

# MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION  
COUNSELLORS AT LAW

## MEMORANDUM

To: Princeton Mayor and Council

From: Trishka W. Cecil, Municipal Attorney   
Lisa M. Maddox, Assistant Municipal Attorney 

Date: June 15, 2015

Re: **Single Use Bag Fee Ordinance – Legal Review**

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As requested, this office has conducted legal research into Princeton's authority to adopt an ordinance requiring retail establishments within Princeton to charge a ten-cent fee for each single-use carry-out bag provided to customers. The ordinance in question, a copy of which is attached as Exhibit "A", was prepared and submitted to the municipality by Princeton residents and endorsed by the Princeton Environmental Commission.

Based on our research and as explained more fully below, the town's authority to adopt the proposed ordinance depends on the intent and purpose of the regulation. For instance, New Jersey has comprehensive statutes in place that address the handling and disposal of solid waste throughout the State, including methods for limiting solid waste. Accordingly, if the purpose of the ordinance is to reduce the amount of waste that ends up in New Jersey's landfills, the ordinance in all likelihood would be preempted by New Jersey's solid waste statutes. On the other hand, reducing litter and controlling pollution of waterways fall within a municipality's general police powers. Therefore, if the purpose of the ordinance is to reduce the amount of litter on Princeton's streets or in Princeton's storm drains and sewers, or to reduce water pollution, then Princeton would have the authority to adopt the regulation, *provided* the facts demonstrate that single-use bags pose a local—as opposed to national or international—problem.

## BACKGROUND

The proposed ordinance would generally require "retail establishments" to charge a ten-cent fee for each single-use carry-out bag provided to a customer. The ordinance defines a "single-use carry-out bag" as "a bag designed for use one time made of any material, commonly plastic or paper, that is provided to a customer at the point of sale and is used to carry goods from such store." If a paper bag is provided, it must be recyclable. Reusable carry-out bags are not included in this definition. Retailers retain the fees, which may be used to pay for bags and defray the retailer's record-keeping costs.

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The proposed ordinance contains exceptions from its requirements for certain types of bags, such as those used for bulk items or meat inside the stores themselves; certain retailers, such as temporary vendors and restaurants; and certain customers, such as low-income families participating in New Jersey's Supplemental Nutritional Assistance Program.

The proposed ordinance is intended to encourage the use of reusable checkout bags by charging a fee on single-use carry-out bags for retail checkout of purchased goods, which, in turn, is aimed at encouraging customers to utilize reusable bags. The stated justifications focus on reducing *plastic* bag use in particular, and are stated as follows:

(1) Single use plastic bags often are discarded into the environment and end up polluting our waterways, clogging sewers, endangering marine life and causing litter. (2) The single use plastic bags end up in landfills; they last hundreds of years, and when they do break down they are a potential source of harmful chemicals. (3) Plastic Bag Ordinances that impose a fee have overwhelmingly been shown, worldwide, to reduce single-use bag consumption effectively and are beneficial to the environment and economy. (4) The best alternative to single use bags is to shift to reusable bags for shopping.

There are domestic and international jurisdictions that have adopted ordinances banning plastic bags or requiring the imposition of fees on the distribution of single-use bags by retailers, including in particular municipalities throughout California, as well as in Texas, New York, and Maine.<sup>1</sup> To date, no municipality in New Jersey has adopted an ordinance either banning the use of plastic bags or imposing a fee on the distribution of single-use carry-out bags.

## **PENDING STATE LEGISLATION**

There are two identical bills pending before the New Jersey Legislature that would address single-use bags, Assembly Bill No. 1367 (A1367) and its companion bill, Senate Bill No. 563 (S563), both introduced on January 16, 2014 and entitled the "Carry-out Bag Reduction and Recycling Act" (Act). A copy of the Act is attached as Exhibit "C" for your information.

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<sup>1</sup>*See generally* Jennie R. Romer & Leslie Mintz Tamminen, Plastic Bag Reduction Ordinances: New York City's Proposed Charge on All Carryout Bags as a Model for U.S. Cities, 27 Tul. Envtl. L.J. 237 (2014), attached hereto as Exhibit "B".

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The Act would require stores to impose a five-cent per bag fee for the use of disposable carry-out bags so as to discourage their use; allow stores to provide a five-cent credit for each bag provided by the customer; and require disposable carry-out bags to be made from recyclable materials. The Act would allow stores to retain one cent from each disposable bag fee (and two cents from each bag fee if a store establishes a credit program), and remit the remainder to the New Jersey Department of Environmental Protection (NJDEP). As proposed, the provisions would apply to every convenience store, bakery, drugstore, supermarket, liquor store, restaurant, delicatessen or retail establishment that provides carry-out bags to its customers, but would not apply to the following: farm markets; bags used inside of a store to package bulk items, unwrapped prepared foods or bakery items, prescription drugs, frozen food, meat or fish, or flowers; paper carry-out bags provided to a customer to carry out food from a restaurant with seating; or plastic bags used to package newspapers or dry-cleaning.

There has been no formal action on A1367 or S563 since January 2014.

## **LEGAL ANALYSIS**

### **A. Federal law; challenges in other jurisdictions.**

There is a limited body of case law from outside New Jersey addressing some of the potential legal issues to consider when drafting legislation similar to the proposed ordinance. In these cases, the objectors challenged similar ordinances on grounds that the ordinances conflicted with or failed to comply with controlling state law in the jurisdictions in question.

For instance, in one case, the plaintiffs challenged a Los Angeles County ordinance prohibiting retail stores from providing plastic carry-out bags and requiring stores to charge customers ten cents for each paper carry-out bag provided, on the grounds that the ten-cent fee was an illegal tax under the California Constitution.<sup>2</sup> In another California case, the plaintiffs challenged an ordinance banning the use of “point of sale” plastic carry-out bags on the basis that California law

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<sup>2</sup>*Schmeer v. County of Los Angeles*, 213 Cal. App. 4th 1310 (Cal. Ct. App. 2013). The court held that the paper carry-out charge was not considered a “tax” because the fee was not remitted to the county and raised no revenue for same, but rather was payable to and retained by the store providing the bag, and to be used for specified purposes. *Id.* at 1329.

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required the city to prepare an environmental impact statement prior to enacting said law.<sup>3</sup>

In a 2014 opinion issued by the Texas Attorney General, the Attorney General called into question on state law grounds the legality of municipal ordinances that prohibited businesses from providing single-use bags to customers.<sup>4</sup>

For purposes of the present analysis, the lesson learned from these and other jurisdictions is that a challenge to a Princeton single-use carry-out bag ordinance would likely be based on state law, rather than federal law. Moreover, our own research indicates that the proposed ordinance could likely withstand an attack based on federal constitutional grounds.<sup>5</sup>

## **B. State law.**

### *1. Preemption.*

On of the first questions when assessing a municipality's authority to adopt a given regulation is whether the field has been preempted by the State. "Preemption is a judicially created principle based on the proposition that a municipality, which is an agent of the State, cannot act contrary to

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<sup>3</sup>*Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal.4th 155 (2011). Based on the court's reading of California law, an environmental impact statement was not required and therefore, the claim failed. *Id.*

<sup>4</sup>*See* Tex. Att'y Gen. Op. No. GA-1078 (Aug. 29, 2014), available at <https://www.texasattorneygeneral.gov/opinions/opinions/50abbott/op/2014/pdf/ga1078.pdf>.

<sup>5</sup>*See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), in which milk sellers and others challenged the constitutionality of a Minnesota statute banning the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sale in other types of nonreturnable, nonrefillable containers, such as paperboard milk cartons. The Court upheld the regulation under the Equal Protection Clause on the basis that the ban on plastic nonreturnable milk containers bore a rational relation to the state's objectives. It also found that the statute was not violative of the Commerce Clause because it did not discriminate between interstate and intrastate commerce, but instead regulated evenhandedly by prohibiting all retailers from selling their product in plastic containers, without regard to the source of the sellers or product. *Id.* at 470, 473.

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the State.”<sup>6</sup> “When the Legislature preempts a field by comprehensive regulation, a municipal ordinance attempting to regulate the same field is void if the municipal action adversely affects the legislative scheme.”<sup>7</sup> To determine whether an ordinance is preempted by state law, the courts apply the following test:

- Does the ordinance conflict with state law, either because of conflicting policies or operational effect (that is, does the ordinance forbid what the Legislature has permitted or does the ordinance permit what the Legislature has forbidden)?
- Was the state law intended, expressly or impliedly, to be exclusive in the field?
- Does the subject matter reflect a need for uniformity?
- Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
- Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature?<sup>8</sup>

Here, one of the stated purposes of the proposed ordinance is to reduce the quantity of single-use plastic bags that end up as solid waste in landfills. New Jersey, however, regulates the collection, disposal and utilization of solid waste in New Jersey through the Solid Waste Management Act, and the enabling legislation and regulations are so comprehensive as to leave little room for local regulation. One of the State’s main reasons for enacting state-wide solid waste management laws was to ensure state-wide, rather than municipality-specific, solutions to solid waste problems, solutions that include addressing the “most efficient, sanitary and economical ways of collecting, disposing, *limiting* and utilizing solid waste . . . .”<sup>9</sup>

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<sup>6</sup>*Overlook Terrace Management Corp. v. Rent Control Bd. of West New York*, 71 N.J. 451, 461 (1976) (citation omitted).

<sup>7</sup>*Plaza Joint Venture v. Atlantic City*, 174 N.J. Super. 231, 238 (App. Div. 1980) (citations omitted).

<sup>8</sup>*Overlook, supra*, 71 N.J. at 461-62 (internal citations and quotations omitted).

<sup>9</sup>*N.J.S.A. 13:1E-2b(6)* (emphasis added).

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In our opinion, then, efforts by municipal ordinance to reduce the quantity and impact of single-use plastic bags when disposed of as solid waste would in all likelihood be preempted by the Solid Waste Management Act.

2. *General municipal police powers; control over local litter and pollution issues.*

Notwithstanding the above, at least two of the other rationales cited in the proposed ordinance do fall within a municipality's police powers and are therefore within Princeton's authority to address through local regulation, provided a factual basis exists to support the need for local regulation: preventing water pollution and curbing litter.

There is statutory support for municipal regulations aimed at protecting municipal water supplies and water ways. For instance, the New Jersey Legislature specifically authorizes local board of health "to pass, alter or amend ordinances and make rules and regulations in regard to the public health within [their] jurisdiction . . . [t]o protect the public water supply and prevent the pollution of any stream of water or well, the water of which is used for domestic purposes, and to prevent the use of or to close any well, the water of which is polluted or detrimental to the public health."<sup>10</sup> This statutory language supports that a municipality has the authority to impose regulations aimed at preventing water pollution.

Similarly, it is well settled that pursuant to their police powers, municipalities may adopt ordinances for purposes of reducing litter.<sup>11</sup> *N.J.S.A.* 40:48-2 defines the scope of those powers, and provides that a municipality may make and enforce ordinances "not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare *of the municipality and its inhabitants*, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law."<sup>12</sup>

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<sup>10</sup>*N.J.S.A.* 26:3-31a.

<sup>11</sup>*Lusardi v. Curtis Point Property Owners Ass'n*, 86 *N.J.* 217, 231 (1981).

<sup>12</sup>*N.J.S.A.* 40:48-2 (emphasis added). Importantly, our courts have upheld municipal ordinances which impose economic regulations upon commercial entities as a valid exercise of police power, similar to what is proposed here. For instance, the courts have upheld ordinances that require arcades to employ security guards at busy times of operation, *Bonito v. Mayor & Council of Bloomfield Tp.*, 197 *N.J. Super.* 390 (Law Div. 1984), and multiple dwelling unit owners to employ armed guards on their premises, 515

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The exercise of the municipal police power, however, is not unlimited. It can only be exercised “in those areas where regulation is needful for the common good, that is, public health, safety, morals or general welfare, and then only by reasonable means substantially connected with the public interest designed to be advanced.”

Thus, despite the fact that a municipal ordinance may be within the permissible objectives of the police power, all police power legislation is subject to the constitutional limitation that it not be unreasonable, arbitrary or capricious, and that the means selected via such legislation shall have real and substantial relation to the object sought to be attained.<sup>13</sup>

Accordingly, that Princeton may have the authority to adopt ordinances for purposes of protecting its water supply and water ways or for preventing litter does not end the analysis. Before these rationales may be cited as bases for the regulation of single-use bags, Princeton will need to identify the problems caused by single-use bags *in Princeton*. To that end, information should be gathered as to whether plastic or other single-use bags end up in the water supply and/or waterways, or in Princeton’s sewers and storm drains, and what damage (physical or economic) this causes.<sup>14</sup> Similarly, it would be helpful to identify what proportion of litter is made of plastic or other single-use bags and what problems are caused by that litter (such as clean up costs and resulting blight).<sup>15</sup> The data need not be exhaustive; they should be sufficient, however, to establish that the problems sought to be addressed by the proposed ordinance exist in Princeton.

Princeton will also need to demonstrate that the chosen means (requiring the imposition of a per-bag fee) will have a real and substantial relation to the objects sought to be attained (protection

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*Associates v. City of Newark*, 132 N.J. 180 (1993). Similarly, it is well-settled that pursuant to its police powers, a municipality may adopt and enforce rent control ordinances. See *Inganamort v. Borough of Fort Lee*, 62 N.J. 521 (1973); *Hutton Park Gardens v. Council of Township of West Orange*, 68 N.J. 543 (1975).

<sup>13</sup>*Bonito, supra*, 197 N.J. Super. at 397-98.

<sup>14</sup>*Id.* at 257.

<sup>15</sup>*Id.*

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of the water supply and waterways, and litter reduction).<sup>16</sup> In doing so, however, Princeton may rely on studies performed elsewhere that document the impact of either banning outright or imposing a charge on single-use bags.<sup>17</sup>

Lastly, Princeton should be prepared to address why the ten-cent fee should apply to paper as well as plastic bags. The proposed ordinance cites the source of the water pollution and litter problems as the single-use *plastic* bags, yet the fee applies to all single-use bags, not just plastic ones.<sup>18</sup>

Once sustainable reasons and factual support therefor are developed for requiring the imposition of a single-use bag fee, the next step will be to ensure that the provisions of the ordinance are drafted so as to be reasonable and responsive to the needs of the community, and to further the goals of the ordinance. In addition, there are several sections of the proposed ordinance, such as the enforcement and penalty provisions and the definitions, among others, that will require further review and refinement. We would be more than happy to assist with the drafting thereof.

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<sup>16</sup>*New Jersey Shore Builders Association v. Township of Jackson*, 199 N.J. 39, 55 (2009).

<sup>17</sup>*See, e.g., E & J Equities, LLC v. Bd. of Adjustment of Twp. of Franklin*, 437 N.J. Super. 490, 511-12 (App. Div. 2014), *certif. granted*, 220 N.J. 574 (2015), addressing a municipal ban on digital billboards. The Appellate Division, applying well-established case law, held that “[t]he burden of proving a ‘substantial government interest’ is not a heavy one. A zoning ordinance ‘need not articulate its objectives’ or produce ‘empirical data ... accompanied by a surfeit of background information.’ To satisfy this burden, the evidence must ‘provide a rational, objective basis from which a reviewing court can ascertain the existence of a substantial governmental interest underpinning the legislation,’ and will be sufficient if ‘whatever evidence the [legislative body] relies upon is reasonably believed to be relevant to the problem’ addressed.” *Id.* (citations omitted). The court added that “[s]uch support may come in the form of ‘reference to studies pertaining to other jurisdictions, legislative history, consensus, and even common sense.’” *Id.* (citations omitted).

<sup>18</sup>*See Bryant v. City of Atlantic City*, 309 N.J. Super. 596, 610 (App. Div. 1998). The article attached hereto as Exhibit B identifies several reasons why bans or fees should apply both to paper and to plastic bags.

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Please feel free to contact either one of us should you have any questions or wish to discuss the above in further detail.

TWC:twc

Enclosures: Proposed ordinance; Romer article; pending State legislation (A1367/S563)

cc:(via email)

Linda McDermott, Clerk

Marc Dashield, Administrator

Kathy Monzo, Assistant Administrator

Robert Kiser, Municipal Engineer

Robert Hough, Director of Infrastructure and Operations

**PRINCETON, New Jersey, Borough and/or Township of Princeton  
AN ORDINANCE TO PROVIDE FOR A SINGLE USE BAG FEE FOR RETAIL STORES  
IN THE TOWN OF PRINCETON**

*On March 8, 2011 and February 28, 2011 the Borough of Princeton and the Township of Princeton respectively passed a Resolution recommending a reduction in the use of single-use plastic bags by all residents and merchants and encouraging all Princeton residents to BYOBAG (Bring their own Bag).*

*The residents of Princeton voted overwhelming in favor of the Mercer County, November 4<sup>th</sup> 2014 Bag Referendum. In fact every District except District 3 voted yes. The non-binding referendum was placed on the ballot to gauge voter interest in diminishing the waste created by single-use bags.*

The intent of this Ordinance is to support those Resolutions and to allow all members of the Princeton community --- residential, business, and educational --- to join in the worldwide movement to act in ways that promote our environmental, health, and economic responsibilities to our planet and to our local and regional populations. The Ordinance encourages the use of reusable checkout bags by charging a fee on single-use carryout bags for retail checkout of purchased goods. Residents are encouraged to bring their own bags or to purchase reusable ones made available for sale.

The justifications for this Ordinance are as follows: (1) Single use plastic bags often are discarded into the environment and end up polluting our waterways, clogging sewers, endangering marine life and causing litter. (2) The single use plastic bags end up in landfills; they last hundreds of years, and when they do break down they are a potential source of harmful chemicals. (3) Plastic Bag Ordinances that impose a fee have overwhelmingly been shown, worldwide, to reduce single-use bag consumption effectively and are beneficial to the environment and economy. (4) The best alternative to single use bags is to shift to reusable bags for shopping.

