

1. Agenda

Documents: [AGENDA 07.16.13.PDF](#)

2. Draft Minutes

Documents: [GPWGDRAFTMINUTES050613.PDF](#), [GPWGDRAFTMINUTES062513.PDF](#)

3. Ordinances

Documents: [BOULDER ORDINANCE.PDF](#), [LA BAG ORDINANCE.PDF](#)

4. Legal Memos

Documents: [PORTLAND LEGAL MEMO.PDF](#), [WINDHAM LEGAL MEMO.PDF](#)

CITY OF PORTLAND, MAINE
Agenda

Green Packaging Working Group Task Force

DATE: 7/16/2013
TIME: 5:00 PM
LOCATION: Portland City Hall
Room 24

AGENDA

1. Approval of Minutes of May 6th and June 25th Meeting
2. Discussion of bag use fees
3. Discussion of further meeting dates
4. Adjourn

Green Packaging Working Group
May 6, 2013

In attendance: Troy Moon, Portland Public Services; Jennifer Thompson, Corporation Counsel's Office; Michele Brooks, Portland citizen; Alexandra Fields, Environment Maine; Ron Adams, Portland Public Schools; Ed Suslovic, Chairperson; Ted Koffman, Maine Audubon Society; Martin Fisher, Serlin Haley; Danny Bouzianis, Dunkin Donuts; Richard Grotton, Maine Restaurant Association; Deb Hart, Retail Association of Maine; Shelley Doak, Maine Grocers Association; Steve Rosario, American Chemistry Council; John Morin, ecomaine; Cathy Ramsdell, Friends of Casco Bay; Matthew Faulkner, Surfrider; Sally Trice, Portland citizen

17:08

The meeting of the Green Packaging Working Group opened at 5:08 p.m. in Room 24 of Portland City Hall on May 6, 2013.

1. Approval of Minutes

Steve Rosario of the American Chemistry Council had several changes to the minutes of April 8th. On page two, he clarified that he did not state that he said "...polystyrene is not the only environmentally damaging substance...." instead he said that "all substances in use in foodware have issues." He also asked that the minutes reflect that on page four John Morin of ecomaine stated that ecomaine does recycle paper cups. Lastly, Mr. Rosario asked that the minutes reflect that he had issues that he had wanted to raise during the previous meeting, but did not have an opportunity to do so at the end of the meeting.

Martin Fisher of Dart Packaging raised the issue of a list of exemptions he had submitted, Chairman Suslovic said that his list and any other proposed amendments would be considered during this evening's deliberations.

The minutes were approved as amended.

2. Review and Final Discussion of Draft Polystyrene Ordinance

Jennifer Thompson of the City's Corporation Counsel Office explained the proposed polystyrene ordinance in detail, beginning with the findings and purposes section. Mr. Rosario reiterated that it was his opinion, as one who had worked in the industry for 22 years, that there were factual errors in the findings section. Ms. Thompson continued the explanation, including the staff-added language regarding the definitions and exemptions.

Chairman Suslovic asked for any clarifying questions from the committee. Hearing none, he asked for a motion. Ted Koffman of Maine Audubon moved to accept the ordinance as written; Cathy Ramsdell of the Friends of Casco Bay seconded the motion.

Discussion:

Mr. Fisher introduced the list of amendments he prepared, noting that all but one had been taken from the materials that had been submitted to the task force. He asked that the task force take up and move each amendment separately.

Mr. Fisher moved an amendment, taken from Freeport's ordinance, to make the City's ordinance null and void if an effective polystyrene recycling program was implemented. Mr. Rosario seconded the motion.

Chairman Suslovic asked about definition of recycling, if it was "bringing it to" Riverside or single sort curbside. Mr. Fisher clarified that his definition gave the City the flexibility to decide. Mr. Koffman asked who decided what an "effective recycling program" was. Mr. Fisher responded the City was. Michele Brooks of Portland asked if the full decision was unquestionably up to the city. Mr. Fisher answered that the City had to give it its stamp of approval. Ms. Brooks made an amendment, agreed to by Mr. Fisher, that language be added clarifying that any effective recycling program required City approval. Mr. Rosario asked that no specific business be named as the administrator of any recycling program. Matthew Faulkner of Surfrider asked that any recycling program have a reuse component to it. Deb Hart of the Retail Association of Maine noted that new technology emerges constantly, and further definition within the ordinance could hamstring the city. Mr. Faulkner reiterated that any recycling program should have a reuse component. The vote was taken, and the motion carried 11-3.

Mr. Fisher moved that the City draw up a list of suitable, affordable biodegradable alternatives for retail and restaurant establishments to use, to be drawn up by the Environmental Services Manager of the City of Portland. Richard Grotton of the Maine Restaurant Association seconded the motion.

Mr. Koffman suggested the City could make such a list available without codifying it in an ordinance. Mr. Fisher said the inclusion of a list was as an educational tool and wasn't meant to be restrictive. Chairman Suslovic noted that new technology changes day by day, and that it wasn't the role of the City to determine what technology was best. Mr. Rosario said that the larger retail food vendors have the resources to do the research for themselves, but smaller establishments may not. In that light, having a list of resources would be very valuable. The vote was taken, and the motion failed 6-8.

Mr. Fisher moved an amendment stating that if the Maine Legislature votes to ban polystyrene statewide, Portland's ordinance would be null and void. He explained that this would prevent "quilt-patching" and the requirement that packaging companies keep track of many different laws and ordinances within the state. Shelley Doak of the Maine Grocers Association seconded the motion. Ms. Brooks asked if he was referencing federal law, and made an amendment, accepted by Mr. Fisher, to change Massachusetts to Maine. Chairman Suslovic noted Portland's stringent smoking ban and asked what would happen if Portland's polystyrene ordinance exceeded state requirements. Ms.

Brooks said she thought Portland's ordinance would stand. Ms. Thompson asked what would happen if the legislature passed a polystyrene ban, then repealed it some time later. Mr. Fisher answered that he didn't want a quilt patch and suggested adding "while a substantially similar Maine law is in existence, the Portland law is superseded." The vote was taken, and the motion passed unanimously.

Mr. Fisher moved to add an in-store recycling exemption, explaining that if a store offers recycling options for polystyrene, it should be allowed to sell it. Ms. Doak seconded the motion.

Mr. Faulkner asked what the definition of recycling would be. Chairman Suslovic answered that Portland partly owns ecomaine and can dictate what recycling is. Mr. Faulkner expressed concern that there were several different recycling practices the city doesn't have control over. Mr. Fisher answered that he added this amendment in the interest of education and personal responsibility. He noted that in-store recycling costs the store and gives them an incentive to recycle. Chairman Suslovic reiterated that recycling has to be convenient in order to be effective, as proved by recycling rates. He said that, in general, customers use polystyrene containers for takeout as opposed to eating on-premises, and it is unlikely customers will return their containers to the store they bought them from. Sally Trice of Portland agreed with him and added that polystyrene containers will still wind up in the trash bag or on the street. Ms. Brooks agreed that the idea that someone is going to bring it back is not logical. She also noted that a bin labeled "recycling" does not mean that the contents will in fact be recycled. Mr. Fisher added an amendment that the in-store recycling program must be approved by the city in order to be exempted from the ordinance. Mr. Rosario suggested other recyclers should be allowed with the in-store program, as opposed to limiting establishments to ecomaine. Chairman Suslovic said if the City finds an effective polystyrene recycling program, the whole ordinance is moot anyway. Mr. Fisher added that this amendment has the capacity to create a market for recycling. Ms. Brooks asked if there were examples of this exemption in any other ordinance. Mr. Fisher answered that he had crafted this one independently of other ordinances. The vote was taken; the motion failed 5-9 with one abstention.

