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TO: Benjamin Lee, Chair, Legislative and Rules Committee
FROM: Michael Toma, Assistant Corporation Counsel *MST*
DATE: April 27, 2018
RE: Proposed Ordinance on Retail Checkout Bags

You have asked for a formal opinion answering several questions relating to the proposed shopping bag ordinance.

- 1) Can the city levy a municipal tax as to non-recyclable non-biodegradable plastic and/or paper bags?

No, there is no statutory authorization for the City to levy a tax relating to the use of plastic and/or paper bags. In determining whether a municipality has the authority to enact a certain piece of legislation, the state Supreme Court has held that courts are not to look for statutory prohibition against such an enactment. Instead, they must look for statutory authority for it. *Simons v. Canty*, 195 Conn. 524, 530 (1985). In Connecticut, much of the authority to enact ordinances derives from C.G.S. §7-148, "Scope of Municipal Powers." This statute authorizes municipalities to "assess, levy and collect taxes for general or special purposes on all property, subjects or objects which may be lawfully taxed." None of the separate taxing statutes authorize the taxing of bags.

- 2) Can the City impose a charge on non-recyclable non-biodegradable plastic and/or paper bags, which charge will be retained solely by the retail establishment, without any retention of the same by the municipality, for the sole purpose of encouraging the use of reusable carryout bags?

We are unsure whether a court would uphold such an ordinance provision. Several courts outside Connecticut have concluded that because the funds from such charges are not received by the municipality, such charges are not taxes and therefore no express taxing authorization

is necessary. None of these are Connecticut decisions. We note that there is no express statutory authority in Connecticut for a municipality to impose a charge in such a manner, that is, to encourage a certain type of environmentally-friendly behavior. There is an argument that can be made that the authority for such a fee can be implied from the City's environmental protection powers, given the objective of encouraging the use of reusable bags. But, there are also counterarguments that can be made, such as, the fee is a defacto tax without statutory authorization, and, the fee constitutes an improper governmental intrusion into the marketplace. As far as we are aware, a legal challenge to such a fee would be a case of first impression in Connecticut.

- 3) To the extent that a charge as reflected in inquiry #2 is acceptable, can the municipality require the retail establishment to sell a reusable bag at "cost" as suggested by Representative Sherwood?

No. Not only is there no express statutory authority in Connecticut for a municipality to engage in such a manner of economic regulation, such a provision would be a form of price control, and such provisions have been upheld in very few circumstances, and only when there are weighty societal interests at stake. The government may intervene in the marketplace to regulate rates or prices that are artificially inflated as a result of the existence of a monopoly or near monopoly (*FPC v. Texaco, Inc.*, 417 U.S. 380, 397-398 (1974)) (recognizing that federal regulation of the natural gas market was in response to the threat of monopoly pricing); or, as a result of a discrepancy between supply and demand in the market for a certain product (*Nebbia v. New York*, 291 U.S. 502, 530 (1934)) (allowing a minimum price for milk to offset a "flood of surplus milk"); or, as a result of the need to protect consumer welfare, such as the use of rent control as the result of a shortage of and increasing demand for housing (*Block v. Hirsh*, 256 U.S. 135, 156 (1921)).

Additionally, the requirement that a retail establishment sell a reusable bag at "cost" would be imposed to ameliorate the concern that the purchase of reusable bags may be financially burdensome for lower-income individuals. However, it would be inequitable to impose on the retail establishments the burden of funding a remedy rather than on the public as a whole. The manner in which government has traditionally met the problem of those who cannot pay reasonable prices for privately sold necessities has been the distribution to them of funds (via welfare, food stamps, and the like) raised from the public at large through taxes. "[P]ublic burdens . . . should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

- 4) Can the City require a retail establishment to give any sort of discount in exchange for the use of recyclable bags?

A requirement that a retailer give a discount to consumers is an unusual proposal to which we have found no clear analogy in other municipal legislation. Consequently, our opinion is not based on precedent, but rather on our prediction of how a court would treat such a law. We believe it unlikely that a mandatory discount provision in an ordinance regulating checkout bags would be upheld by a court, for the following reasons.

