

ORDINANCE NO. 795

**CITY OF MILLBRAE, COUNTY OF SAN MATEO
STATE OF CALIFORNIA**

**AN ORDINANCE OF THE CITY OF MILLBRAE
REPEALING CHAPTER 6.40 OF TITLE 6 OF THE MILLBRAE MUNICIPAL CODE
AND ADOPTING A NEW CHAPTER 6.40 UPDATING DISPOSABLE FOOD SERVICE
WARE REGULATIONS CONSISTENT WITH STATE LAW**

WHEREAS, the production, management, and consumption associated with disposable food service ware, typically used for only a few minutes before being discarded, have significant environmental impacts, including environmental contamination; consumption of precious resources such as energy and water; emissions of greenhouse gases; air and water pollution; litter on streets; and plastic pollution in waterways and oceans; and

WHEREAS, disposable food service ware constitutes a substantial portion of the litter found within the City of Millbrae (City), San Mateo County (County), and the rest of the Bay Area. These types of food service ware are commonly littered or blown out of trash receptacles and migrate through the storm drain system where they eventually end up in the creeks, San Francisco Bay, Pacific Ocean, and shorelines; and,

WHEREAS, reduction of disposable food service ware in the environment will advance compliance with federal, state, and county clean water mandates, including the City's Municipal Regional Stormwater Permit requirement, by helping to reduce trash and litter in stormwater discharges; and

WHEREAS, on February 23, 2021, the City adopted Ordinance No. 785 restricting food facilities use of polystyrene and plastic-based disposable food service ware and requiring the replacement of non-compostable or non-recyclable disposable food service ware with compostable alternatives that are non-plastic, natural fiber-based, and free of all intentionally added fluorinated chemicals, when and where possible; and

WHEREAS, on October 5, 2021, Governor Newsom signed into law AB 1276 and AB 1200, which restrict the distribution of single-use foodware accessories (e.g., utensils, straws, stirrers, condiment packets, etc.) by restaurants and other food facilities statewide, and mandates that no person shall distribute, sell, or offer for sale in the state any food packaging (including single-use foodware) that contains regulated perfluoroalkyl and polyfluoroalkyl substances (PFAS); and

WHEREAS, Ordinance No. 785 includes requirements that are well aligned with many of the requirements on foodware in AB 1276 and AB 1200. However, some discrepancies exist.

As such, the ordinance must be amended to ensure alignment with requirements in both State bills; and

WHEREAS, to ensure the City's regulations are consistent with AB 1276 and AB 1200, the City now wishes to enact this ordinance.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF MILLBRAE, CALIFORNIA, ORDAINS THAT:

SECTION 1. Chapter 6.40 of the Millbrae Municipal Code is hereby repealed and replaced in its entirety by a new chapter 6.40 to be numbered and entitled as follows:

Chapter 6.40

REGULATING THE USE OF DISPOSABLE FOOD SERVICE WARE

- 6.40.010 Definitions.**
- 6.40.020 Distribution of disposable food service ware accessories and Standard condiment.**
- 6.40.030 Standards and required use of disposable food service ware.**
- 6.40.040 Recordkeeping and inspection.**
- 6.40.050 Automatic exemptions.**
- 6.40.060 Case-by-case consideration of requests for hardship exemption.**
- 6.40.070 Enforcement.**

6.40.010 Definitions.

For purposes of this chapter, the following terms have the following meanings:

- A. "Aluminum foil-based" means any disposable food service ware composed entirely of aluminum, including but not limited to aluminum tray liners, aluminum foil, and aluminum foil baskets.
- B. "City facilities" means any building, structure or vehicle owned or operated by the city of Millbrae, its agent, agencies, and departments. This also includes all individuals, entities or organizations using city facilities for public or private events.
- C. "Compostable" means that an item or material that:
 - (1) meets standards for compostability from a certified/approved independent third party approved by the city or designee, in collaboration with local waste processors, haulers, and/or other entities; and/or
 - (2) Is any variation of acceptable materials that will break down, or otherwise become part of usable compost in a safe and timely manner as determined by the city or designee, in collaboration with local waste processors, haulers, and/or other entities; and

(3) Is natural fiber-based. Compostable items may include those that are made entirely of natural fiber or natural fiber-based items that are coated or lined with biologically based polymer, such as corn or other plant sources (e.g., compostable plastics), if certified/approved by independent third parties approved by the city manager or designee.

