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REPORT TO NATURAL RESOURCES AND CULTURE COMMITTEE

REGULATING STYROFOAM AND BOTTLED WATER PRODUCTS

INTRODUCTION

This Office has been posed with the question of what steps the City Council may take to begin the phasing out of Styrofoam¹ and bottled water products at City facilities, departments, and events, including events for which the City has permitting authority. This report will provide an overview of the legal issues that the City Council should take into account when considering whether to take action to regulate the use of expanded polystyrene foam (EPS) products and bottled water² by City departments, at City facilities, or at private events that require City permits.

QUESTION PRESENTED

What is the extent of the City's power to regulate the use of EPS and bottled water products by City departments, at City facilities, or at private events that require City permits?

SHORT ANSWER

In general, the City has considerable discretion in the type of measures it could take to regulate, whether by banning or simply restricting, the use of EPS and bottled water products by City departments, at City facilities, or at City-permitted private events because the authority to enact such regulatory measures stems from the City's broad police powers and such measures are unlikely to violate constitutional due process, equal protection, or interstate commerce rights. Measures that affect only the City's internal operations, such as limitations on when City

¹ Styrofoam is a brand name owned by Dow Chemical Company for extruded polystyrene foam (XPS or XEPS), a material that is most commonly used for insulation in the construction industry. Coffee cups, ice chests, and packing materials (peanuts as well as the molded shapes used to secure electronic equipment and appliances) are made from a different material, expanded polystyrene foam (EPS). EPS is commonly, but mistakenly, referred to as Styrofoam. This report assumes that your inquiry is directed towards products made from EPS and not Styrofoam or XPS.

² The term "bottled water products" is used in this memorandum to refer solely to plastic water bottles, regardless of size. Thus, two-gallon jugs and the five-gallon bottles used in water coolers are included in addition to the two-liter and smaller "personal" sizes. It is assumed your inquiry is not directed at glass bottles.

departments may purchase or make use of EPS and bottled water products are far less likely to raise constitutional issues than regulatory steps that are directed at outside parties or private persons, such as concessionaires operating at City facilities or persons holding events that require City permits. Any proposed regulation that is not limited to the City's organizational units should undergo environmental review prior to its adoption.

BACKGROUND

A number of coastal cities in California and other states have adopted or proposed bans against disposable food containers made from EPS that are used by restaurants and other food vendors. The stated purposes for the bans are to reduce litter ending up in marine areas and impacts to marine wildlife from when they ingest particles of EPS that have broken down. A fewer number of jurisdictions have imposed bans of bottled water; these bans are premised on the desire to reduce the use of plastic and encourage consumption of tap water. Though various forms of opposition have been directed at the two types of bans, there has not been as of yet any legal challenges. We assume that your inquiry is based on similar, if not the same, concerns behind these bans.

ANALYSIS

I. LEGAL AUTHORITY TO REGULATE EPS AND BOTTLED WATER PRODUCTS

A. Police Power

Pursuant to article XI, section 7 of the California Constitution, the City is empowered to "make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws." The police power, as it is commonly called, is broad and is the source of a city's authority to legislate for the benefit of public health, safety, or the general welfare.

A legislative body, in the exercise of its police power has a broad discretion to determine both what public interests are and the measures necessary for the protection of such interests. The determination of the need for a mode of exercising the power is primarily for the legislative body and the courts will not hold enactments invalid unless they are palpably unreasonable, arbitrary or capricious, having no tendency to promote the public welfare, safety, morals, or general welfare.

Justesen's Food Stores, Inc. v. City of Tulare, 43 Cal. App. 2d 616, 621 (1941).

In general, a city's exercise of its police power is proper if it accomplishes a purpose that is within the city's power to address through means that are reasonable. *Serve Yourself Gas Stations Ass'n, Inc. v. Brock*, 39 Cal. 2d 813, 817-18 (1952). Stated alternatively, a city's exercise of its police power is legitimate so long as any reasonable tendency exists that the law or regulation promotes public health, morals, safety, or the general welfare. *See, e.g., Clemons v. City of Los Angeles*, 36 Cal. 2d 95, 98 (1950).

B. Due Process

The Fourteenth Amendment to the United States Constitution prohibits any State (which includes its political subdivisions such as cities) from "depriv[ing] any person of life, liberty, or property, without due process of law." A city's exercise of its police power cannot be unreasonable, arbitrary, or capricious, or else it will be in violation of constitutional protections of due process. *See, e.g., Nebbia v. New York*, 291 U.S. 502, 525 (1934). Generally, a government action (such as a city's adoption of an ordinance) regulating for the benefit of public health, safety, or the general welfare will be upheld as constitutional so long as there is any reasonable basis in fact to support the purpose and necessity for the law. *See Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955). This analysis of determining whether any reasonable basis supports the purpose of the law, also characterized as whether the law is rationally related to achieving a legitimate government purpose, is commonly referred to as the "rational basis" test. The test affords great deference to legislatures.