**SECTIONS**

**I. Single Use Bag Fee Established**

**II. Recordkeeping**

**III. Required Signage**

**IV. Effective Date**

**V. Exemptions**

**VI. Assistance, Outreach and Education**

**VII. Enforcement and violation-penalty**

**VIII. No Conflict With Federal or State Law**

**IX. Severability**

**X. Repeal Clause**

## **DEFINITIONS**

The following definitions apply to this Ordinance:

1. "Single-use carryout bag" means a bag designed for use one time made of any material, commonly plastic or paper, that is provided to a customer at the point of sale and is used to carry goods from such store. Such term shall not include reusable carryout bags.
2. "Exempt bag": a) Bags used by consumers inside stores to: (1) package bulk items, such as fruit, vegetables, nuts, grains, candies, or small hardware items; (2) contain or wrap frozen foods, meat, fish, whether packaged or not; (3) contain or wrap flowers, potted plants, or other items where dampness may be a problem; or (4) contain unwrapped prepared foods or bakery goods; (5) pharmacy prescription bags; or, (6) newspaper bags, door-hanger bags, laundry and/or dry-cleaning bags, or bags sold in packages containing multiple bags intended for use as garbage bags, pet waste or yard waste bags (7) pharmacy items.
3. "Retail Store" Any public commercial business engaged in the sale of personal consumer goods, household items, or groceries to customers who use or consume such items, including those retail stores issued liquor licenses by the Princeton Clerk's Office. "Retail store" does not include temporary vendors at farmers' markets or other temporary events; or restaurants, take-out food establishments or other businesses that receive 90% or more of its revenue from the sale of foods and/or drinks prepared on premises. It also does not include other businesses (e.g., service providers such as salons, spas and drycleaners) where retail sales are clearly secondary and incidental to the primary activity occurring within the business.
4. "Recyclable paper bag" or "recycled paper carryout bag": a paper bag that meets all of the following minimum requirements: (a) contains no old growth fiber, (b) is one hundred percent (100%) recyclable overall and contains a minimum of forty percent (40%) post-consumer recycled material; (c) can be composted; and (d) displays the words "Recyclable" and "Reusable" in a highly visible manner on the outside of the bag.
5. "Reusable bag" means a bag with handles that is specifically designed and manufactured for multiple reuse and is made of cloth, fiber, other machine washable fabric, or durable plastic that is at least 2.25 millimeters thick.

### **Section I. Single Use Bag Fee established**

Retail establishments shall charge a fee of not less than ten cents (\$.10) for each single-use carryout bag provided to any person. No retail store shall be required to charge a fee for an exempt bag.

If Retail stores dispense paper bags they shall only be recyclable paper bags. No retail store shall prevent a person from using a bag of any kind that s/he has brought to any such retail store for the purposes of carrying goods from such store.

## ***Exhibit A***

The retail store may retain 100 percent (100%) of each single use bag fee collected. Such fee may be used by Retailers to pay for bags and to help the Retailers with record keeping costs. No retail store shall provide a credit to any person specifically for the purpose of offsetting or avoiding the carryout fee as required by this Ordinance, with the exception of those customers covered by Section V (1).

## **Section II. Recordkeeping**

Every retail establishment shall keep complete and accurate records or documents of the purchase and sale of any single-use carry out bag by the retail establishment for a minimum period three (3) years from the date of the implementation of this Ordinance. These records shall be available for inspection at no cost to the Princeton Municipality during regular business hours by any municipal employee authorized to enforce this provision.

## **Section III. Required Signage**

Every retail store shall post signs in a location outside or inside of the store, viewable by customers, to educate customers about Princeton's single-use out bag fee and single-use bag policy for the betterment of Princeton's environment.

## **Section IV. Effective Date**

This Ordinance shall take effect six months after its passage and adoption by the Princeton Town Council to allow retail stores and organizations to obtain proper signage and for the Town to provide outreach and education.

## **Section V. Exemptions**

1. Customers who participate in, or are beneficiaries of, any United States government federal welfare program, or any local or Mercer County welfare assistance program, or any New Jersey State welfare program, including but not limited to the New Jersey Supplemental Nutritional Assistance Program (SNAP) or the New Jersey State Supplemental Security Income Program (SSI) must be provided at the point of sale, free of charge, either recyclable paper carry out bags or reusable bags.
2. A retail store or organization may seek exemption from the requirements of this Ordinance from the Town Administrator for up to a one-year period by showing that compliance with the requirements of this Ordinance would deprive the retail store of a legally protected right, cause undue financial hardship or subject that business to a disproportionate economic impact due to circumstances unique to the retail store or organization.
3. A written request for exemption shall include all information necessary for the Town Administrator to make its decision, including but not limited to documentation showing the factual support for the exemption requested. The Town Administrator, or his/her designee, may require the applicant to provide additional information to permit the City to determine facts regarding the exemption request.

# ***Exhibit A***

4. The Town of Princeton may by resolution establish a fee for exemption requests sufficient to cover the administrative costs for processing the exemption request.

#### **Section VI. Outreach, Education & Assistance**

The Town of Princeton shall establish an outreach and education program aimed at educating residents and retail stores about reducing the use of single-use carryout bags and increasing the use of reusable carryout bags.

The Town of Princeton shall be responsible for providing informational literature, and employee training to Retailers. To the extent practicable the Town of Princeton shall seek the assistance of local non-for-profit organizations to provide and distribute reusable carryout bags to residents and signs in accordance with Section II. These efforts shall take place before and after the operative date of the Ordinance. Where practicable the Town of Princeton shall prioritize such outreach and reusable bag distribution to residents in household with annual income below 200% of the federal poverty line.

No later than two months after the effective date of the adoption of this Ordinance the Town Administrator shall distribute a multi-lingual letter to all retail establishments informing them of their obligations to comply with the provisions of this Ordinance. Failure to receive a letter pursuant to this subdivision shall not eliminate the obligations of the retail store pursuant to this Ordinance.

**[To be reviewed and discussed with the Attorneys Town]**

#### **Section VII. ENFORCEMENT AND VIOLATION-PENALTY**

1. The Town of Princeton has primary responsibility for enforcement of this Ordinance. The Town Administrator, or his/her designee, is authorized to promulgate regulations and to take any and all other actions reasonable and necessary to enforce this Ordinance, including, but not limited to, investigating violations, issuing fines and entering the premises of any store during business hours.
2. If the Town Administrator, or his/her designee, determines that a violation of this Ordinance has occurred, s/he 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.
3. Any store that violates or fails to comply with any of the requirements of this Ordinance after a written warning notice has been issued for that violation shall be guilty of an infraction.
4. If a store has subsequent violations of this Ordinance 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: a) A fine not exceeding one hundred dollars (\$100.00) for the first violation after the written warning notice is given; b) A fine not exceeding two hundred dollars (\$200.00) for the

***Exhibit A***

- second violation after the written warning notice is given; or c) A fine not exceeding five hundred dollars (\$500.00) for the third and any subsequent violations after the written warning notice is given.
5. A fine shall be imposed for each day a violation occurs or is allowed to continue.
  6. All fines collected pursuant to this Ordinance shall be used to assist with the implementation and enforcement of the requirements of this Ordinance, including educational outreach to Retailers and the general public.
  7. Any appeal of a written warning notice or fine shall be conducted pursuant to standard municipal regulations and procedures concerning appeals already adopted by the former Princeton Township and Princeton Borough.

### **Section VIII. No Conflict With State or Federal Law**

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

### **Section IX. SEVERABILITY**

If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this Ordinance, or its application to any other person or circumstance.

The Town of Princeton hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase herein, even if any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases herein be declared invalid or unenforceable.

### **Section X. REPEAL**

All Ordinances, or parts thereof, that are in conflict or inconsistent with any provision of this Ordinance are hereby repealed to the extent of such conflict, and the provisions of this Ordinance shall be and remain controlling as to the matters regulated, herein.

# Plastic Bag Reduction Ordinances: New York City’s Proposed Charge on All Carryout Bags as a Model for U.S. Cities

Jennie R. Romer\*  
Leslie Mintz Tamminen†

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I. INTRODUCTION

This Article focuses on New York City’s (NYC) proposed carryout bag ordinance as a model ordinance for cities in the United States.<sup>1</sup> Part II will discuss basic ordinance structures, focusing primarily on the merits of charges on use versus bans. Part III will discuss specific clauses that should be included in ordinances. Part IV will focus on helping cities develop strong administrative records that include (1) specific environmental and economic harms caused by plastic bags and (2) the efficacy of plastic bag ordinances currently in place elsewhere. Part V is a cautionary primer on how to rebut the plastics industry’s main arguments. Part VI focuses on how to build a successful local campaign.

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1. See N.Y. City Council B. No. 1135 (N.Y.C. 2013).

Plastic bags<sup>2</sup> have become an icon of waste, a symbol of our throw-away society, in part because they are highly visible in daily life.<sup>3</sup> Plastic bags are ubiquitous. Approximately 100 billion plastic bags are used in the United States every year, enough to circle 772 times around the globe.<sup>4</sup> Plastic bags have become a focus for source reduction legislation because of the environmental and economic havoc they wreak and because the plastics industry has staunchly opposed any meaningful regulation. Plastic bags represent a “miniscule fraction of the plastics business—about \$1.2 billion of the \$374 billion American plastics market,” but the market for plastic bags is defended with disproportionate vigor by a number of industry groups and manufacturers.<sup>5</sup> Often spending more than \$1 million on campaigns against individual bills, plastics industry groups employ two primary tactics: public relations campaigns opposing the adoption of bag ordinances and lawsuits against cities that adopt such ordinances.<sup>6</sup> Given this background, cities and advocates should be prepared when pursuing these ordinances.

On August 22, 2013, Bill No. 1135-2013 was introduced in the New York City Council, which would place a minimum 10-cent charge on all carryout bags (plastic, paper, and reusable) from retailers in NYC, with the retailers retaining the entire amount of the charge.<sup>7</sup> This legislation builds upon the lessons learned by other cities that have adopted similar legislation. This Article is meant as a resource for cities and states interested in adopting similar legislation. References to opposition groups will primarily focus on lawsuits that have been litigated by plastics industry groups in California, as well as refer to

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2. All mentions of plastic bags refer to single-use plastic carryout bags unless otherwise noted.

3. Jennie R. Romer, *Single-Use Plastic Carryout Bags: An Icon of Waste*, 5 SUSTAINABILITY 341, 341 (2012).

4. Assuming that the average plastic bag is one foot long, if the U.S. population tied its annual consumption of plastic bags together in a giant chain, the chain could reach around the Earth's equator 772 times. (This calculation is based on the Earth's equatorial circumference of 25,000 miles (132,000,000 feet) and a 2008 U.S. plastic bag consumption of almost 102 billion bags.) See U.S. INT'L TRADE COMM'N, PUB. NO. 4080, POLYETHYLENE RETAIL CARRIER BAGS FROM INDONESIA, TAIWAN, AND VIETNAM 18 (2009).

5. SUSAN FREINKEL, PLASTIC: A TOXIC LOVE STORY 156 (2011). The plastics industry is also closely associated with the oil and gas industry because plastic is made from ethylene, a byproduct created in the processing of crude oil and natural gas. See *id.* at 7.

6. For example, after the Seattle City Council passed a 20-cent charge on plastic bags, the American Chemistry Council (ACC) spent over \$1.4 million on a successful ballot initiative to overturn the plastic bag charge. *Id.* at 164. As another example, the ACC “spent \$5.7 million in California during the 2007 to 2008 legislative sessions” and nearly \$1 million in 2010 when the California legislature was considering a statewide ban. *Id.* at 163.

7. N.Y. City Council B. No. 1135 (N.Y.C. 2013).

similar claims in a letter from a New York statewide grocery industry association to the Town of Mamaroneck all but threatening a lawsuit if the town were to adopt a plastic bag ban.<sup>8</sup>

## II. PLASTIC BAG ORDINANCE STRUCTURE: BAN VERSUS CHARGE

The push to focus on source reduction of plastic bags by adopting plastic-bag-reduction ordinances started in Ireland in 2002, where a 15-Euro-cent levy (later raised to 22 Euro cents) on every plastic bag provided at checkout resulted in an over 90% reduction in plastic bag consumption and a considerable reduction in litter within the first year.<sup>9</sup>

### A. “Straight” Plastic Bag Bans

Following Ireland’s lead, San Francisco’s Commission on the Environment recommended that San Francisco charge a 17-cent fee for each single-use plastic or paper grocery bag used, but before the ordinance had a chance to be introduced, opposition groups were successful in passing a plastic bag recycling bill (AB 2449), which included language that specifically preempted all local plastic bag fees in California.<sup>10</sup> Not to be deterred, San Francisco decided to circumvent AB 2449’s fee prohibition by simply banning plastic bags.<sup>11</sup> Several other California cities followed San Francisco’s lead.

Plastic bag bans generally refer to banning plastic carryout bags of a certain thickness—usually those under 2.25 mils thick in the United States—from being distributed.<sup>12</sup> “Straight” plastic bag bans, meaning bans that do not address any other type of carryout bags, often seem to be more popular than charges among American legislators because (1) most plastic bag ordinances adopted to date in the United States were in California where bans are more prevalent due to the advent of AB 2449,

8. Letter from P. Daniel Hollis, III, Shamberg Marwell & Hollis, P.C., Att’ys for the Food Indus. Alliance of N.Y. State, Inc., to Honorable Nancy Seligson, Town Supervisor and Members of the Town Bd., Town of Mamaroneck (Apr. 3, 2013) (on file with author).

9. See Frank Convery et al., *The Most Popular Tax in Europe? Lessons from the Irish Plastic Bags Levy*, 38 ENVTL. & RESOURCE ECON. 1, 2, 7 (2007).

10. See Assemb. B. No. 2449, 2005-2006 Leg., Reg. Sess. (Cal. 2006). Although this bill was codified into California state law (and subsequently repealed), it will be referred to as AB 2449 throughout this Article. See CAL. PUB. RES. CODE §§ 42250-42257 (Deering 2009).

11. For more information on the background of the California plastic bag recycling law and the events leading up its adoption as well as San Francisco’s ban, see generally Jennie Reilly Romer, Comment, *The Evolution of San Francisco’s Plastic Bag Ban*, 1 GOLDEN GATE ENVTL. L.J. 439, 450-59 (2007).

12. See, e.g., L.A., CAL., MUN. CODE §§ 195.01-.08 (2013). This thickness is derived from the definition of “reusable bag” in the plastic bag recycling law. See *id.* § 195.01(J). For a discussion of concerns regarding plastic bag thickness, see *infra* Part III.D.1 of this Article.

(2) the concept of a ban is more straightforward than an ordinance with charges, and (3) many people are concerned with the myriad of impacts associated specifically with plastic bags.<sup>13</sup> However, compared to charges, straight bans present challenges from practical as well as legal perspectives.

From a practical perspective, because customers will continue to require something with which to carry their purchases, a straight plastic bag ban (that does not address other types of carryout bags and does not successfully encourage reusable bag use) will arguably result in customers switching from one bag type to another (e.g., plastic to paper or plastic to thicker plastic), rather than requiring the customer to make a conscious choice about whether they require a bag in the first place. Also, many people are accustomed to reusing plastic carryout bags in a variety of ways, including picking up after dogs or lining small trash cans. Doing away with these bags completely may lead people to purchase bags for these purposes or use other materials, but as discussed below, allowing these bags to be available for a small charge at checkout is a more sophisticated option for actually changing consumer behavior.

As mentioned above, California cities began to adopt plastic bag bans (as opposed to charges) mainly because AB 2449 preemption precluded the option to charge a fee for plastic bags. Interestingly, AB 2449's preemption of fees on plastic bags expired in January 2013, so the charge option is now available in California.<sup>14</sup> As of yet, no California municipality has opted to charge for plastic bags rather than ban them.

#### 1. Lawsuits Based on Environmental Claims in California

From a legal perspective, plastics industry groups have filed numerous lawsuits claiming that a municipality is required to complete a full environmental impact report (EIR) under the California Environmental Quality Act (CEQA) before a plastic bag ban can be adopted. CEQA was created by the California legislature on the premise that the government must “take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds being reached.”<sup>15</sup> To prevent such thresholds from being reached, CEQA requires that every “project” with “potentially significant effects” on the

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13. See *infra* Part IV.A.

14. Please note, however, that the same “unconstitutional tax” arguments regarding paper bags would apply to plastic bag charges as well.

15. CAL. PUB. RES. CODE § 21000(d).

environment that does not fall within an “exemption” or qualify for a “negative declaration” must have an EIR prepared.<sup>16</sup>

With regard to plastic bag ordinances, Save the Plastic Bag Coalition (SPBC)—self-identified as a consumer protection watchdog and claiming to be “formed to counter myths, misinformation and exaggerations about plastic bags by various groups purporting to promote environmental quality”<sup>17</sup>—has filed numerous petitions for writs of mandate in California courts, asserting that a municipality must prepare an EIR before adopting a plastic bag ban. One of these petitions was heard by the California Supreme Court in *Save the Plastic Bag Coalition v. City of Manhattan Beach*, where the substantive question was whether the city was “required to prepare an EIR on the effects of an ordinance banning the use of plastic bags by local businesses.”<sup>18</sup>

In *City of Manhattan Beach*, a straight plastic bag ban had been adopted pursuant to a negative declaration, an intermediate level of environmental review defined as “a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an environmental impact report.”<sup>19</sup> The crux of the issue in *City of Manhattan Beach* was whether SPBC presented substantial evidence to support a fair argument that a plastic bag ban might significantly affect the environment, primarily due to environmental impacts from an increase in paper bag consumption.<sup>20</sup> The California Supreme Court found that while some increase in the use of paper bags was foreseeable, “no evidence suggests that paper bag use by Manhattan Beach consumers in the wake of a plastic bag ban would contribute to [negative environmental] impacts in any significant way.”<sup>21</sup> However, the ruling in *City of Manhattan Beach* was specifically limited to the facts in that case (including the relatively small size of Manhattan Beach), so in the wake

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16. *Id.* § 21080(c)-(d); see also *id.* § 21082.2(a) (“The lead agency shall determine whether a project may have a significant effect on the environment based on substantial evidence in light of the whole record.”); CEQA Guidelines, CAL. CODE REGS. tit. 14, §§ 15307-15308 (2009).

17. *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 105 Cal. Rptr. 3d 41, 46 (Ct. App. 2010), *rev’d*, 254 P.3d 1005 (Cal. 2011).

