



800 City Hall, 200 E. Wells St., Milwaukee, WI 53202, Telephone 414-286-2601, Fax 414-286-8550

## MEMORANDUM

TO: Dana Zelazny, Legislative Reference Bureau

FROM: James M. Carroll, Assistant City Attorney

A handwritten signature in blue ink, appearing to read "J.M. Carroll", written over the printed name of the sender.

DATE: December 4, 2019

RE: Surcharge on Food Delivery Services

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**May the City impose a flat surcharge on delivery fees for app-based food delivery services such as Uber Eats, DoorDash, and GrubHub, the proceeds of which would be partially shared with Milwaukee County and partially used to finance City road maintenance?**

The enforceability of the contemplated surcharge hinges on whether it is 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. “[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.”).

In this instance, the contemplated surcharge on app-based food delivery services appears to resemble a tax, not a fee. The surcharge has no apparent regulatory or supervisory purpose, nor does it bear a “reasonable relationship” to a City-provided service. A connection arguably exists between the use of City roads by delivery drivers and the use of some surcharge proceeds to repair the roads those delivery drivers use. However, the charge’s primary purpose seems to be generating revenue for general use, not for a specific purpose as a tollway would. This is particularly evident in the fact that a portion of the revenue would be shared with Milwaukee County and thus would not be directly used for City purposes at all.

It should also be noted that a subchapter of the Wisconsin Statutes addresses “Transportation Network Companies;” i.e., companies (like Uber and Lyft) that use a digital network to connect passengers to drivers who provide transportation in their personal vehicles. *See* Wis. Stat. §§ 440.40-440.495. It does not appear that this statutory framework applies to Uber Eats, DoorDash, or GrubHub, as those entities deliver food to customers rather than transporting them. However, to the extent that this statutory subchapter may apply to app-based food delivery services, municipalities are expressly forbidden from regulating “Transportation Network Companies” in all but very limited circumstances.

In conclusion, since the proposed surcharge is likely to be characterized as a tax, the City lacks the independent authority to implement it. Such a charge may only be imposed via the state legislative process.

JMC:jmc

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