No. S180720
(Court of Appeal, Second Appellate Dist., Div. Five. No. B215788)
(County of Los Angeles Super. Ct. No. BS116362)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SAVE THE PLASTIC BAG COALITION,
an unincorporated association

PLAINTIFF AND RESPONDENT

V.

CITY OF MANHATTAN BEACH,
a municipal corporation

DEFENDANT AND APPELLANT

SAVE THE PLASTIC BAG COALITION'S ANSWER TO PETITION FOR REVIEW

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ATTORNEY FOR PLAINTIFF AND RESPONDENT
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SAVE THE PLASTIC BAG COALITION

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

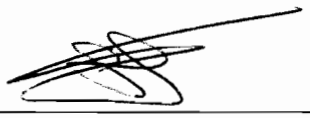
(Rules of Court, Rule 8.208)

Plaintiff Save The Plastic Bag Coalition is an unincorporated association. The members of the coalition are as follows:

Peter M. Grande
Cathy Browne
Louis Chertkow
Rick Zirkler
Chandler Hadraba
Tom MacMillan
Stephen L. Joseph
Allied Plastics, Inc.
Benchmark Polymers, LLC
Bradley Packaging
Crown Poly, Inc.
Elkay Plastics Co., Inc.
Fluid Ink
Grand Packaging, Inc. d/b/a "Command Packaging"
Great American Packaging, Inc.
H. Muehlstein & Co., Inc.
Hilex Poly Company LLC
Metro Poly Corporation
Montebello Plastics, LLC
PPP, LLC
Ship & Shore Environmental Inc.
Sun Plastics, Inc.
Symphony Environmental Technologies, PLC

Plaintiff knows of no other entity or person that must be listed under Rule 8.208 of the Rules of Court.

DATED: March 24, 2010



STEPHEN L. JOSEPH
Attorney for Plaintiff/Respondent

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA

Plaintiff and Respondent, Save The Plastic Bag Coalition, hereby answers the City of Manhattan Beach's Petition for Review.

WHY THE PETITION SHOULD BE DENIED

On July 15, 2008, the City adopted an ordinance banning all plastic bags for the purpose of improving the environment. Under the ordinance, stores would still be permitted to hand out free paper bags. The City had issued an Initial Study (AR 114-121) and a Negative Declaration (AR 111) stating that the ordinance could not possibly have a significant effect on the environment and that no EIR was required. Plaintiff presented substantial evidence that the ordinance might have a significant negative effect on the environment, as (i) it might result in an increase in the number of paper bags and (ii) paper bags are far worse for the environment than plastic bags. Therefore, in accordance with CEQA, the Superior Court and the Court of Appeal ruled that an EIR was required.

Let's set aside the smoke and hysteria generated by the City and the amici and actually read the Court of Appeal's decision. The Court of Appeal ruled that the Initial Study could not support the Negative Declaration, because it summarily dismissed all impacts as "minimal or nonexistent." The Court of Appeal stated (at 25-26):

> It may be that the city's population and the number of its retail establishments using plastic bags is so small and public concern for the environment is so high that there will be little or no increased use of paper bags as a result of the ordinance and little or no impact on the environment affected by the ordinance. But the initial study contains no information about the city's actual experience -- including, *by way of example only*: the

> number of plastic and paper bags consumed; recycling rates; the quantity of plastic bags disposed of in city trash; how the city disposes of its trash; whether plastic bags are a significant portion of litter found; how, when and in what quantities paper and plastic bags are delivered into the city; whether the city has a landfill that would be impacted by any increased paper bag use; whether there are recycling facilities or programs in the city or the surrounding area; and what the likely impact will be of a campaign urging recycling and reusable bag use. There is no statutory exemption from compliance with the California Environmental Quality Act based on a city's geographical or population size. (Italics added.)

The Court applied standard CEQA law. CEQA Guidelines §15061(b)(3), which is 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.[1]

The Initial Study contained a huge information gap. Therefore, it could not be said with certainty that there was no possibility of a significant environmental impact.

When preparing an Initial Study, "an agency must use its best efforts to find out and disclose all that it reasonably can." Guidelines §15144. In *Sundstrom v. County of Mendocino*, *supra*, 202 Cal.App.3d 296, 311, the court stated:

> While a fair argument of environmental impact must be based on substantial evidence, mechanical application of this rule would defeat the purpose of CEQA where the local agency has failed to undertake an adequate initial study. The agency should not be allowed to hide behind its own failure to gather

[1] The CEQA Guidelines ("Guidelines") are at 14 Cal. Code Regs. Ch. 3.