There were no other amendments.

3. Vote on Final Draft Ordinance

Mr. Fisher asked if there would be an opportunity for a minority report. Chairman Suslovic said there would be.

The vote was taken on the full draft ordinance. The motion passed as amended, 9-6.

Chairman Suslovic asked that those who had an interest in compiling a minority report nominate one person to work with Troy Moon of Portland Public Services. Mr. Fisher said he would, and asked how long the minority committee has to submit the

report. Mr. Moon noted that it would probably be needed by May 31 to be submitted to the Transportation, Sustainability and Energy Committee for placement on the earliest agenda possible. Chairman Suslovic said he hoped the ordinance could be placed on the TSE agenda for June 19th. Mr. Fisher asked when Ms. Thompson could get the final draft of the proposed ordinance. Mr. Moon suggested we could distribute the ordinance language on May 17th. Chairman Suslovic reminded everyone that all dates are tentative.

4. Plastic bags discussion

Chairman Suslovic introduced the topic of plastic bags and what, if anything, the task force can do about them. He called on Joshua Dow, a student at Casco Bay High School, who had prepared a presentation on plastic bags and how to dispose of them. Mr. Dow proposed a plastic bag return similar to the bottle return program, in which participants would get a certain amount of change for each plastic bag. In addition to the environmental benefits, such a system would give citizens in financial difficulties a method of earning money. Mr. Dow noted that it took one thousand years for a plastic bag to degrade, and added that plastic bag litter was a monumental worldwide problem.

Mr. Koffman asked if Mr. Dow had looked into biodegradable bags. Mr. Dow responded that there were vegetable oil-based plastic bags that were 92% decomposable. He also mentioned the reusable/recyclable bags that Shaws and Hannaford offered to their customers. Ms. Brooks asked if he had considered bans as a solution. Mr. Dow said there had been attempts at bans, but the plastics industry had brought suits against municipalities that had passed ordinances banning plastic bags. Chairman Suslovic thanked Mr. Dow for opening his eyes to different ideas like the returnable idea as opposed to an outright ban.

Chairman Suslovic asked some questions to get the conversation going. He noted that any tax a municipality enforces must be passed by the state legislature. He also noted that the percentage of people who bring their own bags to the grocery has increased to roughly 50%. Mr. Faulkner noted that any charge would be a fee as opposed to a tax because it is levied only on people who choose to use plastic bags. He said he had spoken with Missy Lavie at ecomaine, who told him that plastic bags are collected and sold to a broker, who will not tell them what's done with them. Mr. Morin corrected him and said plastic bags were likely not burned or landfilled because of the cost the brokers paid. Mr. Faulkner noted that San Diego does not take plastic bags, even though they take everything else and added that it costs the City of San Francisco \$4000/ton to recycle bags that costs \$32/ton on the free market.

Ms. Brooks asked what happened to bags that are collected by the supermarkets. Ms. Doak said they were shipped out of state to be recycled. Mr. Rosario said that plastic bags are a valuable market. He noted that plastic bags were used to manufacture plastic lumber, as well as other recycled content. He noted that many jobs were created in the manufacturing of plastic bags as well as in the recycling and reuse of them. He added he recycles all manner of plastic film when he goes to his local grocery store, not only the plastic grocery bags. Mr. Grotton asked what the discrepancy was between one person

saying it's not worth anything, another person saying it's worth quite a lot. Mr. Morin replied that it depends on the density and cleanliness of the post-consumer plastic. Ron Adams of Portland Public Schools noted the school doesn't use as many plastic bags. He added that even though there are recycling opportunities, there are still lots of bags around.

Ms. Trice asked if there was a definition of "plastic bag" that the task force was targeting. Chairman Suslovic agreed that was one of the first challenges facing the task force. He said that the litter issue was significant, and the task force was looking at post-consumer litter, from appearance to stormwater catch basins.

Mr. Koffman said he had talked with was talking with Irish TD and businessman Ruairi Quinn, who initially opposed the plastic bag tax, but eventually got on board and says it works great as far as reducing litter on land and in the sea. Mr. Koffman suggested incentives in addition to the ones the grocery stores were using. Chairman Suslovic noted that the last time he was in Russia he had to pay for a plastic bag at a store, and used that plastic bag for a month, over and over. Ms. Brooks said she liked the newspaper articles provided by staff, and said the time was right to impose a fee for plastic grocery bags, as opposed to Portland Press Herald newspaper delivery bags. Deb Hart of the Retail Association of Maine asked if Ms. Brooks would define a grocery bag as one you'd get at a convenience store, and Ms. Brooks said she would. Chairman Suslovic suggested "retail" bag as a more appropriate term.

Steve said grocers in Massachusetts have entered into an agreement with the state Department of Environmental Protection to reduce the use of plastic bags. He also noted that Ireland's plastic bag manufacturing industry underwent a drastic downturn after the ban there was passed. He urged the task force to take into account the economics of the issue.

Chairman Suslovic noted that the issue before the task force was litter caused by plastic bags and its cost to the city. He said he liked the recycling programs that the grocery stores had implemented, but he was concerned that too many bags escape that system. Mr. Faulkner noted that plastic grocery bags have handles, as opposed to the plastic bags one puts meat or veggies in. He suggested that the task force consider a ban on paper bags as well. He noted that there are many cottage industries creating beautiful and useful reusable cloth bags that could be composted after one is done.

Ms. Doak said in 2009 a bag tax bill was introduced to the Maine legislature, and through the committee process the same memorandum of understanding that Massachusetts grocers used was adopted. The "Got Your Bags Maine" campaign was designed to reduce the use of plastic grocery bags by 33%. The coalition was also trying to collect data from retail stores to measure the reduction of plastic bag use. She said that the aim of the Maine legislature was to help consumers and the packaging industry understand the recycling and reuse of bags. She noted that plastic and paper bags are made in the United States, while many reusable bags are made elsewhere.

Chairman Suslovic commended the efforts of the retail and grocers committee to increase their education efforts, but the problem of plastic bag litter has not lessened. Mr. Rosario said a ban is a simplistic answer to a complex question, and suggested that this is a personal accountability question. Chairman Suslovic asked for everyone to come to the next meeting with suggestions for abating the problem.

Public comment was then taken on the issue.

Chris O'Neil of the Greater Portland Chamber of Commerce asked the task force to define the problem, its causes and look at many possible solutions. The Chamber asked that the Portland recycling program be examined as part of the problem, specifically the issue of open blue bins that allow recycling to become litter. He said the Portland Chamber of Commerce would consider supporting legislation in Augusta taxing or banning plastic bags statewide before considering a program that would make Portland an outlier. He praised Mr. Dow's idea of bag deposits.

5. Meeting dates

Chairman Suslovic asked Staff to come up with dates for summer meetings. Mr. Moon asked the task force for examples of solutions to the problem from other communities. Chairman Suslovic asked the task force to think about any and all ways to get plastic bags away from where they don't belong. Ms. Hart asked if we had done a citywide program regarding bags. Ms. Doak added that Portland could become the poster child for consumer bag awareness.

