

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF
NEWARK ADDING CHAPTER 8.44, "SUSTAINABLE FOODWARE", TO THE
NEWARK MUNICIPAL CODE TO REGULATE THE USE OF DISPOSABLE
FOODWARE TO IMPROVE THE HEALTH AND SAFETY OF THE NEWARK
COMMUNITY AND ENVIRONMENT**

WHEREAS, the purpose of this Ordinance is to comply with certain state laws restricting the distribution of single-use foodware accessories by restaurants and other food facilities, and to reduce the single-use plastic food service ware to improve the health and safety of the City of Newark community and environment; and

WHEREAS, reducing single-use plastic foodware waste improves the health and safety of the City of Newark's community and the environment as single-use plastics cause litter and pollution flowing to storm drains, creeks, the San Francisco Bay, and the Pacific Ocean. Reducing single-use plastic protects the health and safety of marine life; and

WHEREAS, reducing single-use plastic food service ware waste improves the beauty of the natural environment for the health and safety of the City of Newark community; and

WHEREAS, polystyrene is a problematic environmental pollutant because it breaks down into microplastics which cause significant damage to marine life and wildlife. Polystyrene is non-recyclable and non-reusable and better, recyclable, environmentally friendly materials have replaced polystyrene; and

WHEREAS, on October 5, 2021, AB 1276 was signed into law, restricting the distribution of single-use food service ware accessories (e.g., utensils, straws, stirrers, condiment packets, etc.) by restaurants and other food facilities; and

WHEREAS, the City Council wishes to have a sustainable foodware ordinance in Newark; and

WHEREAS, the City Council desires to authorize staff to enforce the sustainable foodware ordinance within Newark.

THE CITY COUNCIL OF THE CITY OF NEWARK DOES ORDAIN AS FOLLOWS:

SECTION 1. Recitals.

The above recitals are true and correct and made a part of this Ordinance.

SECTION 2. Municipal Code Amendment.

Chapter 8.44, Sustainable Foodware as contained in Exhibit A, attached hereto and incorporated herein, is added to the Newark Municipal Code.

SECTION 3. CEQA.

This Ordinance is exempt from the environmental review requirements of CEQA pursuant to Section 15061 (b)(3) of Title 14 of the California Code of Regulations because it can be seen with certainty that there is no possibility that the provisions contained herein may have a significant effect on the environment. Further, the Ordinance is also exempt from the requirements of CEQA pursuant to CEQA Guidelines Sections 15307 and 15308 of Title 14 of the California Code of Regulations as actions taken by regulatory agencies to assure the maintenance, restoration, enhancement of natural resources, or protection of the environment.

SECTION 4. Severability.

If any provision, section, subsection, sentence, clause, phrase, or word of this Ordinance or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of the Chapter. The City Council hereby declares that it would have passed this Chapter, and each provision, section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any portion of this Chapter or application thereof would be subsequently declared invalid or unconstitutional.

SECTION 5. Publication and effective date.

Within fifteen (15) days from and after adoption, this Ordinance shall be published once in the Tri-City Voice, a newspaper of general circulation printed and published in Alameda County and circulated in the City of Newark, in accordance with California Government Code Section 36933. This Ordinance shall take effect and be enforced thirty (30) days after its adoption.

Chapter 8.44 – SUSTAINABLE FOODWARE

8.44.010 - Purpose.

The City Council finds and determines that:

- A. An Ordinance reducing single-use plastic foodware waste improves the health and safety of the City of Newark's community and the environment since single-use plastics cause litter and pollution flowing to storm drains, creeks, San Francisco Bay, and the Pacific Ocean. Reducing single-use plastic also protects the health and safety of marine life.
- B. An Ordinance reducing single-use plastic foodware waste improves the beauty of the natural environment for the health and safety of the City of Newark community.
- C. Polystyrene is a problematic environmental pollutant since it breaks down into microplastics which cause significant damage to marine life and wildlife. Polystyrene is non-recyclable and non-reusable and better, recyclable, environmentally friendly materials have replaced Polystyrene.
- D. On October 5, 2021, AB 1276 was signed into law by Governor Gavin Newsom. AB 1276 restricts the distribution of single-use foodware accessories (e.g., utensils, straws, stirrers, condiment packets, etc.) by restaurants and other food facilities.

8.44.020 - Definitions.

The following definitions govern the use of terms in this chapter:

- A. "Disposable" means designed to be discarded after a single or limited number of uses and not designed or manufactured for longer-term multiple reuse.
- B. "Foodware" means food contact products used for serving, distributing, holding, packaging, and/or transporting Prepared Food including, but not limited to plates, cups, bowls, trays, clamshell containers, boxes, utensils, straws, lids, and food contact paper (e.g., wraps, bags, tray liners, etc.). The term "Foodware" includes Foodware Accessories and Standard Condiments in Disposable packaging.
- C. "Foodware Accessories" include different types of Foodware such as straws, stirrers, Utensils, condiment cups and packets, cocktail sticks/picks, toothpicks, napkins, cup spill plugs, cup sleeves, and other similar accessory or accompanying Foodware used as part of food or beverage service or packaging. Detachable lids for beverage cups and food containers are not considered a Foodware Accessory.
- D. "Food Facility" means an operation that stores, prepares, packages, serves, vends, or otherwise provides food to the public for human consumption, as defined by the California Health and Safety Code Section 113789 or successor. It includes both permanent and temporary food facilities.

