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STATE OF CALIFORNIA

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

CITY OF MANHATTAN BEACH'S OPENING BRIEF

OF THE DECISION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE

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I.

STATEMENT OF ISSUES

The issues presented in appellant's petition for review were:

a.) *Regulation of plastic bags is an important issue for local government there is a need for guidance on the appropriate environmental review such regulation requires.*

b.) *What is the appropriate standard for determining whether or not there is "substantial evidence" for determining there is a "fair argument" that an EIR is required for a specific project?*

c.) *What constitutes a "substantial impact on the environment" for purposes of requiring an EIR?*

d.) *There should be a de minimus/common sense threshold for requiring an EIR.*

e.) *If the City's negative declaration was flawed, as the appellate court asserts, the appropriate remedy was to remand the matter to the City for further environmental review.*

f.) *Whether or not a non-individual party with only a commercial interest in a project decision has a sufficient "beneficial interest" to have standing to file an action under CEQA.*

For purposes of this brief the foregoing issues are condensed as follows:

a.) Plastic versus Paper.

b.) The CEQA EIR Threshold

i. Fair Argument and Substantial Evidence Tests

ii. Significant Impact on The Environment

c.) CEQA Standing.

d.) The Appropriate Remedy.

II.

STATEMENT OF FACTS

On July 15, 2008 the City of Manhattan Beach adopted Ordinance No. 2115 which implemented a phased ban of distribution of plastic bags at point of sale in the City. The ban was to affect all retailers and restaurants but initially would be effective against the larger retailers and gradually phased in against smaller stores and restaurants over time. Manhattan Beach is a coastal community in the South Bay area of Los Angeles County with a population of approximately 33,852. It is a bedroom community with a small retail and business sector.

The City's planning division prepared an Initial Study for Ordinance 2115. The initial study included consideration of several studies submitted by respondent which suggested that manufacture and distribution of paper bags may have a greenhouse gas impact which is greater than that of plastic bags. None of these studies were specific to Southern California or the proposed Manhattan Beach ban. They were generic and theoretical in nature. None of the studies extrapolated the specific damage to the environment from using paper bags in lieu of plastic bags or attempted to quantify in any way such an

impact. The initial study did not discount or contradict the findings of these studies but determined that, even if the studies were accurate, the scope of the proposed project would not be sufficient to have a significant impact on the environment given the small number of people, businesses and plastic bags affected. Based on this initial study a negative declaration was prepared for Ordinance 2115.

Prior to adoption of the ordinance the city held a public hearing at which respondent's counsel, Stephen Joseph and representatives of many other organizations, both in support and opposition, participated in the hearings regarding the proposed ordinance. These included: Heal The Bay (AR, Vol. I, p. 159-160, 231-233; Vol. II, p. 632, lines 25-28, p. 633-637); Surfrider Foundation (AR, Vol. II, p. 631, lines 5-15, p. 640, lines 17-28, p. 641, lines 1-9, p. 644, line 28, p. 645, lines 1-24); Santa Monica Baykeepers (AR, Vol. II, p. 575.); Earth Resource Foundation (AR, Vol. II, p. 648, lines 14-28, p. 649, lines 1-16); Planet Pals (AR, Vol. I, p. 80, lines 17-28, p. 81, lines 1-20); Endangered Habitat League (AR, Vol. II, p. 577); Californians Against Waste (AR, Vol. I p. 161); Southern California Association of Governments ("SCAG") (AR, Vol. I, p. 230); American Chemistry Council (AR, Vol. I, p. 163-164); Vol. II, p. 641, lines 16-28, p. 642.); California Grocers Association (AR, Vol. I, p. 74, lines 7-28, pages 75-79, p. 167-168); California Restaurant Association (AR, Vol. I, p. 153) as well as the local chamber of commerce and merchants (AR, Vol. I, p. 47 lines 4-9; Vol. II, p. 606, lines 9-13.).

