IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

SAVE THE PLASTIC BAG COALITION, Petitioner and Respondent, v. CITY OF MANHATTAN BEACH, Respondent and Appellant.	CASE NO. S180720 Court of Appeal, 2d Appellate District, Division 5 Case No. B215788 (Los Angeles County Superior Court Case No. BS116362)

CITY OF MANHATTAN BEACH'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW

ROBERT V. WADDEN, JR. [SBN 108865]
CITY ATTORNEY
CITY OF MANHATTAN BEACH
1400 Highland Avenue
Manhattan Beach, CA 90266
Tel: (310) 802-5061
Fax: (310) 802-5251
Attorney for Appellant
CITY OF MANHATTAN BEACH

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1400 Highland Avenue
Manhattan Beach, CA 90266
Tel: (310) 802-5061
Fax: (310) 802-5251
Attorney for Appellant
CITY OF MANHATTAN BEACH

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APPELLANT'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW

I. Introduction

Respondent's answer to appellant's petition for review is full of righteous indignation about the purity of the "Save The Plastic Bag Coalition's" motives in filing this action and their dedication to environmental principles. It is the environmental groups, they warn, that are biased and cannot be trusted when it comes to environmental issues. The absurdity of this hypothesis along with the anomalous outcome of this case and appellant's insistence that CEQA was properly followed in this case make a potent argument that review should be granted.

In its answer respondent relies on two premises: that plastic bags are environmentally superior to paper bags, and; that the City's initial study was devoid of information and analysis. In the end both premises, while untrue, are ultimately irrelevant. This case, after all, is not really about paper versus plastic at all. It is about the low threshold of proof necessary to require an Environmental Impact Report ("EIR") under the "Fair Argument" test.

In the instant case all respondent did was to place in the record a few generic studies which discuss, on a macro scale, impacts from manufacturing plastic and paper bags. None of these studies is geared to the micro effects of a minimal ban of plastic bags or quantified to address the specific impacts of Manhattan Beach's proposed ban. In fact

these reports tell us nothing about the environmental effects of the Manhattan Beach ordinance. Yet their mere introduction in the record is deemed enough under the "Fair Argument" test to create an unrebuttable presumption that the project has an impact on the environment and an EIR must be prepared. Once that threshold is crossed the contents of the initial study are irrelevant. Even a well reasoned and thoroughly analyzed initial study is only one side of the "Fair Argument" that triggers the EIR requirement. According to respondent and the cases it relies upon the lead agency lacks the ability to weigh the arguments and evidence once a scintilla of evidence in support of environmental impact has been introduced.

In fact, this position and the rampant abuse of the CEQA process that has resulted is a powerful argument for why this Court should revisit the "Fair Argument" test and require it to be a more rational and analytical process with due deference to the decision making of local agencies.

II. The Fair Argument Test Requires More Flexibility

In its answer respondent blatantly admits that the CEQA process is rigid and inflexible under the current law. (Respondent's Answer To Petition For Review, p. 5.) This has not always been the case. Earlier cases such as *Newberry Springs Water Assn. v. County of San Bernardino* (1984) 150 Cal.App3rd 740, *Citizens For Responsible Development v. City of West Hollywood* (1995) 39 Cal.App4th 490, *Stanislaus Audobon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144 and *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597 used a far more

deferential standard which permitted the lead agency to weigh and evaluate the evidence in the record.

Over time the test hardened to a point where virtually any evidence in the record will be enough to establish a "Fair Argument" of environmental impact. This trend started as early as *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3rd 988 in which the reviewing court felt comfortable ignoring the lead agency's evaluation of the evidence in the record. The test hardened with cases like *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307 in which the mere existence of a disagreement among experts was sufficient to constitute a "Fair Argument."

It seems unlikely that the legislature ever intended such a rigid and inflexible test when it passed CEQA. Public Resources Code Section 21080(d) provides:

> "If there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment an environmental impact report shall be prepared."

This test is something quite different than the "Fair Argument" test employed in the instant case. In Section 21080(d) the legislature seems to anticipate that the lead agency should weigh the evidence in light of the entire record and make a determination as to the

likelihood of environmental effect. The court created "Fair Argument" rule seems to preclude the right to weigh evidence at all. As the appellate court in this case noted:

> "[I]f a local agency is required to secure preparation of an [environmental impact report] 'whenever it can be *fairly argued* on the basis of substantial evidence that the project may have significant environmental impact' [Citations], then an agency's adoption of a negative declaration is not to be upheld merely because substantial evidence was presented that the project would not have such impact. The trial court's function [and ours] is to determine whether substantial evidence supported the agency's conclusion as to whether the prescribed 'fair argument' could be made. If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an [environmental impact report] and adopt a negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact." [Citations] And if any aspect of the project may result in a significant environmental impact, an environmental impact report is required, even if the overall effect of the project is beneficial. [Citations]." (*Save The*

Plastic Bag Coalition v. City of Manhattan Beach (2010) 181 Cal.App.4th 521, ___.)

