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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

COTTONWOOD
ENVIRONMENTAL LAW
CENTER; LIZ AMETSBOSCHLER;
DANNY CHORIKI; JEREMY
DRAKE; AVIV GUSCIO; KATIE
HARRISON; YOUPA STEIN; MARY
STRANAHAN; JAN SWANSON;
TOMAS WALDORF,

Plaintiffs,

vs.

STATE OF MONTANA,

Defendant.

Cause No. BDV 23–754

Hon. Michael F. McMahon

**PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY
JUDGMENT**

INTRODUCTION

Plaintiffs Cottonwood Environmental Law Center; Liz Ametsboschler, Danny Choriki; Jeremy Drake; Aviv Guscio; Katie Harrison, Youpa Stein; Mary Stranahan; Jan Swanson; Tomas Waldorf (collectively “Plaintiffs”), by and through their attorneys, respectfully move for *partial* summary judgment on their facial constitutional claim challenging House Bill 407 (hereinafter “HB 407”).

HB 407, which prevents Plaintiffs from moving forward with ballot initiatives to regulate single use plastics, is facially unconstitutional because it infringes upon their expressly reserved and constitutionally protected powers of initiative under Article III, section 4; Article V, section 1; and Article XI, section 8 of the Montana Constitution.

Defendants have indicated they are opposed to motions for summary judgment until discovery is complete. Discovery is not necessary for partial summary judgment on this facial challenge because the statute is unconstitutional under all factual scenarios. Plaintiffs request that the Court grant their motion for partial summary judgment so they can assert their constitutional powers of ballot initiative immediately.

Respectfully submitted this 15th Day of February, 2024.

/s/ John Meyer
JOHN MEYER

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, John Phillip Meyer, hereby certify that I have served true and accurate copies of the foregoing Motion - Motion to the following on 02-15-2024:

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**PLAINTIFFS' BRIEF IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY
JUDGMENT**

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INTRODUCTION

Plaintiffs Cottonwood Environmental Law Center, Liz Ametsboschler, Danny Choriki, Jeremy Drake, Aviv Guscio, Katie Harrison, Youpa Stein, Mary Stranahan, Jan Swanson, and Tomas Waldorf (collectively “Plaintiffs”) respectfully move for *partial* summary judgment on the legal issue of whether challenged House Bill 407 is facially unconstitutional because it violates their constitutionally protected power to govern through ballot initiatives. The Court should grant this motion because the challenged section of HB 407, which prohibits local electors from regulating single use plastics via ballot initiative, has unconstitutionally infringed upon Plaintiffs’ expressly reserved powers of initiative in Article V, section 1 and Article XI, section 8 of the Montana Constitution. Plaintiffs have standing to bring this facial challenge because the Gallatin County Election Office has determined the unconstitutional statute prohibits a proposed initiative to regulate single use plastics in Bozeman from moving forward.

LEGAL BACKGROUND

All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted for the good of the whole.

Mont. Const. Art. II, §1. The “Power and structure” section of the Montana Constitution makes clear that the “[t]he people reserve to themselves the power of initiative and referendum.” Mont. Const. Art. V, §1. “The people may enact laws by

initiative on all matters except appropriations of money and special and local laws.” Mont. Const. Art. III, §4. The Constitution requires the legislature to “extend the initiative and referendum powers reserved to the people by the constitution to the qualified electors of each local government unit.” Mont. Const. Art. XI, §8. The Montana Supreme Court has observed the powers of initiative should be “broadly construed to retain the maximum power in the people.” *Choteau Cnty. v. Grossman*, 172 Mont. 373, 378, 563 P.2d 1125 (1977).

APPLICABLE STANDARDS

A party is entitled to summary judgment when it demonstrates that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3); *Moe v. Butte-Silver Bow Cnty.*, 2016 MT 103, ¶ 14, 383 Mont. 297, 371 P.3d 415. In order to demonstrate the absence of a genuine issue of material fact, the moving party must base its case on the “pleadings, the discovery and disclosure materials on file, and any affidavits.” Mont. R. Civ. P. 56(c)(3). Conversely, the party opposing summary judgment has an “affirmative duty” to prove that a “genuine issue of material fact exists” that justifies proceeding further in the litigation. *Tin Cup Cnty. Water v. Garden City Plumbing & Heating, Inc.*, 2008 MT 434, ¶ 54, 347 Mont. 468, 200 P.3d 60. All reasonable inferences that may be drawn from the offered evidence should be drawn in favor of the party opposing summary judgment. *Baumgart v. State*, 2014 MT 194, ¶ 14, 376 Mont. 1, 332 P.3d 225. However,

“[c]onclusory statements, speculative assertions and mere denials are insufficient to defeat a motion for summary judgment.” *Davis v. State*, 2015 MT 264 ¶ 7, 381 Mont. 59, 357 P.3d 320.

“Facial challenges do not depend on the facts of a particular case.” *City of Missoula v. Mt. Water Co.*, 2018 MT 139, ¶ 21, 391 Mont. 422, 419 P.3d 685 (collecting cases). A plaintiff who alleges a statute is facially unconstitutional “may succeed only if the challenger can establish that ‘no set of circumstances exists under which the [challenged legislation] would be valid.’” *Montana Cannabis Industry Ass'n v. State*, 2016 MT 44, ¶ 73, 382 Mont. 256, 368 P.3d 1131 (quoting *U.S. v. Salerno*, 481 U.S. 739, 745 (1987)). A plaintiff bringing such a challenge bears the burden of proving, beyond a reasonable doubt, that the statute is unconstitutional. *See City of Great Falls v. Morris*, 2006 MT 93, ¶ 12, 332 Mont. 85, 134 P.3d 692.

