



PUBLIC WORKS DEPARTMENT

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CITY COUNCIL STAFF REPORT

Meeting: August 16, 2022

Subject

Consider conducting the first reading of an Ordinance related to regulation of single-use plastic foodware and single-use carryout bags.

Recommended Action

Conduct the first reading of Ordinance No. 22-xxxx "An Ordinance of the City Council of the City of Cupertino amending City Code to change the name of section 9.15, adopt new sections 9.15.090 and 9.15.125, and amend sections 9.15.100, 9.15.110, 9.15.120, 9.15.130, 9.17.130, and 9.17.140 to regulate the use of single-use food service ware by food providers, regulate sale of single-use food service ware and expanded polystyrene foam coolers, and regulate single-use carryout bags" (Attachment A,) which includes a finding that adoption of the Ordinance is exempt from the California Environmental Quality Act (CEQA.)

Background

Due to concern for the negative environmental impact of litter, chemical migration into food, waste reduction, and conservation of natural resources, the City of Cupertino seeks to further reduce the use of single-use plastics through regulation of food service ware. The City's Zero Waste Policy, adopted in 2017, acknowledges that reusable foodware is generally preferred to single-use items and particularly seeks to reduce the production of unnecessary plastic food service ware. City Council made single-use plastics a City Work Program item in 2020 and Cupertino's Sustainability Commission recommended restrictions on single-use plastic foodware at their meeting on January 20.

While there are many single-use plastic items, both recyclable and not recyclable used in everyday life, the scope of this Ordinance is limited to single-use plastic food service ware used by food and beverage providers and non-durable expanded polystyrene foam coolers. City Municipal Code currently bans the use of expanded polystyrene (EPS) foam foodware and bans single-use plastic carryout bags (with an exemption for restaurants bagging takeout food orders.)

City Council conducted a Study Session on this topic on March 1 and directed staff to:

- Develop Ordinance language and return in April for a first reading

- Include temporary waivers to reduce impacts to businesses
- Reach out to the business community, including larger corporate interests
- Gather information on consultants with restaurant operation and food service experience able to provide technical and financial assistance to food businesses during transition
- Explore collaboration with local schools, which would not be covered under this proposed Ordinance
- Research reusable solutions for boba tea, which is very popular locally and is often very reliant on single-use plastic for serving and presentation
- Explore a pilot of reusable food service ware for takeout food and beverages
- Explore coordinating similar efforts with surrounding cities
- Explore amending Cupertino's single-use carryout bag Ordinance to require compostable or recyclable produce bags
- Compare the greenhouse gas (GHG) impact of plastic versus compostable foodware
- Clarify the concerns about bio-plastics and allow for future changes that may make those materials acceptable to the compost processors

Discussion

Foodware Ordinance Amendments

Environmental Programs Division staff prepared proposed amendments to Municipal Code Chapter 9.15 that would enact a shift away from single-use plastic foodware and toward compostable and reusable foodware.

Cupertino currently prohibits food service providers from using EPS foam foodware. The amended language (Attachments A and B) proposes to expand on that by requiring foodware accessories to be provided only when requested, banning the use of single-use plastic foodware, banning sale of bio-plastic foodware, and requiring reusables for dining in. The Ordinance enacts these prohibitions in two phases. The elements of those phases are summarized below and presented in Attachment C, which serves as an index to the draft Ordinance itself. Attachment D presents foodware cost comparison information, and Attachment E summarizes the outreach conducted to the food service providers and wider community on this topic.

The first phase of the Ordinance mirrors the requirements of State law Assembly Bill (AB) 1276, which became effective June 1, and requires that food service ware accessories such as utensils, chopsticks, condiment cups and packets, straws, stirrers, splash sticks, and cocktail sticks be provided only upon request by customers. This phase of the Cupertino Ordinance would make the requirements of AB 1276 locally enforceable and would become effective 30 days from the second reading, on October 6. Initially this phase of the Ordinance included an additional recommendation to prohibit self-serve stations for single-use foodware accessories which went beyond what was required by the State law. While self-serve stations do lend themselves to customers taking more items than they need, leading to unnecessary expense and waste,

prohibiting them could cause significant operational impact for some businesses. As such, it is recommended to remove that prohibition and allow this phase to remain identical to the requirements of AB 1276, which will also keep Cupertino in alignment with other jurisdictions and reduce confusion for chain businesses operating in multiple cities.

