

CITY OF MADISON  
**CITY ATTORNEY'S OFFICE**  
Room 401, CCB  
266-4511

**MEMORANDUM**

TO: Solid Waste Advisory Committee; Common Council

FROM: Doran Viste, Assistant City Attorney

DATE: April 28, 2016

RE: Recommendation to Place on File (Legislative File ID # 30771)

On July 16, 2013, File [30771](#) was introduced and referred to the Solid Waste Advisory Committee. The resolution would have directed staff to form a team to make a report to the Common Council on the feasibility of banning plastic shopping bags in the City. On September 5, 2013, the Solid Waste Advisory Committee was scheduled to consider the resolution. However, in looking at the Committee [minutes](#) from that meeting, it appears that no action was taken on the file by the Committee. Rather, on the same day, the Wisconsin Grocers Association filed a letter with the City arguing against any sort of plastic bag ban. In addition, George Dreckmann, the City's former longtime Strategic Initiatives Coordinator for the Streets Division, received word from the same organization that should we proceed with implementing a ban that the grocers and plastic industries would immediately look to have the City's efforts preempted by the State legislature. In light of this information, no action was taken on the resolution as, in light of the direction of the State Legislature over the last couple of years toward municipalities and the City of Madison, legislative preemption was expected by staff.

While it took longer than expected, this legislative preemption has now occurred with the enactment of [2015 Wis. Act 302](#). This Act, which became effective on April 1, 2016 and is attached hereto, created Wis. Stat. Sec. 66.0419, which section states as follows:

**66.0419 Local regulation of auxiliary containers.**

- (1) In this section:
  - (a) "Auxiliary container" means a bag, cup, bottle, can, or other packaging that is designed to be reusable or single-use; that is made of cloth, paper, plastic, cardboard, corrugated material, aluminum, glass, postconsumer recycled material, or similar material or substrates, including coated, laminated, or multi-layer substrates; and that is designed for transporting or protecting merchandise, food, or beverages from a food service or retail facility.
  - (b) "Political subdivision" means a city, village, town, or county.
- (2) No political subdivision may do any of the following:
  - (a) Enact or enforce an ordinance or adopt or enforce a resolution regulating the use, disposition, or sale of auxiliary containers.
  - (b) Prohibit or restrict auxiliary containers.
  - (c) Impose a fee, charge, or surcharge on auxiliary containers.

- (3) (a) This section does not limit the authority of a political subdivision in operating a curbside recycling or commercial recycling program or an effective recycling program under s. 287.11 or in designating a recycling location.
- (b) Subsection (2) (b) and (c) does not apply to the use of auxiliary containers on a property owned by the political subdivision.

This statute completely removes the City's ability to regulate the use and disposal of plastic bags, as well as other food or beverage containers, other than as part of a recycling program (which is essentially the program we already have in place). Because any further regulation of plastic bags would be seen as either a matter of statewide concern or a matter of both a state and local concern, I do not think that the City would be able to use its constitutional home rule authority to adopt a charter ordinance contrary to the express preemption.

Accordingly, because of the clear legislative preemption of the City's ability to regulate the use and disposal of plastic bags, the City Attorney's Office is recommending that File 30771 be placed on file at this time.

Of note, because this issue was of interest to the Council, and the political winds may someday change at the Capitol, I've attached a memorandum drafted by Siely Joshi, a former City Attorney's Office law clerk, summarizing some of the issues that the City would have confronted had it decided to go ahead with implementing some sort of plastic bag regulation. Certainly, this memo would have formed a large part of the report to the Council being called for by the resolution.

*Doran Viste*

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Doran Viste  
Assistant City Attorney

Encl. 2015 Wis. Act 302  
Plastic Bag Ban Research Report

# State of Wisconsin



2015 Assembly Bill 730

Date of enactment: **March 30, 2016**

Date of publication\*: **March 31, 2016**

## 2015 WISCONSIN ACT 302

AN ACT *to create* 66.0419 of the statutes; **relating to:** local regulation of certain containers.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

**SECTION 1.** 66.0419 of the statutes is created to read:  
**66.0419 Local regulation of auxiliary containers.**

(1) In this section:

(a) "Auxiliary container" means a bag, cup, bottle, can, or other packaging that is designed to be reusable or single-use; that is made of cloth, paper, plastic, cardboard, corrugated material, aluminum, glass, postconsumer recycled material, or similar material or substrates, including coated, laminated, or multi-layer substrates; and that is designed for transporting or protecting merchandise, food, or beverages from a food service or retail facility.

(b) "Political subdivision" means a city, village, town, or county.

(2) No political subdivision may do any of the following:

(a) Enact or enforce an ordinance or adopt or enforce a resolution regulating the use, disposition, or sale of auxiliary containers.

(b) Prohibit or restrict auxiliary containers.

(c) Impose a fee, charge, or surcharge on auxiliary containers.

(3) (a) This section does not limit the authority of a political subdivision in operating a curbside recycling or commercial recycling program or an effective recycling program under s. 287.11 or in designating a recycling location.

(b) Subsection (2) (b) and (c) does not apply to the use of auxiliary containers on a property owned by the political subdivision.

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\* Section 991.11, WISCONSIN STATUTES: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication."

