

No. B215788

(County of Los Angeles Super. Ct. No. BS116362)

**IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE**

SAVE THE PLASTIC BAG COALITION,
an unincorporated association

PETITIONER AND RESPONDENT

v.

CITY OF MANHATTAN BEACH,
a municipal corporation

RESPONDENT AND APPELLANT

Appeal From Judgment Of
The Superior Court of California
County Of Los Angeles
(Hon. David P. Yaffe, Presiding)

RESPONDENT'S BRIEF

STEPHEN L. JOSEPH
State Bar No.189234
350 Bay Street, Suite 100-328
San Francisco, CA 94133
Phone: (415) 577-6660
Fax: (415) 869-5380
E-mail: sljoseph.law@earthlink.net

ATTORNEY FOR PETITIONER AND RESPONDENT
SAVE THE PLASTIC BAG COALITION

TABLE OF CONTENTS

	Page
INTRODUCTION	1
WHY DECISION MAKERS AND THE PUBLIC NEED AN EIR	1
STATEMENT OF FACTS	6
A. The Oakland case	6
B. The Petitioner	6
C. The June 3, 2008 Staff Report	7
D. Petitioner’s objections to June 3, 2008 Staff Report	8
E. The June 3, 2008 City Council meeting	11
F. Petitioner’s June 10, 2008 objections	12
G. The City’s Initial Study issued on June 12, 2008	12
H. Petitioner’s June 18, 2008 objections to Initial Study	13
The Scottish report	14
The ULS report	15
The City’s <i>de minimis</i> assertion	17
Failure to address all impacts	17
I. The July 1, 2008 Staff Report	18
The Franklin report	18
The Boustead report	19
The Swedish report	20
Lack of finding regarding fair argument	20
J. Petitioner’s July 1, 2008 supplemental objections	21
K. The misleading table in the July 1, 2008 Staff Report	22
L. The July 1, 2008 City Council meeting	23
M. The Ordinance and the Negative Declaration	24

PROCEDURAL HISTORY	24
THE SUPERIOR COURT DECISION	24
STANDARD OF REVIEW	26
ARGUMENT	26
I. Petitioner Has Public Interest Standing	26
II. An EIR Should Have Been Prepared As Petitioner Made A “Fair Argument”	32
III. The City’s <i>De Minimis</i> Assertion Lacks Any Basis	36
IV. The City Failed To Conduct A Cumulative Analysis	39
A. Failure to analyze the San Francisco ban	41
B. Failure to list and analyze the LA County reduction program and probable ban	43
C. Failure to list and analyze the Santa Monica probable ban	45
D. Failure to list and analyze other probable bans, fees or reduction projects	45
CONCLUSION	46
Word count	47

TABLE OF AUTHORITIES

CASES

	Page
<i>Bozung v. Local Agency Formation Commission</i> (1975) 13 Cal.3d 263	26-27
<i>Burrtec Waste Industries, Inc. v. City of Colton</i> (2002) 97 Cal.App.4th 1133	29-30
<i>Communities for a Better Environment v. California Resources Agency</i> (2002) 103 Cal.App.4th 98	40
<i>County Sanitation District No. 2 v. County of Kern</i> (2005) 127 Cal.App.4th 1544	33-34
<i>Davidon Homes v. City of San Jose</i> (1997) 54 Cal.App.4th 106	33
<i>Friends of “B” Street v. City of Hayward</i> (1980) 106 Cal.App.3d 988	34, 35
<i>Green v. Obledo</i> (1981) 29 Cal.3d 126	27
<i>Leonoff v. Monterey County Board of Supervisors</i> (1990) 222 Cal.App.3d 1337	34, 35
<i>Mejia v. City of Los Angeles (California Home Development, LLC)</i> (2005) 130 Cal.App.4th 322	26, 33
<i>People v. County of Kern</i> (1974) 39 Cal. App. 3d 830	5
<i>San Franciscans for Reasonable Growth v. City and County of San Francisco</i> (1984) 151 Cal.App.3d 61	44-45

<i>Vedanta Society of So. California v. California Quartet, Ltd.</i> (2000) 84 Cal.App.4th 517	5
<i>Waste Management v. County of Alameda</i> (2000) 79 Cal.App.4th 1223	27-28

TABLE OF AUTHORITIES
STATUTES AND REGULATIONS

California Pub. Res. Code:	Page
§21080(c)	33
§21151	33
§42357	42
California Evidence Code:	
§451(f)	41
§452(g)	41
§452(h)	41
14 Cal. Code Regs Ch. 3 (CEQA Guidelines):	
§15002	30
§15061(b)(3)	33, 37
§15063(b)(1)	40
§15064(f)	38
§15064(g)	34
§15065(3)	40, 45
§15144	38, 44
§15378(a)	33
San Francisco Environment Code, Chapter 17	
§1702(b)	42
§1702(j)	15
§1703	42

**TABLE OF SIGNIFICANT DOCUMENTS IN
ADMINISTRATIVE RECORD**

<u>Manhattan Beach documents and objections:</u>	AR
Staff Report dated June 3, 2008	16-22
Petitioner’s June 3, 2008 objections	23-30
Petitioner’s June 10, 2008 objections	393-400
(Proposed) Negative Declaration issued June 12, 2008	109
Initial Study issued June 12, 2008	110-123
Petitioner’s June 18, 2008 objections	374-384
Staff Report dated July 1, 2008	99-107
Petitioner’s July 1, 2008 objections	580a-g
Ordinance adopted July 15, 2008	686-689
<u>Reports:</u>	
Boustead report	473-536
Boustead report impact table	476
Boustead report peer review	535-536
Franklin report	404-418
Franklin report impact conclusions	417-418
Scottish report	419-472
Scottish report impact table	452
ULS report	537-542
Swedish report summary	560-570
Swedish report pages re types of bags studied	543, 560
<u>Miscellaneous:</u>	
<i>The Times</i> of London article dated March 8, 2008	142-144
Oakland decision issued May 2008	170-182
San Francisco plastic bag ban ordinance	235-239

INTRODUCTION

Petitioner and Respondent, Save The Plastic Bag Coalition (“Petitioner”), hereby responds to the Opening Brief filed by Respondent and Appellant City of Manhattan Beach.¹ Petitioner requests that this court affirm the ruling of the Los Angeles Superior Court that an Environmental Impact Report (“EIR”) pursuant to the California Environmental Quality Act (“CEQA”) is required before the City may ban plastic bags.²

WHY DECISION MAKERS AND THE PUBLIC NEED AN EIR

In March 2008, *The Times* of London stated 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. (App. 239.)

When a product is selected for environmental scrutiny, passions may run high. Scrutiny may turn into vilification. As a result, detachment and balance may be lost, factual selectivity and distortion may occur, and the

¹ The City describes itself as the “Petitioner” in the caption on its Opening Brief. The City has not filed a Petition. Save The Plastic Bag Coalition is the only “Petitioner” in this case, having filed a Petition For Writ Of Mandate in the Superior Court. (App. 15-132.)

² The table of contents in the Administrative Record lacks necessary detail. Therefore, a table of significant documents in the Administrative Record is included on the preceding page, which is page vii.

environmental impacts of the alternatives may be understated or ignored. Petitioner believes that this is precisely what has happened with plastic bags, including in Manhattan Beach.

In California, people are bombarded with messages about plastic bags being bad for the environment. Consequently, there is a high level of public awareness that plastic bags present an environmental issue. By now, a large number of people have formed a negative opinion about plastic bags by dint of the repetitious one-sided messaging and sound bites. They believe that paper bags are better for the environment. However, very few people have more than a superficial understanding of the subject. Most people just accept what they are told.

Many people want to make the right environmental choice when they choose paper or plastic, assuming that they do not have a reusable bag with them. They are collectively making decisions about environmental impacts millions of times each day at the checkout. Petitioner believes that they have been fed a diet of myths, selective facts, misinformation and exaggerations about plastic bags. They should know, and have a right to know, the truth.

One of the most egregious examples of misinformation is the heavily publicized and widely held belief that 100,000 marine mammals and a million seabirds die each year as a result of ingesting plastic bags. That allegation has caused great consternation among decision makers and the general public. However, it is untrue. It is based upon a typographical error. The Canadian study on which the assertion is based reported that the deaths resulted from *discarded fishing tackle*. The study did not mention plastic bags at all. (“Series of blunders turned the plastic bag into global villain.” *The Times* of London, March 8, 2008, AR 142-144, 398-400.)

The media has spread the false allegation by copying and pasting it without checking the facts. It is impossible to purge it from the Internet because it is repeated thousands of times, as a Google search will show. However, if an EIR is completed and publicized, articles on the Internet pointing out that the allegation has been confirmed to be false should eventually predominate.