> relevant data.... CEQA places the burden of environmental investigation on government rather than the public. If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.

See also County Sanitation Dist. No. 2 of Los Angeles Co. v. County of Kern, supra, 127 Cal.App.4th, 1544, 1597 ["the lead agency bears a burden to investigate potential environmental impacts."].)

The decision creates a good precedent and an important one. To fully appreciate why, it is helpful to understand the mindset of the City when it prepared the Initial Study. That mindset is revealed by the following comments of the City Attorney to the City Council on June 3, 2008 after Plaintiff had initially demanded an EIR before the ordinance could be adopted.

> 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.[2] (AR 50.)

---

[2] Oakland had banned plastic bags in 2007, but the Alameda Superior Court *(footnote continued on next page)*

> 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.)

No wonder the Initial Study was so poor. It was never intended to be a real analysis. It was intended to "beef up the record." It was a sham designed to get rid of an irritant, namely us.

The Court of Appeal's decision sends a strong message to cities and counties that initial studies must contain information and data about the local experience in order to satisfy the common sense exemption. Sham or conclusory initial studies lacking essential data will be rejected by the courts. The decision also confirms that agencies have the burden of proof, not the public.

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invalidated the ban in April 2008 as no EIR had been prepared. The Oakland opinion is at AR 170-182. Plaintiff was not a party in that case. Plaintiff was formed in June 2008.

The City asks this Court for a second chance to prepare an Initial Study. (Petition at 16-18.) We discuss why it should not have that chance in the arguments section of this Answer.

The City complains about the factual findings. In fact, the City seems to be attempting to reargue and retry virtually every aspect of this case in this Court. However, the City did not file a petition for rehearing and the findings of fact are now effectively a closed matter.

The Court of Appeal applied the clear wording of the CEQA statute, the CEQA Guidelines, and long-settled CEQA case law. There is absolute uniformity of decision. There is no unsettled law.

The City calls the Court of Appeal's decision "rigid and inflexible." (Petition at 4, 10.) The City is absolutely correct. The decision rigidly and inflexibly complies with the law. Faced with that problem, the City asks this Court to change the law. It says this Court should accept a "challenge... to provide fresh and meaningful interpretation" of the fair argument, substantial impact and standing requirements of CEQA. (Petition at 22.) Should this Court accept a "challenge" to throw out four decades of settled jurisprudence on the core elements of CEQA and start "fresh"? For what? To give legal cover to a city that failed to include any data in its Initial Study?

The City further asks this Court to define a "legal threshold" as to when an environmental impact is significant and "provide guidance as to how to determine it." (Petition at 5, 16.) The Governor's Office of Planning and Research and public agencies have the *exclusive* power to define legal thresholds of significance. (Pub. Res. Code §21083, Guidelines §15064.7.) In any event, how would thresholds make any difference if the City did not include any data in its Initial Study? Thresholds without data are useless.

Justice Mosk's dissent is not a basis for review, despite his use of strong language. He said: "Requiring the small city of Manhattan Beach (City), containing a little over 33,000 people, to expend public resources to prepare an [EIR] for enacting what the City *believes* is an environmentally friendly ordinance [banning distribution of plastic bags] stretches [CEQA] and the requirements for an EIR to an absurdity." (Dissent at 1, italics added.) "In this day of limits, we must interpret statutes reasonably so as not to require the unnecessary expenditure of public monies for no corresponding benefit." (Dissent at 8.) The majority responded as follows (at 26):

> There is no statutory exemption from compliance with [CEQA] based on a city's geographical or population size. Nor have we found any decisional authority to the effect that a small city should not be required to expend its resources to comply with [CEQA] when it believes its actions will have a positive effect on the environment.

There is a fair amount of scoffing by the City and the amici about the very notion of GHG being a relevant environmental impact. In 2007, SB 97 was signed into law. It requires that all initial studies and EIRs include calculations of greenhouse gas emissions (GHG). Even though it was enacted before the City issued its Initial Study, it did not take effect until this year. With effect from March 18, 2010, Guidelines §15064.4(a) requires lead agencies preparing initial studies and EIRs to make a "good-faith effort, based on available information, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project." Any complaints about having to evaluate and calculate GHG emissions should be addressed to the Legislature, not the Supreme Court.

