



**Council Meeting: October 22, 2013**

**SUBJECT: Discussion and Possible Action to Introduce an Ordinance Banning the Use and Sale of Expanded Polystyrene Food Containers and to Adopt a Negative Declaration of Environmental Impact**

**BACKGROUND**

Members of the public often incorrectly refer to expanded polystyrene (EPS) as “styrofoam.” Styrofoam™ is a trademark of The Dow Chemical Company for a closed-cell extruded polystyrene foam currently made for thermal insulation and craft applications. Styrofoam™ is not used for food packaging.

When littered or discarded, food containers made from EPS create undesirable impacts on water quality, stormwater, wildlife, and aesthetics within and beyond the city limits of Sunnyvale.

A ban on EPS food containers was first proposed as a study issue in 2010 by Councilmember Chu. Councilmember Griffith co-sponsored the study issue, which became DPW-11-01. The study issue was deferred for 2011 study due to the workload then associated with the plastic single-use bag study issue and the potential cost of CEQA compliance. With the creation of the Environmental Services Department, this study issue became ESD-11-01. Council ranked it second out of three ESD study issues for 2012.

The Sustainability Commission reviewed the study issue on November 19, 2012. The Commission was supportive of an EPS ban and further recommended that such an action should include a ban, within two years of adoption, of retail sales of EPS food containers in the City. Staff supported the Commission recommendations, which were accepted by Council, as detailed below.

When staff reported on the study issue on December 18, 2012, Council directed staff to proceed to prepare an ordinance to:

- Make unlawful the use of expanded polystyrene (EPS) food containers, including beverage containers, by food vendors
- Exempt from the ban:
  - The use of polystyrene for pre-packaged foods sold in retail stores (e.g. pre-packaged meats and eggs)
  - Non-food businesses that use polystyrene for packaging

- Include a process by which food vendors may request an exemption of up to one year if a unique circumstance would cause the food vendor undue hardship
- Have these changes take effect no sooner than six months after second reading of the ordinance
- Ban, within two years of adoption, retail sales of EPS food containers.

Details on the issues leading to the Council's direction are contained in RTC 12-293. The ordinance developed in response to Council's direction is contained in Attachment A.

Staff anticipated that a California Environmental Quality Act (CEQA) Initial Study would lead to a Negative Declaration of Environmental Impact and that the cost of a Sunnyvale-only CEQA process would be approximately \$15,000.

Subsequent discussions at the Santa Clara County Recycling and Waste Reduction Commission (R&WRC), chaired by Vice Mayor Griffith, and the corresponding staff-level Technical Advisory Committee focused on the fact that many jurisdictions were contemplating similar ordinances. A multi-jurisdiction CEQA study could reduce the overall amount of staff work and consultant cost associated with multiple, similar ordinances.

The City of San Jose subsequently offered to conduct a multi-jurisdiction Initial Study, which led to the Negative Declaration of Environmental Impact. The incremental cost to expand the San Jose-only study to the other jurisdictions in the county was estimated to be \$25,000, and the Commission allocated this amount from the County Plan Fee revenues charged on refuse disposal. Thus, the CEQA work was conducted at no direct cost to the City of Sunnyvale.

### **EXISTING POLICY**

Council Policy 3.2.4 - Zero Waste

1. Reduce the amount of Sunnyvale waste being disposed
2. Encourage residents, businesses and agencies to reuse, reduce, and recycle materials judiciously

General Plan Goal EM-8 – Protection of Creeks and Bay: Assure the reasonable protection of beneficial uses of creeks and San Francisco Bay, established in the Regional Board's Basin Plan, and protect environmentally sensitive areas.

General Plan Policy EM-10.4: Support legislation and regulations that will reduce or eliminate pollutants of concern at the source.

## **CEQA REVIEW**

An environmental assessment of the proposed ordinance was required under the California Environmental Quality Act (CEQA). As noted, Sunnyvale and other cities participated in an initial study with San Jose as the lead agency, which resulted in the preparation of a Draft Negative Declaration.