The meeting was adjourned at 6:48 pm.

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Green Packaging Working Group
June 25, 2013

In attendance: John Morin, ecomaine; Shelley Doak, Maine Grocers Association; Curtis Picard, Retail Association of Maine; Tyler Kidder, University of Southern Maine; Avery Day, American Chemistry Council; Ed Suslovic, Portland City Council; Troy Moon, Portland Public Services; Mary Pereira, Portland Public Services; Sally Trice, Portland citizen; Matthew Faulkner, Surfrider; Michele Brooks, Portland citizen

The meeting of the Green Packaging Working Group opened at 5:07 p.m. in Room 24 of Portland City Hall on June 25, 2013 with introductions of the task force members. Ed Suslovic, the Chairman of the meeting, gave an update regarding the reports submitted to the Transportation, Sustainability and Energy Committee on the polystyrene ordinance. Action will be taken on the majority and minority reports at the TSE meeting in July.

1. Review and Refine Objectives regarding Single Use Plastic Bags

Chairman Suslovic began the meeting by explaining that the task force's goal is to examine the issue of plastic bags and explore the different options the City could take. He also noted that, as some of the task force members were interested primarily in the polystyrene issue, suggestions were being taken for additional members to be proposed to the City Council.

2. Review summary of approaches used by other communities to manage plastic bags

Chairman Suslovic said he believed there was a consensus on the task force that plastic bag litter is an issue. He noted that components of the issue include the number of bags used, the ability to recycle the bags, the rate of degradation of bags that escape the recycling system, and the issues that bags create in the stormwater system. He also noted the articles provided that gave information about how other communities are dealing with the litter issue. He then asked "where do we go from here?"

3. Discussion of next steps

Matthew Faulkner of Surfrider Maine proposed offering an ordinance mandating a fee on any single use bag. He said a fee would encourage bring citizens to bring their own bags, but also allowed single use bags if they were wanted or needed. Michele Brooks of Portland agreed, citing the New York Times article about the Irish experience, but she said she wasn't sure about including paper bags. She said any fee would have to be significant enough to change behaviour. Tyler Kidder of University of Southern Maine agreed with the significant fee issue, suggesting something more than the 5 cents bottle fee. Ms. Brooks noted the fee was 35 cents in Ireland. Mr. Faulkner suggested instituting

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a graduated fee structure that increased yearly for a set number of years. He also strongly urged committee to ban all single use bags. He said that the fee was capitalism at its best because only those who valued the bags would pay the fee. Ms. Kidder asked what the fee would be used for. Mr. Faulkner answered that in Washington DC it cleaned up the Anacosta river, in Ireland it goes back to the retailer. Ms. Brooks noted that because a lot of money is required to clean the stormwater drains because of plastic bags, the fee could benefit the City. Mr. Faulkner stressed that any monetary charge wasn't a tax, it was a fee for use.

Chairman Suslovic explained that, according to state law, municipalities cannot impose taxes that have not been passed by the state legislature. He thought that use fees should be ok. Curtis Picard of the Retail Association of Maine said that the Windham town lawyer had had a different opinion regarding the difference between use fees and taxes. He asked that the Windham lawyer's letter be presented to the committee.

Chairman Suslovic asked the committee whether a use fee should include all bags or only plastic. He asked how much the fee should be. He asked how the fee would be distributed. Ms. Brooks suggested that the fee be shared between the retailers and a clean water fund that could be implemented. She noted that some sort of incentive for the retailer to participate was important. Mr. Picard said retailers measure plastic by pound, not by bag, which is an issue the the task force should talk about. He also noted that controlling bags in the self-checkout lanes would be very difficult.

Sally Trice of Portland asked about how the task force was going to deal with produce bags and newspaper bags, and whether the task force could rationalise keeping those but not grocery bags. Mr. Faulkner mentioned a website that has laws and ordinances from around the world, and said most of them exempt produce bags. Ms. Brooks suggested that a ban on produce bags might be too aggressive.

Chairman Suslovic asked the retail members of the task force how reuseable bags are viewed by retailers. Mr. Picard said they're definitely on the rise in grocery stores. They are not used in other retail stores as much. He also noted the rise in shoplifting in connection with consumer-provided bags. He said he was not in favor of a fee on plastic bags, but supported a program of consumer education. Ms. Brooks said she thought the recycling rate of plastic bags seems to have stagnated, and questioned effectiveness of additional educational programs. Mr. Faulkner added that voluntary programs don't do much, but a small fee commands compliance. He said that recycling should be the last thing the task force focuses on, reducing and reusing should be primary.

Chairman Suslovic asked if anyone was in favor of an outright ban. Ms. Trice said she was in favour of one. Ms. Kidder said USM had banned plastic bags, but a college campus was small scale. She said the people who would welcome a ban are not the ones who need single use bags. She noted that the homeless carry their things around in them. Ms. Trice said most grocers sell their reuseable bags for 99 cents, and they can be washed, cutting out the sanitary argument.

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Chairman Suslovic clarified that the task force was to consider the issue of plastic bags. He said unless he was overruled, he'd set a ban aside and look at other solutions. Ms. Brooks said a ban wasn't her first choice. She said she was interested in more ideas from the industry about the changes occurring.

Chairman Suslovic asked the retail members about the challenges for implementing a fee for single use grocery and retail bags. He also asked specifically what bags the task force was considering. Mr. Faulkner suggested that a way to slowly institute the fee would be to first apply it to grocery bags, then dry cleaning, then retail. Chairman Suslovic said that imposing fees by degrees could be regarded as very unfair by retailers. Ms. Brooks asked the retail component of the task force what they thought of a bag fee.

Mr. Picard said he didn't think recycling had become stagnant. As an example, he said Walmart has cut plastic bag use by 37.5 percent from 2007 and 2011 using several different methods, including an educational component. He said he thought the real problem was the litterers. Chairman Suslovic noted that the bottle bill increased recycling and reduced litter by leaps and bounds. Tyler Kidder of University of Southern Maine added that the combination of curbside recycling and pay-per-bag fees provided a financial incentive to people to recycle.

Shelley Doak of the Maine Grocers Association asked for clarification on whether the discussion was addressing the stormwater issue or the litter issue. Ms. Kidder noted that the issue with plastic bags is the fact that so many escape the system, even if they're initially disposed of in the right place. Chairman Suslovic asked what the disadvantage of the fee would be on all retail and grocery establishments.

John Morin of ecomaine said their recycling equipment is not really equipped to handle the plastic bags. He said that some retailers put one item per bag, and that's part of the issue. Mr. Faulkner noted that the less plastic that's made, the better off the planet is. Ms. Brooks said that she doesn't find paper bags as much of a litter problem as plastic bags.

Chairman Suslovic said that if he forgets a plastic bag he asks for paper, and he thought paper was more environmentally damaging. Mr. Picard said paper bags have a larger carbon footprint. Ms. Doak said that she is opposed to a fee, in favor of better education of consumers. She said the retailers view all bags as reuseable.

