



MEMORANDUM

LEGISLATIVE REFERENCE BUREAU

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To: The City-County Task Force on Climate and Economic Equity
From: Luke Knapp, Legislative Fiscal Analyst
Date: January 4, 2021
Subject: Legality of Municipal Carbon Fee

Recently, the City-County Task Force on Climate and Economic Equity and the Environmental Collaboration Office requested information on whether the City of Milwaukee has the legal authority to institute a “carbon fee”. While the information provided in this memorandum should not be construed as a legal opinion, it briefly describes the relevant Wisconsin State Statutes, and provides an overview of carbon fees at the municipal or county level within the United States.

Carbon Tax/Fee

A carbon tax or fee is a form of carbon pricing which decreases the demand for fossil fuels by increasing their price. The revenue raised from these fees or taxes can then be used on a variety of programs and incentives to further slow the pace of global warming, and in some areas is used as assistance for low-income groups.

Wisconsin State Statutes – Tax vs Fee

In Wisconsin, municipalities are prohibited from imposing taxes unless they are specifically authorized by the state legislature, but municipalities may impose fees. The League of Wisconsin Municipalities finds that the difference lies in the municipality’s purpose in imposing the amount charged.

Wis. Stats 66.0628(2) states, “Any fee that is imposed by a political subdivision shall bear a reasonable relationship to the service for which the fee is imposed.” The statutes define a “reasonable relationship” as “the cost charged by a political subdivision for a service provided to a person may not exceed the political subdivision’s reasonable direct costs that are associated with any activity undertaken by the political subdivision that is related to the fee.” The League of Wisconsin Municipalities has interpreted the reasonable expenses as the cost of granting the license or permit and of investigating, inspecting and exercising proper police supervision.

According to the League of Wisconsin Municipalities, a tax is imposed for the purpose of raising revenue, while a fee is generally imposed under a municipality’s “police power” (the power to act for the public health, safety and general welfare). Therefore, fees are used as a means of regulation for activities that may have associated problems or because the general nature of the activity demands local control (i.e. sale of intoxicating

liquors, businesses and occupations, exhibitions and shows, street use and operation of vehicles, construction, etc.).

To determine whether something is a tax or a fee, courts will generally examine the municipality's purpose in imposing it. If the primary purpose is to increase revenue and regulation is incidental, it is considered a tax. If regulation is the primary purpose, and the revenue raised does not clearly exceed the cost of regulation, inspection or police control, it can be determined to be a fee.

Under this understanding, a reasonable fee imposed on carbon per ton may be determined permissible, so long as the fee does not generate an exorbitant amount of revenue that exceeds the cost the City takes on to oversee administration of the fee.

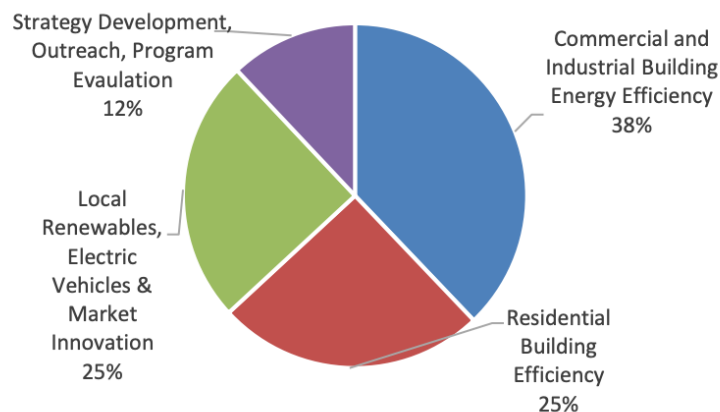
Other Local Carbon Taxes/Fees

In the United States, most carbon taxes are implemented at the state level, including California, Massachusetts, Virginia and Washington. There are, however, two local carbon fees from which Milwaukee can draw comparisons: Boulder, Colorado and Montgomery County, Maryland.

Boulder, CO

In 2007, Boulder passed a Climate Action Plan (CAP) tax. The tax is levied on city residents and businesses based on the amount of electricity they consume, and the tax rates vary based on sector type: residential (\$21 on average per year), commercial (\$94 on average per year), and industrial (\$9,600 on average per year). The tax generates approximately \$1.8 million each year and currently expires on March 31, 2023. Below is a graphic depicting the breakdown of how revenue from the CAP tax is allocated:

Average Annual CAP Tax Allocation



Montgomery County, MD

Montgomery County, Maryland, passed the first county-level carbon tax in the United States in May of 2010. The legislation required payments of \$5 per ton of CO₂ emitted from any stationary source emitting more than a million tons of carbon dioxide during a calendar year. The emissions criteria applied only to an 850-megawatt coal-fired power plant in the county. In June of 2010, the owner of the coal plant, the Mirant Corporation, sued the county to stop the tax. In June of 2011 the Federal Court of Appeals ruled that the tax was actually a fee “for regulatory or punitive purposes”, and therefore it could be challenged in court, much in the same way that Wis. Stats 66.0628(4)(a) allows any person aggrieved by a fee imposed by a political subdivision to file a petition to the Tax Appeals Commission. The Montgomery County Council repealed the fee in July of 2012.

Conclusion

For a carbon fee to be legally implemented in Milwaukee, there would need to be consensus on two major factors: 1) is it in fact a fee and not a tax, and 2) is it considered reasonable in confluence with the cost of administering the fee. To be considered a fee, it would need to be determined that it is within the municipality’s police power (the power to act for public safety, health and general welfare) to regulate the amount of carbon emitted into the atmosphere. There is precedent for equating carbon with a “social cost”, since a 2008 court decision required the federal government to use the social cost of carbon to evaluate the benefits of regulation.

The court decision in Montgomery County, Maryland indicates, in that specific case, that its carbon tax was in fact a fee. However, the County decision to repeal the fee indicates that there was a sense that it was not reasonable or within the County’s policing authority.

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