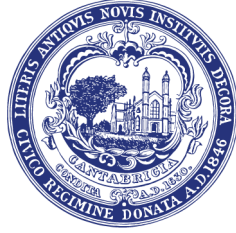


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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

March 4, 2024

Yi-An Huang
City Manager
Cambridge City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

Re: Response to Awaiting Report No. 24-4 of 1/22/24 Re: Report on recommendations and legal opinions for adjusting transportation related fees and other considered changes based on the conversations in committee on December 6, 2023.¹

Dear Mr. Huang:

I write in response to the above-referenced Council Order, which requests that the City Solicitor provide a legal opinion regarding the potential adjustment of transportation related fees and other considered changes to reduce carbon emissions in the City's transportation systems, as discussed in committee on December 6, 2023. During the Health and Environment and Transportation and Public Utilities Committees' December 6, 2023 meeting, the Committees inquired about the City Council's authority to impose or adjust parking permitting fees or other transportation related fees to reflect the costs associated with car travel within the City while continuing to support the needs of low-income residents. The Committees also inquired regarding whether fees structures could permissibly be placed on large vehicles, persons with multiple personal vehicles, and other similar issues. After review, the following presents considerations that the City Council may take into account when crafting more focused policy proposals along these goals.

¹ Policy Order No. 23-137 of 12/6/23 Re: That the Health and Environment and Transportation and Public Utilities Committees hold a public hearing to discuss options for amending parking fees and regulations throughout the city in order to further support the city's goals of low carbon travel.

DISCUSSION

I. Power of the City to Impose Taxes and Fees.

Under Massachusetts law, cities and towns do not have the power to levy tax unless expressly authorized by statute to do so.² Likewise, all property in Massachusetts is considered subject to taxation unless specifically exempted by the state legislature. For instance, specific statutes authorize cities and towns to institute real estate taxes, personal property taxes, and excise taxes. State law allows only for tax exemptions under specific instances, with the taxpayer bearing the burden of proving that they qualify.³ While cities and towns may not assess additional taxes without legislative authority, they may, however, exact fees.⁴ Whether or not a charge is considered a tax or a fee is determined by examining its operation, not by whether the municipality calls it a fee or a tax.⁵

A tax is a revenue-raising exaction imposed through generally applicable rates to defray public expense.⁶ Impact fees, on the other hand, tend to fall into one of two principal categories: “user fees, where a fee is assessed for the use of the governmental entity's property or services; and regulatory fees, where a fee is assessed as part of government regulation of private conduct” (including licensing and inspection fees), founded on a municipality’s police power to regulate particular business or activities.⁷ Impact fees are legitimate to the extent that the services for which they are imposed are sufficiently particularized to justify distribution of the costs among a limited group of beneficiaries or users of the services, rather than the general public.⁸

Affected parties have challenged fees assessed by municipalities on the grounds that they are not actually fees but rather taxes disguised as fees. In the seminal case of Emerson College v. Boston, the Supreme Judicial Court (SJC) set forth three common traits distinguishing fees from taxes:

1. Fees are charged in exchange for a particular governmental service, which benefits the party paying the fee in a manner not shared by other members of society;
2. Fees 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. Fees are collected not to raise revenue generally but to compensate the governmental entity providing the services for its expenses.⁹

² See Mass. Const. Art. 89, §7 (“Home Rule Amendment”) (“Nothing in this article shall be deemed to grant to any city or town the power to ... levy, assess and collect taxes...”); see also Commonwealth v. Caldwell, 25 Mass. App. Ct. 91, 92 (1987).

³ See e.g. M.G.L. c. 59, §5, clauses 3rd, 10th, and 11th.

⁴ See M.G.L. c. 40, §22F.

⁵ Thomson Elec. Welding C. v. Commonwealth, 275 Mass. 426, 429 (1931); Emerson College v. Boston, 391 Mass. 415, 424 (1984); Nuclear Metals, Inc. v. Low-Level Radioactive Waste Management Board, 421 Mass. 196, 201 (1995).

⁶ Opinion of the Justices, 393 Mass. 1209, 1216 (1984); German v. Commonwealth, 410 Mass. 445, 448 (1991).

⁷ Murphy v. Massachusetts Tpk. Auth., 462 Mass. 701, 705 (2012); Opinion of the Justices, 250 Mass. 591, 602 (1924); see also Boston v. Schaffer, 9 Pick. 415, 419 (1830); P. Nichols, Taxation in Massachusetts, 6-9 (3d. ed., 1938).

⁸ See Emerson College at 425.

⁹ See Emerson College at 424-25; Nuclear Metals at 202; Silva v. City of Attleboro, 454 Mass. 165 (2009).

II. Assessment of City Council December 6, 2023 Committee Proposals.

During the December 6, 2023 meeting, the Committees discussed a series of proposals. While no specific proposals were made, the following is offered to provide guidance to the City Council for future proposals or considerations.

