

LAW OFFICES  
*of*  
**STEPHEN L. JOSEPH, ESQ.**

P.O. BOX 221  
TIBURON, CA 94920-0221

*Admitted in California and the District of Columbia*

**TELEPHONE: (415) 577-6660**  
**FAX: (415) 869-5380**  
**E-MAIL: sljoseph.law@earthlink.net**

January 29, 2009

City of San Jose  
200 East Santa Clara St.  
San Jose, CA 95113  
Attention:  
Mayor and City Council  
Director of Environmental Services  
City Attorney

BY FAX TO:  
(408) 292-6207  
(408) 292-6211  
(408) 998-3131  
BY E-MAIL TO:  
cityclerk@sanjoseca.gov  
john.stufflebeam@sanjoseca.gov  
esdwebmaster@sanjoseca.gov  
richard.doyle@sanjoseca.gov

RE: Proposed plastic bag ordinance; CEQA demand; legal objections; notice of intent to file lawsuit

Dear Mayor, City Council, Director and City Attorney:

I represent SaveThePlasticBag.com (“STPB”), an association of plastic bag manufacturers and related businesses and individual citizens who are concerned about the environment in the public interest and the enforcement of public duties.

The City of San Jose (the “City”) is considering the imposition of a fee on plastic carryout bags. Some of the members of STPB supply plastic bags to businesses in the City and will lose sales if a plastic bag ban or fee ordinance is adopted. Other STPB members who are individual citizens are also concerned about the negative environmental consequences of the proposed ordinance and any violation of the requirements of the California Environmental Quality Act (CEQA).

STPB hereby objects to the proposed ordinance under the CEQA, as the City and Santa Clara County have failed to prepare an Environmental Impact Report (EIR). STPB will file an action for writ of mandate in the Superior Court in the event that the City fails to comply with the strict requirements of CEQA before passing an ordinance, including but not limited to preparation of an EIR.

STPB has already filed lawsuits against Los Angeles County and the City of Manhattan Beach for failing to prepare EIRs before banning plastic bags. The cases are pending in the Los Angeles Superior Court.

*On December 18, 2008, the Los Angeles Superior Court granted STPB's motion for preliminary injunction against the City of Manhattan Beach after determining that STPB is likely to succeed on the merits. A copy of the court's ruling is provided herewith.*

*Further, as discussed on pages 12 and 13 of this letter in the section entitled "AB 2449 prohibits a fee on plastic bags," the City Attorney believes that the proposed ordinance would violate the prohibition on imposing fees on plastic bags in AB 2449. It is incredible that the City would continue to move forward with a fee, knowing full well that it is illegal.*

### **Background**

Every manufactured product has a negative environmental impact of some sort. Plastic bags are no exception. The difference between plastic bags and other products is that plastic bags have been singled out for intense and unprecedented scrutiny and are being held to a standard of environmental perfection that no manufactured product could ever satisfy.

Plastic bags are as environmentally benign as any product available today. They have a tiny impact compared to other products and activities. However, this has not prevented them from becoming a negative symbol for some environmental activists and politicians who have become obsessed with eliminating them from the marketplace.

In the following statement, the British Government admitted that plastic bags are a symbol and that politicians are pandering to public opinion.

They are a potent symbol of our throwaway society and public opinion recognizes this. Of course, these bags contribute only a small part of the waste that leads to climate-changing emissions, but we need to change the small things as well as the large and to work with the grain of public opinion.

See [www.timesonline.co.uk/tol/global/article3532326.ece](http://www.timesonline.co.uk/tol/global/article3532326.ece).

Plastic bags have also been caught up in a broader "all plastic is evil" sentiment propagated by extremists, which is simplistic, unrealistic and absurd.

A London Times [editorial](#) states:

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.

Myths and misinformation about plastic bags pervade the Internet. They have found their way into city and county reports, because staffs have failed to check facts. The reports are regarded as true by their unwitting audiences, including well-meaning politicians who rely on the reports.

STPB's primary objective is to provide the *true facts* about plastic bags to decision-makers and the public, thereby dispelling the myths and misinformation. STPB has created an information website at [www.savetheplasticbag.com](http://www.savetheplasticbag.com). The website cites only to studies prepared by governmental organizations and independent environmental groups. No plastic industry studies are cited.

