

BAL HARBOUR

- V I L L A G E -

COUNCIL MEMORANDUM

TO: Honorable Mayor and Village Council

FROM: Jorge M. Gonzalez, Village Manager



DATE: April 16, 2019

SUBJECT: **AN ORDINANCE OF THE VILLAGE COUNCIL OF BAL HARBOUR VILLAGE, FLORIDA, AMENDING CHAPTER 9 "BUSINESS REGULATIONS AND BUSINESS TAX," ARTICLE I "IN GENERAL" OF THE VILLAGE'S CODE OF ORDINANCES TO AMEND SECTION 9-1 "DEFINITIONS," TO AMEND REFERENCES TO DEFINED TERMS IN SECTION 9-2 "AUTOMATIC TIP REGULATIONS," AND TO CREATE SECTION 9-3, "PROHIBITION ON USE, DISTRIBUTION OR SALE OF SINGLE-USE PLASTICS"; AMENDING CHAPTER 2 "ADMINISTRATION," ARTICLE V "CODE ENFORCEMENT," SECTION 2-191 "SCHEDULE OF CIVIL PENALTIES" TO CREATE RELATED PENALTIES; PROVIDING FOR CODIFICATION, SEVERABILITY, CONFLICTS, AND FOR AN EFFECTIVE DATE.**

RECOMMENDATION

The Administration recommends approval of this Ordinance.

BACKGROUND

This Ordinance was heard on First Reading at the March 19, 2019 Council meeting. After some discussion, the Ordinance passed unanimously on First Reading by a 5-0 vote, with Assistant Mayor Salver offering an amendment to provide for exceptions for religious beliefs.¹ These changes between the First and Second Readings are further referenced in the Analysis section of this Memorandum.

By way of further background, this item was first discussed by the Village Council at the June 12, 2018 as a discussion item placed on the agenda by former Councilwoman Cohen. As a result of that discussion, there was no consensus in moving forward with any action

¹ In addition, Mayor Groisman offered that a ban on the individual use of plastics should also be in place on the jetty, similar to the Village Code's grandfathered regulations of styrofoam on the beach in Chapter 11. Because this proposal would require amending a different chapter of the Code than this Ordinance, it will need to be accomplished through a different ordinance. For example:

Section 11-4(c) *Prohibited use of Expanded Polystyrene.*

(1) It shall be unlawful for any person to carry an Expanded Polystyrene Container or Single Use Plastics as defined in Section 9-1 onto any beach within the Village.

items related to this issue. At the September 17, 2018 Council meeting, former Councilwoman Cohen again placed a discussion item on the agenda. As a result of that discussion, the Village Council directed the Village Administration to bring to the Village Council an ordinance in the future that would limit the use of single use plastics on the east side of Collins Avenue and to conduct further research on options for the west side of Collins Avenue. At the February 19, 2019 Council meeting, Councilman Sklar placed a discussion item on the Council agenda for further discussion. As part of this discussion, the Village Council directed the Village Administration to draft an ordinance that would ban all single use plastics in all commercial areas in Bal Harbour Village, including all hotels and all restaurants in commercial areas and in residential buildings. At the March 19, 2019 Council meeting, this Ordinance was heard on First Reading.

ANALYSIS

The small size and disposable nature of single-use plastics, including single-use plastic straws, single-use plastic bags, and single-use plastic flatware and dinnerware causes these items to become an environmental blight for coastal communities worldwide. Bal Harbour Village is a major and internationally recognized tourist destination that continues to encounter discarded plastic items on the Village's beaches, waterways, and streets, as a result of the improper disposal of these single-use plastic items.

The average single-use plastic item is used only for a few minutes before being discarded. Many of these single-use plastic items end up in the ocean, where it takes approximately 200 years to begin degrading. As a result of increasing awareness of this issue, several U.S. cities have been addressing this concern, developing campaigns and policies to ban the use of plastic items, particularly straws and bags. Locally, several cities have a ban on plastic straws, including the City of Miami Beach, the Town of Surfside and the Village of Pinecrest. The City of Coral Gables has a ban on plastic bags, which was upheld by a trial court. Although this ruling is currently on appeal in the Third District Court of Appeal and was argued in December 2017, no opinion has been released yet.

Elsewhere in the U.S., the anti-plastic movement has had mixed success. Supporters say it will take more than banning plastic straws to curb ocean pollution but that ditching them is a good first step and a way to start a conversation about waste and ocean conservation. By some estimates, Americans use 500 million plastic straws alone, not including other plastics, every day, with some parts of the ocean now containing more plastic than fish.

Materials that can serve as substitutes for plastics, include paper, reusable glass, stainless steel, copper, bamboo, and several other kinds of reusable materials.

The proposed Ordinance amends the Village Code, to create definitions for single-use plastics, and to prohibit the use, sale or distribution of single-use plastics in the commercial establishments in Bal Harbour Village, and provides for a penalty. Commercial establishment in this Ordinance is defined as a property used for commercial purposes, such as a hotel, restaurant, café or retail store or vendor, or similar uses located

in a multi-family residential building whether or not the use is open to the public where customers can directly purchase goods or materials.

The Ordinance also regulates all Village-owned properties, including Village Hall, as well as other Village facilities and properties, including the park and beach. Single-Use Plastics, as defined in Section 9-1, shall not be used, sold or distributed as part of a Village-approved activity or event, whether public or private, at any Village Facility or Village Property. Any individuals who might happen to be at the Village Property or Village Facility but are not part of the event or activity would not be covered by this prohibition on use.