**CITY OF MADISON  
OFFICE OF THE CITY ATTORNEY  
Room 401, CCB  
266-4511**

Date: July 31, 2013

**MEMORANDUM**

TO: Doran Viste

FROM: Siely Joshi, Law Clerk

RE: Plastic Bag Ban Research Report

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**Introduction**

The single-use plastic carryout bag has become a widely used item in modern society. Consumers use plastic shopping bags with careless indifference to the detrimental environmental effects that result from the creation and disposal of such items. Although exact numbers are indeterminable, Americans use an estimated 100 billion plastic bags every year, each typically discarded after a single use in which only a few items are carried in the bag.<sup>1</sup> While convenient for consumers, plastic shopping bags raise three major environmental concerns. First, the single-use plastic carryout bag is a product made from natural gas or petroleum that does not biodegrade.<sup>2</sup> Second, wind currents easily sweep lightweight plastic bags into the environment causing widespread pollution.<sup>3</sup> Third, plastic bag production, shipping, and recycling have overarching negative environmental ramifications due to greenhouse gas emissions.<sup>4</sup>

In order to address the damaging environmental effects of these plastic bags many cities and states have set waste reduction goals and enacted legislative policies to achieve those goals. The main policy options for reducing single-use bags are bans, charges, credits for bags supplied by customers at check-out, and mandatory recycling laws.<sup>5</sup> Plastic bag ordinances generally apply only to carryout bags taken at the register – not bags used inside the store for items such as produce or meat.

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<sup>1</sup> Katharine Mieszkowski, *Plastic Bags are Killing Us*, SALON, Aug. 10, 2007, <http://www.salon.com/news/feature/2007/08/10/plasticbags/>.

<sup>2</sup> Bridget M. Warner, *Sacking the Culture of Convenience: Regulating Plastic Bags to Prevent Further Environmental Harm*, 40 U. MEM. L. REV. 645 (2010).

<sup>3</sup> *Id.* at 650.

<sup>4</sup> *Id.*

<sup>5</sup> 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 U. Env'tl. L.J. 377 (2012).

## **I. Types of Plastic Bag Bans/Restriction Programs**

### **A. Charges, Fees and Taxes**

Fee programs and taxes can have multiple purposes. First, by establishing a price on disposable bags, governments can send a price signal to citizens to motivate different behaviors. Approximately 25 nations and local communities have established fee programs to reduce plastic bag use or encourage reusable alternatives.<sup>6</sup> Most single-use bag charge ordinances include a five- to ten-cent charge for plastic bags only, but some require charges for all single-use bags such as paper bags as well.<sup>7</sup> Charges are either supplier-based or consumer-based; however, charges paid by the supplier are generally ineffective because the customer is not provided with a direct incentive to reduce bag use.<sup>8</sup>

#### ***Ireland***

In 2002, Ireland established a 15-Euro cent tax on plastic bags (roughly equivalent to about 28 U.S. cents per bag today), applied to consumers at the point of sale. In the first year of this policy, consumers used 90% fewer plastic bags.<sup>9</sup> The tax grew relatively less effective over time, so the nation increased the tax in 2007. Overall, plastic bags have gone from 5% to less than 0.25% of the waste stream.<sup>10</sup>

#### ***Washington D.C.***

Some cities have implemented a fee as a supplement to other programs such as bag bans. For instance, in 2009, the District of Columbia enacted a law to ban the distribution of disposable, non-recyclable plastic carry-out bags and also mandated a 5-cent fee for distribution of all other disposable bags.<sup>11</sup> After the district implemented the 5-cent fee on plastic bags, the number of bags distributed by food retailers fell from 22.5 million per month to 3.3 million per month, a decrease of more than 85%, and river cleanup efforts have turned up 66% fewer plastic bags.<sup>12</sup>

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<sup>6</sup> Travis Madsen & Julia Ritchie, *Leading the Way Toward a Clean Ocean*, Environment California Research and Policy Center 13 (July 2011), available at [http://www.environmentcalifornia.org/sites/environment/files/reports/Leading%20the%20Way%20Toward%20a%20Clean%20Ocean\\_0.pdf](http://www.environmentcalifornia.org/sites/environment/files/reports/Leading%20the%20Way%20Toward%20a%20Clean%20Ocean_0.pdf)

<sup>7</sup> See, e.g., D.C. Official Code § 8-102.03(a)(1) (imposing five-cent fee for all disposable carryout bags).

<sup>8</sup> See Rebecca Fromer, *Concessions of a Shopaholic: An Analysis of the Movement to Minimize Single-Use Shopping Bags from the Waste Stream and a Proposal for State Implementation in Louisiana*, 23 TUL. ENVTL. L.J. 493, 509-11 (2010) (stating that S.B. 531 "does little to affect the single-use bag markets; it does little to reduce the number of single-use bags actually being produced").

<sup>9</sup> See *Plastic Bags, Current Levy*, Irish Dep't of the Env't, Heritage, & Local Gov't, available at [www.environ.ie/en/Environment/Waste/PlasticBags/#Current%20Levy](http://www.environ.ie/en/Environment/Waste/PlasticBags/#Current%20Levy)

<sup>10</sup> *Irish Bag Tax Hailed Success*, BBC News (Aug. 20, 2002), available at [news.bbc.co.uk/2/hi/europe/2205419.stm](http://news.bbc.co.uk/2/hi/europe/2205419.stm).

<sup>11</sup> Annie Gowen, *D.C. Bags Wasteful Shopping Habit with Tax on Paper and Plastic*, WASH. POST, Jan. 2, 2010, available at [www.washingtonpost.com/wp-dyn/content/article/2010/01/01/AR2010010101673.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/01/01/AR2010010101673.html).

