



Kate Harrison
Councilmember District 4

CONSENT CALENDAR
September 14, 2021

To: Honorable Mayor and Members of the City Council

From: Councilmember Harrison

Subject: Referral to the Zero Waste and Energy Commission (or Successor Commission) to Hold Joint Meetings to Conduct Community Outreach and Education Events with Regard to the Proposed Ordinance Regulating the Use of Carryout and Pre-checkout Bags and to Make Recommendations to the FITES Committee

RECOMMENDATION

Refer to Berkeley's Zero Waste and Energy Commissions (or successor Commission) to hold joint meetings regarding the proposed Ordinance regulating the use of carryout and pre-checkout bags and promoting the use of reusable bags by December 31, 2021.

As part of the series of meetings, the Commissions should:

1. strive to conduct community/business outreach and education events to include, but not limited to the following entities:
 - a. all stores and events that provide pre-checkout bags (e.g., grocery stores, convenience stores, food marts, and food vendors);
 - b. all restaurants, take-out food stores, food trucks, permitted events, and any other commercial establishment not regulated by the state that provide carryout bags; and
2. make any recommendations with respect to any amendments and appropriate phasing to the Facilities, Infrastructure, Transportation, Environment & Sustainability Policy Committee.

POLICY COMMITTEE RECOMMENDATION

On July 21, 2021 the FITES Committee took the following action:

Action: M/S/C (Harrison/Robinson) to make a positive recommendation to the City Council that the Council direct the Zero Waste and Energy Commission (or successor Commission) to hold joint meetings to conduct community outreach and education events and recommend proposed changes and appropriate phasing to the

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FITES Committee.

Vote: All Ayes

BACKGROUND

On December 10, 2019, Councilmember Harrison and cosponsor Councilmember Hahn submitted a draft Ordinance regulating the use of carryout and pre-checkout bags and promoting the use of reusable bags. The Agenda Committee referred the item to the FITES Committee on November 25, 2019.

By closing loopholes in state and county law, the ordinance is aimed at avoiding unnecessary waste, promoting reuse, reducing greenhouse gas emissions, and protecting land/sea wildlife and the urban environment.

Committee consideration of the item was initially delayed due to examination of statewide preemption issues and the COVID-19 pandemic. Subsequently, the item has gone through a number of revisions.

The latest draft of the ordinance has been crafted to consider and complement existing regulations at the state and county levels. With respect to the regulation of carryout bags, this ordinance is intended to *only* regulate entities for which the City is not preempted by the state. Neither the state nor county regulate pre-checkout bags, however, the proposed ordinance would. This ordinance does not regulate bags that are integral to the manufacturing of products, i.e., product bags, and provides a limited exemption process.

As currently drafted, the ordinance does the following across the following bag types and entities:

Carryout bags:

- Bans thicker plastic film carryout bags, except for bags that contain hot liquids, for:
 - restaurants, take-out food stores, and food trucks.
 - permitted events and city-sponsored events
 - any other commercial establishment not regulated by the state¹
- Defines reusable carryout bags as non-plastic film across:
 - restaurants, take-out food stores, and food trucks.
 - permitted events and city-sponsored events
 - any other commercial establishment not regulated by the state
- Charges \$0.10 for paper bags at:

¹ e.g., smaller clothing stores/book/furniture/electronic/gift stores, clothing stores/book/furniture/electronic/gift stores that don't sell perishable goods and have < \$2 million revenue, grocery stores under \$2 million that don't sell alcohol, convenience stores that don't sell alcohol, small pharmacies < 10k square feet etc.

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- restaurants, take-out food stores, and food trucks.
- *Second phase 2023*: requires any paper carryout bag provided by the following be 100% recycled material:
 - restaurants, take-out food stores, and food trucks.
 - permitted events and city-sponsored events
 - any other commercial establishment not regulated by the state

Pre-Checkout Bags:

- Bans all but paper pre-checkout bags, except upon request for meat/seafood, across:
 - all stores & events
- Charges \$ 0.10 min. for any paper pre-checkout bag; *Second phase in 2023*: requires any paper pre-checkout bag to be 100% recycled across:
 - all stores & events
- Defines pre-checkout bags as non-plastic film:
 - all stores & events

In addition, the ordinance prevents stores from unreasonably denying customers from bringing their own reusable bags and containers.

