpretations equally." *id.* (citations omitted, emphasis added). There is no interpretation about the text of TABOR in this case. Again, contrary to Plaintiff's assertion, Pl.'s Resp. 3, *Barber* does not require either an argument or proof that a particular interpretation of TABOR would cripple government as a condition precedent to application of the appropriate standard of review. Thus, Plaintiff must prove the unconstitutionality of the Waste Reduction Ordinance beyond a reasonable doubt.

Plaintiff's Response concerning the Standard of Review also ignores the primary precedent on the tax vs. fee issue, *Bruce v. City of Colorado Springs*, 131 P.3d 1187 (Colo. App 2005), *cert. denied* 2006 Defs.' Mot. 7, which is directly on point, as its decision rejected the same challenge being made here, that a municipal charge or fee imposed by ordinance was an unconstitutional tax under TABOR. [2] The *Bruce* court

[2] When *Bruce* is later discussed and cited in Plaintiff's Response, the fact that the Colorado Supreme Court denied certiorari is not included Pl.'s Resp., ii and 11. The Defendants believe the denial is particularly relevant since one of the issues for which review was requested was whether the Court of Appeals erred when it determined that the street light service charge was a valid fee and not a tax.

applied the *Bloom, supra,* analysis to the ordinance at issue, to determine whether the street light charge was a tax or a fee, and correctly applied both the presumption of constitutionality as well as the burden of the challenging party to prove unconstitutionality beyond a reasonable doubt, 131 P.3d at 1190. This court must also apply that standard of review.

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

A. The fee imposed by the Waste Reduction Ordinance is not an excise tax.

Plaintiff's Response asserts that the fee imposed by the Waste Reduction Ordinance is an excise tax, incorrectly claiming that *Ard v. People*, 66 Colo. 480,182 P. 892 (Colo. 1919) included "an affirmative holding" that vehicle registration fees were an excise or use tax, Pl.'s Resp. 4. There was dicta in that case that stated the fees were a "tax" on the privilege of driving vehicles on highways, made in the context of distinguishing those fees from a property tax, 182 P. at 893, which was one of the arguments in that case; but there was no such holding. The import of *Ard* is that the statute imposing such fees was not an unconstitutional "revenue measure," which the court described as a "tax" in the strict sense of the word, because the purpose of the fees was "not the levying of taxes or the collection of revenue. Such fees are in the nature of a license or toll for the use of the public highways.... a charge in the nature of compensation for damages done to the roads by driving..." 182 P. at 893(citations omitted). *Ard* does hold that where the principal object of a statute is something other than revenue generation [a tax in the strict sense of the word], "the incidental production of revenue" does not render it a "revenue measure," *id.* As discussed below, this aspect of a "tax", i.e. having as its principal

object general revenue generation, is still the defining characteristic of a tax in Colorado. Because the principal object of the Waste Reduction Ordinance is not to generate revenues, the fact that revenues are generated does not render the ordinance unconstitutional.

Plaintiff also ignores the language in *Bloom, supra,* that an excise tax, "which has come to mean any tax which is not an ad valorem tax,"... has as its object "to provide revenue for the general expenses of government," *id.* at 307 (citations omitted). The fact that the revenue from this fee is limited in its use to defray the cost of a particular governmental service, rather than general unrestricted revenue generation, distinguishes it from a tax, *id.*at 308-09 and cases cited therein. Plaintiff's arguments and examples are nothing but the same argument that was unsuccessful in *Bruce, supra*, that "the *Bloom* analysis of special fees has led, and will lead, to almost any governmental service being structured as a fee, thereby escaping TABOR," 131 P.3d at 119. This Court, as the Court of Appeals in *Bruce*, cannot change the *Bloom* test, *id.,* nor can it disregard the *Bruce* decision.

The rant about voluntariness, Pl.'s Resp. 5, apparently triggered by Defendants' countering of Plaintiff's use of the word "mandatory" by stating that the "fee is a choice, not a tax," adds nothing to the analysis of the tax vs. fee issue. As Elizabeth Milias, one of two Plaintiff members residing in Aspen, explained in her deposition, when she shops for groceries in Aspen, she now makes choices: to not use a bag at all, to bring her own reusable bags (but of course, not one of the ones distributed by the City), to use her purse to carry the items purchased, or to forego grocery shopping when she forgets her reusable

bags, rather than use a paper bag and pay the waste reduction fee, Pl.'s Mot., Ex. D, 5-8. Whether that choice is voluntary or not is immaterial since voluntariness is not part of the *Bloom* analysis, *Bruce, supra,* at 1190. That the Municipal Defendants' desired to give grocery shoppers a choice, rather than ban both plastic and paper bags at grocery stores, is clear from the legislative history.

