MEMORANDUM

DATE: October 7, 2019

TO: Molly Daly, Sustainability Intern & Missie Barletto, Assistant Public Works Director

FROM: Kelly Brandon, Assistant City Attorney

SUBJECT: Green Implementation Advancement Board Requests to Regulate Single-Use Plastics

Polystyrene Regulation

In March 2016, Florida passed the following statute relating to polystyrene regulation:

> Regulation of polystyrene products preempted to department.—The regulation of the use or sale of polystyrene products by entities regulated under this chapter is preempted to the department. This preemption does not apply to local ordinances or provisions thereof enacted before January 1, 2016, and does not limit the authority of a local government to restrict the use of polystyrene by individuals on public property, temporary vendors on public property, or entities engaged in a contractual relationship with the local government for the provision of goods or services, unless such use is otherwise preempted by law.

Prior to August 14, 2019, only one court in Florida had ruled on whether the preemptive statute is Constitutional. The Miami Dade Circuit Court, acting in it its appellate capacity, ruled that the Preemption was unconstitutional. Among other Miami specific considerations, the Court also reasoned that it was unconstitutional for reasons that would apply to any cities including that the Legislature delegated Legislative power to the Department of Agriculture without defined standards in violation of Article II and that a facial constitutional challenge fails because there are ways that the Ordinance could be applied without conflicting with 500.90 including that the City would be able to apply its ordinance to restrict polystyrene use on public property, by temporary vendors on public property, and by entities that contract with the City for the provisions of goods or services.

The appellant, Florida Retail Federation also argued that 403.7033 and 403.708(9) preempt the Ordinance. 403.7033 attempts to prohibit local governments from implementing ordinances related to polystyrene until the state Legislature adopts recommendations of DEP, which was provided in 2010 and never adopted by the Legislature and 403.708(9), which regulates the package labeling of polystyrene. The Circuit Court also found that they are unconstitutional as they also lack the necessary standards and guidelines for implementation. Additionally, the Court noted that 403.7033 gives the state Legislature authority to do nothing indefinitely and contemporaneously prevent the cities from doing anything either.

On February 27, 2017, the Florida Retail Federation and the State of Florida has appealed to the 3rd DCA. Oral Argument was heard in December of 2017 but the Court did not make a ruling until August of 2019. In the interim, several cities passed Ordinances regulating polystyrene. There were two approaches—some moved forward with broad-sweeping bans based on the ruling of Miami's Circuit Court (Gainesville, Palm Beach), others sought to regulate within the confines of 500.90 permitted regulation (St. Petersburg, Deerfield Beach, Miami Beach). However, each city appears to have operated under the assumption that 403.7033 and 403.708(9) since neither statute had been enforced against the many cities in Florida that had

passed polystyrene ordinances prior to 500.90. During this time period, the City of Delray Beach had also began to develop an Ordinance that would operate within the confines of 500.90.

However, on August 14, 2019, the Third District Court of Appeal issued its opinion related to the appeal of the Miami Dade Circuit Court's ruling. The Court reversed the decision and commented on the validity of the preemption in all three statutes.

First, the Court evaluated the lower court's determination that 500.90 was unconstitutional. The Court disagreed with the lower court's determination that the Home Rule Amendment applied. It reasoned that the statute applied to all municipalities across the state after January 1, 2016. The statute did not single out a Miami municipality, Coral Gables was simply the first to pass the Ordinance following the preemption. Additionally, the Court determined that 500.90 did not lack delegation because it is a preemption provision. The state's rulemaking authority actually comes from 500.09.

Next, the Court evaluated the trial court's ruling that Statute 403.708(9) and 403.7033 are unconstitutional. The statutes state the following, respectively:

> 403.708(9): The packaging of products manufactured or sold in the state may not be controlled by governmental rule, regulation, or ordinance adopted after March 1, 1974, other than as expressly provided in this act.
>
> 403.7033: Until such time that the Legislature adopts the recommendations of the department, no local government, local governmental agency, or state government agency may enact any rule, regulation, or ordinance regarding use, disposition, sale, prohibition, restriction, or tax of such auxiliary containers, wrappings, or disposable plastic bags.

