



# MEMORANDUM

ITEM NO. 4B1

**To:** Honorable Mayor, Vice-Mayor and Members of the Town Commission

**From:** Lillian M. Arango and Haydee Sera, Town Attorney

**Date:** June 11, 2019

**Subject:** Ordinance Amending Section 34-11, "Prohibition on Distribution, Sale or Use of Plastic Straws," by Amending the Title to be "Prohibition on Distribution, Sale or Use of Single-Use Plastics," Providing for Definitions for Single-Use Plastics, and Regulating Single-Use Plastics

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## Background

On March 13, 2018, the Town Commission adopted Ordinance No. 2018-1676 creating Section 34-11 of the Town Code of Ordinances ("Code") to provide a prohibition on the distribution, sale, or use of plastic straws. On December 11, 2018, the Town Commission adopted Ordinance No. 2018-1690 amending Section 34-11 of the Town Code by clarifying the definition of plastic straws to include plastic stirrers and to specifically define what is not considered a plastic straw.

At the May 14, 2019 Commission meeting, after discussion and consideration of other communities' efforts to protect the environment by regulating single-use plastics and recognition of the effects of single-use plastics on the Town's environment, the Commission directed the Town Attorney to prepare an Ordinance prohibiting the distribution, sale or use of other single-use plastics such as plastic bags and plastic flatware and dinnerware.

## Analysis

Research shows that 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. The Town continues to encounter discarded plastic items on the Town's beaches, waterways, and streets, as a result of the improper disposal of these single-use plastic items.

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 City of Coral Gables, and the Village of Pinecrest. In addition, 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. (Further information about the Coral Gables case is below).

The proposed ordinance prohibits the distribution, sale, or use of Single-Use Plastics (which include Single Use Plastic Bags, Single-Use Plastic Flatware and Dinnerware, and Single-Use Plastic Straws) by or in any commercial establishment, Town Facility, or Town Property or by any Special Event Permittee. Single-Use Plastics, as defined in the Ordinance, include:

- **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. The following shall not be interpreted to be “Single-Use Plastic Bags”:
  - A Compostable Carryout Bag;
  - Any bag without handles provided to a customer;
  - Any bag to protect food or merchandise from being damaged or contaminated by other food or merchandise, when items are placed together in a reusable bag or recyclable bag, including produce bags;
  - Any bag to hold prescription medications dispensed from a pharmacy or veterinary office;
  - Any bag designed to be placed over articles of clothing on a hanger, including dry cleaning bags;
  - Door hanger bags;
  - Newspaper bags;
  - Garbage bags;
  - Pet waste bags;
  - Yard waste bags; and
  - Bags of any type that a customer previously owned and brings to a Commercial Establishment for his or her own use in carrying away store goods.
- **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.

- **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, and which is intended for a single-use. 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.

There are limited exceptions to the prohibition on Single-Use Plastics. An exception has been added to provide that the prohibition on Single-Use Plastics does not apply where a reasonable accommodation is needed by an individual due to religious beliefs. The exceptions provided for in the ordinance prohibiting Single-Use Plastics Straws remain. One exception was for pre-packaged drinks sold at commercial establishments (e.g., a Capri Sun juice pack). The other exceptions were to exempt medical and dental facilities from the prohibition, as well as the school district, county, state, and federal governmental entities. The exception for individuals due to medical or physical conditions also remains.

Between final adoption and December 31, 2019, the Town will engage in a public education campaign to inform commercial establishments of the provisions of the ordinance and to provide assistance with identifying alternatives to single-use plastics. For the sixty-day period from January 1, 2020 through February 29, 2020, the Town will provide warnings for violations of the ordinance. Beginning March 1, 2020, the Town will enforce all provisions of the prohibition on Single-Use Plastics. The Town will continue to enforce the provisions related to Single-Use Plastic Straws as it has been doing since adoption of Ordinance Nos. 2018-1676 and 2018-1690 (as previously codified in Section 34-11).

Assuming the Town Commission adopts the ordinance on second reading, a resolution to provide the fines for violation of the ordinance will be presented to the Commission at the July, 2019 meeting.

### Legal Considerations

The City of Coral Gables is a party to a lawsuit with the State of Florida, the Florida Retail Federation, Inc., and Super Progreso (Miami-Dade Case No.: 2016-18370-CA-01) which directly confronts the constitutionality of Section 403.7033, Florida Statutes, as it relates to plastic bags. On February 27, 2017, the trial court entered an order in *Florida Retail*

*Federation, Inc. and Super Progreso, Inc. v. City of Coral Gables*, finding Sections 403.708(9) and 403.7033, Florida Statutes, relating to plastic bags and packaging unconstitutional. In light of the trial court's decision and despite an appeal by the State of Florida of the trial court's order (Third District Case No.: 3D17-562), the City of Coral Gables Commission adopted Ordinance No. 2017-13 on May 9, 2017. The ordinance prohibits the use of single-use carry out plastic bags at special events and prohibits the sale, use, or distribution of single-use carry out plastic bags by retail establishments within the City. The trial court's decision is currently under consideration by the Third District Court of Appeal, which heard oral argument on December 15, 2017. The appellate court has not rendered a decision on the matter. Opinions are released each Wednesday.

