

**Attachment**  
**RWRC Draft Model Ordinance Language,**  
**and City Administration Discussion**

On December 10, 2008, the RWRC sent the following Draft Model Ordinance Language to the Mayors, City Managers and City Attorneys of Santa Clara County, requesting feedback on the feasibility of implementing the draft ordinance in the jurisdictions from a legal and administrative perspective. The accompanying correspondence to this draft model ordinance language included the following:

“Your comments will be used to develop a final ordinance that will be provided for consideration by policy makers...

“We are specifically seeking feedback on aspects of the ordinance that address outreach, education, enforcement, litter abatement, administration, and level of CEQA review required. A commensurate fee can be determined after a program has been developed...

“The RWRC will review and discuss the comments at the February 25<sup>th</sup> meeting prior to consideration of a formal recommendation on the ordinance. Each city would then need to act independently for the proposed ordinance to be adopted, though a uniform approach between jurisdictions will provide consistency for consumers and businesses...”

The model ordinance language on the following pages is based on the most recent version of the State legislation, AB 2769 (Levine), which was making its way through the legislative process until September 2008. General consensus had been reached by environmentalists and grocers on many key components of this legislation. By accepting the RWRC model ordinance, *if another bill is introduced in 2009*, then San José and Santa Clara County Cities may have a comparable ordinance already in place.

A discussion of alternatives which were considered by stakeholders follows the model ordinance language, along with additional stakeholder information and San José survey details. Finally, notes from preliminary discussions for possible administration and implementation in San José are given.

December 2, 2008

**From:** TAC Source Reduction and Recycling Subcommittee  
**To:** RWRC  
**Re:** MODEL COUNTYWIDE ORDINANCE FOR JURISDICTIONS IN SANTA CLARA COUNTY RELATING TO REGULATION OF SINGLE-USE CARRYOUT BAGS

References are made in the body of the ordinance for jurisdiction-specific information: [jurisdiction-specific header here; remainder to be formatted and renumbered as needed].

**SECTION 1. Findings:**

- (a) Single-use carryout bags provided by stores impose hidden costs on consumers, local governments, the state, taxpayers, and the environment.
- (b) Requiring stores to end the subsidy of single-use carryout bags and charge their full economic and environmental costs will provide consumers with an appropriate market signal to make informed decisions regarding carryout bag reduction and reuse options.
- (c) Requiring stores to charge and remit a customer-based fee for the distribution of single-use carryout bags will help the state and local governments to offset the environmental and social costs of single-use carryout bags.
- (d) The amount and nature of the customer-based fee have a fair and reasonable relationship to the environmental, public health, and societal burdens imposed by the use of single-use carryout bags, and there is a sufficient nexus between the fees imposed and the use of those fees to support programs to prevent the litter of single-use carryout bags, cleaning up the litter caused by single-use carryout bags, and encouraging the reduction of the use of single-use carryout bags.
- (e) [other findings related to the Problem Statement as approved by the Commission at their 10/22/08 meeting, all as determined to be useful by County Counsel or City Attorneys]

**SECTION 2. Division X of Title Y of the [jurisdiction's county or municipal] Code is amended by adding a new Chapter Z to be numbered and entitled and to read as follows:**

**CHAPTER Z. SINGLE-USE CARRYOUT BAGS**

**1. Definitions.** For purposes of this chapter, the following definitions shall apply:

**(a) Bag Pollution Cleanup Fee**

"Bag Pollution Cleanup Fee" means the fee imposed pursuant to Section 2.

**(b) Commission**

"Commission" means the Recycling and Waste Reduction Commission of Santa Clara County.

**(c) Fund**

"Fund" means the Bag Pollution Cleanup Fund, established pursuant to subdivision (a) of Section 5.

**(d) Green carryout bag**

(1) "Green carryout bag" means a single-use carryout bag that is provided by a store to a customer at the point of sale and meets all of the following requirements:

- (A) Is composed of at least 40 percent post-consumer recycled content material.
- (B) Is accepted in 80% of curbside recycling programs in Santa Clara County.
- (C) Is capable of composting within 180 days, as determined by the Commission [or the City/Town/County Manager/Administrator/Director of Finance].

(2) "Green carryout bag" does not include a reusable bag, as defined in this section.

**(e) Reusable bag**

"Reusable bag" means either of the following:

(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..

**(f) Single-use carryout bag**

"Single-use carryout bag" means a single-use carryout bag that is provided by a store to a customer at the point of sale and that is not a reusable bag, as defined in this section. For the purposes of this chapter, "single-use carryout bag" does not include plastic or paper bags that are used by customers or the store to protect or contain meat, fresh produce, food prepared or packaged at the establishment, or other goods that must be protected from moisture, damage, or contamination, and that are placed in a single-use carryout bag at the point of sale.