The second phase of the proposed Ordinance includes elements that are proposed to go into effect one year from the second reading, on September 6, 2023:

1. Prohibit the use of certain types of food service ware by food providers:
 - Continue to prohibit use of expanded polystyrene foam food service ware.
 - Prohibit use of single-use plastic items (even if accepted as recyclable.)
 - Prohibit use of compostable food service ware that contains PFAS (a group of chemicals used to make a coating for products that resist heat, oil, stains, grease, and water) (as required by AB 1200.)
 - Prohibit use of bio-plastics (compostable plastics.)
2. Require reusable food service ware for dining on site:
 - Reusable food service ware must be provided for customers dining on site at the food provider's location. This would require sufficient dishwashing capacity or a contract with a dishwashing service.
3. Prohibit the sale of certain non-compliant foodware:
 - Ban local sale of expanded polystyrene foam foodware.
 - Ban local sale of bio-plastic foodware.
 - Continue to allow local sale of traditional plastic foodware and accessories¹.
4. Exempted items:
 - Paper, wood, bamboo, and other fiber-based compostable foodware items accepted in the City's compost program.
 - Containers made entirely from aluminum and aluminum foil.
 - Plastic straws for those with medical need.
 - Food prepared and packaged outside of the City.
 - Compliant single-use food service used for taking home leftovers from dine-in situations.
 - Temporary exemptions allowed if additional time needed to comply.
 - Temporary exemptions allowed for significant economic hardship.
 - Temporary exemptions allowed for unique packaging hardship.

Why Compostable "Bio-Plastics" Are Not the Answer

¹ Plastic food service ware and accessories includes plastic cups, plates, bowls, utensils, stir sticks, etcetera.

Foodware containers and utensils made from polylactic acid (PLA,) or other “bio-plastics” made from corn or potato starch are not allowed in Cupertino’s organics recycling program, even if labeled as certified compostable. The one exception is that Biodegradable Products Institute (BPI) certified compostable plastic bags are still allowed for collecting food scraps. Problems with bio-plastics:

- They do not break down fast enough. A 60-day timeframe is typical at California composting facilities, which is different from the 180 days allowed by American Society for Testing and Materials (ASTM) standards.
- Considered a contaminant which must be screened out and sent to landfill.
- Bio-plastics in landfill create methane as they degrade.
- People confuse bio-plastics with recyclable traditional plastic.
- Bio-plastic foodware is usually more expensive than other types.
- Currently there is no place for bio-plastics in Cupertino’s waste streams.

There are currently no solutions to the various issues above, however, if technological advances occur in production, processing, or sorting, and these advances changes what is allowed in Cupertino’s local composting program, the Ordinance could be amended.

Single-Use Carryout Bags Ordinance Amendments

City Municipal Code (CMC) currently bans the use of single-use plastic carryout bags at all retail locations with an exemption for restaurants bagging takeout food orders. It requires a fee of ten cents for each paper bag provided at point of checkout and allows reusable bags to be provided with no fee.

- At the recommendation of the Sustainability Commission, a proposed amendment would remove the exemption allowing thin single-use carryout plastic bags for restaurants. If adopted, staff recommends an effective date of September 6, 2023, to align with the new proposed single-use plastic foodware requirements.
- Another amendment to the bag Ordinance would require a ten-cent charge for reusable bags, which would bring Cupertino Municipal Code into alignment with State law. As an observational survey showed grocery stores are already charging for both paper and reusable carryout bags, this is more of a Code cleanup issue, but other retailers will be informed for education and compliance.
- In neither the current form of the CMC nor the proposed amended form would restaurants be required to charge a fee for carryout bags containing takeout food orders.
- A further amendment was suggested by City Council which would require compostable bio-plastic or paper produce bags at local supermarkets and farmers markets. This is not currently recommended due to uncertainty from Cupertino’s compost processors about the role of bio-plastic bags and because there is a State bill contemplating a similar requirement. Staff advises considering this issue when more information is available.