The validity of this Ordinance or parts thereof may depend on the outcome of the Coral Gables litigation.

### **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 Town Facilities or on Town Property (including the beach). With respect to Town Facilities and Town Property, the proposed Ordinance is broader than the Ordinance adopted by Bal Harbour Village. Bal Harbour's Ordinance prohibits the use, sale or distribution of Single-Use Plastics as part of a Village-approved activity or event, whether private or public, in any Village Facility or Village Property.

### **Budget Impact**

Unknown at this time. Use of Code Enforcement and other staff time and resources will be necessary in connection with an education campaign and enforcement.

### **Programming**

Implementation and enforcement of the plastic straw prohibition commenced with the adoption of the original ordinance in March, 2018 and is ongoing. Town Administration and Code Enforcement will continue educational and enforcement efforts of the amended Ordinance and enforcement of the plastic straw prohibition will continue. Enforcement of all other Single-Use Plastics will begin March 1, 2020, after the Town has conducted an educational campaign and conducted a 60-day warning period from January 1, 2020 to February 29, 2020.

### **Commission direction**

Staff recommends the Commission review the attached Ordinance and provide direction on its adoption on first reading.

Reviewed by: LMA

Prepared by: HSS





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**Division 4. Food Service Articles**

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**Section 34-11. Prohibition on Distribution, Sale or Use of Single-Use Plastics Straws.**

(a) *Definitions.* For purposes of this section, the following definitions apply:

- (1) Commercial Establishment means 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 and materials.
- (2) Compostable Carryout Bag means a bag that:
  - a. Conforms to the current ASTM D6400;
  - b. Is certified and labeled as meeting the ASTM D6400 standard specification by a recognized verification entity; and
  - c. Must be capable of undergoing biological decomposition in a compost site such that the material breaks down into carbon dioxide, water, inorganic compounds and biomass at a rate consistent with known compostable materials.
- (3) Recyclable Paper Bag means a bag that contains a minimum average of 40 percent post-consumer recycled materials and displays the minimum percent of post-consumer content on the outside of the bag.
- (4) Reusable Bag means a bag with handles that is specifically designed and manufactured for multiple reuse and made of durable material specifically designed for and provided to customers with the intention of multiple, long-term use and does not include any film plastic bags. Includes Recyclable Paper Bags and Compostable Carryout Bags.
- (5) Single-Use Plastics means Single-Use Plastic Bags, Single-Use Plastic Flatware and Dinnerware, and Single-Use Plastic Straws as defined herein.
- (6) 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

104 transport items provided free of charge, including but not limited to, samples  
105 and informational materials. The following shall not be interpreted to be  
106 “Single-Use Plastic Bags”:

- 107 a. A Compostable Carryout Bag;
- 108 b. Any bag without handles provided to a customer;
- 109 c. Any bag to protect food or merchandise from being damaged or  
110 contaminated by other food or merchandise, when items are placed  
111 together in a reusable bag or recyclable bag, including produce bags;
- 112 d. Any bag to hold prescription medications dispensed from a pharmacy  
113 or veterinary office;
- 114 e. Any bag designed to be placed over articles of clothing on a hanger,  
115 including dry cleaning bags;
- 116 f. Door hanger bags;
- 117 g. Newspaper bags;
- 118 h. Garbage bags;
- 119 i. Pet waste bags;
- 120 j. Yard waste bags; and
- 121 k. Bags of any type that a customer previously owned and brings to a  
122 Commercial Establishment for his or her own use in carrying away  
123 store goods.

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

133 (8) Single-Use Plastic Straw means a straw or stirrer provided, sold, or distributed  
134 for the purpose of imbibing liquids or transferring a beverage from its  
135 container to the mouth of the drinker by suction or for the purpose of mixing a  
136 beverage, provided by a company or individual to a customer of a  
137 Commercial Establishment, typically at the point of sale, which is made  
138 predominantly of plastic derived from one or more of the following:  
139 petroleum, a biologically-based source (such as corn or other plants), or



140 polystyrene, polypropylene, or polyethylene, and which is intended for a  
141 single-use. A Plastic Straw does not include a straw that is made of non-  
142 plastic materials, such as paper, sugar cane, bamboo, or other similar  
143 materials.

144 (9) *Special Event Permittee* means any person or entity, and their  
145 subcontractor(s), issued a special event permit by the Town for a special event  
146 on Town property, or in a Town facility, or in the Town's right-of-way.

147 (10) *Town Facility* includes, but is not limited to, any building, structure, park,  
148 beach, road, street, right-of-way, or other facility owned, operated or managed  
149 by the Town.

