

MEMORANDUM

From: DS

To: EICIV

Subject: 339-193 – plastic bag ban legislation

Date: January 22, 2021

Skip,

You asked me to determine whether Senate Bill 223 and Chapter 8.48 (Disposable Plastic Bags) of the City of Takoma Park Code conflict. In short, although there are some slight differences between the two, I do not believe such differences are significant enough to warrant any action.

I. Preemption

As an initial matter, Senate Bill (“SB”) 223, which, if signed into law, would not take effect until October 1, 2021.¹ The Bill’s preemption, however, would not kick in until July 1, 2022:

(F) Beginning July 1, 2022:

- (1) Only the State may enact a law or take any other action to prohibit, restrict, or regulate the use of plastic bags less than 4 mils thick by a retail establishment;
- (2) Item (1) of this subsection preempts the authority of a county or municipality to enact a law or an ordinance to prohibit, restrict, or regulate the use of plastic bags less than 4 mils thick by a retail establishment; and
- (3) This section supersedes any law or ordinance of a county or municipality that prohibits, restricts, or regulates the use of plastic bags less than 4 mils thick by a retail establishment.

By the clear language of the proposed legislation, it appears that the General Assembly wishes to leave no room for local variations and to create a uniform standard across the State. However, it appears that the preemption would not take effect until July 1, 2020, thus, permitting counties and municipalities to have their own laws in place through June 30, 2021.

II. Exceptions to general prohibition on the use of plastic bags

Both SB 223 and Chapter 8.48 exempt the following uses/items from the prohibition on the provision of “plastic carry out bags” at the point of sale²:

¹ This memorandum presumes that SB 223 will be enacted. A variation of this legislation, however, has been introduced in at least one prior legislative session and did not make it far. A hearing on SB 223 is set to take place on January 28, 2021.

² Takoma Park uses the term “disposable plastic bag.” SB 223 also specifies that the plastic bags covered are less than 4 mils thick, whereas Takoma Park does not specify a thickness or any other measurement for that matter. I am not sure the thickness makes a difference to the overall analysis.

- To contain dry cleaning;
- To contain newspapers; and
- Packages of multiple plastic bags.

Although Takoma park frames the next set of exemptions as “plastic bag use permitted prior to the point of sale,”³ both the City Code and SB 223 permit that plastic bags may be provided for the following items:

- Bulk items like fruit, vegetables, nuts, grains, candy or small hardware items;
- Unwrapped prepared foods or baked goods;
- Frozen foods, meat, fish;
- Flowers, potted plants, or other damp items; and
- Prescription drugs.

SB 223 provides additional exceptions to the general ban on plastic bags for which the City Code does not expressly enumerate:

- A plastic bag to contain ice;
- A plastic bag provided by a food service facility that is necessary to meet food safety and contamination standards;
- A plastic bag provided by a retail establishment to take live fish, insects, mollusks, or crustaceans away from the retail establishment (this is kind of covered by the above references to “meat” and “fish”); and
- A plastic bag provided at a farm or an orchard that contains fruits or vegetables that were produced by and purchased on the farm or orchard (this does not really differ from above reference to “fruits” and “vegetables”).

If the City does not wish for plastic bags to be used to carry ice or to be provided “by a food service facility that is necessary to meet food safety and contamination standards,” they will need to lobby to have that language removed from SB 223. I suspect, however, that that would not be the case and that the City would permit plastic bags to be used for such purposes.

III. Penalties

There appears to be no major conflict between the two pieces of legislation with respect to penalty. SB 223 provides that a retail establishment that violates the general ban is subject to a civil penalty not exceeding \$500. The State bill also states that the “provision of one or more plastic carryout bags at a single point of sale is a single violation” and that a penalty may not be imposed on a retail establishment more than once within a 7-day period.

The City Code classifies a violation of Chapter 8.48 as a class D municipal infraction which may result in \$100.00 fine for the initial offense and a \$200.00 fine for repeat offenses. The City

³ SB 223 further defines “plastic carryout bag” as being “provided by a retail establishment to a customer at the point of sale.” I doubt that the distinction made in the City Code makes much difference.

Code also establishes that the “[d]istribution or one or more disposable bag[] to a customer in connection with a single transaction is a single violation.” The City Code also states that a penalty shall not be imposed more than once within a seven-day period.

Where the two differ is that SB 223 provides that a “penalty may not be imposed under this section unless a retail establishment”: (1) is “first issued a written notice of violation” and (2) “does not correct the violation within 3 months after receipt of the written notice.” The City Code does not offer such a safe-harbor period.⁴ Therefore, if the City wishes to be able to impose a penalty immediately, it is going to have to lobby the General Assembly to amend the language.

IV. Temporary waivers

SB 223 permits that a county government may provide retailers temporary waivers if they are unable to comply with the ban:

A unit of county government may grant a retail establishment up to two waivers from the requirements of this section for a period of up to 3 months for each waiver if the unit of county government determines that achieving compliance under this section would cause the retail establishment an undue hardship or a practical difficulty not generally applicable to other retail establishments in similar circumstances.

The City Code provides no such waiver. Therefore, if the City disagrees with this provision, they should lobby the General Assembly for its removal. Again, however, I doubt that would be the intent of the City.

V. Conclusion

In conclusion, should the City want the provisions of their Code, which slightly differ from the language of SB 223 noted above, to have effect beyond June 30, 2022, they should lobby the General Assembly to amend the proposed legislation.

Enclosures:

Chapter 8.48
Senate Bill 233
New Leal Request Alert

⁴ I could find no City regulations with respect to the enforcement of Chapter 8.48 of the Code.