

No. A133868

(County of Marin Super. Ct. No. CIV1100996)

**IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE**

SAVE THE PLASTIC BAG COALITION,
an unincorporated association

PLAINTIFF AND APPELLANT

V.

COUNTY OF MARIN et al.,
a political subdivision of the State of California

DEFENDANTS AND RESPONDENTS

Appeal From Judgment Of
The Superior Court of California
County Of Marin
(Hon. Lynn Duryee, Presiding)

APPELLANT'S OPENING BRIEF

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**PLAINTIFF'S CERTIFICATION OF
INTERESTED ENTITIES OR PERSONS**

Full Name of Interested Entity/Person	Party	Non- Party	Nature of Interest
Save The Plastic Bag Coalition	[X]		Appellant
Cathy Browne		[X]	Member of Appellant
Louis Chertkow		[X]	Member of Appellant
Peter M. Grande		[X]	Member of Appellant
Chandler Hadraba		[X]	Member of Appellant
Benchmark Polymers, LLC		[X]	Member of Appellant
Bradley Packaging		[X]	Member of Appellant
Crown Poly, Inc.		[X]	Member of Appellant
Elkay Plastics Co., Inc.		[X]	Member of Appellant
Grand Packaging, Inc. d/b/a "Command Packaging"		[X]	Member of Appellant
H. Muehlstein & Co., Inc.		[X]	Member of Appellant
Hilex Poly Company LLC		[X]	Member of Appellant
M. Holland Company		[X]	Member of Appellant
Metro Poly Corporation		[X]	Member of Appellant
Montebello Plastics, LLC		[X]	Member of Appellant
PPP, LLC		[X]	Member of Appellant
Ravago S.A.		[X]	Parent of H. Muehlstein & Co., Inc.

Ship & Shore Environmental Inc.	[X]	Member of Appellant
Sun Plastics, Inc.	[X]	Member of Appellant
Symphony Group (Symphony Group members include d2w Ltd.)	[X]	Member of Appellant
TPG Group/TPG Growth	[X]	Parent of Hilex Poly Company, LLC

STATEMENT OF THE CASE

Marin County adopted an Ordinance banning plastic bags. Stores may provide paper bags to customers, provided that they charge five cents per bag. (The Ordinance is at AR tab E.)

Plaintiff submitted objections, made a fair argument, and demanded an EIR. The County did not prepare an EIR. It not even prepare an Initial Study or issue a Negative Declaration. Instead, after the Ordinance had been adopted, it asserted the categorical exemptions in CEQA Guidelines §§ 15307 and 15308 claiming that it was not required to conduct any environmental review whatsoever as the Ordinance is intended to protect the environment. (Text of §§ 15307 and 15308 on next page.)

CEQA recognizes three tiers of action: legislative, regulatory, and ministerial. The categorical exemptions in §§ 15307 and 15308 apply only to “regulatory agencies” acting “as authorized by” a state law or local ordinance. They do not apply to *legislative* acts such as adoption of an ordinance by a board of supervisors banning plastic bags.

Further, categorical exemptions cannot be used in this case as Plaintiff made a fair argument. (Guidelines § 15300.2(c) – text on next page.)

Moreover, in *Save The Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, the Supreme Court ruled that “appropriately comprehensive environmental review *will be required*” before cities or counties larger than Manhattan Beach may ban plastic bags. (*Id.* at 175, n.10, italics added.) Marin County is seven times larger than Manhattan Beach.

Plaintiff seeks invalidation of the Ordinance, as no EIR was prepared.

TEXT OF CEQA GUIDELINES

CATEGORICAL EXEMPTIONS ASSERTED BY MARIN COUNTY

The CEQA Guidelines (“Guidelines”) are at Cal. Code Regs., title 14.

§ 15307. ACTIONS BY REGULATORY AGENCIES FOR PROTECTION OF NATURAL RESOURCES

Class 7 consists of actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption.

§ 15308. ACTIONS BY REGULATORY AGENCIES FOR PROTECTION OF THE ENVIRONMENT

Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.

THE “UNUSUAL CIRCUMSTANCES” EXCEPTION

§ 15300.2(c). EXCEPTIONS

Significant effect. A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

STATEMENT OF APPEALABILITY

On October 7, 2011, the trial court entered its Judgment Denying Writ Of Mandate And Declaratory Relief. On November 29, 2011, Plaintiff filed its Notice of Appeal. The Judgment appealed from is final.

Plaintiff is only appealing the denial of a writ of mandate based on violation of CEQA, which is the First Cause of Action.

Plaintiff is not appealing the denial of declaratory relief based on state law preemption, which is the Second Cause of Action. The reason is that the state law in question, AB 2449, sunsets at the end of 2012. Therefore, given the timing of this appeal, the issue is effectively moot.

ISSUES PRESENTED ON APPEAL

1. The Supreme Court has ruled that cities and counties larger than Manhattan Beach “will be required” to conduct an “appropriately comprehensive environmental review” under CEQA before banning plastic bags. However, the County takes the opposite position, claiming that plastic bag bans are totally exempt from environmental review under the categorical exemptions in Guidelines §§ 15307 and 15308. Is the County correct?
2. If the answer to 1 is yes, did the County take the necessary steps to rely on the categorical exemptions?
3. If the answers to 1 and 2 are yes, did Plaintiff make a “fair argument” pursuant to Guidelines § 15300.2(c), meaning that the County could not rely on the categorical exemptions?

STATEMENT OF FACTS

A. The Plaintiff

Plaintiff coalition is an unincorporated association. Its members include companies that manufacture, market, sell, supply, or distribute plastic carryout bags in Marin County. Such members would be commercially impacted by the Marin County ordinance banning plastic bags. (Declaration of Peter M. Grande ¶¶ 21, 22, appended to Plaintiff's Opening Brief filed in the trial court.)

The purpose of the coalition is to respond to environmental misinformation about plastic bags and ensure that the environmental impacts of banning plastic bags are made known to decision-makers and the public. Plaintiff contends that there is insufficient justification for banning plastic bags based on environmental facts. Plaintiff seeks to promote and enforce the informational purposes of CEQA in this action based on its own beneficial interest and in the public interest. (Grande Declaration ¶¶ 9, 16-20, 23-33.)

B. Plaintiff's Objections

On December 14, 2010, the Marin County Board of Supervisors (the "Board") held its first reading of the draft Ordinance. No CEQA notice of any kind had been issued or was ever issued prior to adoption of the Ordinance.

On December 28, 2010, Plaintiff timely submitted Objections. (AR tab F.) At pages 11 to 34 of its Objections, Plaintiff made a "fair argument" that the Ordinance will or might result in significant negative environmental impacts as a result of a switch by consumers to paper bags and reusable bags. The evidence that Plaintiff presented is summarized below.

(i) Life Cycle Impacts Of Increased Number Of Paper Bags

One of the primary purposes of the Ordinance is to reduce greenhouse gas emissions and other life-cycle impacts of single-use bags.