In *Nebbia*, a state law that set maximum and minimum prices for milk was upheld on the basis that the state had the power to adopt whatever economic policy it reasonably determined was likely to promote the public welfare so long as it was not arbitrary or discriminatory. *Williamson* involved a state law that, among other things, made it unlawful for any person who was not a licensed optometrist or ophthalmologist to fit lenses or replace eyeglasses lenses without a prescription. The practical effect of the law was that opticians were prohibited from fitting old lenses into new frames or duplicating existing lenses unless they had a prescription. In upholding the law as a valid exercise of the state's power to regulate the general health and welfare, the U.S. Supreme Court stated, "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson*, 348 U.S. at 488.

In general, laws that regulate matters of social welfare or economic or business issues, such as the statutes in *Nebbia* and *Williamson*, are constitutional if they satisfy the rational basis test (*i.e.* are reasonably related to the furtherance of a legitimate government purpose). When government action affects "fundamental" rights and liberty interests, however, courts will subject the regulation to greater scrutiny. *See Washington v. Glucksberg*, 521 U.S. 702 (1997). This more stringent, exacting analysis is commonly referred to as "strict scrutiny." The government is forbidden from infringing fundamental rights and liberty interests at all, unless the infringing action is narrowly tailored to serve a compelling state interest. *See id.* at 721. Apart from the freedoms protected by the first eight amendments of the Bill of Rights, those rights and liberty

interests that are “fundamental” and thus constitutionally protected have not been definitively identified.³ Moreover, the Supreme Court has expressed reluctance to expand the scope of protected liberty interests because the guidelines for doing so are not well defined. *See id.* at 720.

C. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws”) prohibits state and local governments from unlawful discrimination. Basically, similarly situated people are to be treated alike. *See Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). However, not all types of distinction or discrimination are prohibited. For example, distinctions based on economic classifications will be upheld unless they are clearly unreasonable. *See id.* at 440. However, distinctions based upon “suspect classifications”—typically those based on race, alienage or national origin—must be narrowly tailored to serve a compelling state interest or else will be found unconstitutional. *Id.* In general, if a law’s disparate treatment is not based on suspect classes, then the law need only satisfy the rational basis test. *See Dandridge v. Williams*, 397 U.S. 471 (1970).

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some “reasonable basis,” it does not offend the Constitution simply because the classification “is not made with mathematical nicety or because in practice it results in some inequality.” *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (1911). “The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.” *Metropolis Theatre Co. v. City of Chicago*, 228 U. S. 61, 69-70 (1913). “A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.” *McGowan v. Maryland*, 366 U. S. 420, 426 (1961).

Id. at 485.

D. Commerce Clause

Under the Commerce Clause, Congress has the exclusive power to regulate interstate commerce: “The Congress shall have the power . . . to regulate commerce . . . among the several States . . .” U.S. Const. art. I, § 8, cl. 3. If the purpose of a law is “simple economic protectionism,” *i.e.*, affirmatively discriminating against interstate commerce either on its face or

³ Among the liberty interests that the Supreme Court has specifically found to be fundamental and thus protected are the rights to marry, to have children, and to direct the education and upbringing of one’s children. *See Washington*, 521 U.S. at 720.

in practical effect, such as by favoring in-state businesses at the expense of out-of-state businesses, then the law is virtually *per se* invalid. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) (*Clover Leaf Creamery*); *Sherwin-Williams Co. v. City & County of San Francisco*, 857 F. Supp. 1355, 1366 (N.D. Cal. 1994). The *per se* invalid law will be struck down as unconstitutional unless it serves a legitimate local purpose that cannot be served as well by the available nondiscriminatory means. *Sherwin-Williams*, 857 F. Supp. at 1365-66.

States (and cities) are constrained by the Commerce Clause even when they legislate in areas of legitimate local concern, such as environmental protection. See *Clover Leaf Creamery*, 449 U.S. at 471. A law that is evenhanded in its regulation of a legitimate local interest and burdens interstate commerce only incidentally will nonetheless be struck down as unconstitutional if the putative local benefits are outweighed by excessive burdens on interstate commerce. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). “[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.” *Id.*

E. California Constitution

The California Constitution also guarantees rights to due process and of equal protection, (“A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.” Cal. Const., art. I, § 7). The review of social welfare and economic regulation under the state constitution is similar to that under federal due process and equal protection analysis. The California Supreme Court has stated, “In determining the validity of a legislative measure under the police power, our sole concern is with whether the measure reasonably relates to a legitimate governmental purpose and ‘[we] must not confuse reasonableness in this context with wisdom.’” *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 159 (1976).