Compostable does not include items made either primarily or entirely of biologically based polymer (e.g. Polylactic acid (PLA), Polyhydroxyalkanoate (PHA), or other compostable plastic), even if labeled or certified as compostable.

D. "County" means the County of San Mateo.

E. "Disposable" means designed to be discarded after a single or limited number of uses and not designed or manufactured for long-term multiple reuse.

F. "Food service ware" 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 "food service ware" includes food service ware accessories and standard condiments in disposable packing.

G. "Food service ware accessories" include different types of food service ware such as straws, stirrers, cup spill plugs, cup sleeves, condiment cups and packets, utensils, cocktail sticks/picks, toothpicks, napkins, and other similar accessory or accompanying food service ware used as part of food or beverage service or packaging. Detachable lids for beverage cups and food containers are not considered a food service ware accessory.

H. "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. Public schools are exempt from the provisions of this chapter.

I. "Food scrap composting method" means (1) self-hauling of food scraps to a permitted composting facility or a transfer station that accepts food scraps that will be transferred to a permitted composting facility for on-site compost processing, (2) food scrap compost collection service provided by a curbside hauler, or (3) on-site food scrap composting.

J. "Healthcare facilities" means 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.

K. "Natural fiber/natural fiber-based" means a plant or animal-based, nonsynthetic fiber, including but not limited to products made from paper, sugarcane, bamboo, wheat stems/stalk, hay, wood, etc.

L. "Noncompostable" means not meeting the definition of compostable set forth in this chapter.

M. "Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS)" means a class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom.

N. "PFAS Restrictions" mean either of the following:

1. PFAS has not been intentionally added to a product or product component.
2. The presence of PFAS in a product or product component is below 100 parts per million, as measured in total organic fluorine.

O. "Polystyrene-based" means and includes expanded polystyrene, which is a thermoplastic petrochemical material 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). The term "polystyrene" also includes polystyrene that has been expanded or blown using a gaseous blowing agent into a solid foam (expanded polystyrene [EPS]) and clear or solid polystyrene known as oriented polystyrene.

P. "Prepackaged food" means any properly labeled processed food, prepackaged to prevent any direct human contact with the food product upon distribution from the manufacturer and prepared at an approved source.

Q. "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 the 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.

R. "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.

S. "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.

T. "Takeout food delivery service" is a service that delivers takeout food from a food facility to a customer for consumption off the premises. This service can be provided directly by the food facility or by a third party.

U. "Utensils" include different types of instruments used to assist the consumption of food, specifically, forks, knives, spoons, sporks, chopsticks, and tongs.

6.40.020 Distribution of disposable food service ware accessories and standard condiment.

A. Except as provided in subsections (C) and (D), food facilities, for on-premise dining and off-premise dining (e.g., takeout food delivery service, catering off-site, etc.), shall not provide any disposable food service ware accessories or Standard condiment in Disposable packaging to a consumer unless the specific type of disposable food service ware accessory (including different types of utensils) or specific type of standard condiment is requested by the consumer.

B. Food facilities shall only distribute disposable food service ware accessories unbundled, as separate individual units. 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). Disposable food service ware 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 disposable food service ware accessory (including different types of utensils) or type of standard condiment desired without also having to take a different type of disposable food service ware accessory or type of standard condiment.

C. Food facilities may ask a drive-through consumer if the consumer wants a specific type of disposable food service ware accessory (including different types of utensils), if the item is necessary for the consumer to consume prepared food or to prevent spills of or safely transport prepared food.

D. 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 disposable food service ware accessory (including different types of utensils), if the item is necessary for the consumer to consume prepared food or to prevent spills of or safely transport prepared food.