Municipalities have been granted the specific power to provide in the municipal budget for programs that support outreach and education on environmental sustainability, Colo.Rev.Stat. §31-15-711(j). The City of Aspen provided that service to the general public, through outreach and distribution of free reusable bags, prior to adoption of the Waste Reduction Ordinance, just as the City of Colorado Springs provided street lighting to the general public before it imposed its street light service charge, *see Bruce, supra.* In both instances, the fact that the general public still benefits from the service does not make the fee a tax, nor is the fee a tax simply due to a stated or perceived lack of benefits to some who have paid the fee. Just as the City of Colorado Springs chose to stop using its general fund and impose fees on a much smaller portion of its general public to fund its specific street lighting program, Municipal Defendants here have taken a very specific environmental sustainability outreach and education program concerning the unsustainability of single use bags, have chosen to regulate the use of disposable bags in grocery stores, banning plastic and imposing the fee on paper, and in the process have imposed the cost of the education and outreach program and reusable bags on those who choose to continue environmentally unsustainable behavior and thus would benefit most from the program.

B. The Waste Reduction Ordinance must be interpreted to give effect to its intended purpose.

Part II of Pl.'s Resp. also includes arguments similar to those raised in the dissent in *Bruce*, including that there has to be a direct tie between the fee and the service provided; that the service has previously been paid by the general fund; that there is no reasonable relationship between the amount of the fee and the service rendered because the fee is charged in some instances where the person charged does not appear to benefit from the service; and that the fees do not appear to be based on use, 131 P.3d at 1193-95. As pointed out above, those arguments cannot succeed without a change in the *Bloom* test. They were unpersuasive in *Bruce* and are unpersuasive here.

Plaintiff's zeal in ridiculing Defendants' position borders on a lack of candor to the tribunal when it cites *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859 (Colo. 1995) as authority for its mistaken contention that a TABOR-exempt fee may only be collected against persons or property "actually receiving the service," Plaintiff's Reply, p. 9. *Nicholl* did not decide any issue relating to the imposition of a fee under TABOR that was being challenged as an unconstitutional tax. Rather, the language quoted by Plaintiff was used in the Court's analysis of whether or not the E-470 Authority was a district or an enterprise under TABOR. The first quote about "tolls and user fees," Pl.'s Resp. 9, came in the context of analyzing the Authority as a "business", which the Court defined as an activity conducted in "pursuit of benefit, gain or livelihood," 896 P.2d at 868, and merely described the activity of the Authority that supported an argument that it was a "business." Plaintiff's use of the second quote is

more egregious. Plaintiff's Response 9, states: "But a charge collected 'with no direct relation to services provided' is a tax subject to TABOR. *id.* at 869." *id.* at 9. The quoted language came from a discussion that the ability of the E-470 Authority to tax made it more like a district under TABOR than an enterprise, a discussion that concluded as follows:

> Thus, we conclude that the power to unilaterally impose taxes, with no direct relation to services provided, is inconsistent with the characteristics of a business as the term is commonly used. Nor is it consistent with the definition of "enterprise" read as a whole. Accordingly, we hold that the Authority is a district subject to the voter approval provisions of Amendment 1.

896 P.2d at 869. Defendants did not "ignore" this case as Plaintiffs claim; its holding that an entity with general revenue taxing authority is a district subject to TABOR simply was not relevant to the issue at hand. There is no dispute here that the City of Aspen has general revenue taxing authority and is a district under TABOR; the dispute is whether the Waste Reduction Ordinance is an unconstitutional exercise of that general revenue taxing authority.

The plain language of the Waste Reduction Ordinance, especially when considered with its legislative history, demonstrates that as in most legislative functions, the enactment of this Ordinance and the setting of the fee in this case involved judgment and discretion, which this court cannot set aside unless it is inherently unsound, *Bruce, supra* at 1190; *Bloom, supra* at 308. While these Defendants strongly disagree that the fees here can be used for "multifarious purposes," Pl.'s Resp. 11, to date they have been used only for education and outreach and reusable bags and it is unlikely that there will be enough

revenue generated for any of the other limited and related purposes set out in the Ordinance, Defs.' Mot. 2-6. [3] Should the use of the fees for the other purposes set out in Section 13.24.050(g)(2)(c) – (g), Strickland Aff., Ex. 1, 842, be found too general, the severance clause can be used to eliminate the infirmity. In *Bloom*, the ordinance at issue specifically allowed excess funds to be transferred to any city fund, the effect of which "would be to render the transportation utility fee the functional equivalent of a tax," 784 P.2d at 311. Rather than coming to the conclusion that the fee was a tax, the Court instead severed that offensive portion so that the remaining parts of the ordinance could "be implemented in accordance with the stated legislative purpose," *id.*, *see also Reams v. City of Grand Junction*, 676 P.2d 1189, 1196 (Colo. 1984). A court has an obligation to avoid an interpretation which renders an ordinance unconstitutional, *Catholic Health Initiatives Colorado v. City of Pueblo*, 207 P.3d 812, 822 (Colo. 2009).

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 16th day of May, 2013.

Deborah Quinn, Assistant City Attorney
ATTORNEY FOR MUNICIPAL DEFENDANTS

[3] The ordinance also includes in the "whereas" clauses a commitment by staff to return to Council to discuss the ordinance within a year after implementation. Staff can use whatever direction comes from this court in its decision on these Motions as a basis for recommending modification of the ordinance

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2013, a true and correct copy of the foregoing MUNICIPAL DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT was served via ICCES, to the following:

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