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March 17, 2010

Chief Justice Ronald M. George
Associate Justices Baxter, Chin, Kennard, Moreno & Werdegar
Supreme Court of California
Office of the Clerk, First Floor
350 McAllister Street
San Francisco, CA 94102

Re: Amicus Curiae Letter in Support of Petition for Review:
Save the Plastic Bag Coalition v. City of Manhattan Beach,
Case No. B215788

Dear Chief Justice George and Associate Justices:

This letter is presented on behalf of amicus curiae, **Heal the Bay**, urging you to grant the Petition for Review filed by the City of Manhattan Beach in the above-referenced case.

Pursuant to Rule 8.500(g), California Rules of Court, we will first address the interest of Heal the Bay in this matter, and then address the grounds for accepting the Petition under subdivision (b) of said Rule.

1. THE INTEREST OF AMICUS, **HEAL THE BAY**

Heal the Bay is a California non-profit organization based in Santa Monica, California, with approximately 13,000 members and volunteers residing throughout Southern California, including Los Angeles County. On behalf of its members, Heal the Bay is dedicated to making Southern California coastal waters and watersheds, including Santa Monica Bay, safe, healthy, and clean. To achieve its

mission, Heal the Bay conducts scientific research and participates in scientific studies; takes active part in stakeholder processes related to marine debris; comments on Los Angeles Region Trash Total Maximum Daily Loads; sponsors state legislation to prevent and reduce marine debris, including legislation to ban or place a fee on single-use plastic bags; organizes the annual Coastal Clean Up Day for all of Los Angeles County including over 60 sites, including Manhattan Beach and other South Bay locations (on September 19, 2009, HTB's 965 volunteers collected 344 pounds of trash and recyclables at the Manhattan Beach Pier); has organized and run 115 beach clean-ups in Manhattan Beach separate from Coastal Cleanup Day related activities since 2002, picking up over 10,800 plastic items during these clean-up events; and organizes and educates the community on the water quality impacts of urban waste and run-off. Members of Heal the Bay regularly utilize waters in and around Los Angeles County for recreational and aesthetic enjoyment, scientific study, and educational purposes. In addition, Heal the Bay members derive ecological, scientific, aesthetic, recreational, and educational benefit from the conservation of water quality and natural resources in Los Angeles County and Santa Monica Bay. Heal the Bay is keenly interested, from first-hand experience, in the observable, tangible evidence that plastic bags have had and continue to have on the ocean environs. Heal the Bay fully supports the effort by the City of Manhattan Beach to stem the plastic tide that threatens marine life and creates litter on land and in the ocean that its members constantly attempt to reduce and eventually hope to eliminate.

2. REVIEW IS JUSTIFIED BY AN IMPORTANT QUESTION OF LAW: How Low Is the FAIR ARGUMENT Test's Low Threshold?

The Court below seemed apologetic in summarizing its holding, as if bracing for anticipated criticism:

All we are saying is that an environmental impact report must be prepared given that it can be fairly argued based on substantial evidence in the record that the ordinance may have a significant environmental impact. We emphasize that the fair argument test sets a low threshold for preparation of an environmental impact report and reflects a preference for resolving doubts in favor of environmental review.

(181 Cal. App. 4th 521 at ---).

The question presented here is not on the dubious merits of the opinion itself but whether grounds for review are present under subdivision (b), Rule 8.500. This court can regard the opinion below as simply another "fair argument" case under CEQA and ignore it, or the court can look at the implications for future CEQA analysis stemming from the opinion and decide the important statewide legal question whether the term "fair argument" is so elastic as to encompass any plausible argument, no matter how far-fetched, as long as some studies have been placed in the record which articulate hypothetical consequences that may ensue somehow, some day, somewhere in the world, such as global warming or acid rain.

The Butterfly Effect and the Plastic Bag Effect. Objectively speaking, most people would agree that a tornado would be considered an adverse environmental impact. Edward Lorenz, famed meteorologist and MIT professor known as the "father of chaos theory", learned in the 1960s that small differences in a dynamic system such as the atmosphere could set off enormous changes. In 1972 he presented a study entitled "Predictability: Does the Flap of a Butterfly's Wings in Brazil Set Off a Tornado in Texas?" The background and nature of this query is recounted as follows:

Lorenz published his findings in a 1963 paper for the New York Academy of Sciences noting that 'One meteorologist remarked that if the theory were correct, one flap of a seagull's wings could change the course of weather forever.' Later speeches and papers by Lorenz used the more poetic butterfly. According to Lorenz, upon failing to provide a title for a talk he was to present at the 139th meeting of the American Association for the Advancement of Science in 1972, Philip Merilees concocted *Does the flap of a butterfly's wings in Brazil set off a tornado in Texas?* as a title....

The phrase refers to the idea that a butterfly's wings might create tiny changes in the atmosphere that may ultimately alter the path of a tornado or delay, accelerate or even prevent the occurrence of a tornado in a certain location. The flapping wing represents a small change in the initial condition of the system, which causes a chain of events leading to large-scale alterations of events.... Had the butterfly not flapped its wings, the trajectory of the system might have been vastly different. While the butterfly does not "cause" the tornado in the sense of providing the energy for the tornado, it

does "cause" it in the sense that the flap of its wings is an essential part of the initial conditions resulting in a tornado, and without that flap that particular tornado would not have existed."

(http://en.wikipedia.org/wiki/Butterfly_effect).