As part of its consideration of the proposed ordinance, the FITES Committee provided direction at its July 21, 2021 meeting that the Zero Waste and Energy Commissions (or successor Commission) should hold joint meetings with respect to the ordinance aimed at conducting community/business outreach and education events to include the people and entities regulated by the ordinance and to make recommendations regarding any amendments and appropriate phasing of the law to FITES.

The Zero Waste and Energy Commissions respectively focus on issues ranging from City solid waste policy and goals to climate protection and energy conservation. It is in the public interest for the Council to engage its citizen-led commissions to assist in the outreach process to community members and businesses that may be impacted by the proposed ordinance.

FISCAL IMPACTS

Noticing and providing assistance to Commissioners to conduct a series of community outreach meetings will require staff time.

ENVIRONMENTAL SUSTAINABILITY

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By closing loopholes in state and county law, the ordinance is aimed at avoiding waste, promoting reuse, reducing greenhouse gas emissions, and protecting land/sea wildlife and the urban environment.

CONTACT PERSON

Kate Harrison, Berkeley City Councilmember, (510) 981-7140

ATTACHMENTS:

1. Infographic Comparing State and County Laws to the Proposed Berkeley Ordinance
2. Proposed Ordinance Adding BMC Chapter 11.63 and Regulating the Use of Carryout and Pre-checkout Bags and Promoting the Use of Reusable Bags

COMPARISON OF STATE & COUNTY LAW TO PROPOSED BERKELEY ORDINANCE



Law: Public Resources Code Sections 42281 et seq., Senate Bill 270, Proposition 67,

Applicability:



Retail/grocery stores with annual sales > \$2 million that sell some perishable items



Large retail stores with a pharmacy > 10,000 sq. ft. of retail space



Convenience stores, food marts, or liquor stores that sell e.g. milk, bread, soda, & snack foods, and that have a Type 20 or Type 21 alcohol license

Regulation:



Bans flimsy plastic film carryout bags: **×**



Thicker film and other "reusable" carryout bags: **\$0.10 min**



Paper carryout bags: **\$0.10 min + 20-40% Recycled Material**



Law: Alameda County Waste Management Authority Ord. 2016-2

Applicability:



Restaurant, take-out food & food-trucks



All other stores w/ enclosed structure selling goods e.g., clothing, food & personal items

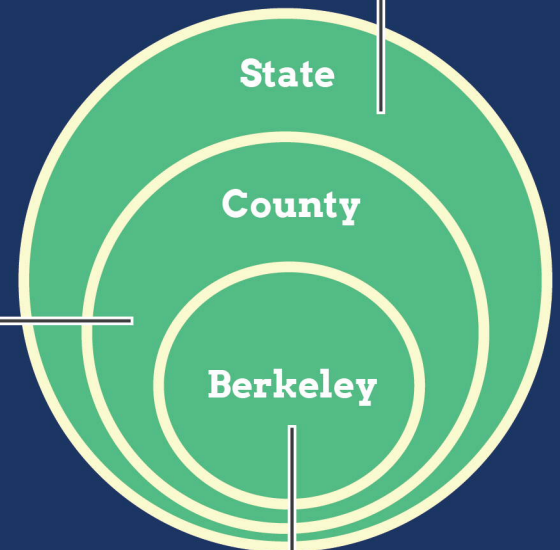
Regulation:



Thicker film and other "reusable" carryout bags: **\$0.10 min**



Paper carryout bags **\$0.10 min (except for restaurants) + 40% Recycled Material**



Law: Proposed Ordinance BMC 11.63

Applicability:



Restaurant, take-out food and food-truck establishments



All other stores selling goods e.g., clothing, food & personal items



Events requiring a street permit



City of Berkeley sponsored events

Regulation:



Bans thicker film bags **×**



Paper carryout bags **\$0.10 min &**



Pre-checkout bags (e.g. produce) **Starting in 2023: 100% Recycled Paper**



Bans compostable plastic

Reusable non-film Bags

ORDINANCE NO. –N.S.