- E. "Healthcare Facilities" mean places that provide healthcare to the public. Healthcare Facilities includes, but is not limited to hospitals, clinics, outpatient care centers, nursing homes, psychiatric care centers, medical offices, hospice homes, mental health and addiction treatment centers, orthopedic and other rehabilitation centers, urgent care, birth centers, etc.
- F. "Polystyrene" and Polystyrene-based" means expanded polystyrene, which is a thermoplastic petrochemical material utilizing a styrene monomer and is included in all or a portion of Foodware.
- G. "Prepackaged Food" means any labeled processed food, prepackaged to prevent any direct human contact with the food product upon distribution from the manufacturer.
- H. "Prepared Food" means food or beverages that undergo a cooking or food preparation technique on the Food Facility's premises for consumption by the public. Cooking or food preparation technique includes, but is not limited to the following:
 1. Cooking methods, utilizing application of heat, such as steaming, microwaving, simmering, boiling, broiling, grilling, frying, or roasting.
 2. Beverage preparation, such as blending, brewing, steeping, juicing, diluting, or pouring.
 3. Food preparation techniques, such as defrosting, rinsing, washing, diluting, cutting, portioning, mixing, blending, assembling, coating, dipping, garnishing, decorating, or icing.

Prepared Food does not include raw eggs or raw, butchered meats, fish, and/or poultry sold from a butcher case, a refrigerator case, or similar retail appliance.

- I. "Standard Condiment" means relishes, spices, sauces, confections, or seasonings that require no additional preparation and that are usually used on a food item after preparation, and includes different types such as ketchup, mustard, mayonnaise, soy sauce, hot sauce, salsa, salt, pepper, and sugar/sugar substitutes.
- J. "Takeout Food" means Prepared Food that is purchased to be consumed off a Food Facility's premises. Takeout Food includes Prepared Food delivered by a Food Facility or by a third-party Takeout Food Delivery Service.
- K. "Takeout Food Delivery Service" is a service for online food ordering and delivery of Prepared Food from a Food Facility to a customer. This service can be provided directly by the Food Facility or by a third-party.
- L. "Utensils" include different types of instruments used to assist the consumption of food, e.g., forks, knives, spoons, sporks, chopsticks, and tongs.

8.44.030 – Distribution of Foodware and Foodware Accessories.

- A. Food Facilities, for on-premises dining and off-premises dining (e.g., Takeout Food Delivery Service, catering off-site, etc.), shall not provide any Foodware Accessories or Standard Condiment in Disposable packaging to a consumer unless the specific type of Foodware Accessory or specific type of Standard Condiment is requested by the consumer, with the following exceptions:

1. Food Facilities that are drive-through Food Facilities may ask a drive-through consumer if the consumer wants a specific type of Foodware Accessory if the item is necessary for the consumer to consume Prepared Food or to prevent spills of or safely transport Prepared Food.
 2. Food Facilities that are located entirely within a public use airport, as defined in Section 77.3 of Title 14 of the Code of Federal Regulations, may ask a walk-through consumer if the consumer wants a specific type of Foodware Accessory if the item is necessary for the consumer to consume Prepared Food or to prevent spills of or safely transport Prepared Food.
- B. Foodware Accessories and Standard Condiment in Disposable packaging provided by Food Facilities for use by consumers shall not be bundled or packaged in a manner that prohibits a consumer from taking only the type of Foodware Accessory or type of Standard Condiment desired without also having to take a different type of Foodware Accessory or type of Standard Condiment. Food Facilities cannot distribute Utensils that are bundled or packaged together. Each type of Utensil (e.g., fork, spoon, knife, etc.) must be specifically requested by the consumer in order for a Food Facility to provide the item(s).
- C. Nothing in this Chapter shall prohibit a Food Facility from making unwrapped Foodware Accessories available to a consumer using refillable self-service dispensers that dispense different types of Foodware Accessories one item at a time to allow for Foodware Accessories to be obtained.
- D. Nothing in this Chapter shall prohibit a Food Facility from making Standard Condiment available to a consumer using refillable self-service dispensers to allow for Standard Condiment to be obtained. Food Facilities that offer Standard Condiment are encouraged to use bulk dispensers for the condiments rather than condiments packaged for single use.
- E. Takeout Food Delivery Services shall provide consumers with the option to proactively request the different types of available Foodware Accessories and the different types of Standard Condiment from a Food Facility serving Prepared Food. The default option on the digital ordering/point-of-sale platforms of Takeout Food Delivery Services shall be that no Foodware Accessories or Standard Condiment are requested.
- F. Takeout Food Delivery Services shall provide Food Facilities the ability to tailor the digital ordering/point-of-sale platforms so that Food Facilities can customize and itemize the different types of available Foodware Accessories (including different types of Utensils) and the different types of available Standard Condiments for consumers to proactively select.
- G. If a Food Facility uses any Takeout Food Delivery Service, the Food Facility shall customize its menu with an itemized list and/or provide options of the different types of available Foodware Accessories and the different types of available Standard Condiments for consumers to proactively select. Only those specific types of Foodware Accessories or specific types of Standard Condiment proactively requested by the consumer shall be provided by the Food Facility. If a consumer does not request any Foodware Accessories or Standard Condiment, no Foodware Accessories or Standard Condiment shall be provided by the Food Facility for delivery of Prepared Food. Each type of Utensil (e.g., fork, spoon, knife, etc.) offered by the Food Facility shall also be