In adopting Ordinance 2115 the Manhattan Beach City Council was primarily concerned with the impact of plastic waste on the beach and in the marine environment. The

Council discussed plans to aggressively promote reusable bags (in fact the City distributed over seven thousand free reusable shopping bags in February 2009, as part of a promotion planned for the day the first phase of Ordinance 2115 was scheduled to take effect and continues to actively promote use of reusable bags). They discussed the fact that the City had no legal authority to implement the less restrictive measure of imposing fees on plastic bags due to the legislature's prohibition of such fees in Public Resources Code Section 42250(b). They heard several hours of public comment on the proposed ordinance including testimony from opponents like respondent, the California Grocers Association and California Restaurant Association and supporters like Heal the Bay, Surfrider Foundation and Californians Against Waste. While the City Council acknowledged consideration of the information provided by respondent (*e.g.*: A.R., Vol. II, p. 57, lines 23-28) they also noted that the ordinance was intended to serve the needs of the community and that the evidence presented regarding plastic waste was compelling. (A.R., Vol. II, p. 58, lines 1-11.) The Council discussed the need to consider fees on paper bags (A.R., Vol. II, p. 59, line 10) and the fact that the community has a very high rate of reusable bag usage. (A.R., Vol. II, p. 59, lines 1-3.) Ultimately, after considering all of these factors, the Council voted unanimously to adopt Ordinance 2115 and certify the negative declaration.

Throughout the process the Coalition made it clear that if the Manhattan Beach ban were adopted they would file a legal action to stop it.[1] True to their word they filed the instant action on August 12, 2008 alleging that the City should have prepared an EIR. On

[1] In a moment of candor the Coalition's counsel admitted that had the City done an EIR they would have challenged that too.

December 18, 2008 respondents sought and obtained a ruling that they were entitled to a preliminary injunction enjoining enforcement of Ordinance 2115. However, they never posted bond nor submitted an order to the court for signature so the injunction never took effect. On February 20, 2009, at a hearing on the petition for writ of mandate, the trial court ruled that the City's ordinance was invalid for failure to comply with CEQA by preparing an EIR. In doing so the court seemed to rule that since plastic versus paper is controversial the Manhattan Beach City Council was required to prepare an EIR as a disclosure document to justify its policy of banning plastic. The trial court's ruling ignored the rule that the mere existence of general controversy over a policy issue does not trigger a requirement for an EIR. (Public Resources Code Section 21082.2(b).)

The City filed a timely appeal and on January 27, 2010 Division Five of the Second Appellate District issued an opinion affirming the writ of mandate issued by the trial court with Justice Mosk dissenting.

III

ARGUMENT

(a.) Plastic v. Paper.

At the hearing on Ordinance 2115 Dr. Mark Gold, the president of Heal The Bay, noted:

". . .the age old question of paper versus plastic is the wrong question. The answer to that question is, of course, reusable." (A.R., Vol. II, p. 43, Lines 10-12.)

Ultimately, this case is not and never was about plastic versus paper. It is about protecting the environment and the legal threshold required under the California Environmental Quality Act ("CEQA") to determine whether or not an environmental impact report ("EIR") is necessary before a local government can act to do so. From respondent's perspective this case is about preserving a market for their product and trying to find a way to use the law to shield its use from local regulation. Respondent knows that so long as plastic is available as a cheaper alternative to paper it will be preferred.

Yet plastic versus paper is not without significance. The "Great Pacific Garbage Patch" is a huge floating island of plastic debris accumulated by ocean currents which is not biodegradable and virtually indestructible by the forces of nature. While it is an aesthetic blight it is also a danger to marine life. The Los Angeles County report submitted to the Manhattan Beach City Council pointed out that 25% of debris found in storm drains was made up of plastic bags. There was also evidence presented to the Council that over six billion plastic bags are used each year in Los Angeles County and that only five percent (5%) of those are recycled. (A.R., Vol. II, p. 596, lines 4-14.) The remainder end up in wetlands, waterways, oceans, beaches, storm drains or as floating, billowing reminders of the downside of human ingenuity. Paper bags break down over time. They are heavier

and less subject to be blown all over and they are recycled at a rate four times that of plastic bags.

