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MEMORANDUM

To: Kim Rehberg, Durham City Attorney, and Bryan Wardell, Counsel, Durham County Attorney

From: Duke Environmental Law and Policy Clinic

Date: November 8, 2021

RE: North Carolina Local Government Authority to Mandate Assessment of Fee for Non-Reusable Bags

Executive Summary:

On October 12, 2021, Don't Waste Durham ("DWD") and the Duke Environmental Law and Policy Clinic ("DELPC") presented a proposal to implement a fee on non-reusable bags before the Durham Joint City County Committee. This presentation built on earlier efforts, largely in 2019 and early 2020, through which the Durham Environmental Affairs Board endorsed this proposal. Due to the COVID-19 pandemic, DWD, DELPC, and other stakeholders agreed to delay moving forward on the proposal. During this interim period, DWD and DELPC documented the impacts of non-reusable bags in Durham, culminating in the report "The Cost of Single-Use Plastic Bags in Durham, North Carolina" ("white paper"). This memo is informed by the white paper and by feedback received from the City Attorney and other interested parties, such as the North Carolina Retail Merchants Association ("NCRMA"), in the wake of the 2019 proposal. While this memo focuses on the sources of local government authority for a bag fee, it also addresses the NCRMA's state constitutional concerns.

This memo has two parts. Part I describes the sources of authority for the City and/or County of Durham to enact a fee on non-reusable bags. It concludes that non-reusable bags may be regulated as waste pursuant to the statutes granting general ordinance-making authority to local governments or North Carolina's Solid Waste Management Act ("SWMA"). This part also concludes that a bag fee is not preempted by current North Carolina law and that it would require an affirmative change to the SWMA to preempt this proposal. Part II addresses concerns raised about local government authority to impose taxes; it explains that this proposal is a fee under North Carolina law, not a tax. Given the waste-reduction purpose of the SWMA, a bag fee is authorized by the state public enterprise statute. Here, the monies generated from the fee would be

housed within the solid waste management division of local government and directed back to waste-reduction programs. Thus, this proposal is not a source of revenue for the city or county, but rather an allowable fee remitted in exchange for a service rendered.

1. Sources of Authority for a Bag Fee

In North Carolina, local governments (counties and municipalities) are creations and instrumentalities of state government.¹ Article VII, § 1 of the North Carolina Constitution gives the General Assembly the power to create these subdivisions and grant any powers to them that it deems advisable.² While North Carolina is not a “home rule” state that grants broad authority to municipalities over local matters, it also does not apply the strict “Dillon’s rule,” a judge-made doctrine that holds that municipalities have only the powers explicitly granted to them by the state. Instead, municipalities receive authority from subject-specific statutes enacted by the General Assembly. When such statutes are ambiguous, they must be interpreted to grant any “additional and supplementary powers that are reasonably necessary or expedient to carry [the grant of authority] into execution and effect.”³

Two sources of statutory authority support a local government fee on non-reusable bags. The first source of authority is the general ordinance-making power, also referred to as the police power. At its highest ebb, this power allows local governments to regulate in areas that would rationally improve the general welfare.⁴ While this power is subject to some important exceptions, none of these would apply in the case of a bag fee.

¹ See *infra* note 24 for a discussion of how this memo addresses both city and county authority.

² N.C. CONST. art. VII, § 1.

³ N.C. GEN. STAT. § 160A-4 (broad construction statute for cities); *id.* § 153A-4 (same for counties); see also *Lanvale Props., LLC v. Cabarrus Cty.*, 731 S.E.2d 800, 809–10 (N.C. 2012) (laying out the history of North Carolina’s statutory construction of local government authority).

⁴ See *King v. Town of Chapel Hill*, 758 S.E.2d 364, 370 (N.C. 2014).

While the North Carolina Supreme Court has shown skepticism towards fees that constrain businesses' profit-making ability,⁵ this skepticism is not a concern here because the bag fee proposal *helps* businesses by nudging consumer behavior in a direction that would save businesses money.⁶ Because this policy offers a win-win-win for Durham's businesses, citizens, and environment, it certainly has a rational relation to the general welfare.

The second source of authority is the North Carolina Solid Waste Management Act ("SWMA").⁷ The SWMA supports efforts by local governments to reduce waste, as it recognizes that the best way to "manage" waste is to avoid its generation in the first place.⁸ In the case of non-reusable bags, a fee would encourage the use of reusable bags with the goal of reducing the total number of bags consumed in Durham. Reducing the number of bags consumed would then reduce the burden on Durham's Solid Waste

⁵ Trey Allen, *King v. Town of Chapel Hill: The Supreme Court Issues a Major Decision on the Police Power of Local Governments (Part 1)*, COATES' CANONS: NC LOC. GOV'T L. (June 26, 2014), <https://canons.sog.unc.edu/king-v-town-of-chapel-hill-the-supreme-court-issues-a-major-decision-on-the-police-power-of-local-governments-part-1/>.

⁶ The NCRMA has argued that a bag fee would cost businesses money, because they would spend time and resources remitting the fee back to the city or county and because they would owe credit card companies a portion of the fee. *See* Mackenzie Stasko, *Durham Leaders Considering Tax on Single-use Paper or Plastic Bags in City and County*, CBS17.COM (Oct. 12, 2021, 6:36 PM), <https://www.cbs17.com/news/local-news/durham-county-news/durham-leaders-considering-tax-on-single-use-paper-or-plastic-bags-in-city-and-county>. While these concerns may be legitimate, both of these costs would be outweighed by the financial benefit of no longer having to purchase a substantial number of bags in the first place. Furthermore, businesses surveyed in Durham support the fee. *See* WHITE PAPER, *infra* note 9, at 21–22 (indicating that 80% of Durham businesses surveyed were in favor of or neutral to the fee proposal).

⁷ N.C. GEN. STAT. § 130A Art. 9.

⁸ *Id.* § 130A-309.04(a).

Management Department and the various other divisions of local government that take responsibility for removing litter from the community's streets, parks, and waterways.⁹

Parts I.A and I.B find the authority to implement a bag fee under the general ordinance-making authority and SWMA, respectively. Part I.C addresses preemption and concludes that neither state law nor federal law provide any grounds to argue that a local government bag fee is preempted. Finally, Part I.D finds that the "North Carolina Commerce Clause," as some refer to Article II, § 24 of the state constitution, does not apply here because this proposal does not involve an unauthorized act of the General Assembly.

A. General Ordinance-Making Authority

Durham has authority to enact a bag fee pursuant to the state's general ordinance-making statute, which is sometimes referred to as the police power. The police power grants cities broad authority to "define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city."¹⁰ The provision for counties is nearly identical.¹¹ The Supreme Court of North Carolina has interpreted this language as authorizing local governments to adopt any ordinance with a "rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare."¹²

⁹ DUKE ENV'T L. AND POL'Y CLINIC, THE COST OF SINGLE-USE PLASTIC BAGS IN DURHAM, NORTH CAROLINA 28, tbl. 3 (2021) [hereinafter WHITE PAPER]. The white paper is accessible on Don't Waste Durham's website, <http://www.dontwastedurham.org/plastic-waste-prevention-policy>, and is also available at this permalink, <https://perma.cc/Q8JN-TVMW>.