GHG emissions are no small matter when it comes to plastic bag bans. As discussed herein, Los Angeles County is on the verge of banning plastic bags. The County has determined that an EIR is required, which must include GHG calculations. Based on the studies reviewed in the Court of Appeal's opinion, banning the 6 billion plastic bags used each year in Los Angeles County alone might result in an increase in paper bag usage that would have the same impact on GHG emissions as between 27,753 and 63,832 passenger vehicles *annually* or the total electricity use of between 18,851 and 43,356 homes *annually*.[3]

Heal the Bay says that asking for an EIR on banning plastic bags is "simply preposterous." (Amicus letter at 6.) Heal the Bay is contradicting itself. At the Manhattan Beach City Council meeting on the proposed ordinance on July 1, 2008, the President of Heal the Bay was asked whether biodegradable (bioplastic) bags should be included in the ban. Such bags had been excluded from the Oakland and San Francisco plastic bag bans. He replied (AR 634):

> Those bans [in San Francisco and Oakland] did not include bioplastics, which is a huge mistake. And so by not doing the CEQA analysis specifically on what the environmental impacts were of not banning that, and moving towards bioplastics with the many problems that they cause, that was a major shortcoming.

Cities and counties dislike the Court of Appeal's decision. They are not supposed to like it. The "whole purpose" of CEQA 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.) They are concerned that the public will discover that the cure

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[3] The calculation is in footnote 12 on page 24 of this Answer.

that they have been selling is worse than the disease. They are worried that information that they have been spreading may be exposed as myths and exaggerations. They are feeling the "political heat." CEQA is working well.

Being a true environmentalist means asking questions, not just saying amen when environmental groups preach. In an editorial, *The Times* of London has warned against the perils of green groupthink:

> 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.[4]

Cities and counties may *believe* that they are doing the right thing for the environment, as Justice Mosk says, but they may *wrongly* believe. They may unintentionally make decisions that harm the environment. They often trust that they are getting the whole story from environmental groups. However, such groups are advocates, not neutrals. While Heal the Bay and Californians Against Waste do truly wonderful work, they cannot be depended on to present both sides of the story when they are campaigning for or against something. They have been shouting from the rooftops for

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[4] www.timesonline.co.uk/tol/comment/leading_article/article3508113.ece. (App. at 239.) *See also* "Series of blunders turned the plastic bag into global villain," *The Times* of London, March 8, 2008. (AR 142-144, 398-400.)

years about the alleged horrors of plastic bags, but they have been noticeably silent about paper bags. We came along in 2008 and ruined the party by presenting the other side of the story.

Pleasing Heal the Bay, Surfrider Foundation and other groups is very good politics in some cities such as Manhattan Beach. The problem is that politics and rigorous fact-finding are a poor mix.

The City Attorney admits that the City listens only to environmental groups and automatically mistrusts any studies or information that we offer. He states (Petition at 12):

> Clearly, respondents have a huge financial interest in blocking any ban on plastic bags and their positions, unlike those of Heal the Bay, Surfrider Foundation, Earth Resource Foundation, Santa Monica Baykeepers or Endangered Habitat League can hardly be expected to be dispassionately in the interest of the environment.

The City Attorney has also stated (App. at 558-59):

> The fact that [Plaintiff has] a powerful economic interest in the continued use of plastic bags would imply bias in their statements and the data upon which they choose to rely.

The fact that the City Attorney believes that environmental groups are "dispassionate" and incapable of bias and selectivity is incredibly naïve.

Ronald Reagan was the Governor who signed CEQA into law in 1970. One of his signature phrases was "Trust, but verify."

The Los Angeles County EIR on its proposed plastic bag ban will be completed by July 1, 2010. The County has invited the City to join its program, which would allow the City to use the County cumulative EIR. Ten other cities in the county have joined. Further, the Green Cities Master Environmental Assessment (MEA) has been published for cities and counties to use in their EIRs. Consequently, this Court's intervention would

serve no useful purpose and might actually delay the EIR process.

The decision should stand. The truth should not be suppressed. Let's let CEQA do its job of non-political fact-finding.

ARGUMENT

I. THE COURT OF APPEAL CORRECTLY STATED THE LAW REGARDING STANDING

The Superior Court and the Court of Appeal held that Plaintiff has standing in this case. The court applied the long settled public right/public duty exception to the beneficial interest rule, which has been accepted by this Court since 1945. (Opinion at 15-18, *citing Board of Social Welfare v. Los Angeles County* (1945) 27 Cal.2d 98, 100-101; *Green v. Obledo* (1981) 29 Cal.3d 126, 144; *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439; *Environmental Protection and Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 479 ["a well-established exception to the beneficial interest rule"].)