Petitioner's intervention in Manhattan Beach was triggered by an utterly inadequate and misleading initial Staff Report issued on June 3, 2008. (AR 16-19.) The City was planning to adopt a plastic bag ban based entirely on that four-page report to promote "the sustainability of our environment." (AR 16.) The report was full of negative statements about the environmental impacts of plastic bags, which were mostly wrong. (See AR 23-30.) One such statement was as follows:

Plastic bags pose a particular problem for wildlife that mistakes the bags for food, and as a result, ingest the bags thereby starving or suffocating. It is estimated that more than 1 million seabirds, 100,000 marine mammals and countless fish die annually through ingestion of and entanglement in marine debris, including plastic bags. (AR 17.)

The June 3, 2008 Staff Report did not say *anything* about the negative environmental impacts of paper bags, which would or might replace plastic bags. Paper bags were discussed in the June 3, 2008 Staff Report in just three sentences. (AR 17.) Therefore, Petitioner demanded an EIR. (AR 23-30.) Petitioner presented solid studies with detailed figures showing that paper bags are significantly worse for the environment than plastic bags. The life cycle of paper bags, including logging, pulp and paper production, transportation and disposal, is a major source of pollution and environmental impacts. For example, two studies show that the life cycle of

paper bags produces between 2.0 and 3.3 times more climate changing greenhouse gas emissions than plastic bags based on the same carrying capacity. (AR 452, 476.) As Petitioner had made a “fair argument” that paper bags are worse for the environment than plastic bags, the City was legally required to prepare an EIR before adopting a plastic bag ban.

If Petitioner hadn’t objected and threatened to sue, the City would have charged ahead and banned plastic bags based only on the June 3, 2008 Staff Report. City Council members and the citizens of Manhattan Beach would have been misled by the misinformation in the report and would have been unaware of the environmental impacts of paper bags.

In response to Petitioner’s objections and the prospect of litigation, the City Attorney told the City Council that “if we could beef up the record we may well be able to proceed.” (AR 50.) Ultimately, the City did “beef up” the record -- and ignored the parts that it didn’t like. In violation of CEQA, the City refused to prepare an EIR.

Unfortunately, the City of Manhattan Beach is not alone in taking a blinkered view. In January 2008, Los Angeles County adopted a program to reduce plastic bags at stores by 30% by 2010 and 65% by 2013. (AR18.) Prior to adoption of the program, County staff had prepared a 50-page report slamming plastic bags for their environmental impacts without even once saying *anything* negative about the environmental impacts of the paper bags that would replace them. (AR 259-315.) Petitioner has sued the County for failing to prepare an EIR before adopting the program.³

Is such selectivity about environmental impacts consistent with the public interest? The answer is indisputably no. The best antidote to selectivity and misinformation is an EIR prepared in accordance with the

³ *Save The Plastic Bag Coalition v. County of Los Angeles*, Los Angeles Superior Court, Case No. BS115845.

exacting requirements of CEQA.

Staff reports are no substitute for an EIR. They are not subject to any regulation or standards. They do not need to be based on any evidence. They are often advocacy documents arguing for one side of an issue. Elected officials are not required to certify or even consider them. Consequently, they carry no real weight and little public confidence. CEQA does not settle for a staff report or a “beefed up” record.⁴

If the City of Manhattan Beach prepares an EIR, the citizens of Manhattan Beach and the broader public will know the truth about the environmental impacts of banning plastic bags based upon an authoritative document. As the court stated in *People v. County of Kern* (1974) 39 Cal. App. 3d 830, 842:

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.

Our society faces major environmental decisions in the years ahead, including important energy and transportation choices that will have long-term consequences. Many of those decisions will be made by California’s city councils and boards of supervisors who understandably will want to make the green choice. Thankfully, EIRs will play a critical role in ensuring that the facts are not lost in a green fog.

⁴ “The whole purpose of the EIR ‘review and consideration function’ is...to expose the elected decision makers to the political heat of certifying an EIR.” *Vedanta Society of So. California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 527.

STATEMENT OF FACTS

A. THE OAKLAND CASE

Prior to the formation of Petitioner coalition, the Alameda Superior Court decided the Oakland case. (AR 170-182.)

In July 2007, the City of Oakland adopted an ordinance banning plastic bags. It was in all relevant respects identical to the Manhattan Beach Ordinance. A coalition formed by plastic bag manufacturers (not the Petitioner in this case) filed a petition for writ of mandate because Oakland had failed to prepare an EIR. *Coalition To Support Plastic Bag Recycling v. City of Oakland, et al.*, Case No. RG07-339097.

In May 2008, the Alameda Superior Court issued a writ of mandate invalidating the Oakland ordinance. (AR 170-182.) It found that there was a possibility that the ordinance would have a significant negative environmental impact, because paper bags are worse for the environment than plastic bags. The Alameda Superior Court based its ruling on the Scottish report, which is discussed below. (AR 419-472) The decision was not appealed.⁵

B. THE PETITIONER

Petitioner is an unincorporated association that was formed on June 3, 2008. (App. 17, 520 ¶¶6, 8.) Its members include individuals and plastic bag manufacturers. (App. 17 ¶¶5-6; 520 ¶6.)

For several years, plastic bags have been the subject of an intense national and international vilification campaign. (App 17 ¶7; 520 ¶7.) Petitioner believes and contends that groups seeking to have plastic bags banned have disseminated myths, misinformation and exaggerations to

⁵ <http://apps.alameda.courts.ca.gov/domainweb/html/index.html>. Enter case number RG07339097 (case sensitive).

promote their goal. (App. 18 ¶8; 520 ¶7.)

Petitioner was formed for the purpose of responding to anti-plastic bag misinformation, in the public interest. (App. 18 ¶¶11-12.) Petitioner maintains an information website at www.savetheplasticbag.com to respond to the environmental misinformation. (App. 18 ¶11; 520 ¶9.) Petitioner's concern about environmental misinformation is genuine and continuing. (App. 589-597.)

Petitioner and its members believe and contend that plastic bags are environmentally superior to paper bags. (App. 24 ¶52 to 25 ¶59.)

Petitioner's objective in filing objections with the City and bringing this action is that of an interested citizen seeking to procure enforcement of the City's public duties and compliance with CEQA in the public interest. The objections were asserted and the action was filed to confer a significant benefit on the general public or a large class of persons by ensuring that the environmental goals of CEQA are not thwarted. (App. 18 ¶13; 521 ¶13; 523 ¶15.)

C. THE JUNE 3, 2008 STAFF REPORT

On June 3, 2008, City staff issued a Staff Report and a draft ordinance to ban plastic bags. (AR 16-22.) The stated purpose of the proposed ordinance was to promote the "sustainability of our environment." (AR 16.)

The Staff Report was a one-sided anti-plastic bag advocacy document and not an objective, accurate or complete assessment of the environmental impacts of banning plastic bags. The report was full of myths, misinformation and exaggerations. One of the assertions in the Staff Report was as follows:

Plastic bags pose a particular problem for wildlife that mistakes the bags for food, and as a result, ingest the bags thereby starving or suffocating. It is estimated that more than 1 million seabirds, 100,000 marine mammals and countless fish die annually through ingestion of and entanglement in marine debris, including plastic bags. (AR 17.)

Note that the City uses the term “plastic bags” in the first sentence, but uses the term “marine *debris*, including plastic bags” in the second sentence. (Emphasis added.) The City dodged the issue of how much of the “debris” causing the deaths of marine mammals and seabirds consists of plastic bags. Similarly, the City Attorney talks about the accumulation of “plastic *debris*” in the Pacific Ocean. (Opening Brief (“OB”) at 22, emphasis added.) It is important to be watchful for that all-encompassing term “debris.” As we shall see below, *The Times* of London has reported that the “debris” responsible for the deaths of the marine mammals and seabirds consists of discarded fishing tackle, not plastic bags.

Marine debris, plastic debris, and plastic bags are not the same things. Terminological imprecision and the misleading juxtapositioning of sentences hinder the quest for the truth. Not everyone notices the wordplay.⁶

D. PETITIONER’S OBJECTIONS TO JUNE 3, 2008 STAFF REPORT

On June 3, 2008, Petitioner filed objections to the Staff Report and addressed the myths, misinformation and exaggerations therein. Petitioner identified ways in which paper bags are worse for the environment than plastic bags and demanded that an EIR be prepared. (AR 23-30.)

⁶ See also City of Santa Monica City Council Report on plastic bags: “Studies have estimated that more than 1 million sea birds, 100,000 marine mammals and countless fish die annually through ingestion of and entanglement in marine debris, including plastic bags.” (AR 246.)