ADDING CHAPTER 11.63 TO THE BERKELEY MUNICIPAL CODE TO REGULATE
THE USE OF CARRYOUT AND PRE-CHECKOUT BAGS AND PROMOTING THE USE
OF REUSABLE BAGS

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Chapter 11.63 of the Berkeley Municipal Code is added to read as follows:

Chapter 11.63

**REGULATING THE USE OF CARRYOUT AND PRE-CHECKOUT BAGS AND
PROMOTING THE USE OF REUSABLE BAGS**

Sections:

11.63.010 Findings and purpose.

11.63.020 Definitions.

11.63.030 Carryout Bag restrictions for Covered Entities.

11.63.040 Pre-checkout Bag restrictions for Grocery Stores and Covered Entities.

11.63.050 Unreasonable denial of customer bags or containers.

11.63.060 General exemptions.

11.63.070 Waivers—applicability and process to obtain.

11.63.080 City of Berkeley—purchases prohibited.

11.63.090 Duties, responsibilities and authority of the City of Berkeley.

11.63.100 Liability and enforcement.

11.63.110 Severability.

11.63.120 Construction.

11.63.130 Effective date.

11.63.010 Findings and purpose.

The Council of the City of Berkeley finds and declares as follows:

- A. Single-use plastic bags and plastic produce bags are a significant contributor to street litter, ocean pollution, marine and other wildlife harm and their production creates greenhouse gas emissions.
- B. The production, consumption and disposal of plastic based bags contribute significantly to the depletion of natural resources. Plastics in waterways and oceans break down into smaller pieces that are not biodegradable, and present a great harm to the global environment.
- C. Among other hazards, plastic debris attracts and concentrates ambient pollutants in seawater and freshwater, which can transfer to fish, other seafood and salt that is eventually sold for human consumption. Certain plastic bags can also contain microplastics that present a great harm to our seawater and freshwater life, which indirectly presents a threat to human life.
- D. It is in the interest of the health, safety and welfare of all who live, work and do business in the City that the amount of litter on public streets, parks and in other public places be reduced.
- E. The City of Berkeley must eliminate solid waste at its source and maximize recycling and composting in accordance with its Zero Waste Goals. Reduction of plastic bag waste furthers this goal.
- F. The State of California and Alameda County Waste Management Authority both regulate single-use, paper, and reusable carryout bags respectively under SB 270/Proposition 67 and Ordinance 2012-02 (as amended by Ordinance 2016-02). However, neither currently address all establishments or pre-checkout (e.g., produce) bags to carry fruits, vegetables, and other loose or bulky items while shopping before reaching the checkout area. These bags, which are often plastic, share many of the same physical qualities as single-use plastic carryout bags no longer permitted in California, and are difficult to recycle, reuse or compost.
- G. The State also does not regulate the price of bags provided at the point of sale by restaurants and streets events, including farmers' markets. While the County's Ordinance 2016-02 regulates restaurant carryout bags, it allows thicker film plastic.
- H. The City of Berkeley currently regulates a number of disposable plastic items through the Single-Use Foodware and Litter Reduction Ordinance (Ord. 7639-NS § 1 (part), 2019), but does not impose regulations with respect to bags. It is in the public interest to reduce plastic and paper waste in areas not preempted by the State of California.
- I. This Chapter is consistent with the City of Berkeley's 2009 Climate Action Plan, the County of Alameda Integrated Waste Management Plan, as amended, and the CalRecycle recycling and waste disposal regulations contained in Titles 14 and 27 of the California Code of Regulations.

11.63.020 Definitions.

- A. "Carryout Bag" means a bag provided at the check stand, cash register, point of sale or other location for the purpose of transporting food or merchandise out of a Covered Entity. Carryout Bags do not include Pre-checkout or Product Bags.
- B. "Covered Entity" means any of the following:
 - (1) any restaurant, take-out food establishment or other business (including, but not limited to, food sales from vehicles or temporary facilities open to the public) that

receives 90% or more of its revenue from the sale of prepared and ready-to-consume foods and/or drinks to the public and is not subject to the requirements of Public Resources Code Section 42281; and

(2) any event, or Person therein, requiring a street event permit pursuant to Berkeley Municipal Code 13.44.040 and not subject to the requirements of Public Resources Code Section 42281; and

(3) any other commercial establishment that sells perishable or nonperishable goods including, but not limited to, clothing, food and personal items directly to a customer and not subject to the requirements of Public Resources Code Section 42281.