¹⁰ N.C. GEN. STAT. § 160A-174(a).

¹¹ *Id.* § 153A-121(a).

¹² *See* King v. Town of Chapel Hill, 758 S.E.2d 364, 370 (N.C. 2014) (quoting State v. Ballance, 51 S.E.2d 731, 735 (N.C. 1949)).

The police power is not unlimited. In its last major opinion to interpret the issue, *King v. Town of Chapel Hill*, the Court was “unwilling to construe our General Statutes to give municipalities *unfettered* power to regulate in the name of health, safety, or welfare.”¹³ In *King*, the North Carolina Supreme Court detailed its position on the precise limits of the police power as applied to municipalities. The Court suggested that regulations impeding the rights of citizens to make a living—in *King*, a towing company owner claiming he could not make a profit post-regulation—generally exceed the police power. Thus, the Supreme Court struck down a provision in Chapel Hill’s ordinance setting out a precise fee schedule for all towing companies operating in the town because it found that the fee schedule impeded the ability of towing companies to turn a profit.¹⁴ The Court held that there was “no rational relationship” between the Town’s fee schedule “and protecting health, safety, or welfare.”¹⁵ However, the Court upheld provisions in Chapel Hill’s ordinance regulating certain notification requirements and requiring clear signage in tow-away zones because it saw those regulations as rational ways to reduce the potential for harmful conflicts between motorists and towing companies.

In light of *King*, a fee on non-reusable bags falls under the local government’s police power because there clearly *is* a rational relationship between a fee on non-reusable bags and the public health and welfare of the community. To document the many ways in which public health and welfare would be improved by a fee on non-reusable bags, the Duke Environmental Law and Policy Clinic and the Durham-based non-profit Don’t Waste Durham prepared a report describing the impacts of non-reusable

¹³ *Id.* at 374 (emphasis added).

¹⁴ *Id.* at 374.

¹⁵ *Id.* at 371.

bags on the Durham community.¹⁶ This report supports the conclusion that non-reusable bags are detrimental to the welfare of the citizenry of Durham and the dignity of the city and county because of their negative economic, environmental, and aesthetic impacts. From an economic standpoint, businesses in Durham spend an estimated \$2.6 million each year on non-reusable bags.¹⁷ From an environmental standpoint, plastic bags are inherently difficult and, in many cases, impossible to recycle, meaning most end up being landfilled.¹⁸ Paper bags, for their part, have a particularly high carbon footprint and are significantly more expensive for businesses.¹⁹ From an aesthetics standpoint, multiple litter surveys found that plastic bags make up approximately 3–8% of all litter in Durham and North Carolina.²⁰ And unfortunately, one needs only to take a ten-minute drive around Durham to see the impact of bag waste on the aesthetics of the area.

Controlling air and water pollution is necessary to public health and safety under North Carolina law.²¹ The Solid Waste Management Act, for example, states that its purpose is “promoting and preserving an environment that is conducive to public health and welfare, and preventing the creation of nuisances and the depletion of our natural resources.”²² Standing alone, this statement fulfills the requisite relation to public health,

¹⁶ WHITE PAPER, *supra* note 9.

¹⁷ *Id.* at 20, table 1.

¹⁸ *Id.* at 42.

¹⁹ *Id.* at 30.

²⁰ *Id.* at 27.

²¹ See N.C. GEN. STAT. § 130A-291(a) (“For the purpose of promoting and preserving an environment that is conducive to public health and welfare, and preventing the creation of nuisances and the depletion of our natural resources, the Department shall maintain a Division of Waste Management”); *cf.* Stanley v. Dep’t of Conservation & Dev., 199 S.E.2d 641, 655–56 (N.C. 1973) (holding that the General Assembly’s exercise of its own police power to address air and water pollution was appropriate).

²² N.C. GEN. STAT. § 130A-291(a).

safety, or welfare to deploy the police power. Viewed in full context of the General Assembly’s regulation of pollutants, addressed more fully in the next sub-section, North Carolina clearly recognizes that inefficient management of waste is a public health hazard.²³ Because the environmental degradation caused by the use of bags in Durham negatively affects public health, Durham has not just the power but a duty to act—and the police power provides the requisite authority.

While “police power” and “policing” are not the same thing, there is an apt analogy between the two: just as the best police department won’t make any arrests, the best solid waste department won’t send any trash to a landfill. While it may be idealistic, this is not an off-handed quip—it is precisely what the Solid Waste Management Act demands.²⁴

B. North Carolina Solid Waste Management Act

The SWMA presents a more concentrated source of authority for a bag fee. The SWMA delegates much of the State’s authority over the regulation of wastes to local governments, defined as “count[ies], cit[ies], town[s] or incorporated village[s].”²⁵ The

²³ See *Stanley*, 199 S.E.2d at 655 (“Regardless of where it occurs, the abatement and control of environmental pollution are immediately necessary to the public health, safety, and general welfare . . .”).

²⁴ See N.C. GEN. STAT. § 130A-309.04(a) (setting out hierarchy for managing solid waste, with “waste reduction at the source” listed first).

²⁵ *Id.* § 130A-290(43). Section 153A of the North Carolina statutes, which covers the authority of Counties, also discusses “[r]egulation of solid wastes.” *Id.* § 153A-136. This provision also grants authority to regulate solid wastes by ordinance at the county level, in a manner that is substantially similar to the Solid Waste Management Act itself. *Id.* § 153A-136(a). In a sense, this section may offer even broader authority, because an ordinance that regulates solid waste may “[i]nclude any other proper manner.” *Id.* § 153A-136(a)(7). Because this memo is meant to cover authority at both the city and county levels, for the sake of consistency, we discuss both city and county authority to regulate solid wastes under the Solid Waste Management Act itself.

question addressed here is whether Durham has the authority to regulate bags at the point of sale. In other words, can bags be regulated pursuant to the SWMA when they are transferred from a retailer to a customer? Based on the plain language and expressly-stated purpose of the statute, the answer must be yes.

The General Assembly emphasizes its preference for waste reduction at many points throughout the SWMA. Most explicitly, the statute sets forth a hierarchy for approaches to solid waste management.²⁶ At the top of the General Assembly's order of preference for solid waste management sits "[w]aste reduction at the source," followed immediately by recycling and reuse;²⁷ waste disposal is given as the last resort.²⁸ Based on this hierarchy alone, a bag fee aimed at reducing bag usage at the point of sale—the point of no return, at which it will inevitably become waste²⁹—is the purest form of fidelity to the statute's plain language.

The SWMA also includes an explicit, broad grant of authority to tailor waste programs to meet local needs. Section 130A-309.09A(a) mandates that "[e]ach unit of local government shall implement programs and take other actions that it determines are necessary to address deficiencies in [collection] service or [disposal] capacity required to meet local needs and to protect human health and the environment."³⁰ Durham's

²⁶ N.C. GEN. STAT. § 130A-309.04(a).

²⁷ *Id.* § 130A-309.04(a)(1).

²⁸ *Id.* § 130A-309.04(a)(6).

²⁹ On average, this occurs 12 minutes after conveyance from retailer to customer. Press Release, Walmart, Somewhere Beyond the Plastic Bag Lies the Future of Retail (Feb. 22, 2021), <https://corporate.walmart.com/newsroom/2021/02/22/somewhere-beyond-the-plastic-bag-lies-the-future-of-retail>.