When interpreting constitutional language, the court will look to “the meaning and intent of constitutional provisions from the plain meaning of the language used without resort to extrinsic aids...” *Nelson v. City of Billings*, 2018 MT 36 ¶ 16, 390 Mont. 290, 412 P.3d 1058. Conversely, “when interpreting a statute, the primary ‘consideration must be defining the objectives the legislature sought to achieve.’” *Catherine E.W. Hansen Trust v. Ward*, 2015 MT 131, ¶ 25, 379 Mont. 161, 349 P.3d 500, (quoting *Cenex, Inc. v. Bd. of Comm'rs*, 283 Mont. 330, 335, 941 P.2d 964, 966 (1997)). Legislative enactments “must yield to constitutional provisions”. *First Bank (N.A.)*

Billings v. Transamerica Ins. Co. 209 Mont. 93, 98, 679 P.2d 1217, 1219 (1984). The courts of Montana are duty bound to “guard, enforce, and protect every right granted or secured by the Constitution...”. *Columbia Falls Elementary Schools v State*, 2005 MT 69, ¶18, 326 Mont. 304, 109 P.3d 257, quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884).

STATEMENT OF UNDISPUTED FACTS

In 2021, the Montana Legislature passed, and the Governor signed, HB 407. That Bill was codified in three separate Sections of the Montana Code. They provide in pertinent part:

7-1-111(21). **Powers denied.** A local government unit with self-government powers is prohibited from exercising the following:

(21) any power as prohibited in 7-1-121(2) affecting, applying, or regulating the use, disposition, sale, prohibition, fees, charges, or taxes on auxiliary containers as defined in 7-1-121(5).

7-1-121. **Statewide uniformity for auxiliary container regulations – local prohibitions – definitions.** (1) The purpose of this section is to prevent any local ordinance, resolution, initiative, or referendum regulating the use, disposition, sale, prohibitions, fees, charges, or taxes on auxiliary containers.

(2) Except as provided in subsection (3), a local unit of government may not adopt or enforce any local ordinance, resolution, initiative, or referendum that:

- (a) regulates the use, disposition, or sale of auxiliary containers;
- (b) prohibits or restricts auxiliary containers; or
- (c) imposes a fee, charge, or tax on auxiliary containers.

...

(5)(a) “Auxiliary container” means a bag, cup, bottle, can, device, eating utensil or tool, or other packaging, whether reusable or single use that is: (i) made of ... plastic, including foamed or expanded plastic ...

7-5-131. **Right to initiative and referendum.** (1) Except as provided in subsection (2), the powers of initiative and referendum are reserved to the electors of each local government...

(2) The powers of initiative and referendum do not extend to:

...

(f) The regulation of auxiliary containers defined in 7-7-121(5) as prohibited in 7-1-121(2).

On October 12, 2023, Cottonwood member Isaac Cheek submitted a proposed ballot initiative to the Gallatin County Election Office that would allow Bozeman electors to vote on whether to regulate single use plastics (auxiliary containers). Cheek Decl. at 1, ¶3 Ex. A. The impetus for the proposed initiative is the environmental harm caused by single use plastics, as set forth in ¶¶ 37 through 55 of Plaintiffs’ Complaint. The Gallatin County Election Office responded that HB 407 prevents the initiative from moving forward. Cheek Decl. at 1, ¶4 Ex. B.

ARGUMENT

I. Plaintiffs have standing to challenge the constitutionality of HB 407.

“Standing is a threshold jurisdictional requirement.” *Mitchell v. Glacier Cty.*, 2017 MT 258, ¶ 9, 389 Mont. 122, 406 P.3d 427. “Standing resolves the issue of whether the litigant is a proper party to seek adjudication of a particular issue, not whether the issue is justiciable.” *Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶ 25, 366 Mont. 450, 288 P.3d 193 (citing *Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶

27, 361 Mont. 77, 255 P.3d 179); *Helena Parents Comm'n v. Lewis & Clark County Comm'rs*, 277 Mont. 367, 371,922 P.2d 1140, 1142 (1996)).

“Facial challenges do not depend on the facts of a particular case.” *City of Missoula v. Mt. Water Co.*, 2018 MT 139, ¶ 21, 391 Mont. 422, 419 P.3d 685 (collecting cases). Facial challenges to a statute, such as this, “are not limited to the present facts but stem from the statute itself.” *Park Cty. Env'tl. Council v. Mont. Dep't of Env'tl. Quality*, 2020 MT 203, ¶ 88, 402 Mont. 168, 477 P.3d 288.

Another district court recently held that plaintiffs had standing to bring a facial challenge to SB 93, another statute that impermissibly infringed upon their constitutional right to ballot initiative. *Ellingson, et al. v. State of Montana*, Montana First Jud. Dist. Ct., Lewis and Clark County, Cause No. ADV-2023-388 (Order granting partial summary judgment, Feb. 5, 2024). In that case, the court cited ballot petitions that had been submitted and were rejected because of the unconstitutional statutory language. *Id.* at 5, ¶¶9-16. Because facial challenges do not depend on the facts of a case, the parties did not engage in discovery for any purpose—standing or otherwise. *Id.* Here, Isaac Cheek, a member of Plaintiff Cottonwood Environmental Law Center, submitted a ballot petition to the Gallatin County Election Office to be processed so that signatures could be gathered to place the Initiative on the ballot. Cheek Decl. at 1, ¶3 Ex. 1. The Gallatin County Election Office determined the Initiative could not move forward because of HB 407. Cheek Decl. at 1, ¶4 Ex. 2. Plaintiffs have standing

to bring this facial challenge because HB 407 prevents them from participating in the constitutionally established ballot issue process. *See, e.g., Ellingson* at 5, ¶¶10-11 (“The harm Plaintiffs allege is interference with their constitutionally protected powers to participate in the ballot issue processes.”)

