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The Honorable Janet Ancel,
 Chair, House Ways & Means Committee
 State House
 115 State Street
 Montpelier, VT 05633-5501

Dear Chair Ancel and Committee Members

The enclosed legal opinion was prepared by the law firm of Eversheds Sutherland located in Washington DC. It outlines the legal issues surrounding the proposed South Burlington Car Rental Tax.

Federal Preemption of the Proposed South Burlington Car Rental Tax

I. Introduction

The following analyzes the applicability of the Federal Aviation Administration (“FAA”) Reauthorization Act of 2018 (the “Reauthorization Act”)¹ to the City of South Burlington’s ballot measure currently pending before the Vermont legislature in H.B. 545 (the “Measure”). The measure, if passed by the state legislature, would amend the City of South Burlington Charter to impose a tax on short term car rentals in the city (the “Car Rental Tax” or “Tax”).

II. Executive Overview

The motor vehicle rental industry has been unique targets of discriminatory state and local tax regimes that impose targeted taxes on vehicle rentals in a way that unduly burdens interstate commerce. In effect, these tax regimes operate as a form of compulsive taxation imposed upon a non-electorate—the motor vehicle rental industry. Among the federal statutes prohibiting discriminatory taxes, the Reauthorization Act prohibits state and localities from levying or collecting certain, taxes, fees, or charges.

Based on the law and analysis herein, the Car Rental Tax, as it is proposed, would operate to impose a tax on short-term car rental businesses in direct violation of the Reauthorization Act. Specifically, the Car Rental Tax would violate the Reauthorization Act because it is: (i) a new tax taking effect after October 5, 2018; (ii) levied or collected “upon any business located at a commercial service airport or operating as a permittee of such an airport”; (iii) “not generally imposed on sales or services by that State, political subdivision, or authority”; and (iv) does not provide that the proceeds thereof are “wholly utilized for airport or aeronautical purposes.”²

¹ Pub. L. No. 115-254, § 159(a), 132 Stat. 3220 (2018) (codified at 49 U.S.C. § 40116(d)(2)(A)(v)).

² 49 U.S.C. § 40116(d)(2)(A)(v).

III. Background

On March 5, 2019, the local voters of the City of South Burlington approved the Measure as put forth by the City Council. The Measure is currently pending before the Vermont legislature in H.B. 545. The Measure would amend the City Charter to add Section 13-1508, which would authorize the City Council to impose the Car Rental Tax.

There is one commercial service airport located in the City of South Burlington, the Burlington International Airport. Short-term rental car businesses have car rental locations at the Burlington International Airport.

IV. Discussion of the Law

A. The Reauthorization Act

The Reauthorization Act, signed into law on October 5, 2018, prohibits state and localities from levying or collecting certain taxes, fees, or charges. The Reauthorization Act, in relevant part, provides:

A State, political subdivision of a State, or authority acting for a State or political subdivision may not do any of the following acts because those acts unreasonably burden and discriminate against interstate commerce: . . . except as otherwise provided under section 47133,³ levy or collect a tax, fee, or charge, first taking effect after the date of enactment of this clause [October 5, 2018], upon any business located at a commercial service airport or operating as a permittee of such an airport that is not generally imposed on sales or services by that State, political subdivision, or authority unless wholly utilized for airport or aeronautical purposes.⁴

(the “Federal Prohibition Clause”). Stated another way, a state or locality may only impose a tax, fee, or charge enacted after October 5, 2018, upon a business located at, or operating as a permittee of, a commercial service airport, if such tax, fee, or charge is imposed uniformly across the state or locality, and the tax revenues are earmarked for airport or aeronautical purposes.

The Reauthorization Act clarifies that the Federal Prohibition Clause does not “affect a change to a rate or other provision of a tax, fee, or charge under section 40116 of title 49, United States Code, that was enacted prior to the date of enactment of this Act.”⁵ A tax, fee, or charge existing prior to the enactment of the Federal Prohibition Clause “shall continue to be subject to the requirements to which such provision was subject under that section as in effect on the day before the date of enactment of this Act.”⁶

³ 49 U.S.C. § 47133 generally prohibits “[l]ocal taxes on aviation fuel” from being spent on anything, but aviation.

⁴ 49 U.S.C. § 40116(d)(2)(A)(v).

⁵ Pub. L. No. 115-254, § 159(b), 132 Stat. 3220 (2018).

⁶ *Id.*

B. The Car Rental Tax

Vermont law authorizes the City of South Burlington to amend its charter.⁷ However, an amendment to the charter of the City of South Burlington, like the Measure, requires consent of the Vermont legislature.⁸

1. Imposition

The Car Rental Tax, as it is proposed, would impose a new tax at the rate of 0.5% on “those transactions in the city involving short term car rentals.”⁹ The Tax would be contained in a new § 13-1508 of the City of South Burlington Charter entitled “Short term car rental highway infrastructure and emergency services tax.”

2. Collection and Remittance

The Car Rental Tax, as proposed, is to “be collected and administered by the City of South Burlington.” The Measure is otherwise silent regarding the collection and remittance of the Car Rental Tax. The City of South Burlington Charter does not otherwise provide any guidance regarding the imposition of the Car Rental Tax or whether it must be passed onto short term car rental customers. We thus look to an analogous tax for guidance—Vermont’s statewide short-term car rental use tax.

Vermont’s short-term car rental use tax is imposed at a rate of 9% on “the rental charge of each transaction.”¹⁰ Pursuant to Vermont law, the “tax is to be collected by the rental company from the renter and remitted to the Commissioner.”¹¹ However, Vermont law holds the short-term car rental company personally liable should the tax not be paid.¹² Accordingly, the short-term car rental use tax is ultimately imposed on the short-term car rental company.