³⁰ N.C. GEN. STAT. § 130A-309.09A(a).

municipal recycling program does not accept plastic bags,³¹ and bags erroneously sent into this stream may be costing the city tens of thousands of dollars every year.³² Due to the difficulty of recycling plastic bags properly³³—and the costs and challenges that arise when plastic bags invariably end up at recycling facilities³⁴—Durham would be justified in determining that a targeted, tailored fee is necessary to protect the environment and human health from the negative effects of plastic bags.³⁵

In addition to the mandate in § 130A.309.09A(a), § 130A-309.09C(c) explicitly authorizes local government to go beyond minimum state standards. The statute reads “[n]othing in this Part shall be construed to prevent the governing board of any county or municipality from providing by ordinance or regulation for solid waste management standards which are stricter or more extensive than those imposed by the State.”³⁶ This provision demonstrates that the General Assembly did not intend to preempt local authority to implement solid waste management policies. Preemption, discussed below in Part I.C, means that local governments generally may not regulate by ordinance fields for which there already exists a complete and integrated statewide regulatory scheme. The General Assembly delegates a lot of decision-making to local governments throughout

³¹ *Recycling Guidelines*, CITY OF DURHAM, <https://durhamnc.gov/866/Recycling-Guidelines> (last accessed Oct. 20, 2021) (Search plastic bags. This will display a message stating “[w]e do not accept plastic bags in our blue bins but you can find a store close to you that does”).

³² This cost would be indirect, as the City of Durham contracts out its recycling to Sonoco Recycling. *See* WHITE PAPER, *supra* note 9, at 23.

³³ *See infra* notes 54–60 and accompanying text.

³⁴ *See* WHITE PAPER, *supra* note 9, at 22 (“An estimated 2.1% of recycled materials (by weight) in Durham is composed of plastic film that should not be there.”).

³⁵ One particular human health effect is on the recycling workers themselves, who are “harnessed and crawl through the sorters to manually cut the tangled plastic film from the machinery.” WHITE PAPER, *supra* note 9, at 22.

³⁶ N.C. GEN. STAT. § 130A-309.09C(c).

the SWMA, but this particular provision shows unequivocally that the statute is not intended to preempt local regulation of waste.

Ultimately, it would be impossible for the statute to accomplish its primary purpose—promoting the reduction of solid waste—if it did not allow for the regulation of materials before they became waste. Of course, this power is not unlimited; there must be some rational connection between the regulation of materials before they become waste and the statute’s goal of preventing solid waste. This reasonableness principle is stated in the “purposes” section of the SWMA: a purpose of the Act is to “[e]ncourage counties and municipalities to utilize *all means reasonably available* to promote efficient and proper methods of managing solid waste.”³⁷

The SWMA gives local governments broad, but far from unlimited, authority. For example, Durham could not, under the auspices of the SWMA, ban open-bed trucks on its streets in the hopes that a lack of trucks would prevent litter from flying off unsecured loads (i.e., waste that is not properly tied down). This hypothetical regulation would not be “reasonabl[e]” because there are many other ways to reduce or prevent waste that would be less disruptive and more effective than a truck ban. In contrast, a bag fee is not simply rational but a necessary and proven way to prevent the unsustainable and costly accumulation of non-reusable bag waste.³⁸ Because of the difficulties with recycling bags,³⁹ regulating bags at the point of sale is the last realistic time to catch them before

³⁷ *Id.* § 130A-309.03(b)(9) (emphasis added).

³⁸ The white paper details how, among a multitude of policy choices, the proposed bag fee stands out as having the greatest benefits at the lowest cost. This conclusion is supported by scientific literature. WHITE PAPER, *supra* note 9, at 36–40.

³⁹ *Id.* at 10–12.

they become solid waste. Indeed, regulation at the point of sale is as narrow as this kind of regulation can be tailored.

This tailoring fits the needs of Durham and all of its stakeholders, as a fee on bags would benefit the citizens of Durham in a multitude of ways. Aesthetically, Durham would be cleaner and urban streams and storm drains would be less burdened by waste. As a result, Durham’s sources of drinking water would receive less plastic pollution.⁴⁰ Durham residents would also benefit from the savings that would result at the Solid Waste Management Department, from fewer jams of recycling equipment and less waste processed overall. Finally, Durham’s businesses are the biggest potential savers, with as much as \$2.6 million to be saved from forgone purchases of non-reusable bags.⁴¹

As set out above, the SWMA by its own terms grants substantial deference to local governments.⁴² The exact contours of that deference are still ambiguous and have not been tested by another North Carolina local government. Such ambiguity cuts *in favor* of the legality of the bag fee because North Carolina’s broad construction statutes demand that ambiguous local government authority be construed broadly.⁴³ Specifically, ambiguous “grants of power shall be construed to include any additional and

⁴⁰ Durham does not track microplastic pollution in its drinking water, nor does it track litter, trash, or debris in its streams, but it is well-known that littered plastic eventually makes its way into water bodies. For example, plastic bags made up 8.4% of litter collected by number in a recent survey. WHITE PAPER, *supra* note 9, at 27; *see also id.* at 15 (“While most litter is produced on land, it ultimately makes its way downstream – often via stormwater discharge – and accumulates in the oceans.”).

⁴¹ *Id.* at 20, table 1.

⁴² N.C. GEN. STAT. § 130A-309.09A(a).

⁴³ *See Lanvale Props., LLC v. Cabarrus Cty.*, 731 S.E.2d 800, 810 (N.C. 2012) (holding that the broad construction statutes apply only when the authority-granting statute is ambiguous).

supplementary powers that are reasonably necessary or expedient to carry them into execution and effect.”⁴⁴

The goal of the SWMA is the reduction of waste at the source.⁴⁵ Coupled with the broad grants of authority set forth in §§ 130A-309A(a) and 130A-309C(c), a local government is empowered to take steps “reasonably necessary or expedient” to carry this goal into effect.⁴⁶ A narrowly-tailored bag fee is both “reasonably necessary” and “expedient.”

As a bag fee is a market-based solution designed to help businesses, it is a better policy for Durham in 2021 than a bag ban.⁴⁷ First, a bag fee is less disruptive than a bag ban, as it allows businesses to use up their existing inventory at a time of supply chain difficulties.⁴⁸ Second, a fee allows consumers to choose which conveyance is right for them while making sure they appreciate the full costs of their choice. Under our proposal, businesses would retain the ability to provide their customers with bags. However, evidence from other cities suggests that businesses would likely need to purchase fewer bags, allowing them to reinvest those savings.⁴⁹ Finally, any monies collected from the bag fee would be used directly to solve the problems that bags cause, including investments in community-based reuse and waste reduction solutions in the very

⁴⁴ N.C. GEN. STAT. § 160A-4; *see also* King v. Town of Chapel Hill, 758 S.E.2d 364, 369 (N.C. 2014).

⁴⁵ N.C. GEN. STAT. § 130A-309.04(a)(1).

⁴⁶ *Id.* §§ 153A-4, 160A-4.

⁴⁷ Our analysis also provides support for the legality of a bag ban.