II. House Bill 407 is facially unconstitutional because it prevents citizens from asserting their explicitly reserved constitutional right to pass laws using local ballot initiatives.

HB 407 is facially unconstitutional because it prevents citizens from passing ballot initiatives to regulate single use plastics. The Gallatin County Election Office determined Plaintiffs’ proposed initiative to regulate single use plastics could not move forward because HB 407 prohibits regulation through local ballot initiatives. Cheek Decl. at 1, ¶4 Ex. 2 at 2 (citing 7-5-131(2)(f), MCA). The Montana Constitution expressly reserves the power of ballot initiatives to the people: “The people reserve to themselves the powers of initiative and referendum.” Article V, Section 1. The Montana Constitution also expressly reserves the power of local ballot initiatives to the People:

Section 8. INITIATIVE AND REFERENDUM. The legislature shall extend the initiative and referendum powers reserved to the people by the constitution to the qualified electors of each local government unit.

Article XI, section 8. HB 407 is facially unconstitutional because it unlawfully impairs the people’s power to regulate single use plastics through a local initiative. *See, e.g. Bd. of Regents of Higher Educ. of Mont. v. State*, 2022 MT 128, ¶24, 409 MT 96, 512 P.3d 748

(holding “where legislative action infringes upon the constitutionally granted powers. . . the legislative power must yield.”) There is no set of circumstances under which HB 407’s ban on citizen initiatives is valid. *E.g., Mont. Cannabis Indus. Ass’n*, ¶ 14 (citation omitted).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for partial summary judgment and issue an order that strikes 7-5-131(2)(f) as facially unconstitutional so that plaintiffs and citizens of Montana may move forward with local ballot initiatives that regulate single use plastics immediately.

Respectfully submitted this 15th day of February 2024.

/s/ John Meyer

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I, John Phillip Meyer, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 02-15-2024:

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vs.

STATE OF MONTANA,

Defendant.

Cause No. BDV 23–754

Hon. Michael F. McMahon

**DECLARATION
OF ISAAC CHEEK**

I, Isaac Cheek, pursuant to Montana Code Annotated §1-6-105, hereby declare as follows:

1. I have personal knowledge of the matters stated herein and, if called as a witness, would competently testify.
2. I submit this declaration as a member of Cottonwood Environmental Law Center.
3. I submitted a local ballot initiative to the Gallatin County Election Office that would regulate single-use plastics (auxiliary containers) in Bozeman when I was a resident and voter in Bozeman. Ex. A.
4. I received a response stating the initiative could not be processed because the Montana Legislature has denied citizens the power to regulate single use plastics. Ex. B.
5. The Bozeman City Commission adopted a resolution stating it would pass a resolution regulating single use plastics if HB 407 was repealed. Ex. C.
6. Several people testified before the Montana legislature asking that HB 407 be repealed or the legislature to pass a statute that regulates single use plastics across the state.

I declare under penalty of perjury the foregoing is true and correct to the best of my knowledge.

Dated this 13th day of February, 2024.

A handwritten signature in black ink that reads "Isaac Cheek". The signature is written in a cursive style with a horizontal line underneath it.

Isaac Cheek

EXHIBIT A

PETITION TO PLACE INITIATIVE NO. ____ ON THE ELECTION BALLOT

(a) If 15% of the voters in Bozeman, MT sign this petition and the total number of voters signing this petition is _____, this initiative will appear on the next general election ballot. If a majority of voters vote for this initiative at that election, it will become law.

(b) We, the undersigned Bozeman voters, propose that the County election supervisor place the following initiative on the November, 2024, general election ballot:

Title: Bozeman Plastics Ordinance

The Bozeman Plastics Ordinance will limit plastic distribution, consumption, and pollution in Bozeman, MT, to protect human and environmental health in our community. The ordinance will prohibit the distribution of polystyrene foam foodware and packing materials, single-use plastic carryout bags at retail sales establishments, single-use plastic straws at food vendors, single-use plastic stirrers at food vendors, and single-use plastic splash sticks at food vendors.

YES to the Bozeman Plastics Ordinance Ballot Initiative # ____

NO to the Bozeman Plastics Ordinance Ballot Initiative # ____

(c) Voters are urged to read the complete text of the initiative, which is attached to this sheet. A signature on this petition is only to put the initiative on the ballot and does not necessarily mean the signer agrees with the initiative.

(d) WARNING

A person who purposefully signs a name other than the person's own to this petition, who signs more than once for the same issue at one election, or who signs when not a legally registered Bozeman, MT, voter is subject to a \$500 fine, 6 months in jail, or both.

(e) Each person is required to sign the person's name and list the person's address or telephone number in substantially the same manner as on the person's voter registration form or the signature will not be counted.

(3) Numbered lines must follow the heading. Each numbered line must contain spaces for the signature, date, residence address, and printed last name and first and middle initials of the signer. In place of a residence address, the signer may provide the signer's post-office address or the signer's home telephone number. An address provided on a petition by the signer that differs from the signer's address as shown on the signer's voter registration form may not be used as the only means to disqualify the signature of that petition signer.