<sup>12</sup> *Id.*

### ***Seattle, WA***

Not all cities, however, have been successful in implementing a single-use bag charge. For instance, in 2008 the Seattle City Council passed an ordinance imposing a twenty-cent charge for each single-use bag provided to customers at all grocery, drug, and convenience stores with annual gross sales of \$1 million.<sup>13</sup> Before the charge was scheduled to go into effect, opponents of the charge gathered enough signatures to require the issue be put before the voters where it failed by 58 percent.<sup>14</sup> Supporters of the charge blamed the loss on the opponents' 15-to-1 spending.<sup>15</sup>

### ***New York City, NY***

In 2008, Mayor Michael Bloomberg tried to impose a fee of six cents per plastic bag, but the measure failed amid opposition from consumers and retailers.<sup>16</sup> Instead, New York passed a law requiring medium-sized chain businesses and stores over 5,000 square feet to recycle plastic bags returned by consumers.<sup>17</sup>

### ***California***

Furthermore, cities in California have been unsuccessful in implementing bag charges due to the Plastic Bag and Litter Reduction Act, signed into law in 2006 by Governor Schwarzenegger.<sup>18</sup> The Act mandated in-store plastic bag recycling programs for California grocery stores and preempted all local plastic bag charges in California. As a result, California cities are in a tough position, because they cannot impose a charge for the distribution of bags, but they face CEQA (California Environmental Quality Act) challenges when they try to bypass the charge approach and ban the distribution of plastic bags.<sup>19</sup>

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<sup>13</sup> Seattle, Wash., Ordinance 122,752, § 1.A (July 28, 2008), *available at* [www.seattlebagtax.org/bagordinance\\_8-14-2008.pdf](http://www.seattlebagtax.org/bagordinance_8-14-2008.pdf). Also, stores with sales of under \$ 1 million were given the option to impose the fee and retain 100% of the fee collected.

<sup>14</sup> Marc Ramirez, *Seattle Voters Don't Buy Shopping-Bag Charge*, SEATTLE TIMES, Aug. 19, 2009, *available at* [www.seattletimes.nwsourc.com/html/politics/2009686467\\_elexseabagfee19m.html](http://www.seattletimes.nwsourc.com/html/politics/2009686467_elexseabagfee19m.html).

<sup>15</sup> The Coalition to Stop the Seattle Bag Tax campaign gathered more than \$1.4 million, including the American Chemistry Council's contribution of more than \$1.5 million.

<sup>16</sup> David W. Chen, *In Mayor's Plan, the Plastic Bag Will Carry a Fee*, N.Y. TIMES, November 6, 2008, *available at* <http://www.nytimes.com/2008/11/07/nyregion/07bags.html?pagewanted=all>.

<sup>17</sup> *Plastic Bag Mandatory Take-Back Recycling Program*, NYC Recycles, *available at* [http://www.nyc.gov/html/nycwasteless/html/stuff/takeback\\_plasticbaglaw.shtml](http://www.nyc.gov/html/nycwasteless/html/stuff/takeback_plasticbaglaw.shtml).

<sup>18</sup> See A.B. 2449, § 1, 2005-2006 Reg. Sess. (Cal. 2006), codified as Cal. Pub. Res. Code § 42250(d) (Westlaw 2012).

<sup>19</sup> *See id.*; *see also* AB 2449 (Levine) Plastic Bag Litter and Waste Reduction, Californians Against Waste, [www.cawrecycles.org/issues/current\\_legislation/ab2449\\_06](http://www.cawrecycles.org/issues/current_legislation/ab2449_06).

### ***Federal Bag Tax***

In April 2013, Representative Jim Moran introduced a bill in the U.S. House of Representatives that would put a five cent tax on plastic and paper bags distributed at supermarkets, convenience stores and other retail shops.<sup>20</sup> The fee revenue would be earmarked for the Land and Water Conservation Fund. Moran modeled his measure on the District of Columbia's tax on plastic bags, which was enacted in 2009. Moran's bill is the first one that would impose such a fee on bags in all 50 states and the District of Columbia. Legislation to impose such a tax has been introduced, and failed, repeatedly, in the General Assembly.<sup>21</sup> However, it is important to note that if enacted, such federal legislation may have a preemptive effect on certain state and local government plastic bag reduction policies.

### **B. Credits**

Some jurisdictions attempt to lower plastic bag usage by requiring stores to provide customers with a credit for each bag supplied by the customer at checkout. This plastic bag credit system attempts to change consumer habits by providing shoppers with a more tangible reason for bringing their own reusable bags. Additionally, this program would be of little cost to retailers, because retailers could provide a credit for an amount that is little more than they spend providing a single-use bag. In fact, some stores offer bag credits voluntarily.<sup>22</sup> For instance, a program at Whole Foods Market offers a credit of at least 5-cents for each checkout bag a customer supplies.<sup>23</sup>

### ***Rhode Island***

In 2006, the Rhode Island state legislature considered a bill aimed at encouraging consumers "to utilize reusable bags through a three-cent retailer-funded rebate for each bag an individual brings to the store."<sup>24</sup> The bill sought to reward customers for supplying reusable bags, by creating a direct economic disincentive for the continued use of wasteful single-use packaging. The Rhode Island bill did not pass and its three-cent credit was criticized on one hand as insufficient to change consumer habits because it was much less than the price of many checkout bags, and on the other because retailers would be responsible for funding the program.<sup>25</sup>

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<sup>20</sup> H.R. 1686, 113th Cong. (2013) ("Trash Reduction Act of 2013").

<sup>21</sup> H.R. 2091, 111th Cong. (2009-2010) ("Plastic Bag Reduction Act").