Chairman Suslovic asked how long plastic bag recycling bins had been in use in stores, Mr. Picard replied that they began appearing in the early 90s. Ms. Kidder noted that plastic bag recycling is still only at 15 percent. Chairman Suslovic said he thought that system had gone as far as possible. Ms. Doak responded the task force had a great opportunity to educate the public on recycling. She added that there were some unintended consequences of bag fees on the less fortunate and the elderly, such as carrying bags with heavier loads and purchasing bags on a limited budget. Chairman Suslovic replied that cost of an item makes a person stop and think whether they really need it. Ms. Trice thought a ban and an educational component didn't cancel one another

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out. She noted that Trader Joe's and Whole Foods give a credit for consumer-supplied bags, and there didn't seem to be a difficulty.

Chairman Suslovic asked the merchant associations to see how much it would cost a retailer per bag in the case of a single use bag fee. Mr. Picard said some people would see a fee as adding to a company's profits, creating controversy for the retailers. He also said that the fee creates an issue when it comes to credit and debit cards, as 3 percent of every purchase, regardless of what is being purchased, goes to MasterCard and Visa.

Ms. Brooks pointed out that her elderly mother wouldn't take plastic bags because the handles hurt her hands. Ms. Trice said she'd like to see a representative from Trader Joe's or Whole Foods at the next meeting to discuss the possible bag fee impact on them.

Chairman Suslovic said he's never bought a reuseable bag, he just acquires them.

Ms. Brooks cited the New York Times article, noting that the plastic bag issue became a non-issue in Ireland.

Chairman Suslovic asked Chris O'Neill of Greater Portland Chamber of Commerce to comment on his organisation's stance on the single use bag issue in light of their general advice that "Portland's doesn't always have to be different," noting that he thought the state would follow the city's lead. Mr. Faulkner said he believed that when a city in Rhode Island was working through the single-use bag issue at the point Portland is now, Shaws said they would provide plastic bags only when asked for them by a consumer.

Chairman Suslovic suggested the committee should focus on the pros and cons of a user fee. Should it be on plastic bags only or all single use bags? If a fee is charged, should it be profit for the store, go to City as part of a stormwater fund or be incorporated into the general fund, or perhaps some sort of split between the retailer and the City? He asked the committee to give thought to the definitional issue of "what is a plastic bag" to give greater clarity to what the fee applies to. He asked the retailers about the effects/opinions of a fee. Ms. Doak said that she would provide some clarification on what retailers are currently doing and what is happening in the state for recycling progress.

Troy Moon of Public Services said the task force needs clarification from the City's Corporation Counsel's office on whether the City can institute a fee. Avery Day of the American Chemistry Council said he understood that the fee had to be tied to a specific cost. Councilor Suslovic said once the task force has information about instituting a fee, then it will get into the specifics and the practicalities of doing so. Mr. Faulkner suggested another process might be to have retailers use the specific cost of their bags to base the fee on. Ms. Trice noted that Save A Lot charges for bags.

Mr. Day asked if bags would be covered under EBT if a bag needed to be purchased.

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Chris O'Neill said he needs more information before he can convey a position of the Chamber. He asked the task force to quantify the problem, such as the paper versus plastic costs. Until he has that, he really can't ask the Chamber membership what their opinion is. He'd rather see the Chamber respond using facts rather than opinions. Chairman Suslovic asked if the Chamber could bring in some retailers to discuss the issue in Portland, and the position of Chambers in communities that a ban is already in place.

Chairman Suslovic mentioned the next meeting on July 16, and asked the committee to start thinking about who they'd like to hear from on the issue pending the Corporation Counsel's opinion on whether a fee is legal under Maine law, and also asked the retailers what they think is working with the current system and what is not working. He reminded members of the request for formal suggestions for additions to task force

The meeting adjourned at 6:20 p.m.

ORDINANCE NO. 7870

AN ORDINANCE ESTABLISHING A NEW CHAPTER 6-15, "DISPOSABLE BAG FEE," B.R.C. 1981, AND SETTING FORTH RELATED DETAILS.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. A new Chapter 6-15, "Disposable Bag Fee," B.R.C. 1981 is added as follows:

Title 6 Health, Safety and Sanitation

Chapter 6-15 Disposable Bag Fee

6-15-1

- (a) **Purpose:** It is the purpose of this chapter to protect the public health and safety and implement the city's Climate Action Plan, Zero Waste Master Plan and the Boulder Valley Comprehensive Plan.
- (b) **Findings:** The City Council finds as follows:
- (1) The city, through its policies, programs, and laws, supports efforts to reduce the amount of waste that must be land-filled and pursue "zero waste" as a long term goal by emphasizing waste prevention efforts;
 - (2) That the use of single-use disposable bags has severe impacts on the environment on a local and global scale, including greenhouse gas emissions, litter, harm to wildlife, atmospheric acidification, water consumption and solid waste generation;
 - (3) Despite recycling and voluntary solutions to control pollution from disposable carryout bags, many disposable single-use bags ultimately are disposed of in landfills, litter the environment, block storm drains and endanger wildlife;
 - (4) Boulder consumers use approximately 14.3 million disposable bags from food stores each year; and
 - (5) The city's taxpayers bear the costs associated with the effects of disposable bags on the solid waste stream, drainage, litter and wildlife.
- (c) **Intent:** The disposable bag fee is necessary to address the environmental problems associated with disposable bags and to relieve city taxpayers of the costs imposed upon the city associated with the use of disposable bags. The City Council intends that the requirements of this chapter will assist in offsetting the costs associated with using disposable bags to pay for the mitigation, educational, replacement, and administrative efforts of the city.

6-15-2 Definitions.

The following terms used in this chapter have the following meanings unless the context clearly indicates otherwise:

“Disposable Bag” means a bag that is not a Reusable Bag.

“Disposable Bag” does not include:

- (a) Bags used by consumers inside stores to:
 - (1) Package bulk items, such as fruit, vegetables, nuts, grains, candy or small hardware items;
 - (2) Contain or wrap frozen foods, meat, or fish;
 - (3) Contain or wrap flowers, potted plants, or other items where dampness may be a problem;
 - (4) Contain unwrapped prepared foods or bakery goods; or
 - (5) A non-handled bag used to protect a purchased item from damaging or contaminating other purchased items when placed in a recyclable paper bag or reusable bag.
- (b) Bags provided by pharmacists to contain prescription drugs.
- (c) Newspaper bags, door-hanger bags, laundry-dry cleaning bags, or bags sold in packages containing multiple bags for uses such as food storage, garbage, pet waste, or yard waste bags.

“Food Store” means a retail establishment or business located within Boulder city limits in a permanent building, operating year round, that is a full-line, self-service market and which sells a line of staple foodstuffs, meats, produce or dairy products or other perishable items.

“Food Store” does not include:

- (a) Temporary vending establishment for fruits, vegetables, packaged meats and dairy;
- (b) Vendors at farmer’s markets or other temporary events;
- (c) Businesses at which foodstuffs are an incidental part of the business. Food sales will be considered to be “incidental” if such sales comprise no more than 2 percent of the business’s gross sales in the city as measured by the dollar value of food sales as a percentage of the dollar value of total sales at any single location.

“Recycled Paper Bag” means a paper bag that is 100 percent recyclable and contains at least 40 percent post-consumer recycled content.

“Reusable Bag” means a bag that is:

- (a) Designed and manufactured to withstand repeated uses over a period of time;

- (b) Is made from a material that can be cleaned and disinfected regularly;
- (c) That is at least 2.25 mil thick if made from plastic;
- (d) Has a minimum lifetime of 75 uses; and
- (e) Has the capability of carrying a minimum of 18 pounds.