Bozeman Citizens' Plastics Ordinance Petition

#:	First Name:	Middle Initial:	Last Name:	Date:	Address/Phone Number:	Signature:
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Bozeman Municipal Code

Chapter 16 (Environment and Health), Article 10 – Plastics Ordinance

Sec. 16.10.010. Definitions

1. DEPARTMENT – The term “department” means the City of Bozeman Code Compliance Officers.
2. FOOD VENDOR – The term “food vendor” means an operation that stores, prepares, packages, serves, vends, distributes, or otherwise provides food for human consumption, including but not limited to any establishment requiring a permit to operate in accordance with the State Food Code.
3. PLASTIC – The term “plastic” means an organic or petroleum derivative synthetic or a semisynthetic organic solid that is moldable, and to which additives or other substances may have been added.
4. POLYSTYRENE FOAM– The term “polystyrene foam” means blown polystyrene as well as expanded and extruded foams using polystyrene, including thermoplastic petrochemical materials utilizing a styrene monomer and processed by any number of techniques including, but not limited to, fusion of polymer spheres (expandable bead polystyrene), injection molding, form molding, and extrusion-blow molding (extruded foam polystyrene).
5. RECYCLABLE – The term “recyclable” means, with respect to material, any material that would otherwise be disposed of or processed as waste that can be recovered, separated, collected, and reprocessed for the purpose of using the reprocessed material in the manufacture of a new product.
6. RETAIL SALES ESTABLISHMENT – The term “retail sales establishment” means any person, corporation, partnership, business venture, or vendor that sells or provides merchandise, goods or materials directly to a customer, whether for profit or not for profit, including but not limited to restaurants, pharmacies, convenience and grocery stores, liquor stores, seasonal and temporary businesses, clothing stores, hardware stores, department stores, jewelry stores, and household goods stores.
7. REUSABLE BAG – The term “reusable bag” means a sewn bag with stitched handles that is –
 1. Not made of plastics;
 2. Specifically designed and manufactured for at least 175 uses;
 3. Can carry 25 pounds over a distance of 300 feet; and
 4. Is machine-washable.
8. SINGLE-USE CARRYOUT BAG – The term “single-use carryout bag” means a bag made of plastic, paper, or other material that is –
 1. Provided by a retail sales establishment to a customer at the point of sale; and
 2. Not a recycled paper bag or a reusable bag.

9. SINGLE-USE PLASTIC STRAW –
 1. IN GENERAL – The term “single-use plastic straw” means a single-use, disposable tube made of plastic derived from either petroleum or a biologically based polymer, such as corn or other plant sources, used to transfer a beverage from a container to the mouth of the person drinking the beverage.
 2. EXCEPTION – The term “single-use plastic straw” shall not include straws made from non-plastic materials, including, but not limited to metal, glass, paper, pasta, sugar cane, wood, or bamboo;
10. SINGLE-USE PLASTIC STIRRER – The term “single-use plastic stirrer” means a device that is used to mix beverages and designed as a single-use product made of plastic.
11. SINGLE-USE PLASTIC SPLASH SICK – The term “single-use plastic splash stick” means a device that fits into the sip-hole of a beverage container lid to prevent a beverage from splashing and is designed as a single-use product made of plastic.

Sec. 16.10.020. Prohibition of Polystyrene, Plastic Bags, Straws, Stirrers, and Splash Guards

1. After 01/01/2025, no business or person may sell or provide in Bozeman, MT, any food ware product composed in whole or in part of polystyrene foam. The following shall be effective immediately subject to this subsection:
 1. No Retail Sales Establishment or Food Vendor shall serve or sell prepared food or beverage in polystyrene foam containers and shall not package meats, eggs, bakery products, fruits or vegetables, or other food in polystyrene foam containers;
 2. No Retail Sales Establishment that sells tangible personal property at retail shall sell or distribute polystyrene foam food or beverage containers;
 3. No polystyrene foam food or beverage container shall be used in any government facility or at any government sponsored event;
 4. No government department or facility shall purchase or acquire polystyrene foam food or beverage containers;
 5. All parties who contract with the government shall be prohibited from using polystyrene foam food and beverage containers in government facilities or on government-funded projects within Bozeman.
2. After 01/01/2025 no business or person may sell or provide in Bozeman any packing material products composed in whole or in part of polystyrene foam, including, but not limited to, polystyrene packing peanuts. The following shall be effective immediately subject to this subsection:
 1. No Retail Sales Establishment that sells tangible personal property at retail shall sell or use polystyrene foam packaging;
 2. No polystyrene foam packaging materials shall be used in any government facility or government sponsored event;

3. No government department or facility shall purchase or acquire polystyrene foam packaging materials;
4. All parties who contract with the government shall be prohibited from using polystyrene foam packaging materials in government facilities or on government-funded projects within Bozeman.
3. After 01/01/2025, except as provided in this subsection, a Retail Sales Establishment shall not provide a single-use plastic carryout bag to a customer at the point of sale or otherwise make plastic bags available to customers. This prohibition does not apply to:
 1. Non-handled bags used to protect items from damaging or contaminating other purchased items placed in a recycled paper bag or a reusable grocery bag;
 2. Bags provided by a business to customers to package loose items, such as fruits, vegetables, nuts, ground coffee, grains, candies, small hardware items; bags used to contain or wrap frozen foods, meat and fish, flowers or potted plants; or other items to contain dampness;
 3. Laundry, dry cleaning, or garment bags, including bags provided by hotels to guests to contain wet or dirty clothing;
 4. Bags sold in packages containing multiple bags intended for use as garbage, pet waste, or yard waste;
 5. Bags used to contain or transport live animals, such as fish or insects sold in pet stores;
 6. Bags used to transport chemical pesticides, drain-cleaning chemicals, or other caustic chemicals sold at the retail level, provided that this exemption shall be limited to one bag per customer.
4. After 01/01/2025, a Food Vendor shall not provide a single-use plastic straw to a customer, unless that customer requests a plastic straw.
5. After 01/01/2025, a Food Vendor shall not provide a single-use plastic stirrer to a customer.
6. After 01/01/2025, a Food Vendor shall not provide a single-use plastic splash stick to a customer.

