

TO: GRACE HANCOCK  
FROM: DAVE KENDALL AND COLE BIRKELAND  
DATE: SEPTEMBER 27, 2023  
RE: BAG FEE ORDINANCE REVIEW



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### QUESTIONS PRESENTED

1. Does the City have the authority to enact a Bag Fee Ordinance?
2. Is the appropriate City Code enforcement mechanism referenced in the Ordinance?
3. Can City enterprises (e.g. municipal liquor stores) collect and keep the bag fee?

### ANALYSIS

- 1. The City may have the authority to enact this ordinance if it determines the ordinance furthers the public health, safety, order, convenience, and general welfare.**

#### *Local Government Police Powers*

The City Council has the authority to pass ordinances that further the general welfare. Minn.

Stat. § 412.221, subd. 32 provides:

The council shall have power to provide for the government and good order of the city, the suppression of vice and immorality, the prevention of crime, the protection of public and private property, the benefit of residence, trade, and commerce, and the promotion of health, safety, order, convenience, and the general welfare by such ordinances not inconsistent with the Constitution and laws of the United States or of this state as it shall deem expedient.

Therefore, if the City Council finds that there will be promotion of “health, safety, order, convenience, and the general welfare” by this ordinance, it has the power to enact such an ordinance provided that there is no conflict with state or federal law. Both the City of Minneapolis and the City of Duluth have enacted similar ordinances. While each of those ordinances were enacted under the general police powers, the distinction should be noted that those ordinances were each enacted under the city’s home rule charter general police powers. By

contrast, the ordinance in Edina would be enacted under the statutory general police power granted in Minn. Stat. § 412.221, subd. 32.

The City of Edina should explain the basis for enacting the ordinance by incorporating a section on findings and purpose. The City of Duluth established findings and a purpose statement in its bag fee ordinance, stating that single use carryout bags “are polluting city waterways and sewers, endangering wildlife, contributing to climate change, and causing unsightly litter” and, “last for many years in community landfills and are a potential source of harmful chemical pollution” therefore, “It is in the best interests of the health, safety and welfare of the citizens and visitors of Duluth to reduce the cost to the city of litter clean up and solid waste disposal and to protect our environment and our natural resources by reducing the distribution of single use carryout bags and incentivizing the use of reusable bags in the city.” Duluth Legislative Code 24-39. The ordinance also stated,

The purpose of this Article is to reduce cost of litter clean up and waste disposal and to improve the environment of Duluth by encouraging the use of reusable carryout bags by imposing a pass through fee on single use carryout bags for retail checkout of purchased goods.

*Id.* The City of Edina could enact a similar ordinance for similar reasons. The ordinance should reflect the City’s findings and purpose for enacting the ordinance.

*Preemption Analysis*

Minn. Stat. § 471.9998, subd. 2 states that, “no political subdivision shall impose any ban upon the use of paper, plastic, or reusable bags for packaging of any item or good purchased from a merchant, itinerant vendor, or peddler.” Because this proposed ordinance merely imposes a charge and not a ban on the use of bags, subdivision 2 would not expressly preempt this proposed ordinance.

Minn. Stat. § 471.9998, subd. 1 states that:

All merchants, itinerant vendors, and peddlers doing business in this state shall have the option to provide customers a paper, plastic, or reusable bag for the packaging of any item or good purchased, provided such purchase is of a size and manner commensurate with the use of paper, plastic, or reusable bags.

Therefore, no local ordinance may be enacted which will prevent merchants from having *the option* to provide customers with a paper, plastic, or reusable bag for the packaging of any item purchased. Because the proposed ordinance applies to any “carryout bag”, including “a paper, plastic or similar bag that is provided by a merchant at the check out stand”, the main requirement of the ordinance (i.e., the five cent fee) does not prevent merchants from having the “option to provide” customers with any carryout bag. However, section 2(b) of the proposed ordinance requires that merchants offering paper carryout bags “must ensure that bags meet the definition of recyclable paper bag, stated in Section 1 above.” Because this paragraph of the proposed ordinance prevents merchants from having the option to provide customers with a paper bag that does not satisfy the ordinance’s definition of a “recyclable paper bag”, this portion is likely preempted by the state statute and should be removed from the draft ordinance.

**2. The appropriate City Code enforcement section is 1-18, and the ordinance should be revised accordingly.**

The proposed ordinance states in section 4:

The City shall have the duty and the authority to enforce provisions of this chapter pursuant to City Code Chapter 1, Sec. 17-19.

Section 1-17 of the City Code addresses severability and Section 1-19 authorizes certain City officials to post a notice or tag of ordinance violations. It will be sufficient to cite only to Section 1-18, which outlines enforcement and remedies. Therefore, section 4 of the ordinance should be amended to read:

The City shall have the duty and the authority to enforce provisions of this chapter pursuant to City Code Chapter 1, Sec. 1-18.

**3. The ordinance should exempt City enterprises from collecting the bag fee in order to avoid any potential for it to be construed as an illegal tax.**

Under the current language of the ordinance, the pass through charge must be collected by an applicable merchant, which is defined in section 1 to include any “government agency”. Therefore, this proposed ordinance as drafted would authorize the government through sales at city enterprises, such as a municipal liquor store, to collect an additional five cents at each point of sale from a customer. It does not matter that the charge is not called a tax, as it would arguably function as a sales tax when it is being collected by the government. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564 (2012)(stating that the essential feature of any tax is that it produces at least some revenue for the government). The charge is not precluded from being a tax merely because the purpose of the ordinance is not to raise revenue. Taxes may be intended to affect individual conduct, because “[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.” *Id.* at 567 (also stating, “taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking”).

Under Minn. Stat. § 297A.99, a political subdivision may not impose a local sales tax without approval from the Minnesota Legislature. Therefore, it would be best practice to amend the proposed ordinance to expressly exclude government agency from the definition of merchant and may even include an express provision which states that the charge shall not apply when the merchant is a government agency.

However, this is not to say that the City must provide plastic bags at City enterprises, such as the City liquor store. The City controls whether and how its enterprises offer carryout

bags. For example, the City would choose to offer only recyclable paper bags at City enterprises.

### **CONCLUSION**

The Cities of Minneapolis and Duluth have enacted bag fee ordinances. The City of Edina has similar authority to enact a bag fee ordinance, should the City of Edina choose to do so. Please give me a call if you have any questions about the issues covered in this memo.