Petitioner also filed a report published in *The Times* of London on March 8, 2008 entitled: “Series of blunders turned the plastic bag into global villain.” (AR 26-27, 398-400.) The report states as follows:

Scientists and environmentalists have attacked a global campaign to ban plastic bags which they say is based on flawed science and exaggerated claims.

The widely stated accusation that the bags kill 100,000 animals and a million seabirds every year are false, experts have told *The Times*. They pose only a minimal threat to most marine species, including seals, whales, dolphins and seabirds....

Campaigners say that plastic bags pollute coastlines and waterways, killing or injuring birds and livestock on land and, in the oceans, destroying vast numbers of seabirds, seals, turtles and whales. However, *The Times* has established that there is no scientific evidence to show that the bags pose any direct threat to marine mammals.

They “don’t figure” in the majority of cases where animals die from marine debris, said David Laist, the author of a seminal 1997 study on the subject. Most deaths were caused when creatures became caught up in waste produce. “Plastic bags don’t figure in entanglement,” he said. “The main culprits are fishing gear, ropes, lines and strapping bands. Most mammals are too big to get caught up in a plastic bag.”

He added: “The impact of bags on whales, dolphins, porpoises and seals ranges from nil for most species to very minor for perhaps a few species. For birds, plastic bags are not a problem either.”

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.”⁷

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 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. We are not going to solve the problem of waste by focusing on plastic bags.

“It doesn’t do the Government’s case any favours if you’ve got statements being made that aren’t supported by the scientific literature that’s out there. With larger mammals it’s fishing gear that’s the big problem. On a global basis plastic bags aren’t an issue. It would be great if statements like these weren’t made....”

⁷The word “debris” haunts this debate.

A 1968 study of albatross carcasses found that 90 per cent contained some form of plastic but only two birds had ingested part of a plastic bag.

Professor Geoff Boxshall, a marine biologist at the Natural History Museum, said: "I've never seen a bird killed by a plastic bag. Other forms of plastic in the ocean are much more damaging. Only a very small proportion is caused by bags...."

E. THE JUNE 3, 2008 CITY COUNCIL MEETING

A City Council meeting was held on June 3, 2008 following receipt of Petitioner's objections. The City Attorney made the following statements on the record regarding the impact of paper bags:

City Attorney (Robert Wadden): [Save The Plastic Bag Coalition] have raised in their letter what's called in CEQA terminology a "fair argument" -- that in fact there could be a negative impact from adopting this ordinance. (AR 48.)

City Attorney: [Save The Plastic Bag Coalition] provide reference to a study. Now that doesn't mean it's a correct argument, but again, we have not sufficiently studied it to provide other evidence on the record that would contradict the evidence that they have presented. (AR 49.)

City Attorney: [C]ertainly if, if we could beef up the record we may well be able to proceed. But as the record is now, there is just simply not enough evidence to avoid a similar situation to Oakland. (AR 50.)

City Attorney: So we, we have a couple of things in our favor, but by and large, I think it's likely that a court would be persuaded by [the Alameda Superior Court ruling in the Oakland Case]. (AR 51.)

City Attorney: [A]s long as [the Initial Study is] not obviously flawed -- even if, even if the judge really believes that our -- the study we rely on is inferior to the one that they've introduced, it doesn't make any difference. It's still substantial evidence and uh, we

would prevail. (AR 54-55.)

City Attorney: Yeah I don't think we would need an EIR for this. They've just simply raised an issue - it would depend on what information is out there. But if we can come up with studies that contradict the argument they've made about paper bags being more negative to the environment than plastic bags, then I think we can move forward rather quickly on it. (AR 59.)

City Attorney: What we're looking for is studies that say why plastic is bad. (AR 73.)

As discussed in the Arguments section of this brief, the City Attorney was wrong about the law. If there is evidence supporting a fair argument of significant environmental impact, it cannot be overcome by substantial evidence to the contrary.

F. PETITIONER'S JUNE 10, 2008 OBJECTIONS

On June 10, 2008, Petitioner filed a letter with the City objecting to the City Attorney's comments quoted above. (AR 393-397.) Petitioner also objected to a statement by City Council member Jim Aldinger that Petitioner was "hijacking environmental law" and that "[u]sing CEQA for this purpose is ridiculous." (AR 395.)

G. THE CITY'S INITIAL STUDY ISSUED ON JUNE 12, 2008

On June 12, 2008, the City issued a draft Initial Study ("Initial Study") and a proposed negative declaration (AR 109-123). It found that the proposed ordinance "COULD NOT have a significant effect on the environment" and stated that a negative declaration would be prepared. (AR 111.) Regarding paper bags, the City made the following findings:

There is a potential that the banning of plastic bags in the City of Manhattan Beach may result in an increase in paper bag usage. The proposed ordinance does require that all paper bags used in the City at the point

of sale be at least composed of 40% recyclable material. *However, it is well documented that the manufacture and distribution of paper bags can consume more energy than plastic bags. This increased use of energy could have an impact on the environment by increasing emissions from power plants and possibly from trucks carrying the heavier bulkier bags.* (AR 114a.) (Emphasis added.)

Thus, the City *conceded* that paper bags may have a significant negative impact on the environment. However, the City tried to negate that finding by making a *de minimis* assertion. The City stated in the Initial Study that the population of the City is “only” 33,852 and that there are “only” 217 retail establishments which might use plastic bags. (AR 120.) It further stated:

[I]t appears that any increase in the total use of paper bags resulting from the proposed ban on plastic bags in Manhattan Beach (and even considering it as a cumulative increase in the bans in Malibu and San Francisco) would be relatively small with a minimal or nonexistent increase in pollutants generated from production and recycling. This is counterbalanced by a modest reduction in plastic refuse being generated in a coastal region. No further investigation is required. (AR 118.)

H. PETITIONER’S JUNE 18, 2008 OBJECTIONS TO INITIAL STUDY

On June 18, 2008, Petitioner filed formal objections to the draft Initial Study and the proposed negative declaration, again demanding that an EIR be prepared. (AR 374-384.) In support of the objections, Petitioner filed two reports with the City: the Scottish report (AR 419-472) and the ULS report (AR 537-542).

The Scottish report: The Scottish report (AR 419-472) was published by the Scottish Government in 2005. It is an environmental impact assessment of the effects of a proposed plastic bag levy in Scotland. The report takes into account the fact that a paper bag holds more than a plastic bag and makes appropriate adjustments. (AR 451 sixth para.) The report includes the following findings:

If only plastic bags were to be levied..., then studies and experience elsewhere suggest that there would be some shift in bag usage to paper bags (which have worse environmental impacts). (AR 424)

[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 460)

Paper bags are anywhere between six to ten times heavier than lightweight plastic carrier bags and, as such, require more transport and its associated costs. They would also take up more room in a landfill if they were not recycled. (AR 460.)

According to the Scottish report (AR 452), paper bags result in:

- 1.1 times more consumption of nonrenewable primary energy than plastic bags.
- 4.0 times more consumption of water than plastic bags.
- 3.3 times more emissions of greenhouse gases than plastic bags.
- 1.9 times more acid rain (atmospheric acidification) than plastic bags.
- 1.3 times more negative air quality (ground level ozone formation) than plastic bags.

- 14.0 times more water body eutrophication than plastic bags.
- 2.7 times more solid waste production than plastic bags.

The ULS Report: The ULS Report addresses the impact of San Francisco’s ordinance banning plastic bags. (AR 537-542.) San Francisco defines acceptable paper bags in the same manner as the Manhattan Beach Ordinance.⁸

The ULS report contains the following findings (AR 539-540):

- Plastic bags generate 39% less greenhouse gas emissions than uncomposted paper bags and 68% less greenhouse gas emissions than composted paper bags.
- Plastic bags consume less than 6% of the water needed to make paper bags.
- Plastic bags consume 71% less energy during production than paper bags.
- Plastic bags generate approximately only one-fifth of the amount of solid waste that is generated by paper bags.

The ULS report 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]. Ironically, reducing the use of traditional plastic bags would not even reduce the reliance on fossil fuels, as paper and biodegradable

⁸ San Francisco Environment Code, Chapter 17, §1702(j): “no old growth fiber...100% recyclable... contains a minimum of 40% post-consumer recycled content”. The San Francisco ban ordinance is in the record at AR 235-239. Manhattan Beach uses the same definition of a “Recyclable Paper Bag.” (AR 687.)

plastic bags consume at least as much non-renewable energy during their full life cycle. (AR 541.)

The ULS report is based on four studies (AR537-538):

- The Carrefour report that was completed according to accepted ISO standards and peer reviewed by the French environmental institute and others.
- The SAEFL report, which was reviewed by various industries including the paper industry.
- The 2005 Boustead report.
- The 2007 Boustead report, which was prepared for the Progressive Bag Alliance (a plastic bag industry group) and peer reviewed by a professor at North Carolina State University. (The 2007 Boustead report is in the Administrative Record at AR 473-536. The peer review is at AR 535-536.)