⁴⁸ *Cf.* Peter S. Goodman, *How the Supply Chain Broke, and Why It Won't Be Fixed Anytime Soon*, N.Y. TIMES (Oct. 22, 2021), <https://www.nytimes.com/2021/10/22/business/shortages-supply-chain.html> (describing the general disruption of global supply chains that is ongoing in late 2021).

⁴⁹ *See* WHITE PAPER, *supra* note 9, at 20, 38–40.

communities bearing a disproportionate burden of the cost of bag waste. A bag ban would not generate revenue to allow for such programs.

Critically, the provision of non-reusable plastic bags currently violates the SWMA because they cannot be recycled economically.⁵⁰ The SWMA states that “[n]o plastic bag shall be provided at any retail outlet to any retail customer to use for the purpose of carrying items purchased by that customer unless the bag is composed of material that is recyclable.”⁵¹ The SWMA defines “recyclable material” as “those materials which are capable of being recycled and which would otherwise be processed or disposed of as solid waste.”⁵² Non-reusable plastic bags meet the second part of the test, but fail the first part. While technical processes exist to recycle plastic bags, these processes are not economically feasible. During COVID-19, plastic bag recycling, which is slow in the best of times,⁵³ slowed even further.⁵⁴ Most curbside recycling programs,

⁵⁰ This analysis focuses on non-reusable bags, but a similar case could be made for increased enforcement of the existing ban on non-recyclable polystyrene food packaging. The SWMA states that “[n]o person shall distribute, sell, or offer for sale in this State any polystyrene foam product that is to be used in conjunction with food for human consumption unless the product is composed of material that is recyclable.” N.C. GEN. STAT. § 130A-309.10(d)(1).

⁵¹ *Id.* § 130A-309.10(c)(1).

⁵² *Id.* § 130A-290(a)(26).

⁵³ Dan Glaun, *The Plastic Industry Is Growing During COVID. Recycling? Not So Much.*, PBS FRONTLINE (Feb. 17, 2021), <https://www.pbs.org/wgbh/frontline/article/the-plastic-industry-is-growing-during-covid-recycling-not-so-much/> (“[A] lot of plastic waste that technically was recyclable — polystyrene foam and PVC containers, food-stained packaging — ended up in landfills, because it was either technologically impossible or too expensive to separate from general waste.”); *see also* Joe Brock, *The Plastic Pandemic*, REUTERS INVESTIGATES (Oct. 5, 2020, 7:00 AM), <https://www.reuters.com/investigates/special-report/health-coronavirus-plastic-recycling/> (explaining that plastics recycling targets and goals are often not met; manufacturers blame this on the fact that recycled plastic costs more than new, or “virgin,” plastic).

⁵⁴ *See* Karine Vann, *The Unfulfilled Promises of Plastic Film Recycling*, WASTE DIVE (Jan. 5, 2021, 8:21 AM), <https://www.wastedive.com/news/plastic-film-bag-takeback-chemical-recycling-coronavirus/592503/> (quoting the leader of a plastics industry group

including Durham's,⁵⁵ do not accept plastic bags and film because they are so easily contaminated and recycling equipment cannot handle them, which makes them practically impossible to recycle.⁵⁶ Furthermore, the private sector in Durham provides a woefully insufficient number of plastic bag drop-off points to make recycling plastic bags feasible for most people.⁵⁷

On a related note, the SWMA states the “goal . . . that at least twenty-five percent (25%) of the plastic bags provided at retail outlets in the State to retail customers for carrying items purchased by the customer be recycled.”⁵⁸ It is unknown whether this goal is being fulfilled, or even tracked.⁵⁹ The EPA estimates that only 10% of plastic bags,

as admitting that, during COVID, “[a] lot of stores got rid of their front-of-house [plastic film] recycling bins”).

⁵⁵ *Recycling Guidelines*, *supra* note 31. On a related note, the SWMA requires that local governments “make a good-faith effort to achieve the State’s forty percent municipal solid waste reduction goal.” N.C. GEN. STAT. § 130A-309.04(c). Enacted in 1989, this goal was supposed to be achieved by 2001. *See Recycling Fees*, WAKE COUNTY N.C., <https://www.wakegov.com/departments-government/tax-administration/real-estate/recycling-fees>. While this specific goal is no longer in effect and hasn’t been updated, it clearly illustrates that the SWMA holds to the principle of aggressive waste reduction.

⁵⁶ WHITE PAPER, *supra* note 9, at 10.

⁵⁷ The American Chemistry Council runs a website called Plastic Film Recycling, which houses a tool called the “Drop Off Directory,” a database of places where consumers can drop off plastic bags and other plastic film for recycling. *Find a Drop Off Location*, PLASTIC FILM RECYCLING, <https://www.plasticfilmrecycling.org/recycling-bags-and-wraps/find-drop-off-location/#jsfdir> (last visited Oct. 28, 2021). There are only 27 locations within Durham listed in the “Drop Off Directory.” *Id.*

⁵⁸ N.C. GEN. STAT. § 130A-309.10(c)(2).

⁵⁹ DELPC reviewed five of North Carolina’s annual waste reports from the 1990s through the 2010s. None of the reports referenced this 25% goals, suggesting that, even in the immediate aftermath of the goal’s enactment, it was not actively tracked. *See infra* note 83 for related details regarding the failure to reach the SWMA’s goal of 40% waste reduction by 2001 (relative to 1992).

sacks, and wraps were recycled nationwide in 2018,⁶⁰ which suggests that North Carolina is likely falling far short of this goal.

To conclude, we return to another stated purpose of the Solid Waste Management Act: to “[p]romote the education of the general public and the training of solid waste professionals to reduce the production of solid waste, to ensure proper disposal of solid waste, and to encourage recycling.”⁶¹ The emphasis the General Assembly placed on waste reduction in the SWMA was neither accidental nor incidental. Rather, waste reduction lies at the very core of the SWMA. This reading reflects the General Assembly’s common-sense recognition that the most efficient and best waste management program avoids the production of waste in the first place.

C. A Bag Fee is not Preempted by Existing Statutes

No existing North Carolina state law preempts regulation of bags by local governments. While preemption due to affirmative enactments on this topic by the state legislature or Congress would prevent Durham from enacting this ordinance,⁶² none of the General Assembly’s prohibitions relevant to the general ordinance-making power preempts a bag fee.

To be valid, a city or county ordinance must be consistent with state and federal law.⁶³ Under North Carolina law, inconsistency is found with city ordinances where:

⁶⁰ UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ADVANCING SUSTAINABLE MATERIALS MANAGEMENT: 2018 TABLES AND FIGURES (December 2020).

⁶¹ N.C. GEN. STAT. § 130A.309.03(b)(10).

⁶² *See* 5 MCQUILLIN MUN. CORP. § 15:18 (3d ed.) (“It is a general rule . . . that ordinances regulating subjects, matters, and things on which there is a general law of the state must be in harmony with that state law, and in any conflict between an ordinance and a statute the latter must prevail . . .”).

⁶³ N.C. GEN. STAT. § 160A-174(b).

- (4) The ordinance purports to regulate a subject that cities are expressly forbidden to regulate by State or federal law; [or]
- (5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation[.]⁶⁴

This memo addresses one possible issue of federal preemption before analyzing state preemption. No statutes at either level preempt a local government fee on plastic bags.