E. 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 disposable food service ware accessories (including different types of utensils) and the different types of available standard condiments for consumers to proactively select. Only those specific types of disposable food service ware accessories (including different types of utensils) 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 disposable food service ware accessories or standard condiment, no disposable food service ware accessories or standard condiment shall be provided by the food facility for delivery of prepared food. Pursuant to subsection (d), 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.

F. Takeout food delivery services must:

1. Provide consumers with the option to proactively request the different types of available Disposable food service ware accessories (including different types of utensils)

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 shall be that no disposable food service ware accessories are requested; and

2. 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 disposable food service ware accessories (including different types of utensils) and the different types of available standard condiments for consumers to proactively select.

G. Nothing in this chapter prohibits a food facility from making unwrapped disposable food service ware accessories available to a consumer using refillable self-service dispensers that dispense different types of disposable food service ware accessories one item at a time to a consumer.

H. Nothing in this chapter prohibits a food facility from making standard condiment available to a consumer using refillable self-service dispensers. Food facilities that offer standard condiments are encouraged to use bulk dispensers for standard condiments rather than those packaged for single-use.

6.40.030 Standards and required use of disposable food service ware.

A. No food facility shall use polystyrene-based disposable food service ware when providing prepared food.

B. Food facilities and city facilities shall only provide disposable straws, stirrers, utensils, and cocktail/toothpicks (and the packaging that these individual items are wrapped in, if any) that are compostable.

C. 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. In particular, nothing in this chapter shall restrict, or be construed to restrict, the provision by food facilities of disposable or compostable straws to individuals who may request the use of disposable non-compostable straws to accommodate medical needs or disabilities. Healthcare facilities may distribute disposable non-compostable straws with or without request by a patient at the discretion of the healthcare facility staff based on the physical or medical needs of the patient.

D. Food facilities and city facilities shall use compostable items for the below disposable food service ware when providing prepared food:

1. Plates.
2. Bowls (of all sizes including, but not limited to, soup and salad bowls).
3. Cups (of all sizes including, but not limited to, beverage and accessory cups for standard condiments).
4. Food trays and food boats.
5. Boxes.

6. Hinged or lidded containers (e.g., clamshells), deli containers, and other containers used for the sale and/or distribution of prepared food

E. Commencing on the effective date of this chapter until December 31, 2022, for the compostable disposable food service ware listed in subsection D of this section, food facilities must use items that meet PFAS restrictions. To verify the PFAS restrictions, food facilities must use items that are certified/approved by independent third parties, approved by the city manager or designee, in collaboration with local waste processors and haulers, as needed.

F. For all other disposable food service ware not listed in subsections B and D of this section, food facilities and city facilities shall use only disposable food service ware that can be composted by the food scrap composting method utilized by the food facility and/or accepted for recycling by the food facility's recycling collection service, unless a feasible alternative does not exist.

G. The city and county shall maintain a list of approved disposable food service ware sources and/or references to resources that maintain regularly updated lists of products that meet the requirements detailed in subsections A, B, D and E of this section. This information will be made available on the city's website, at the city manager's office or another designated location, and through the county's office of sustainability. If a product is not included on the approved lists, the food facility wishing to use a product as disposable food service ware will establish to the county and/or city manager or designee's satisfaction that the product complies with the requirements detailed in subsections A, B, D and E of this section.

6.40.040 Recordkeeping and inspection.

A. Food facilities shall keep complete and accurate record or documents of the purchase of the acceptable disposable food service ware 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 county during regular business hours by county employee or designated staff or representatives authorized to enforce this chapter. 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.

C. The provision of false or incomplete information, records, or documents to the county shall be a violation of this chapter.

6.40.050 Automatic exemptions.

A. Prepackaged food is exempt from the provisions of this chapter.

B. Polystyrene coolers and ice chests intended for reuse are exempt from the provisions of this chapter.

C. Disposable food service ware that is entirely aluminum foil-based or recyclable glass is exempt from the provisions of this chapter.