Despite STPB's best efforts to disseminate the facts, we are finding that many lawmakers and their staffs are still hearing only what they want to hear, including myths and misinformation, and persistently disregarding or refusing to believe any information that interferes with their preconceived views about plastic bags. This is called "confirmation bias." See [http://en.wikipedia.org/wiki/Confirmation bias](http://en.wikipedia.org/wiki/Confirmation_bias).

STPB is determined to ensure that lawmakers arrive at their decisions about plastic bags with the benefit of accurate and comprehensive factual information.

### **An American manufacturing industry and jobs under threat**

85% of plastic bags used in the United States are manufactured in the United States. Approximately 4,000 employees in the United States, including in California, manufacture plastic bags. *When lawmakers take action to eliminate plastic bags, they eliminate American jobs. These are jobs held by real people with real families who are routinely ignored by California politicians.*

All lawmakers, including the members of the San Jose City Council, have a profound responsibility to all the people of this nation and to our manufacturing industries. They cannot ignore the effects of their actions beyond the City's borders.

Destroying American jobs based on myths and misinformation would be irresponsible and tragic. Doing so just when we are entering the worst economic crisis since the Great Depression would be heartless. The thousand of American workers who manufacture plastic bags are not at fault for wanting to support themselves and their families.

Most reusable bags are made in China, including those sold by Trader Joe's, Safeway and Whole Foods. It is incredible that any public official in this country would even think about exporting American jobs without doing *due diligence*. However, that is exactly what is happening.

For the protection of American jobs at this critical time, it is imperative that the members of the City Council recognize that they have a duty to take the special care in their fact-finding and decision-making about plastic bags. They must ensure that prejudice and passion against plastic bags do not affect their decision making.

### **Public opinion**

A poll was conducted by Fairbank, Maslin, Maulin and Associates through a telephone survey of California registered voters between June 28 and July 2, 2008. The sample population was 700 and the margin of error +/- 3.7 %. According to the poll, 58% of Californians oppose a proposed 25 cent tax on plastic bags. More than two-thirds of those polled in Los Angeles and San Diego oppose the tax.

The results of the above opinion polls and others can be viewed at [www.savetheplasticbag.com/ReadContent650.aspx](http://www.savetheplasticbag.com/ReadContent650.aspx).

At a time when many people in the City of San Jose are in dire economic straits and every penny counts, they will not appreciate a tax on shopping.

### **CEQA**

The California Environmental Quality Act (CEQA) is designed to ensure that accurate environmental information is presented to lawmakers before they make their decisions. CEQA requires the preparation of an Environmental Impact Report (EIR) before any ordinances or other "projects" are adopted that *may* have a significant negative effective on the environment.

In *People v. County of Kern* (1974) 39 Cal. App. 3d 830, 842, the court stated:

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.

### **The Oakland lawsuit**

In July 2007, the City of Oakland adopted an ordinance banning plastic bags. A coalition of plastic bag manufacturers (including three STPB members) filed a petition for writ of mandate against the City of Oakland, because the city had failed to prepare an EIR pursuant to CEQA. *Coalition To Support Plastic Bag Recycling v. City of Oakland, et al.*, Alameda Superior Court, Case No. RG07-339097.

In May 2008, the Alameda County Superior Court issued a writ of mandate invalidating the Oakland ordinance. It found that there was a *possibility* that the ordinance would have a significant environmental impact, because paper is worse for the environment and banning of plastic bags would result in increased paper bag usage. The decision was not appealed and the Oakland ordinance has been revoked.

A copy of the Alameda County Superior Court decision can be downloaded on our website litigation page at [www.savetheplasticbag.com/ReadContent541.aspx](http://www.savetheplasticbag.com/ReadContent541.aspx).

### **The Los Angeles County lawsuit**

In January 2008, Los Angeles County adopted a program to reduce the number of plastic bags by 30% by 2010 and 65% by 2013. The failure to achieve either goal will trigger an ordinance banning plastic bags.

In July 2008, STPB filed a petition for a writ of mandate. *Save The Plastic Bag Coalition v. County of Los Angeles, et al*, Los Angeles Superior Court, Case No. BS115845. The ground for the petition is that the county failed to prepare an EIR prior to adopting the program.<sup>1</sup>

The case is pending. Copies of the primary documents filed by STPB can be viewed at [www.savetheplasticbag.com/ReadContent541.aspx](http://www.savetheplasticbag.com/ReadContent541.aspx).