However, the state constitution offers broader protection than that afforded by the U.S. Constitution. “[D]ecisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.” *Serrano v. Priest*, 18 Cal. 3d 728, 764 (1976) (*Serrano II*). Therefore, a law could be found to pass muster under the U.S. Constitution but not under the state constitution because of the presence of a liberty interest protected under California, but not federal, law. Identifying the additional fundamental rights that are protected by the California Constitution is difficult because of the lack of a definitive list.

F. California Environmental Quality Act

Any proposed action to regulate conduct by persons outside the City organization regarding bottled water and EPS products could require the preparation of an environmental impact report (EIR). In *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 181 Cal. App. 4th 521, *review granted*, 108 Cal. Rptr. 3d 555 (2010), a case decided at the beginning of

this year, Manhattan Beach had adopted an ordinance that prohibited certain retail establishments, food vendors and other specified businesses from providing their customers with plastic bags (reusable bags and recyclable paper bags were still allowed) and issued a negative declaration in connection with the ordinance. The court held that the city should have prepared an EIR because there was substantial evidence that the plastic bag distribution ban was likely to increase the use of paper bags and thus likely have a significant effect on the environment in the form of an increase in the consumption of water and nonrenewable energy, greenhouse gas emissions and solid waste production. *Id.*, at 543-45. While the case is no longer binding legal precedent because the California Supreme Court has since granted review, the court could find that CEQA requires a more expansive view with respect to the environmental impacts that must be evaluated.

II. CITY LIKELY HAS CONSIDERABLE DISCRETION TO REGULATE EPS AND BOTTLED WATER PRODUCTS

It does not appear that the City's regulation of EPS and bottled water products would implicate fundamental liberty interests or suspect classifications. This Office has not found any legal authority holding that the access to or use of bottled water or EPS products is a fundamental right protected under the California or U.S. Constitutions, nor any legal authority holding that the vendors, manufacturers or distributors of such products are suspect classes that are entitled to greater protection under either constitution's equal protection clause. Regulatory measures proposed by the City to restrict or even prohibit the use of EPS and bottled water products at City facilities (such as sales of bottled water by concessionaires) or at privately organized and hosted events that require City permits would most likely be valid exercises of the City's police power so long as their purpose is to promote the public health, safety, or general welfare, and the measures are not arbitrary or unreasonable. Being in the nature of social welfare/economic regulation, such measures would only have to bear a rational relation to their purpose and be evenhanded in their regulation of and impact to out-of-state versus in-state (*i.e.* local versus non-local) businesses (or otherwise ensure that the burden to interstate commerce does not clearly outweigh the putative local benefits) in order to be upheld as constitutional. The City has even greater discretion to adopt measures that restrict the City itself as an organization, such as limitations on the purchase or use of bottled water or EPS products by City departments, due to its inherent authority to manage its own operations.

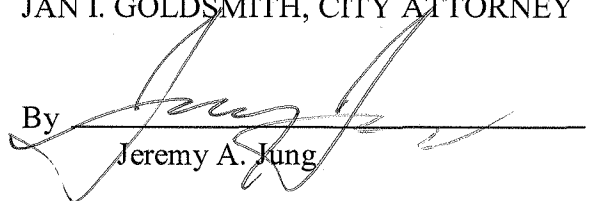
Any proposed regulatory measure that is directed at persons or entities outside the City organization would also require environmental impact analysis. A pending judicial decision may require the analysis to take a more expansive view of the potential actions that are likely to result and their impacts. Examples of factors that may need to be considered are whether the use of alternative products will increase (*e.g.* paper cups substituting for EPS cups) and the impacts that are likely to result, such as whether the increased use in alternative products will result in an overall greater use of products (*e.g.* alternative product does not replace original product on 1:1 ratio), and whether the production of the alternative product uses more energy and resources, and/or results in generation of a larger amount of by-products.

CONCLUSION

The City Council would have considerable latitude with respect to the steps it can take to “phase out” the use of EPS and bottled water products at City facilities and at City-permitted private events because neither fundamental liberty interests nor suspect classifications appear to be implicated. Though it has considerable latitude, the Council should ensure that it does not act arbitrarily or unreasonably and that it does not unduly discriminate against out-of-state (non-local) businesses. The Council would have even greater discretion to adopt similar measures that affect only the City’s own operations. This Office defers to the City Council on the matters of deciding whether to phase out EPS and bottled water products and if so to what extent.

Respectfully submitted,

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