18. *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1008 (Cal. 2011).

19. CAL. PUB. RES. CODE § 21064. See generally Jennie R. Romer & Shanna Foley, *A Wolf in Sheep’s Clothing: The Plastics Industry’s “Public Interest” Role in Legislation and Litigation of Plastic Bag Laws in California*, 5 GOLDEN GATE ENVTL. L.J. 377, 395-96 (2012) (explaining alternatives to environmental impact reports).

20. See *City of Manhattan Beach*, 254 P.3d at 1018.

21. *Id.*

of this ruling, cities developed a way around environmental allegations associated with a straight plastic bag ban by creating a “second generation” plastic bag ban model that incorporates a charge for paper bags.

## 2. Threats of Similar Lawsuits Based on Environmental Claims in New York State

Several NYC-area communities have adopted straight plastic bag bans, including the City of Rye and Village of Mamaroneck in Westchester County, New York, just north of NYC.<sup>22</sup> Several other nearby cities and towns were on track to adopt similar bans until the Food Industry Alliance (FIA), a New York statewide grocery industry association, followed in SPBC’s footsteps and threatened to sue if these municipalities adopted bans. In April 2013, the FIA sent a letter to the Town of Mamaroneck effectively threatening to take legal action if the town went forward with the plastic bag ban that was under discussion at the time.<sup>23</sup> In the letter, the FIA claimed that the proposed plastic bag ban would (1) be preempted by the state plastic bag recycling law in New York, (2) be arbitrary and unconstitutional, and (3) require a full Environmental Impact Statement (EIS) under New York’s State Environmental Quality Review Act (SEQRA).<sup>24</sup>

Advocates suspect that, like other retailer opponents, FIA’s main concern is that the cost of paper bags is much higher than the cost of plastic bags, so a plastic bag ban that does not address paper bags might ostensibly hurt retailers’ profits. Similarly, in California, the California Grocers Association (CGA) opposed plastic bag bans until a paper bag charge started being included in ordinances. At that point, CGA began sending letters of support for cities considering adopting plastic bag bans that included the charges, stating, “Ordinances that do not regulate all single-use bag types . . . do not maximize environmental gain and can cost each store well over \$50,000 a year in increased costs.”<sup>25</sup> Regardless, the FIA’s letter included a variety of additional legal claims,

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22. For more information on carryout bag reduction ordinances adopted in New York State, see *Disposable Bag Reduction*, CITIZENS CAMPAIGN FOR ENV’T, <http://www.citizenscampaign.org/campaigns/plastic-bags.asp> (last updated Jan. 15, 2014).

23. See Letter from P. Daniel Hollis to Honorable Nancy Seligson, *supra* note 8. The Town of Mamaroneck includes within its borders part of the Village of Mamaroneck, mentioned previously.

24. *Id.*

25. Letter from Timothy M. James, Manager, Local Gov’t Relations, Cal. Grocers Ass’n, to Honorable David Chiu, President, Bd. of Supervisors, City & Cnty. of S.F. (Feb. 6, 2012) (on file with author).

using the opposition's playbook that has been successful in delaying the adoption of some legislation in California.

Currently, the Town of Mamaroneck<sup>26</sup> as well as various other New York State municipalities that had been poised to adopt straight plastic bag bans have put those plans on hold in order to research FIA's claims and study various options, likely including keeping tabs on NYC's proposed bill.<sup>27</sup> It follows that studying the strategies from California, with a close eye for differences in the operative state laws, is the best way for advocates to help craft the best laws all over the country.

### *B. Hybrid Bans and Charges Including Second-Generation Plastic Bag Bans*

In part due to the litigation surrounding plastic bag ordinances in California, a very specific form of legislation has taken root there, known as "second-generation" plastic bag bans. Second-generation plastic bag bans address paper bags by imposing a minimum 10-cent charge on all paper bags in part to avoid the "paper could be worse than plastic" environmental claims and still stay within the framework of AB 2449's restriction on fees for plastic bags. For example, San Francisco refined and expanded its original plastic bag ban law to cover all retailers and restaurants and added a minimum 10-cent charge on all other carryout bags provided at the register (mostly paper bags, but also including all reusable bags).<sup>28</sup> Significantly, San Francisco adopted its expanded ordinance pursuant to a "categorical exemption," which may be invoked when a project is not subject to the provisions of CEQA at all and when no further environmental review (namely an EIR) is required.<sup>29</sup>

Categorical exemptions are available for projects that are intended to protect natural resources or the environment and have no reasonable likelihood of significant adverse impacts.<sup>30</sup> But an activity that would

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26. The Village of Mamaroneck has already adopted a plastic bag ban and the Town of Mamaroneck considered a similar ban.

27. See, e.g., Ted Duboise, *Mamaroneck Split on Plastic Bag Ban*, PLASTIC BAG BAN REP. (Apr. 27, 2013), <http://plasticbagbanreport.com/mamaroneck-split-on-plastic-bag-ban/>.

28. See Romer & Foley, *supra* note 19, at 424-25.

29. See CAL. CODE REGS. tit. 14, § 15300 (2009).

30. *Id.* tit. 14, § 15307 ("Class 7 consists of actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption."); *id.* tit. 14, § 15308 ("Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment.

otherwise be categorically exempt is not exempt if there are “unusual circumstances” that “create a ‘reasonable possibility’ that the activity will have a significant effect on the environment.”<sup>31</sup> SPBC has argued that an increase in paper bag use would be an unusual circumstance resulting from second-generation bans. However, because second-generation bans focus on an overall reduction of carryout bags, and there are numerous reports that show that this structure has succeeded in an overall reduction, courts have found that the unusual circumstances exception does not apply.<sup>32</sup>

SPBC continues to sue cities adopting second-generation bans, but has ultimately lost on the substantive claims in every case.<sup>33</sup> However, the threat of these lawsuits effectively had a “chilling effect” on many local plastic bag bans by delaying adoption of ordinances as cities waited to see the outcome of litigation or opted to complete expensive (and apparently unnecessary)<sup>34</sup> EIRs to avoid potential litigation.<sup>35</sup>

### C. Charges, Fees, and Taxes

Charging for all types of carryout bags has proven to lead to large reductions in single-use bag consumption while still providing customers with options, and this is the type of structure that has been introduced in NYC. Charges have a greater impact on overall reduction in carryout bag use because charges effectively incentivize changes in consumer behavior, because customers are required to make a conscious decision to purchase a bag. “The truth is there are a lot of times that we don’t really need a plastic bag,” said Council Member Brad Lander, one of the

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Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.”)

31. *Davidon Homes v. City of San Jose*, 62 Cal. Rptr. 2d 612, 617 (Ct. App. 1997).

32. *See, e.g., Save the Plastic Bag Coal. v. City & County of San Francisco*, 166 Cal. Rptr. 3d 253, 266-68 (Ct. App. 2013). Also, the other exception that SPBC has argued was applicable is the “cumulative impacts” exception, which the court found did not apply because there would be no negative impacts. *See id.* at 262-63.

33. *See, e.g., Save the Plastic Bag Coal. v. County of Marin*, 159 Cal. Rptr. 3d 763 (Ct. App. 2013).

34. Please note that the court of appeal decision upholding San Francisco’s categorical exemption is binding precedent within that jurisdiction and might serve as persuasive precedent in other California jurisdictions. The scathing language used by the court of appeal includes characterizing SPBC’s “strained interpretation” of a sentence as “*stretch[ing] the bounds of reasonable advocacy.*” *City & County of San Francisco*, 166 Cal. Rptr. 3d at 263 (emphasis added).

35. For example, the official cost of the City of San Jose’s EIR was \$140,000, and it took fifteen months to complete. E-mail from Emy Mendoza, San Jose Env’tl. Servs. Dep’t, to Jennie Romer (July 13, 2011, 9:37 PM) (on file with author).

cosponsors of NYC's bill.<sup>36</sup> And a bag charge leaves the option available for a variety of bags for those times when a bag is needed, for a modest price. Also, plastic bag charges have a well-proven track record in the United States and abroad.<sup>37</sup>

The terms "fees" and "charges" and "tax" are often used interchangeably, but advocates should be clear about what these terms mean. Taxes go in whole or in part to the government. Generally, the power to tax at the local level is limited to the state government, and municipalities cannot collect taxes. The main example of a bag tax in the United States is in Washington, D.C, where this limitation does not apply because D.C. is not constrained by a state law. Under D.C.'s law, all retailers that sell food or alcohol are required to charge 5 cents for each paper or plastic carryout bag provided at the register.<sup>38</sup> Under the law, 1 to 2 cents from each bag stays with the retailer and the remainder is collected by the government and put into the Anacostia River Fund, which is used to fund environmental programs including educational programs and giveaways of reusable bags.<sup>39</sup> This law led to a 50% to 70% reduction of carryout bag consumption, and bag litter in the Anacostia River was also reduced.<sup>40</sup>

#### 1. How To Avoid the "Unconstitutional Tax" Argument: Let the Retailer Keep the Money

The term "charge" is a broader term than "tax" or "fee" and may include any instance where the customer is required to pay for an item independent of where the money goes.

In 2010, as Los Angeles (L.A.) County's plastic bag ban was in the final stages of being drafted, several industry groups were successful in convincing California voters to pass Proposition 26 (Prop 26), a constitutional amendment requiring voter approval for any "levy, charge, or exaction" imposed by a local government.<sup>41</sup> Due to concerns over whether Prop 26 would apply to money collected for the paper bags charge under L.A. County's second-generation ban, L.A.'s bag ordinance

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36. Paula Katinas, *Plastic Bags in Grocery Stores Will Cost You, If New Bill Passes*, BROOKLYN DAILY EAGLE (Aug. 20, 2013), <http://www.brooklyneagle.com/articles/plastic-bags-grocery-stores-will-cost-you-if-new-bill-passes-2013-08-20-173000>.

37. See *infra* Part IV.B.1 for more information on the efficacy of plastic bag charges.

38. Jeffrey Seltzer, Assoc. Dir., Stormwater Mgmt. Div., D.C. Dep't of Env't, D.C. Bag Law Presentation (Dec. 11, 2012) (presentation on file with author).

39. See *id.*

40. *Id.*

41. CAL. CONST. art. XIII C, §§ 1(e), 2(b).

was amended so that all of the money stayed with the retailers and therefore would not be considered a tax.

In late 2011, Hilex Poly, a large plastics manufacturer, and four individual named plaintiffs who claimed to have been “harmed” by paying the 10-cent store charge for paper bags in unincorporated L.A. County filed a complaint against L.A. County.<sup>42</sup> This was a case of first impression under Prop 26, claiming that L.A. County’s bag ordinance—specifically the 10-cent-per-paper-bag fee provision—fell under Prop 26’s requirement for voter approval.<sup>43</sup> Plaintiffs argued that the ordinance lacked voter approval and was therefore an unconstitutional tax—in violation of Prop 26. Though the lawsuit only purports to concern part of the ordinance (the 10-cent fee levied on paper bags), in reality this case was an attempt by a major plastic bag manufacturer to use Prop 26 as a mechanism to invalidate the entire plastic bag ordinance.

L.A. County successfully argued that the ordinance was not an unconstitutional tax. The county said the 10-cent paper bag charge is not a “levy, charge, or exaction,” under the meaning of Prop 26, because the 10-cent charge remains with the retailer and does not go back to the government. The California Second District Court of Appeal affirmed the superior court’s decision that the paper bag fee was not a revenue generation measure for the government within the meaning of Prop 26, thus requiring no voter approval, and that a fee that goes to a private entity can never be a “tax” under Prop 26—even if the charge is compelled by the government.<sup>44</sup>

## 2. The Ability of Local Governments To Collect “Regulatory Fees” for Bags Has Yet To Be Determined

The term “fee” is sometimes used to refer to charges where the money collected goes in whole or in part to the government. In *Schmeer v. County of Los Angeles*, the superior court also discussed, as dicta, that even if the 10-cent fee were a tax, Prop 26’s exemption for “a specific benefit” conferred on the “payor” would apply because a customer receives a bag in exchange for paying the 10 cents and the price is supported by “substantial evidence.”<sup>45</sup> However, this is purely dicta because the money in L.A. County’s ordinance stays with the retailer. Also, the allowance for an exception like the one discussed in *Schmeer*

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42. See 153 Cal. Rptr. 3d 352, 354-55 (Ct. App. 2013).

43. See *id.* at 355.

44. See *id.* at 364-66.

45. Tentative Decision on Petition for Writ of Mandate: Denied at 9, *Schmeer*, 153 Cal. Rptr. 3d 352 (No. BC470705).

depends on the language of each state's constitution. Most environmental advocates would prefer that some of the money collected go to a fund like the Anacostia River Fund in Washington, D.C., so it is worth exploring whether a municipality in another state could allow an ordinance to be structured to have some portion of the charge go back to the local government.

### III. SPECIFIC CLAUSES TO BE INCLUDED IN ORDINANCES

After deciding whether to use a ban or a charge, there are several other specific clauses that should be included in most ordinances.

#### A. *Decide What Types of Businesses Should Be Covered*

The breadth of what types of businesses are covered by a plastic bag ordinance is primarily a function of the political will of a city. Options include covering (1) only city vendors, (2) only supermarkets,<sup>46</sup> (3) supermarkets and large pharmacy chains, (4) all stores that sell food, (5) all retail, or (6) all retail and restaurants. Most ordinances are focused on plastic carryout “t-shirt” type bags common at grocery stores or stores that sell food. Some ordinances phase in implementation in two parts, starting with larger stores then expanding to smaller stores.

##### 1. A Note About Restaurants

Most plastic bag bans do not include restaurants. This is due in large part to the political will of communities as well as practical concerns regarding food delivery. In California, most cities refrained from drafting ordinances that covered restaurants because of fears about lawsuits by SPBC. SPBC alleged that regulating plastic bag use at restaurants was preempted by the California Health and Safety Code.<sup>47</sup> SPBC argued that the field occupied by the Retail Food Code, which generally “establish[es] health and sanitation standards for retail food establishments,” also preempted anyone but the legislature from regulating single-use bags.<sup>48</sup> The city and county of San Francisco was the first to fully litigate this Health and Safety Code preemption claim.

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46. Supermarkets are generally defined as grocery stores that gross annual sales of at least \$2 million per year or have at least 10,000 square feet of retail space. *See, e.g.,* L.A., CAL., MUN. CODE § 195.01(K) (2013). However, the term “supermarket” might be specifically defined by statute in some states.

47. *Save the Plastic Bag Coal. v. City & County of San Francisco*, 166 Cal. Rptr. 3d 253, 269 (Ct. App. 2013); *see* CAL. HEALTH & SAFETY CODE § 113705 (Deering 2012).

48. *City & County of San Francisco*, 166 Cal. Rptr. at 270 (quoting *Cal. Grocers Ass'n v. City of Los Angeles*, 254 P.3d 1019, 1026 (Cal. 2011)).

In December 2013, the California First District Court of Appeal found that preemption by the Code did not apply.<sup>49</sup> As a result, several California cities have recently included restaurants in ordinances.

## 2. State Regulation of Certain Types of Businesses

Some states *specifically* preempt regulation of certain types of businesses, and those businesses should be exempt from plastic bag ordinances.

### *B. Require Paper Bags Be Made from Postconsumer Recycled Content*

Most bag ordinances require that paper bags provided at the register be recyclable and made from recycled content. Ordinances typically require paper bags to contain a minimum of 40% postconsumer recycled content.<sup>50</sup> Recycled content can include manufacturing scraps, whereas postconsumer recycled content is “a finished product that would normally be disposed of as solid waste, having completed its intended end-use and product life cycle.”<sup>51</sup>

Requiring minimum postconsumer content is most important in a straight plastic bag ban context, where the environmental impacts of paper versus plastic bags are more carefully weighed. Several reports funded by groups associated with the plastic industry conclude that, in some respects, paper is worse for the environment than plastic, but those reports focus on paper bags made with less recycled content or from virgin materials and do not adequately assess the full spectrum of end-of-life impacts of plastic.<sup>52</sup> Requiring minimum postconsumer content for paper bags helps rebut those studies. Most ordinances, including NYC’s proposed bill, require that paper bags contain a minimum of 40% postconsumer recycled content.<sup>53</sup>

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49. *See id.* at 269-71.

50. Further research into the availability and cost of paper carryout bags with postconsumer recycled content over 40% is advisable.

51. *See* CAL. PUB. RES. CODE § 42290(c) (Deering 2009).

52. *See, e.g.*, Chet Chaffee & Bernard R. Yaros, Boustead Consulting & Assocs. Ltd., Life Cycle Assessment for Three Types of Grocery Bags—Recyclable Plastic; Compostable, Biodegradable Plastic; and Recycled, Recyclable Paper (2007) (unpublished report), <http://www.savetheplasticbag.com/UploadedFiles/2007%20Boustead%20report.pdf>.

53. *See, e.g.*, N.Y. City Council B. No. 1135 (N.Y.C. 2013).

*C. Amount of Charge*

Generally, bag ordinances that include charges have a single charge apply to all bag types. Charges range from 5 cents (Washington, D.C.) to \$1 (Brownsville, Texas), but most charges are set at a minimum of 10 cents (as with most California ordinances that include a charge on paper bags, including San Francisco). The amount of the bag charge depends on the political will of the community. As discussed below, reports issued by various cities show that even charges of 5 to 10 cents cause a significant reduction in bag consumption.<sup>54</sup> NYC’s proposed bill requires a minimum charge of 10 cents on all carryout bags.<sup>55</sup>

*D. How To Define “Reusable Bag”*

The most basic definition of “reusable bag” is the definition from California’s plastic bag recycling law, which defines “reusable bags” in the following ways: “(1) A bag made of cloth or other machine washable fabric that has handles. (2) A durable plastic bag with handles that is at least 2.25 mils thick and is specifically designed and manufactured for multiple reuse.”<sup>56</sup>

## 1. Thickness

In essence, the standard AB 2449 definition of 2.25 mils thickness for any reusable bag essentially just requires that plastic bags be thicker to qualify as reusable and thus available either for free or for a charge (depending on the jurisdiction). Banning bags under this thickness, but charging for paper or reusables (including thick plastic bags), addresses the “worst offender”—thin bags that break easily and tend to get caught in the wind—yet still gives customers the option to pay for a plastic bag. However, a standard requiring 2.25-mils-thick bags takes more resources, namely fossil fuels, to manufacture. Another option that has not been explored in the United States is banning “ultrathin” (also known as “lightweight”) plastic bags and putting a charge on all other carryout bags. This structure has been adopted in China with a ban on plastic bags less than 0.025 millimeters (0.98 mils)<sup>57</sup> thick and a charge on all

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54. See *infra* Part IV.B.1.

