

LAW OFFICES
of
STEPHEN L. JOSEPH, ESQ.

350 BAY STREET
SUITE 100-328
SAN FRANCISCO, CA 94133

Admitted in California and the District of Columbia

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

September 18, 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.stufflebean@sanjoseca.gov
esdwebmaster@sanjoseca.gov
richard.doyle@sanjoseca.gov

RE: CEQA demand and objection; objection and notice of intent to litigate regarding plastic bag ban; objection and notice of intent to litigate regarding plastic bag fee

Dear Mayor, City Council, City Attorney and Director:

I represent the SaveThePlasticBag.com ("STPB"), a non-profit association concerned about the environmental impact of plastic bag bans and fees.

The City Council has voted to consider a proposed ordinance to ban or impose fees on plastic bags. STPB is concerned about the negative environmental consequences of such an ordinance.

I am hereby notifying you that STPB will file an action for a writ of mandate in the Superior Court in the event that the City fails to comply with the strict requirements of the California Environmental Quality Act (CEQA) before passing an ordinance, including but not limited to preparation of an EIR. In the writ, STPB will request and demand compliance with CEQA and invalidation of any ordinance that does not comply with CEQA.

In 2007, a lawsuit was filed against the City of Oakland to overturn its plastic bag ban. STPB filed lawsuits against Los Angeles County and the City of Manhattan Beach

in 2008 and against the City of Palo Alto in 2009 for failing to prepare EIRs before banning plastic bags.¹

In May 2008, the Alameda 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 The decision was not appealed and the Oakland ordinance has been revoked.

In February 2009, the Los Angeles Superior Court granted STPB's petition against Manhattan Beach and overturned the city's ordinance on the same basis as the Oakland case. Manhattan Beach has appealed. A decision by the Court of Appeal is expected sometime in mid to late 2010.

In August 2009, STPB settled its lawsuit against Palo Alto, The City agreed to limit its ban to four stores and not to expand to any more stores without first preparing a full Environmental Impact Report.

Copies of the Oakland and Manhattan Beach rulings and the Palo Alto settlement can be downloaded at www.savetheplasticbag.com/ReadContent541.aspx.

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 an environmental standard 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.

¹ STPB filed the lawsuits using its alternative name "Save The Plastic Bag Coalition."

See 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. This is especially true about the impact of plastic bags on marine life. See www.timesonline.co.uk/tol/news/environment/article3508263.ece.

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. 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 simply groupthink and “confirmation bias.” See 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 environmental information.

CEQA

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 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).²

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:

² “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.

In March 2008, ULS (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. The March 2008 ULS report can be downloaded at <http://www.use-less-stuff.com/research.htm>.

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/research.htm.

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.

Banning plastic bags and imposing a fee on paper bags would still create a shift to paper bags because paper bags would remain available.

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.

Most reusable bags are manufactured in China. An EIR is necessary 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.”³

³ 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.

The “common sense” exemption

CEQA Guidelines §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.”⁴

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 Guidelines §15300. The Alameda County Superior Court in the Oakland case noted that CEQA Guidelines §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 Guidelines §15065(3) states that an EIR must be prepared if “the project has possible environmental effects that are individually limited but cumulatively considerable.” CEQA Guidelines §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 Guidelines §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 Guidelines §15355(b) states that “[c]umulative impacts can result from individually minor but collectively significant projects taking place over a period of time.”

⁴ 14 Cal. Code. Regs. Ch. 3 is referred to herein as “CEQA Guidelines.”

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 Guidelines §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 Guidelines §15064.7(a)

The City has 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 Palo Alto plastic bag ban ordinance adopted in 2009
- 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 comparative environmental impact of plastic and paper bags. It is indisputable that paper bags may have a significant negative effect on the environment and that the test in CEQA Guidelines §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 CEQA Guidelines §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 Superior Court.

Any exemption for paper bags would still require an EIR

There is no substantial evidence that exempting paper bags with recycled content from a ban or a fee would eliminate the significant environmental impact of paper bags. Recycling of paper bags is an industrial process that *produces* significant negative environmental impacts rather than eliminating them. In the absence of an Initial Study showing, based on *substantial evidence*, that there is *no possibility* that paper bags with recycled content have a significant environmental impact, an EIR must be prepared.

We submit that the City cannot show, based on substantial evidence, that there is *no possibility* that paper bags with recycled content will have no significant environmental impact. The Scottish Report is substantial evidence to the contrary.

As stated above, 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, supra*, 54 Cal.App.4th at 117.

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

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....

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....

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. (Guidelines, §15064, subd. (f)(1); *League for Protection of Oakland’s etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904-905.

127 Cal.App.4th at 1579-80. 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.”)

Objection to a plastic bag ban based on state law

STPB also believes that the City does not have the power to ban plastic bags. In 2006, Assembly Bill AB 2449 was signed into law by the Governor. It is codified as Pub. Res. Code §§42250-42257, but usually referred to as “AB 2449.” The law is the State of California’s preemptive solution to all plastic bag environmental issues.

When signing the bill into law, the Governor issued the following signing statement:

Because this is a statewide program the bill *precludes* locals from implementing more stringent local requirements. The bill sunsets in six years [on January 1, 2013] and this will allow locals time to develop additional programs or the legislature to consider a more far reaching solution.⁵ (Emphasis added.)

Clearly a ban is a “more stringent local requirement” and “more far reaching solution.” Therefore, AB 2449 preempts the City’s power to ban plastic bags prior to January 1, 2013.

This may be the subject of litigation against the City if an ordinance is passed.

Objection to a plastic bag fee based on state law

California Public Resources Code §42254(b)(2) 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.”

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).

Request for notices

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.

Conclusion

I 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.

⁵ http://gov.ca.gov/pdf/press/ab_2449_sign.pdf

All rights are reserved.

Sincerely,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Stephen L. Joseph