A. Could the City provide its own tax incentives to its residents for the purchase of electric vehicles?

Cities or towns cannot issue new taxes unless authorized by state law. Conversely, municipalities may also not grant tax exemptions unless likewise authorized by the state legislature. Currently, tax incentives for the purchase of electric vehicles are only authorized under federal and state law. On the federal level, the Inflation Reduction Act (Public Law 117-169) authorizes a tax credit up to \$7,500 for the purchase of certain qualifying new electric vehicles. On the state level, Massachusetts authorizes rebates for qualifying owners of electric vehicles through the Massachusetts Offers Rebates for Electric Vehicles (MOR-EV) program, 225 CMR 26.00. Neither state nor federal law have granted municipalities the authority to issue their own tax exemptions or rebates for the purchase or operation of electric vehicles. Such authorization could only be granted to the City either through 1) a new state or federal law, or 2) special legislation giving the City the authority to issue such tax incentives. Absent such legislation, the City does not have the authority to issue new taxes or tax exemptions on its own for electric vehicles.

B. Could the City lower property taxes for residents who possess an electric car or do not possess a residential parking permit? Likewise, could the City raise property taxes for those that do possess a residential parking permit?

The assessment of property taxes is dictated by state law. The procedures by which local boards of assessors determine the amount of the property tax levy for the fiscal year are set forth in G.L. c. 59, §§ 21, 23. The annual assessment of real property by municipal boards of assessors is conducted in accordance with state law. In order to calculate what property taxes are owed, assessors must take into account all land, buildings, and “other things thereon or affixed thereto,” unless expressly exempted. M.G.L. c. 59, § 2A. Personal property is not included in this assessment, unless such item is so firmly attached to or integrated into the land or buildings due to their bulk, size, special design, or permanence that it may be assessed as part of the real property. See e.g. Chelsea v. Richard T. Greene Co., 319 Mass. 162 (1946) (hoisting machinery necessary to operate marine railway); Town of Franklin v. Metcalfe, 307 Mass. 386 (1940) (lunch cart mounted on foundation belonging to the lessee). The valuation standard for property tax assessments is “fair cash valuation” (also referred to as “full and fair cash valuation”). G.L. c. 59, § 38.

The Massachusetts Constitution requires that property taxes be “proportional,” or apply equally to the class of property assessed. MA Const. pt. 2, c. 1, § 1, art. 4. The state legislature may grant reasonable exemptions without violating this constitutional requirement of proportionality. Opinion of the Justices, 324 Mass. 724 (1949). Most exemptions for particular categories of property or persons are found in G.L. c. 59, § 5. Exemption from taxation is a

privilege and a claimant must establish that it comes within the express words or necessary implication of the statute. Animal Rescue League of Boston v. Assessors of Boston, 310 Mass. 330 (1941).

In this case, the possession, or lack thereof, of a City issued residential parking pass would not be considered land, buildings, or other affixed property from which property taxes are assessed. Likewise, electric vehicles are considered personal property, which is subject to the excise tax. M.G.L. c. 60A. As such, neither can be considered when assessing the value of property. Additionally, neither are part of the exemptions from taxation found in M.G.L. c. 59, §5. As such, the only way residential parking permits or electric vehicle ownership could be taken into account to reduce property taxes is through either being listed as a category for a tax exemption under state law or the passage of special legislation authorizing the City's Board of Assessors to take such factors into consideration when assessing property taxes.

C. Could the City charge higher or lower fees for residential parking permits based on certain criteria such as vehicles size, type, number of vehicles per household, or income of the applicant?

Assessing whether a fee is valid and not an impermissible tax is a fact intensive process, and courts will assess a municipality's rationale and basis for the institution of fees. Any specific proposal from the City Council to raise residential parking permits on the criteria stated would require further study by TPT, CDD, the Law Department, and other applicable departments. The following is provided as general guidance on the issue.

Applying the Emerson College test to the City's residential parking permit fees, the courts would likely find the current fees charged for the residential parking permits valid. The fees are charged in exchange for a particular governmental service, residential parking registration and stickers, for the use of City property (its public ways) for parking, which only benefits the party paying for the service and is not shared by others. The fee is paid by choice; residents have the option of not utilizing the service if they so desire. Finally, the fee currently charged is not collected to generally raise revenue but to compensate the City for providing the service and managing the expenses related to it.

Whether the fees charged would still be found to be valid if they were adjusted under the Committees' proposals would depend on their nature and the basis supporting them. If the fee amount is changed in a manner unproportional to the use of the City's public ways for residential parking and the cost of operating the residential parking program because some vehicles are charged more based on type, the fee may be subject to challenge as an impermissible tax. Additionally, the fee may be subject to challenge if the purpose of the fee change is to meet the City's climate goals because then the purpose of the fee would be to benefit all members of society and not just the party paying the fee. On the other hand, it may be permissible to reduce the fee for lower-income residents with a policy in place regarding what income levels would qualify for a reduced fee and what supporting documentation would be required to ensure application of the reduced fee in a non-discriminatory manner.

We are happy to provide further analysis and guidance in response to specific proposals. Please let me know if you have any questions.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Megan B. Bayer". The signature is fluid and cursive, with the first name "Megan" being more prominent than the last name "Bayer".

Megan B. Bayer
Acting City Solicitor