55. N.Y. City Council B. No. 1135 (“Covered stores shall charge a fee of not less than ten cents for each carryout bag provided to any person.”).

56. CAL. PUB. RES. CODE § 42250.

57. Mil is a unit of measurement equal to one thousandth of an inch and is typically used in manufacturing and engineering in the United States.

other carryout bags.<sup>58</sup> The European Commission has also recognized the importance of restricting lightweight plastic carryout bags, which it defines as plastic bags with a thickness of less than 50 microns (1.97 mils).<sup>59</sup>

As of yet, 2.25 mils seems to remain the main standard in the United States because no standard for ultrathin has been proposed.<sup>60</sup> As information about ultrathin plastic bag ban effectiveness becomes available from other countries that have enacted ultrathin plastic bag bans coupled with bag charges, a definition of the ideal ultrathin thickness should become clearer.

## 2. Durability Requirements

In some jurisdictions, durability clauses were added to the definition of reusable bag to increase the quality of bags given away at the register, in order to avoid the outcome where bags made to comply with the minimum 2.25 mils standard would simply be given away for free (2.25 mils plastic bags are relatively inexpensive, around the same price as a paper bag). In practice, these durability standards have in most instances made the reusable bags more expensive and thus discouraged indiscriminate free distribution of bags. Increasing the required thickness of reusable bags to be greater than the current 2.25 mils standard may have a similar effect in practice as well but, as discussed above, would require more fossil fuels.

An example of a standard durability requirement is contained in L.A. County's ordinance, in the relevant portion of the definitions section for "reusable bag," which reads:

*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 Article 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 of a material that can be cleaned or disinfected; (4) does not contain lead in an amount greater than

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58. Ben Block, *China Reports 66-Percent Drop in Plastic Bag Use*, WORLDWATCH INST., <http://www.worldwatch.org/node/6167> (last visited Mar. 25, 2014).

59. European Comm'n, *Environment: Commission Proposes To Reduce the Use of Plastic Bags*, EUROPEAN UNION (Nov. 4, 2013), [http://europa.eu/rapid/press-release\\_IP-13-1017\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1017_en.htm).

60. In another approach, the City of Austin's bag ordinance requires traditional bags to be replaced by reusable bags and the reusable bags made of plastic must be 4 mils thick. See Jeff Stensland, *Council Votes To Beef Up 'Bag Ban,'* TIME WARNER CABLE NEWS (Nov. 9, 2012), <http://austin.twcnews.com/content/news/289156/council-votes-to-beef-up—bag-ban->

89 [parts per million (ppm)], nor contain total heavy metals (lead, hexavalent chromium, cadmium, and mercury) in an amount greater than 99 ppm, unless lower heavy metal limits are imposed by applicable state or federal law, in which case such standards shall apply; (5) has printed on the bag, or on a tag that is permanently affixed to the bag, (i) the name of the manufacturer, (ii) the country where the bag was manufactured, (iii) a statement that the bag does not contain lead, cadmium, or any other heavy metal in toxic amounts, (iv) the percentage of Postconsumer Recycled Material used, if any, and (v) bag care and washing instructions; and (6) if made of plastic, is a minimum of at least 2.25 mils thick.<sup>61</sup>

*E. Make the Charge Apply to All Carryout Bags (Including Reusable Bags)*

Another way to get around thicker plastic bags being given away for free is to require that a minimum charge also apply to reusable bags. The idea of charging for a reusable bag may seem counterintuitive because bag ordinances are meant to promote the use of reusable bags. However, a minimum charge for all bags avoids the loophole seen in some jurisdictions where paper and plastic were subject to bans or charges and cheap reusable bags were being given away for free indiscriminately. The first California municipality to begin exploring the option of charging a minimum for all types of bags (including reusable) was San Francisco, and several other California cities have followed.

Generally, reusable bag charges are for the same amount as paper bag charges (typically 10 cents), but the charge is a minimum charge—a “floor,” not a “ceiling”—so that retailers are not forced to provide cheap reusable bags for 10 cents and may instead opt to provide higher quality reusable bags at a higher price point.

Bag ordinances that require a minimum charge for reusable bags sometimes allow for limited promotional giveaways of reusable bags. This allows stores to promote reusable bag use as well as promote their brand, while at the same time ensuring that reusable bags are not being given away indiscriminately, thereby addressing the concern that free reusable bags would simply replace conventional plastic bags as a “thicker” plastic bag. For example, San Francisco’s expanded ordinances state: “A Store shall not charge the Checkout Bag Charge required under subsection (a) for a Reusable Bag which meets the requirements of this Chapter and which is distributed to a customer without charge during a limited duration promotional event, not to exceed 12 days per year.”<sup>62</sup>

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61. L.A., CAL., MUN. CODE § 195.01(J) (2013).

62. S.F., CAL., ENV’T CODE § 1703.5(d)(2) (2012).

*F. Make the First Violation a Warning*

Officially making the first violation a warning in the language of the ordinance can help appease the fears of retailers. For example, NYC's proposed bill specifically states that any covered store that violates the provision "shall receive a warning notice for the first such violation."<sup>63</sup>

*G. Include Exemptions for Certain Types of Bags*

Plastic bag ordinances are only meant to apply to carryout bags, so most ordinances include a section exempting any other specific types of plastic bags. Most ordinances, at a minimum, exempt bags without handles used within the store to carry unpackaged food (due to health concerns) and bags provided by a pharmacy to carry prescription drugs (due to Health Insurance Portability and Accountability Act's privacy rules).<sup>64</sup> Depending on the jurisdiction, more specific exemptions are often added (e.g., newspaper bags and dry cleaning bags), and the municipal department in charge of enforcement is often given some discretion in determining additional exemptions. For example, NYC's proposed bill defines an exempt bag as:

(i) a bag without handles used to carry produce, meats, dry goods or other non-prepackaged food items to the point of sale within a store or market or to prevent such food items from coming into direct contact with other purchased items; (ii) a bag provided by a pharmacy to carry prescription drugs; or (iii) any other bag to be exempted from the provisions of this chapter as determined by rule of the commissioner.<sup>65</sup>

*H. Include an Exemption for Customers Using "Food Stamps"*

Most ordinances include an exception for customers using state supplemental nutrition assistance programs, commonly known as "food stamps," or other similar programs. Most ordinances specify that this exception only applies to transactions where assistance is being used to pay for all or part of the purchase and some ordinances specify that stores "may" provide an exemption rather than "shall."<sup>66</sup>

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63. N.Y. City Council B. No. 1135 (N.Y.C. 2013).

64. See Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 18, 26, 29, and 42 U.S.C.).

65. N.Y. City Council B. No. 1135.

66. Compare SAN JOSE, CAL., MUN. CODE § 9.10.2020(D) (2013) ("A Retail Establishment may provide a [qualifying customer] with one or more Recycled Paper Bags at no cost . . ."), with L.A., CAL., MUN. CODE § 12.85.060 (2010) ("All stores must provide at the point

*I. Include a Clause That Requires Education and Outreach*

Education and outreach campaigns help ensure the success of bag ordinances by increasing retailers' and the community members' knowledge about the program and focusing on transitioning customers to bring their own bags. It can be useful to include a clause outlining the outreach and education to be undertaken by the relevant city department. For example, NYC's proposed bill includes a clause that requires the Commissioner of the Department of Sanitation to establish outreach and education for residents and covered stores about how to reduce the consumption of single-use bags and increase the use of reusable bags: "To the extent practicable, the commissioner shall seek the assistance of private entities and local not-for-profit organizations to provide and distribute reusable carryout bags to residents and [informational] signs . . . to covered stores."<sup>67</sup>

*J. Specify That Biodegradable (and Maybe Compostable) Bags Are Not Allowed*

Much confusion exists surrounding bioplastics, so much so that the Federal Trade Commission (FTC) has provided detailed guidelines (commonly referred to as "Green Guides") regarding what claims may be made about biodegradable and compostable plastics.<sup>68</sup> Also, the California legislature adopted legislation that made it illegal to refer to plastic bags as "biodegradable," "degradable," or "decomposable" and required that any plastic bag labeled with the term "compostable" or "marine degradable" meet the applicable ASTM International standard specification.<sup>69</sup> The concern is that "biodegradable" is an inherently misleading and misunderstood term with regard to plastics.<sup>70</sup> Bioplastics have different technical definitions and lack standardization testing. While there is an established testing criteria for compostable plastics, namely the ASTM International 6400 standard, experts cannot agree on a testing criteria for biodegradable plastics.<sup>71</sup>

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of sale, free of charge, either reusable bags or recyclable paper carryout bags . . . to any [qualifying customer].").

67. N.Y. City Council B. No. 1135.

68. See Degradable Claims, FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.8 (2013).

69. See CAL. PUB. RES. CODE § 42357 (Deering 2009).

70. See *Confused by the Terms Biodegradable & Biobased*, BIODEGRADABLE PRODS. INST. 1-3, <http://www.bpiworld.org/resources/Documents/PROiB%5B1%5D.pdf> (last visited Mar. 25, 2014).

71. See *Compostable Plastics*, CALIFORNIANS AGAINST WASTE, [http://www.cawrecycles.org/issues/compostable\\_plastics](http://www.cawrecycles.org/issues/compostable_plastics) (last visited Mar. 25, 2014).

With regard to plastic bag ordinances, biodegradable plastic bags should be specifically disallowed and compostable plastic bags should be allowed only (1) if they meet the ASTM International 6400 standard for compostable claims, (2) in jurisdictions where residential curbside composting is well-established and accepts compostable plastic bags, and (3) when they are not given away for free (the carryout bag minimum charge should apply). The reason to only allow compostable bags where there is residential curbside composting is that compostable bags are only better for the environment when they are actually composted in an industrial composting facility (rather than going to a landfill).<sup>72</sup> The prohibition on compostable bags (where a jurisdiction does not actually compost) protects consumers from being misled into paying more for something that they believe is better for the environment, even though the product may not actually be better for the environment, an issue commonly referred to as “greenwashing.”

Due to all of the difficulties inherent in responsible disposal of compostable plastic bags, very few ordinances have incorporated such provisions. One of the only examples of an ordinance that allows for compostable plastic bags in the United States is San Francisco’s expanded plastic bag ordinance.<sup>73</sup> San Francisco’s ordinance meets all of the criteria mentioned above because bags must meet the ASTM International standard, because San Francisco is one of the few cities with well-established residential curbside compost pickup that accepts compostable plastic bags (so bags are much more likely to actually get composted), and because the bag charge applies to compostable plastic bags as well as paper and reusable bags.<sup>74</sup>

#### IV. BUILDING A STRONG ADMINISTRATIVE RECORD FOR AN ORDINANCE

##### A. *Get Specific Harms Caused by Plastic Bags on the Record*

It is important that cities build their case on the public record that (1) single-use plastic bags cause harm to the environment and that (2) plastic bag ordinances have been shown to reduce single-use bag consumption effectively and are beneficial to the environment and economy. As discussed above, this comes into play primarily in the context of lawsuits alleging that plastic bag ordinances may harm the

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72. See Compostable Claims, FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.7.

73. S.F., CAL., ENV’T CODE § 1703.5(a)(2) (2012).

74. See *id.* §§ 1702(b), 1703.5(a)(2).

environment. This section is meant as a primer for cities unsure of what information is available as well as for advocates desiring well-vetted speaking points on the issue. However, it should be noted that this information must be constantly updated because the science and the data collection is continuously evolving.

1. Specific Harm: Local Plastic Bag Pollution
  - a. Plastic Bags Are a Major Component of Litter, Which Can Lead to Urban Blight

Plastic bags are costly, environmentally damaging, and easily preventable sources of litter and pollution. Light and aerodynamic, plastic bags can become airborne even when properly disposed of; bags photodegrade and disintegrate into particles, littering our urban landscape and posing a serious threat to the riparian and marine environments and wildlife. Even when they are no longer obvious to the naked eye, plastic degrades into tiny particles that adsorb toxins and contaminate our food chain as well as water and soil.<sup>75</sup>

Ideally, cities should have specific information on the record regarding the amount of plastic bags in the waste stream, what proportion of litter is made of plastic bags, and the specific problems caused by that litter. For example, the California Integrated Waste Management Board estimates that plastic bags comprise 0.4% of California's total waste stream by weight,<sup>76</sup> but contribute significantly to litter, especially within catch basins (openings in street curbs into which stormwater flows).<sup>77</sup> As another example, L.A. County found that plastic bags constituted 25% of the weight and 19% of the volume of trash collected during the June 10, 2004, "City of Los Angeles Catch Basin Cleaning."<sup>78</sup>

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75. See Matthew Cole et al., *Microplastics as Contaminants in the Marine Environment: A Review*, 62 MARINE POLLUTION BULL. 2588, 2589 (2011); Richard C. Thompson et al., *Lost at Sea: Where Is All the Plastic?*, 304 SCIENCE 838, 838 (2004).

76. Cascadia Consulting Grp., Inc., *Statewide Waste Characterization Study*, CAL. RECYCLE 6 tbl.ES-3 (Dec. 2004), <http://www.calrecycle.ca.gov/Publications/Documents/LocalAsst/34004005.pdf>.

77. MIRIAM GORDON, CAL. COASTAL COMM'N, ELIMINATING LAND BASED DISCHARGES OF MARINE DEBRIS IN CALIFORNIA: A PLAN OF ACTION FROM THE PLASTIC DEBRIS PROJECT 18 (2006) (finding plastic film and bags constitute 43% of trash found in catch basins).

78. L.A. Cnty. Bd. of Supervisors, *An Overview of Carryout Bags in Los Angeles County*, L.A. DEP'T OF PUB. WORKS 24-25 (Aug. 2007), <http://ladpw.org/epd/pdf/PlasticBagReport.pdf>.

b. Costs of Plastic Bag Litter: Local Municipal Litter Cleanup Costs and Other Costs to Municipalities

Plastic pollution remains an immense environmental *and economic* problem. Cities are overwhelmed by the enormous costs of cleaning up litter.<sup>79</sup> Some cities, held to federal pollution limits under the Clean Water Act, face steep fines unless trash is decreased.<sup>80</sup> Typical end-of-pipe management solutions have not been sufficient to keep pace with the enormous amount of plastic trash, and cities are scrambling to protect the environment, save costs, and clean up their communities. Ultimately, cities have sought ways to reduce pollution *at its source*, and increasingly turn to plastic bag ordinances.

Single-use plastic bags are costly to us as both consumers and as taxpayers—the costs of these one-time use products are passed on in the form of higher prices and increased taxes. For example, New Yorkers use 5.2 billion carryout bags per year, the vast majority of which are not recycled.<sup>81</sup> As of 2008, plastic bags accounted for more than 1.7 million tons of residential garbage per week in the United States, and New York City pays an estimated \$10 million annually to transport 100,000 tons of plastic bags to landfills in other states.<sup>82</sup>

As revealed in a report produced on behalf of the Natural Resources Defense Council by Kier Associates, 95 California cities, towns, and taxpayers (communities ranging in size from just over 700 residents to over 4 million) are shouldering nearly \$500 million per year in costs to

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79. See Kier Assocs., *The Cost to West Coast Communities of Dealing with Trash, Reducing Marine Debris*, EPA (Sept. 2012), <http://www.epa.gov/region9/marine-debris/pdf/WestCoastCommsCost-MngMarineDebris.pdf> (finding that ninety West Coast communities are spending more than \$520,000,000—over half a billion dollars—each year to combat litter and curtail marine debris); *Facts at a Glance, DON'T TRASH CALIFORNIA*, CAL. DEP'T OF TRANSP., <http://www.dontrashcalifornia.info/pdf/Statistics.pdf> (last visited Feb. 20, 2014) (finding that state and local governments in California spend over \$375 million per year on litter prevention, cleanup, and disposal, \$72 million of which is spent on cleaning up cups and bags).

80. For example, the total maximum daily load (TMDL) for trash in the Los Angeles River and Ballona Creek—both of which discharge untreated stormwater directly onto local beaches and into the Pacific Ocean—requires a 10% annual reduction in trash entering the waterways, down to a target of zero trash by 2014. Cal. Reg'l Water Quality Control Bd., L.A. Region, *Trash Total Maximum Daily Loads for the Los Angeles River Watershed*, EPA 27-29 (July 27, 2007), <http://www.epa.gov/waters/tmdl/docs/34863-RevisedStaffReport2v2.pdf>. Significant federal penalties could accrue for noncompliance.

81. See Office of Mgmt. & Budget, N.Y.C., *January 2009 Financial Plan: Fiscal Years 2009-2013*, NEW YORK CITY 43 (Jan. 30, 2009), [http://www.nyc.gov/html/omb/downloads/pdf/tech1\\_09.pdf](http://www.nyc.gov/html/omb/downloads/pdf/tech1_09.pdf).