The Ordinance states in relevant part as follows:

WHEREAS, the use of all single-use shopping bags (plastic, paper, biodegradable) have *severe* environmental impacts, including greenhouse gas (GHG) emissions, litter, harms to wildlife, ground level ozone formation, atmospheric acidification, water consumption and solid waste generation;

WHEREAS, the use of single-use paper bags result in *greater* (GHG) emissions, atmospheric acidification, water consumption, and ozone production than single-use plastic bags;

WHEREAS, it is the County's desire to conserve resources, reduce the amount of GHG emissions....

(AR tab E, italics added. See also AR tab 83 at 2 stating that a goal of the Ordinance is to “reduce the amount of GHG (greenhouse gas) emissions expended in producing single-use bags.”)

The County conceded in the whereas clauses that paper bags are more harmful to the environment than plastic bags. The County also conceded it again in the trial court. In its trial brief, the County stated:

However, it is equally true that almost no one would deny that severely limiting the use of single-use plastic bags would not have an environmentally beneficial effect if single-use plastic bags were merely replaced by single-use paper bags as opposed to reusable bags. The County agrees with [Plaintiff's] primary argument herein that in several respects, the negative environmental impacts from the production, use and disposal of single-use paper bags are as bad, if not worse, than the impacts from single-use plastic bags.

(Marin County's Memorandum Of Points And Authorities In Opposition To Petition For Writ Of Mandate And Complaint For Declaratory Relief ("County's Trial Court Brief") at 1-2.)

Even though the County does not dispute Plaintiff's position that paper bags are worse for the environment than plastic bags, Plaintiff will review here some of the scientific evidence that it submitted to the County as part of its Objections. Plaintiff cited and provided five life cycle assessments: the Franklin Report (AR tab 20), the Scottish Report (AR tab 21), the Boustead Report (AR tab 22), the ULS March 2008 Report (AR tab 23), and the Ecobilan/Carrefour Report (AR tabs 24 and 25).

The Scottish Report found that the life cycle of paper bags results in:

- **3.3** times **more** emissions of greenhouse gases than plastic bags;
- **1.1** times **more** consumption of nonrenewable primary energy than plastic bags;
- **4.0** times **more** consumption of water than plastic bags;
- **1.9** times **more** acid rain than plastic bags;
- **1.3** times **more** negative air quality than plastic bags;
- **14.0** times **more** water body eutrophication than plastic bags;
- **2.7** times **more** solid waste production than plastic bags; and

(AR tab 21 at 23.) The Scottish Report includes the following conclusion:

[A] paper bag has a more adverse impact than a plastic bag for most of the environmental issues considered. Areas where paper bags score particularly badly include water consumption, atmospheric acidification (which can have effects on human health, sensitive ecosystems, forest decline and acidification of lakes) and eutrophication of water bodies (which can lead to growth of algae and depletion of oxygen).

(AR tab 21 at 31.)

The Boustead Report (AR tab 22) is a comprehensive life cycle assessment of the environmental impacts of the types of plastic and paper carryout bags used in the United States. (AR tab 22 at 6-7). It takes into account that a paper bag holds more than a plastic bag and applies an adjustment factor: 1 paper bag = 1.5 plastic bags. (AR tab 22 at 7.) The Boustead Report findings are as follows:

**BOUSTEAD REPORT TABLE SHOWING THAT PAPER BAGS
ARE WORSE FOR THE ENVIRONMENT THAN PLASTIC BAGS**
(AR Tab 22 at 4)

Carrying Capacity of paper and plastic bags equivalent to 1000 paper bags	Paper bags (30% recycled fiber)	Plastic bags
Total Energy Used (MJ)	2622	763
Fossil Fuel Use (kg)	23.2	14.9
Municipal Solid Waste (kg)	33.9	7.0
Greenhouse Gas Emissions (CO ₂ Equiv. Tons)	0.08	0.04
Fresh Water Usage (Gal)	1004	58

The Boustead Report analyzes paper bags with 30% post-consumer recycled content. (AR tab 22 at 6-7.) The Ordinance requires that paper bags have 40% post-consumer recycled content. (Ordinance §5.46.010(c).) An additional 10% of recycled content would not result in a 10% improvement in environmental impacts. However, even if an extra 10% of recycled content in paper bags decreased all environmental impacts of paper bags by a full 10%, paper bags would still be far worse than plastic bags in every environmental category. For example, instead of consuming 2622 megajoules of total energy, 1000 paper bags would consume 2360 megajoules. Plastic bags with the same carrying capacity consume only 763 megajoules.

The Boustead Report was commissioned by Progressive Bag Affiliates, a plastic bag industry organization. (AR tab 22 at 3.) It was peer reviewed by an independent third party, a Professor of Chemical Engineering at North Carolina State University. (AR tab 22 at 4, 63-64.) He is an expert on life cycle analysis with extensive experience in the field. (AR tab 22 at 63.) He stated that the Boustead Report

provides both a sound technical descriptions (sic) of the grocery bag products and the processes of life cycle use.... Whatever the goals of the policy makers, these need to be far more explicit that general environmental improvement, since the life cycle story is consistent in favor of recyclable plastic bags.

(AR tab 22 at 63.)¹

¹ The professor disagreed with part of the report. (AR tab 22 at 64.) The report was amended to the extent that the Boustead author agreed with the professor's comments. For example, the figure "103" for electricity in Table 9B was corrected to "154." (See AR tab 22 at 64, 19.)

The ULS March 2008 Report (AR tab 23) evaluates the impact of San Francisco's ordinance banning plastic bags and concludes as follows:

Legislation designed to reduce environmental impacts and litter by outlawing grocery bags based on the material from which they are produced will not deliver the intended results. While some litter reduction might take place, it would be outweighed by the disadvantages that would subsequently occur (increased solid waste and greenhouse gas emissions) [from paper bags].

(AR tab 23 at 5.)

Plaintiff also cited the EIR prepared and certified by Los Angeles County before it banned plastic bags. (AR tab F at 39-40.) The EIR is a tailored study that addresses both life cycle and local impacts. It is substantial evidence that the Marin County Ordinance may have a significant negative impact on the environment. (AR tab 86 is a summary of the Los Angeles County EIR.)²

Los Angeles County adopted a goal-oriented threshold of significance based on the following objectives:

- Inconsistency with laws and regulations in managing GHG emissions.
- Inconsistency with the goal to reduce greenhouse gas emissions to 1990 levels by 2020, as required by AB 32.³

² In the Objections, Plaintiff stated: "The Los Angeles County EIR is at: [hyperlink]. It is not provided herewith as it is too large to send via e-mail. However, STPB requests that it be made part of the administrative record." (AR tab F at 39.) The EIR and Statement of Overriding Considerations are at http://dpw.lacounty.gov/epd/aboutthebag/ordinance_govt.cfm.

³ Guidelines §15065(a)(3) states that a lead agency shall find that a project may have a significant effect on the environment when "the project has the potential to achieve short-term environmental goals to the disadvantage of long-term environmental goals."

(Los Angeles County EIR at 3-3.14-15.)