**(g) [Administrator]**

"[Administrator]" means the [designated official] of [jurisdiction].

**(h) Store**

"Store" means a retail establishment that provides single-use carryout bags (including green carryout bags) to its customers as a result of the sale of a product. The following are excluded from the definition of "store": restaurants, take-out food establishments, or any other businesses that receive 90% or more of their revenue from the sale of food prepared or packaged at the establishment.

**2. Bag Pollution Cleanup Fee**

(a) (1) Except as provided in Section 3, on and after October 1, 2009, a store shall not provide a single-use carryout bag, including a green carryout bag, to a customer at the point of sale, unless the store charges and collects from the customer the Bag Pollution Cleanup Fee of twenty-five cents (\$0.25) per bag.

(2) Before January 1, 2014, the total amount charged to a customer pursuant to paragraph (1) shall not exceed two dollars (\$2.00) per transaction and on and after January 1, 2014, this restriction shall not apply.

(b) The amount charged pursuant to paragraph (1) of subdivision (a) shall be separately stated on the receipt provided to the customer at the time of sale, and shall be identified as the Bag Pollution Cleanup Fee.

(c) (1) A store charging a fee pursuant to subdivision (a) may retain a portion of the fee, as specified in paragraph (2), in an amount necessary to reimburse the store's costs associated with complying with this chapter, in accordance with Section 4.5. The store shall remit the remainder of the fee to the [jurisdiction].

(2) A store may retain not more than five cents (\$0.05) of the fee for each single-use carryout bag that is not a green carryout bag. For a single-use carryout bag that is a green carryout bag, a store may retain not more than ten cents (\$0.10) of the fee for each bag.

(d) Any other transaction fee charged by a store in relation to providing a single-use carryout bag shall be identified separately from the Bag Pollution Cleanup Fee.

### **3. Exemption of WIC and Food Stamp transactions**

Before January 1, 2014, the fee imposed pursuant to Section 2 shall not be charged to either of the following for any transaction that is not combined with other purchases:

- (a) A customer participating in the Special Supplemental Food Program for Women, Infants, and Children (Article 2 (commencing with Section 123275) of Chapter 1 of Part 2 of Division 106 of the Health and Safety Code).
- (b) A customer participating in the State Department of Social Services Food Stamp Program.

### **4. Remittance of fee**

A store that collects the Bag Pollution Cleanup Fee pursuant to Section 2 shall calculate the amount of money collected and, after deducting the amount specified in subdivision (c) of Section 2, shall, in accordance with Section 6, remit the remainder to the [jurisdiction] for deposit into the fund.

### **5. Store use of retained portion of fee**

A store charging a fee pursuant to Section 2 shall use the amount of the fee retained pursuant to subdivision (c) of Section 2 for all of the following:

- (a) Reimbursement of the store's costs associated with the collection and remittance of the fee pursuant to Sections 2 and 4.
- (b) The development of in-store educational materials encouraging the use of reusable bags for distribution to customers.
- (c) The development and implementation of an educational campaign encouraging the use of reusable bags, including, but not limited to, public service announcements.
- (d) Reimbursement of the store's costs associated with providing reusable bags to customers participating in programs described in subdivisions (a) and (b) of Section 3.
- (e) Reimbursement of the store's costs associated with providing reusable bags as donations to community organizations, nonprofit organizations, and other similar entities.
- (f) Reimbursement of the store's costs associated with customers' choice to use green carryout bags.

### **6. Bag Pollution Cleanup Fund**

(a) The Bag Pollution Cleanup Fund is hereby established. All fees collected pursuant to this chapter shall be deposited in the fund.

(b) The moneys in the fund shall be expended, upon appropriation in the manner and in the order of priority as follows:

- (1) to reimburse the [jurisdiction]'s costs of implementing Sections 7 through 10.
- (2) for purposes of programs that encourage and support recycling of single-use carryout bags and single-use carryout bag pollution prevention, cleanup, abatement, and outreach programs.

### **7. Administration of Single Use Carryout Bag Fee**

(a) The [Administrator] shall administer and collect the Bag Pollution Cleanup Fee

(b) The [Administrator] may adopt rules and regulations to carry out this article, including, but not limited to, provisions governing collections, reporting, refunds, and appeals.