82. Elisabeth Rosenthal, *Is It Time To Bag the Plastic?*, N.Y. TIMES, May 19, 2013, at SR4.

stop litter from becoming pollution.<sup>83</sup> That is money down the drain that could otherwise be invested in public services like schools, firefighters, police, or improving public parks and other open spaces.<sup>84</sup>

Clearly, cities understand the need to move forward and that plastic bag ordinances are good for economic development and saving money. As mentioned earlier, the county and city of L.A. have already adopted bans on plastic bags. L.A. County's EIR estimated that implementation of its bag ordinance could meet the objective of "[r]educ[ing] the County's, Cities', and Flood Control District's costs for prevention, clean-up, and enforcement efforts to reduce litter in the County by \$4 million."<sup>85</sup>

i. Plastic Bags Increase the Expense of Sorting Recyclables and Degrade the Worth of Other Higher-Value Recyclables

Plastic carryout bags often *hinder* municipal recycling by becoming caught in recycling processing equipment, causing recycling sort lines to go offline while waiting for plastic bags to be removed from mechanical gears.<sup>86</sup> Plastic bags require extra energy and costs in the recycling process, which is why Sims Municipal Recycling in NYC supports the proposed NYC bag legislation. According to Sims, in addition to the large plastic garbage bags used to transport commingled material, people

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83. Kier Assocs., *Waste in Our Water: The Annual Cost to California Communities of Reducing Litter that Pollutes Our Waterways*, NATURAL RES. DEF. COUNCIL 1-2, app. B tbl.14 (Aug. 2013), [http://docs.nrdc.org/oceans/files/oce\\_13082701a.pdf](http://docs.nrdc.org/oceans/files/oce_13082701a.pdf) (finding that the top communities are L.A. at \$36.4 million, San Diego at \$14.1 million, Long Beach at \$13.0 million, San Jose at \$8.9 million, Oakland at \$8.4 million, and Sacramento at \$2.9 million). For this study, information about litter capable of becoming aquatic debris "was solicited from 221 communities randomly selected from a list of all California communities. . . . Cost data came from a variety of sources including MS4 [Municipal Separate Storm Sewer] permits; annual budgets and reports; and phone interviews and e-mail correspondence with city hall staff, public works field managers, and knowledgeable nongovernmental organizations." *Id.* Of the 250-plus cities, towns, and municipal agencies contacted, "95 (representing about 20 percent of all California communities and one-third of the state's total population) responded with data relating to some, if not all, of the six cost categories." *Id.*

84. See TEDxTALKS, *TEDxGreatPacificGarbagePatch—Vice Mayor Suja Lowenthal—Growing Costs of Plastic Collection*, YOUTUBE (Dec. 16, 2010), <http://youtu.be/ElvXUt0BHWQ>.

85. Sapphos Envtl. Inc., *SCH No. 2009111104, Ordinances To Ban Plastic Carryout Bags in Los Angeles County: Final Environmental Impact Report*, L.A. DEP'T OF PUB. WORKS, § 2.4.2, at 2-18 (Oct. 28, 2010), <http://ladpw.org/epd/aboutthebag/pdf/FinalEIR.pdf>.

86. See Romer, *supra* note 11, at 445-46 (citing Office of Supervisor Ross Mirkarimi, City & Cnty. of S.F., *Costs Associated with Paper and Plastic Bags* (2007) (on file with author) ("San Francisco's curbside recycling contractor, Norcal Recycling, spends \$494,000 annually on 'classifier' employees given the task of removing non-recyclable materials, including plastic bags, from the recycling streams and \$100,000 annually on clearing machinery jams caused by plastic bags.")).

also try to recycle used plastic bags curbside, even though plastic bags are not recycled (and end up being transported to a landfill) because there is currently no market for dirty plastic bags.<sup>87</sup> According to Maite Quinn at Sims: “We don’t want to see excess plastic bags coming into our stream. It costs us money to handle it and it costs us money to bring it to a landfill.”<sup>88</sup> Local recyclers should be surveyed about plastic carryout bag-related costs, and those costs should be included in the administrative record for a proposed bill.

ii. Misleading Reports by an Industry-Funded Group  
Purport To Show That Cities Do Not Save Money with  
Bans

The National Center for Policy Analysis’ (NCPA) latest report calls into question whether plastic bag bans save cities money.<sup>89</sup> The December 2013 report makes unsupported assumptions with budget figures. For example, the report identifies the percentage of the litter stream that is plastic bags and then creates a budget statistic manufactured from that number without accounting for the disproportionate impact of plastic bag litter (e.g., costly municipal recycling facility downtime to remove bags from clogging screens, labor for bag removal in trees and storm drains, etc.). The report also cites increases in city budgets for all solid waste without specifying what components, if any, these increased budget figures are related to plastic bag cleanup. Similarly, the report cites increases in spending when the budget figures relied upon involve variables related to all solid waste, not just plastic bags. Thus, the report does not cite any coherent evidence about bag ban cost savings for cities.

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87. See *New York City Students Hold Conference To Discuss Plastic Bag Bans*, PLASTICBAGLAWS.ORG (Mar. 4, 2013), <http://plasticbaglaws.org/new-york-city-students-hold-conference-to-discuss-plastic-bag-bans-council-member-pledges-to-introduce-legislation/>; Citizen, Vimeo, *We Use 4 of These a Day, and They’re Kind of the Worst*, UPWORTHY (2013), <http://www.upworthy.com/we-use-4-of-these-a-day-and-theyre-kind-of-the-worst-3>; see also SAMANTHA MACBRIDE, RECYCLING RECONSIDERED: THE PRESENT FAILURE AND FUTURE PROMISE OF ENVIRONMENTAL ACTION IN THE UNITED STATES 179 (2012) (stating that plastic bags only have a domestic recycling market in the United States if the plastic bags are “kept clean, dry, and separate from rigid plastics,” which is nearly impossible in municipal recycling collection programs).

88. *New York City Students Hold Conference To Discuss Plastic Bag Bans*, *supra* note 87.

89. See H. Sterling Burnett, *Policy Rep. No. 353, Do Bans on Plastic Grocery Bags Save Cities Money?*, NAT’L CTR. FOR POLICY ANALYSIS 13 (Dec. 2013), <http://www.ncpa.org/pdfs/st353.pdf>. See *infra* Part V.A.5 for a summary of another NCPA report on purported harm to retailers.

## 2. Specific Harm: Marine Plastic Pollution

Most of the trash in the ocean comes from the land, and most of it is plastic. Eighty percent of marine debris comes from land-based sources.<sup>90</sup> Roughly 60% to 80% of all marine debris is plastic.<sup>91</sup> Plastic can take hundreds of years or more to break down, and some types never truly biodegrade at sea.<sup>92</sup>

In the environment, plastic eventually breaks down into smaller and smaller particles that attract toxic chemicals.<sup>93</sup> Plastic bags tend to photodegrade relatively quickly because they are made from thin film and tend to float in the ocean and be exposed to the sun, unless they are weighed down by sediment. These particles are ingested by wildlife on land and in the ocean and can contaminate our food chain.<sup>94</sup> Some parts of the ocean are like a plastic soup, where there are six pounds of plastic for every pound of plankton.<sup>95</sup> Plastic has reportedly harmed over 663 marine species, most through ingestion and entanglement.<sup>96</sup>

Plastic bags especially hurt turtles because bags floating in water look like jellyfish, a primary food for turtles, and researchers have commonly found plastic bags in the digestive tracts of dead sea turtles.<sup>97</sup>

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90. MICHELLE ALLSOPP ET AL., GREENPEACE INT'L, PLASTIC DEBRIS IN THE WORLD'S OCEANS 6 (2006), available at [http://www.unep.org/regionalseas/marinelitter/publications/docs/plastic\\_ocean\\_report.pdf](http://www.unep.org/regionalseas/marinelitter/publications/docs/plastic_ocean_report.pdf).

91. *Id.* at 9.

92. GORDON, *supra* note 77, at 2.

93. Cole et al., *supra* note 75, at 2589, 2595; Thompson, *supra* note 75, at 838.

94. EPA-909-R-11-006, *Marine Debris in the North Pacific: A Summary of Existing Information and Identification of Data Gaps*, EPA 8 (Nov. 2011), <http://www.epa.gov/region9/marine-debris/pdf/MarineDebris-NPacFinalAprvd.pdf>; see also Yukie Mato et al., *Plastic Resin Pellets as a Transport Medium for Toxic Chemicals in the Marine Environment*, 35 ENVTL. SCI. & TECH. 318, 318 (2001); Lorena M. Rios et al., *Quantification of Persistent Organic Pollutants Adsorbed on Plastic Debris from the Northern Pacific Gyre's "Eastern Garbage Patch,"* 12 J. ENVTL. MONITORING 2226, 2232-33 (2010); Emma L. Teuten et al., *Potential for Plastics to Transport Hydrophobic Contaminants*, 41 ENVTL. SCI. & TECH. 7759, 7762-63 (2007); Emma L. Teuten et al., *Transport and Release of Chemicals from Plastics to the Environment and to Wildlife*, 364 PHIL. TRANSACTIONS ROYAL SOC'Y B. 2027, 2040-42 (2009); Charlotte Stevenson, *Plastic Debris in the California Marine Ecosystem: A Summary of Current Research, Solution Efforts and Data Gaps*, UNIV. S. CAL. SEA GRANT 22-24 (Sept. 2011), <http://www.usc.edu/org/seagrant/research/PlasticReport/PlasticReport.pdf>.

95. C.J. Moore et al., *A Comparison of Neustonic Plastic and Zooplankton Abundance in Southern California's Coastal Waters*, 44 MARINE POLLUTION BULL. 1035, 1038 tbl.3 (2002).

96. *CBD Technical Series No. 67, Impacts of Marine Debris on Biodiversity: Current Status and Potential Solutions*, SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY 9 (2012), <http://www.cbd.int/doc/publications/cbd-ts-67-en.pdf>.

97. See N. Mrosovsky et al., *Leatherback Turtles: The Menace of Plastic*, 58 MARINE POLLUTION BULL. 287, 287-88 (2009) (noting that 37.2% of Leatherback turtle necropsies from 1968 to 2009 showed plastic in their stomachs, and plastic bags were the most commonly found item).

According to the Ocean Conservancy's 2013 International Coastal Cleanup Day data, the fourth most numerous item found was plastic bags.<sup>98</sup> Reports from local beach and/or park cleanup groups should be surveyed about how many plastic bags are collected during cleanups and that information should be included in the administrative record for a proposed bill.

*B. Show That Ordinances Have Been Effective Elsewhere*

1. Efficacy of Plastic Bag Ordinances

As mentioned previously, Ireland imposed one of the first taxes on plastic bags, and it was incredibly effective. The levy there applies to every plastic bag provided at checkout.<sup>99</sup> Ireland has demonstrated a greater than 90% reduction in plastic bag consumption and considerable reduction in litter since the charge went into effect.<sup>100</sup> Moreover, Ireland generated an estimated €12 million in revenue in the levy's first year.<sup>101</sup>

Several plastic bag ordinances have been in effect for at least a couple of years, and reports showing significant decreases in plastic bag consumption as well as litter are now available. For example, the Washington, D.C., 2009 bag tax reduced usage by approximately 50% to 70%, and part of the revenue helps clean up the Anacostia River.<sup>102</sup> Large stores covered by L.A. County's 2010 10-cent single-use bag charge reduced single-use bag usage by 95% and paper bag usage by 30%.<sup>103</sup> Generally, higher bag charge amounts lead to greater reductions in bag consumption.<sup>104</sup>

Since 2012, the city of San Jose has reduced plastic bag litter by 89% in the storm drain system, 60% in the creeks and rivers, and 59% in

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98. INT'L COASTAL CLEANUP, OCEAN CONSERVANCY, WORKING FOR CLEAN BEACHES AND CLEAN WATER: 2013 REPORT, at 14 (2013), available at <http://www.oceanconservancy.org/our-work/international-coastal-cleanup/2013-trash-free-seas-report.pdf>; see also INT'L COASTAL CLEANUP, OCEAN CONSERVANCY, TRACKING TRASH 25 YEARS OF ACTION FOR THE OCEAN: 2011 REPORT, at 5 (2011), available at [http://act.oceanconservancy.org/pdf/Marine\\_Debris\\_2011\\_Report\\_OC.pdf](http://act.oceanconservancy.org/pdf/Marine_Debris_2011_Report_OC.pdf) (indicating that nearly eight million bags were collected during Coastal Cleanup Days from 1986 to 2011).

99. See *Plastic Bags*, IR. DEP'T OF THE ENV'T, CMTY. & LOCAL GOV'T, <http://www.environment.ie/en/Environment/Waste> (last visited Mar. 20, 2014).

100. *Id.*

101. Convery et al., *supra* note 9, at 6.

102. See Seltzer, *supra* note 38.

103. *About the Bag: Announcements*, L.A. CNTY. DEP'T OF PUB. WORKS, <http://dpw.lacounty.gov/epd/aboutthebag> (last visited Jan. 14, 2014).

104. See *Checkout Bag Charge: Economic Impact Report*, S.F. CITY & CNTY. OFFICE OF THE CONTROLLER 6 (Nov. 30, 2011), <http://www.sfcontroller.org/Modules/ShowDocument.aspx?documentid=2721> (comparing bag charge amounts and reduction percentages).

city streets and neighborhoods with a 10-cent-per-bag charge (in addition, the average number of single-use bags used per customer decreased from 3 bags to 0.3 bags per visit).<sup>105</sup>

2. Show That Adopting a Plastic Bag Ordinance Is Part of a National Movement Towards Sustainability

a. U.S. Examples

In California, plastic bag ordinances that cover ninety municipalities have been adopted at the local level.<sup>106</sup> Local source-reduction laws like plastic bag bans have been highly successful because cities and citizens realize they are saving money and protecting the environment with bans on items that can easily be replaced with sustainable alternatives.

Several cities outside of California have adopted ordinances as well, ranging across the United States from Homer, Alaska, to Boulder, Colorado, from Honolulu, Maui, Kauai, and Hawaii Counties to Santa Fe, New Mexico, from Austin, Texas, to Portland, Oregon, and from Seattle, Washington, to Montgomery County, Maryland.<sup>107</sup> NYC introduced an ordinance on August 22, 2013.<sup>108</sup>

At the federal level, Representative Jim Moran (D-VA8) introduced the Trash Reduction Act of 2013, which would amend the Internal Revenue Code to require retailers to pay a 5-cent excise tax on each disposable carryout bag provided to a consumer.<sup>109</sup>

b. International Examples

More than thirty-seven countries or cities outside the United States have enacted bag ban legislation, including China, Italy, Mexico City, and Delhi, as well as some of the world's least-developed nations like

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105. Memorandum from Kerrie Romanow, Dir. Evtl. Serv., City of San Jose, to the San Jose Transp. and Env't Comm. (Nov. 21, 2012), *available at* [http://www.cawrecycles.org/files/SanJose\\_updatememo\\_Nov2012.pdf](http://www.cawrecycles.org/files/SanJose_updatememo_Nov2012.pdf).

106. *Plastic Bags: Local Ordinances*, CALIFORNIANS AGAINST WASTE, [http://www.cawrecycles.org/issues/plastic\\_campaign/plastic\\_bags/local](http://www.cawrecycles.org/issues/plastic_campaign/plastic_bags/local) (last visited Mar. 20, 2014) (noting that sixty-nine ordinances cover ninety California cities and counties).

107. *See National List of Local Bag Ban Ordinances*, CALIFORNIANS AGAINST WASTE, [http://www.cawrecycles.org/issues/plastic\\_campaign/plastic\\_bags/national](http://www.cawrecycles.org/issues/plastic_campaign/plastic_bags/national) (last visited Mar. 25, 2014).

108. N.Y. City Council B. No. 1135 (N.Y.C. 2013).

109. Trash Reduction Act of 2013, H.R. 1686, 113th Cong. (2013). The bill had seven cosponsors as of February 22, 2014. *H.R. 1686: Trash Reduction Act of 2013*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/113/hr1686> (last visited Feb. 22, 2014).

Bangladesh and Ethiopia.<sup>110</sup> Commentators report that China's government estimates it has reduced overall plastic bag use by 66% (an estimated forty billion bags) in the first year of implementation alone.<sup>111</sup>

In November 2013,

[T]he European Commission adopted a proposal that requires Member States to reduce their use of lightweight plastic carrier bags. Member States can choose the measures they find most appropriate, including charges, national reduction targets or a ban under certain conditions.

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Technically, the proposal amends the Packaging and Packaging Waste Directive with two main elements. First, Member States are required to adopt measures to reduce the consumption of plastic carrier bags with a thickness below 50 microns . . . . Second, these measures may include the use of economic instruments, such as charges, national reduction targets, and marketing restrictions . . . .<sup>112</sup>

## V. PLASTICS INDUSTRY STANDARD ARGUMENTS AND ATTEMPTS TO PREEMPT ORDINANCES

### A. *Responses to Standard Arguments Used by Plastics Industry Groups*

#### 1. Plastic Bag Recycling

The plastics industry's biggest argument to discourage banning or otherwise restricting plastic bags is that they can be recycled, either voluntarily or through a legislative mandate. The "reduce-reuse-recycle" mantra, however, makes it clear that recycling is not the best choice. Plastic bag recycling is used by the plastics industry as a distraction from other issues and as a method of forestalling plastic bag source reduction regulation. People typically see recycling as something positive and "green," but the truth is that plastic bag recycling rates are low (under or around 5%). The exact number is hard to determine because most plastic bag recycling statistics are commingled with the recycling rates for other types of plastic films, which are generally recycled at a much higher rate. Of the total plastic films collected for recycling in the United States in 2008, 57% were exported to unspecified nations other than Canada, 29% went to make composite lumber, and a measly 4% went on to make film

110. See *Retail Bags Report*, FLA. DEP'T OF ENVTL. PROT. (Sept. 9, 2013), <http://www.dep.state.fl.us/waste/retailbags/pages/mapsandlist.htm>; *Track the Movement*, CHICOBAG, <http://www.chicobag.com/track-movement> (last visited on Mar. 25, 2014).

111. Block, *supra* note 58.

112. European Comm'n, *supra* note 59.

and bags.<sup>113</sup> Also, plastic bag collection is difficult and not cost effective, and there is a limited market for plastic recycled bags, especially if they are contaminated with food or other substances.<sup>114</sup> In comparison, paper bags are recycled at much higher rates (65%), are generally accepted in curbside municipal recycling programs, and can be recycled back into paper bags.<sup>115</sup>

Consequently, plastic bag recycling programs have failed: for example, voluntary recycling by L.A. County, the city of San Francisco, and Santa Clara County all had lackluster results that took years, wasted municipal funds, and ultimately ended in bans.<sup>116</sup> Even AB 2449, California's attempt at mandating a voluntary recycling program, ended in failure, with the state being unable to say whether the law had even worked.<sup>117</sup> Consequently, industry attempts to substitute voluntary recycling programs or educational efforts should not deter cities from moving directly to source reduction ordinances.<sup>118</sup>

## 2. Bacteria in Reusable Bags

In 2011, the American Chemistry Council (ACC) funded a study authored in part by University of Arizona Professor Charles P. Gerba that looked at the dangers of bacteria in reusable bags. The study found that

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113. MACBRIDE, *supra* note 87, at 200.