Based on the foregoing threshold of significance, Los Angeles County determined in its EIR that even imposing a 10-cent fee on paper bags, requiring that paper bags be made of at least 40 percent post-consumer material, and promoting and distributing reusable bags would not ensure that there would be no significant negative environmental impacts caused by its ordinance. The EIR contains a section entitled “Significant Unavoidable Adverse Impacts That Cannot Be Mitigated To Below The Level Of Significance” which states:

Based on a conservative analysis, [Los Angeles] County has determined that cumulative indirect GHG emissions resulting from implementation of the recommended ordinances will have the potential to result in significant unavoidable impacts even with implementation of mitigation measure GHG-1, which will be expected to reduce significant adverse impacts to GHG emissions to the maximum extent feasible. Consequently, in accordance with Section 15093 of the State CEQA Guidelines, a Statement of Overriding Considerations has been prepared (see Section IX of this document) to substantiate the County’s decision to accept this potential unavoidable adverse environmental effect because it is outweighed by the potential benefits afforded by the recommended ordinances.

(Los Angeles County EIR Section IV at 1; AR tab F at 40; AR tab 86 at 1.) The Los Angeles County Board of Supervisors adopted a “Statement of Overriding Considerations” to enable it to pass its ordinance, notwithstanding the findings in the EIR. (Los Angeles County EIR Section IX, AR tab F at 40.)

As discussed in the arguments section of this brief, Marin County was not permitted to take into account its 5-cent fee when determining whether categorical exemptions apply. However, even if Marin County

could take into account its 5-cent fee, the Los Angeles County EIR confirms that Marin County would fall far short of achieving its goal of offsetting the significant negative impacts of the Ordinance. If a 10-cent fee is insufficient for this purpose in Los Angeles County, a 5-cent fee is insufficient in Marin County.⁴

(ii) Local Impacts Of Increased Number Of Paper Bags

Plaintiff also objected on the ground that the Ordinance might result in significant local negative environmental impacts, including but not limited to the following:

- In what quantities plastic and paper bags are used in the county;
- Whether plastic bags are a significant portion of litter found;
- The quantity of plastic bags disposed of in the county's trash;
- How trash is disposed of in the county;
- Whether the county has a landfill that would be impacted by any increased paper bag use;
- Whether there are recycling facilities or programs in the county or neighboring areas;
- Plastic and paper bag recycling rates;
- What would be the likely impact of a campaign urging recycling and reusable bag use.

(AR tab F at 3.)

⁴ The Los Angeles County EIR is based on the Ecobilan/Carrefour Report ("EC Report"). (AR tab 86 at 1; EC Report is AR tabs 24 & 25.) The Los Angeles County EIR states that the EC Report is "relatively recent; contains relatively sophisticated modeling and data processing techniques; considers a wide range of environmental indicators; considers paper, plastic, and reusable bags; was critically reviewed by the French Environment and Energy Management Agency; and contains detailed emission data for individual pollutants." (AR tab 86 at 1.) The Scottish Report is based entirely on the EC Report. (AR tab 21 at 23.)

(iii) The County's Extraordinarily Low Paper Bag Fee

Los Angeles County, the City of San Jose, and the City of Santa Monica have banned plastic bags. (AR tab F at 21.) Prior to adopting their ordinances, they completed EIRs. The EIRs included analyses of the minimum amount of a paper bag fee that would be required to offset the environmental impacts of an increased number of paper bags. Based on the EIRs, they required that stores charge the following minimum fees for paper bags:

- Los Angeles County: 10 cents (AR tab 91) – which the Los Angeles County EIR determined to be too low to offset the increased negative impacts of paper bags
- Santa Monica: 10 cents (Santa Monica Municipal Code §5.45.030)
- San Jose: 10 cents initially, increasing to 25 cents in 2014 (AR tab 72)

(AR tab F at 21.) The Marin County Ordinance requires that stores charge a 5-cent minimum paper bag fee. Plaintiff objected as a mere 5 cents may not prevent significant negative environmental impacts. (AR tab F at 18-21.)

The fee is the only real disincentive for consumers to switch away from paper bags. In 2008, ULS conducted a survey of 25 stores in San Francisco covered by that city's plastic bag ban. The San Francisco ordinance did not require that stores charge a fee for paper bags. The ULS (September 2008) Report (AR tab 26) states as follows:

Page 2: The number of consumers bringing their own bags was judged to be minimal, and not greater than in other cities. Very few people were seen bringing reusable bags to the stores, no more than the observer has seen being used in other metropolitan areas such as Detroit or Chicago.

Page 4: Safeway, 1335 Webster: Virtually everyone used paper bags, some double bagging. Only saw 1-2 people using reusable tote bags. No plastic bags of any type.

Page 4: Safeway, 2020 Market: Virtually all paper bags, some double bagging. A few more reusable totes than in other store. (Less affluent neighborhood with younger crowd.)

Page 4: Trader Joe's, 555 9th: As expected, more people using totes, but not a large number. However, significant use of paper bags and double bagging of paper!

Marin County is an affluent area. Charging a nickel is no guarantee that consumers will not overwhelmingly switch to paper bags, as they did in San Francisco. Moreover, the Ordinance provides that economically disadvantaged people are not required to pay the fee at all. (Ordinance § 5.46.020(b), AR tab E.) These are the people who would have been the most likely to avoid paying the cost of a paper bag. As the County has not prepared an EIR, we do not know what percentage of the population is not required to pay the fee, but we do know based on ULS's San Francisco survey that a very large percentage of this group will take free paper bags.

(iv) Impacts Of Increased Number Of Reusable Bags

One of the problems of the plastic bag debate is that reusable bags are spoken of in glowing terms, as if they have zero negative environmental impacts. *All* manufactured goods result in negative environment impacts. Reusable bags are no exception. Plaintiff made a fair argument, based on the facts set forth below, that the Ordinance may result in significant negative environmental impacts as a result of the increase in the number of reusable bags. (AR tab F at 22-34, 40.)

Most reusable bags are made of polypropylene or cotton. The Los Angeles County EIR determined that each polypropylene or cotton reusable

bag must be used at least 104 times before offsetting their enormous negative environmental impacts including very high CO₂ emissions compared to a plastic bag. (AR tab F at 40; AR tab 86 at 2; Los Angeles County EIR at 12-33.) If a customer takes two such bags and discards one without using it, the other one must be used at least 208 times.

No one can be certain that every reusable bag distributed in the County will be used on average at least 104 times, especially as the bags become filthy and unhygienic after far fewer uses than that. According to a University of Arizona survey, 97% of consumers do not wash their reusable bags. (AR tab F at 23-24, AR tabs 32, 33.) In Australia, massive numbers of unused and underused reusable bags are filling up landfills at a rapid rate. (AR tab F at 25-27, AR tab 34.)

One of the County's justifications for banning plastic bags is that "plastic bags had no recycling markets." (AR tab 83 at 4-5.) (AR tab F at 9.) The County is wrong. Plastic bags are recyclable and can be deposited in plastic bag recycling bins at all supermarkets and large drug stores in California. (Pub. Res. Code §§ 42250-57; see photograph of a recycling bin at a Safeway in unincorporated Marin County at AR tab F at 10.) All bags deposited in the bins *must* be recycled. (Pub. Res. Code §§ 42252(c).) There are many recycling companies that buy plastic bags deposited in the bins, including Trex, AERT, and Hilex. (AR tabs 50-54.)

