

The Difference Between a "Fee" and a "Tax"

- 1) A "fee" is "a charge required to be paid in return for a particular government service or program ... that benefits the payer in some manner different from the members of the general public not paying the fee." In short, a "fee" is a "quid pro quo" arrangement where a person provides some substantial benefit to the person paying the "fee". [*Burns V. Greenville County Council, June 30, 2021, Appellate Case No. 2018-002255, Supreme Court of South Carolina*]. For example, paying a "fee" for telephone service, the person paying the "fee" receives substantial benefit with the ability to make telephone calls.
- 2) A "Tax" is type of compulsory payment largely, or completely absent, of bearing a direct relationship to a benefit received by the payer of the "tax", exemplified by New Hampshire's "Tax On Meals And Rooms". When paying a "meals tax" to the Department Of Revenue, the person paying the "tax" receives no substantial benefit from the DOR. Thus, the "tax" is not a "fee".

RSA 78-A – A Tax On Meals is Solely Granted by Law to One State Agency

- 3) RSA 78-A, "Tax On Meals And Rooms", authorizes the Commissioner of the DOR, the exclusive authority to administer a "tax" on meals defined as: "any food or beverage, or both, including food products, prepared for human consumption and provided by a restaurant in such form as to be available for immediate consumption without further significant preparation ..." The term "meal" includes food or beverages sold on a "take out" or "to go" basis."
- 4) The Pease Development Authority [PDA] has no taxing authority granted by the state legislature. Thus, the PDA body politic is prohibited from taxing anyone.
- 5) In March 2023, the PDA executive director created a new Department of Ports and Harbors [DPH] contract element called a "concession fee" which would impose a cost on all DPH businesses providing meals for sale described as: "prepared food and beverage items" which would include "Hamburgers, hot dogs, sandwiches, lobster roll, prepared shellfish, salads, mac and cheese, chowders/soups, packaged snacks, sodas, juices, coffee, tea and breakfast items." This "concession fee" needed to be paid to the PDA in the amount of "10% of its gross revenues, excluding only sales tax and gratuities".
- 6) It is intuitively obvious to the most casual observer that the substance of the PDA "concession fee" is constructively the same as the DOR's "meals tax". Thus, renaming a "meals tax" as a "concession fee" does not change its true nature and application.
- 7) The DPH is subject to RSA 541-A rule making pursuant to RSA 12-G:42,X & RSA 541-A:21,(n). Accordingly, RSA 541-A:22 "Validity of Rules" applies:
 - I. No agency rule, including a form, is valid or effective against any person or party, nor may it be enforced by the state for any purpose, until it has been filed as required in this chapter and has not expired.
 - III. An agency shall not by rule:
 - (f) Adopt rules under another agency's authority.
- 8) There are no DPH RSA 541-A rules that authorizes the PDA the ability to charge a "concession fee". Thus, this would be the board essentially violating RSA 541-A:22,I. The "concession fee" is actually as "tax". Since the PDA lacks the authority to "tax" anyone, litigation against individual board members is possible. Lastly, even if the PDA had taxing authority, the PDA cannot impose a "tax" or a "concession fee" pursuant to RSA 541-A:22,III(f) based on meals without the legislature granting such authority to the PDA.

Was "Concession Fee" Implementation Compliant with Due Process?

- 9) No. It was imposed by fiat on only two of six DPH food businesses.
- 10) In the new agreements dated March 2023, the executive director created a new DPH contract element called a "*concession fee*" which presumably would impose a costs on all DPH business agreements in the amount of "*10% of its gross revenues, excluding only sales tax and gratuities*" for those businesses selling "*prepared food and beverage items*".
- 11) The "*concession fee*" was first implemented in agreements delivered by the executive director to only two DPH businesses in March 2023: Rye Harbor Lobster Pound [RHLP] and Rye Harborside [RH]. These agreements covered the 2023 and 2024 summer seasons. They were revised multiple times up until June 13, 2023.
- 12) These agreements were not subject to negotiation, nor had the PDA voted to include 10% "*concession fees*" prior to the June 2023 board meeting. The executive director is not empowered to set PDA policy.
- 13) The Pease Development Authority held no RSA 541-A like due process public hearings prior to the June 2023 board meeting regarding implementing a DPH "*concession fee*".
- 14) The DPH is subject to RSA 541-A rule making: RSA 12-G:42,X & RSA 541-A:21,(n).
- 15) To date, there is no DPH "*concession fee*" rule filed pursuant to RSA 541-A.
- 16) Pursuant to RSA 541-A:22, I, DPH rules must follow the these procedure before rules such as the "*concession fee*" are implemented. When the PDA went ahead and implemented these "*concession fees*", the PDA deprived interested parties of their basic constitutional rights to:
 - a. Due process and notice requirements [RSA 541-A:3 & 6];
 - b. Public hearings for interested parties to submit comments [RSA 541-A:11];
 - c. Two tier open meeting approval process as a check and balance [DPH & PDA];
 - d. Providing a detailed fiscal impact statement [RSA 541-A:5];
 - e. Rules may not violate the NH constitution [RSA 541-A:6];
 - f. Compliance with state and federal law [541-A:3-a];
 - g. Adopting and filing a final rule under [541-A:14]
- 17) On June 13, 2023 the PDA approved these agreements which were non-complaint with RSA 541-A even though the board was advised that RSA 541-A compliance was required.
- 18) The board did not allow either party to speak while the board took up the matter.

Was the DPH "Concession Fee" Applied Fairly to all DPH Businesses?

- 19) No. The "*concession fee*" is unfair for two reasons relating to economic discrimination.
- 20) Firstly, the "*concession fee*" is a targeted "*carve out*" condition not applying to all other DPH retail sales. The "*concession fee*" only applies to the retail sales of "*meals*". As a result, it is a condition which constructively exempts all other DPH businesses that sell other products and services to the public. The question of: "*Why only food items?*" has never been discussed, explained or justified by the PDA.
- 21) Secondly, this charge was actually only applied to two DPH food businesses. There was never a reason set forth by the PDA to justify this discriminatory decision manifest as excluding three well known DPH food vendors from paying any "*concession fee*": one at Rye Harbor and two at Hampton Harbor.