Environmental Comparison Between Types of Foodware

While single-use foodware is highly visible and often non-essential, it is not a significant contributor of GHG in Cupertino, when compared to transportation or energy sources. While there are lifecycle analyses of the various types of single-use foodware, they do not take into consideration the impacts of items that are littered and end up in the oceans; the concern over chemicals leaching into food, or that plastic single-use foodware is unlikely in actual practice to be clean enough to be recycled. They also do not take into consideration what has been called the “carrier benefit” of compostable foodware, which is something that does not need to be emptied or wiped clean of food scraps before being placed in a green bin and thus may carry more food scraps into the compost stream. Setting aside those gaps, most of the GHG production and water use are from resource extraction and manufacturing – fossil fuels for plastics, trees for paper, crops for bio-plastics and mining aluminum. Based purely on climate change impact, there is not a clear best choice among single-use items.² Meanwhile, reusable items made from ceramic, steel, or glass consistently result in a lower carbon footprint after they have been reused and washed a number of times. Washing processes that are energy and water-efficient can reduce the break-even point considerably.³

Outreach to Schools and Large Corporations

Staff interviewed several large institutional food service providers in Cupertino during the summer of 2021 about their use of foodware. Common concerns included being able to quickly transition to reusables for dining in given needed structural changes and labor shortages. Conversations with representatives from Cupertino Union School District (CUSD) revealed concerns over product availability due to supply chain issues and cited a lack of dishwashing capacity and funding shortfalls. While CUSD would not be subject to the City’s Ordinance, they are open to collaborating for change and have already made choices to unbundle foodware available to students, have eliminated straws, and already use paper-based trays to hold food. Fremont Union High School District (FUHSD) has members of the Silicon Valley Youth Climate Action organization actively working on issues of climate change with leaders in the District and are requesting to form an advisory group to include representatives from the cities in FUHSD, climate groups, and students to act on a variety of topics, including waste reduction. Staff has also reached out to De Anza College to discuss this topic.

Assistance for Businesses During Transition

If the Ordinance is adopted, staff recommends contracting for technical and financial assistance to help Cupertino’s food service businesses understand and adjust to the requirements, including sourcing foodware and connecting businesses with mini grants. A consultant who is deeply knowledgeable about food service business requirements,

² “Food Service Ware LCA Harmonization.” State of Oregon Department of Environmental Quality accessed at <https://www.oregon.gov/deq/FilterDocs/FoodLCAreport.pdf>

³ “Reusable Food Service Ware.” State of Oregon Department of Environmental Quality and Franklin Associates, a Division of Eastern Research Group accessed at <https://www.oregon.gov/deq/FilterDocs/reusable-fsw.pdf>

regulations, supplies, and challenges who also has experience with making these types of transitions will best be able to provide such assistance. A request for proposal is under development.

The Challenge of Bubble Tea

There are at least 14 locations in Cupertino that serve bubble “boba” tea as a primary item and others that serve bubble tea on their menu. Seeing the tea and tapioca pearls through the cup and shaking the drink to mix it are part of the expected experience, and out of the 14 boba-focused tea places, 13 used clear single-use plastic cups and a machine to heat-seal film plastic across the top to cover the drinks. From a limited online search, the heat-sealing machinery can cost around \$2000, and for franchised shops the presentation and packaging could be required. Understanding these concerns, City Council is interested in reusable alternatives. Staff talked to one reusable takeout foodware solutions company operating out of Mountain View that is specifically piloting a clear cup alternative that would work for boba. Staff also purchased specialized mason jar lids, reusable straws, and travel cups as a demonstration and giveaway items for events such as Earth Day. A readily available solution does not currently exist to replace the experience of the heat-sealed transparent to-go cups. In recognition of this, the proposed Ordinance includes a “unique packaging exemption” that could be employed while reusable and fiber-based compliant options are encouraged.

Piloting Reusables for Takeout

Reusables for takeout food and drinks is a business model that is already gaining some traction in the Bay Area and elsewhere around the country and the world. A common method is to charge a deposit for a reusable to-go container which is refunded once the container is returned to a drop-off site, usually via a smart phone app. The returned containers are cleaned, sanitized, and returned to the food providers. In other models the containers are returned to participating businesses and washed and sanitized by the businesses themselves. City Council and Sustainability Commission were both interested to learn more about such possibilities, as were more than 60% of businesses and customers when asked in surveys. Staff has reached out to two providers for more information. Meanwhile, as a timely indicator that this is a topic of interest more widely, Starbucks announced on March 15 that it is planning to provide easy access to personal and other reusable to-go cups in café, drive-thru, and mobile orders by 2025. This plan includes making use of a double-window for drive-thru orders to enable customers to bring their own cups and a reusable and returnable borrowing cup model like what has already been described. Staff will continue to reach out to companies that provide this service and make a future recommendation to City Council for consideration of a possible local pilot.