Sec. 16.10.030. Implementation

1. After 01/01/2025, the City of Bozeman shall design and post for free usage on the municipal website educational materials for display in Retail Sales Establishments. Educational materials shall include the following elements, including but not limited to –
 1. An announcement of the effective date of this ordinance;
 2. A reminder to bring reusable bags
2. Before 01/01/2025 the City of Bozeman shall issue a news release including –
 1. An announcement of the effective date of this ordinance;
 2. A reminder to bring reusable bags

3. The City of Bozeman shall provide a written notice to each affected establishment at least 90 days prior to the effective date of this ordinance.
4. The City Commission may promulgate rules and regulations to implement Sec. 16.10.020. of this Chapter.
5. A Retail Sales Establishment affected by regulations pursuant to Sec. 16.10.020.b. of this ordinance shall clearly and visibly display at the store entrance and at each check-out counter or register signage developed by the City, as described in Sec. 16.10.030.f. of this ordinance.
6. Food Vendors required to only provide straws upon request shall clearly and visibly display signage developed by the City, as described in Sec. 16.10.020.e. of this ordinance.

Sec. 16.10.050. Enforcement and Penalties

1. Upon being made aware of a potential violation of this ordinance, the City of Bozeman's Code Compliance Officers shall determine whether a violation has occurred.
2. If the department confirms that a violation has occurred, the department shall give written notice to the owner of the property, the owner's agent, and/or the person committing the violation that the violation is occurring and must immediately cease.
3. If an additional violation of this ordinance occurs within one month after a warning notice is issued for an initial violation, the department shall issue a notice of violation and shall impose a penalty against the noncompliant party;
4. The penalty for each violation that occurs after the issuance of the warning notice shall be no more than;
 1. \$1,000 for the first offense;
 2. \$2,000 for the second offense and all subsequent offenses.

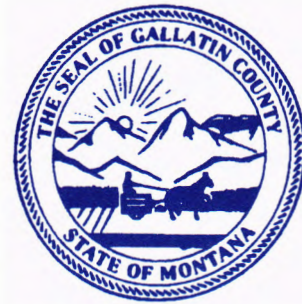
Payment of such fines may be enforced through civil action.

EXHIBIT B

State of Montana

County of Gallatin

Bozeman



November 1, 2023

Isaac Cheek
Grassroots Conservation Coordinator
Cottonwood Environmental Law Center
P.O. Box 412 Bozeman, MT 59771
isaactcheek@gmail.com
(847) 977-8392

Re: Initiative Petition to place Bozeman Plastics Ordinance on the Ballot

Dear Mr. Cheeks,

This letter responds to the proposed petition to place Bozeman Plastics Ordinance on the Ballot (hereafter "Petition"), which you submitted to my office on October 12, 2023. The laws relating to local government ordinances are codified at Title 7, Chapter 5, Part 1, Montana Code Annotated ("MCA"). Pursuant to §7-5-134(2), MCA, I have reviewed the Petition for sufficiency as to form and am rejecting the Petition for both form and purpose for the reasons stated herein.

Section 7-5-134(3), MCA, requires that I forward a proposed petition to the local government attorney for further review as to form and compliance with § 7-5-131 and § 7-5-132, MCA. The Petition was forwarded to Bozeman City Attorney Greg Sullivan for this review. The City Attorney's review letter is enclosed.

Based on my review of the Petition and the analysis performed by the City Attorney, I am rejecting the petition for the following reasons:

First, per § 13-27-236(2) and § 13-27-212(3), MCA, (2023), the entire statement of purpose should be on the top of the signature page. Section 13-27-236(2) states in relevant part: "Near the top of each sheet containing signature lines must be printed the title of the . . . issue to be referred," and ""The complete text of the issue proposed or referred must be attached to or contained within each signature sheet if sheets are circulated separately." Section 13-27-212(3) further provides that "a state of purpose and implication is the petition title for an issue circulated by petition"

Next, the final paragraph of the Petition, starting "(3) Numbered lines must follow the heading," is copied from § 13-27-238, MCA, and is not intended to be stated on a petition.

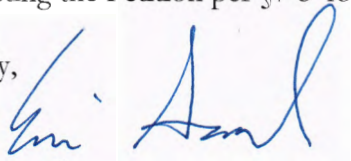
Last, the Petition is outside the powers of initiative. I rely on the detailed legal analysis from City Attorney Greg Sullivan regarding the initiative power of the City to adopt a "Plastics Ordinance".

Section §7-5-131(2) MCA states: “The powers of initiative do not extend to the following . . . (f) the regulation of auxiliary containers, defined in 7-1-121(5), as prohibited by 7-1-121(2), MCA.

As the action is prohibited by law, the City Attorney has not prepared a ballot statement per §7-5-134(3) and (4), MCA.

For these reasons, I have determined the Petition is insufficient as to form. I am notifying you that I am rejecting the Petition per §7-5-134(2), MCA.

Sincerely,

A handwritten signature in blue ink, appearing to read "Eric Semerad", is written over a light blue rectangular background.

Eric Semerad
Gallatin County Election Administrator

C: Erin Arnold, Chief Civil Deputy County Attorney
Greg Sullivan, Bozeman City Attorney

October 27, 2023

Eric Semerad
Gallatin County Clerk & Recorder/Elections Administrator
311 West Main Street
Bozeman, MT 59715
eric.semerad@gallatin.mt.gov

Sent via email; paper copy will follow

RE: Initiative for Bozeman Plastics Ordinance

Dear Eric,

I write in fulfillment of my statutory duty pursuant to 7-5-134(3), MCA, in review of the proposed citizens' initiative to adopt the Bozeman Plastics Ordinance (the "Initiative"). In my evaluation of the Initiative, I am statutorily mandated to review the Initiative for whether the Initiative is in the proper form and is within the powers of initiative of the citizens of the city of Bozeman. My review is not to determine the validity or constitutionality of the proposed Initiative. 45 Mont. Op. Gen. No. 5, 1993. For the reasons stated below, I determine the form of the Initiative is not in compliance with the Bozeman City Charter and the Initiative involves a matter that is outside the initiative power of citizens of the city of Bozeman and therefore does not comply with 7-5-131, MCA.