In *Green v. Obledo*, *supra* at 144, this 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 disputes that Plaintiff has standing and cites just one case: *Waste Management v. County of Alameda,* (2000) 79 Cal.App.4th 1223. Waste Management operated a landfill. Its competitor, Browning-Ferris,

operated a landfill about four miles away. When Waste Management sought permission to accept designated waste at its landfill, the County required an EIR. When Browning-Ferris sought similar permission to accept designated wastes at its 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. (Italics 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 issues whatsoever. It admitted that the sole purpose of its petition for writ of mandate was to use CEQA to *impose on its competitor the expense of preparing an EIR.*

Waste Management is easily distinguishable from the present case. Plaintiff's action in this case is based solely on environmental issues. The object of Plaintiff's action is to enforce a public duty. It is in the public interest that decision-makers and the public be informed about the environmental impacts of the City's proposed ordinance.

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 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.*, 13 Cal.3d 263, 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 City says that "it is uncontroverted that [Plaintiff's] reason for existence is the protection of its commercial interests." The City's assertion is totally untrue and has been controverted throughout this case. According to the Opinion (at 15), "Plaintiff counters that it exists to respond to the misinformation, myths, and exaggerations that have been disseminated about the environmental impacts of plastic bags." (*See also* Plaintiff's Verified Petition for Writ of Mandate ¶¶11-12, App. at 18.)

One such myth is that paper bags are better for the environment than plastic bags. Another myth is that 100,000 marine mammals and a million seabirds die each year from ingesting plastic bags. The allegation is a central claim of anti-plastic bag activists. However, the Canadian report on which the allegation is based mentioned only *discarded fishing tackle* as the cause of the deaths, not plastic bags. There was no mention of plastic bags.[5]

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[5] "Series of blunders turned the plastic bag into global villain," *The Times* of London, March 8, 2008. (AR 398-400.) In its first Staff Report, the City said: "It is 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 17.) Heal the Bay is spreading the myth. (Heal the Bay written statement to Los Angeles County Board of Supervisors, App. at 763).

There are many other environmental myths and exaggerations. Unfortunately environmental groups have not seen fit to speak out about such misinformation. Plaintiff is playing an essential role in ensuring that decision-makers and the public are not misled.

The law remains clear and uniform. *Waste Management* is not a conflicting opinion.

II. THE COURT OF APPEAL CORRECTLY STATED THE "FAIR ARGUMENT" TEST

In issuing a Negative Declaration, the City relied on Guidelines §15061(b)(3), known as the "common sense exemption," which states as follows:

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

The City argues that the Court of Appeal was required to defer to the City's determination. (Petition at 12.) That is not the law. In *Mejia v. City of Los Angeles (California Home Development, LLC),* (2005) 130 Cal.App.4th 322, 332-333, the court stated:

> 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.]"

The City cites three cases that it claims support the proposition that courts must defer to the agency's decision. (Petition at 3-4.) However,

those cases do not stand for that proposition. (*Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 151 ["Application of this standard is a question of law and deference to the agency's determination is not appropriate."]; *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602 ["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."]. Deference was not discussed in the third case cited by the City: *Citizens' Com. to Save Our Village v. City of Claremont* (1995) 37 Cal.App.4th 1157.)

The City asks this Court to accept a "challenge... to provide fresh and meaningful interpretation" of the fair argument, substantial impact and standing requirements of CEQA. (Petition at 22.) There is no reason to do so. The rules are long standing, consistent and clear. Nothing in the Court of Appeal's opinion calls them into question. There are no conflicting authorities.

The Guidelines, state and local rules and regulations, administrative procedures, governmental documents and forms including the Environmental Checklist Form, are based on 40 years of settled interpretations of CEQA law.[6] Thousands of Initial Studies and EIRs are planned or in process based on those settled interpretations and the Environmental Checklist Form. Creating "fresh" new interpretations of law would cause confusion and upheaval. There is no justification for it.

[6] The Environmental Checklist Form is Appendix G to the Guidelines.

III. THIS COURT CANNOT ESTABLISH LEGAL THRESHOLDS OF SIGNIFICANCE

The City says that this Court "should define" a "legal threshold" as to when an environmental impact is significant and "provide guidance as to how to determine it." (Petition at 5.) The City states: "A clear statement by this court as to the level and extent an impact must reach before being considered substantial is necessary." (Petition at 16.)

