

## Interoffice Memorandum

**To:** Attorney General Mark Brnovich; Oramel H. (O.H.) Skinner, Unit Chief Counsel  
**From:** Britt W. Hanson, City Attorney  
**Date:** October 10, 2017  
**Subject:** Plastic Bag Ban – Challenge to the City’s Ordinance Under SB1487

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The City of Bisbee is a charter city formed under Art. XIII, § 2 of the Arizona Constitution. On September 13, 2013, pursuant to the City Charter, the City Council enacted Ordinance O-13-14, which prohibits retailers from providing single use plastic bags to customers. In 2016, the Legislature passed HB 2131, codified as A.R.S. § 9-500.38, forbidding cities from enacting such ordinances.

### The Problem

This tight knit community of 5,200 near the Mexican border cares deeply about our living conditions. One condition that beset the City was the litter and blight caused by plastic carry out bags. These bags are like little parachutes: the slightest breeze will send a bag sailing until it catches on something. Throughout the City, when plastic bags were dispensed to shoppers, plastic bags would occasionally blow from shoppers’ hands until they caught on mesquite and other trees and bushes. Multiply this by numerous such occasions and you have a blighted mess in short order. Here is a photo taken in 2012 behind (east of) Safeway Plaza in Bisbee.



To remedy this blight, citizens volunteered to clean up this and other areas blighted by plastic bags. Here is a photo taken after one such clean up effort.



Volunteers depicted in the photo include former Mayor Adriana Badal and current Mayor David Smith.

### **The Solution**

Rather than rely on the repeated vigilance of volunteer groups, the City resolved to solve the plastic bag blight more permanently. In 2013, the Mayor and Council enacted Ordinance O-13-14, which prohibits retailers from providing single use plastic bags to customers. Shoppers are encouraged to bring reusable cloth bags when shopping. At many retail stores, including Safeway, paper bags are made available to customers if they do not have reusable bags.

This solution has been extraordinarily successful. Here is a photo taken in 2016, from the exact vantage point as the first photo.





Where previously this open field was littered with hundreds of plastic bags, there is now only one lonely bag.

The bag ban has also saved taxpayer dollars. According to Bisbee's Public Works Director, Andy Haratyk, before the bag ban he had crews cleaning up plastic bag litter along highways. (See the attached letter from Haratyk). This was done every other week, stretching the City's resources. He no longer needs to do this, saving the City a significant amount of money. Haratyk also observes that before the ban, plastic bags cluttered alleyways because "[w]hen a garbage truck picks up a dumpster the first item to fly out of the dumpster is usually a single use plastic bag." The problem with plastic bag litter was particularly acute at the City's solid waste transfer station. "I had become so accustomed to the bag litter that I stopped noticing it—that is, until we stopped using plastic bags and I saw the other transfer stations in the system that are still plagued by plastic bags." (The County has had a similar problem with plastic bags at the landfill. After complaints from neighboring ranchers and others reached ADEQ about bag litter emanating from the landfill, the County, after having a crew of twenty men clean up the litter, finally had to erect an 18 foot screen around the landfill to control the bag litter).

### **Local Concern**

No reasonable person could claim that the problem caused by plastic bag blight is not a matter of local concern to the citizens of Bisbee. Nor could any reasonable person claim that the successful solution to that problem—the plastic bag ban—is not a matter of local concern.

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This is just common sense. Would a person rather live in a community blighted by plastic bag litter, as depicted in the first photo, or in a community without that kind of blight?

And, for Bisbee, with an economy fueled by tourism, it is a matter of economics as well. Would a person rather *visit* a community blighted by plastic bags, or one that is clean and green, as depicted in the last photo?

The economic interest in eliminating blight is particularly important for Bisbee. One of the primary draws for tourists is Bisbee's aesthetics: it is an historic Arizona town, listed on the National Register of Historic Places. In 2016, readers of [Sunset](#) magazine named Bisbee the best small town in the West to live, while readers of [USA Today](#) named Bisbee the Best Historic Small Town in the United States.

<http://www.azcentral.com/story/travel/arizona/2016/05/02/bisbee-best-small-town/83837652/>.