The following statement is made in the ULS report:

While the 2007 Boustead Consulting Study was performed in the United States, the other studies originated in Europe. Because production processes are relatively similar globally, the data provide accurate assessments that can be used to draw valid conclusions in the United States. The similarity in results between the American and European studies further bears this out. (AR 538 n.3)

The City asserts in its Opening Brief, based on its reading of the ULS website at some unspecified time, that the editor of ULS has served on advisory boards for Wal-Mart and is the President of a marketing company that advises “the industry.” (OB 11, n.1.) The City also states in its Opening Brief that the “ULS Report was prepared by an agency run by a packaging industry consultant and its credibility suspect.” (OB 15.) Petitioner objects on the ground that the ULS website is not in the

Administrative Record (or even in the Appendix). There is no evidence in this case that ULS is in any way connected to the plastic bag industry or any related industries. The City never raised the issue of ULS's credibility prior to adoption of the Ordinance or in the Superior Court. In any event, there is no basis whatsoever for a finding that the ULS report is based on suspect or falsified data, if that is what the City is implying.

The City's *de minimis* assertion: In its June 18, 2008 objections, Petitioner objected to the City's *de minimis* argument that the impact of a plastic bag ban would be "relatively small with a minimal or nonexistent increase in pollutants generated from production and recycling." Petitioner stated:

The size of the city and the number of retail outlets have nothing to do with whether the activity in question may have a significant negative effect on the environment. If it were otherwise, then each small city could avoid the preparation of an EIR, but the cumulative effect of many small cities doing the same thing would be large. (AR 382, ¶E)

Failure to address all impacts: One of the grounds in Petitioner's June 18, 2008 objections was that the City had not addressed *all* of the possible negative environmental effects of paper bags identified in the Scottish and ULS Reports. (AR 382, ¶F) The Initial Study, including the final version (AR 109-123), did not even mention increased water consumption, increased acid rain, increased ground level ozone formation, increased water body eutrophication, increased solid waste production, or increased logging operations, all of which were addressed in the Scottish report. (AR 103, 452, 539-540.) The City did not assert that those significant environmental effects would be minimal or nonexistent. They are all significant negative environmental impacts that the City failed to

address *and preclude*.

I. THE JULY 1, 2008 STAFF REPORT

On July 1, 2008, the City published a second Staff Report. (AR 99-107.) The City referred to and attached three more reports (in addition to the Scottish and ULS reports).

The Franklin report: The City cited and attached the Franklin report that was prepared for the plastic industry. (AR 103, 404-418.) The City stated in the July 1, 2008 Staff Report: “Although this report is 18 years old, it is often cited in articles related to the paper versus plastic debate.” (AR 102.) The report is a life cycle assessment of plastic and paper carryout bags used in the United States. The Franklin report shows that plastic bags are substantially better for the environment than paper bags, because (AR 417-418):

- The energy requirements for plastic bags are between 20% and 40% less than for paper bags at zero percent recycling of both kinds of bags. Assuming paper bags carry 50% more than plastic bags, the plastic bag continues to require 23% less energy than paper bags even at 100% recycling.
- Plastic bags contribute between 74% and 80% less solid waste than paper bags at zero percent recycling. Plastic bags continue to contribute less solid waste than paper bags at all recycling rates.
- Atmospheric emissions for plastic bags are between 63% and 73% less than for paper bags at zero percent recycling. Plastic bags continue to contribute less atmospheric emissions than paper bags at all recycling rates.
- At a zero percent recycling rate, plastic bags contribute over 90% less waterborne wastes than paper bags. This percentage actually

increases as the recycling rate increases.

- The landfill volume occupied by plastic bags is 70% to 80% less than the volume occupied by paper bags based on 10,000 uses.

The Boustead report: The City attached the 2007 Boustead report to the July 1, 2008 Staff Report. (AR 473-536). The 2007 Boustead report is one of four reports that form the basis for the ULS report, including a 2005 Boustead report. (AR 538.) (All references hereinafter to the “Boustead report” mean the 2007 Boustead report.)

The 2007 Boustead report is an extremely thorough and detailed life cycle assessment of the environmental impacts of plastic and paper carryout bags in the United States. It is packed with data. It studied the types of plastic and paper bags carryout commonly used in the United States. (AR 478, 479.) It took into account that a paper bag holds more than a plastic bag and applied an adjustment factor. (AR 475.)

The Boustead includes the following findings based on carrying capacity equivalent to 1000 paper bags: (AR 476.)

- Total energy use: Paper bags = 2622 megajoules. Plastic bags = 763 megajoules.
- Fossil fuel use: Paper bags = 23.2 kilograms. Plastic bags = 14.9 kilograms.
- Municipal solid waste: Paper bags = 33.9 kilograms. Plastic bags = 7.0 kilograms.
- Greenhouse gas emissions: Paper bags = 0.08 CO₂ equivalent tons. Plastic bags = 0.04 CO₂ equivalent tons.
- Fresh water usage: Paper bags = 1004 gallons. Plastic bags = 58 gallons.

The Boustead report studied paper bags with 30% post consumer

recycled content. (AR 478, 479.) The Ordinance requires that paper bags have 40% post-consumer recycled content. (AR 687.) Recycling is a collection, transportation and industrial operation with environmental impacts, so an extra 10% of recycled content would not result in a 10% improvement in environmental impacts. (Obviously, a paper bag with 100% post consumer recycled content would not have zero environmental impacts.) However, if we take optimism to the extreme and assume that an extra 10% of recycled content would decrease all environmental impacts of paper bags by 10%, paper bags are *still* far worse than plastic bags in *every* environmental category. (See Boustead report table at AR 476 and Scottish report at AR 452.) 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 763 megajoules. (AR 476.)

The recycling scenarios in the Boustead report are 5.2% for plastic bags and 21% for paper bags. (AR 518.) These are the same as the recycling rates that the City accepted and used in the July 1, 2008 Staff Report. (AR 100-101.)

The Boustead report was commissioned by Progressive Bag Affiliates, a plastic bag industry organization. (AR 473.) It was peer reviewed by an independent third party, a Professor of Chemical Engineering at North Carolina State University. (AR 476, 535-536.) He is an expert on life cycle analysis with extensive experience in the field. (AR 535.) He commented 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 535.)

The professor reviewed every single one of the figures in the report and disagreed with some of them. (AR 536.) The Boustead 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 536, 491).

The Swedish report: The City also cited and attached a summary of a report that it claimed was "prepared by an Independent Swedish Environmental Consulting Group." (AR 102, 560-570.) According to the Staff Report, the "independent" Swedish report concluded that paper bags were better for the environment than plastic bags. (AR 103.) The City failed to mention that page 48 of the summary of the Swedish report was missing from the copy attached to the July 1, 2008 Staff Report. As we shall see, missing page 48 turned out to be very important.

Lack of finding regarding fair argument: The City made no finding in the July 1, 2008 Staff Report that the Ordinance could not have a significant negative effect on the environment.

J. PETITIONER'S JULY 1, 2008 SUPPLEMENTAL OBJECTIONS

Petitioner filed supplemental objections on July 1, 2008 in response to the July 1, 2008 Staff Report. (AR 580a-g.) Petitioner strongly objected to the omission of page 48 of the summary of the Swedish report. (AR 580b-c.) Petitioner found page 48 on the Internet and appended it to its objections.⁹ (Page 48 is AR 560.)

Page 48 contains a statement that the Swedish report was prepared on behalf of European paper bag producers Eurosac and CEPI Eurokraft. The website home pages of Eurosac and CEPI Eurokraft are attached to the

⁹ The City added missing page 48 to the record sometime after July 1, 2008.

July 1, 2008 objections showing that they are paper bag producers. (AR 580e-g). The report was not “independent” at all. The public was misled by the City.¹⁰

The following statement also appeared on Page 48 (AR 560):

It is noted that the products analyzed in this study are fundamentally different products to checkout carrier bags -- they are bigger bags.

They certainly were fundamentally different bags. *They were “animal feed distribution sacks.”* (AR 543.) The capacity of the bags was 25 kg, which is 55 lbs. (AR 571 table heading Study 2.)

Petitioner objected in its July 1, 2008 supplemental objections, pointing out that the bags studied in the Swedish report were the wrong kind of bags. (AR 580c.) Based on page 48, Petitioner stated that the Swedish report was “misleading and irrelevant.” (AR 580c.)