Based on the imposition of Vermont’s short-term car rental use tax, it reasons that the Car Rental Tax, while potentially required to be collected from the customer/renter, would be a tax on the short-term car rental companies.

3. Use of the Tax Proceeds

The proceeds from the Car Rental Tax are to “be used to fund city [sic] highway maintenance and emergency services expenses in order to reduce the municipal property tax

⁷ 24 App. Vt. Stat. Ann. c. 13 § 2101.

⁸ Vt. Const. Ch. II, § 69.

⁹ Article IV of the Measure defines “short term car rental” to mean and include “any rental of a pleasure car for a period of less than six months. It shall not mean, rental of motor trucks, motor buses, motorized highway building equipment, road making appliances, school buses, tractors, motor-driven cycles, electric personal assistive mobility devices, agricultural service vehicles, and category I and II special purpose vehicles, as these terms are defined under section 4 of Title 23. In addition, it shall not include membership-based community carsharing services.”

¹⁰ 32 V. Stat. Ann. § 8903(d).

¹¹ 32 Vt. Stat. Ann. § 8903(d); Vt. Rental Company Tax Report Instructions. “Every person required to collect the use tax . . . shall forward such tax and a report of same on forms prescribed and furnished by the commissioner at the frequency determined by the commissioner.” 32 Vt. Stat. Ann. § 8905(d).

¹² 32 Vt. Stat. Ann. § 8909 (“If the tax due under subsection 8903(d) of this title is not paid as hereinbefore provided the Commissioner shall suspend the rental company’s license to act as rental company and motor vehicle registrations within the State of Vermont until such tax is paid, and such tax may be recovered with costs in an action brought in the name of the State on this statute.”).

collected on the city grand list and shall not be used to increase total City revenues.”¹³ The revenues from the Car Rental Tax are not earmarked for airport or aeronautical purposes, nor are the revenues expected to serve any airport or aeronautical purpose.¹⁴

V. Analysis

A. The Car Rental Tax, if enacted, violates the Reauthorization Act

The Car Rental Tax, as it is proposed, would violate the Federal Prohibition Clause of the Reauthorization Act. Under the Federal Prohibition Clause a tax, fee, or charge, is preempted if it (i) first takes effect after October 5, 2018; (ii) is levied or collected “upon any business located at a commercial service airport or operating as a permittee of such an airport”; (iii) is “not generally imposed on sales or services by that State, political subdivision, or authority”; and (iv) does not provide that the proceeds thereof are “wholly utilized for airport or aeronautical purposes.” The Car Rental Tax meets each of these elements.

First, the Car Rental Tax is a new proposed tax. Currently, the City of South Burlington does not impose a tax on short-term car rentals, nor does it impose an analogous tax on other transactions. Furthermore, the Car Rental Tax is not a proposal for a local option tax that is authorized by Vermont state law.¹⁵ Instead, the enactment of the Tax requires the approval of the Vermont legislature. Additionally, the Car Rental Tax, if enacted, would be effective as of a date that is after the enactment date of the Federal Prohibition Clause.¹⁶

Second, the Car Rental Tax would be levied on and collected from short-term car rental businesses located at a commercial service airport in the City of South Burlington. The plain meaning of the second element prohibits a tax that is levied on or collected from “any business located at a commercial service airport.”¹⁷ While there may be an obligation on a short-term car rental business to collect the Car Rental Tax from its customers, the state’s short-term car rental use tax would suggest that the Car Rental Tax would remain the personal liability of the short-term car rental business.¹⁸ Accordingly, the Car Rental Tax would be a tax on short-term car rental businesses in direct violation of the second element of the Federal Prohibition Clause.

Third, the Car Rental Tax would not be “generally imposed on sales or services” by the City of South Burlington. The plain meaning of the third element bars a tax that is not commonplace for sales or services transactions. The term “sales or services” is nonspecific, broadly encompassing an expansive range of sales and services. The Car Rental Tax would not generally be imposed on sales or services. Rather, it is targeted at only one type of transaction – sales of short term car rentals to customers in the City of South Burlington.

¹³ City of South Burlington Charter § 13-1508(d) (as proposed in the Measure).

¹⁴ See *Id.*

¹⁵ See generally, 24 Vt. Stat. Ann. § 138.

¹⁶ H.B. 545 was introduced in the Vermont legislature on March 28, 2019, and is effective upon passage, which is after October 5, 2018.

¹⁷ (Emphasis added). See *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917) (“[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms.”).

¹⁸ See 32 Vt. Stat. Ann. § 8909.

Lastly, the proceeds of the Car Rental Tax are not to be “wholly utilized for airport or aeronautical purposes.”¹⁹ Instead, the proceeds are earmarked for highway maintenance and emergency services expenses, not airport or aeronautical purposes.

Because the Car Rental Tax, if enacted, would meet each of these four elements, the Tax would be in violation of the Federal Prohibition Clause of the Reauthorization Act. And the collection of the federally-preempted Car Rental Tax from customers would expose short-term car rental businesses to the risk of class-action lawsuit for collecting a tax that is barred by federal statute.²⁰

Respectfully Submitted:



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Enterprise Holdings

¹⁹ 49 U.S.C. § 40116(d)(2)(A)(v).

²⁰ See, e.g., *In re AT&T Mobility Wireless Data Services Sales Tax Litigation*, 789 F. Supp. 2d 935(N.D. Ill. 2011) (class action case asserting that AT&T had collected tax from customers that was preempted by the Internet Tax Freedom Act (47 U.S.C.A. § 151 note)).