Federally, the Resource Conservation and Recovery Act (RCRA)⁶⁵ regulates solid and hazardous waste disposal broadly, but in a manner that does not preempt a local bag fee ordinance. The EPA promulgated regulations defining the “[r]equirements for State regulatory powers” under RCRA.⁶⁶ This section defines the requirements for states to be in compliance with § 4003(4) of RCRA, which sets “minimum requirements for approval of [state or regional solid waste] plans.”⁶⁷ The regulation states that state regulatory powers “[s]hall be adequate to enforce solid waste disposal standards which are equivalent to *or more stringent than* the criteria for classification of solid waste disposal facilities.”⁶⁸ Not only does the relevant section of RCRA defer implementation power to the states, but it also expressly allows the states to implement standards more stringent than federal standards. Thus, the plain language of RCRA and its implementing regulations is inconsistent with any claims of preemption.

The caselaw on this issue (or lack thereof) supports our interpretation of the plain language of RCRA. A number of cities, counties, and states across the country have

⁶⁴ *Id.* This provision applies to cities, but the preemption policy would be the same for county ordinances. *See id.* § 153A-136 (“Any [county] ordinance adopted pursuant to this section shall be consistent with and supplementary to any rules adopted by the Commission for Public Health or the Department of Environmental Quality.”).

⁶⁵ 42 U.S.C. § 6901 et. seq.

⁶⁶ 40 C.F.R. § 256.21.

⁶⁷ Resource Conservation and Recovery Act § 4003, 42 U.S.C. § 6943.

⁶⁸ 40 C.F.R. § 256.21(a) (emphasis added).

enacted bag fees or bag bans,⁶⁹ and we have identified no lawsuits that have posed a federal preemption argument.⁷⁰ Furthermore, RCRA does not address whether waste may be regulated at the time of purchase rather than at the time of disposal. Thus, there are no explicit federal limits on state power to enact a bag fee or to delegate that power to local governments.

A greater set of North Carolina laws could preempt environmental ordinances, but they do not preempt a local government fee on non-reusable bags. One of these statutes, informally known as the “Hardison Amendment 2.0,”⁷¹ implicates RCRA. Hardison 2.0 established a broad prohibition on environmental regulations that are more stringent than federal rules or statutes. However, the prohibition therein applies only to “agenc[ies] authorized to implement and enforce State and federal environmental laws.”⁷² In subsection (b) of the Amendment, such agencies are limited to a set list of state-level administrative agencies, including the Department of Environmental Quality (“DEQ”), the Environmental Management Commission (“EMC”), and Wildlife Resources Commission.⁷³ Furthermore, when there is no federal regulation on point, Hardison 2.0

⁶⁹ For a list of states, counties, and municipalities that have adopted laws or ordinances regulating non-reusable bags, see *National List of Local Plastic Bag Ordinances*, CALIFORNIANS AGAINST WASTE, <https://www.cawrecycles.org/list-of-national-bans>.

⁷⁰ In *Soc. of Plastics Indus., Inc. v. City of New York*, 326 N.Y.S.2d 788 (Sup. Ct. 1971), the plaintiff argued that a local tax on rigid and semi-rigid plastic containers was preempted by the federal Solid Waste Disposal Act, which was the precursor to RCRA. The court held that plaintiff did not sufficiently pursue the issue at trial to meet its burden of proof on this claim, although it did not specify what standard of proof would have been required.

⁷¹ N.C. GEN. STAT. § 150B-19.3. Hardison was re-enacted in 2011, effectively reinstating a group of statutory provisions that had set forth such restrictions from the early 1970s until their repeal in 1995. 1995 N.C. Laws Ch. 507, § 27.8 (repealing the air and water Hardison Amendments).

⁷² N.C. GEN. STAT. § 150B-19.3.

⁷³ *Id.* § 150B-19.3(b).

does not apply.⁷⁴ Because RCRA does not set a performance standard for waste reduction, nor address fees imposed at the point of purchase, it does not trigger Hardison 2.0.

As mentioned above, the Solid Waste Management Act also does not preempt local bag-related ordinances. The Act confers authority to “administer and enforce” its provisions upon two covered statewide entities, the DEQ and EMC.⁷⁵ Critically, however, the SWMA grants local governments independent authority to “implement programs and take other actions that it determines are necessary to address deficiencies in service or capacity required to meet local needs and to protect human health and the environment.”⁷⁶

Most importantly, the SWMA explicitly disclaims any potential preemption. The section of the Act concerning the additional powers granted to local governments states that:

[n]othing in this Part [the non-hazardous solid waste provisions of Article 9] shall be construed to prevent the governing board of any county or municipality from providing by ordinance or regulation for solid waste management standards which are stricter or more extensive than those imposed by the State solid waste management program and rules and orders issued to implement the state program.⁷⁷

Instead of setting a single solid waste management plan for the state and requiring local governments to follow it, the legislature wrote into the SWMA that the State should:

⁷⁴ Richard Whisnant, UNC School of Government, *Why Do States Stifle Their Own Environmental Regulatory Innovations?*, ENV’T L. IN CONTEXT (Feb. 2, 2015), <https://elinc.sog.unc.edu/why-do-states-stifle-their-own-environmental-regulatory-innovations>.

⁷⁵ N.C. GEN. STAT. § 130A-4(c).

⁷⁶ *Id.* § 130A-309.09A(a).

⁷⁷ *Id.* § 130A-309.09C(c).

- “[A]ssist units of local government with solid waste management;”⁷⁸
- “Encourage regional solid waste management projects;”⁷⁹
- “Encourage coordinated local activity for solid waste management;”⁸⁰
- “Provide planning, technical, and financial *assistance* to units of local government . . . for reduction, recycling, reuse, and processing of solid waste ;”⁸¹
- Provide in the State-level solid waste management plan “planning *guidance* and technical *assistance* to counties and municipalities” to assist them in the “development and implementation of solid waste reduction programs” and in “meeting the municipal solid waste reduction goals established” by the SWMA.⁸²

At nearly every turn in the SWMA, the General Assembly expresses an intent to set broad goals of solid waste management at the state level but leaves the implementation of those goals to the local governments themselves. It consistently and explicitly casts the state as a facilitator, a supporter, an assistant, or a guide for local initiatives. To that end, it confers on local governments the responsibility to “establish and maintain a solid waste reduction program.”⁸³ Apart from stating that demolition debris need not be disposed of in a landfill,⁸⁴ and encouraging separation of recyclables in the waste stream,⁸⁵ the

⁷⁸ *Id.* § 130A-309.04(a) (emphasis added).

⁷⁹ *Id.* § 130A-309.04(b) (emphasis added).

⁸⁰ *Id.* § 130A-309.06(a)(3) (emphasis added).

⁸¹ *Id.* § 130A-309.06(a)(4) (emphasis added).

⁸² *See id.* § 130A-309.07(3)–(4) (emphasis added).

⁸³ *Id.* § 130A-309.09B(a). It also required that “[u]nits of local government shall make a good-faith effort to achieve the State’s forty percent (40%) municipal solid waste reduction goal.” *Id.* § 130A-309.09A(b). This goal was not achieved. In 2002, a state report found that waste disposal had actually *increased 14%* during the statutory timeframe (FY 1991-92 through FY 2001-02). STATE OF NORTH CAROLINA, DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, NC SOLID WASTE MANAGEMENT ANNUAL REPORT FY 01-02 8 (2002).

