



# County of Fairfax, Virginia

## MEMORANDUM

**DATE:** November 30, 2020  
**TO:** Board of Supervisors  
**FROM:** Bryan J. Hill  
County Executive   
**SUBJECT:** Update on Development of a Plastic Bag Tax Ordinance

On July 28, 2020, the Board of Supervisors (Board) unanimously adopted its [Fairfax Green Initiatives #2 Board Matter](#), introduced by Supervisor Storck. Fairfax Green Initiatives #2 (FGI #2) includes 14 environment and energy-related action items. Item #4a directs the Office of Environmental and Energy Coordination (OEEC) to provide a plan to the Environmental Committee regarding implementation of a \$0.05 plastic bag fee in 2021. The purpose of this memorandum is to provide an update to the Board on the development of a plastic bag tax ordinance in Fairfax County.

### Legislation Overview

Legislation enacted in 2020, [HB 534/SB 11](#), authorizes Fairfax County to adopt an ordinance imposing a \$0.05 tax on disposable plastic bags provided by grocery stores, convenience stores and drugstores, with some exemptions. This legislation amended Virginia Code Title 58.1, *Taxation*, Chapter 17, *Miscellaneous Taxes*, by adding Article 12, *Disposable Plastic Bag Tax*, consisting of sections 58.1-1745 through 58.1-1748.

Va. Code Section 58.1-1745 directs retailers to collect the tax. Section 58.1-1747 establishes a retailer discount. For the period January 1, 2020 through December 31, 2022, retailers may retain two cents (\$0.02) from the tax collected on each disposable plastic bag. This discount drops to one cent (\$0.01) beginning January 1, 2023.

Section 58.1-1748 directs the Tax Commissioner to collect, administer, and enforce the tax in essentially the same manner that the retail sales and use tax is collected, administered, and enforced. The county must notify the Tax Commissioner three months in advance of the ordinance's effective date. The tax shall become effective on the first day of any calendar quarter, but no earlier than January 1, 2021.

Revenues from the plastic bag tax program are to be appropriated for designated activities, specifically environmental clean-up, mitigation of pollution and litter, education, and the provision of reusable bags to recipients of federal food support program (i.e., SNAP and WIC).

### **State Guidance**

Va. Code Section 58.1-1748, *Administration*, provides in part that “[t]he Tax Commissioner shall develop and make publicly available guidelines implementing the provisions of this article.” Despite locality interest in the guidelines, the state has indicated that it intends to wait to issue guidelines until at least one locality adopts an ordinance. On November 6, 2020, the Policy Development Director of the Virginia Department of Taxation (VDT) explained to Jay Doshi, Director of Tax Administration, that VDT “plan[s] to issue guidelines once a locality has passed the requisite ordinance in order to prevent the confusion that might result if we issue guidelines for a tax that does not exist.”

The absence of state guidelines leaves a number of unresolved questions related to application of the plastic bag tax. Several of these questions were identified during an October 6, 2020 webinar hosted by the Northern Virginia Regional Commission (NVRC). Questions range from definitions to responsibilities. For example:

- What constitutes “a convenience store” for purposes of taxation? Does the term include home improvement stores such as Home Depot or Lowes, and/or household and general-merchandise stores such as Target and Walmart?
- Will the state provide education and outreach to regulated communities prior to the effective date of a local ordinance, or is that the obligation of the locality?
- Given that the law states that the Tax Commissioner shall “collect, administer, and enforce” the tax, how will enforcement be performed? Will the state issue penalties for non-compliance and, if so, what is the penalty schedule?

The VDT has expressed a willingness to consider issues that localities believe should be addressed prior to enactment of a plastic bag tax. However, it appears that VDT believes that localities do not need to address the type of questions raised at the October 6 webinar before they draft and adopt an ordinance. In a November 17 email to staff of the City of Alexandria, VDT stated that the locality “would authorize the tax, but would not need to set forth any specific policy decisions.” Under this approach, each business simply would determine for itself whether it fits into one of the three retail categories set forth in the statute based on the facts of its situation. For example, a “superstore” retailer that sells both groceries and other merchandise would not be obligated to collect and remit the plastic bag tax if it defines itself as something other than a grocery store, convenience store or drugstore. At least at this time, there appears to be no mechanism to contest a retailer’s categorization short of a court challenge and sufficient facts to support a locality’s different categorization.

### **Revenue Considerations**

Va. Code Section 58.1-1745.B provides that revenues from the plastic bag tax shall be appropriated for four specified purposes: (1) environmental cleanup; (2) providing education programs designed to reduce environmental waste; (3) mitigating pollution and litter; or (4) providing reusable bags to recipients of two federal food support programs (SNAP and WIC). The statute appears to give localities wide discretion regarding the allocation of revenues. Further, because the statute does not define the terms used, localities are likely to be able to

decide what constitutes “environmental cleanup,” “environmental waste,” and “pollution and litter” for purposes of appropriating revenues.

The Virginia Department of Taxation [Fiscal Impact Statement](#) accompanying SB 11 estimated that the proposed plastic bag tax could potentially generate annual aggregate local revenues of between \$20.8 million and \$24.9 million statewide, based on revenue generated from similar taxes in the District of Columbia and Montgomery County, Maryland.

The experiences of the District and Montgomery County suggest that a plastic bag tax will recover declining revenues over time, as customer behavior changes, although it may take several years for this to occur. For example, in 2012, Montgomery County implemented a \$0.05 bag tax on most carry-out plastic and paper bags. According to an April 2018 [news story](#), tax revenues in 2014 were \$2.41 million. Revenues grew to \$2.61 million in 2017 before beginning to decline. As of May 2018, fiscal year tax revenue from the bag tax was about \$1.75 million, slightly below the pace of the 2017 figures for the same period.