### **The Manhattan Beach lawsuit**

In July 2008, the City of Manhattan Beach adopted an ordinance banning plastic bags. In August 2008, STPB filed a petition for a writ of mandate. *Save The Plastic Bag Coalition v. City of Manhattan Beach, et al*, Los Angeles Superior Court, Case No. BS116362. The ground for the petition is that the city failed to prepare an EIR prior to adopting the ordinance.

The case is pending. Copies of the primary documents filed by STPB in the case can be viewed at [www.savetheplasticbag.com/ReadContent541.aspx](http://www.savetheplasticbag.com/ReadContent541.aspx).

---

<sup>1</sup> STPB filed the lawsuits in the name of Save The Plastic Bag Coalition, an alternative name that it uses for litigation purposes.

As noted above, on December 18, 2008 the court granted STPB's motion for preliminary injunction against Manhattan Beach. The court ruled that STPB is "likely to succeed on the merits of its claim that an EIR is required in the circumstances of this case." The court noted that STPB had cited studies regarding the environmental impact of the Manhattan Beach plastic bag ban ordinance that conflicted with the City of Manhattan Beach's environmental conclusion. The court stated that the "solution required by CEQA in such cases is to publicly air the dispute between the experts by ordering an EIR, rather than ignoring or suppressing the existence of such a dispute." A copy of the court's ruling is provided herewith.

### **The environmental impact of paper bags**

In 2005, the "Scottish Government" issued an environmental impact assessment on the effects of a proposed plastic bag levy in Scotland (the "Scottish Report"). The report states:

Page vi: 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).

Page 31: [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).<sup>2</sup>

Page 31: 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.

The Scottish Report (at page 23) contains the following comparison of the environmental metrics of plastic bags and paper bags. The report takes into account the fact that a paper bag holds more than a plastic bag. According to the report, paper bags result in:

---

<sup>2</sup> "Eutrophication" means the process by which a body of water becomes rich in dissolved nutrients, thereby encouraging the growth and decomposition of oxygen-depleting plant life and resulting in harm to other organisms.

- 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 Alameda County Superior Court relied upon the Scottish Report in making its decision to invalidate the Oakland plastic bag ban ordinance. The report is available at [www.scotland.gov.uk/Resource/Doc/57346/0016899.pdf](http://www.scotland.gov.uk/Resource/Doc/57346/0016899.pdf). A copy of the report is provided herewith by e-mail.

In March 2008, ULS ([www.use-less-stuff.com](http://www.use-less-stuff.com)) issued a report analyzing the types of paper bags required under San Francisco's plastic bag ban ordinance (the "March 2008 ULS Report"). The March 2008 ULS Report includes the following findings:

- 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.
- Paper sacks generate almost five times more solid waste than using plastic bags.
- After four or more uses, reusable plastic bags are superior to all types of disposable bags -- paper, polyethylene and compostable plastic -- across all significant environmental indicators.

The March 2008 Report concludes as follows (at page 5):

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). Ironically, reducing the use of traditional plastic bags would not even reduce the reliance on fossil fuels, as paper and biodegradable plastic bags consume at least as much non-renewable energy during their full lifecycle.

The Alameda County Superior Court relied upon the March 2008 ULS report in making its decision to invalidate the Oakland plastic bag ban ordinance. A copy of the March 2008 ULS report can be downloaded at [www.use-less-stuff.com](http://www.use-less-stuff.com). A copy of the report is provided herewith by e-mail.

### **Banning or imposing a fee on plastic bags would increase paper bag usage**

In 2007, the City of San Francisco passed an ordinance banning non-compostable plastic carryout bags in supermarkets and grocery stores with more than \$2 million in annual sales and chain pharmacies. The ordinance requires the use of paper bags, compostable plastic bags, or reusable bags.

To determine the impact of the ordinance, ULS observed store and customer bag usage in San Francisco. A total of 25 retail stores were visited from September 14 to 17, 2008. Stores were walked through, store personnel were questioned, checkout activities were observed, and customers' bagging preferences were reviewed.