⁸⁴ *See* N.C. GEN. STAT. § 130A-309.09B(a)(1). This sub-section is titled “[l]ocal government waste reduction programs.” *Id.*

⁸⁵ *See id.* § 130A-309.09B(a)(3).

General Assembly places no qualifications on the solid waste reduction programs chosen by local governments. Indeed, there are no specific limitations on the local solid waste reduction programs envisioned other than their alignment with the waste reduction goals set by statute.⁸⁶ Thus viewed in full context, the SWMA is clearly *granting* local governments authority to regulate in the solid waste space, not *preempting* them from doing so.

A related but distinct issue is whether the General Assembly *could in the future* preempt local government authority to regulate non-reusable bags. The State has enacted a number of express prohibition statutes on certain relatively narrow subjects, such as the maximum size for soft drinks.⁸⁷ The General Assembly also repealed its own ban on plastic bags in the Outer Banks.⁸⁸ Notably, this ban had been in place for eight years, had been effective in reducing plastic bag litter, and was widely supported by local businesses, including the Outer Banks Chamber of Commerce.⁸⁹ While that repeal is not a perfect comparison because it was motivated, at least in part, by a constitutional question not present here,⁹⁰ it could be interpreted to evince some hostility to local regulation of plastic bags.

The General Assembly would be less likely to intervene in response to a fee on non-reusable bags in Durham for two reasons. First, in the case of the Outer Banks bag ban repeal, the General Assembly was simply undoing its own prior action. Here,

⁸⁶ See *id.* § 130A-309.09A(b).

⁸⁷ *Id.* § 160A-203.

⁸⁸ S.L. 2017-209; see also Talia Sechley & Michelle Nowlin, *Outer Banks Bag Ban Latest Victim of Political Posturing*, NEWS & OBSERVER (Oct. 5, 2017), <https://www.newsobserver.com/opinion/op-ed/article177310541.html>.

⁸⁹ See Sechley & Nowlin, *supra* note 88.

⁹⁰ See Bonner & Doran, *infra* note 92.

undoing Durham’s bag fee would require affirmative intervention in the form of new law. Furthermore, this new law would be acting against the direction of popular opinion, effectively overriding the will of Durham’s voters, and potentially those of other local governments that are considering implementing similar policies.⁹¹ Second, the Outer Banks bag ban raised an active question as to whether that type of regulation was an unconstitutional local act under Article II, § 24 of the North Carolina Constitution.⁹² Here, the SWMA both permits and prescribes local governments to tailor their own waste management regulations to local needs. Thus, state preemption would involve amending or writing around the SWMA, which could invite uncertainty and unintended consequences for the State’s entrenched waste management regime.

D. “North Carolina Commerce Clause” is Inapplicable Here

The North Carolina Retail Merchants Association (“NCRMA”) has suggested that a bag fee, or bag ban, would be impermissible under the provision of the North Carolina Constitution prohibiting the regulation of commerce by local acts.⁹³ This allegation is completely inapposite here because the provision, Article II, § 24, applies to regulation of local acts *by the General Assembly*, not the local governments themselves. Prohibiting the General Assembly from regulating trade or labor on a locality-by-locality basis makes

⁹¹ To the knowledge of DELPC, there are organizations in Wilmington, Beaufort, Asheville/Buncombe, and Carteret Counties, as well as Raleigh and Fayetteville, working to advance similar proposals.

⁹² Lynn Bonner & Will Doran, *The End May be Near for Outer Banks Plastic Bag Ban*, NEWS & OBSERVER (Aug. 30, 2017), <https://www.newsobserver.com/news/politics-government/politics-columns-blogs/underthe-dome/article170378722.html> (“Rep. Chuck McGrady, a Hendersonville Republican, said the ban is ‘is pretty clearly unconstitutional’ because it applies only to a few beach towns and not statewide.”).

⁹³ N.C. CONST. art. II, sec. 24(1)(j). The NCRMA has referred to this provision as the “North Carolina Commerce Clause” in some of its past correspondence related to this proposal.

good sense for a number of reasons, including that this authority is explicitly and implicitly granted to local governments *by the General Assembly itself* through the general ordinance-making authority and the SWMA, among many other statutes”. Local representatives know their constituents and are more directly responsive to their needs. They are better positioned to tailor local regulations that might affect trade or labor within the limits set forth by the General Assembly’s authority-granting statutes, like the SWMA. The argument set forth by the NCRMA is different: it has argued that the local governments themselves cannot regulate the “trade” of bags on a local level. This is the opposite of what the drafters of the North Carolina Constitution wrote and intended.

2. A Charge on Non-Reusable Bags Would Be a Properly-Enacted Fee

The NCRMA has asserted that Durham lacks authority to impose a “tax.” Although the NCRMA is correct that the North Carolina Constitution limits Durham’s authority to authorize taxes, the argument is misplaced because this proposal would impose a fee, not a tax.

This Part analyzes the various aspects of how Durham’s authority to impose a bag fee is legally distinct from a tax. Part II.A continues the work of Part I in establishing that the City and County of Durham have authority to impose fees under the state public enterprise statute and the Solid Waste Management Act. Part II.B dives deeper into the question of statutory authority by analyzing how a bag fee would fulfill a legitimate public purpose, as that concept has been defined by the North Carolina Supreme Court. Part II.C analyzes the bag fee proposal against North Carolina’s definition of a tax and finds that it meets none of the three conditions of a tax. Part II.D concludes that sales tax would not apply to the bag fee itself.

A. North Carolina Local Governments Have the Authority to Impose Fees on Bags

A local government has the explicit authority to impose fees, subject to a public hearing requirement, for use of the services to be furnished by any public enterprise.⁹⁴ The statutory definition of “public enterprise” includes “solid waste collection and *disposal systems* and facilities.”⁹⁵ The exact extent of this authority is ambiguous because it is not clear what is meant by the term “disposal systems.” Under the broad waste reduction-based language in the Solid Waste Management Act, this term could readily be interpreted to encompass regulation of bags before they become waste.⁹⁶ The SWMA itself is also ambiguous with respect to the methods or tools local governments may use to implement the statute.⁹⁷ When statutes granting cities authority are ambiguous, they must be interpreted to grant any “additional and supplementary powers that are reasonably necessary or expedient to carry [the grant of authority] into execution and effect.”⁹⁸ The relevant statute for counties is substantially similar.⁹⁹

In addition to statutory interpretation, a close reading of relevant case law also provides support for local government authority to impose fees on non-reusable bags. In *Homebuilders Association of Charlotte, Inc. v. City of Charlotte*,¹⁰⁰ the North Carolina Supreme Court stated that “municipal power to regulate an activity implies the power to

⁹⁴ N.C. GEN. STAT. § 160A-314(a) (cities); *id.* § 153A-277(a) (counties).

⁹⁵ *Id.* § 160A-311(6) (emphasis added).

⁹⁶ *See supra* Part I.B.

⁹⁷ *Id.*

⁹⁸ N.C. GEN. STAT. § 160A-4 (broad construction statute for cities).

⁹⁹ *Id.* § 153A-4 (“[T]he provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power.”).