This sounds like a very different test than that in Public Resources Code Section 21080(d). It is a test which precludes any weighing of the evidence in light of the entire record. Under the appellate court's test any evidence in the record suggesting the possibility of environmental impact is sufficient to trigger an EIR even if the preponderance of the evidence supports the likelihood of minimal or no impact. Indeed, in the instant case the court notes:

> "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." (*Id,* 181 Cal.App.4th at ___.)

Yet it is unable, under the existing "Fair Argument" test, to acknowledge this rationale in light of any evidence to the contrary however minimal.

III. The Appellate Court Dissent Raises Important Issues

Respondent attempts to dismiss Justice Mosk's thoughtful and responsible dissent by claiming that he was arguing small cities should be exempted from CEQA. That, of

course, is absurd and insults an appellate court justice who has raised some serious issues about the application of CEQA where evidence points to a *de minimis* environmental impact.

Obviously small cities initiating projects which clearly have an impact on the environment should be treated no differently than any other lead agency sponsoring a project. However, the point of Justice Mosk's dissent is, not that small cities should be able to bypass CEQA, but that the scope of an action should be considered in determining significant environmental impacts. The dissent points out that the reports submitted by the respondent deal with the effects of paper versus plastic in an unquantified "undefined territory" and therefore cannot be considered "substantial evidence" for purposes of Public Resources Code Section 21080(d). The same analysis would apply for a large agency. In this particular case the size of the City is relevant to the scope of the project and the resulting impacts as analyzed by the initial study. The dissent's focus is on how the record is to be evaluated and how the evidence is weighed. Justice Mosk rejects the rigid mechanistic approach in favor of a common sense evaluation of the record which takes into account the realities of the project. The dissent also takes note of the reality of who the respondent in this case is and what their motivations are. Ultimately Justice Mosk urges a more balanced and pragmatic approach to CEQA without abandoning the legislature's original purpose in passing the legislation:

> "The Legislature and judiciary generally have taken steps to ensure that environmental impacts are given consideration, including

> when government acts. But that does not mean that we must apply environmental laws in a commercial dispute or when efforts are made to protect the environment in a limited area, just because of some hypothetical, de minimis effects of an ordinance. I do not believe 'it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact.' "
>
> (*Save The Plastic Bag Coalition v. City of Manhattan Beach* (2010) 181 Cal.App.4th 521, ___.)

In other words, the respondent may well have met the technical requirements of the existing "Fair Argument" test, but a reasonable evaluation of the evidence clearly indicates the project will not have a significant environmental impact.

IV. This Court Should Consider More Restrictive Standing Requirements For CEQA

The traditional approach to standing to bring CEQA lawsuits has been permissive. The CEQA statute itself has no standing parameters so the doctrine has been created by the courts. The general rule under writ of mandate cases as applied to CEQA is that the petitioner must have a "beneficial interest" in that they will be adversely affected by the environmental impacts of the challenged project. (*Bozung v. LAFCO* (1975) 13 Cal.3rd 263, 272.) Where the public interest is involved the courts have often dispensed with the beneficial interest requirement in the case of individuals. Allegations that a petitioner is within a class of citizens beneficially interested and a resident of an area affected by the project have been held to be sufficient to establish standing. (*Kane v. Redevelopment*

Agency (1986) 179 Cal.App.3rd 899, 904.) Some cases have even suggested that a geographical nexus to the project is sufficient. (*Citizens Ass'n for Sensible Dev. v. County of Inyo* (1985) 172 Cal.App.3rd 151, 158.) (This assertion has been contradicted by more recent case law requiring a petitioner to show an actual beneficial interest and discounting mere geographical proximity, See: *Waste Management v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1226.)

Unincorporated Associations such as the respondent obviously have no beneficial interest themselves but generally have been permitted to serve as petitioners in mandate cases where the individual members of the association would have had standing to sue on their own (which they would not in the instant case).

In cases under CEQA's Federal corollary, NEPA, Federal courts do not permit standing unless the petitioner has a beneficial interest which is within the "zone of interest" protected by the statute. (*Lujan v National Wildlife Fed'n* (1990) 497 US 871, 883.)

In the instant case the unincorporated association does not allege that its members live or work in the area of the project or that they have a beneficial interest of any kind other than their economic interest in manufacturing and selling the product to be regulated by the project. Were this a NEPA lawsuit it would have been dismissed at the outset. In fact, the *Waste Management* court appears to be heading in a direction where the interest of a commercial entity must be truly within the zone of interest protected by CEQA for it to have standing.

The abuse of CEQA for purely economic reasons has become an impediment to economic development without doing anything to truly protect the environment. Court created liberal standing rules are a major part of the problem. It is hardly revolutionary to require, as Federal courts do in NEPA actions, that the beneficial interest being asserted by a petitioner bear some relationship to the intent of the statute.