“Disposable Bag Fee” means a city fee imposed and required to be paid by each consumer making a purchase from a Food Store for each Disposable Bag used during the purchase assessed for the purpose of mitigating the impacts of Disposable Bags.

6-15-3 Disposable Bag Fee Requirements.

- (a) For each Disposable Bag provided to a customer, Food Stores shall collect from customers, and customers shall pay, at the time of purchase, a Disposable Bag Fee of \$0.10.
- (b) Food Stores shall record the number of Disposable Bags provided and the total amount of Disposable Bag Fees charged on the customer transaction receipt.
- (c) A Food Store shall not refund to the customer any part of the Disposable Bag Fee, nor shall the Food Store advertise or state to customers that any part of the Disposable Bag Fee will be refunded to the customer.
- (d) A Food Store shall not exempt any customer from any part of the Disposable Bag Fee for any reason except as stated in section 6-15-7, “Exemptions,” B.R.C. 1981.

6-15-4 Retention, Remittance, and Transfer of the Disposable Bag Fee.

- (a) A Food Store may retain 40 percent of each Disposable Bag Fee collected, which is the “Retained Percent.”
- (b) The Retained Percent may only be used by the Food Store to:
 - (1) Provide educational information about the Disposable Bag Fee to customers;
 - (2) Provide the signage required by section 6-15-5, “Required Signage for Food Stores,” B.R.C. 1981;
 - (3) Train staff in the implementation and administration of the fee;
 - (4) Improve or alter infrastructure to allow for the implementation, collection, administration of the fee;
 - (5) Collect, account for and remit the fee to the city;
 - (6) Develop and display informational signage to inform consumers about the fee, encourage the use of reusable bags or promote recycling of plastic bags; and
 - (7) Improve infrastructure to increase plastic bag recycling.

- (c) The Retained Percent shall not be classified as revenue for the purposes of calculating sales tax.
- (d) The amount of the Disposable Bag Fee collected by a Food Store in excess of the Retained Percent shall be paid to the city and shall be used only as set forth in subsection (g) to mitigate the effects of Disposable Bags in Boulder.
- (e) A Food Store shall pay and the city shall collect all Disposable Bag Fees. The city shall provide the necessary forms for Food Stores to file with the city, to demonstrate compliance with the provisions of this ordinance.
 - (1) If payment of any amount to the city is not received on or before the applicable due date, penalty and interest charges shall be added to the amount due as described in section 6-15-8, "Audits and Violations," B.R.C. 1981.
- (f) The Disposable Bag Fee shall be administered by the city manager. The city manager is authorized to adopt interpretive rules pursuant to chapter 1-4, "Rulemaking," B.R.C. 1981, to implement this chapter, prescribe forms and provide methods of payment and collection and otherwise implement requirements of this chapter.
- (g) Funds from the Disposable Bag Fee shall be used only for the expenditures that are intended to mitigate the effects of Disposable Bags, including without limitation the following:
 - (1) Administrative costs associated with developing and implementing the Disposable Bag Fee.
 - (2) Activities of the city to:
 - (A) Provide reusable carryout bags to residents and visitors;
 - (B) Educate residents, businesses, and visitors about the impact of Disposable Bags on the city's environmental health, the importance of reducing the number of single-use carryout bags entering the waste stream, and the expenses associated with mitigating the affects of single-use bags on the city's drainage system, transportation system, wildlife and environment;
 - (C) Fund programs and infrastructure that allow the Boulder community to reduce waste associated with Disposable Bags;
 - (D) Purchase and install equipment designed to minimize bag pollution, including, recycling containers, and waste receptacles associated with Disposable Bags;
 - (E) Fund community cleanup events and other activities that reduce trash associated with Disposable Bags;
 - (F) Mitigate the effects of Disposable Bags on the city's drainage system, transportation system, wildlife and environment;

- (G) Maintain a public website that educates residents on the progress of waste reduction efforts associated with Disposable Bags; and
 - (H) Fund the administration of the Disposable Bag Fee program.
- (h) No Disposable Bag Fees collected in accordance with this ordinance shall be used only for general government purposes.
- (i) Disposable Bag Fees collected in accordance with this chapter shall be continually available for the uses and purposes set forth in subsection (g) of this section without regard to fiscal year limitation. No Disposable Bag Fee funds shall be used for any purpose not authorized in this chapter.

6-15-5 Required Signage for Food Stores.

Every Food Store subject to the collection of the Disposable Bag Fee shall display a sign in a location outside or inside of the business, viewable by customers, alerting customers to the city of Boulder's Disposable Bag Fee.

6-15-6 Requirement for Disposable Paper Bags.

No Food Store shall provide any paper bag that is not a Recycled Paper Bag.

6-15-7 Exemptions.

A Food Store may provide a Disposable Bag to a customer at no charge if the customer provides evidence that he or she is a participant in a federal or state Food Assistance Program.

6-15-8 Audits and Violations.

- (a) Each Food Store licensed pursuant to the provisions of this chapter shall maintain accurate and complete records of the Disposable Bag Fees collected, the number of Disposable Bags provided to customers, the form and recipients of any notice required pursuant to this chapter, and any underlying records, including any books, accounts, invoices, or other records necessary to verify the accuracy and completeness of such records. It shall be the duty of each Food Store to keep and preserve all such documents and records, including any electronic information, for a period of three years from the end of the calendar year of such records.
- (b) If requested, each Food Store shall make its records available for audit by the city manager during regular business hours for the city to verify compliance with the provisions of this chapter. All such information shall be treated as confidential commercial documents.
- (c) If any person fails, neglects, or refuses to collect the Disposable Bag Fee, or underpays the Disposable Bag Fee, the city manager shall make an estimate of the fees due, based on available information, and shall add thereto penalties, interest, and any additions to the

fees. The manager shall serve upon the delinquent Food Store personally, by electronic mail or by first class mail directed to the last address of the Food Store on file with the city, written notice of such estimated fees, penalties, and interest, constituting a Notice of Final Determination, Assessment, and Demand for Payment, (also referred to as "Notice of Final Determination") due and payable within 20 calendar days after the date of the notice. The Food Store may request a hearing on the assessment as provided in section 6-15-9, "Hearings," B.R.C. 1981.

- (d) If payment of any amount of the Disposable Bag Fee to the city is not received on or before the applicable due date, penalty and interest charges shall be added to the amount due in the amount of:
 - (1) A penalty of ten percent of total due;
 - (2) Interest charge of one percent of total penalty per month.

6-15-9 Hearings.

- (a) A Food Store may request a hearing on any proposed fee imposed under this title after receiving a Notice of Final Determination, by filing a written request for hearing within 20 calendar days of the date of mailing of the Notice of Final Determination. The request for hearing shall set forth the reasons for and amount of changes in the Notice of Final Determination that the Food Store seeks and such other information as the manager may prescribe.
- (b) The city manager shall conduct the hearing under the procedures prescribed by chapter 1-3, "Quasi-Judicial Hearings," B.R.C. 1981, except that the manager shall notify the Food Store in writing of the time and place of the hearing at least ten days before it is scheduled, unless the Food Store agrees to a shorter time. The hearing shall be held within 60 days of the date of receipt of the request for a hearing, unless the Food Store agrees to a later date.

6-15-10 Criminal Sanctions.