And that blight and litter is a matter of local concern is not just common sense. Arizona courts have consistently recognized that remedying blight is a legitimate municipal concern: Eg., “protecting aesthetic values by avoiding visual clutter is a constitutionally sanctioned objective

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for a municipality.” *State of Arizona v. Watson*, 198 Ariz. 48, 53 (Div. 1 2000)(upholding the Constitutionality of a Phoenix ordinance prohibiting visual blight and hazardous accumulations of garbage and debris on one's premises).

And just as envisioned by the framers of Arizona’s Constitution, as a charter city Bisbee was entitled to enact the plastic bag ban as a solution to the problem pursuant to Art. XIII, § 2 of the Arizona Constitution. See *City of Tucson v. Grezaffi*, 200 Ariz. 130, 135, 23 P.3d 675 (Div.2 2001)(upholding regulation of smoking in restaurants as a matter of local concern pursuant to Art. XIII, § 2).

And what is the State’s interest in making Bisbee reverse its plastic bag ban and revert to blight and litter? It’s hard to say. Although the law prohibiting Bisbee from banning plastic bags declares that it is a matter of statewide concern, it doesn’t say what that concern is. Nor do the Senate Fact sheet or House summary for HB2131 say what that concern might be.

Section 5 of HB 2131 (added, oddly, by the Senate Rules Committee) does contain a legislative finding: “The legislature finds that small businesses are particularly sensitive to costs and expenses incurred in complying with regulatory actions of a city, town or county. The legislature further finds that inconsistent regulation by cities, towns and counties hinders a small business from benefiting from free and open competition.”

But you would be hard pressed in the legislative proceedings of either the House or Senate to find any testimony or alleged facts on which to base such findings, either as a general proposition or specifically as related to a local plastic bag ban. In fact, during the January 27, 2016 hearing of the House Commerce Committee, where the bill was introduced, none of the members of the House Commerce Committee gave any rationale for supporting HB 2131. None. They just passed it out of Committee.

During the House Commerce Committee discussion of HB 2131, no member, pro or con, showed the slightest curiosity as to why Bisbee—the only jurisdiction in the State with a bag ban, with three and a half years of experience with it under its belt—passed its bag ordinance, whether it achieved its objective, or whether retailers or customers felt burdened by it. If they had, they would have found that Bisbee’s retailers have embraced it. And it has actually saved them money. According to Pam Rodrigues, the owner of Acacia on Main Street:

Not only have I not incurred additional costs and expenses, the plastic bag ban has saved me between \$500 and \$600 per year in the cost of bags. As for customer reaction, I have received no negative feedback from my customers, most of who are from out of town. In fact, many customers, when told that I cannot provide a plastic bag, have responded that they appreciate it and wish their city had a similar ban on plastic bags. No one likes the unsightly litter that they cause.

Ms. Rodrigues’ letter is attached.

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Also attached is a petition signed by 43 of Bisbee's local business owners, gathered on a moment's notice, supporting the plastic bag ban—and refuting the unsupported legislative findings that the bag ban that the bag ordinance has imposed costs to comply, or that it in any way hinders them from benefiting from free and open competition.

It should be noted that in its conception Bisbee's plastic bag ban ordinance was in no way anti-business. In fact, Bisbee's largest retailer, Safeway, provided the City with the model ordinance on which Bisbee based its plastic bag ban ordinance.

If the businesses in Bisbee that the Legislature is supposedly protecting with HB 2131 have no issue with the bag ban, does the State really have any interest in prohibiting Bisbee from doing so?

And really, who should decide how best to combat Bisbee's blight and litter problem: the citizens of Bisbee and their representatives, or State legislators most of whom probably have never even visited Bisbee and have no clue as to its local concerns? The passage of this bill is a poster child as to why local control of some matters is a much more effective manner of governing than from afar—and why the framers of Arizona's Constitution provided for charter cities' home rule in Article XIII, § 2.

#### **Test: Local vs. Statewide Concern**

Where a State law might conflict with a local ordinance, the test set forth by the Arizona Supreme Court in *Strode v. Sullivan*, 72 Ariz. 360, 365 (1951) asks “whether the subject matter is characterized as of statewide importance or purely local interest”. In *State ex rel. Mark Brnovich v. City of Tucson*, No. CV-16-0301-SA, pp. 16-17 (2017), the Court specifically declined to jettison the *Strode* test, as urged in a concurring opinion. In so declining, the majority observed that “assuming it is constitutional, a state statute on any particular topic will always trump and invalidate a political subdivision's conflicting ordinance, even if the topic indisputably is solely and purely one of local concern. Under that view, one must wonder what is left of charter cities' authority under article 13, section 2.”