First, the Initiative includes a statement indicating that if 15% of registered voters sign the petition the Initiative will appear on the next general election ballot. The 15% requirement included in the Initiative appears to originate from the threshold for signatures required for a citizens' initiative to qualify for the ballot established pursuant to 7-5-132, MCA. However, Sec. 6.03 of the Bozeman City Charter requires, "In verifying petitions for initiatives and referendums, the percentage of signatures required under state law shall be reduced in proportion to the number of inactive registered voters as most recently certified by the county election administrator pursuant to state law." The Initiative, as currently drafted, does not address the requirements of Sec. 6.03 of the Bozeman Charter.

Next, the proposed ordinance the Initiative seeks to place on the ballot (the "Proposed Ordinance"),



when taken as a whole, is outside the powers of a citizen initiative. 7-5-131(2), MCA, states, “The powers of initiative do not extend to the following: (f) the regulation of auxiliary containers, defined in 7-1-121(5), as prohibited by 7-1-121(2).” As explained below, the Proposed Ordinance seeks to regulate activities, items, persons, and businesses in a manner that is substantially the same as that which the Montana Legislature has denied the power of citizen initiative related to auxiliary containers.

My discussion is rooted in the legal requirement that the constitutionality of an enacted legislative statute is presumed valid. *Ravalli Co. v. Erickson*, 2004 MT 35, ¶ 17, 320 Mont. 31, 85 P.3d 772. As such, I presume 7-5-131(2)(f), MCA, is constitutional.

In 2021, the Montana Legislature adopted HB407, which is codified, in part, at 7-5-121, MCA. Under 7-5-121(1), MCA, the purpose is to “preempt any local ordinance, resolution, initiative, or referendum regulating the use, disposition, sale, prohibitions, fees, charges, or taxes on certain containers” (emphasis added).

7-1-121(5)(a), MCA, defines auxiliary containers as:

“a bag, cup, bottle, can, device, eating or drinking utensil or tool, or other packaging, whether reusable or single use, that is:

(i) made of cloth, paper, plastic, including foamed or expanded plastic, cardboard, corrugated material, aluminum, glass, postconsumer recycled material, or similar material or substrates, including coated, laminated, or multilayer substrates; and

(ii) designed for transporting, consuming, or protecting merchandise, food, or a beverage to or from, or at, a food service, manufacturing, distribution or processing facility, or retail facility.”

As noted, 7-5-131(2)(f), MCA, denies the initiative power to citizens of a local government “as prohibited by 7-1-121(2)”, MCA, which states:

“Except as provided in subsection (3), a local unit of government may not adopt or enforce any local ordinance, resolution, initiative, or referendum that:

(a) regulates the use, disposition, or sale of auxiliary containers;

(b) prohibits or restricts auxiliary containers; or

(c) imposes a fee, charge, or tax on auxiliary containers.”

The language in the Proposed Ordinance regulating uses and actions related to plastics is substantially similar to language in 7-1-121 MCA, addressing auxiliary containers. The following is an analysis of the Proposed Ordinance in relation to the prohibitions related to auxiliary containers adopted through HB407.

First, the Proposed Ordinance seeks to adopt a prohibition on retail sales establishments or food vendors serving or selling prepared food or beverages in “polystyrene foam containers.” Proposed Ordinance at 16.10.020.1.1. That same subsection also seeks to prohibit retail sales establishments or food vendors from “package[ing] meats, eggs, bakery products, fruits or vegetables, or other food in polystyrene foam containers.” The Proposed Ordinance would also prohibit retail sales establishments from selling or distributing “polystyrene foams food or beverage containers.” Proposed Ordinance at 16.10.020.1.2.

Both 16.10.020.1.1 and 16.10.020.1.2 of the Proposed Ordinance seek to regulate items that clearly fall within the definition of auxiliary containers contained at 7-1-121(5)(a), MCA, and which are prohibited from regulation pursuant to 7-1-121(2), MCA. The common meaning of a container is “a receptacle (such as a box or jar) for holding goods.” Merriam Webster Dictionary, available at <https://www.merriam-webster.com/>, visited October 24, 2023; See *State v. Christensen*, 2020 MT 237, 401 Mont. 247 (2020) at ¶ 95 (determining where the Legislature has not defined a statutory term, courts may consider dictionary definitions in determining the plain and ordinary meaning of words). The Proposed Ordinance does not define the term “container”; however, the use of the term “container” by the Legislature in adopting HB407, when considered with the term’s common dictionary definition, clearly includes “bags, cups, bottles, can, devices, drinking utensils or tools, or other packaging...” – the very items 7-1-121, MCA, preempts local ordinances or initiatives from addressing.

The same conclusion applies to 16.10.020.2 of the Proposed Ordinance. This subsection prohibits a business or person from selling or prohibiting “any packing material product composed in whole or in part of polystyrene foam... The definition of auxiliary containers at 7-5-121(1) addresses “other packaging” and includes in its definition the term “foamed or expanded plastic.” Polystyrene foam is commonly understood to be a plastic.

Additionally, the Proposed Ordinance at 16.10.020.3 prohibits a retail sales establishment from providing “a single use plastic carryout bag to a customer at the point of sale or otherwise make plastic bags available to customers.” Despite the exceptions listed under 16.10.020.3.1 of the Proposed Ordinance, this subsection addresses the same items and material prohibited from local ordinance or initiative in 7-5-121(1), MCA. I also note the Proposed Ordinance uses the term “plastic bags.” 7-5-121(5)(a), MCA, defines an auxiliary container to include “a bag” that is “made of [] plastic.”