- (a) The city attorney, acting on behalf of the people of the city, may prosecute any violation of this title in municipal court in the same manner that other municipal offenses are prosecuted.
- (b) The maximum penalty for a first or second conviction within two years, based on date of violation of this section, is a fine of \$500.00. For a third and each subsequent conviction within two years, based upon the date of the first violation, the general penalty provisions of section 5-2-4, "General Penalties," B.R.C. 1981, shall apply.

Section 3. The provisions of this ordinance relating to the collection of the Disposable Bag Fee and required store signage shall become effective July 1, 2013. All other provisions shall be effective 30 days from the date of passage. The city manager shall develop and

implement the administrative and financial processes for the collection of the fee between the effective date of this ordinance and June 30, 2013.

Section 4. If any section, subsection, sentence, clause or phrase of this chapter is for any reason held invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this chapter.

Section 5. This ordinance is necessary to protect the public health, safety, and welfare of the residents of the city, and covers matters of local concern.

Section 6. The City Council deems it appropriate that this ordinance be published by title only and orders that copies of this ordinance be made available in the office of the city clerk for public inspection and acquisition.

INTRODUCED, READ ON FIRST READING, AND ORDERED PUBLISHED BY
TITLE ONLY this 2nd day of October, 2012

Mayor

Attest:

City Clerk

READ ON SECOND READING, AMENDED, ADOPTED, AND ORDERED
PUBLISHED BY TITLE ONLY this 16th day of October, 2012.

Mayor

Attest:

City Clerk

READ ON THIRD READING, AMENDED, ADOPTED, AND ORDERED
PUBLISHED BY TITLE ONLY this 1st day of November, 2012.

Mayor

Attest:

City Clerk

READ ON FOURTH READING, PASSED, ADOPTED, AND ORDERED
PUBLISHED BY TITLE ONLY this 15th day of November, 2012.

Mayor

Attest:

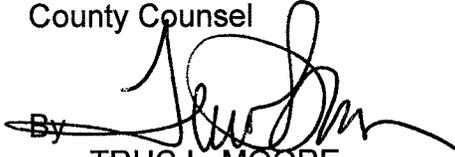
City Clerk

ANALYSIS

This ordinance amends Title 12 – Environmental Protection of the Los Angeles County Code, by adding a Chapter regulating the use of plastic carryout bags and recyclable paper carryout bags and promoting the use of reusable bags within the County unincorporated area.

Pursuant to this new Chapter, plastic carryout bags, as defined, may no longer be distributed by affected stores and a 10-cent (\$0.10) charge for recyclable paper carryout bags distributed by those stores will apply.

ANDREA SHERIDAN ORDIN
County Counsel

By 

TRUC L. MOORE
Deputy County Counsel
Public Works Division

TLM:ia

09/23/10 (Requested)

11/16/10 (Revised)

ORDINANCE NO. _____

An ordinance amending Title 12 – Environmental Protection of the Los Angeles County Code, relating to regulating the use of plastic carryout bags and recyclable paper carryout bags and promoting the use of reusable bags within the County unincorporated area.

The Board of Supervisors of the County of Los Angeles ordains as follows:

SECTION 1. Chapter 12.85 is hereby added to read as follows:

12.85.010 Definitions.

The following definitions apply to this Chapter:

- A. "Customer" means any person purchasing goods from a store.
- B. "Operator" means the person in control of, or having the responsibility for, the operation of a store, which may include, but is not limited to, the owner of the store.
- C. "Person" means any natural person, firm, corporation, partnership, or other organization or group however organized.
- D. "Plastic carryout bag" means any bag made predominantly of plastic derived from either petroleum or a biologically-based source, such as corn or other plant sources, which is provided to a customer at the point of sale. "Plastic carryout bag" includes compostable and biodegradable bags but does not include reusable bags, produce bags, or product bags.
- E. "Postconsumer recycled material" means a material that would otherwise be destined for solid waste disposal, having completed its intended end use and product life cycle. "Postconsumer recycled material" does not include materials and by-products

generated from, and commonly reused within, an original manufacturing and fabrication process.

F. "Produce bag" or "product bag" means any bag without handles used exclusively to carry produce, meats, or other food items to the point of sale inside a store or to prevent such food items from coming into direct contact with other purchased items.

G. "Recyclable" means material that can be sorted, cleansed, and reconstituted using available recycling collection programs for the purpose of using the altered form in the manufacture of a new product. "Recycling" does not include burning, incinerating, converting, or otherwise thermally destroying solid waste.

H. "Recyclable paper carryout bag" means a paper bag that meets all of the following requirements: (1) contains no old growth fiber, (2) is one hundred percent (100%) recyclable overall and contains a minimum of forty percent (40%) post-consumer recycled material; (3) is capable of composting, consistent with the timeline and specifications of the American Society of Testing and Materials (ASTM) Standard D6400; (4) is accepted for recycling in curbside programs in the County; (5) has printed on the bag the name of the manufacturer, the location (country) where the bag was manufactured, and the percentage of postconsumer recycled material used; and (6) displays the word "Recyclable" in a highly visible manner on the outside of the bag.

I. "Reusable bag" means a bag with handles that is specifically designed and manufactured for multiple reuse and meets all of the following requirements: (1) has a minimum lifetime of 125 uses, which for purposes of this subsection, means

the capability of carrying a minimum of 22 pounds 125 times over a distance of at least 175 feet; (2) has a minimum volume of 15 liters; (3) is machine washable or is made from a material that can be cleaned or disinfected; (4) does not contain lead, cadmium, or any other heavy metal in toxic amounts, as defined by applicable state and federal standards and regulations for packaging or reusable bags; (5) has printed on the bag, or on a tag that is permanently affixed to the bag, the name of the manufacturer, the location (country) where the bag was manufactured, a statement that the bag does not contain lead, cadmium, or any other heavy metal in toxic amounts, and the percentage of postconsumer recycled material used, if any; and (6) if made of plastic, is a minimum of at least 2.25 mils thick.

J. "Store" means any of the following retail establishments located within the unincorporated area of the County:

(1) A full-line, self-service retail store with gross annual sales of two million dollars (\$2,000,000), or more, that sells a line of dry grocery, canned goods, or nonfood items and some perishable items;

(2) A store of at least 10,000 square feet of retail space that generates sales or use tax pursuant to the Bradley-Burns Uniform Local Sales and Use Tax Law (Part 1.5 (commencing with Section 7200) of Division 2 of the Revenue and Taxation Code) and that has a pharmacy licensed pursuant to Chapter 9 (commencing with Section 4000) of Division 2 of the Business and Professions Code; or

(3) A drug store, pharmacy, supermarket, grocery store, convenience food store, foodmart, or other entity engaged in the retail sale of a limited line of goods

that includes milk, bread, soda, and snack foods, including those stores with a Type 20 or 21 license issued by the Department of Alcoholic Beverage Control.

12.85.020 Plastic carryout bags prohibited.

- A. No store shall provide to any customer a plastic carryout bag.
- B. This prohibition applies to bags provided for the purpose of carrying away goods from the point of sale and does not apply to produce bags or product bags.

12.85.030 Permitted bags.

All stores shall provide or make available to a customer only recyclable paper carryout bags or reusable bags for the purpose of carrying away goods or other materials from the point of sale, subject to the terms of this Chapter. Nothing in this Chapter prohibits customers from using bags of any type that they bring to the store themselves or from carrying away goods that are not placed in a bag, in lieu of using bags provided by the store.