As part of its "Bag2Bag" recycling program, Hilex has built and operates a state of the art plastic bag recycling facility that can be seen in a photograph in AR tab 54. Hilex has worked with retailers to establish more than 30,000 plastic bag recycling points across the United States to supply used bags to its facility. (AR tabs 53 & 54.)

In contrast, reusable bags are not recyclable at all. All cotton, polypropylene, and PET reusable bags must be disposed of in landfills. (AR tab F at 27-28.) In Australia, unused and underused reusable bags are piling up in landfills at a rapid rate. (AR tab F at 25-27; AR tab 34.)

The plastic bag recycling rate is not high enough, but banning plastic bags is not the solution. An EIR must consider alternatives to a ban. (Guidelines § 15126.6.) One alternative would be to require more stores to install plastic bag recycling bins, require better signage, and educate consumers to use them. If the County can promote reusable bags, it can promote plastic bag recycling.

C. Plaintiff's Demand For An EIR

Based on Plaintiff's fair argument that the Ordinance may result in significant increased negative environmental impacts, Plaintiff demanded that the County prepare an EIR. (AR tab F at 1.) The County, including the Board of Supervisors, did not respond to or comment on Plaintiff's Objections or exhibits at any time. No Initial Study or EIR was prepared.

D. Adoption Of The Ordinance

On January 25, 2011, the Board held a public hearing and adopted the Ordinance. (AR tab E at 1-5.) The Board made no findings regarding Plaintiff's Objections and adopted no resolution regarding CEQA or any categorical exemptions. CEQA was not mentioned in the Ordinance.

On March 2, 2011, the County filed a Notice of Exemption dated February 3, 2011 (which was nine days after adoption of the Ordinance) with the County Clerk. (AR tab E page 6.) The notice asserts the categorical exemptions in Guidelines §§ 15307 and 15308 and states the "Reasons for Exemption" in their entirety as follows:

The ordinance is intended to maintain, restore and enhance natural resources and the environment generally based on substantial evidence that it will reduce the County's contribution of oil-based plastic waste as well as paper waste to the landfills; reduce oil consumption and greenhouse gas emissions in general; reduce the amount of plastic and paper litter in the environment; and reduce degradation of the marine environment and harm to marine wildlife.

E. The Ordinance Is The First Stage Of A Countywide Project

Although the Ordinance only applies to the unincorporated areas of the County, a letter from the Marin County Agricultural Commissioner to the Board of Supervisors states as follows:

Page 2: The County of Marin has approximately 50 retail establishments within its jurisdiction and 440 in the incorporated cities and towns of Marin for a total of 490 retail stores. The Marin County Hazardous and Solid Waste Joint Powers Authority...estimates that Marin residents use upwards of 138 million bags annually that end up in Marin's landfill or the waste stream.

Page 8: It appears that a city working group will work to modify the County's ordinance for adoption in most or all cities....

Page 8-9: [O]utreach is expected to be focused on...Encouraging all cities and towns in Marin to pass the model statewide ordinance, effective January 1, 2012. The cities of San Rafael and Mill Valley are seriously considering passage of the model ordinance and entering into a Memorandum of Understanding (MOU) with our Weights and Measures Department for enforcement.

Page 9: There are 490 retail business establishments qualified for plastic bag inspection and enforcement procedures on a countywide basis.

(AR tab 83.)

PROCEDURAL HISTORY

On February 24, 2011, Plaintiff timely filed its Verified Petition For Writ Of Mandate in the Marin County Superior Court.

On September 12, 2011, Marin County Superior Court Judge Lynn Duryee issued her Tentative Decision denying Plaintiff's request for a Writ of Mandate invalidating the Ordinance.

At the hearing on September 13, 2011, Plaintiff requested a statement of decision, including an explanation of how the judge could square her tentative decision that the County could rely on categorical exemptions with the ruling of the Supreme Court in *Manhattan Beach*. (RT 9/13/11 at 5-6.)

On September 14, 2011, Judge Duryee issued her Order On Submitted Matter. The Order states:

The court finds that the County acted reasonably in enacting the Ordinance and was entitled to rely on the CEQA Exemption. There is substantial evidence to support the County's legislative action, as required by Section 21168.5.

Judge Duryee never mentioned the *Manhattan Beach* decision. The fact that an ordinance is reasonable and supported by substantial evidence does not exempt it from CEQA. Such an approach negates CEQA completely.

In response to Plaintiff's request for a statement of decision, Judge Duryee orally read her September 14, 2011 Order in open court *verbatim* on September 27, 2011. She still made no mention of the *Manhattan Beach* decision. (No court reporter was present.)

On October 7, 2011, the Judgment Denying Writ of Mandate and Declaratory Relief was entered. On November 29, 2011 Plaintiff timely filed its Notice of Appeal.

THE STANDARD OF REVIEW

“[I]f a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.” (Guidelines § 15064(f)(1).)

On review, deference by the court to the agency’s determination is not appropriate. (*Mejia v. City of Los Angeles (California Home Development, LLC)* (2005) 130 Cal.App.4th 322, 332.)

The appeal court reviews the agency’s decision *de novo*. (*Gentry v. City of Murietta* (1995) 36 Cal.App.4th 1359, 1375-76; *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1076; *Mejia, supra*, 130 Cal.App.4th at 332.)

ARGUMENT

I. The Supreme Court's Decision In *Manhattan Beach Controls The Outcome Of This Case*

In July 2008, the City of Manhattan Beach adopted an ordinance banning plastic bags. It prepared an Initial Study and Negative Declaration. Plaintiff Save The Plastic Bag Coalition (the same plaintiff as in the instant case) had objected and demanded that the city prepare an EIR on the ground that a shift to paper bags would have a significant negative impact on the environment. Plaintiff filed a petition for writ of mandate. The case reached the California Supreme Court, which ruled as follows in July 2011:

- A. Plaintiff Save The Plastic Bag Coalition has legal standing to file CEQA actions. (*Manhattan Beach, supra*, 52 Cal.4th at 165-170.)
- B. The City of Manhattan Beach was too small to have been required to prepare an EIR. The population is only 33,852. “There are only two supermarkets, three (and two future) drug stores, and one Target store known to be high volume users of plastic shopping bags in the City which would be affected by the ban.” (*Id.* at 161.)
- C. The court stated: “[T]he analysis would be different for a ban on plastic bags by a larger governmental body, which might precipitate a significant increase in paper bag consumption.” (*Id.* at 174.)
- D. The court stated:

While cumulative impacts should not be allowed to escape review when they arise from a series of small-scale projects, that prospect does not appear in this case. According to plaintiff, the movement to ban plastic bags is a broad one, active at levels of government where an appropriately comprehensive environmental review *will be required*.

(*Id.* at 174, n.10, italics added.)

In summary, EIRs are required for plastic bag bans by (i) cities and counties that are larger than Manhattan Beach and (ii) small cities and counties based on cumulative impacts. The population of Marin County was 252,409 in 2010, which is 7.5 times larger than Manhattan Beach.⁵

II. This Action Was Timely Filed

This action was timely filed on February 24, 2011. (Pub. Res. Code § 21167.)

III. Plaintiff Has Standing

Plaintiff has beneficial and citizen standing. (*Manhattan Beach, supra*, 52 Cal.4th at 165-170.)