16.10.020.3 of the Proposed Ordinance further defines auxiliary containers in that they are “designed for transporting, consuming or protecting merchandise, food or a beverage to or from or at a food service, manufacturing, distribution or processing facility, or retail facility.” These subsections of the Proposed Ordinance seek to prohibit a food vendor from providing a single use plastic straw, a single use plastic stirrer, or a single use plastic splash stick to customers. The

definition of “auxiliary container” at 7-5-121(5)(a), MCA, includes “device[s]” and drinking utensil[s] or tool[s].” A straw is a “a tube (as of paper, plastic, or glass) for sucking up a beverage.” Merriam Webster Dictionary, visited October 24, 2023. A plastic stirrer is a device used to mix beverages. And a splash stick is a “device used to keep heat and liquid from escaping a lidded cup.” yourdictionary.com, available at <https://www.yourdictionary.com/> (visited October 24, 2023). Taken as a whole, these are the exact items the Proposed Ordinance seeks to regulate.

Sections 16.10.020.1.3-5 of the Proposed Ordinance lists prohibitions on the use and purchase of polystyrene foam food or beverage containers at “any government facility or any government sponsored event.” The term “government” is not defined in the Proposed Ordinance, and it is unclear whether these sections of the Proposed Ordinance are intended to apply to only City of Bozeman operations or facilities, or also to those of any other unit of local government (including Gallatin County or Bozeman School District 7), or even to property owned by the State of Montana.

Section 7-1-121(3)(e), MCA, provides that the prohibition on regulating the use disposition, or sale of auxiliary containers does not apply to “the use of auxiliary containers on property owned by a local unit of government.” The plain language of the Proposed Ordinance indicates it could be construed to apply to more governmental entities than “units of local government,” to include government facilities outside the control of the City of Bozeman. 7-1-121 (5)(b), MCA, defines “local unit of government to include “any county, municipality, school district...”. Given this exception and the use by the Montana Legislature of the phrase “unit of local government” in HB407, it is unclear whether these provisions of the Proposed Ordinance attempt to regulate in a way that is authorized by the exceptions listed 7-1-121(3), MCA.

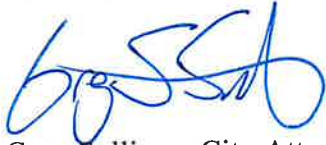
The Proposed Ordinance further seeks to regulate packing materials made of polystyrene foam (commonly known as packing peanuts) under 16.10.020.2. This item does not appear to be specifically listed under the definition of auxiliary container included at 7-1-121(5)(a), MCA. However, 7-1-121, MCA, addresses “other packaging” made of “foamed or expanded plastic” that is “designed for transporting...or protecting merchandise” to or from a “manufacturing, distribution or processing facility or retail facility.” 7-1-121(5)(a)(i-ii), MCA. Given this language, it is plausible the Legislature intended for items such as packing peanuts to be regulated pursuant to HB407. As such, it is unclear whether 16.10.020.2 the Proposed Ordinance seeks to regulate an item expressly prohibited by 7-1-121, MCA.

Finally, I point out the Proposed Ordinance is titled “Plastics Ordinance.” Under Montana law, an ordinance may not contain more than one subject which must be clearly expressed in its title. 7-5-4201(3)(b), MCA. As such, I must consider the Proposed Ordinance as one subject. I conclude that when considered as a whole, the Proposed Ordinance clearly falls within the Legislature’s denial of the initiative power for regulation or auxiliary containers.

For the above stated reasons, I determine the Initiative does not comport with the Bozeman City Charter and involves a matter that has been excluded by the Montana Legislature from the initiative power.

Sincerely,

BOZEMAN CITY ATTORNEY'S OFFICE



Greg Sullivan, City Attorney

C: Bozeman City Commission
 Jeff Mihelich, Bozeman City Manager

EXHIBIT C



RESOLUTION 5470

A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF BOZEMAN, MONTANA, DECLARING ITS SUPPORT FOR LEGISLATION BY THE 2023 MONTANA LEGISLATURE RESTORING TO LOCAL GOVERNMENTS THE POWER TO BAN SINGLE USE PLASTICS, OR IN THE ALTERNATIVE, FOR LEGISLATION BY THE 2023 MONTANA LEGISLATURE BANNING CERTAIN SINGLE USE PLASTICS, INCLUDING BUT NOT LIMITED TO SINGLE USE PLASTIC BAGS, STRAWS, STIRRERS, AND POLYSTYRENE CONTAINERS.

WHEREAS, the Bozeman City Commission recognizes the constitutional right of all Montanans, including the citizens of Bozeman, Montana, to a clean and healthful environment, and

WHEREAS, the Bozeman City Commission acknowledges that it, the State of Montana, and all persons, have a duty to maintain and improve a clean and healthful environment for present and future generations, and

WHEREAS, the Bozeman City Commission has concluded that single use plastics pose an imminent danger to its citizens' constitutional right to a clean and healthful environment, and

WHEREAS, the 2021 Montana Legislature passed, and the Governor signed, House Bill 407 revoking the power of local governments to perform their constitutional duty to maintain and improve a clean and healthful environment by banning certain single use plastics, and

WHEREAS, the 2021 Montana Legislature did not pass any legislation banning single use plastics, to address the imminent danger posed by single use plastics, to a clean and healthful environment, and

WHEREAS, by revoking the power of local governments to ban single use plastics, the State of Montana, acting through the 2021 Montana Legislature, has prevented local governments, including the Bozeman City Commission, from performing their constitutional duty to maintain and improve a clean and healthful environment, and

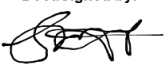
WHEREAS, the State of Montana, acting through the 2023 Legislature, must enact legislation banning certain single use plastics, to fulfill its constitutional duty to maintain and improve a clean and healthful environment, and