Coordinating with other Cities

City Council was interested in the pace and interest of nearby cities to adopt similar restrictions on single-use plastics. While it would be ideal to move together as a region

similar to what happened with plastic bags and expanded polystyrene, a model Ordinance effort at the County level was derailed by COVID-19 and a few cities have advanced on their own in the meantime. Pausing this effort in Cupertino to attempt to coordinate efforts more broadly across the County would delay implementation beyond Fiscal Year (FY) 22-23. Acting now will place Cupertino as a leader, paving the way for other jurisdictions considering similar Ordinances. Figure one below shows the current and planned regulations of neighboring jurisdictions.

Figure 1: Comparison of Foodware Ordinances in Neighboring Jurisdictions

Comparison of Food Service Ware Ordinance Provisions		Cupertino (Recommended)	Mountain View	Palo Alto	Sunnyvale	Berkeley	County of San Mateo	San Francisco	Santa Cruz (City)	Sonoma (County)
Use of Single-Use Foodware Ware	All single-use food service ware must be compostable FC/AL = Fiber-based compostable or aluminum C/R = compostable or recyclable	FC/ AL	FC/ AL	x		x	FC	C/ R	FC /R	C/ R
	Prohibit use of some single-use plastic foodware accessories	x	x	x		x	x	x	x	x
	Prohibit use of expanded polystyrene (EPS) foam foodware	x	x	x	x	x	x	x	x	x
Require Reusable Food Service Ware	Requires reusable foodware for dine-in P = Planned for future phase E = Encouraged	x	P	P		x	E		P	E
	Require events to make reusable beverage cups available							x		
Sale of Single-Use Foodware	Prohibit sale of EPS foam foodware	x	x	x	x			x	x	x
	Prohibit sale of single-use plastic accessories		x							
	Prohibit sale of single-use compostable plastic foodware	x								
	Prohibit sale of single-use traditional plastic foodware									
Sale of other EPS Products	Prohibit sale of EPS ice chests, other items		x	x				x	x	x
	Prohibit sale of EPS packing peanuts, blocks			x				x	x	x
Cup Charges	Require a charge for single-use cups E= Encouraged					x			x	E
Container Charges	Require a charge for single-use containers									
Compostable Produce Bags	Require grocery stores and farmer's markets to use compostable bags for meat and produce. C/R = compostable or recyclable			x				C/R		
No Thin Plastic Bags for Takeout Food Orders	Prohibit use of thin single-use carryout plastic bags for takeout food orders	x						x		

Impact on Food Providers

Economically, the impact of the Ordinance could be mixed. With the implementation of the first phase per AB 1276 to offer utensils and accessories only on demand, providers could see cost savings from not giving out unwanted items. When the additional foodware requirements go into effect, providers using single-use plastic or bio-plastic food ware will need to use compliant PFAS-free fiber-based compostable or aluminum to-go foodware. The cost of transitioning to use compliant products could vary widely and is not universally more expensive. Food service providers surveyed in summer 2021 were using a combination of products. Transitioning to reusables for dine-in will require some businesses to purchase washable items and either make use of available dishwashing capacity or increase that capacity. Understanding that this may not be financially or practically possible in some cases, temporary waivers for additional time needed and financial hardship are included. Figure 2 below shows the range of food provider categories in Cupertino and anticipated impact.

Figure 2: Summary of Common Food Provider Types in Cupertino and Potential Impacts (based on business license data)

Type of Food Provider	Number of Businesses	% of Total	Expected Impacts
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Dine-in (Full-service restaurants)	73	49%	Moderate: <ul style="list-style-type: none"> Over half of full-service restaurants that offer dine-in provide reusables, but some provide only single-use plastic or a combination of both
Fast-food/casual (Includes locations that also offer dine-in with limited seating, but operates primarily through takeout orders)	34	23%	High: <ul style="list-style-type: none"> Majority of fast-food/casual locations offer only single-use items or a combination of products such as single-use plastics and paper/fiber-based items
Café/bakery/dessert	22	15%	Moderate: <ul style="list-style-type: none"> Majority offer only single-use disposables
Boba tea	13	9%	High: <ul style="list-style-type: none"> High-usage of single-use plastic cups and straws
Grocery/Supermarkets	6	4%	Low: <ul style="list-style-type: none"> Single-use items not primarily given out
Catering Trucks	2	1%	Moderate: <ul style="list-style-type: none"> Use only disposables