What is the point of a legal threshold if the Initial Study contains no data? In any event The City is asking this Court to usurp the *exclusive* statutory authority of the Governor's Office of Planning and Research (OPR) and public agencies regarding the development of any such thresholds. (Pub. Res. Code §21083.) OPR developed the CEQA Guidelines. (Guidelines §15000.) Guidelines §15064.7(a) states that "each public agency is encouraged to develop and publish thresholds of significance that the agency uses in the determination of significance of environmental effects." According to §15064.7(b), any such thresholds may only be adopted by "ordinance, resolution, rule or regulation, and developed through a public review process and supported by substantial evidence." This Court cannot supplant OPR and public agencies in the development of thresholds of significance and cast aside the public review process.

Moreover, this Court cannot be expected to foresee all factual scenarios. It is impossible to anticipate and predetermine how many tons of CO_2 or megajoules of energy or kilograms of solid waste (*et cetera*) would be significant for all kinds of projects and all possible permutations.

IV. THE COURT OF APPEAL FOUND THAT THE CITY'S INITIAL STUDY LACKED ANY DATA AND WAS UTTERLY INADEQUATE

As we have seen, the Court of Appeal ruled that the Initial Study was inadequate.

Take the impacts on local landfills for example. According to the Boustead table (Opinion at 10), 1,000 paper bags result in 33.9 kg of solid waste. Plastic bags with the same carrying capacity as 1,000 paper bags result in just 7.0 kg of solid waste. The Court of Appeal pointed out that there was no information in the Initial Study regarding how the City disposes of its trash and "whether the city has a landfill that would be impacted by any increased paper bag use." (Opinion at 26.) Why couldn't the City have included such information in the Initial Study?

It was not Plaintiff's burden to find out any of the information that the City failed to include in the Initial Study. When preparing an Initial Study, "an agency must use its best efforts to find out and disclose all that it reasonably can." Guidelines §15144. The local agency has the burden of proof. *Sundstrom v. County of Mendocino*, *supra*, 202 Cal.App.3d at 311 [local agency has the burden of proof and cannot hide behind its own failure to gather relevant data]; *County Sanitation Dist. No. 2 of Los Angeles Co. v. County of Kern*, *supra*, 127 Cal.App.4th at 1544 [lead agency bears the burden to investigate potential environmental impacts.].)

By dismissively labeling all impacts as "minimal or nonexistent," the City provided only argument and unsubstantiated opinion. (AR 115, 118.) If a city or county could omit all data and summarily dismiss potential impacts, CEQA would be meaningless.

V. THE CITY SHOULD NOT BE PERMITTED TO PREPARE A NEW INITIAL STUDY

The City asks for an opportunity to prepare another Initial Study, which should be taken as an admission that the existing one is totally deficient. (Petition at 6.) The City has waived this issue as it was not raised in a petition for rehearing. Further, the City has never said what changes it would make to the Initial Study.

Nothing can negate the evidence already in the record. (*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."].)

A second opportunity would not help the City because an amended Initial Study would definitely have to include a cumulative analysis of the proposed Los Angeles County plastic bag ban. (Guidelines §15063(b)(1), §15065(3); *Communities for a Better Environment v. California Resources Agency,* (2002) 103 Cal.App.4th 98, 114, 119; *San Franciscans for Reasonable Growth v. City and County of San Francisco*, (1984) 151 Cal.App.3d 61, 75.) In December 2009, the County determined that its proposed ban may have a significant negative effect on the environment and that an EIR is therefore required.[7]

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[7] http://dpw.lacounty.gov/epd/plasticbags/pdf/Initial_Study_12012009.pdf.

The City cites *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359. (Petition at 18.) In that case, the entire project needed to be redefined by the agency. There was no way of knowing whether the redefined project would require an EIR.[8]

VI. JUSTICE MOSK'S DISSENT IS A PLEA TO BEND THE RULES FOR A "SMALL CITY" THAT "BELIEVES" IT IS DOING THE RIGHT THING IN CHALLENGING ECONOMIC TIMES

Justice Mosk believes that plastic bags should be banned. He made that abundantly clear. Regrettably, he seems inclined to bend the rules past breaking point to achieve that objective. How else can we interpret the following statements in his opinion?

> Dissent at 1: Requiring the small city of Manhattan Beach (City), containing a little over 33,000 people, to expend public resources to prepare an [EIR] for enacting what the City *believes* is an environmentally friendly ordinance... stretches [CEQA] and the requirements for an EIR to an absurdity. (Italics added.)
>
> Dissent at 8: In this day of limits, we must interpret statutes reasonably so as not to require the unnecessary expenditure of public monies for no corresponding benefit.