WHEREAS, if the State of Montana, acting through the 2023 Legislature, fails to enact legislation banning certain single use plastics, it must repeal House Bill 407 and allow local governments to fulfill their constitutional duty to maintain and improve a clean and healthful environment by passing ordinances which ban certain single use plastics, and

NOW, THEREFORE, BE IT RESOLVED by the City Commission of the City of Bozeman, Montana, to wit:

1. The Bozeman City Commission declares its support for the banning of certain single use plastics, and
2. The Bozeman City Commission urges the State of Montana, acting through the 2023 Montana Legislature, to fulfill its constitutional duty to maintain and improve a clean and healthful environment for present and future generations by enacting legislation that bans certain single use plastics, and
3. The Bozeman City Commission urges the State of Montana, acting through the 2023 Legislature, to repeal House Bill 407 if it fails to enact legislation banning certain single use plastics, so that local governments can fulfill their constitutional duty to maintain and improve a clean and healthful environment by banning certain single use plastics, and
4. The Bozeman City Commission declares its intention to favorably consider the adoption of an ordinance regulating certain single use plastics in coordination with local businesses if House Bill 407 is repealed.

PASSED, ADOPTED, AND APPROVED by the City Commission of the City of Bozeman, Montana, at a regular session thereof held on the ²⁰____ day of _____, 20^{December}22.

DocuSigned by:

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CYNTHIA L. ANDRUS
Mayor

ATTEST:

DocuSigned by:

Mike Maas

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MIKE MAAS

City Clerk

DocuSigned by:



APPROVED AS TO FORM:

DocuSigned by:

Greg Sullivan

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GREG SULLIVAN

City Attorney

CERTIFICATE OF SERVICE

I, John Phillip Meyer, hereby certify that I have served true and accurate copies of the foregoing Affidavit - Affidavit to the following on 02-15-2024:

David Kim Wilson (Attorney)
401 North Last Chance Gulch
Helena MT 59601

Representing: Katie Harrison, Liz Ametsboschler, Aviv Guscio, Youpa Stein, Jan Swanson, Cottonwood Environmental Law Center, Jeremy Drake, Danny Choriki, Tomas Waldorf, Mary Stranahan

Service Method: eService

Robert M. Farris-Olsen (Attorney)
401 N. Last Chance Gulch
Helena MT 59601

Representing: Katie Harrison, Liz Ametsboschler, Aviv Guscio, Youpa Stein, Jan Swanson, Cottonwood Environmental Law Center, Jeremy Drake, Danny Choriki, Tomas Waldorf, Mary Stranahan

Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620

Representing: State of Montana

Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620

Representing: State of Montana

Service Method: eService

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620

Representing: State of Montana

Service Method: eService

Emily Jones (Attorney)
115 North Broadway

Suite 410
Billings MT 59101
Service Method: eService
E-mail Address: emily@joneslawmt.com

Electronically Signed By: John Phillip Meyer
Dated: 02-15-2024

John Meyer
COTTONWOOD ENVIRONMENTAL LAW CENTER
P.O. Box 412 Bozeman, MT 59771
John@cottonwoodlaw.org
(406) 546-0149

David K.W. Wilson, Jr.
Robert Farris-Olsen
MORRISON SHERWOOD WILSON & DEOLA
401 N. Last Chance Gulch
Helena, MT 59601
kwilson@mswdlaw.com
rfolsen@mswdlaw.com
(406) 442-3261

Attorneys for Plaintiff

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

COTTONWOOD
ENVIRONMENTAL LAW
CENTER; LIZ AMETSBOSCHLER;
DANNY CHORIKI; JEREMY
DRAKE; AVIV GUSCIO; KATIE
HARRISON; YOUPA STEIN; MARY
STRANAHAN; JAN SWANSON;
TOMAS WALDORF,

Plaintiffs,

vs.

STATE OF MONTANA,

Defendant.

Cause No. BDV 23–754

Hon. Michael F. McMahon

**DECLARATION
OF JEREMY DRAKE**

I, Jeremy Drake, pursuant to Montana Code Annotated §1-6-105, hereby declare as follows:

1. I have personal knowledge of the matters stated herein and, if called as a witness, would competently testify.
2. I submit this declaration on my own behalf.
3. I am a resident and registered voter in Missoula, Montana.
4. If HB 407 was not in place, I would submit a proposed initiative so that the people of Missoula could vote on whether to regulate single use plastics (auxiliary containers).

I declare under penalty of perjury the foregoing is true and correct to the best of my knowledge.

Dated this 14th day of February, 2024.

A handwritten signature in black ink, appearing to read 'JD', is written over a horizontal line.

Jeremy Drake

CERTIFICATE OF SERVICE

I, John Phillip Meyer, hereby certify that I have served true and accurate copies of the foregoing Affidavit - Affidavit to the following on 02-15-2024:

David Kim Wilson (Attorney)
401 North Last Chance Gulch
Helena MT 59601

Representing: Katie Harrison, Liz Ametsboschler, Aviv Guscio, Youpa Stein, Jan Swanson, Cottonwood Environmental Law Center, Jeremy Drake, Danny Choriki, Tomas Waldorf, Mary Stranahan

Service Method: eService

Robert M. Farris-Olsen (Attorney)
401 N. Last Chance Gulch
Helena MT 59601

Representing: Katie Harrison, Liz Ametsboschler, Aviv Guscio, Youpa Stein, Jan Swanson, Cottonwood Environmental Law Center, Jeremy Drake, Danny Choriki, Tomas Waldorf, Mary Stranahan

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215 N. Sanders
Helena MT 59620

Representing: State of Montana

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215 N Sanders
Helena MT 59620

Representing: State of Montana

Service Method: eService

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620

Representing: State of Montana

Service Method: eService

Emily Jones (Attorney)
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Service Method: eService
E-mail Address: emily@joneslawmt.com

Electronically Signed By: John Phillip Meyer
Dated: 02-15-2024