



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>INVESTIGATIVE REPORT</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>October 23, 2017</p>	<p>No. 17-003</p> <p>Re: City of Bisbee Ordinance O-13-14 Regulating Disposable Carryout Bags</p>
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To: The Honorable Doug Ducey, Governor of Arizona
The Honorable Steve Yarbrough, President of the Arizona Senate
The Honorable J.D. Mesnard, Speaker of the Arizona House of Representatives
The Honorable Warren Petersen, Requesting Member of the Arizona Legislature
The Honorable Michele Reagan, Secretary of State of Arizona

I. Summary

Pursuant to Arizona Revised Statutes (“A.R.S.”) § 41-194.01, the Attorney General’s Office (“Office”) has investigated the City of Bisbee’s (“City”) Ordinance O-13-14 (“Ordinance”) and, as amended by the Ordinance, Bisbee City Code art. 9.7 (“Code,” and together with the Ordinance, “City’s Regulation”), which presently regulates disposable carryout bags. Based on a review of relevant authorities and materials during the limited 30-day period in § 41-194.01(B), the Attorney General has determined that the City’s Regulation **violates** state law.

II. Background

A. The Office's Investigation

On September 28, 2017, the Office received a request for legal review of the Ordinance pursuant to A.R.S. § 41-194.01 from Senator Warren Petersen (“Request”). The Office asked the City to provide a voluntary response. The City cooperated with the Office’s review by providing a voluntary response, along with supporting materials. In performing the required investigation during the limited 30-day period, the Office reviewed relevant materials and authorities.

The Office’s legal conclusions are set forth below. The facts recited in this report serve as a basis for those conclusions, but they are not administrative findings of fact and are not made for purposes other than those set forth in A.R.S. § 41-194.01.

B. Relevant State Law

In relevant part, A.R.S. § 9-500.38 provides that:

A. A city or town may not:

1. Impose a tax, fee, assessment, charge or return deposit on a consumer or an owner, operator or tenant of a business, commercial building or multifamily housing property for auxiliary containers.
2. Regulate the sale, use or disposition of auxiliary containers by an owner, operator or tenant of a business, commercial building or multifamily housing property.

A.R.S. § 9-500.38(A). It further defines “auxiliary container” to include “reusable bags, disposable bags . . . and containers . . . that are used for transporting merchandise or food to or from a business[.]” *Id.* at (D).

C. The City's Code And Ordinance

The Code provides that “no retail establishment in the City of Bisbee shall provide a single use plastic carryout bag to a customer.” Bisbee City Code art. 9.7.3(B) (2016). It further states that “a retail establishment may provide a customer with one or more recycled paper bags . . . but only if each such bag is subject to a reasonable fee . . . in an amount not less than five cents (\$.05)[.]” Bisbee City Code art. 9.7.3(D). These requirements were adopted by the City through the Ordinance, which was entitled “Regulation of Disposable Carryout Bags.” And the presence of these provisions subjects retail establishments to the threat of enforcement, including up to \$500 per violation. Bisbee City Code art. 9.7.6.

III. Analysis

The City's Regulation conflicts with A.R.S. § 9-500.38—the City regulates disposable bags through the Code and Ordinance, and A.R.S. § 9-500.38(A) prohibits municipalities from regulating such bags, which are included in the definition of “auxiliary container” in A.R.S. § 9-500.38(D). The City acknowledged this conflict in its voluntary written response to the Office.

The only remaining question is whether the City's Regulation addresses a matter of “purely local interest” such that it prevails against A.R.S. § 9-500.38. *See State ex. rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 598 ¶42 (2017). As the Arizona Supreme Court recently explained in connection with a prior Attorney General investigation and report under A.R.S. § 41-194.01, Arizona courts have recognized only two areas as matters of “purely local interest,” such that a charter city municipal ordinance could prevail over a conflicting state law: (1) the method and manner of conducting city elections; and (2) the method and manner in which

municipal real property is disposed. *See Tucson*, 242 Ariz. at 602 ¶¶55-56.¹ Therefore, the City’s Regulation does not address a matter of purely local interest and does not prevail.

When conflicting state and local laws touch on interests that are validly *both* statewide and local, *Tucson* instructs that the statewide interest must prevail. *See Tucson*, 242 Ariz. at 602 ¶54. The City has certainly identified valid areas of concern for municipalities, including reducing waste management costs and improving the appearance of the City. But whether some local concern exists is not the dispositive inquiry for purposes of this review under A.R.S. § 41-194.01. Under *Tucson*, the dispositive inquiry is whether a statewide interest exists in the regulated subject matter. And given the several statewide interests identified by the Legislature in connection with A.R.S. § 9-500.38, any valid local interests addressed by the Code and Ordinance must give way. The Legislature identified several statewide interests in enacting A.R.S. § 9-500.38, for instance, interests in: (1) avoiding regulations which could burden small businesses that are “particularly sensitive to costs and expenses incurred in complying with regulatory actions”; and (2) ensuring that “inconsistent regulation by cities, towns and counties [do not] hinder[] a small business from benefiting from free and open competition.” *See Ariz. Sess. Laws ch. 28, § 5* (2016). The statewide nature of these interests is patent. Thus, the City’s stated interests in regulating disposable carryout bags cannot result in the City’s Regulation prevailing against A.R.S. § 9-500.38.

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¹ Generally, municipalities possess “no greater powers than those delegated to them” by the State. *See City of Scottsdale v. Maricopa Cnty.*, 103 Ariz. 204, 205 (1968). However, a city that has framed for itself a charter pursuant to Article XIII, § 2 of the Arizona Constitution may act in the absence of state-level legislative action “consistent with, and subject to, the Constitution and the laws of the state[.]” *See also Tucson*, 242 Ariz. at 598-99 ¶¶39-40. The “purely local interest” analysis applies only to charter cities, of which the City is one; for non-charter cities, the presence of a conflict with state law in and of itself would establish a violation of state law for purposes of A.R.S. § 41-194.01, without the need for further analysis.

The presence of statewide interests, and the fact that the Code and Ordinance do not fit into the two recognized areas of purely local interest, mandate the determination that the City's Regulation violates state law. The City has offered policy arguments for why it believes local regulation of disposable carryout bags is preferable. But the Legislature has spoken. *See* A.R.S. § 9-500.38. To be clear, A.R.S. § 9-500.38 does not prohibit the City from establishing voluntary initiatives and using simple persuasion to increase the use of reusable carryout bags and reduce or eliminate use of disposable plastic carryout bags. Indeed, as reflected in the materials the City submitted, support for such efforts could be robust. And no state law compels businesses to offer these bags—businesses across the state are free to choose, and if the business community in the City wishes to voluntarily stop using single use carryout bags they may do so. Regardless, the City may not impose regulatory mandates on private citizens and businesses to accomplish its policy goal.

IV. Conclusion

The Office concludes under A.R.S. § 41-194.01(B) that the City's Regulation, reflected in the Code and Ordinance, **violates** state law. Pursuant to A.R.S. § 41-194.01(B)(1), the City has thirty days from the issuance of this written report to resolve the violation. If the City fails to resolve the violation within thirty days, the Attorney General will, pursuant to A.R.S. § 41-194.01(B)(1), "[n]otify the state treasurer who shall withhold and redistribute state shared monies from the county, city or town as provided by § 42-5029, subsection L and from the city or town as provided by § 43-206, subsection F."



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