V. Assuming Arguendo That The City's Initial Study Were Flawed It Should Be Permitted To Do A New One.

The City produced a thorough and well reasoned analysis of the potential impacts of its plastic bag ban in its initial study. The initial study looked at the scope of the project and, while giving the assertions of respondent the benefit of the doubt, determined that even if production of paper bags is more damaging to the environment the number of bags affected by the ban was so minimal as to not produce an impact. Both the trial and appellate courts struggled with this concept because, they said, no thresholds of significance for this sort of project have been established. The dissent focuses strongly on the reasonable common sense analysis of the initial study and the utter failure of respondents to have addressed it in any way in the record.

However, even if the initial study were flawed that does not automatically mean that an EIR must be prepared. The option of remand should be clearly available to reviewing courts in order to avoid situations where they substitute their judgment for the lead agency. While respondent claims that this issue was never raised in the lower court it was, in fact, thoroughly briefed and disregarded by the appellate court. In fact, both the

appellate and trial courts seemed to believe that they were obligated in this case to order that an EIR be prepared. No current published case clarifies the scope of discretion available to a reviewing court in a CEQA case.

A reasonable reading of Public Resources Code Section 21168.9 would lead one to believe that it was the legislature's intent that a reviewing court should mandate a defendant in a CEQA case to do what is necessary to bring its actions into compliance, no more and no less. Nothing in the code gives a reviewing court the discretion to order a specific course of environmental review where, as in the instant case, the court has found the preliminary stage of CEQA review to be defective.

VI. Conclusion

Respondent suggests that the Court's intervention at this stage would serve no useful purpose. Other agencies are now preparing EIR's so the matter is moot. As Justice Mosk's dissent points out these agencies are only doing so because they have been intimidated by respondent's aggressive campaign of litigation. It is precisely because of the use of CEQA as a cudgel by groups attempting to protect their economic interests that this court should take a fresh look at the "Fair Argument" test in its current rigid and inflexible form. In order to challenge a project an opponent must be required to have a legitimate environmental interest in a project's impact. They must be required to do more than dump a few generic studies into the record and be able to argue that they have created a controversy sufficient to constitute a "Fair Argument." Some deference to the fact finding of the lead agency must be required. Some consideration of the reasonable

scope of a project must be allowed. Otherwise there are very few controversial projects that will not require an EIR and many of those projects, regardless of how worthy, will simply not get done.

In many ways respondent's answer to the petition highlights how rigid the law has become and how that rigidity provides a protection for those who would obstruct, obfuscate and delay the functions of government in order to serve their private economic interests. Surely the Court is aware how often this scenario is played out in the courts of California. The present situation is peculiarly anomalous and as Justice Mosk points out ". . .stretches the California Environmental Quality Act (CEQA) and the requirements for an EIR to an absurdity." It is not however, a unique situation. While it is true that the legislature is currently considering different ways to cope with the abuse of CEQA it is also true that some of these abuses have been promoted by court interpretations with have stretched the boundaries of the statute. These are ripe for consideration allowing the intent and effect of CEQA to be preserved without permitting it to be a weapon in disputes having nothing to do with the environment.

March 30, 2010

Robert V. Wadden Jr.
City Attorney

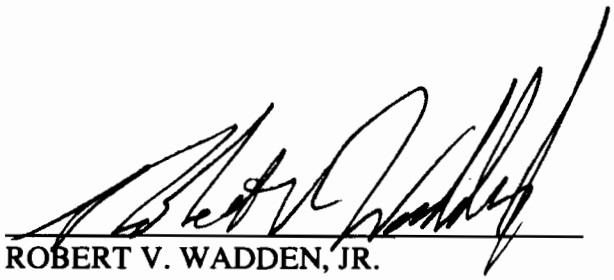
By _____
Attorney For Respondent,
City of Manhattan Beach

CERTIFICATE OF COMPLIANCE

The word count on the word processor indicates that there were 2,868 words in the document including this certificate of compliance.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and corrected.

Dated: March 30, 2010



ROBERT V. WADDEN, JR.
City Attorney
Attorneys for Appellant,
City of Manhattan Beach

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years, and not a party to the within action; my business address is 1400 Highland Avenue, Manhattan Beach, California 90266. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service.

On April 1, 2010, following ordinary business practice, I served the within **CITY OF MANHATTAN BEACH'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW;** on the party or parties named below, by U.S. Mail, addressed as follows:

STEPHEN L. JOSEPH, ESQ.
350 Bay Street, Suite 100-328
San Francisco, CA 94133

AFSHIN DAVID YOUSSEFYEH
1875 Century Park East, Suite 1490
Los Angeles, CA 90067

Hon. David P. Yaffe
111 N. Hill Street Dept. 86
Los Angeles, CA 90012

Clerk Court of Appeals
Second Appellate District
300 S. Spring, North Tower
Los Angeles, California 90013-1213

VIA MESSENGER
California Supreme Court (Orig + 13 copies)
San Francisco Office
350 McAllister Street
San Francisco, CA 94102-7303

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 1, 2010, at Manhattan Beach, California.

WENDY MORENO
Printed Name

Wendy Moreno
Signature