The public review period for the Draft Negative Declaration began July 10, 2013, and ended August 9, 2013. Five comment letters were received by the City of San Jose during the circulation period for the Polystyrene Foam Food Service Ware Ordinance Initial Study from:

- City of Sunnyvale
- Town of Los Altos Hills
- City of Los Altos
- City of Cupertino
- Diane Heckman, Los Altos Resident

The letters from the cities of Sunnyvale and Los Altos acknowledged review of the Initial Study and had no comments on the text of the Initial Study.

As noted in an August 9, 2013, letter from the State Clearinghouse, no comments were submitted by State Agencies.

On August 21, 2013, the San Jose Director of Planning, Building and Code Enforcement provided responses to all comments received. The comments received did not raise significant environmental issues that were not already adequately addressed in the Initial Study/Draft Negative Declaration.

As a result of the comment letters, additional clarifying language on minor issues was added to the Initial Study in underline/strikethrough format. The resulting Revised Initial Study/Negative Declaration document can be viewed at <http://www.sanjoseca.gov/DocumentCenter/View/22613>. Copies of this document are also available for public review at the Sunnyvale Library and the City Clerk's office.

As a "responsible agency" under CEQA, Sunnyvale must consider the Negative Declaration prepared by the lead agency and reach its own conclusions on whether and how to approve the ordinance. The City Council may adopt the proposed Negative Declaration only if it finds on the basis of the whole record before it (including the initial study and any comments received), that there is no substantial evidence that the project will have a significant effect on the environment and that the Negative Declaration reflects the City Council's independent judgment and analysis.

Staff recommends that the City Council consider the Revised Initial Study and proposed Negative Declaration and adopt the Negative Declaration.

## **DISCUSSION**

The ordinance (Attachment A) conforms to the direction given by Council on December 18, 2012.

The Initial Study prepared by City of San Jose has examined the potential for environmental impacts caused by adoption of ordinances banning EPS containers. The Initial Study evaluated a “project” with three ordinance elements:

1. Banning use of EPS food containers by food providers
2. Banning retail sales of EPS food containers
3. Banning retail sales of EPS ice chests and coolers.

Per Council’s direction, the draft ordinance includes elements #1 and #2. The ordinance proposes to ban food provider use of EPS starting on Earth Day, April 22, 2014. Based on County Department of Health permit information, approximately 600 food vendors in Sunnyvale will be affected by the prohibition on dispensing prepared food in EPS food containers. The six-month delay will provide a transition period that will allow food vendors to use up already-purchased stocks of EPS food containers and purchase non-EPS containers. The term “food provider” is used in the ordinance to make it clear that the ban applies whether or not there is a charge for the food or beverage being provided. This would include, for example, additional situations where a customer is provided free food samples at a store or is given a beverage such as coffee or water in a waiting room.

Staff is proposing that the ban on retail sales of EPS food containers take effect one year later, on April 22, 2015. The delay provides sufficient time for affected stores to sell off existing inventories and plan their transitions away from EPS and toward non-EPS alternatives. Initial staff research into the number of stores affected by the subsequent retail sales ban indicates that approximately 100 stores will be affected. The amounts of EPS on store shelves vary significantly. Those stocking and selling larger amounts of EPS food containers are a smaller set of stores that cater to restaurants and similar customers who buy in bulk. Smaller amounts are sold, primarily to individuals, by a larger number of stores that includes grocers, pharmacies and drug stores, sporting goods stores, department and general merchandise stores, and hardware stores.

During the transition periods, City staff will provide information to food providers and the public regarding the changes introduced by the ordinance and alternatives to EPS containers. The same information will be given to stores that sell food containers at a later date, according to the implementation schedule in the ordinance.

**FISCAL IMPACT**

Banning EPS food containers will produce fiscal impacts to the City that, in the short term, will be too small and diffuse to measure accurately. These impacts will consist mainly of reduced litter cleanup in street medians, parks and other City property and waterways (or more thorough cleanup of non-EPS litter).

The City's Stormwater Permit requires that permittees implement control measures for litter and trash such as ordinances to reduce litter-prone products (e.g., bans on single use bags and single use expanded polystyrene food ware). Approving such ordinances will assist the City in complying with the City's stormwater permit trash reduction load requirements. Meeting the trash reduction targets will require implementing a portfolio of actions. Actions that reduce litter at the source help limit broader implementation of higher cost structural retrofits and reduce their associated maintenance.