Indeed. If Bisbee's exercise of its charter powers to eliminate local litter and blight can't survive, it's hard to imagine what possibly could. The notion of charter cities would become a joke. And Article XIII, § 2 will become a joke along with it. And the intent of the framers of Constitution in passing that provision, described by the Supreme Court in *City of Tucson v. Walker*, 60 Ariz. 232, 238 (1943) as “to render the cities adopting such charter provisions as nearly independent of state legislation as was possible”, will have been eviscerated. The Legislature could crush any independence of charter cities, and thus override the Constitution, simply by declaring anything to be a matter of statewide interest, as they have attempted to do here.

Here, Bisbee's plastic bag ban ordinance a) was designed to address a specific local problem; b) is narrowly drawn to address that problem; c) has been very successful in eliminating that problem; and d) was, at the time it was enacted, unquestionably a Constitutional exercise of its charter city powers. Under these circumstances, Bisbee's plastic

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bag ordinance should be deemed to be of purely local interest pursuant to *Strode*. Although such a test is stringent, at least it will leave some home rule authority to charter cities pursuant to Article XIII, § 2.

### **Conclusion**

This photo was taken last week, on October 3, 2017, of the same area as the previous photos.



The community wishes for this area, and the rest of Bisbee, to remain free of plastic bag litter into the future, as it is today.

BWH:sml-b

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October 10, 2017

Britt W. Hanson  
Bisbee City Attorney  
Chief Civil Deputy  
Cochise County Attorney  
Drawer CA  
Bisbee, AZ 85603

Re: Impact of Ban of Single-Use Plastic Bags on The City of Bisbee

As you may already know, I was responsible for creation of the City of Bisbee's ("City") recycling program. However, I did not take an active role in the creation and enactment of the City's plastic bag ban because I believed it was a matter that should be addressed by the Bisbee City Council. I am writing today to express my observations of the plastic bag ban's impact on the City. Notably, the plastic bag ban's impact on the City is positive and has surprisingly unexpected results. Its impact on the City is evidenced in the City's neighborhood alleys, roadside right-of-ways, and in the Arizona Department of Transportation's ("ADOT") right-of-ways throughout the city.

Routinely, either the City or the Public Works Department schedules clean-up of litter around the City, including clean-up of ADOT's right-of-ways because ADOT no longer has the staff to do this type of work in rural communities. Therefore, it becomes the City's responsibility to use its extremely limited and stretched resources to maintain and clean all the City's right-of-ways, as it has also become a responsibility for most of the other rural communities. Most of the litter along right-of-ways was plastic bags.

Cleaning of the plastic bags from the City's alleys and right-of-ways is a significant undertaking, requiring a large amount of time and labor. Personally, I would schedule prison crews every other week, at the City's expense, to clean the City's right-of-ways of these single-use plastic bags. Because of the plastic bag ban, this significant undertaking is no longer necessary. I was extremely surprised to observe that in a period of six months after enactment of the City's plastic bag ban, there is now little to no debris in the alleys and on the side of the roads.

Now, it is apparent to me that plastic bags were almost exclusively the sole cause of the City's alleys and highway debris problem. Whenever a garbage truck picks up a dumpster, the first item to fly out of the dumpster is usually a single-use plastic bag. Currently, because of



the plastic bag ban, we have little to no issues with this problem. The one area that speaks volumes about the plastic bag ban's impact on the City is the Cochise County Transfer Station System. There is a marked and startling difference between the City's station and Douglas's or Wilcox's stations. Personally, I had become so accustomed to the plastic bag litter that I stopped noticing it – that is, until we stopped using plastic bags and I saw the other transfer stations in the system that are still plagued by plastic bags.

After seeing the impact of the City's plastic bag ban - less litter on our city streets and on the ADOT right-of-ways - I wonder why every Arizonian would not want to keep Arizona clean and beautiful.

Sincerely,



Andy Haratyk

Public Works Director, City of Bisbee

Acacia Art & Antiques  
69 Main Street, P.O. Box 303  
Bisbee, Arizona 85603  
520 432 2752  
acacia-bisbee.com



Hon. Mark Brnovich  
Arizona Attorney General

October 2, 2017

Re: Bisbee's Plastic Bag Ordinance

Dear Mr. Brnovich

I am the owner and operator of Acacia, an antiques store on Main Street in Bisbee, and have been for twelve years. As such I am very familiar with implementing the City's plastic bag ban ordinance.