(c) The Bag Pollution Cleanup Fee shall be due and payable quarterly on or before the 25th day of the month following each calendar quarter. Payments shall be accompanied by a form, as prescribed by the [Administrator], including, but not limited to, electronic media.

(d) The [Administrator] may require the payment of the fee for other than quarterly periods.

**8. Administration and enforcement**

Except as otherwise provided by this chapter, the [Administrator] or designee shall administer and enforce this chapter.

**9. Enforcement**

Enforcement of this chapter shall be by the County of Santa Clara Weights and Measures Division [and/or by jurisdiction's agencies to be named] in the following manner:

(a) The Division of Weights and Measures will conduct an initial inspection of each store during the first year this chapter is operative. The inspection shall consist of a survey in which the store manager will demonstrate compliance with this chapter.

(b) Noncompliance will result in a Notice of Violation and a re-inspection shall occur within 90 days. If the store is in compliance upon first re-inspection, the Notice of Violation will remain in effect for a period of no less than one (1) year and re-inspection may occur within 12 months.

(c) Failure to comply after second re-inspection will result in a fine no less than \$100 for the first offense and a re-inspection shall occur within 90 days. Notice of Violation will remain in effect for a period of no less than two (2) years.

(d) A second offense shall result in a fine no less than \$500; violations thereafter will result in a maximum of \$1,000 per violation.

**10. Records**

Stores shall retain their records for a minimum of three years from the date on which any fee or report based on such records is submitted as provided in Sections 4, 5, or 7. Records shall be available to County of Santa Clara Department of Agriculture Commissioner, Integrated Waste Management Program Manager, Weights and Measures Program Manager and/or their designees [and/or by jurisdiction's agencies to be named].

**11. Operative Date**

This chapter shall become operative on October 1, 2009.

[jurisdiction-specific approval format]

## **Stakeholder Discussion of Model Ordinance Alternatives**

As directed by Council in May 2008, staff continued to work with stakeholders on a plan to significantly reduce both plastic and paper carryout bags. The stakeholders who had been meeting from February to April 2008 (California Grocers Association, PW Market, Safeway, Target, American Chemistry Council), resumed meeting with the addition of some smaller local grocers. In June 2008, after the Santa Clara County Cities Association agreed to support a collaborative regional approach, and RWRC gave the task to TAC and SRR to develop model ordinance language, representatives from various cities joined the stakeholder group. Other interested parties (e.g. Sierra Club, Save The Bay, haulers and landfill staff), also asked to be included in the stakeholder process and have been on the listserve for this group and/or have attended the bi-weekly meetings.

From May to December 2008, the core group which attended bi-weekly meetings discussed various plans which would reduce both plastic and paper carryout bags, as well as evaluated what other cities are doing and considered best practices. The State legislation (AB 2769) was introduced during this period. The final product of this group was the model ordinance, but many additional issues were discussed and are presented below. Additionally, San José staff from ESD and Finance have been meeting to discuss general administration and implementation possibilities.

At the August 27, 2008 RWRC meeting, there was unanimous agreement that the draft model ordinance should have the elements listed below.

### **A. All types of carry out bags at check outs should be included in the ordinance, paper, plastic and compostable plastic.**

1. Alternative: only plastic bags would be included. There is almost unanimous consensus that this alternative is environmentally inferior due to resource consumption and disposal considerations.

The inclusion of all types of single use carry out bags will provide the maximum impetus for consumers to bring and utilize their own reusable bags. Excluding any one particular type of bag from the ordinance would be a less desirable option. All bags involve some level of resource consumption and disposal consideration and all bags have varying degrees of negative environmental impacts. Making one type of bag free while banning or charging a fee on another type of bag would compel the consumer to choose the available bag that had no fee attached to it.

Compostable plastic bags are included in the ordinance because at this time, facilities do not have systems in place to differentiate between compostable and non-compostable plastic bags. Most plastic bags are non-compostable, so that outside of backyard composting, compostable plastic bags go to the landfills and are not composted.

**B. The ordinance would reduce the use of single use carry out bags primarily through fees charged to the consumer on a per bag basis rather than an all out ban on paper, plastic or both.**

1. Alternative: the ordinance would be based on bans of all types of disposable carryout bags, rather than fees. This would be less flexible than a fee based system, and does not provide revenue to offset costs of litter control or enforcement of bans.
2. Alternative: the ordinance would be based on bans of disposable, carryout plastic bags, and fees on paper bags.

It is recommended that fees be levied on consumers rather than retailers in order to conform to AB 2449. San José is undertaking a cost study to determine the appropriate amount of the fee in order to recoup costs for which the fee is being collected. Exemptions would be given for Food Stamp recipients and those enrolled in Women, Infants and Children (WIC) Programs.