114. *Id.* at 179.

115. *Increase Paper Recovery for Recycling*, AM. FOREST & PAPER ASS'N, <http://www.afandpa.org/sustainability/increase-paper-recovery> (last visited Mar. 25, 2014) ("In 2012, 65.1 percent of all paper consumed in the U.S. was recovered for recycling, nearly doubling our rate of paper recovery since 1990.").

116. In 2008, L.A. County launched its voluntary plastic bag recycling program, and in November 2010, the County Department of Public Works reported that the voluntary recycling program "was not successful in achieving its goals" because "[o]ver a two-year period and despite State law requirements under AB 2449 . . . not more than eight (8) stores at any given time had met the minimum participation levels." Letter from Gail Farber, Dir., L.A. Cnty. Dep't of Pub. Works, to the L.A. Cnty. Bd. of Supervisors, L.A. DEP'T OF PUB. WORKS (Nov. 16, 2010), [http://ladpw.org/epd/aboutthebag/PDF/BoardLetters/BoardLetter\\_nov2010.pdf](http://ladpw.org/epd/aboutthebag/PDF/BoardLetters/BoardLetter_nov2010.pdf). Similarly, San Francisco's voluntary program was declared a failure. *See Romer, supra* note 11, at 445-46. Santa Clara County scrapped its voluntary bag reduction program in favor of an ordinance after administrators saw only a 2% increase in reusable bag use. Memorandum from Kevin O'Day, Acting Dir., Dep't Agric. & Envtl. Mgmt., Cnty. of Santa Clara, to Bd. of Supervisors, Cnty. of Santa Clara (Apr. 13, 2010) (on file with author); SANTA CLARA, CAL., ORDINANCE CODE § B11-508 (2011); *see also* CITY OF SAN JOSE, FILE NO. PP09-193, SINGLE-USE CARRYOUT BAG ORDINANCE: DRAFT ENVIRONMENTAL IMPACT REPORT 35 (2010), *available at* <http://www.sanjoseca.gov/index.aspx?NID=2435> ("The City's experience with recycling plastic bags has been that processing costs greatly exceed their value.").

117. *See The Failure of Plastic Bag Recycling*, CALIFORNIANS AGAINST WASTE (Feb. 6, 2012, 2:24 PM), <http://www.cawrecycles.org/node/5232>.

118. *See id.*; *see also infra* Part IV.A.1.b.i (discussing how plastic bags hinder the municipal recycling process).

consumers who were interviewed rarely washed their reusable bags and that some bags contained bacteria but that “[h]and or machine washing reduced the number of bacteria in reusable bags by > 99.9%.”<sup>119</sup> *Consumer Reports* issued a rebuttal pointing out that the bacteria found was minimal and that the sample size of eighty-four bags was too small to be meaningful.<sup>120</sup> A scientist interviewed by *Consumer Reports* noted, “A person eating an average bag of salad greens gets more exposure to these bacteria than if they had licked the insides of the dirtiest bag from this study . . . .”<sup>121</sup> Also, it should be noted that plastic bag ordinances apply only to carryout bags; bags used within stores (e.g., for meat, poultry, fish, etc.) would still be available. Studies such as Gerba’s were simply attempts to distract public attention and delay the adoption of plastic bag legislation, and advocates were able to point out the flaws in the studies as well as the funding sources to quell the concerns of many cities.<sup>122</sup>

In 2012, University of Pennsylvania Institute for Law and Economics issued a research paper that looked at hospital admissions in San Francisco after San Francisco’s bag ban went into effect, concluding that an increase in emergency room visits meant that reusable bags were causing an increase in foodborne illness.<sup>123</sup> The study received a lot of media attention but was flawed because the study focused on a time period where there was no verified increase in reusable bag use in the San Francisco area and no gastrointestinal bacterial infections were linked to reusable bag users.<sup>124</sup> The San Francisco Department of Public Health issued a detailed official response pointing out several other flaws related to the types of bacteria observed.<sup>125</sup> The San Francisco Department of Public Health concluded:

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119. David L. Williams et al., *Assessment of the Potential for Cross-Contamination of Food Products by Reusable Shopping Bags*, 31 FOOD PROTECTION TRENDS 508, 513 (2011).

120. See *Can Reusable Grocery Bags Make You Sick, or Is that Just Baloney?*, CONSUMER REPORTS (July 22, 2010, 1:32 PM), <http://www.consumerreports.org/cro/news/2010/07/can-reusable-grocery-bags-make-you-sick-or-is-that-just-baloney/index.htm>.

121. *Id.*

122. See, e.g., Aaron Sankin, *Plastic Bag Ban Responsible for Spike in E. Coli Infections, Study Says*, HUFFINGTON POST (Feb. 7, 2013, 8:22 PM), [http://www.huffingtonpost.com/2013/02/07/plastic-bag-ban\\_n\\_2641430.html](http://www.huffingtonpost.com/2013/02/07/plastic-bag-ban_n_2641430.html).

123. See Jonathan Klick & Joshua D. Wright, *Grocery Bag Bans and Foodborne Illness* (Univ. of Pa. Inst. for Law & Econ., Research Paper No. 13-2, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2196481](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2196481).

124. See Sankin, *supra* note 122.

125. Letter from Thomás J. Aragón, Health Officer, Dep’t of Pub. Health, City & Cnty. of S.F., to Eileen Shields, Pub. Health Info. Officer, Dep’t of Pub. Health, City & Cnty. of S.F. (Feb. 10, 2013), available at [http://blogs.berkeley.edu/wp-content/uploads/2013/02/SF-Health-Officer-MEMO-re-Reusable-Bag-Study\\_V8-FIN1.pdf](http://blogs.berkeley.edu/wp-content/uploads/2013/02/SF-Health-Officer-MEMO-re-Reusable-Bag-Study_V8-FIN1.pdf).

[T]he hypothesis that there is a significant increase in gastrointestinal foodborne illnesses and deaths due to reusable bags has not been tested, much less demonstrated in this study. It would be a disservice to San Francisco residents and visitors to alarm them by claiming that it has been. It could be useful, however, to remind people to use safe food-handling practices, including maintaining the cleanliness of everything they use to transport, handle, and prepare food.<sup>126</sup>

### 3. Industry Argues That There Will Be a Disproportionate Impact on Low-Income Customers

A favorite argument of the plastics industry is that a bag ban and any accompanying charge on paper bags, or a bag charge, is a regressive tax and will hurt low-income people more than others. Not only is this type of argument a form of prejudice (implying that people with less money are not concerned about the environment and cannot be environmentally protective due to their economic status), but actually, the reverse is true: poorer people get hit harder by both the cost of bags currently embedded in the price of food and by taxes in the form of costs to clean up litter.<sup>127</sup>

Grocery stores currently embed 2 to 5 cents per plastic bag and 5 to 23 cents per paper bag into food prices.<sup>128</sup> Thus, by eliminating the cost to retailers of providing bags free of charge, L.A. County found its ordinance potentially saves approximately \$18 to \$30 per consumer per year.<sup>129</sup> Against these clear savings to taxpayers, the county estimated that the combined costs of the ordinance to each unincorporated county resident is less than \$4 per year, including the cost of purchasing replacement plastic bags for trash liners and their associated taxes.<sup>130</sup> Even more importantly, bag ordinances focus on encouraging customers to *bring their own bag*, not purchase bags; reusable bag giveaway and educational programs that help to provide bags to low-income residents should thus be part of any successful ordinance.

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126. *Id.*

127. *See, e.g.,* BenZolno, *Latinos Ask You To Ban the Bag in California*, YOUTUBE (Aug. 28, 2012), <http://youtu.be/Hc9zLB16ctk>.

128. *See* L.A. CNTY. BD. OF SUPERVISORS, *supra* note 78, at 15-16 tbl.1.

129. *See id.* at 36 tbl.9 (noting that the annual cost of providing plastic bags and paper bags is \$18 and \$30 respectively per consumer, assuming such costs were passed along to consumers).

130. *Implementation of the County of Los Angeles Plastic and Paper Carryout Bag Ordinance*, L.A. CNTY. DEP'T OF PUB. WORKS 1, <http://ladpw.org/epd/aboutthebag/PDF/Bag%20Ban%20Status%20Nov%202012.pdf> (last visited Feb. 22, 2014).

#### 4. Job Loss Due to Loss of Manufacturing Jobs

As political currency goes, “jobs” are sacred, thus it is imperative to understand plastic bag manufacturing in any specific district seeking to enact an ordinance. In L.A. City and County, claims of job loss were overcome by research into the variety of companies making and distributing plastic bags: it was found that only three companies actually manufactured bags in L.A. County, and none in the city proper. Also, most single-use bags were sold to markets outside of California, and all of these companies manufactured items other than plastic bags, including thicker, reusable plastic bags.<sup>131</sup> Consequently, despite its hyperbole, the industry failed to identify empirical and clear evidence that manufacturing jobs would be hurt by bans on single-use plastic bags.<sup>132</sup> Advocates were also assisted by information establishing that California (and L.A.) was home to many reusable bag companies (over twenty companies throughout the state).

#### 5. Job Loss Due to Harm to Retail Businesses

In addition to their December 2013 report,<sup>133</sup> the NCPA also published an August 2012 report that attempted to portray bag reduction ordinances as bad for retail businesses.<sup>134</sup> The report essentially extrapolates conjecture rather than actually completing a comprehensive survey. The report was based on a survey conducted by NCPA in December 2011 that looked at large and small stores in the unincorporated areas of L.A. County covered by the county’s ordinance versus nearby similar stores within city jurisdictions, which were not

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131. For example, Command Packaging is listed on L.A. County’s “About The Bag” Web site as a reusable bag maker and extensively advertises its reusable bags. *See True Reusable Bags Meet Bag Ban Ordinances*, COMMAND PACKAGING, <http://www.commandpackaging.com/true-reusablebags.asp> (last visited Mar. 25, 2014). The company is also listed as a certified purveyor of reusable bags for San Francisco. *See Suppliers of Reusable Checkout Bags—Ordinance Effective October 1st 2012*, S.F. DEP’T OF ENV’T (Aug. 1, 2013), [http://www.sfenvironment.org/sites/default/files/fliers/files/sfe\\_zw\\_vendors\\_reusableplastic.pdf](http://www.sfenvironment.org/sites/default/files/fliers/files/sfe_zw_vendors_reusableplastic.pdf).

132. For example, the Board of Public Works Commission learned, based on October 12, 2011, testimony of Cathy Browne, Crown Poly General Manager, before the L.A. City Board of Public Works, that plastic bags were only 65% of Crown Poly’s gross revenues; of that 65%, 90% of plastic bags were sold to entities outside of L.A. County, thus a ban would only impact jobs related to around 5% of Crown Poly’s overall bag production. *Recording of Bd. of Pub. Works Meeting*, L.A. CNTY. BD. OF PUB. WORKS (Oct. 12, 2011), <https://ia601006.us.archive.org/29/items/BPW2011/20111012.mp3>. Accordingly, it was not clear that any of their workers were at risk of losing their jobs.

133. *See infra* Part IV.A.1.b.ii (questioning report’s conclusion that plastic bag bans do not save cities money).

134. PAMELA VILLARREAL & BARUCH FEIGENBAUM, NAT’L CTR. FOR POLICY ANALYSIS, A SURVEY ON THE ECONOMIC EFFECTS OF LOS ANGELES COUNTY’S PLASTIC BAG BAN (2012).

covered by the ordinance.<sup>135</sup> The survey sought to determine the effects of the county ban, focusing on impacts to sales and employment at affected stores and shopping behaviors of customers. The study claimed to have identified a negative financial impact on stores in the unincorporated areas; however, the study's conclusions were based on survey responses from only 3% of stores. In contrast, an L.A. County staff report looked at the effect on local businesses and found that the ordinance "appears to have a minimal financial impact on local businesses."<sup>136</sup>

*B. Attempts by Plastic Industry Lobbyists To Preempt Local Ordinances at the State or National Level*

As discussed above, California's AB 2449 was a good example of state law preempting a certain type of plastic bag law.<sup>137</sup> AB 2449 specifically preempted fees on plastic bags, and plastics industry groups unsuccessfully argued that field preemption was implied.

1. Illinois

Illinois SB 3442, a bill that masqueraded as an innocent recycling initiative but specifically preempted municipal bag bans, was successfully vetoed in 2012.<sup>138</sup> Even assuming SB 3442's recycling incentives were meritorious, SB 3442's targets were low and expanded the definition of plastic bag recycling to include film, which virtually guaranteed the bill would have little or no impact on pollution or consumer education and/or behavior, but would instead set a preemption precedent.<sup>139</sup>

2. Florida

Under Florida's Energy, Climate Change, and Economic Security Act of 2008, no local or state government may enact any regulation or tax on the use of such retail bags until the state legislature takes action on

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135. *See id.* at 3.

136. *Implementation of the County of Los Angeles Plastic and Paper Carryout Bag Ordinance*, *supra* note 130, at 2.

137. *See infra* Part II.A.

138. Plastic Bag and Film Recycling Act, S. 3442, 97th Gen. Assemb., Reg. Sess. (Ill. 2012); *see* Veto Message, Gov. Pat Quinn to the Honorable Members of the Illinois Senate (Aug. 26, 2012).

139. *Bill Would Prohibit Local Bag Bans*, CAMPAIGN FOR RECYCLING (May 2, 2012), [http://www.campaignforrecycling.org/whats\\_new/recycling\\_news/may2\\_sb3442](http://www.campaignforrecycling.org/whats_new/recycling_news/may2_sb3442).

the issue.<sup>140</sup> The Act requires the Department of Environmental Protection to perform an analysis and submit a report to the legislature regarding the necessity and efficacy of both statewide and local regulation of bags used by consumers to carry products from retail establishments.<sup>141</sup> As of December 2013, the legislature has not taken any action on the issue, so local ordinances may not be adopted.

## VI. BUILDING A LOCAL GRASSROOTS CAMPAIGN

Along with structuring an ordinance properly and getting the pertinent information on the public record, building a local grassroots campaign in support of the ordinance is often a very important part of getting a plastic bag ordinance adopted.

### A. *Building a Coalition*

Building a coordinated coalition of groups interested in supporting a plastic bag ordinance is a critical first step in the process. Advocates interested in starting a campaign should reach out to local environmental groups to see if there is already a campaign underway or if others are interested in starting a campaign. The environmental groups most interested in plastic bag reduction tend to be groups concerned specifically with waste reduction, water and ocean issues, and conservation. Once a coalition has begun to form, members should reach out to a variety of other groups to broaden the coalition, for example, neighborhood associations, business improvement districts, retail associations, political parties, recycling companies, social justice organizations, faith-based organizations, and local student groups. If no local groups are currently working on the issue, advocates should try to coordinate an event that brings together local groups for a film screening and/or panel discussion on the issue to see if groups would like to get involved. The film *Bag It* is often shown at such events, and a “tool kit” for activism is available on the film Web site.<sup>142</sup> Other toolkits are also available on the Web sites of other advocates.<sup>143</sup>

140. FLA. STAT. ANN. § 403.7033 (West 2014).

141. See *id.*; see also *Retail Bags Report for the Legislature*, FLA. DEP’T OF ENVTL. PROT. (Feb. 1, 2010), [http://www.dep.state.fl.us/waste/quick\\_topics/publications/shw/recycling/retail\\_bags/Retail-Bag-Report\\_01Feb10.pdf](http://www.dep.state.fl.us/waste/quick_topics/publications/shw/recycling/retail_bags/Retail-Bag-Report_01Feb10.pdf).

142. *Bag It Town Tool Kit*, BAG IT, [http://www.bagitmovie.com/downloads/bagittown\\_toolkit.pdf](http://www.bagitmovie.com/downloads/bagittown_toolkit.pdf) (last visited Feb. 22, 2014).

143. See, e.g., *Bag Ban Tool Kit*, CALIFORNIANS AGAINST WASTE, <http://www.cawrecycles.org/issues/plasticbagcampaign/toolkit> (last visited Mar. 25, 2014); *Activist’s Toolkit: Ban the Bag in Your City! Keep Plastic Out of the Pacific*, ENV’T CAL., <http://www.environmentcalifornia.org/resources/cae/activists-toolkit-ban-bag-your-city> (last visited Mar. 25, 2014).

When groups decide to work together to promote a plastic bag ordinance, they should meet periodically to discuss what types of policies they support and develop a mission statement in order to grow the coalition. For example, in NYC, the bag coalition is called the “Bag It NYC Coalition.”<sup>144</sup> And in Chicago, the coalition is called “Bring Your Bag Chicago.”<sup>145</sup>

*B. Finding a “Champion” on the City Council*

After an initial coalition has been established, the coalition should meet with local council members to discuss their mission statement and to see if any council members have an interest in pursuing a plastic bag ordinance. If a council member is interested in pursuing an ordinance, the coalition should present the council member with information that the coalition has gathered on ordinance options (including this Article). The council member can then work with staff to develop the exact language of the ordinance, and the coalition members can work on further developing the coalition and encouraging other council members to sign on to the bill as cosponsors.

Council members can also be helpful in identifying local government personnel that can assist with information about relevant local government costs for litter cleanup. It is extremely helpful to have as much information as you can about the quantity and composition of litter and the costs of litter in the specific area in which an ordinance is being considered. Often, this information is disclosed only after local government personnel are directed to begin working on an ordinance, but ideally, this type of information would be solicited early in the advocacy process.

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144. The Bag It NYC Coalition’s name was inspired by the film *Bag It*, but is only loosely affiliated with the film. As of January 3, 2014, coalition members included *Bag It* (the film), BK Greens, Brooklyn Food Coalition, Citizens Campaign for the Environment, Citizens Committee for New York City, Clean Seas Coalition, Einstein Environment Sustainability & Conservation Club at Albert Einstein College of Medicine, Environmental Committee of the Park Slope Food Coop, Green Schools Alliance, Human Impacts Institute, LES Ecology Center, National Resources Defense Council, No Impact Project, NY League of Conservation Voters, PlasticBagLaws.org, Sane Energy Project, Sims Municipal Recycling, Surfrider Foundation NYC, Sustainable Flatbush, The 5 Gyres Institute, The Hewitt School Earth Committee, and The Plastic Bag Mandala/What Moves You. See BAGITNYC, <http://bagitnyc.org/> (last visited Mar. 25, 2014).