Not only have I not incurred additional costs and expenses, the plastic bag ban has saved me between \$500 and \$600 per year in the cost of bags.

As for customer reaction, I have received no negative feedback from my customers, most of who are from out of town. In fact, many customers, when told that I cannot provide a plastic bag, have responded that they appreciate it and wish their city had a similar ban on plastic bags. No one likes the unsightly litter that they cause.

I fully support our community's ban on plastic bags.





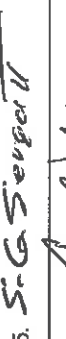








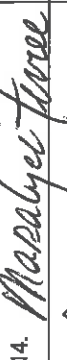

Sincerely,

Pam Rodrigues

A handwritten signature in black ink, appearing to be 'Pam Rodrigues', followed by a long horizontal line extending to the right.

# Business Owners' Support for Bisbee's Plastic Bag Ordinance O-13-14

We, the undersigned, business owners in Bisbee, Arizona, support Bisbee's Plastic Bag Ordinance O-13-14, prohibiting retailers from providing single use plastic bags to customers. During the four years that the plastic bag ban has been in effect, it has not caused us to incur any additional costs and expenses in order to comply. Nor has it hindered us from benefiting from free and open competition.

Signature	Name (first and last name printed)	Name of Business	Physical Address of Business (include city or town)	Date signed
	Kathy Sawden	Finders Keepers Antiques	81 Main St Bisbee AZ 85603	10-4-17
	Jason Kihl	Metamorphosis	79 Main, Bisbee AZ 85603	10-4-17
	KATE DREW WILLIAMS CRISTINA	UPDOWN TRIBAL	44 Main St Bisbee AZ 85603	10/4/17
	Cristina Plascencia	55 Main Gallery	55 Main Box 5 Bisbee AZ 85603	10/4/17
	S.G. Sengert	47 Main	215 Main St Bisbee AZ 85603	10/4-17
	Carol Lokay	Bisbee Books & Music	2 Copper Queen	10/4/17
	David Owen	Jewelry Designs by Owen	45 Main Bisbee 85603	10/4/17
	Kara Peters	Black Sheep Imports	15 Main St Bisbee 85603	10/4/17
	REED BOOTH	KILBEAR BEE MARKET	20 MAIN BISBEE 85603	10/4/17
	SHERIE MARKS	BISBEE HOT & SPICY	51 MAIN ST. BISBEE 85603	10/4/17
	Joan Werner	BKWILL LLC	48 Main St 85603 Bisbee	10-4-17
	Alexandra Bodkins	MEDIDIAN BOOKS	79 1/2 MAIN ST BISBEE 85603	10/4/17
	KRISTIN DREISS	SINGLE TREE	18 MAIN ST BISBEE 85603	10/4/17
	Marlynn Fearee	Pontura	22 MAIN ST - Bisbee 85603	10/4/17
	Jerilyn Thompson	THE GIFT BASKET	42 MAIN ST BISBEE 85603	10/4/17



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Signature	Name (first and last name printed)	Name of Business	Physical Address of Business (include city or town)	Date signed
	Lourdes V Hunter	Bisbee Bow Bow	91 Main Bisbee AZ 85603	10/4
	Ariva Trishman	Art Home	74 Main Bisbee AZ 85603	10/4
	Kenneth Wallace	Bisbee Bicycle Brothers	78 Main St, Bisbee AZ 85603	10/4/17
	Linda Gracie	Uinda Gracie Realty	286a Tombstone Cyn, Bisbee, AZ 85603	10/4/17
	Kelly Galligan	Poco	15 Main St Bisbee AZ 85603	10/4/17
	Kelly Hymphrey	Va Voorn!	10K St Bisba, AZ 85603	10/5/17
	Suzanne Page	BTHb	7 Main ST	10/5/17
	Carol I Chandler	Sense of Place Gallery	#2 Copper Queen Plaza	10/5/17
			63C Broadway Ave	10/5/17

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[illegible]

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Signature	Name (first and last name printed)	Name of Business	Physical Address of Business (include city or town)	Date signed
<i>Cyndi Wilkins</i>	Cyndi Wilkins	HAPPY PAWS	157 main st Bisbee, AZ 85603	10/6/17
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[illegible]