Plaintiff's intervention brings balance to the plastic bag debate. "Corporate purposes are not necessarily antithetical to the public interest.... [Corporations may have] particular expertise and thus may have an enhanced understanding of the public interests at stake." (*Manhattan Beach, supra*, 52 Cal.4th at 169.) One draft EIR on banning plastic bags states: "The intervention of the plastic bag manufacturers has stimulated more thoughtful consideration of the environmental issues associated with single-use carryout bags." (City of Fort Bragg Draft EIR, October 2011.⁶)

IV. The Ordinance is a Project Under CEQA

The Ordinance is a "project" subject to CEQA as the "whole of [the] action...has a potential for resulting in either a direct physical change in the

⁵ The U.S. Census Bureau webpage showing this figure is attached to the Plaintiff's unopposed Request For Judicial Notice In Support Of Opening Brief filed in the trial court on July 28, 2011. This court is requested to take judicial notice of the population figure.

⁶ <http://city.fortbragg.com/pdf/Single%20Use%20Bag%20DEIR%2010-24-11.pdf>

environment, or a reasonably foreseeable indirect physical change in the environment.” (Pub. Res. Code § 21080(c), (d), § 21151; Guidelines § 15378(a); *Manhattan Beach*, *supra*, 52 Cal.4th at 171, n.7.)

V. There Is No Blanket CEQA Exemption For Plastic Bag Bans

If the County believed that it was justified in not preparing an EIR, it was initially required to conduct an Initial Study to support its determination and give notice to the public of its intent to adopt a Negative Declaration. (Pub. Res. Code § 21080(c), Guidelines § 15070, Guidelines § 15063(a): “[T]he Lead Agency shall conduct an Initial Study to determine if the project may have a significant effect on the environment.”) The County ignored these requirements. Instead, after it had already adopted the Ordinance, the County for the first time asserted the CEQA categorical exemptions in Guidelines §§ 15307 and 15308. (AR tab E at 6.)

According to the California Natural Resources Agency, which issues the Guidelines:

Statutory exemptions are descriptions of *types* of projects for which the California Legislature has provided a *blanket* exemption from CEQA procedures and policies. [Italics added.]

(<http://ceres.ca.gov/ceqa/flowchart/exemptions/index.html>.) By ruling that the County could rely on categorical exemptions, the trial court was saying that a plastic bag ban is not the *type* of project that requires compliance with CEQA because there is a *blanket* exemption.

The trial court’s ruling flies in the face of the Supreme Court’s decision in *Manhattan Beach*. If comprehensive environmental review “will be required” for some plastic bag bans, there *cannot* be a *blanket* exemption for this *type* of project.

VI. Categorical Exemptions Are Only Available To “Regulatory Agencies” Implementing A Preexisting Authorizing “State Law Or Local Ordinance”

The CEQA categorical exemptions asserted by the County state as follows:

§ 15307. ACTIONS BY REGULATORY AGENCIES FOR PROTECTION OF NATURAL RESOURCES

Class 7 consists of actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption.

§ 15308. ACTIONS BY REGULATORY AGENCIES FOR PROTECTION OF THE ENVIRONMENT

Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.

Guidelines §§ 15307 and 15308 are based on the following **three-level hierarchy**:

- **Legislative** acts by legislative bodies such as the Marin County Board of Supervisors, including adoption of an ordinance banning plastic bags. Such acts are *never* categorically exempt under §§ 15307 and 15308.
- **Regulatory** “actions” for environmental protection by “regulatory agencies, as authorized by state law or local ordinance...where the regulatory process involves procedures for protection of the environment.” **There must be a “state law or local ordinance” already in place that is the source of the regulatory authority.** The Marin County Ordinance states: “The Agricultural Commissioner is authorized to establish regulations....” (Ordinance § 5.46.050(a). AR tab E.) Those regulations would be exempt under §§ 15307 and 15308.
- **Ministerial** acts that involve little or no personal judgment as to the wisdom or manner of carrying out the project. A public official merely applies the law to the facts. (Guidelines § 15369.) These acts are always categorically exempt. (Guidelines §§ 15268, 15300.1.) An example would be a Marin County inspector citing a storeowner for continuing to provide plastic bags.

If the Natural Resources Agency intended to extend the categorical exemptions to *any* agency, it would not have used the term “*regulatory agencies*.” The courts interpret §§ 15307 and 15308 strictly. The Supreme Court has ruled: “Exemption categories are not to be expanded beyond the reasonable scope of their statutory language.” (*Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 125.)

An example of a regulatory action is cited in the text of § 15307: “wildlife preservation activities of the State Department of Fish and Game.” That agency issues regulations, *as authorized by enabling legislation*, the Fish and Game Code. That is typical regulatory action.

The purpose of the regulatory exemption is to avoid the need for regulatory agencies to *repeat* environmental review that has *already* been done at the legislative level. In *Magan v. County of Kings* (2002) 105 Cal.App.4th 468, Kings County banned the dumping of sewage sludge on agricultural land and claimed that the ban was exempt under § 15308. The Court of Appeal agreed as the dumping of sewage sludge was already subject to federal and state regulations. (*Id.* at 471.) For example, composed “Exception Quality Sewage Sludge” was determined by the U.S. EPA and the state to be acceptable for spreading on agricultural land. Therefore such sludge was exempt from the Kings County ban. (*Id.*) There was no need for Kings County to *repeat* the environmental review that had already been performed.

The Marin County Board of Supervisors was not acting a regulatory agency “as authorized by” a state law or a local ordinance. There was no existing regulatory process involving procedures for environmental protection. The County is misusing categorical exemptions to avoid preparing an EIR.

The County is trying to create an enormous loophole in CEQA that would allow cities and counties to adopt ordinances that they deem to be “green” or “environmentally protective” without Initial Studies, Negative Declarations, and EIRs. This has enormous implications, far beyond plastic bags, that would severely compromise and discredit CEQA. This court should reject the County’s strategy.

**VII. The Categorical Exemptions Are Inapplicable As There Are
“Unusual Circumstances” In This Case**

Guidelines § 15300.2(c) states as follows:

A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

Plaintiff produced substantial evidence that paper and reusable bags may cause significant negative environmental impacts. The Ordinance may make the environment worse, not better.

In *Manhattan Beach*, the Supreme Court ruled that environmental impacts both within and outside the project area must be considered. (*Manhattan Beach, supra*, 52 Cal.4th at 173.) The court said that impacts outside the project area may be evaluated at a reasonably high level of generality. (*Id.* at 174.) As we have seen, the Ordinance expressly states that one of its primary purposes is to reduce life cycle impacts that occur outside the project area, including greenhouse gas emissions. However, the Ordinance may have the unintended opposite effect by significantly increasing greenhouse gas emissions.

The County states that it “agrees” with Plaintiff’s primary argument that “in several respects, the negative environmental impacts from the production, use and disposal of single-use paper bags are as bad, if not worse, than the impacts from single-use plastic bags.” (County’s Trial Court Brief at 1-2.) Further, the whereas clauses in the Ordinance acknowledge that paper bags are *worse* for the environment than plastic bags. “Where there is a reasonable possibility that a project or activity may have a significant effect on the environment, an exemption is improper.” (*Int’l Longshoremen’s & Warehousemen’s Union v. Board of Supervisors*

(1981) 116 Cal.App.3d 265, 276; see also *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115-117 addressing both categorical exemptions and the common sense exemption.)