Reports to Council do not normally address private sector fiscal impacts, but due to the nature of the recommended action, the following analysis is provided.

Food vendors that already use non-EPS disposable containers should see no impact as a result of a ban. These vendors may actually benefit from a ban if it creates a more level "playing field" by preventing competing food vendors from using lower-cost EPS food packaging.

Food Vendors that currently use EPS food packaging and, as a result of a ban, replace them with containers made from alternate materials are likely to pay more for the replacement containers. At the detail level, the additional cost of each non-EPS item compared to its EPS equivalent varies with the type of container. For example, one of the companies that displayed non-EPS containers at the food vendor outreach meetings stated that restaurants would pay around \$0.07 to \$0.12 more for a small clamshell and as much as \$0.13 to \$0.43 more for a large, 8-inch container, depending on the material the restaurant selected. The higher cost figures apply to compostable containers, which staff does not anticipate being required by the ordinance.

The overall fiscal impact on a particular food vendor would vary by the type of food vendor. For example, a food truck or fast food business typically spends proportionally more on food packaging than a full service restaurant.

Stores that currently sell EPS food containers sell them in bulk to food vendors and/or to individual members of the public. When barred from selling EPS containers, the stores will lose the revenue they currently earn from those sales. However, current and planned bans on food vendor use of EPS products will reduce these customers' demand for EPS and increase demand for food containers made from other materials. Thus, stores are likely to replace the EPS products with non-EPS products that serve the same functions and

customers. To the extent that the non-EPS products cost more, stores may sell somewhat fewer units of product, but at higher price points. Overall, store revenues and profits are not likely to change significantly as a result of a ban on sales of EPS food containers.

**PUBLIC CONTACT**

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, at the Sunnyvale Senior Center, Community Center and Department of Public Safety; and by making the agenda and report available at the Sunnyvale Public Library, the Office of the City Clerk and on the City's Web site.

**ALTERNATIVES**

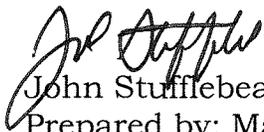
Alternative 1: Adopt the Negative Declaration and introduce the ordinance (Attachment A).

Alternative 2: Take other action at the discretion of Council.

**RECOMMENDATION**

Staff recommends that Council approve Alternative 1: Adopt the Negative Declaration and introduce the ordinance (Attachment A).

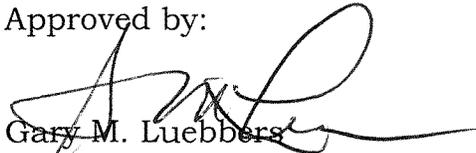
Reviewed by:



John Stufflebean, Director, Environmental Services

Prepared by: Mark Bowers, Solid Waste Programs Division Manager

Approved by:



Gary M. Luebbbers  
City Manager

**Attachments**

A. Proposed Ordinance

**ORDINANCE NO. \_\_\_\_**

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SUNNYVALE ADDING CHAPTER 5.39 (ENVIRONMENTALLY ACCEPTABLE FOOD CONTAINERS AND SERVICE WARE) OF TITLE 5 (BUSINESS LICENSES AND REGULATIONS) OF THE SUNNYVALE MUNICIPAL CODE RELATED TO POLYSTYRENE FOOD CONTAINERS AND SERVICE WARE**

WHEREAS, on December 12, 2012, the City Council directed staff to prepare a draft ordinance prohibiting the use of polystyrene foam food containers and service ware; and

WHEREAS, the City of San Jose, acting as the lead agency under the California Environmental Quality Act (CEQA), undertook to prepare environmental documentation for a proposed ordinance prohibiting the use of polystyrene foam food containers and service ware on behalf of all 15 cities in Santa Clara County and the County of Santa Clara;

WHEREAS, the Initial Study and Notice of Intent to Adopt a Negative Declaration were circulated for public review and comments; and