<sup>22</sup> See, e.g., *Nickels for Nonprofits*, Whole Foods, [wholefoodsmarket.com/stores/cleveland/store-calendar/](http://wholefoodsmarket.com/stores/cleveland/store-calendar/) (the Whole Foods in Cleveland offers a five-cent credit per reusable bag used by the customer, which the customer can opt to donate to a non-profit).

<sup>23</sup> *Green Mission*, Whole Foods, <http://www.wholefoodsmarket.com/mission-values/environmental-stewardship/green-mission>.

<sup>24</sup> See R.I. Gen. Laws Ann. §§23-18.11-1 to 23-18.11-6 (Westlaw 2012) (regulating the use of plastic bags but not including the three-cent rebate).

<sup>25</sup> Adam Akullian et al., *Plastic Bag Externalities and Policy in Rhode Island*, BROWN POL'Y REV. 1 (2006), available at [www.seattlebagtax.org/referencedpdfs/en-akullianetal.pdf](http://www.seattlebagtax.org/referencedpdfs/en-akullianetal.pdf).

## *San Francisco, CA*

In 2009, San Francisco considered an ordinance to require all supermarkets and pharmacies covered by San Francisco's plastic bag ban to provide a bag credit.<sup>26</sup> That proposal faced opposition by retailers and was shelved in favor of moving forward with expanding the scope of the city's plastic bag ban and adding a charge for paper bags.<sup>27</sup> Thus, credits may work best as part of a more comprehensive ordinance, like Washington D.C.'s ordinance, under which retailers are given the option to retain a larger portion of the bag charge if they offer a bag credit program.<sup>28</sup>

## **C. Plastic Bag Bans**

Plastic bag bans focus on eliminating the most environmentally harmful form of single-use bags. The appeal of plastic bag bans relates in part to their simplicity since collection and reporting of charges and credits are not required. Plastic bag bans are often criticized for simply transitioning customers from plastic to paper bags. Thus, some argue that plastic bag bans are most effective if combined with a charge on paper bags, and even more so by instituting bag credits to further encourage the use of reusable bags.

### **i. Bag Bans Across the World**

Plastic bags bans are popular in developing countries where implementation of charges can present difficult obstacles. Many of these bans apply only to thin plastic bags, based on the reasoning that thin bags pose an especially great threat to the environment because they are more likely to be blown by the wind and end up as litter.<sup>29</sup> For example, Manila banned plastic bags below fifty microns “because they cannot be recycled and cause flooding.”<sup>30</sup> Similarly, India banned plastic bags of less than sixty microns thickness.<sup>31</sup> The United Nations Environment Program (UNEP) has also called for a worldwide ban on thin-film plastic bags,<sup>32</sup> stating that

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<sup>26</sup> S.F., Cal., Proposed Ordinance File No. 092211, *available at* [plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/SF-plastic-bag-credit1.pdf](http://plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/SF-plastic-bag-credit1.pdf).

<sup>27</sup> See Rachel Gordon, *S.F. May Expand Ban on Disposable Plastic Bags*, S.F. GATE (Aug. 3, 2010), *available at* [www.articles.sfgate.com/2010-08-03/news/22010241\\_1\\_plastic-bags-large-supermarkets-and-chain-american-plastics-council](http://www.articles.sfgate.com/2010-08-03/news/22010241_1_plastic-bags-large-supermarkets-and-chain-american-plastics-council).

<sup>28</sup> Romer & Foley, *supra* note 5, at 388 (citing Wash. D.C. Ordinance, § 4(B)(i) (2001 & Supp. 2009), *available at* [plasticbaglaws.org/wordpress/wp-content/uploads/2010/02/leg\\_Washington-DC.pdf](http://plasticbaglaws.org/wordpress/wp-content/uploads/2010/02/leg_Washington-DC.pdf)).

<sup>29</sup> Susan Anyangu-Amu, *Kenya: Plastic Bags: Convenience Costing the Earth*, Inter Press Service News Agency (Jan. 21, 2010), *available at* [www.ipsnews.net/africa/nota.asp?idnews=50061](http://www.ipsnews.net/africa/nota.asp?idnews=50061).

<sup>30</sup> Czarina Nicole Ong, *Manila Seeks to Ban Thin Plastic Bags*, MANILA BULLETIN PUB. CORP. (Oct. 2, 2010), *available at* [www.mb.com.ph/node/280155/manila-](http://www.mb.com.ph/node/280155/manila-).

<sup>31</sup> *Coming Soon, Blanket Ban on Thin Plastic Bags*, THE NEW INDIAN EXPRESS (June 6, 2011), *available at* [www.ibnlive.in.com/news/coming-soon-blanket-ban-on-thin-plastic-bags/157017-60-120.html](http://www.ibnlive.in.com/news/coming-soon-blanket-ban-on-thin-plastic-bags/157017-60-120.html).

<sup>32</sup> Press Release, United Nations Environment Program, *Report Brings to the Surface the Growing Global Problem of Marine Litter* (Aug. 6, 2009), *available at* [www.unep.org/ecosystemmanagement/News/PressRelease/tabid/426/language/en-US/Default.aspx?DocumentID=589&ArticleID=6214&Lang=en](http://www.unep.org/ecosystemmanagement/News/PressRelease/tabid/426/language/en-US/Default.aspx?DocumentID=589&ArticleID=6214&Lang=en).



thin-film plastic bags “should be banned or phased-out rapidly everywhere – there is simply zero justification for manufacturing them anymore, anywhere.”<sup>33</sup>

Some countries implement not only a ban on certain types of plastic bags, but also set a fee on other types of bags. For example, China has banned disposable bags that fail to meet the durability standards necessary to be considered reusable.<sup>34</sup> China then requires retailers to charge customers a fee to obtain one of the more durable plastic bags, encouraging reuse. Since the implementation of the bag ban and fee program China has reported a 66% drop in plastic bag use, equivalent to 40 billion bags, saving an estimated 1.6 million tons of petroleum.<sup>35</sup>

## ii. Bag Bans in the United States

In the United States, plastic bag bans have garnered significant resistance from the plastics industry. Contrary to its name, a “bag ban” is not always an absolute ban on all plastic carryout bags.

