

COMMISSION MEMORANDUM

To: Mayor Philip Levine
Members of the City Commission
Jimmy Morales, City Manager

cc: Rafael Granado, City Clerk

From: Raul J. Aguila, City Attorney

Date: July 26, 2017

Subject: **AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING CHAPTER 82 OF THE CODE OF THE CITY OF MIAMI BEACH, ENTITLED "PUBLIC PROPERTY," BY AMENDING ARTICLE IV, ENTITLED "USES IN PUBLIC RIGHTS-OF-WAY," BY AMENDING DIVISION 5, ENTITLED "SIDEWALK CAFES," BY AMENDING SUBDIVISION I, ENTITLED "GENERALLY," BY AMENDING SECTION 82-366 THEREOF, ENTITLED "DEFINITIONS," TO DEFINE THE TERM "SINGLE-USE CARRY OUT PLASTIC BAG"; BY AMENDING SUBDIVISION II, ENTITLED "PERMIT," BY AMENDING SECTION 82-385 THEREOF, ENTITLED "MINIMUM STANDARDS, CRITERIA, AND CONDITIONS FOR OPERATION OF SIDEWALK CAFES" TO PROVIDE PROVISIONS RELATING TO SINGLE-USE CARRY OUT PLASTIC BAGS; AND PROVIDING FOR REPEALER, SEVERABILITY, CODIFICATION, AND AN EFFECTIVE DATE.**

I. Introduction

Pursuant to the request of Commissioner Michael Grieco, the above-referenced Ordinance has been placed on the July 26, 2017 City Commission meeting agenda for consideration on Second Reading/Public Hearing. The Ordinance passed on First Reading at the June 7, 2017 City Commission meeting. The Ordinance amends Chapter 82 of the City Code to define "single-use carry out plastic bags" and to provide that, at sidewalk cafes, single-use carry out plastic bags shall not be allowed on the right-of-way and shall not be provided to sidewalk cafe patrons. The provisions in the Ordinance would only become effective as explained in Section IV of this Memorandum.

II. Section 403.7033, Florida Statutes

In 2008, the Florida Legislature created Section 403.7033, Florida Statutes, which directed the Florida Department of Environmental Protection ("DEP") to "undertake an analysis of the need for new or different regulation of auxiliary containers, wrappings, or disposable plastic bags used by consumers to carry products from retail establishments." ("Plastic Bag Statute" or "Statute"). The Plastic Bag Statute required DEP to submit a report with conclusions and

recommendations to the Legislature no later than February 1, 2010. Lastly, the Statute states that, “[u]ntil such time that the Legislature adopts the recommendations of the department, no local government, local governmental agency, or state government agency may enact any rule, regulation, or ordinance regarding use, disposition, sale, prohibition, restriction, or tax of such auxiliary containers, wrappings, or disposable plastic bags.”

Consistent with the Statute’s mandate, DEP issued such a report (“Retail Bags Report” or “Report”) on February 1, 2010. However, the recommendations set forth in the Report were never adopted by the Legislature. Accordingly, the preemptive clause in Section 403.7033 remains in effect.

III. *Florida Retail Federation, Inc. and Super Progreso Inc. v. City of Coral Gables* (Fla. 11th Jud. Cir. Case No. 2016-18370-CA-01)

On July 18, 2016, Plaintiffs Florida Retail Federation, Inc. and Super Progreso Inc. filed a complaint in the Miami-Dade County Circuit Court against the City of Coral Gables, challenging the Coral Gables Polystyrene Ordinance, and seeking a declaratory judgment and injunctive relief.¹ The Plaintiffs argued that the Polystyrene Ordinance not only violated State statutory provisions regarding polystyrene regulations, but also violated several other Florida Statutes, including Section 403.7033, the Plastic Bag Statute, which addresses disposable plastic bags. On September 28, 2016, the Court granted the State of Florida’s motion to intervene in the litigation.

After reviewing the parties’ cross-motions for summary judgment, the Circuit Court entered an order granting the City of Coral Gables’s motion for summary judgment, which order upheld the Coral Gables Polystyrene Ordinance. The Court reasoned, among other things, that the Plastic Bag Statute set forth in Section 403.7033, Florida Statutes, “lack[s] the necessary standards and guidelines for implementation, rendering [it] unconstitutionally vague” The Plaintiffs and the State of Florida, as an intervenor, have appealed the Circuit Court ruling to the Third District Court of Appeal (Case No. 3D17-562), where that appeal is currently pending.

IV. Contingent effective date

Given that the Circuit Court’s order regarding the unconstitutionality of the Plastic Bag Statute is currently subject to appeal, the attached proposed Ordinance has been carefully drafted so that it would only take effect upon the issuance of a final mandate by the Third District Court of Appeal or the Florida Supreme Court which upholds the unconstitutionality of the Plastic Bag Statute set forth in Section 403.7033, Florida Statutes.

The City may condition the effectiveness of legislation on the outcome of the Coral Gables litigation. “Legislation, the effectiveness of which is conditioned upon the happening of a contingency, has generally been upheld.” *Helmsley v. Borough of Ft. Lee*, 394 A.2d 65, 82 (N.J. 1978) (upholding an ordinance contingent on the final outcome of litigation, including appeals) (citing *City of Miami Beach v. Lansburgh*, 218 So. 2d 519 (Fla. 3d DCA 1969), *reh’g denied*, 226 So. 2d 821 (Fla. 1969) (municipal ordinance to take effect upon passage of bill pending in state legislature)); *see also Gauden v. Kirk*, 47 So. 2d 567, 575 (Fla. 1950) (“In the absence of constitutional or statutory provisions to the contrary, statutes may become effective on the happening of certain conditions or contingencies specified in the act, or implied therefrom.”).

¹ On February 9, 2016, the City of Coral Gables adopted Ordinance No. 2016-08, prohibiting the sale and use of expanded polystyrene by City vendors and contractors, special event permittees, food service providers, and stores (the “Polystyrene Ordinance”).

If, following all appeals in the Coral Gables litigation, the Circuit Court is *reversed* and Section 403.7033, Florida Statutes, is found to be constitutional, rather than unconstitutional, then the Office of the City Attorney will prepare a second Ordinance repealing the attached Ordinance.