¹⁰⁰ *Homebuilders Ass’n of Charlotte, Inc. v. City of Charlotte*, 442 S.E.2d 45, 49 (N.C. 1994).

impose a fee in an amount sufficient to cover the cost of regulation.”¹⁰¹ Even in situations in which the legislature has made clear that the costs of the regulations in question will be paid for through taxes, the local government is not precluded from deciding to impose fees for use.¹⁰² These fees would, however, remain subject to reasonableness analyses and would need to be tailored to meet the actual costs of the regulatory program.¹⁰³

In two relevant cases, North Carolina courts have declined to broadly construe local power when they found the underlying statutes to be unambiguous. These cases, *Lanvale Properties, LLC v. County of Cabarrus*¹⁰⁴ and *Quality Built Homes Inc. v. Town of Carthage*,¹⁰⁵ are distinguishable from the bag fee proposal. In *Lanvale Properties*, the court held that the relevant enabling statute, which authorized counties to enact zoning ordinances, did not give counties broad implied powers.¹⁰⁶ In *Quality Built Homes*, the court read the plain language of the enabling statute, the public enterprise statute,¹⁰⁷ as clearly allowing municipalities to charge only for the contemporaneous use of water and sewer, not *future* use.¹⁰⁸ On that basis, the court invalidated city ordinances levying fees for *future* use of water and sewer.¹⁰⁹ In sum, the statutes in *Lanvale* and *Quality Built*

¹⁰¹ *Id.* at 49.

¹⁰² *See id.* at 51 (“The City has chosen a reasonable alternative by requiring that those who desire a particular service bear some of the costs associated with the provision of that service.”).

¹⁰³ *See id.*

¹⁰⁴ 731 S.E.2d 800 (N.C. 2012).

¹⁰⁵ 789 S.E.2d 454 (N.C. 2016).

¹⁰⁶ *Lanvale Properties, LLC*, 731 S.E.2d at 803, 818.

¹⁰⁷ *See supra* notes 94–95 and accompanying text.

¹⁰⁸ *Quality Built Homes*, 789 S.E.2d at 458 (stating that it was well established that the power to impose fees for future use required the language “services *to be* furnished,” and the public enterprise statutes did not include the prospective “to be” language).

¹⁰⁹ *Id.* at 459.

Homes included specific and detailed lists regarding the tools or methods local governments were supposed to use in implementing them, and were thus not ambiguous.

In contrast, the Solid Waste Management Act states that local governments *must* assess and address solid waste but does not attempt to tell them *how* to do so. The absence of an explicit directive empowers the City and County of Durham to make their own determinations about what actions are necessary to address solid waste, and then to take those actions. In fact, the statute states that “[e]ach unit of local government *shall* implement programs and *take other actions that it determines are necessary*.”¹¹⁰ Because the statutory language is broad and ambiguous, in that it does not dictate details, it triggers the broad-construction statutes.¹¹¹ Courts are thus required to broadly construe the powers of local government conveyed by the statute. When read in conjunction with the fee-authorizing provision of the public enterprise statute, local government authority to regulate bags under the SWMA must include the power to implement a fee.

While Durham would be the first locality in North Carolina to place a fee on non-reusable bags, many local governments in other states have done so. In Colorado, for example, the City of Aspen enacted a 20-cent fee on paper bags. Colorado has a statutory provision that places procedural limitations on the assessment of taxes;¹¹² in that way, it is similar to Article II, § 23 of the North Carolina Constitution. When a group challenged

¹¹⁰ N.C. GEN. STAT. § 130A-309.09A(a) (emphasis added).

¹¹¹ *Id.* § 160A-4 (broad construction statute for cities); *id.* § 153A-4 (same for counties).

¹¹² This provision is known as the Taxpayer’s Bill of Rights (“TABOR”), and it requires that Colorado voters approve each new tax. *Colo. Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506, 508 (Colo. 2018).

Aspen's bag fee on grounds that it was really a "tax" that violated state law, the Supreme Court of Colorado upheld the fee.¹¹³ The Supreme Court of Colorado noted that:

when a government exercises its authority pursuant to its police power to regulate for health and safety, and imposes a charge as part of a regulatory regime, and the charge is reasonably related to the direct or indirect cost of regulating the activity, such a charge is not a tax subject to voter approval.¹¹⁴

Of course, Colorado is not North Carolina, but the legal question is analogous: the City of Aspen had authority to regulate non-reusable bags, and each state court that examined the issue found that the charge placed on those bags was a fee, not a tax.¹¹⁵ Courts in North Carolina can and should draw the same conclusion.

B. A Fee on Bags Has a Legitimate Public Purpose Authorized by the Solid Waste Management Act

Fees imposed by local governments may be collected only for purposes set forth in the statutory grant of authority to assess fees.¹¹⁶ A bag fee would manage solid waste by reducing waste at the source, consistent with the explicit purposes and authorities of the Solid Waste Management Act. Importantly, however, a bag fee would also cover the costs associated with improper disposal of bags, through litter pickup, clearing of stormwater drains, and the added costs of recycling when bags are erroneously placed in that waste stream.¹¹⁷

¹¹³ *See Colo. Union of Taxpayers Found.*, 418 P.3d at 515–16.

¹¹⁴ *Id.* at 508.

¹¹⁵ *Id.* at 509.

¹¹⁶ *See Smith Chapel Baptist Church v. City of Durham*, 517 S.E.2d 874, 881 (N.C. 1999) (holding a city-imposed fee collected for purposes beyond the unambiguous and explicit statutory authority to be impermissible); *Manning v. County of Halifax*, 166 N.C. App. 279 (2004) (holding a fee imposed by the county that raised revenue in excess of the relevant costs to violate the statutory authority limiting fee collection to such costs).

¹¹⁷ WHITE PAPER, *supra* note 9, at 20, table 1.

Whether a fee is within the statutory grant of local authority hinges on the language of the enabling statute. Two seminal cases guide this analysis. In *Smith Chapel Baptist Church v. City of Durham*, the North Carolina Supreme Court determined that a fee imposed by the City of Durham was collected for a purpose not authorized by the state stormwater statutes.¹¹⁸ The relevant statute stated that fees “may not exceed the city’s cost of providing a stormwater and drainage system.”¹¹⁹ Thus, the city could not collect fees under the stormwater statutes for purposes such as ordinance and policy development, inspections, outreach, and other stormwater related activities.¹²⁰ Because the city explicitly used the fee for purposes other than funding stormwater and drainage construction, the court struck down the city’s fee.

Similarly, in *Manning v. County of Halifax*,¹²¹ the North Carolina Supreme Court struck down a county fee for exceeding statutory authority. Although the County had the authority to assess fees for the collection of solid waste and use of disposal facilities, N.C. Gen. Stat. § 153A-292(b) explicitly stated that such fees could not exceed the costs of collection or operation of the disposal facilities.¹²² During trial, the County conceded that the revenue generated from the fee exceeded the costs of providing collection services and disposal facilities.¹²³ Thus, the court invalidated the fee because it exceeded the County’s statutory authority.¹²⁴

¹¹⁸ N.C. GEN. STAT. §§ 160A-311–314; *see Smith Chapel*, 517 S.E.2d at 881.

¹¹⁹ *Smith Chapel*, 517 S.E.2d at 878 (quoting N.C. GEN. STAT. § 160A–314(a), (a1)).

