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January 2, 2020

Jim Owczarski
Milwaukee City Clerk
City Hall
200 East Wells Street Room 205
Milwaukee, WI 53202

RE: Common Council File No. 191476,
Municipal Service Fee on Food Delivery Network Services

Dear Mr. Owczarski:

Our office was recently consulted regarding a per-delivery City fee proposal applicable to services like Uber Eats, Door Dash, and GrubHub. This proposal is now the subject of a proposed ordinance found in in Common Council File No. 191476, which was referred to the Public Works Committee on December 17, 2019. Our analysis follows.

Issue: Is an ordinance imposing a \$0.60 “municipal service fee” on each food delivery originating or terminating in the City of Milwaukee by an app-based service such as Uber Eats, DoorDash, or GrubHub legal and enforceable?

Short Answer: No. The proposed ordinance is not legal and enforceable because the municipal service fee is likely to be characterized as a tax requiring state legislative authorization.

The Proposed Ordinance

The stated purpose of the ordinance is to “provide the department of public works with sufficient resources to maintain public streets and to reduce added wear and tear on public streets arising from the proliferation of on-demand food delivery services.” The ordinance applies to companies that use digital platforms to facilitate “food delivery network services;” i.e., that use an app on a smartphone or other device to connect delivery drivers using their personal vehicles with customers seeking food delivery from local restaurants.



Each time that a food delivery facilitated by such a company occurs from a Milwaukee restaurant or to a Milwaukee customer, the company must collect a \$0.60 fee from the customer. Companies must remit collected fees to the City on a quarterly basis. Resulting revenues “shall be deposited in a street maintenance fund” that “shall be used only to defray city costs for street maintenance activities and to supplement non-rail-based public transportation in the city.”

Applicable Law

The enforceability of the contemplated municipal service fee hinges on whether it is properly classified as a tax or a fee. “The legislature has plenary power over the whole subject of taxation.” *State ex rel. Thomson v. Giessel*, 265 Wis. 207, 213 (1953). Municipalities therefore “may only enact the types of taxes authorized by the legislature.” *Blue Top Motel, Inc. v. City of Stevens Point*, 107 Wis. 2d 392, 395 (1982). Conversely, municipalities may impose fees of their own accord, provided that such fees “bear a reasonable relationship to the service for which the fee is imposed.” Wis. Stat. § 66.0628(2).

When evaluating whether a municipal charge is a fee or a tax, the key focus is on that charge’s underlying purpose—not on its name. *Bentivenga v. City of Delavan*, 2014 WI App 118, ¶ 6. In other words, calling a charge a “fee” does not make it a fee. “[T]he primary purpose of a tax is to obtain revenue for the government, while the primary purpose of a fee is to cover the expense of providing a service or of regulation and supervision of certain activities.” *City of River Falls v. St. Bridget's Catholic Church of River Falls*, 182 Wis.2d 436, 441–42, (Ct.App.1994); *see also State v. Jackman*, 60 Wis. 2d 700, 707 (1973) (“a license fee is one made primarily for regulation and whatever fee is provided is to cover the cost and the expense of supervision or regulation.”).

Analysis

Despite its name, the contemplated “municipal service fee” on app-based food delivery services appears to resemble a tax for two reasons.

1. Supervisory or Regulatory Purpose

First, the municipal service fee does not appear to cover the cost of supervision and regulation. At this time there is no City regulatory ordinance that specifically targets food delivery network services to the exclusion of other types of delivery services, nor does the proposed legislation identify any such regulatory ordinance. There is thus no indication that the proceeds of the \$0.60 per-delivery charge will be used to enforce any specific City rules related to food delivery network services. Indeed, the text of the proposed ordinance does not indicate a supervisory or regulatory purpose at all.

2. Reasonably Related to City-Provided Service

Second, the municipal service fee does not seem reasonably related to a City-provided service. The ordinance draws a connection between the use of City roads by food delivery network services and the need to fund repairs of the roads those companies use and to enhance public transportation options. In this regard the proposed ordinance narrowly targets a certain type of business to address an extremely broad issue: deterioration of the City's public thoroughfares. But why is the charge only applicable to companies like GrubHub and Uber Eats? What about delivery services offered directly by restaurants, such as Domino's or Jimmy John's? And why stop with deliveries of food—why not include flower deliveries, or Amazon package deliveries, or furniture deliveries? What about the broad array of other businesses that use the City's roads, from construction companies to insurance agencies to day care providers?

If the purpose of the ordinance is to ensure that businesses causing wear and tear on City roads also pay for road maintenance and public transportation services, then *all* such businesses should be subject to a fee. The proposed ordinance is legally problematic because it lacks a justification for targeting a few businesses that use City roads while ignoring many others.

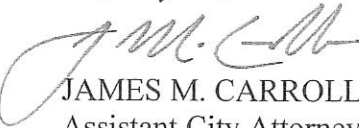
Conclusion

Since the proposed municipal service fee appears intended to raise revenue and does not possess the characteristics of a true fee, as described above, it is likely to be characterized as a tax. The City lacks the independent authority to implement a tax outside the state legislative process. For this reason, the ordinance creating the municipal service fee is not legal and enforceable as drafted.

Very truly yours,



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