First, there is no express statutory authority in Connecticut for a municipality to engage in such a manner of economic regulation. In addition, this concept in essence transfers wealth from the retailers to the consumers, and a reviewing court is likely to conclude that in doing so the legislation effects an unconstitutional taking of property from the retailers. Such a provision would be intended to encourage environmentally-friendly practices, but at the expense of the retailers. Damage to the environment from non-recyclable bags is a problem caused not only by retailers, who make a business decision to offer such bags to consumers, but also by the manufacturers of the plastic bags, as well as by consumers, who choose to use such bags; once the bags are used, they eventually enter the waste stream, or become litter. Addressing the problem by imposing an economic burden only on the retailers violates the Constitution's Takings Clause. The Supreme Court has repeatedly observed that the purpose of the Takings Clause in the Bill of Rights is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Finally, mandating that a retailer give a discount constitutes a form of price control, in that it prevents the retailer from charging consumers "full" price. As discussed in the answer to the previous question, such provisions have been upheld in very few circumstances, and only when there are weighty societal interests at stake.

- 5) Can the City require that a retail establishment use either recyclable and/or biodegradable plastic bags, or is its power limited to banning certain types of bags?

Yes, provided there is adequate factual justification for the approval of some bags and the prohibition on other bags. That is, there should be information in the record that the types of bag that are being prohibited from use are actually relatively harmful to the environment. Any regulation must be reasonably calculated to achieve its intended purpose; it must have a rational relationship to its objective. *Blue Sky Bar, Inc. v. Town of Stratford*, 203 Conn. 14, 22 (1987).

- 6) What sort of scientific evidence should be introduced to the Board of Representatives to form the factual justification for the ordinance?

In the event of a lawsuit challenging a checkout bag ordinance, the City will need to demonstrate that the ordinance is rationally related to the objective of protecting the environment, and so the Board of Representatives should accept into the record of its deliberations evidence of a scientific nature which sets forth the (relative) harm that certain bags cause to the environment. Information can be received from articles in professional journals and government publications. One such example is: Matthew Cole et al., *Microplastics as Contaminants in the Marine Environment: A Review*, 62 Marine Pollution Bulletin 2588, 2589 (2011). Factual support for the ordinance can also be offered by speakers who can provide information regarding the amount of bags in the waste stream, what proportion of litter is made of bags, and the problems caused by that litter, whether in the downtown or residential areas, or in parks or at the beaches.

A good example of a Connecticut court case in which the court found that a challenged municipal ordinance was supported by evidence in the record is *Modern Cigarette, Inc. v. Town of Orange*, 256 Conn. 105 (2001). *Modern Cigarette, Inc.*, a distributor of tobacco products, challenged the Town of Orange's ordinance prohibiting cigarette vending machines within the town's borders. In upholding the validity of the ordinance, the purpose of which was to prevent the illegal purchase of cigarettes by minors from a vending machine, the state Supreme Court noted that the town's notice of the enactment of the ordinance included various whereas clauses preceding the actual language of the new ordinance. These whereas clauses contained factual determinations that the Court considered to be legislative findings. Some of the whereas clauses read as follows:

“WHEREAS: Cigarettes are the most heavily advertised product in the United States and the tobacco industry spends more than \$421 million annually for outdoor advertising of cigarettes;

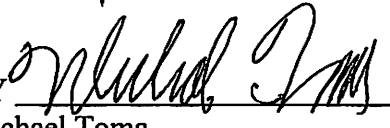
WHEREAS: More than 3 million young people under the age of 18 consume more than 947 million packs of cigarettes annually in the United States, yielding gross sales to the tobacco industry each year of approximately \$1 billion;

WHEREAS: Recent governmental surveys have found a 50% increase in the percentage of adolescents who smoke cigarettes;

WHEREAS: Local school officials have reported a noticeable rise in teenage smoking.”

We recommend that the Board of Representatives include in its notice of adoption of a checkout bag ordinance whereas clauses containing the factual determinations which provide the basis for the need for the ordinance.

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BY 
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