Impact of the Passage of Senate Bill (SB) 54: The Plastic Pollution Prevention and Packaging Producer Responsibility Act

On June 30, The Plastic Pollution Prevention and Packaging Producer Responsibility Act was signed into State law. This law is an extended producer responsibility law that will require the producers and manufacturers of certain plastic packaging and foodware to achieve specific targets by January 1, 2032:

- Reduce the weight and number of plastic items produced by 25% compared to 2023
- All covered items must be recyclable or compostable
- All covered items must be recycled or composted at a 65% rate

In addition, the law specifies that no less than four percent of the required reductions come from shifting to reusable or refillable packaging and food ware systems. This shows awareness that shifting from one type of single-use product to another is not the whole solution and indicates that requiring reusables for dining in and exploring reusable takeout solutions as proposed with this local Ordinance will position Cupertino well for the future.

California Environmental Quality Act

This Ordinance is not a project under the requirements of the CEQA, together with related State CEQA Guidelines (collectively, “CEQA”) because it has no potential for resulting in physical change in the environment. In the event that this Ordinance is found to be a project under CEQA, it is subject to the CEQA exemption contained in CEQA Guidelines section 15061(b)(3) because it can be seen with certainty to have no possibility that the action approved may have a significant effect on the environment. CEQA applies only to actions which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. In this circumstance, the proposed action to regulate the use of single-use foodware by food providers and local sale of prohibited foodware and other expanded polystyrene products would have no or only a de minimis effect on the environment because reducing disposable plastic foodware items such as straws, utensils, and stirrer sticks and having compostable alternatives offered only upon request and other provisions of the Ordinance would not have the potential for causing a significant effect on the environment. In addition, if the proposed Ordinance were a project under CEQA, the project would be exempt from CEQA under CEQA Guidelines section 15307, which exempts from CEQA actions taken by regulatory agencies for the protection of the environment. The foregoing determination is made by the City Council in its independent judgment.

Next Steps

If adopted, the Ordinance will be brought before Council for a second reading on September 6.

Sustainability Impact

The proposed Ordinance is consistent with two actions in the Cupertino Climate Action Plan as well as California State law. The proposed Ordinance encourages a push towards more reusable foodware which is consistent with Climate Action Plan Measure C-SW-1: Zero Waste Goal. The proposed Ordinance promotes the collection of organics from the local waste stream, which will reduce GHG emissions from the landfill consistent with Climate Action Plan Measure C-SW-2: Food Scrap and Compostable Paper Diversion. Enabling organic items to reach the compost stream supports the diversion requirements of California Senate Bill 1383, the State’s short-lived climate pollutant reduction regulations.

Fiscal Impact

If the Ordinance is adopted, staff recommends contracting for technical and financial assistance to help Cupertino’s food service businesses understand and adjust to the requirements. The cost to hire technical assistance as described is expected to be approximately \$100,000 to cover support both before and after the implementation of the most significant changes, including offering a defined number of small grants to help cover the costs of switching to reusables or purchasing compliant foodware. Of the

money budgeted to the Single-Use Plastics Ordinance and Mayor's Cup Challenge City Work Program Item under 520-81-802 750-084, page 469 of the FY21-22 Adopted Budget, it is anticipated that approximately \$60,000 will be available that could be allocated for a technical assistance contract. The balance of \$40,000 would be drawn from the Resource Recovery Enterprise Fund and has been approved as part of the FY 22-23 budget. Ongoing compliance monitoring and support can be performed by existing staff conducting inspections and outreach for stormwater pollution prevention program and SB 1383.

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Reviewed by: Matt Morley, Director of Public Works

Approved for Submission by: Dianne Thompson, Acting City Manager

Attachments:

A – Single-Use Plastics and Bags Draft Ordinance – Blackline Version

B – Single-Use Plastics and Bags Draft Ordinance – Clean Version

C – Single-Use Plastics Ordinance Elements and Phasing Summary

D – Single-Use Foodware Cost Comparisons

E – Summary of Single-Use Plastics Outreach