### *San Francisco, CA*

In 2007, San Francisco became the first city in the U.S. to effectively ban single-use bags on a municipal level.<sup>36</sup> The San Francisco ban is not a total ban on all bags; retailers are simply limited to recyclable paper bags, compostable plastic bags, or reusable cloth or fabric bags.<sup>37</sup> Not all retailers are affected; the statute only applies to supermarkets with over two million dollars of gross annual sales.<sup>38</sup> Pharmacies with five or more locations within city limits and under the same ownership are also included in the ban. Administrative or civil fines for violations range from \$100 to \$600 depending on the number of infractions and the means the city follows to extract the fines.<sup>39</sup>

After the ban was implemented, it is estimated that over 100 million fewer plastic bags were provided by stores in 2010 than in 2009.<sup>40</sup> The ban’s success has often been attributed to the well-written statute, as it provides clarity in its drafting and fairness to small business. The longest section of the chapter is devoted to definitions which clarify each type of bag to be allowed and which stores must adhere to these rules.<sup>41</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> *Researchers: Plastics Bags Ban Needs Strengthening*, CRIEnglish.com (May 30, 2011), available at [www.english.cri.cn/7146/2011/05/30/2702s640058.htm](http://www.english.cri.cn/7146/2011/05/30/2702s640058.htm).

<sup>35</sup> Ben Block, *China Reports 66-Percent Drop in Plastic Bag Use*, World Watch Institute, available at [www.worldwatch.org/node/6167](http://www.worldwatch.org/node/6167).

<sup>36</sup> Charlie Goodyear, *S.F. First City to Ban Plastic Shopping Bags*, S.F. Chronicle (Mar. 28, 2007), <http://www.sfgate.com/green/article/S-F-FIRST-CITY-TO-BAN-PLASTIC-SHOPPING-BAGS-2606833.php>. See also S.F., Cal., Env’t Code ch. 17 (2007).

<sup>37</sup> S.F., Cal., Env’t Code ch. 17, § 1703(a) (2007).

<sup>38</sup> *Id.* at § 1702(l)(1).

<sup>39</sup> *Id.* at § 1705.

<sup>40</sup> Nate Berg, *The Math Behind Sacking Disposable Bags*, Atlantic Cities (Sept. 26, 2011), <http://www.theatlanticcities.com/politics/2011/09/bags-get-sacked/141/>.

<sup>41</sup> S.F., Cal., Env’t Code ch. 17, § 1702 (2007).

The ordinance is also praised for its ability to evolve without further legislation.<sup>42</sup> Several parts allow the regulation to be modified over time to fit industrial and commercial changes by alluding to extrinsic sources. For example, it sets the requirements for compostable plastic bags to conform with the American Society for Testing and Materials standards, which, as the statute explicitly recognizes and allows, "may be amended from time to time."<sup>43</sup> Additionally, the law defers to annual updates of the Progressive Grocer Marketing Guidebook in order to determine which stores are "full-line, self-service supermarket[s]."<sup>44</sup> Moreover, the Director of the Department of the Environment is empowered to create and amend separate guidelines to aid in the implementation of the ordinance.<sup>45</sup> Allusion to outside sources and creating a fast-track for the Director to update the ordinance through future guidelines allows the San Francisco plastic bag ordinance to remain relevant and effective, even when technological and economic changes occur.

### *Hawaii*

No state has yet to enact a statewide ban, fee or tax. However, Hawaii does have a de-facto statewide ban since all four counties in the state now ban non-biodegradable plastic bags and paper bags that are not at least 40 percent recycled.<sup>46</sup> Since the enactment of the plastic bag bans there has been a reported increase in paper bag use, prompting talks for implementation of a fee on paper bags.

### *Chicago, IL*

In Chicago, Alderman Joe Moreno has proposed a ban on plastic grocery bags which requires that retail stores only provide reusable bags.<sup>47</sup> If passed Chicago would be the largest city in the nation with such a ban. The Illinois Retail Merchants Association opposes the ban and its lobbying efforts have helped scuttle previous attempts to ban bags in Chicago.

### *Outer Banks, NC*

In 2009, North Carolina banned plastic bags for the Outer Banks region, a chain of barrier islands off its coast.<sup>48</sup> The statutes simply prohibit retailers from providing plastic bags with only minimal technical reference to bag measurements. As an additional waste-preventing measure, retailers are only allowed to replace the plastic bags with paper substitutes if: (1) the paper bags are made from recycled paper and (2) that retailer offers a rebate to customers using their own reusable bags.<sup>49</sup> Finally, the ban only affects a limited area, namely those islands or

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<sup>42</sup> Gary D. Godman, *Countering Single-Use Bag Consumption with State Legislation: The Old Dominion Considers a New Trend*, 37 WM. & MARY ENVTL. L. & POL'Y REV. 569, 578 (2013).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 579.

<sup>45</sup> *Id.*

<sup>46</sup> *State Plastic and Paper Bag Legislation: Fees, Taxes, Bans; Recycling and Reuse*, National Conference of State Legislatures (June 2013), available at <http://www.ncsl.org/issues-research/env-res/plastic-bag-legislation.aspx#ny>.