C. "Customer" means any Person obtaining goods from a Covered Entity or Grocery Store.

D. "Grocery Store" means a supermarket, grocery store, convenience food store, foodmart, or other entity engaged in the retail sale of goods that include perishable and nonperishable food items;

E. "100% Recycled Content Paper Bag" means either a Carryout Bag provided by a covered Entity or a Pre-checkout Bag provided by a Grocery Store that contains no old growth fiber and one hundred percent (100%) postconsumer recycled material; is one hundred percent (100%) recyclable and compostable, consistent with the timeline and specifications of the American Society of Testing and Materials (ASTM) Standard D6400; and has printed in a highly visible manner on the outside of the bag the words; "Recyclable," the name and location of the manufacturer, and the percentage of postconsumer recycled content;

F. "Reusable Carryout Bag" means a bag that is specifically designed and manufactured for multiple reuse and meets all of the following requirements:

(1) has a minimum lifetime of 125 uses, which for purposes of this subsection, means the capability of carrying a minimum of 22 pounds 125 times over a distance of at least 175 feet;

(2) has a minimum volume of 15 liters;

(3) is washable by hand or machine, or is made from a material that can otherwise be cleaned or disinfected;

(4) does not contain lead, cadmium or any other heavy metal in toxic amounts, as defined by applicable state and federal standards and regulations for packaging or reusable bags;

(5) has printed on the bag, or on a tag that is permanently affixed to the bag, the name of the manufacturer, the location (country) where the bag was manufactured, a statement that the bag does not contain lead, cadmium, or any other heavy metal in toxic amounts, and the percentage of postconsumer recycled material used, if any; and

(6) is not primarily made of plastic film, regardless of thickness.

G. "Person" means an individual, firm, public or private corporation, limited liability company, partnership, industry or any other entity whatsoever.

H. "Pre-checkout Bag" means a 100% Recycled Content Paper Bag provided to a customer to carry produce, bulk food, or other food items to the point of sale inside a store.

I. "Product Bags" are bags that are integral to the packaging of a product such as film or other bags used to fully encapsulate liquid or semi-liquid takeout food items (e.g., soup containers) to prevent spillage; or bags designed to be placed over articles of clothing on a hanger at dry cleaning or laundry facility.

11.63.030 Carryout Bag restrictions for Covered Entities.

- A. No Covered Entity shall provide or sell a Carryout Bag other than 100% Recycled Content Paper Bags or Reusable Carryout Bags at the check stand, cash register, point of sale or other location to a Customer for the purpose of transporting food or merchandise out of such Covered Entity.
- B. A Covered Entity may provide or make available for sale to a Customer a 100% Recycled Content Paper Bags for a minimum price of ten cents (\$0.10).

11.63.040 Pre-checkout Bag restrictions for Grocery Stores and Covered Entities.

- A. No Grocery Store or Covered Entity shall provide Pre-checkout Bags other than 100% Recycled Content Paper Bags.
- B. Notwithstanding subsection A, Covered Entities and Grocery Stores may provide plastic film bags as Pre-checkout Bags to Customers for the sole purpose of separating meats and seafood only upon the specific request of a Customer. Covered Entities shall not solicit Customers with respect to this exception.
- C. A Grocery Store or Covered Entity may make available for sale to a Customer Pre-checkout Bags for a minimum price of ten cents (\$0.10).

11.63.050 Unreasonable denial of customer bags or containers.

Any establishment regulated by Public Resources Code Section 42281, Alameda County Waste Management Authority Ordinance 2016-02, or this Chapter, shall not unreasonably deny a customer from using bags or containers of any type that they bring themselves, including in lieu of using bags or containers provided by the establishment. However, establishments may refuse, at their sole discretion, any customer-provided bag or container that is cracked, chipped or corroded, appears inappropriate in size, material, or condition for the intended food item, or that appears to be excessively soiled or unsanitary. If the customer accepts a store-provided bags or containers in lieu, any charge required pursuant to this ordinance, other applicable law, or the establishment's policy will apply.