K. THE MISLEADING TABLE IN THE JULY 1, 2008 STAFF REPORT

The July 1, 2008 Staff Report includes a table comparing the Franklin and Swedish reports. (AR 103.) The court is strongly urged to review the table. It is the most graphic and prominent feature of the July 1, 2008 Staff Report. Petitioner has two major complaints about the table.

First, there is no mention of the fact that the Swedish report studied 55lb capacity animal feed distribution sacks, not plastic carryout bags. It is truly incredible and inexcusable that this hugely relevant fact is not mentioned.

Second, the table completely omits the Scottish, ULS, Boustead reports. By excluding those reports, the table makes it appear, falsely, that there is no data in the record on the impact of paper bags on global

¹⁰ Petitioner was not objecting to the fact that it was an industry sponsored study. Petitioner objected to the City claiming that it was “independent.”

warming, acidification, nutrient enrichment (eutrophication), ozone formation, and aquatic toxicity (water pollution). Anyone reading the table is led to believe that those categories have been “not considered” and that paper is environmentally superior in those categories based on the Swedish report. In fact, the Scottish, ULS, and Boustead reports contain abundant data on those categories showing that plastic bags are environmentally superior to paper bags.¹¹

The Staff Report, especially the table, is grossly misleading to decision makers and the public. It highlights why Petitioner serves an important public purpose in exposing the environmental truth. No “environmental group” or anyone else has pointed out these problems.¹²

L. THE JULY 1, 2008 CITY COUNCIL MEETING

On July 1, 2008, the Council held a meeting to cast its first vote on the proposed ordinance. Petitioner’s counsel made public comments at the meeting. (AR 611-630.)

By that time, the City had four reports showing that paper carryout bags are worse for the environment than plastic bags: the Scottish report, the ULS report, the Franklin report and the Boustead report. The Swedish report was irrelevant because it did not study plastic carryout bags.

¹¹ The fact that the table appears in a South African report (AR 543-571 at 571) is no excuse. The South African report is undated but as it only mentions the Franklin report dated 1990 (date at AR 553) and the Swedish report dated 2000 (date at AR 560), it was obviously prepared long before the Scottish (2005), Boustead (2007), and ULS (2008) reports. This is confirmed by the footnote at AR 552 showing a 2001 e-mail date. The South African authors did not have the benefit of the later reports. The City did.

¹² The City stated in its brief in the Superior Court: “The fact that petitioners have a powerful economic interest in the continued use of plastic bags would reasonably imply bias in their statements and the data upon which they choose to rely.” (App. 558 line 26 to 559 line 1.) Perhaps the City should acknowledge its own bias and selectivity.

Therefore, the relevant evidence was unanimous.

City Council member Aldinger remained unconvinced. He stated at the meeting:

[What] really disturbs me most is that they are using CEQA against environmental issues. And, you know, for anybody to stand up and say that this does -- it has a negative impact on the environment just shocks me. (AR 649-650.)

M. THE ORDINANCE AND THE NEGATIVE DECLARATION

On July 15, 2008, the City Council adopted the Ordinance banning plastic bags at grocery stores, food vendors, restaurants, pharmacies, other businesses, and city facilities. (AR 673, 686-689.) The Ordinance states:

An Initial Environmental Study was prepared in compliance with the provisions of [CEQA]. Based upon this study it was determined that the project is not an action involving any significant impacts upon the environment, and a Negative Declaration was prepared and is hereby adopted. (AR 686 ¶H.)

In deciding not to prepare an EIR, the City simply brushed aside the Scottish report, the ULS report, the Franklin report, and the Boustead report.

PROCEDURAL HISTORY

On August 12, 2008, Petitioner filed a Verified Petition For Writ of Mandate in the Los Angeles Superior Court requesting that the Ordinance be invalidated. (App. 15-132) Petitioner contended that it had presented substantial evidence to the City that a shift to paper bags might have significant negative environmental impacts.

On February 20, 2009, the Superior Court ruled in favor of Petitioner. (App. 806-809.)

On March 25, 2009, the Superior Court issued the requested writ of

mandate. (App. 815-816.) On April 24, 2009, the City filed a Notice of Appeal. (App. 817-818.)

THE SUPERIOR COURT DECISION

Standing: The Superior Court ruled that Petitioner has standing. The court stated: “Petitioner here raises a genuine environmental issue: whether the banning of plastic bags, and the consequent increase in the use of paper bags, will increase, rather than decrease, injury to the environment.” (App. 807.)

Fair argument: The Superior Court ruled that Petitioner had made a “fair argument.” The court stated: “The Administrative Record in this contains substantial evidence to support a fair argument that the prohibition of the distribution of plastic bags to customers will result in a net increase, rather than a net decrease, in damage to the environment. Each side has placed in the administrative record studies that support its position in this matter. Under such circumstances, an Environmental Impact Report (EIR) must be created and considered by the public officials who are contemplating an ordinance, the very purpose of which is to improve the environment.” (App. 807-808.)

The City asserts in its Opening Brief that the Superior Court ruled that an EIR was required merely because the issue is “controversial.” (OB 3-5.) The City does not mention the Superior Court’s actual decision. The Superior Court specifically and clearly ruled, in writing, that “the record contains substantial evidence to support a fair argument.” (App. 807-808.)

De minimis: The Superior Court ruled that the City’s contention that the negative environmental impacts caused by increased paper bag use would be “minimal” has no merit because it is supported by no standard by which to determine what is “minimal.” (App. 808-809.)

STANDARD OF REVIEW

As discussed below, the City was required by CEQA to prepare an EIR if the Administrative Record contained any substantial evidence that negative environmental impacts might occur as a result of the Ordinance. This is known as the “fair argument” test. In *Mejia v. City of Los Angeles (California Home Development, LLC)*, (2005) 130 Cal.App.4th 322, 332-333, the court stated as follows:

Application of the ‘fair argument’ test is a question of law for our independent review. [Citations.] We review the trial court’s findings and conclusions de novo [citation], and do not defer to the agency’s determination [citation] except on ‘legitimate, disputed issues of credibility.’ [Citation] “Under this standard, deference to the agency’s determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary. [Citation.]”

ARGUMENT

I. PETITIONER HAS PUBLIC INTEREST STANDING

Petitioner was formed to respond to the misinformation, myths and exaggerations that have been disseminated about the environmental impacts of plastic bags. For example, the allegation that 100,000 sea mammals and a million seabirds die each year as a result of ingesting plastic bags is misinformation. The notion that paper bags are better for the environment than plastic bags is a myth. Petitioner is fully engaged in and committed to the cause of establishing and publicizing the environmental truth regarding plastic bags. Petitioner’s concern is genuine and continuing. (App. 589-597.)

In *Bozung v. Local Agency Formation Commission*, (1975) 13 Cal.3d 263, the Supreme Court held that a person had standing under

CEQA “to procure enforcement of a public duty.” *Id.* at 272. In *Green v. Obledo*, (1981) 29 Cal.3d 126, 144, the Supreme Court stated as follows:

It is true that ordinarily the writ of mandate will be issued only to persons who are “beneficially interested.” (Code Civ. Proc., §1086.) Yet in *Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, this court recognized an exception to the general rule “where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced” (*id.* at pp. 100-101). The exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right. (*Id.* at p. 100.) It has often been invoked by California courts.

The City cites *Waste Management v. County of Alameda*, (2000) 79 Cal.App.4th 1223. (OB 19-21.) The facts were as follows. Waste Management operated the Altamont landfill. Its competitor, Browning-Ferris, operated the Vasco Road landfill about four miles away. When Waste Management sought regulatory permission to accept designated waste at the Altamont landfill, the County required preparation of an EIR. When Browning-Ferris sought similar permission to accept designated wastes at the Vasco Road landfill, no EIR was required. The court stated:

At 1235: Accordingly, in its respondent’s brief, Waste Management asserts a beneficial interest by complaining it was required to undertake the substantial expense of EIR review and mitigation while Browning-Ferris was not, *and it identifies its injury as the extra costs it incurred and continuing competitive injury due to Browning-Ferris’s lower costs.* The assertion fails. (Emphasis added.)

CEQA is not a fair competition statutory scheme. Numerous findings and declarations were made by the Legislature with respect to CEQA. (Pub. Res. Code, §§ 21000-21005.) None of them suggest a purpose of fostering, protecting, or otherwise affecting economic competition among commercial enterprises.

Thus, Waste Management's commercial and competitive interests are not within the zone of interests CEQA was intended to preserve or protect and cannot serve as a beneficial interest for purposes of the standing requirement.

At 1236: The matter of a citizen's action is a long-established exception to the requirement of a personal beneficial interest. The exception applies where the question is one of public right and the object of the action is to enforce a public duty -- in which case it is sufficient that the plaintiff be interested as a citizen in having the laws executed and the public duty enforced. [citing *Green v. Obledo, supra*, and other cases.]