<sup>47</sup> <http://www.bizjournals.com/chicago/news/2013/06/18/plastic-bag-ban-goes-to-city-council.html>

<sup>48</sup> *State Plastic and Paper Bag Legislation*, *supra* note 46.

<sup>49</sup> N.C. Gen. Stat. § 130A-309.123 (2012). The rebate amount is set at the retailer's cost of providing one recycled paper bag multiplied by the number of reusable bags provided by the customer.

peninsulas that have more than 200 permanent inhabitants, contain a National Wildlife Refuge or National Seashore, and are bordered by the Atlantic on the east and a coastal sound on the west.

In 2011, the ban was temporarily suspended by the state legislature because of a tornado that hit Dunn, North Carolina, a major distribution center for paper bags in the area.<sup>50</sup> Many Outer Banks stores did not even seem to know the ban was suspended and continued using paper bags during the 2011 hiatus.<sup>51</sup> The ban has also weathered repeal attempts.<sup>52</sup>

### Currently Proposed Bag Ban/Restriction Policies

#### *Santa Fe, NM*

The city of Santa Fe, New Mexico is considering banning plastic bags, regulating the use of recyclable paper bags, and promoting the use of reusable bags through the city's proposed Reusable Bag Ordinance.<sup>53</sup> The Ordinance would ban thin-film plastic bags and require stores to charge customers a 10-cent fee for a large paper bag. Stores would retain revenue from the per-bag fee to help defray the cost of providing bags. The rules would allow shoppers benefiting from state and federal food assistance programs to get paper bags for free. Plastic bags for meat and produce would still be allowed at grocery stores, and small paper bags would be exempt. The city plans to spend about \$9,000 to buy reusable shopping bags to promote the idea of reducing bag waste.<sup>54</sup> Other cities, including Los Angeles, Washington, D.C., and Austin, Texas, have adopted similar rules about bag use.

#### *Dallas, TX*

In August 2013, the Dallas City Council will vote on Dwaine Caraway's proposed ordinance banning disposable plastic checkout bags and paper sacks.<sup>55</sup> The proposed ordinance would:

- Prohibit businesses from providing thin, single-use carryout plastic and paper bags.
- Allow businesses to provide or sell reusable carryout bags. That includes washable cloth, fabric or woven bags; recyclable plastic bags that are at least 0.004 inches thick; and, when the rule takes effect, paper bags with at least 40% recycled content. It would require that paper bags have at least 80% recycled content a year later.
- Require signs at stores reminding shoppers to bring their own reusable bags to carry purchases home.

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<sup>50</sup> See *Ban on Plastic Bags to Resume in Outer Banks*, WNCT 9 on Your Side (June 25, 2011), <http://www2.wnct.com/news/2011/jun/25/ban-plastic-bags-resume-outer-banks-ar-1154404/>.

<sup>51</sup> *Id.*

<sup>52</sup> See Rob Morris, *Plastic Bag Ban Repeal Decomposing in Committee*, Outer Banks Voice (June 28, 2011), <http://outerbanksvoice.com/2011/06/28/plastic-bag-ban-repeal-decomposing-in-committee/>.

<sup>53</sup> *Plastic Bag Ban Good for City*, Santa Fe New Mexican, May 16, 2013, available at [http://www.santafenewmexican.com/opinion/editorials/article\\_ffb77cd1-f7ff-5cb0-b9c8-f70c875b3a3a.html](http://www.santafenewmexican.com/opinion/editorials/article_ffb77cd1-f7ff-5cb0-b9c8-f70c875b3a3a.html).

<sup>54</sup> *Id.*

<sup>55</sup> Tegan Hanlon, *Opposing Sides Weigh Pros, Cons of a Plastic Bag Ban in Dallas*, Dallas News, July 2, 2013, available at <http://www.dallasnews.com/news/local-news/20130702-opposing-sides-weigh-pros-cons-of-a-plastic-bag-ban-in-dallas.ece>

- Allow exemptions, including plastic dry cleaning bags; garbage and newspaper bags; trash can liners; bags for certain bulk food purchases, such as candy and nuts; bags used to wrap frozen foods; and restaurant carryout bags.

The proposed ordinance is argued for based on environmental concerns, but like many other cities the proposed ban faces opposition from the plastics industry, which claims that recycling is key to curbing litter and environmental pollution, not bans.

### *Massachusetts*

Denise Provost, a Massachusetts state representative, is trying to implement a statewide ban on plastic shopping bags in retail and grocery stores due to environmental concerns.<sup>56</sup> The plastic bag ban, which would go into effect in April 2015, recommends that shops instead consider reusable bags or brown paper bags. The bill would not include the smaller plastic bags used for produce at grocery stores. The state representative suggested that more could be added to her legislation, such as the possibility of adding a “plastic bag fee” for stores who insist on continuing to use the banned products.<sup>57</sup> Customers would possibly pay for the bags, so that it would create a sense of worth for the product, and people would be more inclined to reuse them, rather than pay again when returning to a store. The state representative stated that “this is another option too that’s not a ban, but it’s a way of reducing use, [consumers] would start looking at a plastic bag as a commodity and not something that’s disposable.”<sup>58</sup>

### *Voluntary Bag Bans by Retailers*

Some major retailers in the U.S. have started promoting eco-friendly practices without waiting for legislative action. For example, the grocery retailer Whole Foods Market implemented a company-wide plastic bag ban and received a positive response from the customer base which applauded the company’s progressive stance towards the environmental issue.<sup>59</sup>

Similarly, IKEA and Traders Joe's also banned plastic carryout bags. In 2007, IKEA offered three alternatives to customers: 1) bring your own reusable bags; 2) purchase an IKEA sustainable reusable bag for fifty-nine cents; or 3) pay five cents for each plastic carryout bag used at checkout.<sup>60</sup> Customers supported the plastic bag program and IKEA reported a ninety-two percent reduction in plastic bag use in the first year.<sup>61</sup> Capitalizing on this success and recognizing that paper bags are a poor alternative, IKEA banned all single-use carryout bags in October 2008. IKEA's plastic bag phase-out approach is a strong model for legislative initiatives. These American retailers' voluntary efforts could reach much further through legislation that applies to all retailers, but across-the-board regulation faces serious opposition in the United States.