¹²⁰ *See Smith Chapel*, 517 S.E.2d. at 878–81.

¹²¹ *Manning*, 166 N.C. App. at *4.

¹²² *Id.* at *2–4.

¹²³ *Id.* at *4.

¹²⁴ *Id.*

The application of the statute in *Manning* can be distinguished from a prior case, *Barnhill Sanitation Service, Inc. v. Gaston County*.¹²⁵ In *Barnhill*, the court of appeals held that the County “acted pursuant to its authority under [§] 153A–292 to set reasonable fees for the use of its available landfills” when it imposed a simple volume-based fee on landfill use.¹²⁶ As was the case in *Barnhill*, the authority to assess a bag fee under the plain language SWMA is clear. The Act authorizes local governments to “implement programs and take other actions that it determines are necessary to address deficiencies in service or capacity required to meet local needs and to protect human health and the environment.”¹²⁷ Here, the purpose of the proposed bag fee is to address an inefficiency in consumer behavior and a gap in the recycling system that negatively affects human and environmental health. The proposed bag fee is well within the boundaries of the statutory authority of local governments to manage solid waste.

C. A Fee on Bags Does Not Meet Any of N.C.’s Three Conditions for a Tax

A mandatory charge paid directly by a consumer who chooses to use a non-reusable bag is a fee under the North Carolina Constitution.¹²⁸ North Carolina’s courts have ruled that a charge is a “tax” under Article II, § 23 of the state constitution only where it is “levied and collected as a contribution to maintenance of general government, and . . . imposed upon the citizens in common at regularly recurring periods for the purpose of providing continuous revenue.”¹²⁹ This definition can be re-framed as a three-

¹²⁵ *Id.* at *3–4.

¹²⁶ *Barnhill Sanitation Service, Inc. v. Gaston County*, 362 S.E.2d 161, 167 (1987), disc. rev. denied, 366 S.E.2d 856 (1988) (mem.).

¹²⁷ N.C. GEN. STAT. § 130A-309.09A(a).

¹²⁸ See N.C. CONST. art. II § 23 (laying out what the General Assembly must do to impose a tax or to allow a county or city to impose a tax).

¹²⁹ See N.C. CONST. art. II § 23; *Barnhill*, 362 S.E.2d at 167 (citing *State ex rel. Dorothea Dix Hospital v. Davis*, 232 S.E.2d 698 (1977)).

part test: a financial assessment is a tax if it is (1) “levied and collected as a contribution to maintenance of general government,” (2) “imposed upon the citizens in common at regularly recurring periods,” and (3) for “the purpose of providing continuous revenue.”¹³⁰

Applying this definition of a tax, the North Carolina Court of Appeals in *Barnhill* determined that a volume-based assessment imposed on all commercial, industrial, and municipal haulers who used a county landfill was not a tax, but a fee.¹³¹ The North Carolina Court of Appeals further affirmed this interpretation in *Stafford v. County of Bladen*.¹³² The *Stafford* court determined that landfill use fees imposed by Bladen County were not taxes, but permissible fees.¹³³

Similarly, a fee imposed on those who choose to utilize a non-reusable bag from a retailer does not meet any of the three characteristics of a tax. First, the proposed bag fee *will not* be used to fund general government and thus does not meet the first condition of a tax. Second, the bag fee will not be “imposed upon the citizens in common at regularly recurring periods.”¹³⁴ Like the volume-based fee or landfill use fee highlighted above, the bag fee would apply only to those customers who choose to have a business provide them with non-reusable bags at a specific point in time. Third, the bag fee is not for the “purpose of providing continuous revenue.”¹³⁵ Instead, the bag fee is intended to encourage consumers to reduce waste at the source by foregoing unnecessary non-

¹³⁰ *Barnhill*, 363 S.E.2d at 167.

¹³¹ *Id.*

¹³² 592 S.E.2d 711, 715 (2004) (citing *Barnhill*, 362 S.E.2d at 167), disc. rev. denied, 599 S.E.2d 409 (mem.) (2004).

¹³³ *Stafford*, 592 S.E.2d. at 713, 715.

¹³⁴ *Barnhill*, 362 S.E.2d at 167.

¹³⁵ *Id.*

reusable bags, and to provide the Solid Waste Management Department with funds to cover the costs associated with litter cleanup, improper disposal of bags, consumer education, and provision of reusable bags to low-wealth residents. Ideally, little-to-no funds will be collected at all, because few, if any, non-reusable bags will be used in Durham. To the extent that revenue is collected as a result of the fee, it will be used to solve the problems that bags cause.¹³⁶

D. Sales Tax Will Not Apply to a Bag Fee

As explained above in Part II.C, the proposed bag fee is not a tax under North Carolina law. However, even if it were characterized as a tax, it would not violate statutory restrictions on sales and use taxes.¹³⁷

Pursuant to N.C. Gen. Stat. § 105-164.3(237), “sales price” is defined as “[t]he total amount or consideration for which tangible personal property, digital property, or services are sold, leased, or rented.”¹³⁸ The statute goes on to enumerate various costs and charges that are included under the term “sales price.”¹³⁹ Notably, the statute describes three categories which are *not* included in the term “sales price,” specifically excluding “[a]ny taxes imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the consumer.”¹⁴⁰ Thus, any tax imposed directly on the consumer that is stated separately on the receipt is not included in the term “sales price.” Charges not included in the sales price are not subject to the sales or use

¹³⁶ See *supra* text accompanying notes 49–50.

¹³⁷ See N.C. GEN. STAT. § 105-164.13(23)(a) (exempting plastic, paper, and other kinds of bags from sales and use taxes).

¹³⁸ *Id.* § 105-164.3(237)

¹³⁹ *Id.* § 105-164.3(237)(a).

¹⁴⁰ *Id.* § 105-164.3(237)(b)(3).

tax.¹⁴¹ The bag fee would be imposed directly on the consumer and stated separately on the receipt. Thus, it is explicitly excluded from the definition of “sales price.” Because the bag fee is not included in the sales price, it is necessarily not subject to a sales tax.

3. Conclusion

The North Carolina General Assembly empowers local government through subject-specific enabling statutes, like the Solid Waste Management Act. Under the Solid Waste Management Act, Durham has ample legal authority to impose a fee on non-reusable bags provided to consumers at the point of sale. Specifically, the SWMA mandates that local governments assess solid waste needs and take whatever action they deem necessary to address those needs.¹⁴² If the city or county finds that action is needed to reduce the problems posed by non-reusable bags to the environment, public health, and local economy, then it may impose a bag fee to address these complex and costly effects.

Requiring businesses to charge customers a reasonable amount for a non-reusable bag would be a legal and authorized fee, not a tax. The charge is authorized by the public enterprise statute, which enable fees for solid waste disposal systems. Additionally, the proposed fee does not meet any of the three criteria that must be present for a charge to be considered a tax under North Carolina law. Moreover, the charge will not be included in the sales price nor subjected to a sales tax. The proposed bag fee is a legal and effective way for Durham to address the aesthetic, environmental, and economic impacts of non-reusable bags.

¹⁴¹ *Id.* § 105-164.4(a)(1)(a).

¹⁴² *Id.* § 130A-309.09A(a).