The use of fees would provide an incentive to consumers to use reusable bags and provide revenue to offset costs of enforcement, education and litter control. An outright ban on all bags was not recommended because it is less flexible than a fee based system and it would not leave the consumer with an option for unexpected shopping trips or in the event that they forgot to bring their own reusable bags. Banning plastic bags, but imposing a fee on paper bags, was not recommended because it would be confusing to the public and would not foster the desired behavioral change. Both types of bags have significant, though different, environmental impacts. Fees collected by the jurisdiction from the retailer may be used for augmenting litter programs, public education/outreach and enforcement of the ordinance and will be at the discretion of the jurisdiction.

**C. Retailers would be allowed to retain a portion of the fee for cost recovery purposes, 5 cents for plastic and 10 cents for paper, based on ordinance definitions and standards.**

Various costs will be incurred by retailers for educational and training costs related to reusable bags, and the collection and remittance of the fee. In response to grocery and retailer stakeholder input, at the State and local level, consensus was reached regarding retention of a portion of the fee by retailers. In Seattle, smaller retailers with gross sales below a particular level were going to be allowed to retain the whole fee, and would not have been required to remit any portion.

**D. All retailers would be included except restaurants and take out food establishments.**

1. Alternative: the ordinances would apply only to the large grocers and pharmacies currently covered by AB 2449.
2. Alternative: the ordinance would apply to a larger fraction of retail establishments than AB 2449, but would exclude the majority of small establishments, at least initially. This alternative might be seen as necessary by some jurisdictions if a fee-based system is chosen, due to difficulties of administering a near-universal program.

3. Alternative: the ordinance would apply to all retail except a few specified establishments, such as restaurants and non-profits. This alternative is seen by the California Grocers Association and some others as superior from a public information and enforcement perspective, especially for a ban-based system.

To apply the ordinance only to the large grocers and pharmacies currently covered by AB 2449 presents an economic disadvantage to the AB 2449 covered retailers. Doing so also sends the wrong message to consumers that all bags and retailers are *not* created equal. Another alternative considered was to apply the ordinance to a larger percentage of retail establishments than those covered by AB 2449, but exclude the majority of small establishments, at least initially. This was abandoned because both the California Grocer's Association and the County Commissioners felt the "broader is better" approach is more equitable to retailers and less confusing to the consumer. A retail establishment or non-profit organization wishing to apply for an exemption must do so with the local jurisdiction/enforcement agency by providing documentation of extreme hardship.

**E. All jurisdictions will have some form of the ordinance to their City Councils by the week of April 20, 2009 (Earth Week) with a specific effective date to be determined by each jurisdiction (possibly Oct. 1, 2009).**

1. Alternative: the local ordinances would become effective on some specified date or after a different duration.
2. Alternative: the local ordinance might only become effective if a Statewide fee or ban is not in effect by January 1, 2010 or some other date, the resolution passed by City of Los Angeles.
3. Alternative: the local fee would not be effective on all or some stores until the existing preemption of local fees is eliminated or expires.

The local ordinances would become effective on some specified date or after a different time period. One alternative considered was that the local ordinance might become effective only if a statewide fee or ban is not in effect by January 1, 2010 or some other date, or that the local fee would not be effective on all or some stores until the existing preemption of fees provided by AB 2449 is eliminated or expires. However, in order for this effort to have an extensive countywide impact, it is imperative that all jurisdictions adopt a fairly uniform ordinance and implement it in a similar time frame. Bags ending up in the roadways and creeks do not respect jurisdictional boundaries. Additionally local governments cannot rely on a statewide fee or ban in the foreseeable future and must take action now. Should future statewide legislation be implemented, it *may* supersede the need for a local ordinance.

**F. Enforcement in unincorporated Santa Clara County will be carried out by the County's Weights and Measures Division (WMD) when they make their regularly scheduled visits to retailers to do scanner checks; jurisdictions could decide to also use the WMD, or would be free to consider alternative methods of enforcement. County staff will provide a sample MOU which could be used by jurisdictions.**

1. Alternatives: Environmental Health enforcement could be considered a local option

2. Alternatives: With ban compared to fee systems, then:
  - a. Ban can be enforced on a complaint basis, but
  - b. A fee system requires proactive enforcement.

Each jurisdiction may choose to enforce the ordinance as appropriate and may include City code enforcement, County Department of Environmental Health, or others to be determined. The language in any ordinance will require retail establishments to post signage (windows, checkout areas) notifying the public that the establishment is covered by the ordinance or is exempt. Enforcement may then be conducted on a complaint basis. This is an area where consistency between jurisdictions would be particularly beneficial for universal enforcement throughout the County.

