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# OHIO LEGISLATIVE SERVICE COMMISSION

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H.B. 242  
133<sup>rd</sup> General Assembly

## Bill Analysis

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**Version:** As Passed by the House

**Primary Sponsors:** Reps. Lang and Jones

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### SUMMARY

- Prohibits local governments from imposing a tax, fee, assessment, or other charge on auxiliary containers (for example, a plastic or paper bag), the sale, use, or consumption of auxiliary containers, or on the basis of receipts received from the sale of auxiliary containers.
- Authorizes a person to use an auxiliary container for purposes of commerce or otherwise.
- Clarifies that existing law prohibiting the improper deposit of litter applies to auxiliary containers under the state anti-littering law.

### DETAILED ANALYSIS

#### Auxiliary containers

The bill enacts new law and modifies existing law governing “auxiliary containers.” Under the bill, auxiliary containers are single-use or reusable packaging such as bags, cans, bottles, or other containers made of materials such as plastic, glass, metal, or cardboard that is designed for transporting food, beverages, or other merchandise from or at a restaurant, grocery store, or other retail establishment.<sup>1</sup> In particular, the bill does all of the following with respect to auxiliary containers:

1. Prohibits a municipal corporation, charter county, or limited home rule township from imposing a tax, fee, assessment, or other charge on auxiliary containers, the sale, use, or consumption of such containers, or on the basis of receipts received from the sale of

<sup>1</sup> R.C. 3736.01(K).

such containers (for a more detailed explanation of this provision, see “**Local fee and tax prohibitions**,” below);<sup>2</sup>

2. Authorizes a person to use an auxiliary container for purposes of commerce or otherwise. The bill specifies that nothing in this authorization may be construed to prohibit the authority of a county, municipal corporation, or solid waste management district from implementing a voluntary recycling program (see **COMMENT 1**);<sup>3</sup>
3. Clarifies that existing law prohibiting the improper deposit of litter applies to auxiliary containers under the state anti-littering law. Current law prohibits a person from improperly depositing litter on public property, private property not owned by the person, or in or on waters of the state. Violation of the prohibition is a third degree misdemeanor, and a sentencing court may require the violator to remove litter from property or from the waters of the state.<sup>4</sup>

## **Local fee and tax prohibitions**

### **Municipal corporations**

Municipal corporations are endowed by the Ohio Constitution with home rule powers, which authorize them to exercise powers beyond those provided in state law and, in certain respects, contrary to state law.<sup>5</sup> In particular, municipal corporations may impose taxes without explicit authorization to do so under state law.<sup>6</sup> However, the Ohio Constitution does allow the General Assembly to enact laws limiting the power of municipalities to levy taxes and assessments.<sup>7</sup> Indeed, continuing law prohibits municipalities from levying several types of taxes, including sales taxes and gross receipts taxes.

The bill further restricts municipal taxing power by prohibiting municipal corporations from imposing a tax on auxiliary containers themselves, on the sale, use, or consumption of such containers, or on the basis of receipts received from the sale of such containers. The bill also prohibits a municipal corporation from imposing a fee, assessment, or other charge on any of those bases (see **COMMENT 2**).<sup>8</sup>

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<sup>2</sup> R.C. 301.30, 504.04(B)(8), and 715.013(B).

<sup>3</sup> R.C. 3736.021.

<sup>4</sup> R.C. 3736.32 and 3767.99, not in the bill.

<sup>5</sup> Ohio Constitution, Article XVIII, Section 3.

<sup>6</sup> *Gesler v. City of Worthington Income Tax Bd. of Appeals*, 138 Ohio St.3d 76; 2013-Ohio-4986; 3 N.E. 1177.

<sup>7</sup> Ohio Constitution, Article XIII, Sections 6 and 13.

<sup>8</sup> R.C. 715.013(B).