At 1237: This exception promotes a policy of guaranteeing citizens an opportunity to ensure that the purpose of legislation establishing a public right is not impaired or defeated by a governmental agency.

The petitioner in Waste Management did not raise any environmental concerns or issues whatsoever. It admitted that the sole purpose of its petition was to use CEQA to impose the expense of preparing an EIR on its competitor. The petitioner in that case was not interested in proving or disproving any environmental facts. It did not identify even a single environmental issue that an EIR would address or resolve. It did not identify any public interest in an EIR.

Waste Management is completely different from the instant case. Petitioner's action is based on environmental concerns, not competitive economic concerns. The object of Petitioner's action is to enforce a public duty in the public interest.

In *Burrtec Waste Industries, Inc. v. City of Colton*, (2002) 97 Cal.App.4th 1133, two competing corporations, Taormina and Burrtec, were engaged in solid waste recycling and disposal. The City of Colton approved a Mitigated Negative Declaration (MND) and granted a Conditional Use Permit (CUP) to Taormina to operate a solid waste facility. Burrtec alleged that the notice of intention to adopt the MND was not properly posted, as a result of which it did not find out about its competitor's application for the amended CUP until after it was too late to comment or appeal the city's approval. Burrtec did not allege that it would suffer any environmental harm. The court stated (at 1138-39):

CEQA litigants often may be characterized as having competing economic interests. [Citation] But, under CEQA, a corporation is a person entitled to receive notice and to bring a suit for noncompliance. [CEQA §21066.] Furthermore, as noted by the trial court, the interest asserted by Burrtec in its writ petition is not a commercial one but an issue involving the adequacy of the public notice required by CEQA. Where a plaintiff seeks by mandamus to enforce a public duty, especially under CEQA, standing is properly conferred: “[S]trict rules of standing that might be appropriate in other contexts have no application where broad and long-term effects are involved.” [*Bozung v. Local Agency Formation Com.*, *supra*, 13 Cal.3d at 272.]

Waste Management does not compel a different result. Sufficient evidence supports the superior court's determination that the express beneficial interest asserted by Burrtec is not rank commercialism but rather the need for public notice under CEQA. The record establishes Burrtec has a genuine and continuing concern for environmental matters and for compliance with the CEQA process. According to Eric Herbert, a Burrtec officer, the company encourages and monitors environmental compliance, including

CEQA determinations, by itself and other waste companies in Southern California. Burrtec even reviewed the initial approval of Taormina's Colton site although it did not comment on it. Using the primary factor of a demonstrated environmental concern, as identified in *Waste Management*, [footnote] we hold Burrtec meets the test, under the particular circumstances of this case, for being allowed to bring a citizen suit as a corporation.

In this case, the interest asserted by Petitioner is not “rank commercialism,” but rather the need for an EIR to address specific environmental issues. Petitioner is not making any commercial arguments in support of its case.

According to CEQA Guidelines §15002, the “basic purposes of CEQA” are as follows:

1. Inform governmental decision-makers and the public about the potential, significant environmental effects of proposed activities.
2. Identify ways that environmental damage can be avoided or significantly reduced.
3. Prevent significant, avoidable damage to the environment by requiring changes in projects through the use of feasible alternatives or mitigation measures.
4. Disclose to the public the reasons why a governmental agency approved the project in the manner the agency chose if significant environmental effects are involved.

Those are precisely the public purposes and duties that Petitioner is asking this court to enforce.

Only a group that has the financial support of business interests could reasonably be relied upon to incur the substantial cost and responsibility of litigating against the City to enforce CEQA in a case like

this. That is because none of the environmental impacts affect any one location or person in particular. Pollution, greenhouse gas emissions and the other negative environmental impacts of paper bags are widespread and affect us all.

If Petitioner doesn't hold the City's feet to the fire on environmental truth regarding plastic bags, then who will? Heal the Bay? Surfrider Foundation? None of the "environmental groups" that participated in the process provided any evidence to the City about the environmental impacts of paper bags, including the increase in climate changing greenhouse gas emissions. None of them searched for and found missing page 48 of the summary of the Swedish report and brought it to the City Council's attention. None of them said a word about the fact that the Swedish report studied 55 lb capacity animal feed distribution bags, not carryout bags. None of them pointed out that the allegation about 100,000 marine mammals and a million seabirds is untrue. None of them objected to the City's obfuscations or misinformation or took issue with anything that the City said or did. And most importantly, none of them asked for an EIR. Clearly, they are not reliable defenders of the *whole* truth on the plastic bag issue.

The Superior Court correctly ruled that Petitioner has standing because "Petitioner here raises a genuine environmental issue: whether the banning of plastic bags, and the consequent increase in the use of paper bags, will increase, rather than decrease, injury to the environment." (App. 807.) The ruling is fully consistent with *Green v. Obledo*, *Waste Management* and *Burrtec*.

Finally regarding standing, the City points out that Petitioner has filed a lawsuit against Los Angeles County regarding its failure to prepare

an EIR prior to adopting its plastic bag reduction program in January 2008. (OB 20; *Save The Plastic Bag Coalition v. County of Los Angeles*, Los Angeles Superior Court, Case No. 115845.) The City asserts that the trial court in that case sustained the County's demurrer based on Petitioner's lack of standing. (OB 20.) In fact, the trial court in that case ruled as follows:

There remains the prospect of public interest standing, which requires enforcement of a public duty and the public interest would suffer if the agency is not compelled to perform [citing *Green v. Obledo*] as well as that the persons beneficially interested would find it difficult to vindicate their rights and the Coalition has a specific interest in doing so. [Citing *Waste Management*.] The Petition states a conclusion of public interest standing (Pet. ¶15), but does not allege facts that would support public interest standing. The demurrer to the CEQA claim (not the declaratory relief claim) is sustained based on lack of standing. As this is an issue for which the Coalition might be able to allege public interest standing, leave to amend is granted.¹³

Petitioner filed an amended petition with new factual allegations supporting public interest standing. The County filed an answer to the amended petition without filing another demurrer. The trial is set for April 2010.

II. AN EIR SHOULD HAVE BEEN PREPARED AS PETITIONER MADE A "FAIR ARGUMENT"

The Ordinance has a potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. Therefore, the City was required to prepare an

¹³ The City has not provided this court with a copy of the demurrer ruling in the Los Angeles County case. As the demurrer ruling is not important to this case, Petitioner has not provided a copy either. Petitioner is merely responding to the City's assertion. Petitioner will not object if the City attaches a copy of the demurrer ruling to its reply brief.

EIR or issue a negative declaration. Pub. Res. Code §21080(c), (d), §21151; CEQA Guidelines §15378(a).

In issuing the Negative Declaration, the City relied on Pub. Res. Code §21080(c)(1) and CEQA Guidelines §15061(b)(3) which is known as the “Common Sense Exemption.” CEQA Guidelines §15061(b)(3) states:

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.

In *Davidon Homes v. City of San Jose*, (1997) 54 Cal.App.4th 106, 117, the court ruled:

If 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.

If there is “any credible evidence” that negative environmental impacts are possible, an EIR must be prepared. *Mejia v. City of Los Angeles, supra*, 130 Cal.App.4th at 332.

In *County Sanitation District No. 2 v. County of Kern*, (2005) 127 Cal.App.4th 1544, the court held as follows:

At 1558: We hold County was required to prepare an EIR under CEQA. This is because CEQA requires the preparation of an EIR whenever substantial evidence supports a fair argument that an ordinance will cause potentially significant adverse environmental impacts.

At 1579: California courts, including the Fifth Appellate District, routinely describe the fair argument test as a low threshold requirement for the initial preparation of an EIR that reflects a *preference for resolving doubts in favor of environmental review....* [Emphasis added.]

In contrast to this description of the fair argument test, County asserts that “[a]ny reasonable doubts whether substantial evidence exists must be resolved in favor of the agency’s decision.” This assertion is rejected because (1) it misstates the low threshold of the fair argument test and (2) the case relied upon by County did not actually involve the fair argument test or the approval of a negative declaration....

At 1580: A logical deduction from the formulation of the fair argument test is that, 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.

See also, *Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337, 1348 (“If such evidence [supporting a fair argument of significant environmental impact] is found, it cannot be overcome by substantial evidence to the contrary.”); *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 (“[E]vidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact.”)

CEQA Guidelines §15064(g) states:

[I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: 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.

Banning plastic bags means that there may or will be a shift to paper bags, as the City concedes. (AR 114a, 115, 424.) The Scottish Report (AR 419-472), the ULS Report (AR 537-542), the Franklin report (AR 404-

418), and the Boustead report (AR 473-536) all constitute substantial evidence that paper bags are worse for the environment than plastic bags.