ULS found that all food chains affected by the ordinance had switched to paper bags only. ULS also found that "very few people" brought reusable bags to the store -- no more than in other cities. ULS concluded as follows in a report issued in September 2008:

If reducing environmental impact is the objective of the Ordinance, results to date do not indicate it will be successful. First, little use of reusable bags was observed. Second, the replacement of plastic by paper and the return to double bagging may actually increase environmental impact, as many peer reviewed lifecycle studies indicate that paper bags use more energy, produce more waste, and generate more greenhouse gas emissions than do plastic bags.

The September 2008 ULS Report can be downloaded at [www.use-less-stuff.com](http://www.use-less-stuff.com). A copy of the report is provided herewith by e-mail.

The Scottish Government also concluded in the Scottish Report (at page vi) that banning or imposing a fee on plastic bags only would result in a substantial boost in paper bag usage.

### **The environmental impact of reusable bags**

If plastic bags and paper bags are banned or subjected to a fee, then a boost in reusable bag usage will occur. Like any other manufactured product, reusable bags have a negative environmental impact. However, we have found that lawmakers and their staffs act as if reusable bags have no negative environmental impact whatsoever, which is unrealistic and untrue.

An EIR is necessary and demanded to determine the following:

- Metrics of consumption of nonrenewable energy to produce reusable bags. (An article in the *Wall Street Journal* (An Inconvenient Bag, Sep 26, 2008) states: “Many of the cheap, reusable bags that retailers favor are produced in Chinese factories and made from nonwoven polypropylene, a form of plastic that requires about 28 times as much energy to produce as the plastic used in standard disposable bags and eight times as much as a paper sack, according to Mr. Sterling, of Natural Capitalism Solutions.”)
- Metrics on emissions of greenhouse gases in the production of reusable bags.
- Metrics on consumption of water to produce reusable bags.
- Metrics on creation of acid rain (atmospheric acidification) in the production of reusable bags.
- Metrics on creation of negative air quality in the production of reusable bags
- Metrics on water pollution or eutrophication in the production of reusable bags.
- Metrics on the consumption of nonrenewable energy to transport reusable bags. (Most reusable bags are made in China and have to be shipped to the United States and then transported by truck. Reusable bags are more voluminous and heavier than plastic bags, thereby requiring more diesel fuel to transport.)
- Metrics on the reusability of plastic carryout bags for bin liners, pet waste and other uses, which are not uses for “reusable” bags.
- Recyclability of reusable bags. (Most reusable bags are made from nonwoven polypropylene, which is not recyclable.)
- Metrics on solid waste production caused by disposal of plastic bags.
- Metrics on the extent to which reusable bags are actually reused. (The above-mentioned *Wall Street Journal* article referenced above states: “Earlier this year, KPIX in San Francisco polled 500 of its television viewers and found that more than half -- 58% -- said they almost never take reusable cloth shopping bags to the grocery store.”<sup>3</sup>

### **The “common sense” exemption**

CEQA §15061(b)(3), known as the “common sense exemption,” 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.”<sup>4</sup>

---

<sup>3</sup> STPB is highly averse to relying on newspaper reports for environmental data. However, the *Wall Street Journal* article shows the need for a Life Cycle Analysis on reusable bags, rather than an automatic (and clearly erroneous) assumption that reusable bags have no significant environmental impact.

<sup>4</sup> 14 Cal. Code. Regs. Ch. 3 is referred to herein as “CEQA.”

The California Court of Appeal has held: “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.” *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 117.

There is such a legitimate dispute about the negative environmental impacts of boosting usage of paper bags and reusable bags.

### **Categorical exemptions**

No categorical exemptions are available to the City under CEQA §15300. The Alameda County Superior Court in the Oakland case noted that CEQA §15300.2(c) contains an exception to the categorical exemptions when there is a “reasonable possibility” that the activity will have a significant effect on the environment due to “unusual circumstances.” The court ruled that a shift in consumer use from one environmentally damaging product to another constitutes an “unusual circumstance” of an activity that would otherwise be exempt from review under CEQA as activity undertaken to protect the environment.

### **Cumulative effects**

CEQA §15065(3) states that an EIR must be prepared if “the project has possible environmental effects that are individually limited but cumulatively considerable.” CEQA §15065(3) states that “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.”

CEQA §15355 defines “cumulative impacts” as “two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.” CEQA §15355(b) states that “[c]umulative impacts can result from individually minor but collectively significant projects taking place over a period of time.”