listed individually, unbundled on the menu, and provided by the Food Facility for delivery along with the Prepared Food only if requested by the consumer.

8.44.040 - Standards and Required Use of Foodware.

- A. No Food Facility shall use Polystyrene or Polystyrene-based Disposable Foodware when providing Prepared Food.
- B. Nothing in this Chapter shall conflict or be construed to conflict with the Americans with Disabilities Act or any other applicable law concerning the rights of individuals with disabilities.

8.44.050 - Recordkeeping and Inspection.

- A. Food Facilities shall keep complete an accurate record or documents of the purchase of the acceptable Foodware evidencing compliance with this Chapter for a minimum period of three years from the date of purchase.
- B. The record shall be made available for inspection at no cost to the City staff (or their designee) authorized to enforce this ordinance unless an alternative location or method of review is mutually agreed upon, the records or documents shall be made available at the Food Facility address. The City may, from time to time modify the requirements and inspections to enable compliance by the Food Facilities.

8.44.060 - Automatic Exemptions.

- A. Prepackaged Food is exempt from the provisions of this Chapter.
- B. If the City determines that a reasonably feasible Foodware that complies with this ordinance does not exist, these items will be exempt from all or select requirements of the abovementioned provisions of this Chapter until the City's Environmental Services Manager (or their designee) determines that a reasonably feasible alternative is available on the market for purchase.
- C. Temporary exemptions due to an emergency are automatic without the submission of a request for an exemption. An emergency is defined as a sudden, unexpected occurrence posing a clear and imminent danger that requires immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services. Examples of an emergency include, but are not limited to natural disasters, emergencies due to the release of hazardous materials, emergencies associated with loss of power and/or water, or emergency medical response.

8.44.070 - Case-by-Case Consideration of Requests for Hardship Exemption.

- A. Grounds for an exemption.

An exemption from any of the provisions of this Chapter may be granted by the Environmental Services Manager or designee upon demonstration by a Food Facility to the satisfaction of the City that strict application of the requirements would cause undue hardship. An "undue hardship" includes, but is not limited to the following:

1. A situation unique to the Food Facility where a suitable alternative that conforms with the requirements detailed in this ordinance does not exist for a specific application.
2. Imposing the provisions of this Chapter would cause significant economic hardship. "Significant economic hardship" may be based on, but not limited to, demonstrating that suitable Disposable Foodware is not available at a

commercially reasonable price and the additional cost associated with providing the Disposable Foodware is particularly burdensome to the Food Facility based on the type of operation(s) affected, the overall size of the business/operation, the number, type and location of its facilities, the impact on the overall financial resources of the Food Facility, and other factors. Reasonable added cost for a suitable item as compared to a similar item that the Food Facility can no longer use shall not by itself constitute adequate grounds to support an exemption for such item. In determining whether a significant economic hardship has been established, the Environmental Services Manager or designee may consider the following information: ability of the Food Facility to recover the additional expense by increasing its prices; the availability of tax credits and deductions; outside funding; and other options.

- B. Request for an exemption. A request for an exemption from the requirements of this Chapter shall include all information deemed necessary by the City to render a decision, including but not limited to documentation showing the factual support for the requested exemption. A request for an exemption may be approved by the Environmental Services Manager or designee, in whole or in part, with or without conditions. The duration of the exemption, if granted, shall also be determined by the Environmental Services Manager or designee.

8.44.080 - Enforcement.

- A. The Environmental Services Manager or their designee may enforce this Chapter. The enforcement provisions will commence January 1, 2024, after the outreach and education phase for Food Facilities.
- B. Any violation of Section 8.44.040 is punishable as specified in Section 1.16.010 or by any other applicable law.
- C. The first and second violations of Section 8.44.030 shall result in a notice of violation, and any subsequent violation of that section shall constitute an infraction punishable by a fine of twenty-five dollars for each day in violation, but not to exceed three hundred dollars annually.
- D. The Environmental Services Manager or designee can modify the enforcement process from time to time to ensure compliance with this Chapter, and such authorization can include modifications to enforcement provisions, the methods, and details to issue violations, and or assess administrative fines on behalf of the City.
- E. This Section shall not be interpreted to limit any otherwise available civil or administrative remedies under law.