WHEREAS, during the public review and comment period, the City of Sunnyvale, as the responsible agency, participated in the CEQA process as required by Title 14 of the California Code of Regulations, Section 15096; and

WHEREAS, the City of San Jose adopted the Negative Declaration on August 27, 2013; and

WHEREAS, on October 22, 2013, the City Council held a duly-noticed public hearing to consider the Initial Study and Negative Declaration in connection with the City Council's review and approval of the proposed ordinance prohibiting the use of polystyrene foam food containers and service ware in Sunnyvale.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF SUNNYVALE DOES ORDAIN AS FOLLOWS:

**SECTION 1. CEQA REVIEW.**

1. The City Council has reviewed the Negative Declaration for the proposed ordinance to prohibit the use of polystyrene food containers and service ware, and all comments received regarding the Negative Declaration. After reviewing the foregoing, the City Council has determined that no evidence or circumstances exist that would require the preparation of additional environmental documents. Further, the City Council has exercised its independent judgment and has determined that the ordinance will not have a significant impact on the environment.

2. The City Council of the City of Sunnyvale adopts the Negative Declaration for the proposed ordinance to prohibit the use of polystyrene foam food containers and service ware within the City of Sunnyvale, which is on file with the City Clerk.

SECTION 2. CHAPTER 5.39 ADDED. Chapter 5.38 (Environmentally Acceptable Food Containers) of Title 5 (Business Licenses and Regulations) is hereby added to the Sunnyvale Municipal Code as follows:

### **Chapter 5.39**

#### **ENVIRONMENTALLY ACCEPTABLE FOOD CONTAINERS AND SERVICE WARE**

Sections:

- 5.39.010 Definitions
- 5.39.020 Polystyrene foam food containers and service ware prohibited
- 5.39.030 Exemptions
- 5.39.040 Violations

#### **5.39.010. Definitions.**

Unless otherwise expressly stated, whenever used in this chapter, the following terms shall have the meanings set forth below:

- (a) "Customer" means a person obtaining prepared food from a food provider.
- (b) "Food container" means a container that is used, or is intended to be used, to hold prepared food. "Food container" includes, but is not limited to, a cup, bowl, plate, tray, carton, or clamshell container that is intended for single use.
- (c) "Food provider" means any vendor, business, organization, entity, group or individual operating in the city of Sunnyvale that offers food or beverages to the public for consumption on or off premises, regardless of whether there is a charge for the food. "Food provider" includes, but is not limited to, restaurants, retail food establishments, caterers, cafeterias, stores, shops, sales outlets, grocery stores, delicatessens, itinerant restaurants, pushcarts, and vehicular food vendors. "Food provider" also includes cafeterias in private schools and places of employment whether or not such establishments are open to the general public.
- (d) "Food service ware" includes plates, bowls, cups, lids, straws, stirrers, forks, spoons, knives, napkins, trays, and other items primarily designed for use in consuming food.

(e) "Polystyrene foam" means a container made of blown polystyrene, and expanded and extruded foams (sometimes called Styrofoam<sup>®</sup>) which are thermoplastic petrochemical materials utilizing a styrene monomer and processed by any number of techniques including, but not limited to, fusion of monomer spheres (expanded bead polystyrene), injection molding, foam molding, and extrusion-blown molding (extruded foam polystyrene), which is used, or is intended to be used, to hold prepared food.

(f) "Prepared food" means any food, including beverages, that is served, packaged, cooked, chopped, sliced, mixed, brewed, frozen, squeezed, or otherwise prepared for consumption, including but not limited to ready-to-eat and takeout food.

(g) "Vendor" means any store or business which sells or offers goods or merchandise, located or operating within the City of Sunnyvale.

**5.39.020 Polystyrene foam containers and service ware prohibited.**

(a) On or after April 22, 2014, a food provider shall not dispense prepared food to a customer in a polystyrene foam food container.

(b) On or after April 22, 2015, polystyrene foam food containers and polystyrene foam food service ware shall not be sold or provided by any vendor in the City of Sunnyvale.

**5.39.030. Exemptions.**

The following are exempt from the provisions of this Chapter:

(a) Raw eggs and raw, butchered meat, fish, or poultry that is sold from a butcher case or a similar retail appliance.