Despite its admission in Ordinance that “the use of single-use paper bags result in *greater* (GHG) emissions ... than single-use plastic bags,” the County made no attempt to quantify or evaluate the greenhouse gas emission reduction or increase that may result from the Ordinance. “A lead agency should make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project.” (Guidelines § 15064.4.) Further, the County never even mentioned greenhouse gas emissions caused by an increase in the number of *reusable* bags.⁷

The applicable standard for determining whether Plaintiff has demonstrated “unusual circumstances” is the “fair argument” standard, which is the same standard as the “common sense” exemption. (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 264-267.) The “common sense” exemption is contained in Guidelines §15061(b)(3) which states as follows:

Where it can be seen *with certainty* that there is *no possibility* that the activity in question *may* have a significant effect on the environment, the activity is not subject to CEQA.

⁷ While the Supreme Court cautioned against “overreliance” on life cycle assessments, it also said that they “may well be a useful guide for the decisionmaker when a project entails substantial production or consumption of the product.” (*Manhattan Beach, supra*, 52 Cal.4th at 175.) In this case, where life cycle impacts are cited by the County as the one of the primary reasons for adopting the Ordinance, life cycle assessments are particularly important.

Under the fair argument standard, “[i]f legitimate questions can be raised about whether the project might have a significant impact and there is any dispute about the possibility of such an impact, the agency cannot find with certainty that a project is exempt.” (*Davidon Homes, supra*, 54 Cal.App.4th at 117.) The agency “*must refute that claim to a certainty before finding that the exemption applies.*” (*Id.* at 118, italics added.)⁸

“[I]f a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.” (Guidelines § 15064(f)(1); *County Sanitation District No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1580 [“If substantial evidence establishes a reasonable possibility of a significant environmental impact, then the existence of contrary evidence in the administrative record is not adequate to support a decision to dispense with an EIR.”])⁹

Assuming for the sake of argument that the Ordinance would even qualify for a categorical exemption, there are “unusual circumstances” in this case. Plaintiff made a fair argument that the County never even

⁸ Guidelines §15064(g) states: “If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.”

⁹ “CEQA places the burden of environmental investigation on government rather than the public. If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record.” (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.)

attempted to refute. Therefore, an EIR must be prepared.¹⁰

VIII. The 5-Cent Paper Bag Fee May Not Be Taken Into Account In Determining Whether The Categorical Exemptions Are Applicable

In determining whether the County may rely on categorical exemptions, the 5-cent fee on paper bags may not be taken into account. In *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, the court stated:

In determining whether the significant effect exception to a categorical exemption exists, “[i]t is the possibility of a significant effect ... which is at issue, not a determination of the actual effect, which would be the subject of a negative declaration or an EIR. Appellants cannot escape the law by taking a minor step in mitigation and then find themselves exempt from the exception to the exemption.”

The reason is not simply because that is what the Guidelines require; the fundamental reason is substantive. The Guidelines dealing with the second phase of the environmental review process [the Initial Study resulting in a possible Mitigated Negative Declaration] contain elaborate standards -- as well as significant procedural requirements -- for determining whether proposed mitigation will adequately protect the environment and hence make an EIR unnecessary; in sharp contrast, the Guidelines governing preliminary review do not contain any requirements that expressly deal with the evaluation of mitigation measures.

¹⁰ In 2007, Oakland banned plastic bags and asserted categorical exemptions. In 2008, the Alameda County Superior Court ruled that there were “unusual circumstances” and that the exemptions were inapplicable. (*Coalition to Support Plastic Bag Recycling v. City of Oakland*, Case No. RG07-339097.) The tentative decision, which was adopted as the final decision, is at AR tab 46. The discussion regarding categorical exemptions is at pages 10-13 of the decision. The court based its ruling on the Scottish Report and an earlier version of the ULS March 2008 Report.

(*Id.* at 1200, citations omitted.) In *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, the court stated:

Mitigation measures may support a negative declaration but not a categorical exemption.

(*Id.* at 1102.)

As the trial court properly found, the County erred in relying upon mitigation measures to grant a categorical exemption from CEQA.... If a project may have a significant effect on the environment, CEQA review must occur, and only then are mitigation measures relevant.... The County made a premature and unauthorized environmental evaluation at the preliminary stage of considering eligibility for a categorical exemption.

(*Id.* at 1107-1108; see “Can’t Mitigate Your Way To A Categorical Exemption, Court Says.” <http://www.cp-dr.com/node/443>.)

Accordingly, it must be assumed for the purpose of categorical exemptions that there would be *no fee* on paper bags. In any event, Los Angeles County in its EIR determined that even a 10-cent fee would not be high enough to avoid significant negative environmental impacts. The County cannot be *certain* that the 5-cent fee will have the desired effect.

IX. The County Was Required To Prepare An EIR, Even If It Believed The Overall Effect Of The Ordinance Was Beneficial

The County apparently takes the position that if it deems a project to have an overall beneficial effect, the project is exempt from CEQA. The County is mistaken. Guidelines § 15063(b)(1) states that if “*any aspect of the project*, either individually or cumulatively, may cause a significant effect on the environment, *regardless of whether the overall effect of the project is adverse or beneficial*, the Lead Agency shall” prepare an EIR.

In *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), the court refused to allow the Secretary of the Interior to take action under the Endangered Species Act (“ESA”) without satisfying the requirements of the National Environmental Policy Act (“NEPA”). The court’s reasoning applies to the instant case:

While the protection of species through preservation of habitat may be an environmentally beneficial goal, Secretarial action under ESA is not inevitably beneficial or immune to improvement by compliance with NEPA procedure.... The short- and long-term effects of the proposed governmental action...are often unknown or, more importantly, initially thought to be beneficial, but after closer analysis determined to be environmentally harmful. Furthermore, that the Secretary believes the effects of a particular designation to be beneficial is equally immaterial to his responsibility to comply with NEPA.... NEPA’s requirements are not solely designed to inform the Secretary of the environmental consequences of his action. NEPA documentation notifies the public and relevant government officials of the proposed action and its environmental consequences and informs the public that the acting agency has considered those consequences. A federal agency could not know the potential alternatives to a proposed federal action until it complies with NEPA and prepares at least an EA.

(*Id.* at 1437.)

X. The Ordinance Must Be Treated As A Countywide Project Under CEQA

In the trial court, the County argued that other cities in Marin County have not yet acted to ban plastic bags and that only unincorporated parts of the County are relevant to the discussion. (County’s Trial Court Brief at 14.) The County is proposing a cat and mouse game under which the County legislates for the unincorporated areas and then each city passes

a ban without preparing an EIR based on the excuse that each city is small. Plaintiff will never catch the mouse. The court should reject such a transparent CEQA-avoidance strategy. The County should be required to prepare an EIR for the entire county, including the cities, based on its plan that all parts of the county will be covered by the same plastic bag ban. (AR tab 83 at 2, 8-9.)