There are three elements in Justice Mosk's view of CEQA. First, "small cities" should be subject to different rules under CEQA than big

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[8] The ruling in *Gentry* was as follows: "Nothing in this opinion should be taken to mean that the City must prepare an EIR for the Project. When the City takes up the matter again, it may consider: whether the Project is a change or modification to either the Plan EIR or the Adobe I EIR, and if so, whether an SEIR is required; whether the Project is partially exempt under section 21083.3; whether to use tiering; and whether to propose a new mitigated negative declaration." 36 Cal.App.4th 1359 at 1424.

cities. Second, if a small city "believes" that it is acting in an environmentally friendly manner, it should not be required to prepare an EIR. Third, CEQA (and other statutes) must be interpreted differently in challenging economic times.

The majority responded to Justice Mosk's extraordinary statements as follows (Opinion at 26):

> There is no statutory exemption from compliance with [CEQA] based on a city's geographical or population size. Nor have we found any decisional authority to the effect that a small city should not be required to expend its resources to comply with [CEQA] when it believes its actions will have a positive effect on the environment.

We would add three points. First, no one is forcing the City to ban plastic bags. Second, CEQA is not about finances. It is about the environment. Third, nothing excuses the fact that the City in this case prepared an inadequate Initial Study.

Justice Mosk asked whether government publication of books or policies to shift from cloth towels or hand blowers in restrooms to paper would constitute a project under CEQA. (Dissent at 3.) We have three responses. First, the City agrees and admits that banning plastic bags is a project under CEQA. The City told the Court of Appeal that "clearly CEQA applies...We never argued that it wasn't a project." (Opinion at 18.) Second, the City has not raised the issue of whether this is a "project" in its Petition. Third, whether any other projects or purported projects require EIRs is not at issue in this case. Here we are concerned with banning plastic bags. Nothing else.

While Justice Mosk did not agree with the outcome, he did not identify any conflicting authorities.

VII. THE EIR PROCESS IS WELL UNDERWAY

The Court of Appeal provided a status report on the Green Cities MEA and pending EIRs on the plastic bag ban issue as of the time of its decision in January 2010. (Opinion at 27.) As this is an answer to a petition for review, Plaintiff believes that it has a duty to provide this Court with an updated status report. This Court may wish to take this information into account in deciding whether its intervention would serve any useful purpose at this stage.

City of Palo Alto: As stated in the Opinion (at 27), the City of Palo Alto has agreed not to enact or adopt any further plastic bag bans until it has completed an EIR.

City of San Jose: As stated in the Opinion (at 27), the City of San Jose declared that it will prepare an EIR before adopting its proposed ordinance to ban plastic bags. The EIR is now being prepared. The draft EIR is expected in May 2010.

City of Santa Monica: A draft EIR is being prepared and is expected to be issued by the end of March 2010.

Los Angeles County: In 2007, Los Angeles County issued a Staff Report that was a 50-page attack on plastic bags in support of a ban, without any mention whatsoever of the negative environmental impacts of paper bags. (AR 259-315.) In January 2008, based on the 2007 Staff Report, the Board of Supervisors passed a resolution to reduce and eliminate plastic bags. Consequently, Plaintiff filed an action against the County to require it to conduct an EIR before adopting a ban. *Save The Plastic Bag v. County of Los Angeles,* Los Angeles Superior Court, Case No. BS115845.

In December 2009, the County completed and issued an Initial Study pursuant to CEQA regarding its proposed ordinance to ban plastic bags. At page 2-2 of the County's Initial Study, the County made the determination that a plastic bag ban may have a significant negative effect on the environment and that an EIR is therefore required.[9]

The draft County EIR will be issued soon. The Board of Supervisors has passed a resolution requiring that the final County EIR be completed by July 1, 2010. (County Initial Study at page 1-12.)[10] At that time, the Board of Supervisors will consider an ordinance to ban plastic bags. The Board of Supervisors will have the benefit of an EIR when it makes its decision.

The Guidelines have been amended with effect from March 18, 2010.[11] A new section has been added requiring lead agencies to make a "good-faith effort, based on available information, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project." Guidelines §15064.4(a).

Banning plastic bags in Los Angeles County alone would or might result in an increase in paper bag usage that would have the same impact on GHG as between 27,753 and 63,832 passenger vehicles annually or the total electricity use of between 18,851 and 43,356 homes annually. There would also be massive increases in fossil fuel use, municipal solid waste, fresh water usage, and water and air pollution, according to the studies

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[9] http://dpw.lacounty.gov/epd/plasticbags/pdf/Initial_Study_12012009.pdf.