The City did not make a determination that any of the reports was not credible. There would have been no legitimate basis for such a determination. The credibility of the reports was never even in question. Nor did the City challenge any of the reports based on substance.

The four reports constitute an overwhelming body of evidence that paper bags are worse for the environment than plastic bags. Therefore, it cannot be said with certainty that there is no possibility of a negative environmental impact. Petitioner has made a fair argument.

In any event, there was no finding by the City and there is no evidence whatsoever in the Administrative Record showing that paper bags are better for the environment than plastic bags regarding:

- Consumption of nonrenewable primary energy
- Consumption of water
- Climate changing greenhouse gas emissions
- Acid rain (atmospheric acidification)
- Negative air quality (ground level ozone formation)
- Water body eutrophication
- Solid waste production
- The cutting down of trees

The Swedish report is irrelevant, because the plastic bags in that study were 55 lb capacity animal feed distribution sacks. (AR 543.) In any event, evidence supporting a fair argument of significant environmental impact cannot be overcome by substantial evidence to the contrary. *Leonoff, supra*, 222 Cal.App.3d at 1348; *Friends of "B" Street, supra*, 106 Cal.App.3d 988, 1002.

The City acknowledges that paper bags can become litter, but asserts in its Opening Brief that it doesn't matter because they are biodegradable on the beach and in the ocean. (OB 13.) The City does not cite any study or data in the Administrative Record supporting that assertion. Petitioner objects to the baseless statement in the Opening Brief. Over what period of time does the City believe that paper bags truly biodegrade, including on a beach? Ten years, twenty years, or more? Obviously they will continue to be litter until they allegedly melt away into nothingness, so the timeframe does matter. Do paper bags create any greenhouse gases when they biodegrade? According to the ULS report: “[B]iodegradation release[s] carbon dioxide (CO₂), a greenhouse gas, into the atmosphere, increasing the potential for climate change.” (AR 539.) What happens to any additives or chemicals in the bags? Do they biodegrade too? These and other questions are unaddressed in the Administrative Record. They should be addressed in an EIR.

III. THE CITY'S *DE MINIMIS* ASSERTION LACKS ANY BASIS

This section III addresses the environmental impact of the Manhattan Beach Ordinance standing alone. The next section IV addresses the cumulative impact of the Manhattan Beach Ordinance and plastic bag reduction projects including bans in other locations.

As we have seen, the City stated in the Initial Study that the population of Manhattan Beach is “only” 33,852 and there are “only” 217 retail establishments which might use plastic bags (AR 120). Based on these figures, it concluded as follows:

[I]t appears that any increase in the total use of paper bags resulting from the proposed ban on plastic bags in Manhattan Beach (and even considering it as a

cumulative increase in the bans in Malibu and San Francisco) would be relatively small with a minimal or nonexistent increase in pollutants generated from production and recycling. This is counterbalanced by a modest reduction in plastic refuse being generated in a coastal region. No further investigation is required. (AR 118. See also AR 120.)

The “Initial Study Checklist” states that the explanation of each issue should identify “the significance criteria or threshold, if any, used to evaluate each question.” (AR113a ¶9a.) In declaring that the impacts would be “minimal,” the City identified only the size of the city as the significance criterion or threshold. However, it is possible for a small city with 33,852 people and 217 stores to produce significant environmental impacts.

The population figure and the number of stores is not a quantification of an environmental impact. The quantification of environmental impacts would be expressed as the number of bags with equivalent carrying capacity multiplied by the number of years that the Ordinance may remain in effect¹⁴ multiplied by:

- Energy consumption (see AR 476 for impact in megajoules, also AR 528)
- Fossil fuel use (see AR 476 for impact in kilograms, also AR 529)
- Greenhouse gas production (see AR 476 for impact in CO₂ equivalent tons, also AR 531)
- Solid waste production (see AR 476 for impact in kilograms, also AR 530)
- Gallons for water consumption (see AR 476 for impact in gallons,

¹⁴ [T]he unintended consequences can be significant and long-lasting.” Boustead report at AR 476. It would be appropriate to extrapolate the environmental impacts over at least 30 years into the future. The test is what time period is “possible.” CEQA Guidelines §15061(b)(3).

also AR 531)

- Other environmental impacts

The Boustead report breaks down the figures into minute detail. For example, 1000 paper bags use 4,591,000 milligrams of crude oil. (AR 486.) This is one of more than a thousand pieces of such data in the Boustead report that were available to the City.

After quantifying the environmental impacts, the City could then, and only then, have addressed the issue of whether the impacts would be significant.

With an abundance of available data at its fingertips, what did the City do? It summarily labeled all the impacts as “minimal” and consigned the data to oblivion.¹⁵

CEQA Guidelines §15064(f) states: “Argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous, or evidence that is not credible, shall not constitute substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” By merely labeling the impacts as “minimal,” the City provided only argument and unsubstantiated opinion. If a city or county could just dismiss impacts by labeling them as “minimal,” without reference to any metrics and standards, it would open the floodgates to the wholesale evasion of CEQA.

As part of its *de minimis* assertion, the City states that decreasing plastic bag “refuse” would “counterbalance” the negative environmental effects of paper bags. (AR 118.) That is a *non sequitur*. “Refuse” means

¹⁵ When drafting a negative declaration, “an agency must use its best efforts to find out and disclose all that it reasonably can.” CEQA Guidelines §15144.

trash. Reducing plastic bag trash does not negate the impacts caused by paper bag usage, including increased climate changing CO₂ emissions, increased acid rain, increased ground level ozone formation, increased water body eutrophication, increased water consumption, increased solid waste production, and increased logging operations. The City was comparing apples and oranges and making a flawed and invalid argument.

The Superior Court ruled that the City's determination that environmental impacts would be "minimal" is supported by no standard by which to determine what is "minimal." The court stated that the size of the City of Manhattan Beach relative to the size of other cities is not sufficient to show that the Petitioner had not made a fair argument regarding the environmental impact of paper bags. (App. 808-809.) The Superior Court's ruling regarding the *de minimis* issue is clearly correct. Petitioner made a fair argument that there *might* be significant environmental impacts from increased paper bag usage. The City did not eliminate that possibility.

IV. THE CITY FAILED TO CONDUCT A CUMULATIVE ANALYSIS

The issue of whether the City prepared a proper cumulative impact analysis is moot, because there is no point in preparing a cumulative analysis to take into account the impacts of bans in other places if Petitioner made a fair argument regarding the impacts caused by the Manhattan Beach Ordinance standing alone. Nevertheless, we will assume for the sake of argument that the City's *de minimis* finding regarding its proposed ordinance was legally valid based on Manhattan Beach being a small city. In other words, we are assuming that the Superior Court decided the *de minimis* issue incorrectly. In that case, the City was still required to conduct a proper cumulative impact analysis.

CEQA Guidelines §15063(b)(1) states that if an agency determines in an Initial Study “that there is substantial evidence that 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,” it must prepare an EIR. CEQA Guidelines §15065(3) states that an EIR must be prepared if “the project has possible environmental effects that are individually limited but cumulatively considerable. ‘Cumulatively considerable’ means that the “incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.”

In *Communities for a Better Environment v. California Resources Agency*, (2002) 103 Cal.App.4th 98, the court stated:

At 114: Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. [Footnote.] One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

At 118: From *Kings County and Los Angeles Unified*, the guiding criterion on the subject of cumulative impact is whether *any* additional effect caused by the proposed project should be considered significant given the existing cumulative effect. [Emphasis added.]

The Initial Study noted that only Oakland, San Francisco and Malibu had enacted bans. (AR 120.) There was no listing or discussion of any probable future bans or plastic bag fees or reduction programs.

Regarding Oakland, the City noted in the Initial Study that the ban had been invalidated. (AR 120.)

Regarding San Francisco, the Initial Study contains just one sentence:

San Francisco's ban does not include biodegradable plastic bags and so will not displace all plastic bag usage. (AR 120.)

Regarding Malibu, the Initial Study contains just one sentence:

Malibu is a City of only 12,575 with an extremely small retail component within its boundaries." (AR 120.)

The Initial Study did not contain a legally sufficient cumulative impacts analysis for the following reasons.

A. Failure to analyze the San Francisco ban

The City was required to address the environmental impacts of the San Francisco plastic bag ban. In *Communities for a Better Environment*, *supra*, 103 Cal.App.4th at 119, the court stated:

However, under CEQA section 21083, under the Guidelines section 15355 definition of cumulative impacts, and under the *Kings County/Los Angeles Unified* approach, the need for an EIR turns on the impacts of *both* the project under review and the relevant past, present and future projects. [Emphasis by court.]