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

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. [*Id.* at 114.]

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. [*Id.* at 118.] (Emphasis added.)

The court stated that the agency must “focus on the combined effects of these impacts.” 103 Cal.App.4th at 121.

CEQA §15064(f) specifically addresses the kind of evidence that an agency may and may not rely upon in determining whether there will be a significant effect:

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.

CEQA §15064.7(a) states that an agency may develop “thresholds of significance.” A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant. CEQA §15064.7(a)

Santa Clara County and the City have not developed any such thresholds of significance.

Based on the foregoing, in determining whether the common sense or any other exemption applies, the City is required by law to view its own proposal in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects, including but not limited to the following:

- The Santa Clara County model plastic bag ban ordinance
- The San Francisco plastic bag ban ordinance adopted in 2007
- The City of Malibu plastic bag ban ordinance adopted in 2008
- The City of Manhattan Beach plastic bag ban ordinance adopted in 2008
- The Los Angeles County single use bag reduction program adopted in January 2008
- The proposed City of Santa Monica plastic bag ban ordinance
- All other plastic bag ordinances and projects that are being considered in California and outside California

### **Demand for EIR**

If the City proposes to ban or impose a fee on plastic bags only, then STPB demands that an EIR be prepared pursuant to CEQA that determines and evaluates the environmental impact of paper bags. It is indisputable that paper bags may have a significant negative effect on the environment and that the test in §15061(b)(3) would not be satisfied.

If the City proposes to ban or impose a fee on plastic and paper bags, then STPB demands that an EIR must be prepared pursuant to CEQA that includes findings on the environmental impact of reusable bags. It is indisputable that reusable bags may have a significant negative effect on the environment and that the test in §15061(b)(3) would not be satisfied.

In the event that no EIR is prepared, then STPB hereby asserts a continuing objection pursuant to California Public Resources Code §21177. STPB will also file a petition for a writ of mandate in Santa Clara Superior Court.

### **An ordinance is a “project” under CEQA**

In the Memorandum dated January 20, 2009 from Mr. John Stufflebean to the Transportation and Environment Committee, he states that the proposed ordinance would not be a “project” under CEQA. His statement is legally incorrect.

“Project” is defined in CEQA §15378(a)(1) as any action “which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment” including an activity “directly undertaken by any public agency.”

As discussed above, the proposed 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.

### **AB 2449 prohibits a fee on plastic bags**

California Public Resources Code §42254(b)(2) (known as “AB 2449”) states that a city, county, or other public agency “shall not adopt, implement, or enforce an ordinance, resolution, regulation, or rule to...[i]mpose a plastic carryout bag fee upon a store that is in compliance with this chapter.”

Apparently, the County and possibly the City are taking the position that a fee imposed on consumers at the point of sale is not prohibited by §42254(b)(2), as it would not be a fee imposed “upon a store.”

It is obvious that §42254(b)(2) prohibits any fee on plastic bags imposed at the point of sale or in a store. The County's position is nothing more than wordplay. STPB strongly objects to any such fee.

*We note that the City Attorney apparently agrees with us on this point. In the City of San Jose staff report dated January 20, 2009, the Director of Environmental Services states:*

*In an analysis of the draft model ordinance by the City's Attorney's Office, the Bag Pollution Cleanup Fee appears to be inconsistent with AB 2449, which took effect on July 1, 2007.... The bill also specifically prohibits local governments from imposing a fee on plastic bags. Attempts to preempt AB 2449 could invite legal challenges.*

In the event that the City imposes a fee on plastic bags at the point of sale or in a store, STPB will file a lawsuit to invalidate it based on §42254(b)(2).

Nothing in this letter is intended to waive STPB's right to challenge the imposition of a fee on plastic bags.

#### **Attorney's fees**

In the event that STPB files any legal proceedings, STPB will request attorney's fees pursuant to California Code of Civil Procedure §1021.5.

#### **Conclusion**

Pursuant to CEQA §15072(b), I request that you mail to me any future notice of intent to adopt a negative declaration or mitigated negative declaration under CEQA regarding plastic bags. I further request that this letter be made part of the administrative record on the proposed ordinance.

STPB is interested in opening a constructive dialog with the City. If there is any interest on the City's part, please let me know.

All rights are reserved.

Sincerely,

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

Stephen L. Joseph