11.63.060 General exemptions.

- A. Bags exempt from the Chapter include Product Bags, or bags sold in packages containing multiple bags intended for use as garbage, pet waste or yard waste bags.
- B. Nothing in this Chapter prohibits customers from using bags of any type that they bring to the establishment themselves or from carrying away merchandise or materials that are not placed in a bag at point of sale, in lieu of using bags provided by the establishment.
- C. Notwithstanding the requirements of Sections 11.63.30 and 11.63.40, Covered Entities and Grocery Stores, except as subject to the requirements of Public Resources Code Section 42281, providing 100% Recycled Content Paper Bags as Carryout Bags at the point of sale or Pre-Checkout Bags before the point of sale, shall provide such bags at no cost to a Customer participating in the California Special Supplemental Food Program for Women, Infants, and Children pursuant to Article 2 (commencing with Section 123275) of Chapter 1 of Part 2 of Division 106 of the California Health and Safety Code; a Customer participating in CalFresh pursuant to Chapter 1 commencing with Section 18900) of Part 6 of Division 9 of the California Welfare and Institutions Code; and a Customer participating in the Supplemental Food Program pursuant to

Chapter 10 (commencing with Section 15500) of Part 3 of Division 9 of the California Welfare and Institutions Code.

11.63.070 Waivers—applicability and process to obtain.

- A. The City Manager shall prescribe and adopt rules, regulations and forms for Covered Entities or Grocery Stores to obtain a partial waiver from any requirement of this ordinance upon sufficient evidence by the applicant that the provisions of this Chapter would cause undue hardship. The phrase "undue hardship" may include, but is not limited to situations where compliance with the requirements of this Chapter would deprive a person of a legally protected right.
- B. Waivers may be granted by the City Manager or their designees, based upon documentation provided by the applicant and, at the City Manager's discretion, independent verification, including site visits.
- C. The City Manager or their designees shall act on a waiver application no later than 90 days after receipt of such application, including mailing written notification of the City Manager's decision to the address supplied by the applicant.
- D. Waivers may be granted for a specified term of up to x [x months]. During the waiver term, the Covered Entities or Grocery Store shall make diligent efforts to become compliant. Under extraordinary circumstances, should a Covered Entities or Grocery Store demonstrate that, at the close or expiration of a granted waiver term, and with diligent efforts to become compliant, compliance remains infeasible, additional waivers of up to x (x) months each may be granted. It shall be the Covered Entities or Grocery Store's responsibility to apply for any subsequent waivers in a timely manner.
- E. Notwithstanding the x (x) month maximum term for waivers set forth in Section 11.63.070 (D), in certain limited and unique circumstances existing prior to adoption of this ordinance, where the Covered Entities or Grocery Store demonstrates diligent efforts to comply but, due to insurmountable unique circumstances, may never be reasonably able to comply, the City Manager or their designee may grant a waiver for a longer specified term.

11.63.080 City of Berkeley—purchases prohibited.

The City of Berkeley and any City-sponsored event shall only provide or sell to a Customer 100% Recycled Content Paper Bags or Reusable Carry-out Bags for the purpose of carrying away goods or other materials from the point of sale or event.

11.63.090 Duties, responsibilities and authority of the City of Berkeley.

The City Manager or their designee shall prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of this Chapter and is hereby authorized to take any and all actions reasonable and necessary to enforce this Chapter including, but not limited to, inspecting any Covered Entity or Grocery Store's premises to verify compliance.

11.63.100 Liability and enforcement.

- A. Anyone violating or failing to comply with any requirement of this Chapter may be subject to an Administrative Citation pursuant to Chapter 1.28 or charged with an infraction as set forth in Chapter 1.20 of the Berkeley Municipal Code; however, no administrative citation may be issued or infraction charged for violation of a

requirement of this Chapter until one year after the effective date of such requirement.

- B. Enforcement shall include written notice of noncompliance and a reasonable opportunity to correct or to demonstrate initiation of a request for a waiver or waivers pursuant to Section 11.63.060.
- C. The City Attorney may seek legal, injunctive, or other equitable relief to enforce this Chapter.
- D. The remedies and penalties provided in this section are cumulative and not exclusive.

11.63.110 Severability.

If any word, phrase, sentence, part, section, subsection, or other portion of this Chapter, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the prescribed application thereof, shall be severable, and the remaining provisions of this Chapter, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The City Council hereby declares that it would have passed this title, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases had been declared invalid or unconstitutional.

11.63.120 Construction.

This Chapter is intended to be a proper exercise of the City's police power, to operate only upon its own officers, agents, employees and facilities and other persons acting within its boundaries, and not to regulate inter-city or interstate commerce. It shall be construed in accordance with that intent.

11.63.130 Effective date.

The provisions in this ordinance are effective [], 2022.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