150 (11) *Town Property* includes, but is not limited to, any land, water, or air rights  
151 owned, operated or managed by the Town.

152 (b) **Single-Use Plastics Straws Prohibited; Exceptions**

153 (1) A Single-Use Plastics Straw shall not be ~~used, sold, or distributed, sold, or~~  
154 used by or in any eCommercial eEstablishment or at any Town Facility or  
155 Town Property or by any Special Event Permittee.

156 (2) *Exceptions.*

157 a. This prohibition shall not apply to pre-packaged drinks sold at  
158 eCommercial eEstablishments.

159 b. This prohibition shall not apply to medical or dental facilities.

160 c. This prohibition shall not apply to the school district or county, state,  
161 or federal governmental entities.

162 d. This prohibition shall not apply where a reasonable accommodation is  
163 needed by an individual due to a medical or physical condition, or a  
164 religious belief.

165 (c) **Enforcement; Penalties**

166 (1) Following adoption of this Section, the Town shall engage in public education  
167 efforts to inform eCommercial eEstablishments and users of Town Facilities  
168 and Property of the provisions of this Section and to provide assistance with  
169 identifying alternatives to Single-Use Plastics Straws.

170 (2) The Town's Code Compliance Department shall enforce all provisions of this  
171 Section. Enforcement of violations related to Single-Use Plastic Straws shall  
172 continue as previously regulated pursuant to Ordinance Nos. 2018-1676 and  
173 2018-1690 (as previously codified in Section 34-11). Beginning January 1,  
174 2020, the Town's Code Compliance Department shall begin a 60-day period

175 of providing written warnings for all other violations of this Section.  
176 Beginning March 1, 2020, the Department shall enforce all provisions of this  
177 Section.

178 (3) Penalties for violations of the provisions of this Section shall be enforced  
179 through Chapter 15 of the Town Code. Fines shall be in the amounts  
180 prescribed in the schedule of civil penalties adopted by resolution.

181 (d) Reusable Bags. Commercial Establishments are strongly encouraged to educate  
182 their staff to promote Reusable Bags and encourage customers to use Reusable  
183 Bags. Should Commercial Establishments provide carryout bags, they shall be  
184 Reusable Bags as defined herein, and offered free of charge or for a fee as  
185 determined by the merchant. Commercial Establishments may keep any fees  
186 charged to offset the cost of providing the Reusable Bag.

187 **Secs. 34-12 – 34-25. Reserved.**

188 **Section 3. Codification.** It is the intent of the Town Commission that the provisions  
189 of this ordinance shall become and be made a part of the Town’s Code of Ordinances, and that  
190 the sections of this Ordinance may be renumbered or relettered, and the word “ordinance” may  
191 be changed to “section,” “article,” “regulation,” or such other appropriate word or phrase in  
192 order to accomplish such intentions.

193 **Section 4. Severability.** The provisions of this Ordinance are declared to be  
194 severable and if any section, sentence, clause or phrase of this Ordinance shall for any reason be  
195 held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining  
196 sections, sentences, clauses, and phrases of this Ordinance but they shall remain in effect, it  
197 being the legislative intent that this Ordinance shall stand notwithstanding the invalidity of any  
198 part.

199 **Section 5. Conflicts.** All ordinances or parts of ordinances, resolutions or parts of  
200 resolutions, in conflict herewith, are repealed to the extent of such conflict.

201 **Section 6. Effective Date.** This Ordinance shall become effective immediately upon  
202 final adoption on second reading. The Town Manager shall have the discretion to delay  
203 enforcement of this Ordinance beyond March 1, 2020 as he may deem necessary. In the event  
204 that the Florida Statutes are amended to preempt any part of this Ordinance following the 2020  
205 Legislative Session, this Ordinance may be repealed to the extent of that preemption by  
206 resolution of the Town Commission.

207 **PASSED** on first reading on the 11<sup>th</sup> day of June, 2019.

208 **PASSED AND ADOPTED** on second reading on the \_\_\_\_\_ day of \_\_\_\_\_, 2019.

209                    **On Final Reading Moved By:** \_\_\_\_\_

210                    **On Final Reading Second By:** \_\_\_\_\_

211    **FINAL VOTE ON ADOPTION**

212    Commissioner Barry Cohen            \_\_\_\_\_

213    Commissioner Michael Karukin        \_\_\_\_\_

214    Commissioner Tina Paul                \_\_\_\_\_

215    Vice Mayor Daniel Gielchinsky        \_\_\_\_\_

216    Mayor Daniel Dietch                    \_\_\_\_\_

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Daniel Dietch

Mayor

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222    **ATTEST:**

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226    Sandra Novoa, MMC

227    Town Clerk

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229    **APPROVED AS TO FORM AND LEGALITY FOR THE USE**

230    **AND BENEFIT OF THE TOWN OF SURFSIDE ONLY:**

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234    Weiss Serota Helfman Cole & Bierman, P.L.

235    Town Attorney