D. If the city or county determines that reasonably feasible disposable food service ware that complies with MMC 6.40.030(A), (B), (D) and (E) does not exist, these items will be exempt from the abovementioned provisions of this chapter until the city or county determines that a

reasonably feasible alternative is available on the market for purchase. The city and county will have a current list of these exempted disposable food service ware made public, with hard copies available in the city manager's office or another designated location.

E. 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.

6.40.060 Case-by-case consideration of requests for hardship exemption.

A. Grounds for an exemption. An exemption from any of the provisions of this chapter and the county's chapter may be granted by the county manager, or city manager or designee upon demonstration by a food facility to the satisfaction 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 MMC 6.40.030(A), (B), (D) and (E) 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 food service ware is not available at a commercially reasonable price and the additional cost associated with providing the disposable food service ware 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 city 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 city 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 city manager or designee. Information about the application process for requesting an exemption will be made available on the city's website, at the city's manager's office or another designated location, and through the county office of sustainability.

6.40.070 Enforcement.

A. The city manager or designee, including county officials, may enforce this chapter. Such authorization includes, without limitation, the authority to hold hearings, issue citations, or assess administrative fines on behalf of the city.

B. Violation of this chapter is a public nuisance subject to all applicable civil, administrative, and criminal remedies and penalties according to the provisions and procedures contained in this chapter and state law including, but not limited to, an action for abatement or injunctive relief.

C. Compliance plan. If requested by the city manager or designee, a food facility that is in violation of any provision of this chapter must create and submit to the city manager or designee a compliance plan, that must include information on corrective actions(s) that the food facility will undertake to become compliant with this chapter. The city manager or designee may request additional information from the food facility, including, but not limited to, a proposed timeline for corrective action(s) and identification of individuals responsible for ensuring compliance with this chapter. Once requested, the food facility must create and submit its completed compliance plan within fourteen calendar days (14).

D. Notwithstanding authorization of enforcement by county personnel of this chapter, the violation of, or noncompliance with, any of the requirements of this chapter or applicable provisions of this code shall be subject to any administrative, civil, or criminal enforcement remedies available under the law and/or the city's municipal code. In addition, the city may enforce the violation of this chapter by means of civil enforcement through a restraining order, a preliminary or permanent injunction or by any other means authorized by the law.

This section shall not be interpreted to limit any otherwise available civil or administrative remedies under law.

SECTION 2. SEVERABILITY

If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held by a court of competent jurisdiction to be invalid or unconstitutional, such decision will not affect the validity of the remaining portions of this Ordinance. The City Council of the City of Millbrae hereby declares that it would have passed this Ordinance and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that one or more sections, subsections, sentences, clauses or phrases may be held invalid or unconstitutional.

SECTION 3. EFFECTIVE DATE; PUBLICATION

This Ordinance shall be in full force and effect thirty days from its passage. However, enforcement of this Ordinance will not begin until October 1, 2022. At least five days prior to its adoption and within fifteen days after its adoption, a summary of this Ordinance shall be published once in a newspaper of general circulation in the County of San Mateo and City of Millbrae.

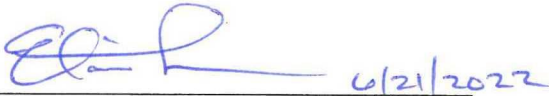
INTRODUCED at a regular meeting of the City Council of the City of Millbrae held on May 10, 2022.

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Millbrae held on May 24, 2022.



MAYOR

ATTEST:



CITY CLERK

I do hereby certify that the foregoing Ordinance was duly and regularly passed and adopted by the City Council of the City of Millbrae this 24th day of May 2022, by the following vote:


AYES: COUNCILMEMBERS: Oliva, Papan, Fung, Holober, Schneider

NOES: COUNCILMEMBERS: None

ABSENT: COUNCILMEMBERS: None

ABSTAIN: COUNCILMEMBERS: None

EXCUSED: COUNCILMEMBERS: None

 4/21/2022

CITY CLERK