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<sup>56</sup> Steve Annear, *State Official Wants to Ban Plastic Bag Use in Massachusetts By 2015*, Boston Magazine, June 28, 2013, available at <http://www.bostonmagazine.com/news/blog/2013/06/28/plastic-bag-ban-massachusetts-state-house/>.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Warner, *supra* note 2, at 670.

<sup>60</sup> *Id.* at 671.

<sup>61</sup> *Id.*

## **II. Arguments For and Against Bag Bans**

### ***A. Recycling as an Alternative***

The Progressive Bag Affiliates (“PBA”), one of the main supporting coalitions of the plastic bag industry, has influenced states and municipalities considering a ban or fee to opt for a recycling program instead.<sup>62</sup> For instance, in a 2008 Pennsylvania initiative, just as a Pennsylvania state representative was about to introduce a statewide bill to phase out plastic carryout bags, the lobbying efforts of the PBA influenced the representative to introduce a plastic bag recycling program instead. The plastic industry maintains that a strong recycling program is sufficient to address the environmental harms caused by plastic bags.

Currently there are over 8,000 curbside recycling programs throughout the country;<sup>63</sup> however, promoting plastic bag recycling as the only measure to reduce the number of plastic bags consumed each year falls short of having a truly positive impact on plastic bag consumption and waste. In fact, in California, where bag recycling programs have existed in retail stores for over ten years, “less than 2% of all plastic bags” are being recycled.<sup>64</sup>

Furthermore, the trouble does not stop once plastic actually reaches recycling centers. Many people do not know that one dirty piece of plastic can contaminate an entire bale of recycled plastics, forcing a recycling center to send thousands of pounds of plastic to a landfill.<sup>65</sup> Even a small amount of the wrong type of plastic can send an entire bale to the landfill. It is estimated that approximately 90% of single-use plastic bags that reach recycling facilities end up at landfills.<sup>66</sup>

Another disincentive for plastic recycling is that processing recycled plastics can exceed the cost of simply creating new plastic.<sup>67</sup> In California, Berkeley's curbside recycling contractor decided against collecting plastic bags for recycling after conducting a cost/benefit analysis and finding that curbside collection of plastic bags would involve expensive processing and has very limited benefits in reducing environmental impacts and diverting waste.<sup>68</sup>

Moreover, mandated recycling programs are unlikely to change consumer behavior in the actual checkout lane; consumers will likely use the same number of plastic bags each week and each year. This is the case in New York City, where the mayor found that the city's current recycling mandate is not enough to reduce plastic bag usage and sought to supplement it with a

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<sup>62</sup> Kari Huus, *How Plastics Industry Battles Bans on Its Bags*, MSNBC.COM, Mar. 14, 2008, available at <http://www.msnbc.msn.com/id/23596727/>. Listing New York, NY; Austin, TX; Phoenix, AZ; Annapolis, MD; and Los Angeles, CA as cities that have considered plastic bag bans but instead opted for plastic bag recycling programs.

<sup>63</sup> *Id.*

<sup>64</sup> Samantha Weinstein, *Main Ingredient in “Marine Soup”: Eliminating Plastic Bag Pollution Through Consumer Disincentive*, 40 CAL. W. INT’L L.J. 291, 299 (2010).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 301.

<sup>68</sup> Jennie Reilly Romer, *The Evolution of San Francisco’s Plastic Bag-Ban*, 1 Golden Gate U. Envtl. L.J. 439, 446 (2007).

six-cent fee on all plastic bags.<sup>69</sup> The best possible solution to the harmful environmental impacts of the plastic bag will come from conservation; effective legislation, therefore, should enforce conservation. "Recycling should not serve as a replacement for source reduction or reuse but rather as a secondary measure in the transition to a more sustainable way of life."<sup>70</sup> Unfortunately, plastic bag recycling ordinances are often industry-sponsored and often include preemptive language preventing local jurisdictions from enacting other policies relating to plastic bags.<sup>71</sup>

## **B. Environmental Lawsuits**

Opposition to plastic-bag bans argue that "materials-based" bans, such as San Francisco's bag ban, have led to an increase in paper bag use and created a different environmental impact.<sup>72</sup> Based on this argument, Save the Plastic Bag Coalition (STPBC), an industry lobbying group, launched an extensive campaign to halt the spread of plastic bag bans in California.<sup>73</sup> Its primary tactic has been to force those local governments proposing plastic bag bans to draft environmental impact reports on the bans' effects pursuant to the California Environmental Quality Act (CEQA).<sup>74</sup> STPBC has already frozen efforts by ten California cities to ban plastic bags.<sup>75</sup> Most recently, on January 27, 2010, the Second District Court of Appeal in Los Angeles invalidated Manhattan Beach's proposal for a plastic bag ban, holding that the town was required to conduct an environmental impact report before implementing the ban.<sup>76</sup> STPBC argued that preparation of an environmental impact report would have revealed that a ban on plastic bags would "inevitably result in increased use of paper bags," which they argued "are worse for the environment."<sup>77</sup>

Oakland and Fairfax, CA adopted ordinances banning plastic bags, but both faced lawsuits by the Coalition to Support Plastic Bag Recycling. Fairfax, however, succeeded in implementing the ordinance by a ballot initiative.<sup>78</sup> Save the Plastic Bag Coalition has threatened other CA cities contemplating bans on single-use plastic bags with lawsuits. In response, many California cities added a small charge (five to ten cents per bag) for paper bags to offset such claims. Los Angeles County was the first California municipality to adopt a hybrid ordinance, now these hybrid ordinances have become the standard in California.