[10] Plaintiff understands that the July 1, 2010 deadline may be pushed back to an undetermined date in September 2010.

[11] http://ceres.ca.gov/ceqa/docs/Adopted_and_Transmitted_Text_of_SB97_CEQA_Guidelines_Amendments.pdf

reviewed in the Opinion and the Green Cities MEA (discussed below).[12]

VIII. THE GREEN CITIES MEA HAS NOW BEEN PUBLISHED

Green Cities is an organization formed by the Cities of Berkeley, Hayward, Los Angeles, Pasadena, Richmond, Sacramento, San Diego, San Francisco, San Jose, Santa Barbara, and Santa Monica and Marin County.[13] As stated in the Opinion (at 27), Green Cities has been preparing a statewide Master Environmental Assessment (MEA) pursuant to Guidelines §15169. The MEA was published on March 8, 2010, after the Court of Appeal decision in this case.[14]

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[12] The basis for the GHG calculation is as follows. According to the LA County Initial Study at page 1-3, about 6 billion plastic bags are used in the County each year. 6 billion plastic bags would be replaced by 4 billion paper bags (applying the 1.5:1 ratio at page 13 of the Opinion), assuming that the County's optimistic plan to persuade everyone to reject free paper bags and use only reusable bags fails. According to the Boustead table at page 10 of the Opinion, the life cycle of 1,000 paper bags results in 0.08 CO_2 equivalent tons of GHG and the life cycle of 1,500 plastic bags (i.e. the number of plastic bags with the carrying capacity of 1,000 paper bags) produces 0.04 CO_2 equivalent tons of GHG. (As stated in the Boustead table, the comparative metrics are based on "carrying capacity equivalent to 1,000 paper bags.") Therefore the increase in GHG caused by replacing 6 billion plastic bags with 4 billion paper bags would be 160,000 CO_2 equivalent tons. The Scottish report calculates GHG for paper bags at 3.3 times that of plastic rather than the 2.0 Boustead ratio. (Opinion at 8.) Based on a 3.3 ratio, the increase in GHG would be 368,000 CO_2 equivalent tons. Vehicle and residential CO_2 equivalents are obtained from the U.S. EPA GHG Equivalences Calculator at: www.epa.gov/RDEE/energy-resources /calculator.html.

[13] http://greencitiescalifornia.org.

[14] The MEA can be downloaded at http://greencitiescalifornia.org/mea.

The MEA is for use by all cities and counties in California, including Manhattan Beach, that are seeking to ban plastic bags. Manhattan Beach provided some of the funding for the MEA.[15] Green Cities states in the Executive Summary: "[The MEA] can be used by local governments in the preparation of EIRs to assess the potential impacts of such ordinances. Using this MEA can help reduce the cost and time of preparation of agencies' EIRs by reducing the need for independent research."

When the MEA was published on March 8, 2010, the Coordinator of Green Cities, Carol Misseldine, told the media:

> "There are dozens and dozens of cities out there ready to implement plastic bag bans and some type of fee on all other single-use bags," Misseldine said. "We are hoping that this report can used by local governments" to prepare the environmental impact reviews needed to assess the potential impacts of such ordinances and enable them to enact laws that withstand legal scrutiny.
>
> "The ACC and the plastic bag industry have made a valid point that if you ban plastic bags, people will use more paper, and that, in many ways, paper bags are more problematic than plastic bags," Misseldine said.
>
> "While plastic bags have a huge impact on marine debris, litter and wildlife, the analysis found that paper bags have a greater negative impact than plastic bags on greenhouse gas emissions, ground level ozone formation, atmospheric acidification and water consumption," Misseldine said.[16]

The Green Cities MEA extensively addresses the comparative environmental impacts of plastic bags and paper bags. It does not include

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[15] Full MEA Acknowledgements, http://greencitiescalifornia.org/mea. The Acknowledgements are on the fourth page.

[16] http://www.plasticsnews.com/headlines2.html?id=18049&channel=117.

GHG calculation and quantification, but there is no requirement that an MEA contain such information. At long last a governmental report has been issued which acknowledges that paper bags are in many important ways more problematic for the environment than plastic bags.

Charles McGlashan, a staunch anti-plastic bag advocate and a Marin County Supervisor, told the media:

> We learned from the new master environmental assessment that our hunch was right. Paper and plastic are equally bad for the environment.[17]

Plaintiff does not agree with Supervisor McGlashan's conclusion. However, an environmental assessment is certainly better than a "hunch."