The County must conduct an EIR if the impacts are “cumulatively considerable.” (Guidelines §15065(3); see also Guidelines §15355(b). In *Manhattan Beach*, the Supreme Court confirmed that “cumulative impacts [from plastic bag bans] should not be allowed to escape review when they arise from a series of small-scale projects.” (*Manhattan Beach, supra*, 52 Cal.4th at 174, n.10.)

It makes no difference that cities in the County have not yet adopted their own bans. They are awaiting the outcome of this case before moving forward. In *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, the court stated:

[W]e must reject the argument that, because some of the projects under review might never be built, it was reasonable for the Commission not to consider any of them in its cumulative analyses. Such argument is without merit. The fact that the EIR’s subject project itself might be built, rather than the fact that it might not be built, creates the need for an EIR. Similarly, the fact that other projects being reviewed are as close to being built as the subject project makes it reasonable to consider them in the cumulative analyses.

We also reject the argument that the Commission was entitled to ignore projects that have not passed all regulatory hurdles.

(*Id.* at 75.)

**XI. Written Findings Of Fact Must Be Made In Support Of
Categorical Exemptions And No Such Findings Were Made In
This Case**

In *CalBeach Advocates v. City of Solana Beach* (2002) 103 Cal.App.4th 529, the court ruled that “the determination that a project falls under a categorical exemption requires discretionary factfinding.” (*Id.* at 541.) An agency must “produce substantial evidence supporting its exemption decision” when “opponents of the project have raised arguments regarding possible significant environmental impacts.” (*Davidon, supra*, 54 Cal.App.4th at 117.

As the County failed to conduct discretionary fact finding “supporting its exemption decision,” it could not rely on any categorical exemptions.

**XII. The County Did Not Assert The Exemptions Until It Was Too
Late**

Even if the County could in theory rely on the categorical exemptions, the Board of Supervisors never asserted them. The County did not assert them until nine days after the Ordinance was adopted, by which time it was too late. (AR tab E at 6.)

A public agency must make a determination regarding categorical exemptions as part of its “preliminary review” before acting. (*Banker's Hill, supra*, 139 Cal.App.4th at 257-258; *Salmon Protection, supra*, 125 Cal.App.4th at 1106.)

XIII. The County And Its Citizens Need An EIR

The Board of Supervisors and the citizens of Marin County need an EIR to enable them to evaluate the environmental merits and impacts of the project. Among other things, they need to know:

- Whether plastic bags are really as bad for the environment as they are made out to be;
- How much worse are paper bags than plastic bags;
- Whether a five-cent fee on paper bags is high enough to act as a significant disincentive to increased paper bag use;
- Whether reusable bags are truly a sustainable alternative given the huge number of times that they have to be used to offset their greater environmental impacts than plastic and paper bags, serious hygiene issues if they are not washed regularly, and the fact that they are not recyclable; and
- Whether there are alternatives to a plastic bag ban that the Board could consider.

The demand for an EIR is based on the substantial evidence that the Ordinance may result in negative environmental impacts. Plaintiff also hopes that an EIR will help to correct the myths, misinformation, exaggerations, spin, and selective photography that the County and others have been disseminating about plastic bags.

In its Objections, Plaintiff addressed some of the misinformation spread by the County. (AR tab F at 7-9.) For example, the Marin County Agricultural Commissioner wrote to the Board of Supervisors stating as follows:

On April 25, 2007, the SW-JPA AB 939 Local Task Force report cited plastic bags as a major solid waste issue in Marin. It reported that plastic bags had no recycling markets, took 500 years to decompose, and posed a hazard to the environment as bag litter is "... responsible for the death of a million sea birds and 100,000 marine mammals annually worldwide."

(AR tab 83 at 4-5.) This is false and misleading information.

The allegation that plastic bags are responsible for the deaths of 100,000 marine mammals and a million seabirds is simply untrue. Plaintiff cited an article in *The Times* entitled "Series of blunders turned the plastic bag into global villain" that states in part:

The central claim of campaigners is that the bags kill more than 100,000 marine mammals and one million seabirds every year. However, this figure is based on a misinterpretation of a 1987 Canadian study in Newfoundland, which found that, between 1981 and 1984, more than 100,000 marine mammals, including birds, were killed by discarded nets. The Canadian study did not mention plastic bags.

Fifteen years later in 2002, when the Australian Government commissioned a report into the effects of plastic bags, its authors misquoted the Newfoundland study, mistakenly attributing the deaths to "plastic bags".

The figure was latched on to by conservationists as proof that the bags were killers. For four years the "typo" remained uncorrected. It was only in 2006 that the authors altered the report, replacing "plastic bags" with "plastic debris". But they admitted: "The actual numbers of animals killed annually by plastic bag litter is nearly impossible to determine."

In a postscript to the correction they admitted that the original Canadian study had referred to fishing tackle, not plastic debris, as the threat to the marine environment.

Regardless, the erroneous claim has become the keystone of a widening campaign to demonise plastic bags.

David Santillo, a marine biologist at Greenpeace, told The Times that bad science was undermining the [British] Government's case for banning the bags. "It's very unlikely that many animals are killed by plastic bags," he said. "The evidence shows just the opposite."

(AR tab 6.)

The U.S. National Oceanic and Atmospheric Administration states as follows:

Question: Is it true that 100,000 marine mammals and/or sea turtles die each year due to marine debris/plastics/plastic bags?

Answer: We were able to find no information to support this statement. An erroneous statement attributing these figures to plastic bags was published in a 2002 report published by the Australian Government; it was corrected in 2006.

(AR tab 13.)

Question: Is it true that marine debris kills a million seabirds each year?

Answer: This statement is currently unknown. We are so far unable to find a scientific reference for this figure. The closest we have found is "214,500 to 763,000 seabirds are killed annually incidental to driftnet fishing by Japanese fishermen in the North Pacific Ocean (US Department of Commerce, 1981)" from Laist, 1987. This refers to active fishing gear bycatch and not marine debris; it also predates the high seas driftnet ban adopted by the United Nations General Assembly in 1992.

(AR tab 82.)

David Laist is a senior policy and program analyst with the federal Marine Mammal Commission. He says:

In their eagerness to make their case, some of the environmental groups make up claims that are really not supportable.

(AR tab 8.)

The allegation that plastic bags take 500 years to decompose is a favorite sound bite of anti-plastic bag campaigners. However, the fact that *paper* bags *do* decompose is a *negative* environmental impact, because decomposing paper emits methane, a greenhouse gas that has 21 to 23 times more impact on global warming than CO₂. (AR tab F at 5.; Los Angeles County EIR at 3.3-31 & 33.)

The Marin County Bring Your Own Bag (BYOB) leaflet that is part of the County's document appendix in support of the Ordinance contains even more troubling and bizarre disinformation. (AR tab 87; see also AR tabs 88, 89, and 90.) BYOB Marin is a County project in association with EcoMom Alliance, Green Sangha, iReuse and Teens Turning Green. The document *which is only concerned with plastic bags* states:

Certain chemicals found in plastics (especially BPA, phthalates, PFOA, PFOs, polystyrene, and additives such as antimony, cadmium, and lead) are associated with a who's who of modern disorders, including asthma, cancer, diabetes, obesity, premature puberty, and reproductive failure.