**G. All bags, regardless of size will be included. Due to health and safety standards, sub-bags used for produce and meat would be exempt, as would smaller "header" bags such as those used for greeting cards, and other small items.**

Including all bags of all sizes regardless of purpose was considered. Sub-bags used for produce and meat, slim "header" bags used for greeting cards to protect against moisture and/or damage or the larger, slim bags used to protect print shop jobs would not have been exempt. However health and safety standards recommend a protective bag for meat and produce in order to prevent cross contamination and common sense dictates protecting easily damaged items from harm.

**H. Performance Standards are built in to the ordinance to measure success that may include litter surveys, store surveys and/or the amount or weight of disposable bags purchased.**

Waste audits, litter surveys and or comparing the weight of the bags purchased by a retailer at the initial implementation of the ordinance versus the weight purchased two or three years after implementation should give a good measure for gauging behavioral change in consumers. Additionally, firms which specialize in public opinion and awareness information gathering to gauge behavioral changes through surveys might also be useful relative to the ordinance. At the very least, the ordinance should be evaluated within three years of implementation.

**G. Outreach to stakeholders and the public will continue during the months preceding implementation in the form of community presentations, meetings, signage, print and other mass media. Public outreach and materials will be developed in the languages used by the Registrar of Voters and include English, Spanish, Vietnamese, Tagalog and Chinese.**

Outreach may be developed and funded by individual jurisdictions, the Countywide Public Education subcommittee of the Technical Advisory Committee and/or regional efforts. This is another area where consistency between jurisdictions would be particularly beneficial. San José, Santa Clara County and other major cities in the Bay Area are currently collaborating with BayROC to develop a regional media messaging campaign to promote reusable bags.

### ***Administration and Implementation***

City staff have been evaluating various issues generally related to the administration and enforcement of an ordinance to reduce single-use carryout bags. Policies developed for fee administration and enforcement would be subject to legal review prior to implementation. ESD staff have coordinated with the Finance Department to analyze potential reporting and auditing functions as they may be similar to other programs currently being administered within the City.

Key administrative issues being explored include, but are not limited to: the application process; payment, collection and processing of fees; compliance, auditing and enforcement monitoring. As the specific details of this program become solidified, staff will report further developments regarding research and progress towards formalizing an administrative and enforcement policy, as well as any issue resolution. Key program components and relevant information are further described below.

**Application process to identify and catalog all retailers to be covered by the ordinance:** The City currently has some demographic information about potential participants which would need to be refined and confirmed by the business owners, so that notification for participation and payment schedules could be sent to them. Protocols would need to be developed to accommodate changes in business ownership, and provide for a systematic way to maintain the database of retailers.

**Payment, collection and processing of fees:** The City's Finance Department has a structure in place for receiving and posting payments and assessing late fees. The bag fee program could be incorporated into the current structure, but further analysis is required to determine specifics related to such things as the optimal frequency of payments, and impacts on City resources with respect to the processing and posting of transactions related to this program.

**Compliance monitoring to review report submittals and fee remittance:** Internal review of reports and fee remittances would be essential for ensuring accuracy of payments received and would provide oversight for the remitting retailers. It is anticipated that this function would occur within the existing Finance organizational structure.

**Auditing of retailers' records:** Store visits and thorough systematic reviews of records for the purpose of verifying correctness and accuracy would need to be done with some relative frequency. Currently in other City programs, there can be random sampling of accounts that are audited, as well as a for-cause audit which may be done if reported data or remittances do not fall within the expected range.

**Enforcement to monitor compliance:** It is anticipated that the first phase of a bag fee program would focus on education regarding best management practices with respect to retailers' implementation of this program. Brochures, placards and signage could be developed and distributed to assist stores during an initial transition period.

A number of options to achieve enforcement are under consideration. Currently City watershed field inspectors routinely visit restaurants and food service establishments to oversee compliance related to waste water discharge. Analysis will need to be done to determine if an expansion of their duties could be made to include enforcement of this program. Concurrently, the County is planning to utilize their Weights and Measures Division to do enforcement of this program in unincorporated areas. Since Weights and Measures has jurisdiction at all retail stores to measure scale accuracy and scanned prices, it is thought that this group may be a good option to enforce this program countywide, which would have the benefit of supporting a consistent enforcement approach.. Enforcement services could be implemented through an MOU the County and City, though specifics such as cost have not yet been established.