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<sup>69</sup> Warner, *supra* note 2, at 656.

<sup>70</sup> *Id.* at 657.

<sup>71</sup> Romer & Foley, *supra* note 5, at 392.

<sup>72</sup> Fromer, *supra* note 8, at 503-504.

<sup>73</sup> *Id.* at 504.

<sup>74</sup> *Id.*

<sup>75</sup> See Mike Verespej, *LA Court Sides with Bag Makers on Ban*, Waste & Recycling News, Feb. 15, 2010, at 11 (noting that Save the Plastic Bag Coalition has "forestalled plastic bag bans in Encinitas, Oakland, Los Angeles County, Santa Clara County, San Diego, Santa Monica, Morgan Hill, Mountain View and San Jose").

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Sustainable Fairfax, Plastic Bag Ban Is On!*, available at <http://www.sustainablefairfax.org/content/view/199/4/> (Feb. 20, 2010).

### ***C. Jobs and Economy Jobs and Economy***

Plastics producers around the country are against bans and fees on plastic bags. For example, one prominent website run by plastic bag maker, Hilex Poly, lists several arguments against bag bans and bag fees.<sup>79</sup> The site claims that bans and fees threaten jobs in the plastic bag manufacturing and recycling industry, but it does not explain why plastic bag manufacturers could not convert to making similar packaging products to be used in other areas or why a reduction in plastic bags would severely hinder the recycling of other plastics.<sup>80</sup>

Plastic bag ban supporters argue that this “loss of jobs” argument is more of a scare tactic than anything else. These supporters argue that machines usually make plastic bags, not people. Moreover, they also claim that quality reusable bags are stitched one at a time by someone operating a sewing machine, thus, sustaining the job market in the bag manufacturing field.

Another popular concern argued by the plastics industry is that a bag fee or ban would be unfair to low-income families who are unable to pay the additional fee or buy reusable bags.<sup>81</sup> Many legislative proposals take this concern into account, however, such as Seattle's effort to provide every family with at least one reusable bag and the Los Angeles ordinance clause exempting qualifying consumers from paying the fee.<sup>82</sup> If properly informed the consumer public will likely conform and adapt to plastic bag regulation.

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<sup>79</sup> See *Learn the Facts, Bag the Ban*, <http://www.bagtheban.com/learn-the-facts/>.

<sup>80</sup> Godman, *supra* note 42, at 590.

<sup>81</sup> Weinstein, *supra* note 64, at 331.

<sup>82</sup> Warner, *supra* note 2, at 678.

**Table: Local Enacted Plastic-Bag Regulations in the U.S. (as of 2011)<sup>83</sup>**

Location Name	Estimated Population	Year Effective	Ban	Fee	Recycling Requirement	Voluntary	Provide alternatives*
30 small communities, AK	16,500	1998	X				
Albany County, NY	298,130	2008			X		
Austin, TX	656,562	2007				X	
Chicago, IL	2,853,114	2008			X		
Edmonds, WA	40,158	2009	X				
Fairbanks, AK	35,132	2010		X			
Fairfax, CA	7,066	2008	X				
Kauai County, HI	63,689	2011	X				
Lake County, IL	712,453	2007			X		
Los Angeles, CA	3,833,995	2008				X	
Madison, WI	231,916	2009			X		
Malibu, CA	13,009	2008	X				
Manhattan Beach, CA**	36,605	2008	X				
Marshall County, IA	39,523	2009					X
Maui County, HI	143,574	2011	X				
Nassau County, NY	1,351,652	2008			X		
New York City, NY	8,363,710	2008			X		
Oakland, CA**	404,155	2007	X				
Outer Banks, NC	33,518	2009	X				
Paia, HI	2,752	2008	X				
Palo Alto, CA	59,395	2009	X				
Phoenix, AZ	1,567,924	2007				X	
Rockland County, NY	298,545	2008			X		
San Francisco, CA	808,976	2007					X
Solana Beach, CA	12,825	2008				X	
Suffolk County, NY	1,512,224	2007			X		
Tempe, AZ	175,523	2008				X	
Tucson, AZ	541,811	2009			X		
Washington, DC	591,833	2010	X	X			
Westchester County, NY	953,943	2008			X		
Westport, CT	26,051	2009	X				
Total***			13	2	10	5	2
*Provide alternatives means to provide alternative bags such as compostable or reusable bags							
** Under lawsuit, not in effect							
***Washington DC has both a ban and a fee							

<sup>83</sup> *Retail Bags Report for the Legislature*, Florida Department of Environment Protection 28, February 1, 2010, available at [http://www.dep.state.fl.us/waste/quick\\_topics/publications/shw/recycling/retailbags/Retail-Bag-Report\\_01Feb10.pdf](http://www.dep.state.fl.us/waste/quick_topics/publications/shw/recycling/retailbags/Retail-Bag-Report_01Feb10.pdf)