(b) A food provider may dispense prepared food to a customer using polystyrene foam containers if that food provider demonstrates, in writing, to the satisfaction of the director of environmental services that compliance with the provisions of this Chapter will impose a unique problem, not generally applicable to other persons in similar circumstances, that will result in an undue economic hardship. The director of environmental services shall put the decision to grant or deny an exemption in writing and may exempt the food vendor pursuant to this subdivision until April 22, 2015, or not more than one year from the date of the demonstration, whichever date is sooner. The Director's decision shall be final.

**5.39.040. Violations.**

(a) The director of environmental services has primary responsibility for enforcement of this chapter. The director of environmental services is authorized to promulgate regulations and to take any and all other actions reasonable and

necessary to enforce this chapter, including, but not limited to, investigating violations, issuing fines and entering the premises of any store during business hours.

(b) If the director of environmental services determines that a violation of this chapter has occurred, he or she will issue a written warning notice to the operator of the vendor or food provider that a violation has occurred and the potential penalties that will apply for future violations.

(c) Any vendor or food provider that violates or fails to comply with any of the requirements of this chapter after a written warning notice has been issued for that violation shall be guilty of an infraction.

(d) If a vendor or food provider has subsequent violations of this chapter that are similar in kind to the violation addressed in a written warning notice, the following penalties will be imposed and shall be payable by the operator:

(1) A fine not exceeding one hundred dollars for the first violation after the written warning notice is given;

(2) A fine not exceeding two hundred dollars for the second violation after the written warning notice is given; or

(3) A fine not exceeding five hundred dollars for the third and any subsequent violations after the written warning notice is given.

(e) A fine shall be imposed for each day a violation occurs or is allowed to continue.

(f) All fines collected pursuant to this chapter shall be deposited in the Wastewater Management Fund of the department of environmental services to assist the department with its costs of implementing and enforcing the requirements of this chapter.

(g) Any vendor or food provider who receives a written warning notice or fine may request an administrative review of the accuracy of the determination or the propriety of any fine issued, by filing a written notice of appeal with the director of environmental services no later than thirty days after receipt of a written warning notice or fine, as applicable. The notice of appeal must include all facts supporting the appeal and any statements and evidence, including copies of all written documentation and a list of any witnesses, that the appellant wishes to be considered in connection with the appeal. The appeal will be heard by a hearing officer designated by the director of environmental services. The hearing officer will conduct a hearing concerning the appeal within forty-five days from the date that the notice of appeal is filed, or on a later date if agreed upon by the appellant and the city, and will give the appellant ten days prior written notice of the date of the hearing. The hearing officer may sustain, rescind, or modify the written warning notice or fine, as applicable, by written decision. The hearing officer will have the power to waive any portion of the fine in a manner consistent with the

decision. The decision of the hearing officer is final and effective on the date of service of the written decision, is not subject to further administrative review, and constitutes the final administrative decision.

SECTION 3. CONSTITUTIONALITY; SEVERABILITY. If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance, and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

SECTION 4. EFFECTIVE DATE. This ordinance shall be in full force and effect thirty (30) days from and after the date of its adoption.

SECTION 5. POSTING AND PUBLICATION. The City Clerk is directed to cause copies of this ordinance to be posted in three (3) prominent places in the City of Sunnyvale and to cause publication once in *The Sun*, the official newspaper for publication of legal notices of the City of Sunnyvale, of a notice setting forth the date of adoption, the title of this ordinance, and a list of places where copies of this ordinance are posted, within fifteen (15) days after adoption of this ordinance.

Introduced at a regular meeting of the City Council held on October 22, 2013, and adopted as an ordinance of the City of Sunnyvale at a regular meeting of the City Council held on \_\_\_\_\_, 2013, by the following vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

ATTEST:

APPROVED:

\_\_\_\_\_  
City Clerk  
Date of Attestation: \_\_\_\_\_

\_\_\_\_\_  
Mayor

(SEAL

APPROVED AS TO FORM:

\_\_\_\_\_  
Joan A. Borger, City Attorney