12.85.040 Regulation of recyclable paper carryout bags.

- A. Any store that provides a recyclable paper carryout bag to a customer must charge the customer 10 cents (\$0.10) for each bag provided, except as otherwise provided in this Chapter.
- B. No store shall rebate or otherwise reimburse a customer any portion of the 10-cent (\$0.10) charge required in Subsection A, except as otherwise provided in this Chapter.
- C. All stores must indicate on the customer receipt the number of recyclable paper carryout bags provided and the total amount charged for the bags.

D. All monies collected by a store under this Chapter will be retained by the store and may be used only for any of the following purposes: (1) costs associated with complying with the requirements of this Chapter, (2) actual costs of providing recyclable paper carryout bags, or (3) costs associated with a store's educational materials or education campaign encouraging the use of reusable bags, if any.

E. All stores must report to the Director of Public Works, on a quarterly basis, the total number of recyclable paper carryout bags provided, the total amount of monies collected for providing recyclable paper carryout bags, and a summary of any efforts a store has undertaken to promote the use of reusable bags by customers in the prior quarter. Such reporting must be done on a form prescribed by the Director of Public Works, and must be signed by a responsible agent or officer of the store confirming that the information provided on the form is accurate and complete. For the periods from January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31, all quarterly reporting must be submitted no later than 30 days after the end of each quarter.

F. If the reporting required in Subsection E is not timely submitted by a store, such store shall be subject to the fines set forth in Section 12.85.080.

12.85.050 Use of reusable bags.

A. All stores must provide reusable bags to customers, either for sale or at no charge.

B. Each store is strongly encouraged to educate its staff to promote reusable bags and to post signs encouraging customers to use reusable bags.

12.85.060 Exempt customers.

All stores must provide at the point of sale, free of charge, either reusable bags or recyclable paper carryout bags or both, at the store's option, to any customer participating either in the California Special Supplemental Food Program for Women, Infants, and Children pursuant to Article 2 (commencing with Section 123275) of Chapter 1 of Part 2 of Division 106 of the Health and Safety Code or in the Supplemental Food Program pursuant to Chapter 10 (commencing with Section 15500) of Part 3 of Division 9 of the Welfare and Institutions Code.

12.85.070 Operative date.

This Chapter shall become operative on July 1, 2011, for stores defined in Subsections J(1) and J(2) of Section 12.85.010. For stores defined in Subsection J(3) of Section 12.85.010, this Chapter shall become operative on January 1, 2012.

12.85.080 Enforcement and violation—penalty.

A. The Director of Public Works has primary responsibility for enforcement of this Chapter. The Director of Public Works is authorized to promulgate regulations and to take any and all other actions reasonable and necessary to enforce this Chapter, including, but not limited to, investigating violations, issuing fines and entering the premises of any store during business hours. The Director of the Department of Agricultural Commissioner/Weights and Measures and the Director of Public Health may assist with this enforcement responsibility by entering the premises of a store as part of their regular inspection functions and reporting any alleged violations to the Director of Public Works.

B. If the Director of Public Works determines that a violation of this Chapter has occurred, he/she will issue a written warning notice to the operator of a store that a violation has occurred and the potential penalties that will apply for future violations.

C. Any store that violates or fails to comply with any of the requirements of this Chapter after a written warning notice has been issued for that violation shall be guilty of an infraction.

D. If a store has subsequent violations of this Chapter that are similar in kind to the violation addressed in a written warning notice, the following penalties will be imposed and shall be payable by the operator of the store:

(1) A fine not exceeding one hundred dollars (\$100.00) for the first violation after the written warning notice is given;

(2) A fine not exceeding two hundred dollars (\$200.00) for the second violation after the written warning notice is given; or

(3) A fine not exceeding five hundred dollars (\$500.00) for the third and any subsequent violations after the written warning notice is given.

E. A fine shall be imposed for each day a violation occurs or is allowed to continue.

F. All fines collected pursuant to this Chapter shall be deposited in the Solid Waste Management Fund of the Department of Public Works to assist the department with its costs of implementing and enforcing the requirements of this Chapter.

G. Any store operator who receives a written warning notice or fine may request an administrative review of the accuracy of the determination or the propriety of

any fine issued, by filing a written notice of appeal with the Director of Public Works no later than 30 days after receipt of a written warning notice or fine, as applicable. The notice of appeal must include all facts supporting the appeal and any statements and evidence, including copies of all written documentation and a list of any witnesses, that the appellant wishes to be considered in connection with the appeal. The appeal will be heard by a hearing officer designated by the Director of Public Works. The hearing officer will conduct a hearing concerning the appeal within 45 days from the date that the notice of appeal is filed, or on a later date if agreed upon by the appellant and the County, and will give the appellant 10 days prior written notice of the date of the hearing. The hearing officer may sustain, rescind, or modify the written warning notice or fine, as applicable, by written decision. The hearing officer will have the power to waive any portion of the fine in a manner consistent with the decision. The decision of the hearing officer is final and effective on the date of service of the written decision, is not subject to further administrative review, and constitutes the final administrative decision.

12.85.090 Severability.

If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason held to be invalid by a decision of any court of competent jurisdiction, that decision will not affect the validity of the remaining portions of the ordinance. The Board of Supervisors hereby declares that it would have passed this ordinance and each

and every section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of this ordinance would be subsequently declared invalid.

12.85.10 No conflict with federal or state law.

Nothing in this ordinance is intended to create any requirement, power or duty that is in conflict with any federal or state law.

[1285TMCC]

MEMORANDUM

TO: Chairman Suslovic and
Members of the Green Packaging Working Group

FROM: Jennifer L. Thompson, Associate Corporation Counsel

DATE: July 1, 2013

RE: Plastic Bag User Fee v. Tax

This memo will address certain questions that have arisen in connection with the Working Group's consideration of a possible user fee associated with single-use/disposable plastic bags.

1. What makes a charge a "user fee" rather than a tax?

The distinction between "reasonable user fees" and taxes was articulated by the First Circuit in *San Juan Cellular Tel. Co. v. Public Serv. Comm'n*, 967 F.2d 683 back in 1992. According to the court in that case:

[Courts] have sketched a spectrum with a paradigmatic tax at one end and a paradigmatic fee at the other. The classic "tax" is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community. The classic "regulatory fee" is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.

Id.

Using this distinction as a starting point, a number of courts have adopted the following three-pronged test for distinguishing between a user fee and a tax:

- who imposes the assessment?
- who pays the assessment?
- what the revenue is spent on?

If the answer to each is broad (a legislative body vs. a regulatory body; the general public vs. specific users; and general revenue vs. specific fund), then it qualifies as a tax. Typically, when the primary purpose of an enactment is to raise revenue, the enactment will be considered a tax, regardless of the name attached to the act.

See Discussion at <http://www.banthebagspdx.com/?p=485>

According to the First Circuit: “the most salient factor in the decisional mix concerns the destination of the revenues raised by the impost[.]” *Cumberland Farms v. Tax Assessor, State of Maine*, 116 F.3d 943 (1st Cir. 1997). Therefore, where the monies raised go into a general fund and the stated purpose of the impost is to garner revenue, it will most likely be considered a tax. Where, however, fees are retained by a retailer or deposited into a fund intended for a specific service (preferably related to the particular use for which it is imposed) then it will most likely be considered a user fee.