Plaintiff pointed out that plastic *bags* do not contain any of those chemicals or additives. (AR tab F at 9.) The allegations in the leaflet are irresponsible.

There is much more misinformation circulating about plastic bags, especially about the so-called "Great Pacific Garbage Patch." According to the *Los Angeles Times*, it is "an area of the ocean larger than Texas and thick with floating plastic debris: bottles, bottle caps, bits of packaging and uncountable plastic bags." (AR tab 3.) This is not true.

According to Dr. Marcus Eriksen of the Algalita Marine Research Foundation: "There is no island of plastic trash." [AR tab 81.] He claims that there is confetti of waste spread over the ocean surface. However, he

found very little such confetti when he went out to the Pacific himself and conducted a 24-hour trawl. (See YouTube video at http://www.youtube.com/watch?v=3d3_fLsjC8U which is part of the administrative record. AR tab 96.)

The Scripps Seaplex expedition went out to the Pacific to survey marine debris. The Chief Scientist on the expedition, Miriam Goldstein, states as follows regarding the Great Pacific Garbage Patch: “Misinformation on this issue is rampant.” (AR tab 9 at 1.) Regarding whether there is an area of trash in the Pacific “twice the size of Texas” as is frequently claimed, she states: “There is no evidence for this. There certainly is a lot of trash, but there have been no measurements of either the trash’s total area or its growth rate.” (AR tabs 9, 10.)

Oregon State University issued a press release on the subject of the Great Pacific Garbage Patch based on research and voyages to the Pacific by a Professor of Oceanography, Angel White. (“Oceanic ‘garbage patch’ not nearly as big as portrayed in media.” AR tab 93.) Professor White says:

The amount of plastic out there isn’t trivial, but using the highest concentrations ever reported by scientists produces a patch that is a small fraction of the state of Texas, not twice the size.

There is no doubt that the amount of plastic in the world’s oceans is troubling, but this kind of exaggeration undermines the credibility of scientists. We have data that allow us to make reasonable estimates; we don’t need the hyperbole. Given the observed concentration of plastic in the North Pacific, it is simply inaccurate to state that plastic outweighs plankton, or that we have observed an exponential increase in plastic.

In an environmentally conscientious place such as Marin County, environmental *fads* can displace environmental *facts*. People may be too

willing to believe anything that confirms their views, including myths, misinformation, and spin on their favorite websites and blogs. This is known as “confirmation bias.” As Simon and Garfunkel said in *The Boxer*, “a man hears what he wants to hear and disregards the rest.”

The Times (London) stated as follows in an editorial:

There is a danger that the green herd, in pursuit of a good cause, stumbles into misguided campaigns.

Analysis without facts is guesswork. Sloppy analysis of bad science is worse. Poor interpretation of good science wastes time and impedes the fight against obnoxious behavior. There is no place for bad science, or weak analysis, in the search for credible answers to difficult questions....

Many of those who have demonized plastic bags have enlisted scientific study to their cause. By exaggerating a grain of truth into a larger falsehood they spread misinformation, and abuse the trust of their unwitting audiences.

(AR tab 7.)

Environmental decisions should be based on facts and analysis, not myths, hyperbole, and wishful thinking.¹¹

¹¹ Plaintiff’s complaint that myths and misinformation are being disseminated is not the basis for the demand for an EIR. Plaintiff’s demand for an EIR is based on the “fair argument” that the Ordinance may result in significant negative environmental impacts as a result of increased numbers of paper and reusable bags. One of the *benefits* of an EIR is that it must be based on substantial evidence and should dispel the myths.

CONCLUSION

The County abused its discretion and violated CEQA by not preparing an EIR. *Nothing in this brief is intended to waive the overriding point that the Supreme Court's decision absolutely requires that Marin County prepare an EIR before banning plastic bags.*

An EIR will assist the Board of Supervisors in making an *informed* decision and provide the voters with information to evaluate that decision. As the court stated in *People v. County of Kern* (1974) 39 Cal.App.3d 830:

Only by requiring [an agency] to fully comply with the letter of the law can a subversion of the important public purposes of CEQA be avoided, and only by this process will the public be able to determine the environmental and economic values of their elected and appointed officials, thus allowing for appropriate action come election day should a majority of the voters disagree.

(*Id.* at 842.)

WHEREFORE, Plaintiff requests that this court reverse the judgment of the trial court denying the Writ of Mandate; order or require the trial court to order repeal of the Ordinance; and order or require the trial court to order the County to prepare an EIR before banning plastic bags.

DATED: February 9, 2012

STEPHEN L. JOSEPH

A handwritten signature in black ink, appearing to be 'S. L. Joseph', with a long horizontal line extending from the top right.

Attorney for Plaintiff and Appellant
SAVE THE PLASTIC BAG COALITION

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 10,081 words, including footnotes, excluding the Table of Contents, the Table of Authorities, the Certificate of Interested Entities, this Certificate of Compliance, and the Proof of Service In making this certification, I have relied on the word count of the computer program used to prepare the brief.

DATED: February 9, 2012

STEPHEN L. JOSEPH

A handwritten signature in black ink, appearing to be 'Stephen L. Joseph', with a long horizontal line extending from the top right of the signature.

Attorney for Plaintiff and Appellant
SAVE THE PLASTIC BAG COALITION

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am an active member of the State Bar of California and not a party to the within action. My business address is 350 Bay Street, Suite 100-328, San Francisco, CA 94133.

I served the foregoing document described as APPELLANT'S OPENING BRIEF in this action as follows.

BY FEDERAL EXPRESS

I maintain an account with Federal Express. On February 9, 2012, I placed one true copy of said document in a sealed Federal Express container and deposited it in a Federal Express drop-off receptacle in San Francisco, California. The Airbill was marked "FedEx Priority Overnight (Next business morning)" delivery; payment to be charged to sender's account; and permit delivery without signature. The names and address on the Airbill and the numbers of copies enclosed were as follows:

Patrick K. Faulkner
COUNTY COUNSEL
David L. Zaltsman, Deputy
3501 Civic Center Drive, #275
San Rafael, CA 94903
Phone: (415) 499-6127

County Counsel and I have agreed that we will serve all briefs by Federal Express or other overnight means, next business morning delivery.

BY PERSONAL DELIVERY

On February 9, 2012, I personally delivered four copies to the Supreme Court of California at the following address:

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

BY MAIL

On February 9, 2012, I placed true copies thereof in sealed envelopes with postage fully prepaid in the United States Mail at San Francisco, California. The names and addresses on the envelopes and the number of copies were as follows:

One copy for delivery to Superior Court Judge Lynn Duryee:

Civil Clerk
Room 113
Marin County Superior Court
3501 Civic Center Drive
San Rafael, CA 94903

One copy addressed as follows:

Office of the Attorney General
1300 "I" Street
Sacramento, CA 95814-2919

I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing stated herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 9, 2012 at San Francisco, California.

A handwritten signature in black ink, appearing to be "Stephen L. Joseph", with a long horizontal line extending from the top right of the signature.

STEPHEN L. JOSEPH