San Francisco is a large city with a population of 744,041, which is 22 times greater than Manhattan Beach.¹⁶ The effects of banning plastic bags in San Francisco cannot be ignored.

¹⁶ U.S. Census Bureau, 2006 estimate: <http://quickfacts.census.gov/qfd/states/06/0667000.html>. The court is requested to take judicial notice of the population figure for San Francisco pursuant to Evidence Code §§451(f), 452(g) and (h).

The City dismissed the need to address the impacts of the San Francisco ban by asserting that the San Francisco ban “does not include biodegradable plastic bags and so will not displace all plastic bag usage.” (AR 120.) The assertion is incorrect. San Francisco allows plastic bags that are compostable, not biodegradable. San Francisco Environment Code, Chapter 17, §§1702(b), 1703. (The San Francisco ban ordinance is in the record at AR 235-239.) A compostable bag is not the same as a biodegradable bag. Pub. Res. Code §42357. In order to breakdown as intended, compostable plastics must be sent to an industrial or food composting facility.¹⁷ (AR 539.)

It is not clear what point the City was trying to make by asserting that the San Francisco ban “does not include biodegradable plastic bags and so will not displace all plastic bag usage.” (AR 120.) Was the City assuming that compostable bags are better for the environment than regular plastic or paper bags? If so, the City’s assumption is wrong based on substantial evidence in the record.

The ULS report addressed compostable and biodegradable bags as part of its study to “gauge the impact of the [San Francisco plastic bag ban].” (AR 537, 539.) The ULS report states that “composting and biodegradation release carbon dioxide (CO₂), a greenhouse gas into the atmosphere, increasing the potential for climate change.” (AR 539.) The Boustead report includes metrics showing that compostable bags are worse for the environment than regular plastic bags. (AR 476.)

Dismissing the San Francisco ban in summary fashion does not

¹⁷ “Compostable plastic bags, although available, are in short supply as the technology is still new, and therefore cannot currently meet market demand. So it appears that the proposed laws banning plastic grocery bags may simply cause a shift from plastic bags to the only alternative that can immediately supply the demand -- paper bags.” Boustead report at AR 477.

comply with the CEQA requirement that cumulative impacts be addressed.

B. Failure to list and analyze the LA County reduction program and probable ban

There is no listing or mention in the Initial Study of the plastic bag reduction program and a probable ban in Los Angeles County.

In the June 3, 2008 Staff Report, the City stated:

On January 22, 2008, the Los Angeles Board of Supervisors voted to reduce plastic bag usage by enacting voluntary reductions of 30 percent and 65 percent respectively. If these targets are not met by the deadlines, a mandatory ban may be implemented. (AR 18.)

Heal the Bay made the following comment about the Los Angeles County program at the July 1, 2008 Manhattan Beach City Council meeting stating that a ban is probable:

[The County] know that the recycling program that they're setting up is doomed to failure and that basically it's putting a ban out there in the future.... Nobody in the County of Los Angeles I have heard thinks that they'll reach the 65% target. They think it's a phased ban.¹⁸ (AR 635-636.)

The City states in the Opening Brief: "On page 70 of the AR Council member Aldinger is quoted as saying that a ban would automatically go into place if the County did not meet its voluntary goals by 2010, however a review of the LA County record indicated that no commitment was made for a ban and in fact no ordinance of any kind was adopted." (OB 17, n.2.) Petitioner objects. City Council member Aldinger did not refer to the Los Angeles County record. This is what he said:

¹⁸ The City says that Heal the Bay is "dispassionately" interested in the truth and fully credible. (OB 14-15.) Therefore, the City must accept Heal the Bay's comments as true.

No, but I just talked to Steve two weeks ago and he told me that it was -- that there was a ban that went into place if they didn't meet the voluntary stuff in 2010. (AR 70.)

When drafting a negative declaration, “an agency must use its best efforts to find out and disclose all that it reasonably can.” CEQA Guidelines §15144. In other words, the City must be proactive in obtaining information. If the City of Manhattan Beach needed more information about the Los Angeles County program, it should have asked County officials. There is no indication in the record that it did that. Lindy Coe-Juell, the Assistant to the Manhattan Beach City Manager and the staff person assigned to this project (AR 16), told the City Council at the July 1, 2008 meeting that she had spoken to a representative from the San Francisco Department of the Environment about the San Francisco ordinance. (AR 597.) She could have made similar contacts with Los Angeles County officials to obtain more information.

It is undisputed that a Los Angeles County ban will or *may* result if the 30% and 65% reduction goals are not met. In *San Franciscans for Reasonable Growth v. City and County of San Francisco*, (1984) 151 Cal.App.3d 61, 75, 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.

Moreover, the Los Angeles County pre-ban reduction program itself is environmentally significant because stores may achieve the County's 30% and 65% goals in an attempt to avoid a ban.

The County reduction program is a "current project" and a ban is a "probable future project" that the City was required to take into account in determining cumulative impacts. CEQA Guidelines §15065(3).

C. Failure to list and analyze the Santa Monica probable ban

There is no mention in the Initial Study of a City of Santa Monica staff recommendation to ban plastic bags that was attached to the City's July 1, 2008 Staff Report. (AR 243-256.) This omission was a violation of the cumulative analysis requirement. CEQA Guidelines §15065(3).

D. Failure to list and analyze other probable bans, fees or reduction projects

There is no list of other cities, counties, or other places that will probably ban bags (as of the date of the Initial Study). Only already enacted bans are discussed in the Initial Study, as if that was all that the City was required to consider.

By focusing on individual cities, the City missed the big picture. There is a major movement underway statewide and around the world to eliminate or ban plastic bags, which the City cannot deny. The City acknowledged and described the statewide and worldwide movement and other plastic bag reduction measures including bans and fees in its June 3 and July 1, 2008 Staff Reports. (AR 13, 18, 104-106.) The statewide and worldwide plastic bag ban movement must be part of any cumulative analysis as they are "current projects" and "probable future projects." CEQA Guidelines §15065(3).

CONCLUSION

In its opposition brief in the trial court, the City stated:

[The Ordinance] is a largely symbolic gesture designed to send a message from a coastal city to other jurisdictions and the general public about the importance of clean beaches and oceans, which is precisely why petitioners have chosen to contest it. (App. 569.)

The negative environmental impacts of the City's Ordinance are real, not symbolic. A shift to paper bags will consume more energy including fossil fuels, increase climate changing greenhouse gases, increase water and air pollution, increase acid rain, increase water body eutrophication, increase solid waste, and result in the cutting down of more trees.

It is in the public interest that an EIR be prepared giving decision makers and the public full information about the environmental impacts and evaluating possible alternatives before a decision is made to ban plastic bags.

WHEREFORE, Petitioner respectfully requests that this court affirm the ruling of the Superior Court that the City's failure and refusal to prepare an EIR was a prejudicial abuse of discretion and remand for enforcement of the writ of mandate.

DATED: October 22, 2009

STEPHEN L. JOSEPH

Attorney for Petitioner and Respondent
SAVE THE PLASTIC BAG COALITION

WORD COUNT

I certify that the number of words in this brief is 12,973. This number includes footnotes and excludes the Certificate of Interested Entities, the Table of Contents, the Table of Authorities, the Table of Significant Documents in the Administrative Record, this Word Count certificate, and the Proof of Service. The word count was generated by Microsoft Word.

DATED: October 22, 2009

STEPHEN L. JOSEPH

Attorney for Petitioner and Respondent
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 **RESPONDENT’S BRIEF** on the interested parties in this action as follows.

I maintain an account with Federal Express. On October 23, 2009, I placed true copies of said document in sealed Federal Express containers and deposited them in a Federal Express drop-off receptacle in San Francisco, California. The Airbills were marked “FedEx Priority Overnight (Next business morning)” delivery; payment to be charged to sender’s account; and permit delivery without signature. The names and addresses on the Airbills and the numbers of copies enclosed were as follows:

One copy to counsel for Appellant
City of Manhattan Beach:
Robert V. Wadden, Jr.
City Attorney
City of Manhattan Beach
1400 Highland Avenue
Manhattan Beach, CA 90266
Phone: (310) 802-5061

Counsel for Appellant has stipulated in writing to accept service by Federal Express.

Four copies to Supreme Court:
Office of the Clerk
California Supreme Court
300 S. Spring Street
Second Floor
Los Angeles, CA 90013
Phone: (213) 830-7570

One copy to Superior Court trial judge:
Hon. David P. Yaffe, Judge
Department 86
Los Angeles Superior Court
111 North Hill Street
Los Angeles, CA 90012
Phone: (213) 974-5881

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 23, 2009 at San Francisco, California.

STEPHEN L. JOSEPH