Of course it is obvious that no one can compel a butterfly to prepare an EIR to analyze and mitigate the potential adverse effects of a tornado. However, if a governmental agency or private conservation group nourishes, protects and releases back into the environment an endangered species of butterflies¹, is an EIR required because a fair argument *can be made* from scholarly scientific journals that this may have consequences on weather patterns elsewhere in the world? Would citation to scholarly articles by MIT Professor Emeritus Lorenz on the "butterfly effect" be accorded the same weight as the industry-generated "plastic-bag effect" studies were below, in determining that the low threshold for a fair argument had been met?

Manhattan Beach (population 33,852) is the proverbial butterfly flapping its tiny wings, and the Plastic Bag Coalition has assumed the mantle of Edward Lorenz, offering studies pointing out that this flapping may lead to such tornados as global warming, acid rain, undue water consumption, fuel consumption, and who knows what else --- utter chaos from unintended consequences! The important question of law for this court is: Does CEQA require a city to spend its dwindling resources attempting to provide highly debatable answers to essentially unanswerable questions of remote consequences, and then spend even more resources defending its conclusions in court against its inevitably unsatisfied antagonists -- such as a consortium of plastic-bag industrialists? Citing the appellate court opinion, opponents of any proposed regulatory ordinance will hire teams of economists and scientists to scrutinize the proposed ordinance, no matter how benign. They will present scholarly studies pointing to potential butterfly-effect consequences that, according to the court of appeals, must be examined in an EIR. The key is simply producing scholarly studies hypothesizing potential unintended consequences to

1 See, *L.A. Times*, March 7, 2010, p. A39, "These butterflies are free--- to multiply; Conservationists exult as 80 of the endangered Palos Verdes blue venture into the wild", describing release of rare blue butterflies.

posit a "fair argument" about adverse impacts, not necessarily a valid or winning argument. Plausible is apparently good enough to trigger an EIR. This will undoubtedly lead to full employment for industry consultants, but it will grind government regulations to a halt under the crushing weight of studies and litigation. Consider a hypothetical mega-city which imposes a ban on "supergraphic" vinyl billboards due to the safety hazards and nuisance effects created by this type of sign draped over large buildings. Under the reasoning of the opinion below, the hypothetical Vinyl Billboard Coalition would be entitled to demand an EIR to study the effects of this regulation, such as the increased consumption of paper needed to obtain the same advertising space at more, smaller locations, or the increased use of energy if the alternative is to cause advertisers to use more digital billboards in place and instead of the banned vinyls. Would an injunction be appropriate to prevent the city from ordering the removal of supergraphics until such time as the EIR and all the post-EIR litigation was complete?

Ironically, the point made by Professor Lorenz, often misunderstood, was not that the tornado could actually be predicted from the flapping wings, but that in fact even though it might be a consequence, it could *not* be accurately predicted². The chain of causation is complex and subject to innumerable variables, as in the case of what may happen as a consequence of the ban on distribution of plastic bags in a city of 33,000 people. Only the immediate, reasonably foreseeable consequences can be determined, and the city determined those results are environmentally sound, bringing into play the purpose of the exemption in CEQA Guidelines, section 15308, as pointed out in Justice Mosk's dissent.(181 Cal. App. 4th at ---).

No matter how much money is spent on an EIR, the City will not be able to accurately assess, nor propose feasible mitigation measures for, the supposed effects on global warming, global energy consumption, water consumption and "acid rain" (a phenomenon not recently seen in Manhattan Beach). Of course, recognizing the impossibility of quantifying such infinitesimal impacts on such world-wide phenomenon, Plastic Bag Coalition argued below that the city must study the "cumulative effects" of banning plastic bags in places like San Francisco, 400 miles away. Is the City of Manhattan Beach supposed to mitigate the global

² See, *Dizikes*, "The Meaning of the Butterfly- Why Pop Culture Loves the 'Butterfly Effect', and Gets It totally Wrong",

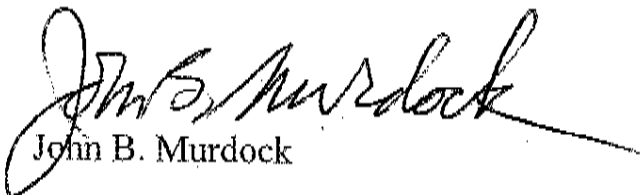
http://boston.com/bostonglobe/ideas/articles/2008/06/08/the_meaning_of_the_butterfly

warming impacts of paper bags in San Francisco and other cities as well as Manhattan Beach? The entire notion that an EIR will actually be useful to study these impacts in connection with the distribution of plastic *versus* paper bags in Manhattan Beach is simply preposterous. It was taken seriously by the court presumably because Scotland did a study of the impacts *on that entire nation* of placing a levy on plastic bags nationwide while not placing a similar levy on paper, thereby giving window dressing to the supposed "fair argument" pleaded by the Bag Coalition. However, a study on the potential nationwide impacts of a tax levy in Scotland is a far different matter than attempting to calculate the worldwide greenhouse gas and acid rain impacts of a few paper bags in Manhattan Beach.

Respectfully, this honorable court is called upon to determine whether the "broad reach" of CEQA's intended environmental analysis is *so broad* as to burden municipalities with the duty to ferret out, by way of a full-blown EIR, every hypothetical consequence of every ordinance proposed.

Heal the Bay urges the court to take up this question by granting the city's Petition for Review, so that the merits of the decision may be explored in greater depth.

Very truly yours,



John B. Murdock

Attorney for Heal the Bay

cc: Service list attached