145. *Bring Your Own Bag Chicago*, FACEBOOK, <https://www.facebook.com/bringyourbagchicago> (last visited Mar. 25, 2014).

*C. Creating a FAQ and Support Letter and Other Advocacy Tools*

A key part to successful adoption of a plastic bag ordinance is coalition-building and preparation of materials before an ordinance is introduced. For example, in NYC, the bill's cosponsors collaborated with the Bag It NYC Coalition to compose a document that laid out the premise of the bill as well as answers to Frequently Asked Questions (FAQs), and the document was made available to other council members and journalists before the bill was introduced.<sup>146</sup> Also, Bag It NYC Coalition members drafted a sign-on letter expressing their support of the ordinance and invited other groups to sign on.<sup>147</sup>

Sign-on letters in support of legislation generally work best when they are drafted and circulated approximately two weeks prior to a legislative event (the introduction of a bill or a committee or council vote), allowing one week for coalition members to review the letter and suggest edits. If coalition members want to sign on to the letter, they should be asked to send the name, title, logo, and e-signature of the authorizing person to the designated coalition member coordinating the letter. Some coalition members may choose to submit their own letters as well to address specific concerns, but a sign-on letter is an effective means of allowing groups to work together and show their collaboration while minimizing duplicative effort. Sign-on letters should be provided to journalists at the legislative event to underscore the bill's widespread grassroots community support.

Generally, support (either in the form of sign-on letters or direct outreach to council members) should include businesses as well as individual advocates. Often, communities have businesses that already support a bag ban policy or are willing to participate in a pilot bag giveaway (for example, a "Day Without a Bag" educational day where a local market or store gives away some free reusable bags in conjunction with some press and educational material).<sup>148</sup> Events that bring businesses, local government, and the community together and start educating the public about reusable bags are helpful to building support and momentum for an ordinance.

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146. See *Why Reduce Plastic Bag Waste?*, N.Y.C. COUNCIL MEMBER BRAD LANDER, <http://bradlander.com/sites/default/files/images/Plastic%20Bags%20bill%20outline.pdf> (last visited Mar. 25, 2014).

147. Letter from Eric Goldstein et al. to New York City Council Members (Aug. 19, 2013), available at [http://plasticbaglaws.org/wordpress/wp-context/uploads/2011/09/ltr\\_NYC\\_Coalition-Bug-Bill-2013-08-19.pdf](http://plasticbaglaws.org/wordpress/wp-context/uploads/2011/09/ltr_NYC_Coalition-Bug-Bill-2013-08-19.pdf).

148. See, e.g., *A Day with a Bag*, HEAL THE BAY, <http://www.healthebay.org/get-involved/events/day-without-bag> (last visited Mar. 25, 2014).

With all of the specific types of advocacy tools mentioned above, it is critical to make sure these tools are prepared and disseminated timely, before any vote. Likewise, it is imperative to have educational events occur in advance of any legislative hearing or decision. Advocates should be encouraged to meet early with city council members and plan to invite members to events in their respective districts. When arguments and/or questions arise, advocates can then refine letters or FAQ materials to include any necessary rebuttals. Often, objections to an ordinance are untrue and without merit, but the success of the ordinance ultimately rests upon how well the advocates “put out the fire” with outreach, materials, and the other techniques and tools specified in this Article.

#### *D. (Social) Media*

Social media is important for any legislative campaign, but is especially effective because it can leverage grassroots involvement. Social media should involve a variety of things like a Facebook site, ideally a stand-alone Web site, an online petition, photo and video content, and press releases to help generate news stories and editorials. The coalition should have a media committee that coordinates media and messaging amongst the coalition. Ideally, one or more of the coalition member groups could host a Web site with up-to-date information on the legislation events and a petition or registration. One or two people should be designated the administrator of the Facebook page and/or Web site and be in charge of keeping the site up to date, which may include posting interesting articles relevant to plastic bags to maintain an online presence even when there is not a lot of movement with the legislation.

Groups and individuals should use caution when creating online petitions about local bag campaigns. Online petitions work best when they are in support of specific legislation and are released jointly by coalition members at a time when something is happening with the legislation, like a committee vote. Groups and individuals can tend to jump the gun and create their own petitions without a pragmatic goal in mind, which can lead to “petition fatigue,” where people sign one petition and are then less likely to sign another petition that is more focused on actual legislation. Another issue with online petitions is that petitions work best when they are signed by people that live in the legislative district where the legislation is pending. Council members care about what their own constituents think, and most online petitions do not allow for petition signers to be sorted by city council district. So, although general online petitions may seem effective at first glance, they are unlikely to sway council member votes effectively unless they are aimed

at specific legislation and there is a mechanism to discern whether the signers are constituents.

Engaging media professionals can help develop a larger following for the proposed legislation. Press releases should be prepared for significant events, ideally coordinated by one coalition group and incorporating quotes from several members of the coalition. Coalition members should also submit editorials to local newspapers and reach out to media contacts to help develop feature stories about the legislation. Web and film professionals should also be approached.<sup>149</sup> The best media strategy is to promote the bag campaign from various angles with a coordinated message amongst all of the grassroots advocates working on the campaign.

## VII. CONCLUSION

In the face of fierce opposition from the plastics industry and lawsuits, more and more cities are exploring plastic bag reduction ordinances, including NYC, the most populous city in the United States. To date, almost 140 local jurisdictions in the United States have adopted plastic bag ordinances.<sup>150</sup> Cities increasingly understand that where there are sustainable alternatives to a product that has the propensity to become litter, a bag ordinance—particularly a charge on all carryout bags or a ban on plastic and charge on all other carryout bags—is an effective policy approach. Advocates must learn from the lessons of other cities and move forward with plastic bag ordinances in a cohesive manner in order to win the fight against well-funded and sophisticated opponents.

Single-use plastic carryout bags have emerged as an icon of waste, but plastic bag reduction laws can be equally iconic “gateway” sustainability bills that result in a burgeoning environmental awareness for consumers.<sup>151</sup> Plastic bag reduction regulation can be the tipping point for a cultural shift towards more sustainable (and less “throw-away”) behavior; once people start paying attention to convenience packaging like shopping bags, they often begin paying attention to other single-use items as well. Mandating charges on carryout bags has proven to be an incredibly effective mechanism to reduce single-use bag

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149. For example, local filmmakers created *The Immortal Plastic Bag*, a short six-minute film about the New York City Council’s proposed bill to charge for bags, with the help of various coalition members. Citizen, *supra* note 87. The film was released through blogs and through social media.

150. See *Plastic Bags: Local Ordinances*, *supra* note 106; *National List of Local Bag Ban Ordinances*, *supra* note 107.

151. See Romer, *supra* note 3, at 343.

consumption by requiring customers to pay attention to the simple habitual act of taking a bag. The strategies outlined in this Article will be helpful in encouraging a thoughtful and educated approach for advocates to continue to grow this sustainability movement.

**ASSEMBLY, No. 1367**

**STATE OF NEW JERSEY**  
**216th LEGISLATURE**

PRE-FILED FOR INTRODUCTION IN THE 2014 SESSION

**Sponsored by:**

**Assemblywoman LINDA STENDER**

**District 22 (Middlesex, Somerset and Union)**

**SYNOPSIS**

"Carryout Bag Reduction and Recycling Act."

**CURRENT VERSION OF TEXT**

Introduced Pending Technical Review by Legislative Counsel



***Exhibit C1***

1 AN ACT concerning disposable and reusable carryout bags, and  
2 supplementing Title 13 of the Revised Statutes.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State  
5 of New Jersey:

6

7 1. This act shall be known and may be cited as the "Carryout  
8 Bag Reduction and Recycling Act."

9

10 2. a. The Legislature finds and declares that:

11 (1) The production of plastic and paper carryout bags in the  
12 United States has significant and detrimental environmental impacts  
13 each year, using over 12 million barrels of oil, cutting down over 14  
14 million trees, and killing thousands of marine animals through  
15 ingestion and entanglement;

16 (2) Each year, an estimated 14 billion plastic carryout bags and  
17 10 billion paper carryout bags are used in the United States alone, of  
18 which only one percent of the plastic carryout bags are returned for  
19 recycling;

20 (3) Most plastic carryout bags when biodegrading become toxic,  
21 contaminating soil and waterways, and plastic and paper carryout bags  
22 take up a large volume of the solid waste in landfills; and

23 (4) The plastic and paper carryout bags that are recycled must  
24 go through a lengthy and labor-intensive process of re-integration and  
25 renewal, using many chemicals, intense heat, and water.

26 b. The Legislature therefore determines that the State should:

27 (1) require stores to impose a fee for the use of disposable  
28 carryout bags so as to discourage their use;

29 (2) allow stores to provide a credit for each bag provided by the  
30 customer; and

31 (3) require disposable carryout bags to be recyclable plastic  
32 bags or recyclable paper bags.

33

34 3. As used in this act:

35 "Carryout bag" means a bag provided by a store at the point of  
36 sale for customers to carry their goods out of the store, but shall not  
37 include (1) a bag used inside a store to package bulk items,  
38 unwrapped prepared food or bakery items, prescription drugs,  
39 frozen food, meat or fish, or flowers, (2) a paper carryout bag  
40 provided to a customer to carry out food from a restaurant with  
41 seating, or (3) a plastic bag used to package newspapers or dry-  
42 cleaning.

43 "Department" means the Department of Environmental  
44 Protection.

45 "Disposable carryout bag" means a carryout bag that is made of  
46 any material and that is not a reusable bag.

1 "Operator" means a person in control of, or having daily  
2 responsibility for, the daily operation of a store, which may include,  
3 but is not limited to, the owner of the store.

4 "Recyclable paper bag" means a paper carryout bag that meets  
5 all of the following requirements: (1) the bag contains no old  
6 growth fiber; (2) the bag is 100% recyclable and contains a  
7 minimum of 40% post-consumer recycled content; and (3) the bag  
8 displays the words "Please Recycle This Bag" in a highly visible  
9 manner.

10 "Recyclable plastic bag" means a plastic carryout bag that meets  
11 all of the following requirements: (1) the bag is made of high-  
12 density polyethylene film marked with the SPI resin code 2, or low-  
13 density polyethylene film marked with the SPI resin code 4; and (2)  
14 the bag displays the words "Please Recycle This Bag" in a highly  
15 visible manner.

16 "Reusable bag" means (1) a bag made of cloth or other machine  
17 washable fabric that has handles, or (2) a durable plastic bag with  
18 handles that is at least 2.25 mils thick and is specifically designed  
19 and manufactured for multiple reuse.

20 "Store" means a convenience store, bakery, drugstore,  
21 supermarket, liquor store, restaurant, delicatessen, or retail  
22 establishment that provides carryout bags to its customers as a  
23 result of the sale of a product, but shall not include a farm market as  
24 defined pursuant to section 3 of P.L.1983, c.31 (C.4:1C-3).

25

26 4. a. Beginning January 1, 2014, every operator shall impose a  
27 \$0.05 fee on every disposable carryout bag that is provided to a  
28 customer.

29 b. Except as provided in subsection c. of this section, the  
30 operator shall retain \$.01 of the fee charged pursuant to this section,  
31 and shall remit the remaining \$.04 to the Department of  
32 Environmental Protection.

33 c. An operator may establish a voluntary carryout bag credit  
34 program pursuant to section 5 of this act. Any operator that  
35 establishes a voluntary carryout bag credit program may retain \$.02  
36 of the fee charged pursuant to this section, and shall remit the  
37 remaining \$.03 to the Department of Environmental Protection.

38 d. The operator shall indicate the total number of disposable  
39 carryout bags provided, and the total fee charged pursuant to  
40 subsection a. of this section, on the sales or other receipt given to  
41 the customer.

42

43 5. a. Any operator may establish a voluntary carryout bag  
44 credit program pursuant to this section. Under the program, the  
45 operator shall:

- 1 (1) provide a credit to the customer of \$.05 for each carryout  
2 bag provided by the customer for use in the transaction, regardless  
3 of whether the bag is plastic or paper or is a reusable bag;
- 4 (2) provide the total number of credits for the number of  
5 carryout bags that are reasonably required to carry the purchased  
6 goods;
- 7 (3) prominently advertise its participation in, and the substance  
8 of, the carryout bag credit program at each of its checkout registers;  
9 and
- 10 (4) indicate the total amount credited pursuant to this section on  
11 the sales or other receipt of the customer who provides the carryout  
12 bags.
- 13 b. An operator that establishes a voluntary carryout bag credit  
14 program shall not be required to provide a \$.05 credit for that  
15 portion of a customer's purchase for which the customer declines  
16 the use of a carryout bag.
- 17 c. Any operator that establishes a voluntary carryout bag credit  
18 program shall register with the Department of Environmental  
19 Protection on a form prescribed by the department.  
20
- 21 6. Beginning on January 1, 2015, an operator shall not provide  
22 a disposable carryout bag unless the disposable carryout bag is a  
23 recyclable plastic bag or recyclable paper bag.  
24
- 25 7. a. Beginning April 1, 2014, and quarterly thereafter, every  
26 operator shall submit a report, in writing, to the department and  
27 shall remit the dollar equivalent of the amount collected from  
28 customers as disposable carryout bag fees pursuant to section 4 of  
29 this act, less the amount authorized to be retained by the operator.  
30 The report shall document the total fees collected from the  
31 distribution of disposable carryout bags, the total amount retained  
32 by the operator, and the total amount credited to customers who  
33 provide carryout bags under a voluntary carryout bag credit  
34 program established pursuant to section 5 of this act.
- 35 b. The revenues from the fees on disposable carryout bags shall  
36 be deposited by the department in the Barnegat Bay Restoration  
37 Fund established pursuant to section 8 of this act and shall be used  
38 for the purposes of the fund.  
39
- 40 8. a. There is established in the Department of Environmental  
41 Protection a special, nonlapsing fund to be known as the "Barnegat  
42 Bay Restoration Fund." The fund shall be administered by the  
43 Commissioner of Environmental Protection and shall be credited  
44 with:
- 45 (1) moneys received from operators from fees charged for the  
46 provision of disposable carryout bags pursuant to section 4 of this  
47 act;

- 1 (2) such moneys as are appropriated by the Legislature; and  
2 (3) any return on investment of moneys deposited in the fund.  
3 b. Moneys in the fund shall be annually appropriated and used  
4 for programs to improve the water quality of the Barnegat Bay.  
5  
6 9. The department shall be responsible for the implementation and  
7 enforcement of this act. The department shall maintain all submitted  
8 reports in order to track progress in reducing the volume of  
9 disposable carryout bags.  
10  
11 10. a. Whenever the Commissioner of Environmental Protection  
12 finds that a person has violated any provision of this act, or any rule  
13 or regulation adopted pursuant to this act, the commissioner may:  
14 (1) Issue an order in accordance with subsection b. of this  
15 section requiring any such person to comply with the provision; or  
16 (2) Bring a civil action in accordance with subsection c. of this  
17 section; or  
18 (3) Levy a civil administrative penalty in accordance with  
19 subsection d. of this section; or  
20 (4) Bring an action for a civil penalty in accordance with  
21 subsection e. of this section.  
22 Recourse to any of the remedies available under this section shall  
23 not preclude recourse to any of the other remedies prescribed in this  
24 section or by any other applicable law.  
25 b. Whenever, on the basis of available information, the  
26 commissioner finds a person in violation of any provision of this  
27 act, or any rule or regulation adopted pursuant thereto, the  
28 commissioner may issue an order: (1) specifying the provision or  
29 provisions of the law, rule, or regulation of which the person is in  
30 violation; (2) citing the action which constituted the violation; (3)  
31 requiring compliance with the provision or provisions violated; and  
32 (4) providing notice to the person of the right to a hearing on the  
33 matters contained in the order.  
34 c. The commissioner is authorized to institute a civil action in  
35 Superior Court for appropriate relief from any violation this act, or  
36 any rule or regulation adopted pursuant thereto. Such relief may  
37 include, singly or in combination:  
38 (1) A temporary or permanent injunction; and  
39 (2) Assessment of the violator for the costs of any investigation  
40 or inspection, and for the reasonable costs of preparing and bringing  
41 legal action under this subsection.  
42 d. The commissioner is authorized to assess a civil  
43 administrative penalty of up to \$100 for the first violation, up to  
44 \$200 for the second violation, and up to \$500 for the third and each  
45 subsequent violation. No civil administrative penalty shall be  
46 levied pursuant to this section until after the party has been notified  
47 by certified mail or personal service. The notice shall: (1) identify  
48 the section of the law, rule, or regulation that has been violated; (2)

1 recite the facts alleged to constitute the violation; (3) state the  
2 amount of the civil administrative penalties to be imposed; and (4)  
3 affirm the rights of the alleged violator to a hearing. The ordered  
4 party shall have 20 days from receipt of the notice within which to  
5 deliver to the commissioner a written request for a hearing. After  
6 the hearing and upon finding that a violation has occurred, the  
7 commissioner may issue a final order after assessing the amount of  
8 the penalty specified in the notice. If no hearing is requested, the  
9 notice shall become a final order after the expiration of the 20-day  
10 period. Payment of the penalty is due when a final order is issued  
11 or the notice becomes a final order. The authority to levy an  
12 administrative penalty is in addition to all other enforcement  
13 provisions in this act and in any other applicable law, rule, or  
14 regulation, and the payment of any penalty shall not be deemed to  
15 affect the availability of any other enforcement provisions in  
16 connection with the violation for which the assessment is levied.  
17 Any civil administrative penalty assessed under this section may be  
18 compromised by the commissioner upon such terms and conditions  
19 as the commissioner may establish by rules or regulation.