2. Is it possible to create a user fee for plastic grocery bags and, if so, what might that look like?

The short answer to this is “yes, it is possible.” Although some states or municipalities have either banned plastic bags all together or opted not to regulate their use at all, a number of others have imposed a user fee on plastic bags. Given the distinction between taxes and user fees, it makes sense that many of those states and municipalities that have opted to regulate plastic bags by charging a “user fee” have created a structure by which the proceeds of the fee are deposited into a special fund(s) aimed at litter clean up or abatement or used to help encourage citizens to use re-usable bags instead of disposable plastic bags.

One example is the ordinance recently adopted by Boulder, Colorado, attached.

Also attached is an ordinance adopted in Los Angeles, California. Although Los Angeles’s ordinance bans plastic bags, it permits the use of recyclable paper bags and charges a user fee for those. I thought the mechanism by which that fee is charged and allocated might be another helpful example.

3. Are re-usable bags eligible expenses for SNAP or GA benefits?

According to the Maine Department of Health and Human Services Office of Family Independence, SNAP benefits cannot be used to purchase any non-food item. Therefore, although I have not found an express prohibition on purchasing reusable grocery bags with SNAP benefits, it appears to me that they would not be a covered expense.

It similarly appears to me that the cost of reusable grocery bags would not be an eligible expense under the General Assistance program. That program pays only for “necessary expenses,” the definition of which includes food but expressly excludes non-food items.

Given the exclusion of non-food items, I do not have a sense that the exclusion of reusable grocery bags from SNAP and General Assistance benefits would change if a fee were imposed on the use of plastic bags. I have, however, posed that question to representatives of the State of Maine, DHHS and will update the Working Group once I have received the answer.



Attorneys at Law

MEMORANDUM

TO: Anthony T. Plante, Town Manager

FROM: Kenneth M. Cole III, Esq.

RE: Plastic Bag Ordinances

DATE: April 19, 2012

Facts. Windham is considering implementing a single-use bag ordinance which would ban the use of plastic bags and charge up to 10 cents for non-recyclable paper bags.

Issue. May a municipality impose a single-use bag ordinance in Maine and, if so, what are the legal ramifications?

Bag Ban Laws. Given the novelty of such laws, it does not appear that any court has had the opportunity to decide whether such bag *bans* are generally valid. The California Supreme Court has ruled on such an ordinance, but the issue in that case was related to issues stemming from California's unique environmental requirements.¹

In order to ban single-use bags outright, a municipality must be acting pursuant to its police power in order to promote the public health, wealth, safety and general welfare of its residents.² The police power is vested in the State government but may be delegated to municipalities through enabling legislation. Accordingly, the State of Maine has authorized municipalities to exercise such power so long as the power has not otherwise been expressly or implicitly reserved by the State.³

Assuming that a municipality is acting within their appropriately delegated police powers, municipalities are given substantial deference.⁴ Accordingly, an ordinance may be invalidated only if it is not rationally related to a legitimate government

¹ Save the Plastic Bag Coalition v. City of Manhattan Beach, 52 Cal. 4th 155 (Cal. 2011) (upholding a single-use bag ordinance when challenged by a trade group on the ground that the process used did not violate CEQA)

² Delogu v. City of Portland, 843 A.2d 33 (Me. 2004)

³ 30-A M.R.S.A. § 3001 (granting municipalities broad authority to pursue their delegated police powers)

⁴ MacImage of Maine, LLC v. Androscoggin County, 2012 WL 1008643 (March 27, 2012)

purpose (rational basis review).⁵ In this manner, a challenging party bears the burden of proving constitutional deficiency and “must establish the complete absence of any state of facts that would support the need for the statute's enactment.”⁶

There are currently several challenges to such ordinances (mostly in California) on the ground that the ordinances are not rationally related to a legitimate public purpose.⁷ Given the deference that courts have traditionally given to municipalities in pursuing their police powers, it is not clear if such challenges will be successful. That being said, as the issue itself is novel, towns enacting such ordinances will most likely open themselves up to litigation and should be prepared to bear such costs.

Bag Fee Laws. Similarly to bag bans, there is relatively little case law on point with respect to bag *fees*. However, a court in California has upheld a bag fee ordinance, holding generally that such a fee was not a tax when the reasonable fees charged accrued to the *retailer* and *not* the city (as revenue).⁸

In order to charge “fees” for bags, a court would first determine whether the fees are truly “fees” or whether they are actually a “tax.” The distinction is that “taxes are primarily intended to raise revenue” while fees are intended to cover costs of administering programs under a municipality’s police power.⁹

In Maine, all taxing power initially vests with the State and municipalities are only granted the power to tax if specifically authorized to do so. Maine courts have held, in light of the State Constitution, that “what money shall be raised by taxation, what property shall be taxed, what exempted, rests exclusively with the Legislature to say, without any limitations,” except as otherwise provided.¹⁰ Accordingly, there is a very strong presumption against delegation of the legislature's power to tax and taxes disguised as “fees” will be given significant scrutiny.¹¹

As it does not appear that the State has granted municipalities the authority to collect taxes on bags, the only alternative would be if the bag “fee” is truly

⁵ *Id.*

⁶ *Id.*

⁷ *See, for example, Save the Plastic Bag Coalition v. County of Santa Cruz*, Case No. CV172379, (Complaint)

⁸ *Schmeer et al v. County of Los Angeles*, BC 470705 (holding that no municipal revenue is generated by the fees, as all monies are kept by the retailer, and therefore the fees cannot be considered a tax)

⁹ *Strater v. Town of York*, 541 A.2d 938 (Me. 1988) (upholding a \$10 harbor usage fee)

¹⁰ *Delogu*, 843 A.2d 33, *quoting Greaves v. Houlton Water Co.*, 143 Me. 207, 211, 59 A.2d 217, 219 (1948)

¹¹ *Id.*

considered to be a “fee.” Accordingly, the bag fee must cover the reasonable costs of administering a municipality’s police power.¹² In order to impose a bag fee, a municipality would have to justify the fee by relating it to some kind of administrative cost – perhaps by obtaining a license to sell the bags and then charging fees for the cost of the bags/service. The service would also need to be rationally related to a legitimate government purpose in order to come within the municipality’s delegated police power. Based on a cursory review of existing ordinances, it appears that this approach has not yet been taken.

Alternatively, a municipality may avoid the consequences of imposing a “tax” by creating an ordinance that forces retailers to charge a reasonable amount for the sale of such bags (as long as the retailers keep the proceeds). In this manner, a municipality would not be raising revenue and may therefore be able to avoid the pitfalls of having the charge be categorized as a “tax” or a “fee.” This seems to be the most common approach to bag fee ordinances. However, municipalities should again be prepared to litigate the issue. Plaintiffs have challenged such ordinances on a number of grounds, including being outside of environmental laws, violations of commerce clause nationwide uniformity, as illegal taxes and beyond police power limitations.

Conclusion. If Windham wishes to create an ordinance regulating the use of single-use bags, it should be prepared to litigate the issue. It appears that any ordinance would have to provide that fees are only charged to the extent that they offset the cost of the bags (and ensure that all proceeds go to the retailer). In any event, single-use bag ordinances are a novel idea and the vast majority of litigation is still running its course. The better option, given the peculiarities of Maine law, would be to encourage the Legislature to either impose such a tax or authorize local option ordinance power to regulate this use. The Council can by resolution formally express its (and the residents’ of Windham) concerns in this regard.

¹² Strater, 541 A.2d 938