

ORDINANCE NO. 7,844–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 Carryout Bag restrictions for Restaurants

**11.63.050 Pre-checkout Bag restrictions for Food Product Stores and Covered
Entities.**

11.63.060 Unreasonable denial of customer bags or containers.

11.63.070 General exemptions.

11.63.080 Waivers—applicability and process to obtain.

**11.63.090 Carry-out bag restrictions for the City of Berkeley and City-sponsored
events.**

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

11.63.110 Liability and enforcement.

11.63.120 Severability.

11.63.130 Construction.

11.63.140 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. "Accepted Compostable Pre-Checkout Bag" means a bag that is accepted by the City's compost facility as having the requisite and appropriate physical qualities for controlled biological decomposition in conjunction with other organic solid waste.

B. "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 or Restaurant. Carryout Bags do not include Pre-checkout or Product Bags.

C. "Covered Entity" means any of the following:

(1) 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

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

D. "Customer" means any Person obtaining goods from a Covered Entity, Food Product Store or Restaurant.

E. "Food Product Store" means a supermarket, convenience food store, foodmart, or other entity engaged in the retail sale of goods that include perishable and nonperishable food items, and with a total floor area over 2,500 square feet.

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

G. "Pre-checkout Bag" means a Recycled Content Paper Bag, Accepted Compostable Pre-Checkout Bag, or plastic film bag provided or sold to a customer to carry produce, bulk food, or other food items to the point of sale inside a store.

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

I. "Recycled Content Paper Bag" means either a Carryout Bag provided by a Covered Entity or a Pre-checkout Bag provided by a Food Product Store that contains no old growth fiber and a minimum of forty percent (40%) 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.

J. "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 made of plastic film, regardless of thickness.

K. "Restaurant" means a food or take-out food establishment (including, but not limited to, food sales from vehicles or temporary facilities open to the public) that sells prepared food directly to a customer and is not subject to the requirements of Public Resources Code Section 42281.

L. "Reusable Pre-checkout Bag" means a bag that is specifically designed and manufactured for multiple reuse and meets all of the following requirements:

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

(2) 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;

(3) 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

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

11.63.030 Carryout Bag restrictions for Covered Entities.

A. No Covered Entity shall provide or sell a Carryout Bag other than 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 Recycled Content Paper Bag, provided that the Covered Entity charge a minimum of ten cents (\$0.10) per bag.

11.63.040 Carryout Bag restrictions for Restaurants.

A Restaurant providing a Customer with plastic film Carryout Bag, at the Customer's request, in order to carry leftovers after sit-down meal service, shall charge a minimum of ten cents (\$0.10) per bag.

11.63.050 Pre-checkout Bag restrictions and requirements for Food Product Stores and Covered Entities.

A. A Food Product Store providing a Customer with plastic film Pre-checkout Bags, or Pre-checkout Bags deemed not to be Accepted Compostable Pre-Checkout Bags, shall charge a minimum of ten cents (\$0.10) per bag. Food Product Stores shall consider providing appropriate signage detailing procedures for acquiring and purchasing such bags. Food Product Stores providing Pre-checkout Bags deemed not to be Accepted Compostable Pre-checkout Bags pursuant to this Chapter shall provide signage notifying customers that such bags are not composted and are sent to landfill, and indicating availability of options such as bringing their own bag, or acquiring Recycled Content Paper or Reusable Pre-Checkout Bags.

B. Notwithstanding subsection A, Covered Entities and Food Product Stores may provide plastic film bags as Pre-checkout Bags to Customers free of charge for the sole purpose of separating meats and seafood only upon the specific request of a Customer.

Covered Entities shall not proactively offer Customers plastic film Pre-checkout Bags for such uses.

C. Food Product Stores may provide Recycled Content Paper or Accepted Compostable Pre-checkout Bags free of charge in produce and other aisles.

D. Food Product Stores shall make reasonable efforts to stock and make Reusable Pre-checkout Bags available or for sale.

E. A state law (SB 1046) scheduled to take effect on January 1, 2025 will preempt this Section 11.63.050 with respect to Food Product Stores. At that point, this Section 11.63.050 shall only apply to Covered Entities unless SB 1046 is repealed or otherwise amended.

11.63.060 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, except Restaurants with respect to takeout orders, 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 store-provided bags or containers in lieu, any charge required pursuant to this ordinance, other applicable law, or the establishment's policy will apply.

11.63.070 General exemptions.

A. Bags exempt from this Chapter include Product Bags, bags sold in packages containing multiple bags such as those intended for use as garbage, pet waste bags, yard waste bags, and bags which are integral to the use of other objects.

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 Food Product Stores, except as subject to the requirements of Public Resources Code Section 42281, providing 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.

11.63.080 Waivers—applicability and process to obtain.

A. The City Manager shall prescribe and adopt rules, regulations and forms for Covered Entities or Food Product 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.

11.63.090 Carry-out bag restrictions for the City of Berkeley and City-sponsored events.

The City of Berkeley and any City-sponsored event shall provide or sell to a Customer or participant only 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.

11.63.100 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 Food Product Store's premises to verify compliance.

11.63.110 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.

11.63.120 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.

11.63.130 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.

11.63.140 Effective date.

- A. Sections 11.63.040 and 11.63.050 shall take effect January 1, 2023.
- B. Section 11.63.090 shall take effect January 1, 2023.
- C. All other provisions in this ordinance are effective June 30, 2023.

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.

At a regular meeting of the Council of the City of Berkeley held on November 15, 2022, this Ordinance was passed to print and ordered published by posting by the following vote:

Ayes: Bartlett, Droste, Hahn, Harrison, Kesarwani, Robinson, Taplin, Wengraf, and Arreguin.

Noes: None.

Absent: None.