20 e. A person who violates any provision of this act, or any rule  
21 or regulation adopted pursuant thereto, an administrative order  
22 issued pursuant to subsection b. of this section, or a court order  
23 issued pursuant to subsection c. of this section, or who fails to pay a  
24 civil administrative penalty in full pursuant to subsection d. of this  
25 section, shall be subject, upon order of a court, to a civil penalty not  
26 to exceed \$500 for the violation. Any civil penalty imposed  
27 pursuant to this subsection may be collected with costs in a  
28 summary proceeding pursuant to the "Penalty Enforcement Law of  
29 1999," P.L.1999, c.274 (C.2A:58-10 et seq.). The Superior Court  
30 and the municipal court shall have jurisdiction to enforce the  
31 provisions of the "Penalty Enforcement Law of 1999" in connection  
32 with this act.

33  
34 11. The department shall adopt, pursuant to the "Administrative  
35 Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), such rules  
36 and regulations as are necessary to effectuate the purposes of this  
37 act.

38  
39 12. This act shall take effect immediately.

40  
41

42 STATEMENT

43

44 This bill would be known as the "Carryout Bag Reduction and  
45 Recycling Act" and would (1) require stores to impose a \$.05 fee  
46 per bag for the use of disposable carryout bags, (2) allow stores to  
47 provide a \$.05 credit for each bag provided by a customer, and (3)

1 require disposable carryout bags provided by stores to be recyclable  
2 by January 1, 2015.

3 The bill would require the operator of any store to impose a \$.05  
4 fee on every disposable carryout bag provided to a customer. The  
5 operator would retain \$.01 and remit the remaining \$.04 to the  
6 Department of Environmental Protection. The operator of a store  
7 may also establish a voluntary carryout bag credit program, where a  
8 customer would be provided a credit of \$.05 for each carryout bag  
9 the customer provides. Should an operator establish a voluntary  
10 carryout bag credit program, the operator would be authorized to  
11 retain \$.02 of every \$.05 imposed for providing a disposable  
12 carryout bag to a customer.

13 Under the bill, the provisions would apply to the operator of a  
14 convenience store, bakery, drugstore, supermarket, liquor store,  
15 restaurant, delicatessen or retail establishment that provides  
16 carryout bags to its customers but would not apply to a farm market  
17 as defined pursuant to section 3 of P.L.1981, c.31 (C.4:1C-3). The  
18 committee substitute would not apply to (1) bags used inside of a  
19 store to package bulk items, unwrapped prepared food or bakery  
20 items, prescription drugs, frozen food, meat or fish, or flowers, (2)  
21 paper carryout bags provided to a customer to carry out food from a  
22 restaurant with seating, or (3) plastic bags used to package  
23 newspapers or dry-cleaning.

24 Beginning in 2015, the operator of any store would be prohibited  
25 from providing a disposable carryout bag unless the carryout bag is  
26 recyclable.

27 The revenue from the fees remitted to the department would be  
28 deposited in the Barnegat Bay Restoration Fund established in the  
29 committee substitute, and would be used for programs to improve  
30 the water quality of the Barnegat Bay.

31 The bill would require a store operator to submit a quarterly  
32 report to the Department of Environmental Protection together with  
33 the remittance of the dollar equivalent of the amount collected from  
34 customers as disposable carryout bag fees, less the amount  
35 authorized to be retained by the operator. The report would also be  
36 required to document the total fees collected from the distribution  
37 of disposable carryout bags, the total amount retained by the  
38 operator, and the total amount credited to customers who provide  
39 carryout bags under a voluntary carryout bag credit program as  
40 described in the committee substitute.

41 Finally, the bill would authorize the imposition of civil  
42 administrative penalties for violations of \$100 for the first violation,  
43 \$200 for the second violation, and \$500 for the third and subsequent  
44 violations. The committee substitute would also authorize the  
45 Commissioner of Environmental Protection to issue an order to  
46 require compliance with the act, to bring a civil action, and to bring  
47 an action for a civil penalty, for a violation of the act.

# SENATE, No. 563

## STATE OF NEW JERSEY 216th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2014 SESSION

**Sponsored by:**

**Senator BOB SMITH**

**District 17 (Middlesex and Somerset)**

**Senator JIM WHELAN**

**District 2 (Atlantic)**

**Senator LINDA R. GREENSTEIN**

**District 14 (Mercer and Middlesex)**

**SYNOPSIS**

"Carryout Bag Reduction and Recycling Act."

**CURRENT VERSION OF TEXT**

Introduced Pending Technical Review by Legislative Counsel



1 AN ACT concerning disposable and reusable carryout bags, and  
2 supplementing Title 13 of the Revised Statutes.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State  
5 of New Jersey:

6

7 1. This act shall be known and may be cited as the "Carryout  
8 Bag Reduction and Recycling Act."

9

10 2. a. The Legislature finds and declares that:

11 (1) The production of plastic and paper carryout bags in the  
12 United States has significant and detrimental environmental impacts  
13 each year, using over 12 million barrels of oil, cutting down over 14  
14 million trees, and killing thousands of marine animals through  
15 ingestion and entanglement;

16 (2) Each year, an estimated 14 billion plastic carryout bags and  
17 10 billion paper carryout bags are used in the United States alone, of  
18 which only one percent of the plastic carryout bags are returned for  
19 recycling;

20 (3) Most plastic carryout bags when biodegrading become toxic,  
21 contaminating soil and waterways, and plastic and paper carryout bags  
22 take up a large volume of the solid waste in landfills; and

23 (4) The plastic and paper carryout bags that are recycled must  
24 go through a lengthy and labor-intensive process of re-integration and  
25 renewal, using many chemicals, intense heat, and water.

26 b. The Legislature therefore determines that the State should:

27 (1) require stores to impose a fee for the use of disposable  
28 carryout bags so as to discourage their use;

29 (2) allow stores to provide a credit for each bag provided by the  
30 customer; and

31 (3) require disposable carryout bags to be recyclable plastic  
32 bags or recyclable paper bags.

33

34 3. As used in this act:

35 "Carryout bag" means a bag provided by a store at the point of  
36 sale for customers to carry their goods out of the store, but shall not  
37 include (1) a bag used inside a store to package bulk items,  
38 unwrapped prepared food or bakery items, prescription drugs,  
39 frozen food, meat or fish, or flowers, (2) a paper carryout bag  
40 provided to a customer to carry out food from a restaurant with  
41 seating, or (3) a plastic bag used to package newspapers or dry-  
42 cleaning.

43 "Department" means the Department of Environmental  
44 Protection.

45 "Disposable carryout bag" means a carryout bag that is made of  
46 any material and that is not a reusable bag.

1 "Operator" means a person in control of, or having daily  
2 responsibility for, the daily operation of a store, which may include,  
3 but is not limited to, the owner of the store.

4 "Recyclable paper bag" means a paper carryout bag that meets  
5 all of the following requirements: (1) the bag contains no old  
6 growth fiber; (2) the bag is 100% recyclable and contains a  
7 minimum of 40% post-consumer recycled content; and (3) the bag  
8 displays the words "Please Recycle This Bag" in a highly visible  
9 manner.

10 "Recyclable plastic bag" means a plastic carryout bag that meets  
11 all of the following requirements: (1) the bag is made of high-  
12 density polyethylene film marked with the SPI resin code 2, or low-  
13 density polyethylene film marked with the SPI resin code 4; and (2)  
14 the bag displays the words "Please Recycle This Bag" in a highly  
15 visible manner.

16 "Reusable bag" means (1) a bag made of cloth or other machine  
17 washable fabric that has handles, or (2) a durable plastic bag with  
18 handles that is at least 2.25 mils thick and is specifically designed  
19 and manufactured for multiple reuse.

20 "Store" means a convenience store, bakery, drugstore,  
21 supermarket, liquor store, restaurant, delicatessen, or retail  
22 establishment that provides carryout bags to its customers as a  
23 result of the sale of a product, but shall not include a farm market as  
24 defined pursuant to section 3 of P.L.1983, c.31 (C.4:1C-3).

25

26 4. a. Beginning January 1, 2014, every operator shall impose a  
27 \$0.05 fee on every disposable carryout bag that is provided to a  
28 customer.

29 b. Except as provided in subsection c. of this section, the  
30 operator shall retain \$.01 of the fee charged pursuant to this section,  
31 and shall remit the remaining \$.04 to the Department of  
32 Environmental Protection.

33 c. An operator may establish a voluntary carryout bag credit  
34 program pursuant to section 5 of this act. Any operator that  
35 establishes a voluntary carryout bag credit program may retain \$.02  
36 of the fee charged pursuant to this section, and shall remit the  
37 remaining \$.03 to the Department of Environmental Protection.

38 d. The operator shall indicate the total number of disposable  
39 carryout bags provided, and the total fee charged pursuant to  
40 subsection a. of this section, on the sales or other receipt given to  
41 the customer.

42

43 5. a. Any operator may establish a voluntary carryout bag  
44 credit program pursuant to this section. Under the program, the  
45 operator shall:

- 1 (1) provide a credit to the customer of \$.05 for each carryout  
2 bag provided by the customer for use in the transaction, regardless  
3 of whether the bag is plastic or paper or is a reusable bag;
- 4 (2) provide the total number of credits for the number of  
5 carryout bags that are reasonably required to carry the purchased  
6 goods;
- 7 (3) prominently advertise its participation in, and the substance  
8 of, the carryout bag credit program at each of its checkout registers;  
9 and
- 10 (4) indicate the total amount credited pursuant to this section on  
11 the sales or other receipt of the customer who provides the carryout  
12 bags.
- 13 b. An operator that establishes a voluntary carryout bag credit  
14 program shall not be required to provide a \$.05 credit for that  
15 portion of a customer's purchase for which the customer declines  
16 the use of a carryout bag.
- 17 c. Any operator that establishes a voluntary carryout bag credit  
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22 a disposable carryout bag unless the disposable carryout bag is a  
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24
- 25 7. a. Beginning April 1, 2014, and quarterly thereafter, every  
26 operator shall submit a report, in writing, to the department and  
27 shall remit the dollar equivalent of the amount collected from  
28 customers as disposable carryout bag fees pursuant to section 4 of  
29 this act, less the amount authorized to be retained by the operator.  
30 The report shall document the total fees collected from the  
31 distribution of disposable carryout bags, the total amount retained  
32 by the operator, and the total amount credited to customers who  
33 provide carryout bags under a voluntary carryout bag credit  
34 program established pursuant to section 5 of this act.
- 35 b. The revenues from the fees on disposable carryout bags shall  
36 be deposited by the department in the Barnegat Bay Restoration  
37 Fund established pursuant to section 8 of this act and shall be used  
38 for the purposes of the fund.  
39
- 40 8. a. There is established in the Department of Environmental  
41 Protection a special, nonlapsing fund to be known as the "Barnegat  
42 Bay Restoration Fund." The fund shall be administered by the  
43 Commissioner of Environmental Protection and shall be credited  
44 with:
- 45 (1) moneys received from operators from fees charged for the  
46 provision of disposable carryout bags pursuant to section 4 of this  
47 act;

1 (2) such moneys as are appropriated by the Legislature; and

2 (3) any return on investment of moneys deposited in the fund.

3 b. Moneys in the fund shall be annually appropriated and used  
4 for programs to improve the water quality of the Barnegat Bay.

5

6 9. The department shall be responsible for the implementation and  
7 enforcement of this act. The department shall maintain all submitted  
8 reports in order to track progress in reducing the volume of  
9 disposable carryout bags.

10

11 10. a. Whenever the Commissioner of Environmental Protection  
12 finds that a person has violated any provision of this act, or any rule  
13 or regulation adopted pursuant to this act, the commissioner may:

14 (1) Issue an order in accordance with subsection b. of this  
15 section requiring any such person to comply with the provision; or

16 (2) Bring a civil action in accordance with subsection c. of this  
17 section; or

18 (3) Levy a civil administrative penalty in accordance with  
19 subsection d. of this section; or

20 (4) Bring an action for a civil penalty in accordance with  
21 subsection e. of this section.

22 Recourse to any of the remedies available under this section shall  
23 not preclude recourse to any of the other remedies prescribed in this  
24 section or by any other applicable law.

25 b. Whenever, on the basis of available information, the  
26 commissioner finds a person in violation of any provision of this  
27 act, or any rule or regulation adopted pursuant thereto, the  
28 commissioner may issue an order: (1) specifying the provision or  
29 provisions of the law, rule, or regulation of which the person is in  
30 violation; (2) citing the action which constituted the violation; (3)  
31 requiring compliance with the provision or provisions violated; and  
32 (4) providing notice to the person of the right to a hearing on the  
33 matters contained in the order.

34 c. The commissioner is authorized to institute a civil action in  
35 Superior Court for appropriate relief from any violation this act, or  
36 any rule or regulation adopted pursuant thereto. Such relief may  
37 include, singly or in combination:

38 (1) A temporary or permanent injunction; and

39 (2) Assessment of the violator for the costs of any investigation  
40 or inspection, and for the reasonable costs of preparing and bringing  
41 legal action under this subsection.

42 d. The commissioner is authorized to assess a civil  
43 administrative penalty of up to \$100 for the first violation, up to  
44 \$200 for the second violation, and up to \$500 for the third and each  
45 subsequent violation. No civil administrative penalty shall be  
46 levied pursuant to this section until after the party has been notified  
47 by certified mail or personal service. The notice shall: (1) identify  
48 the section of the law, rule, or regulation that has been violated; (2)

1 recite the facts alleged to constitute the violation; (3) state the  
2 amount of the civil administrative penalties to be imposed; and (4)  
3 affirm the rights of the alleged violator to a hearing. The ordered  
4 party shall have 20 days from receipt of the notice within which to  
5 deliver to the commissioner a written request for a hearing. After  
6 the hearing and upon finding that a violation has occurred, the  
7 commissioner may issue a final order after assessing the amount of  
8 the penalty specified in the notice. If no hearing is requested, the  
9 notice shall become a final order after the expiration of the 20-day  
10 period. Payment of the penalty is due when a final order is issued  
11 or the notice becomes a final order. The authority to levy an  
12 administrative penalty is in addition to all other enforcement  
13 provisions in this act and in any other applicable law, rule, or  
14 regulation, and the payment of any penalty shall not be deemed to  
15 affect the availability of any other enforcement provisions in  
16 connection with the violation for which the assessment is levied.  
17 Any civil administrative penalty assessed under this section may be  
18 compromised by the commissioner upon such terms and conditions  
19 as the commissioner may establish by rules or regulation.

20 e. A person who violates any provision of this act, or any rule  
21 or regulation adopted pursuant thereto, an administrative order  
22 issued pursuant to subsection b. of this section, or a court order  
23 issued pursuant to subsection c. of this section, or who fails to pay a  
24 civil administrative penalty in full pursuant to subsection d. of this  
25 section, shall be subject, upon order of a court, to a civil penalty not  
26 to exceed \$500 for the violation. Any civil penalty imposed  
27 pursuant to this subsection may be collected with costs in a  
28 summary proceeding pursuant to the "Penalty Enforcement Law of  
29 1999," P.L.1999, c.274 (C.2A:58-10 et seq.). The Superior Court  
30 and the municipal court shall have jurisdiction to enforce the  
31 provisions of the "Penalty Enforcement Law of 1999" in connection  
32 with this act.

33  
34 11. The department shall adopt, pursuant to the "Administrative  
35 Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), such rules  
36 and regulations as are necessary to effectuate the purposes of this  
37 act.

38  
39 12. This act shall take effect immediately.

40  
41

42 STATEMENT

43

44 This bill would be known as the "Carryout Bag Reduction and  
45 Recycling Act" and would (1) require stores to impose a \$.05 fee  
46 per bag for the use of disposable carryout bags, (2) allow stores to  
47 provide a \$.05 credit for each bag provided by a customer, and (3)

1 require disposable carryout bags provided by stores to be recyclable  
2 by January 1, 2015.

3 The bill would require the operator of any store to impose a \$.05  
4 fee on every disposable carryout bag provided to a customer. The  
5 operator would retain \$.01 and remit the remaining \$.04 to the  
6 Department of Environmental Protection. The operator of a store  
7 may also establish a voluntary carryout bag credit program, where a  
8 customer would be provided a credit of \$.05 for each carryout bag  
9 the customer provides. Should an operator establish a voluntary  
10 carryout bag credit program, the operator would be authorized to  
11 retain \$.02 of every \$.05 imposed for providing a disposable  
12 carryout bag to a customer.

13 Under the bill, the provisions would apply to the operator of a  
14 convenience store, bakery, drugstore, supermarket, liquor store,  
15 restaurant, delicatessen or retail establishment that provides  
16 carryout bags to its customers but would not apply to a farm market  
17 as defined pursuant to section 3 of P.L.1981, c.31 (C.4:1C-3). The  
18 bill would not apply to (1) bags used inside of a store to package  
19 bulk items, unwrapped prepared food or bakery items, prescription  
20 drugs, frozen food, meat or fish, or flowers, (2) paper carryout bags  
21 provided to a customer to carry out food from a restaurant with  
22 seating, or (3) plastic bags used to package newspapers or dry-  
23 cleaning.

24 Beginning in 2015, the operator of any store would be prohibited  
25 from providing a disposable carryout bag unless the carryout bag is  
26 recyclable.

27 The revenue from the fees remitted to the department would be  
28 deposited in the Barnegat Bay Restoration Fund established in the  
29 bill, and would be used for programs to improve the water quality  
30 of the Barnegat Bay.

31 The bill would require a store operator to submit a quarterly  
32 report to the Department of Environmental Protection together with  
33 the remittance of the dollar equivalent of the amount collected from  
34 customers as disposable carryout bag fees, less the amount  
35 authorized to be retained by the operator. The report would also be  
36 required to document the total fees collected from the distribution  
37 of disposable carryout bags, the total amount retained by the  
38 operator, and the total amount credited to customers who provide  
39 carryout bags under a voluntary carryout bag credit program as  
40 described in the bill.

41 Finally, the bill would authorize the imposition of civil  
42 administrative penalties for violations of \$100 for the first violation,  
43 \$200 for the second violation, and \$500 for the third and subsequent  
44 violations. The bill would also authorize the Commissioner of  
45 Environmental Protection to issue an order to require compliance  
46 with the act, to bring a civil action, and to bring an action for a civil  
47 penalty, for a violation of the act.