



Attorneys at Law

## MEMORANDUM

TO: Anthony T. Plante, Town Manager

FROM: Kenneth M. Cole III, Esq.

RE: Plastic Bag Ordinances

DATE: April 19, 2012

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**Facts.** Windham is considering implementing a single-use bag ordinance which would ban the use of plastic bags and charge up to 10 cents for non-recyclable paper bags.

**Issue.** May a municipality impose a single-use bag ordinance in Maine and, if so, what are the legal ramifications?

**Bag Ban Laws.** Given the novelty of such laws, it does not appear that any court has had the opportunity to decide whether such bag *bans* are generally valid. The California Supreme Court has ruled on such an ordinance, but the issue in that case was related to issues stemming from California's unique environmental requirements.<sup>1</sup>

In order to ban single-use bags outright, a municipality must be acting pursuant to its police power in order to promote the public health, wealth, safety and general welfare of its residents.<sup>2</sup> The police power is vested in the State government but may be delegated to municipalities through enabling legislation. Accordingly, the State of Maine has authorized municipalities to exercise such power so long as the power has not otherwise been expressly or implicitly reserved by the State.<sup>3</sup>

Assuming that a municipality is acting within their appropriately delegated police powers, municipalities are given substantial deference.<sup>4</sup> Accordingly, an ordinance may be invalidated only if it is not rationally related to a legitimate government

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<sup>1</sup> Save the Plastic Bag Coalition v. City of Manhattan Beach, 52 Cal. 4th 155 (Cal. 2011) (upholding a single-use bag ordinance when challenged by a trade group on the ground that the process used did not violate CEQA)

<sup>2</sup> Delogu v. City of Portland, 843 A.2d 33 (Me. 2004)

<sup>3</sup> 30-A M.R.S.A. § 3001 (granting municipalities broad authority to pursue their delegated police powers)

<sup>4</sup> MacImage of Maine, LLC v. Androscoggin County, 2012 WL 1008643 (March 27, 2012)

purpose (rational basis review).<sup>5</sup> In this manner, a challenging party bears the burden of proving constitutional deficiency and “must establish the complete absence of any state of facts that would support the need for the statute's enactment.”<sup>6</sup>

There are currently several challenges to such ordinances (mostly in California) on the ground that the ordinances are not rationally related to a legitimate public purpose.<sup>7</sup> Given the deference that courts have traditionally given to municipalities in pursuing their police powers, it is not clear if such challenges will be successful. That being said, as the issue itself is novel, towns enacting such ordinances will most likely open themselves up to litigation and should be prepared to bear such costs.

**Bag Fee Laws.** Similarly to bag bans, there is relatively little case law on point with respect to bag *fees*. However, a court in California has upheld a bag fee ordinance, holding generally that such a fee was not a tax when the reasonable fees charged accrued to the *retailer* and *not* the city (as revenue).<sup>8</sup>

In order to charge “fees” for bags, a court would first determine whether the fees are truly “fees” or whether they are actually a “tax.” The distinction is that “taxes are primarily intended to raise revenue” while fees are intended to cover costs of administering programs under a municipality’s police power.<sup>9</sup>

In Maine, all taxing power initially vests with the State and municipalities are only granted the power to tax if specifically authorized to do so. Maine courts have held, in light of the State Constitution, that “what money shall be raised by taxation, what property shall be taxed, what exempted, rests exclusively with the Legislature to say, without any limitations,” except as otherwise provided.<sup>10</sup> Accordingly, there is a very strong presumption against delegation of the legislature's power to tax and taxes disguised as “fees” will be given significant scrutiny.<sup>11</sup>

As it does not appear that the State has granted municipalities the authority to collect taxes on bags, the only alternative would be if the bag “fee” is truly

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *See, for example, Save the Plastic Bag Coalition v. County of Santa Cruz*, Case No. CV172379, (Complaint)

<sup>8</sup> *Schmeer et al v. County of Los Angeles*, BC 470705 (holding that no municipal revenue is generated by the fees, as all monies are kept by the retailer, and therefore the fees cannot be considered a tax)

<sup>9</sup> *Strater v. Town of York*, 541 A.2d 938 (Me. 1988) (upholding a \$10 harbor usage fee)

<sup>10</sup> *Delogu*, 843 A.2d 33, *quoting Greaves v. Houlton Water Co.*, 143 Me. 207, 211, 59 A.2d 217, 219 (1948)

<sup>11</sup> *Id.*

considered to be a “fee.” Accordingly, the bag fee must cover the reasonable costs of administering a municipality’s police power.<sup>12</sup> In order to impose a bag fee, a municipality would have to justify the fee by relating it to some kind of administrative cost – perhaps by obtaining a license to sell the bags and then charging fees for the cost of the bags/service. The service would also need to be rationally related to a legitimate government purpose in order to come within the municipality’s delegated police power. Based on a cursory review of existing ordinances, it appears that this approach has not yet been taken.

Alternatively, a municipality may avoid the consequences of imposing a “tax” by creating an ordinance that forces retailers to charge a reasonable amount for the sale of such bags (as long as the retailers keep the proceeds). In this manner, a municipality would not be raising revenue and may therefore be able to avoid the pitfalls of having the charge be categorized as a “tax” or a “fee.” This seems to be the most common approach to bag fee ordinances. However, municipalities should again be prepared to litigate the issue. Plaintiffs have challenged such ordinances on a number of grounds, including being outside of environmental laws, violations of commerce clause nationwide uniformity, as illegal taxes and beyond police power limitations.

**Conclusion.** If Windham wishes to create an ordinance regulating the use of single-use bags, it should be prepared to litigate the issue. It appears that any ordinance would have to provide that fees are only charged to the extent that they offset the cost of the bags (and ensure that all proceeds go to the retailer). In any event, single-use bag ordinances are a novel idea and the vast majority of litigation is still running its course. The better option, given the peculiarities of Maine law, would be to encourage the Legislature to either impose such a tax or authorize local option ordinance power to regulate this use. The Council can by resolution formally express its (and the residents’ of Windham) concerns in this regard.

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<sup>12</sup> Strater, 541 A.2d 938