Again, the Court reasoned that neither statute delegates rulemaking authority. Instead, the statutes are preemption provisions prohibiting local governments from regulating. Since the statutes do not delegate authority, they cannot be found unconstitutional pursuant to the nondelegation doctrine.

Further, the Court disagreed with the lower court that there were any arbitrary classification schemes related to 500.90. There is no mention of beach towns in the statute so it could not be considered an arbitrary classification if it is not even a classification. Additionally, the exemption date is not a classification scheme as noted by the lower court.

Based on the analysis above, the Court found that none of the three state statutes were unconstitutional. Then, the Court applied the statutes to the Ordinance presented by the City of Coral Gables. The Court explained that the lower court used the passage of 500.90, the most recent statute, to interpret the legislative intent related to the prior statutes. The Court found the lower court's analysis to be unpersuasive and misguided as the plain language of each statute clearly state that expressly preempt local regulation. Since the plain language is clear, the lower court's resort to statutory interpretation was improper.

<u>So where are we now?</u>

The Court has concluded that none of the three statutes are unconstitutional. Taking all three statutes into consideration, the following cannot be regulated:

- The packaging of products manufactured or sold in the state
- Use, disposition, sale, prohibition, restriction, or tax of:
    - Containers , wrappings, or disposable plastic bags
- Use or sale of polystyrene products unless:

- By individuals on public property
- Temporary vendors on public property
- Or entities engaged in contracts with the local government for provision of goods
- Or any of the above (i.e. packaging, containers, wrappings, or plastic bags)

Therefore, based on the above, we do not recommend that the City regulate the following items as discussed and requested by the Green Board as the regulation of such is preempted by the above statutes:

1. Packaging Peanuts and Foam Beads (preempted by 403.708(9)).
2. Plastic Bags (preempted by 403.7033)
3. Polystyrene Containers (preempted by 403.7033 combined with 500.90)

NOTE: Senator Stewart has proposed bill 2020 SB 182, which would Amend 403.7033 to delete the preemption language and would repeal 500.90. If approved, the Act would take effect on July 1, 2020. (To allow effective regulation, the bill really needs to include an amendment to 403.708(9))

Cigarette Regulation

Additionally, regulation of smoking is also preempted by the state. Florida Statute 386.209 states the following:

> **386.209 Regulation of smoking preempted to state.**—This part expressly preempts regulation of smoking to the state and supersedes any municipal or county ordinance on the subject; however, school districts may further restrict smoking by persons on school district property. This section does not preclude the adoption of municipal or county ordinances that impose more restrictive regulation on the use of vapor-generating devices than is provided in this part.

While there are no specific cases on point, the Attorney General has authored several opinions related to regulation of smoking by non-state entities. Most relevant, in 2005, the City Attorney of the City of Margate, asked the Attorney General whether Florida Statute 386.209 prohibited a municipality from regulating smoking in a public park. The Attorney General advised that the plain language of the statute makes it clear that the Legislature has directed that the state, not local governments, regulates smoking wherever it may occur. Therefore, a city's attempt to regulate smoking by ordinance in any way other than that prescribed by the Legislature would be preempted and of no effect. Since the opinion was authored, the Statute has not been amended in any way to allow further municipal regulation. On the other hand, when an AG opinion was issued that stated that the School District could not further regulate smoking, the Legislature amended the Statute the following year to allow the School District further regulatory authority. Therefore, the preemption as to municipality regulation appears to be even more clear.

Notwithstanding, cigarettes and cigars are specifically included as litter in Sec. 101.17.

Items that could be regulated but would be up to the Commission whether they wish to regulate:

1. Toothpicks, plastic stirrers, cocktail sticks
2. Single-use plastic utensils and include "upon request" language
3. Mylar balloons and confetti
4. Balloon releases—to restrict further than Florida Statute, which restricts 10 balloons or over

AND/OR Publicize the Green Business Certification Program and encourage local businesses to participate