



CITY OF SOMERVILLE, MASSACHUSETTS
LAW DEPARTMENT

April 28, 2010

Honorable Board of Aldermen
City Hall
93 Highland Avenue
Somerville, MA 02143

Re: Order No. 189129
Legality of a trust fund requiring big box stores entering Somerville to contribute to a fund

Dear Honorable Board Members:

You have asked whether the City may lawfully create a trust fund (similar to the Affordable Housing Trust Fund) that requires big box stores commencing business in Somerville to contribute to a fund that supports small and independent businesses in Somerville.

In my opinion, such a requirement is not legally permissible on the grounds that it effectively imposes a tax on big box stores.

Under Massachusetts law, cities do not have the power to tax. See Art. 89, § 7 of the Amendments to the Massachusetts Constitution (“Nothing in this article shall be deemed to grant to any city or town the power to . . . levy, assess and collect taxes . . .”).

“Fees” share common traits that distinguish them from “taxes.” [1] they are charged in exchange for a particular government service which benefits the party paying the fee in a manner ‘not shared by other members of society’; [2] they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; and [3] the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses.” Emerson College v. Boston, 391 Mass. 415, 424-425 (1984).

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In my opinion, applying the factors in the Emerson College case, the payments will be characterized as a tax because 1) the payments do not benefit the fee payer in a manner not shared by others; and 2) the payments are collected to raise revenue. Therefore, in my opinion, such a requirement is not permissible.¹

Please feel free to contact me if you have any additional questions.

Very truly yours,

David Shapiro
Assistant City Solicitor

cc: Mayor Joseph Curtatone
Janice Delory, Chief of Staff
Matt Dias, Mayor's Aide
Francis X. Wright, Jr., City Solicitor

¹ Chapter 44, section 55C permits a City to establish an Affordable Housing Trust Fund. No such statute grants the City the authority to establish a fund for big box stores to contribute to a fund that supports small and independent businesses.