Prior to the Green Cities MEA, we had only seen a stream of totally one-sided city and county staff reports that distorted, summarily dismissed, or completely ignored the negative environmental impacts of paper bags. This includes (but is not limited to) the Los Angeles County 2007 Staff Report (AR 259-315) and the Manhattan Beach Initial Study.

It appears from the Green Cities MEA that at least some governmental officials who are leading the drive to ban plastic bags have finally come to the realization that disclosing the full environmental impacts to decision-makers and the public is the best policy.

The Green Cities MEA is a direct result of this litigation. It shows the true value of CEQA.

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[17] http://www.publicceo.com (search for "McGlashan").

IX. THIS COURT'S INTERVENTION AT THIS STAGE WOULD SERVE NO USEFUL PURPOSE

Following the Court of Appeal's decision, the City Attorney told the media that he would *not* be recommending a petition for review. Presumably he could see no useful purpose in continuing to fight given that the EIR process has moved to an advanced stage. He said the City's next step would be to prepare an EIR and that it might try to join with other public agencies in preparing it.[18] The fact that the City is now listed as a financial sponsor of the Green Cities MEA means that the City has now joined and acquiesced in the EIR process.[19]

Since March 2008, Los Angeles County has offered all cities in the county the option of joining its plastic bag reduction and elimination program "in a collaborative effort and to take advantage of the framework already developed by the County." (County Initial Study at 1-10.)[20] The County EIR is being prepared as part of that program. The EIR will cover unincorporated and incorporated parts of the County including Manhattan Beach.[21] Ten cities in the county have already joined, including the City's neighbors Hermosa Beach and Redondo Beach. (County Initial Study at pages 1-10 to 1-11. The City of Los Angeles has passed a resolution to ban plastic bags.[22]) If the City of Manhattan Beach joins the County program it

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[18] http://www.metnews.com/articles/2010/save012810.htm.

[19] Full MEA Acknowledgements page, http://greencitiescalifornia.org/mea.

[20] http://www.bragaboutyourbag.com ("About the Program" page).

[21] http://dpw.lacounty.gov/epd/plasticbags/pdf/NOP_DEIR.pdf. The County Initial Study covers, and the County EIR will cover, all of the "ordinances" (in the plural) that will be considered by participating cities as part of the County program. (County Initial Study at page 1-1.)

[22] www.lacitysan.org/solid_resources/pdfs/2008/07-3155_ca_07-22-08.pdf.

will be covered by the County cumulative EIR.[23]

The City Council's decision to try to prolong this litigation, thereby overruling the City Attorney's recommendation, makes no sense. The County's cumulative EIR process has moved past the point of no return. By financially sponsoring the Green Cities MEA, the City has clearly accepted the reality that it cannot avoid an EIR.

By the time that this Court renders a decision on the merits, the Los Angeles County EIR will be complete. This Court's intervention at this stage would serve no useful purpose. There is no reason for this Court to indulge the City Council by spending valuable time on this matter.

CONCLUSION

The environmental purposes of CEQA are well served by the Court of Appeal's decision. 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.

WHEREFORE, the Petition should be denied.

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[23] Plaintiff does not support the County's proposed ordinance to ban plastic bags. However, Plaintiff does support a single cumulative EIR for the entire county. A combined EIR makes perfect sense.

DATED: March 24, 2010

STEPHEN L. JOSEPH

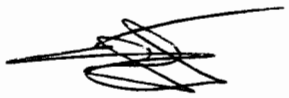
Attorney for Plaintiff and Respondent
SAVE THE PLASTIC BAG COALITION

WORD COUNT

I certify that the number of words in this document is 7681. This number includes footnotes and excludes the Certificate of Interested Entities, the Table of Contents, the Table of Authorities, this Word Count certificate, and the Proof of Service. The word count was generated by Microsoft Word.

DATED: March 24, 2010

STEPHEN L. JOSEPH



Attorney for Plaintiff 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 **SAVE THE PLASTIC BAG COALITION'S ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows. I maintain an account with Federal Express. On March 24, 2010, 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.

One copy to Superior Court clerk and 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

One copy to Clerk of the Court of Appeal:
Clerk Court of Appeal
300 S. Spring Street
Second Floor
Los Angeles, CA 90013
Phone: (213) 830-7570

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 24, 2010 at San Francisco, California.

STEPHEN L. JOSEPH