## Charter counties

In general, counties possess only those powers expressly delegated to them by state law, or those which are necessarily implied from those powers.<sup>9</sup> However, the Ohio Constitution allows counties, with voter approval, to adopt a charter, which may endow the county with the same home rule powers exercised by municipal corporations, including the power of taxation.<sup>10</sup> However, the charters of both of the counties in Ohio that have adopted charters, Cuyahoga and Summit, specifically disclaim the power to levy any tax other than the taxes permitted under state law for noncharter counties.<sup>11</sup>

As with municipal corporations, the bill prohibits a charter county from imposing a tax, fee, assessment, or other charge on auxiliary containers, on the sale, use, or consumption of such containers, or on the basis of receipts received from the sale of the containers (see **COMMENT**). But the bill specifies that charter counties may still impose their general sales and use taxes on such containers to the extent the sale of such containers is taxable or becomes taxable in the future under the state's sales and use tax law.<sup>12</sup>

## Limited home rule townships

Similar to counties, townships are generally limited to acting in accordance with powers delegated to them under state law.<sup>13</sup> Continuing law authorizes certain townships with at least 3,500 residents to form a limited home rule government, which is allowed to exercise home rule powers, subject to certain exceptions. Among other exceptions is a prohibition against levying taxes not authorized under state law for all townships.<sup>14</sup> Accordingly, even limited home rule townships are prohibited from levying taxes not authorized by state law, but this does not necessarily imply that they lack power to impose fees or other charges for regulatory purposes that are not regarded as taxes.

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<sup>9</sup> See *Geauga County Bd. of Commrs. v. Munn Rd. Sand & Gravel*, 67 Ohio St.3d 579, 621 N.E. 696 (1993); *State ex rel. Kuntz v. Zangerle*, 130 Ohio St. 84 (1935), syllabus, paragraph 1.

<sup>10</sup> Ohio Constitution, Article X, Section 3.

<sup>11</sup> Article I, Section 1.02, Charter of Cuyahoga County, available at: Article I, Section 1.02, Charter of Cuyahoga County, available at: <http://council.cuyahogacounty.us/en-US/Charter-CuyahogaCounty.aspx>, and Article I, Section 1.02, Charter of Summit County, available at: <https://co.summitoh.net/index.php/executive/charter-government>.

<sup>12</sup> R.C. 301.30. Current sales and use tax law appears to exempt a broad range of items, some of which might qualify as auxiliary containers, when purchased by retailers for their customers' use – see R.C. 5739.02(B)(15).

<sup>13</sup> See *State ex rel. Schramm v. Ayres*, 158 Ohio St. 30, 106 N.E.2d 630 (1952) and *Drees Co. v. Hamilton Twp.*, 132 Ohio St.3d 186, 2012-Ohio-2370, 970 N.E.2d 916.

<sup>14</sup> R.C. 504.04(A)(1).

The bill expressly prohibits home rule townships from imposing a fee, assessment, or other charge on auxiliary containers, on the sale, use, or consumption of the containers, or on the basis of receipts received from the sale of the containers.<sup>15</sup>

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## COMMENT

1. The bill authorizes any person to use an auxiliary container for “purposes of commerce or otherwise.” It also applies the existing littering law to the improper disposal of such containers. It is unclear how a municipal ordinance (enacted by a municipal corporation under its municipal home rule authority)<sup>16</sup> that prohibits persons from using auxiliary containers would interact with this general authorization.<sup>17</sup>

2. The bill prohibits municipal corporations and charter counties from imposing a “fee, assessment, or other charge” on auxiliary containers, on the sale, use, or consumption of such containers, or on the basis of receipts received from the sale of such containers.<sup>18</sup> Although the Ohio Constitution and county charters appear to allow state law’s limitation on each subdivision’s respective taxing power, it is unclear whether the Ohio Constitution authorizes the General Assembly to limit “fees and other charges” that might be imposed by a municipal corporation or charter county for regulatory or other public welfare purposes.<sup>19</sup>

Because the bill restricts municipal and charter county authority to impose fees and charges, it may interfere with a municipal corporation’s or charter county’s home rule authority.

Indeed, courts have held that a statute enacted by the General Assembly that purports to limit that constitutional authority may be invalid as applied to these home rule subdivisions.<sup>20</sup> The same issue does not arise with limited home rule townships, as their home rule authority is granted by state law and not the Ohio Constitution.

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<sup>15</sup> R.C. 504.04(B)(8).

<sup>16</sup> Ohio Constitution, Article XVIII, Section 3.

<sup>17</sup> See *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963.

<sup>18</sup> R.C. 301.30 and 715.013(B).

<sup>19</sup> See *Drees, infra*. for discussion of legal distinction between taxes versus fees and other government exactions.

<sup>20</sup> See *Canton*.

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## HISTORY

Action	Date
Introduced	05-13-19
Reported, H. State & Local Gov't	06-27-19
Passed House (58-35)	12-11-19

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