There is currently no reliable estimate of the revenues that could be generated by a plastic bag tax in Fairfax County, in part because of uncertainties regarding its application. Despite Fairfax County’s slightly larger population, revenues could be well below Montgomery County’s numbers because the tax in Virginia would apply to many fewer types of retailers and fewer types of bags. While Montgomery County’s law applies to virtually all retailers and restaurants providing carryout bags to their customers at the point of sale, Fairfax County would be permitted to apply the tax only to grocery stores, convenience stores and drugstores. Further, in Montgomery County the \$0.05 charge applies to plastic or paper bags provided by retailers; there are no exemptions based on a bag’s thickness or durability. (While restaurants must collect the \$0.05 tax when providing carryout plastic bags, they may not collect the tax from customers for paper bags used to carry out prepared or leftover food or drink.) See <https://www.montgomerycountymd.gov/bag/retailers.html>.

### **Regional Efforts**

The Waste Management Board of the Northern Virginia Regional Commission (NVRC) has begun exploring issues related to the enabling legislation set forth in Article 12. It plans to include on its December 4, 2020 meeting agenda an item related to development of a model plastic bag tax ordinance for use by localities in the Northern Virginia region.

The City of Alexandria is currently monitoring activity. In a [May 12, 2020 Budget Question and Answer](#), staff stated that it would monitor the situation throughout the summer and into the early fall, and then make a recommendation to the City Council. In support of this wait-and-see approach, staff cited possible safety concerns associated with reusable bags as well as the numerous states and localities that have either delayed implementation or lifted their plastic bag rules during the coronavirus epidemic.

In October 2020, members of the Arlington County Board of Supervisors expressed concerns about adopting a plastic bag tax amid the pandemic, citing equity concerns. Arlington County plans to convene a public workgroup early in 2021 to discuss the issue. See

<https://www.arlnow.com/2020/10/21/arlington-county-board-says-potential-bag-tax-must-consider-equity/>.

### **Anticipated Fairfax County Efforts**

OEEC is currently exploring the issues associated with development and implementation of a plastic bag tax ordinance in conjunction with the Office of the County Attorney (OCA) and the Departments of Tax Administration (DTA), Management and Budget (DMB), and Public Works and Environmental Services (DPWES). County staff also anticipates coordinating with NVRC and jurisdictions in the region.

#### **A. Community Engagement**

Given the uncertainties associated with the pandemic and the absence of VDT guidelines, OEEC anticipates a two-phase process. The first phase would focus on obtaining community input and likely would include the following steps:

- Developing a webpage dedicated to the plastic bag tax issue, including a high-level overview of the ordinance's requirements and opportunities for comment, both generally and on specific issues.
- Hosting one or more public workshops or meetings to solicit and gather input for use in drafting the ordinance. Those meetings would be virtual if pandemic restrictions are still in effect.
- Posting an electronic survey on the dedicated webpage for use in obtaining comment from interested persons.

The impact of an ordinance imposing a tax on disposable plastic bags is wide-ranging. Consequently, the OEEC anticipates an extensive outreach effort. Groups and associations that OEEC currently anticipates contacting are listed below. This list is likely to be supplemented.

Organizations with an environmental focus that may be interested in providing input include:

Litter Free VA, which is an organization focused on issues related to single-use plastic bags  
Alliance for the Chesapeake Bay  
Alice Ferguson Foundation  
Chesapeake Bay Foundation  
Clean Fairfax  
Fairfax 350  
Faith Alliance For Climate Solutions  
Friends of Accotink Creek  
Friends of Dyke Marsh  
Izaak Walton League of America – Virginia Division Arlington-Fairfax Chapter  
Northern Virginia Soil and Water Conservation District  
Potomac Conservancy  
Potomac Riverkeeper Network  
Sierra Club – Virginia Chapter

Other organizations that may be interested in providing input include:

Dulles Regional Chamber of Commerce  
Northern Virginia Chamber of Commerce  
Virginia Petroleum and Convenience Marketers Association  
Virginia Pharmacists Association  
Virginia Retail Merchants Association  
Virginians Organized for Interfaith Community Engagement

Following this community engagement phase, OEEC would report to the Board on its outreach efforts and findings and request Board direction.

### **B. Ordinance Development**

Board direction to develop a plastic bag tax ordinance would trigger a second phase involving a joint effort on the part of OEEC, OCA, DMB, DPWES and DTA to develop a draft ordinance. Comments received from the public and associations during the outreach phase will be taken into consideration as the ordinance is drafted. Activities during this phase are expected to include:

- Presenting the draft ordinance to the Environmental Quality Advisory Council (EQAC), for EQAC's consideration and comment.
- Following any revisions deemed necessary in response to EQAC's comment, updating the dedicated webpage to inform the community of a proposed ordinance and soliciting comment on that proposal.
- Presenting the draft ordinance at a meeting of the Board's Environmental Committee. Significant revisions may require a second presentation before the Environmental Committee.
- Assuming support at the Environmental Committee meeting, requesting Board authority to advertise a public hearing regarding the proposed plastic bag ordinance. The request for authority to advertise the public hearing would be accompanied by a complete draft of the ordinance.
- Assuming approval of the request for authority to advertise, requesting Board authority to hold a public hearing at least 15 days after publication of the advertisement.

Assuming Board adoption, the ordinance would not be effective for at least three months, because the statute requires that the locality notify the state Tax Commissioner of the adoption of the ordinance three months prior to its effective date. There may be further delay as the ordinance must take effect on the first day of any calendar quarter.

If you have questions, please contact Kambiz Agazi at 703-324-1788 or via email at [Kambiz.Agazi@fairfaxcounty.gov](mailto:Kambiz.Agazi@fairfaxcounty.gov).

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