Exceptions to this Ordinance include:

- This prohibition shall not apply to medical or dental facilities.
- This prohibition shall not apply to the school district or county, state, or federal governmental entities.
- This prohibition shall not apply where a reasonable accommodation is needed by an individual due to a medical or physical condition, or, as directed at first reading, for a religious belief.

The civil penalty for a violation would be \$250.00 per infraction for a commercial establishment, and \$25 for an individual. Single-use plastics defined in this Ordinance include:

Single-Use Plastic Straw means a straw or stirrer provided, sold, or distributed for the purpose of imbibing liquids or transferring a beverage from its container to the mouth of the drinker by suction or for the purpose of mixing a beverage, provided by a company or individual to a customer of a Commercial Establishment, typically at the point of sale, which is made predominantly of plastic derived from one or more of the following: petroleum, a biologically-based source (such as corn or other plants), or polystyrene, polypropylene, or polyethylene. A Plastic Straw does not include a straw that is made of non-plastic materials, such as paper, sugar cane, bamboo, or other similar materials, and does not apply to pre-packaged drinks.

There are limited exceptions to the prohibition on plastic straws. One exception is for pre-packaged drinks sold at Commercial Establishments (e.g., a Capri Sun juice pack).

Single-Use Plastic Bag means a bag provided by a company or individual to a customer of a Commercial Establishment, typically at the point of sale, for the purpose of transporting purchases, which is made predominantly of plastic derived from one or more of the following: petroleum, a biologically-based source (such as corn or other plants), or polystyrene, polypropylene, or polyethylene. This definition includes bags provided to a customer to transport items provided free of charge, including but not limited to, samples and informational materials.

There are several exceptions to this definition involving the business' use of plastic bags, similar to those in the Coral Gables ordinance.

Single-Use Plastic Flatware and Dinnerware means eating and serving utensils and plates, bowls, cups, and glasses provided by a company or individual to a customer of a Commercial Establishment, typically at the point of sale, made predominantly of plastic derived from one or more of the following: petroleum, a biologically-based source (such as corn or other plants), or polystyrene, polypropylene, or polyethylene. Single-Use Plastic Flatware and Dinnerware does not include flatware and dinnerware made of non-plastic materials, such as paper, sugar cane, bamboo, or other similar materials.

Again, for all of the above, medical and dental facilities are exempt from the prohibition, as well as the school district, county, state, and federal governmental entities. In addition, where persons with medical or physical conditions or religious beliefs need a reasonable accommodation, the Ordinance will not apply.

Several venues in Bal Harbour Village have already begun to transition away from plastic products. Marriott International, which operates both the St. Regis Bal Harbour and the Ritz-Carlton Bal Harbor, plans to remove plastic straws and drink stirrers from all of its 6,500 hotels and resorts worldwide by July 2019. Both the St. Regis and the Ritz-Carlton have already eliminated plastic straws and are now using paper straws. Some restaurants in the Bal Harbour Shops, including Makoto, Carpaccio's, Le Zoo, and Zodiac have also already transitioned away from some plastic products, including straws, containers and to-go bags.

The proposed Ordinance would not take full effect until October 1, 2019, in order to allow the Village Administration to conduct a public education campaign for an extended period of time and for vendors to exhaust their current inventory and to identify alternatives to single-use plastics. Following the Village's public education efforts, the Village shall provide for a 60-day written warning period (from October 1, 2019, through November 30, 2019), during which time written warnings shall be issued by the Village Code Compliance for violations of the Ordinance. Beginning on December 1, 2019, Code Compliance shall enforce the Ordinance.

Legal Considerations

The Village currently has the power to adopt this Ordinance. As previously discussed, the Florida Legislative Session started on March 5, 2019 and bills have been filed to preempt municipal power to adopt ordinances like this one. The Session is scheduled to end on May 3, 2019, and it is possible that by that time, this Ordinance, or portions of this Ordinance, will have been preempted. The Florida Legislature has the option and the power to protect preexisting regulations by grandfathering them as it did for vacation rentals, but it is not required to do so. The more common approach in recent years is for the Legislature to completely preempt without grandfathering.

Two bills go beyond mere preemption and are worthy of additional consideration: in one bill, the mere attempt to adopt an ordinance regarding plastics could result in a \$25,000 fine against the Village, and in both bills, the Village could be liable for the attorneys' fees and costs of challengers seeking to enforce preemptions. Both bills and their companions are proposed to become effective July 1, 2019, and both are advancing through committee hearings in both chambers. It is possible that these bills will not be enacted by the Legislature, approved by the Governor, and become law. But if they do pass, the Village Council may want to amend this ordinance quickly to avoid potential financial exposure. Therefore, the Village Attorney has added language to the Ordinance to allow the Village Council to decide whether to adjust or repeal the Ordinance in one vote, if needed to respond to preemption: "In the event that Florida Statutes are amended to preempt any part of this Ordinance following the 2019 Legislative Session, this Ordinance may be repealed to the extent of that preemption by resolution of the Village Council."

CONCLUSION

The proposed Ordinance prohibits the use, sale or distribution of single-use plastics in any Commercial Establishment, and the use, sale, or distribution of single-use plastics at Village-approved events or activities, whether public or private, at any Village Facility or on Village Property. Adoption of the proposed Ordinance would help contribute to a cleaner and safer environment by decreasing the use of single-use plastics, including single-use plastic straws, single-use plastic bags, and single-use plastic flatware and dinnerware, in an effort for these items to not become an environmental blight for Bal Harbour Village.