There is a movement among environmentalists to find a solution to the problem of ever accumulating plastic debris. It is a movement which has found support among local governments, like San Francisco, Malibu, Santa Monica, Palo Alto, Manhattan Beach and others who have tried to fill the void created by the inaction of the State legislature by taking action themselves. But it is a movement which has given rise to a counter movement among those, like respondents, who profit from plastic. The media and the public have taken an interest in this conflict raising the scrutiny of the legal issues raised by this case.

(b.) <u>The CEQA EIR Threshold.</u>

i. The Fair Argument and Substantial Evidence Tests

An EIR is required whenever substantial evidence in the record supports a "fair argument" that significant impacts will occur as a result of the project. (*No Oil, Inc. v. City of Los Angeles* (1975) 13 Cal.3rd 68, 75.) Both the concepts of "substantial evidence" and "fair argument" have been variously interpreted by reviewing courts in the past. In the instant case both the trial court and appellate court applied the most rigid interpretation of these concepts.

The essence of respondents' argument throughout these proceedings has been that Ordinance 2115 required an EIR because some studies show the manufacture of plastic bags as having a lesser impact on the environment than manufacture of paper bags and a

ban of plastic bags would result in an unspecified increase in use of paper bags which would be detrimental to the environment. (App., Vol. III, p. 514, lines 7-11.) In support of this argument respondents relied entirely on several studies which suggest that manufacture and distribution of paper bags may have a greenhouse gas impact which is greater than that of plastic bags. None of these studies were specific to Southern California, Los Angeles County or the proposed Manhattan Beach ban. They were generic and theoretical in nature and done on a macro scale. None of the studies extrapolated specific damage to the environment from using paper bags in lieu of plastic bags or attempted to quantify in any way such an impact.

The City, on the other hand prepared an initial study which addresses the potential for the ordinance to have environmental impacts. It acknowledges the possibility that paper bag usage may increase from a plastic bag ban and that some evidence supports the contention that manufacture and distribution of paper bags consumes more energy than that of plastic bags. (AR, Vol. I, p. 114a.) It also analyzes the potential for increased paper bag use based on the scope of the proposed project including consideration of the size of the community in which the ban would be effective and the extent of its commercial sector. (AR, Vol. I, p. 114a-115, 117a, 120.) This analysis was relevant to the checklist areas of Air Quality, Water Quality and Transportation. The facts articulated in the initial study include, that Manhattan Beach is a small, residential community with a population of only 33,852, that its commercial sector includes only 217 licensed retail stores which may use plastic bags, that the number of larger retail

stores such as supermarkets and big box retail stores is very small. (AR, Vol. I, p. 114a-115, 117a, 120.) These are not unsubstantiated opinions but material facts.

The administrative record reviewed by the Manhattan Beach City Council reflects the fact that average use of plastic bags in Los Angeles County is 600 bags per person per year (with less than 5% recycled). (AR, Vol. I, p. 17.) Six billion plastic bags are used each year in Los Angeles County. (AR, Vol. I, p. 16.) That means that Manhattan Beach plastic bag use (33,852 population x 600 bags per person = 20,311,200 bags per year) is only a bare .003% of the total annual plastic bag consumption in Los Angeles County alone. Of course the ban on plastic bags is not a ban on the use of bags but a ban on the distribution of plastic bags at point of sale within the City. Given the disproportionate residential character of Manhattan Beach and small retail sector noted in the initial study, (AR, Vol. I, p 117a) it is clear that Manhattan Beach residents get many of their bags at vendors located outside Manhattan Beach. These would be unaffected by the ban. Therefore, the actual effect on plastic ban usage is likely to be considerably smaller than if plastic bag usage were simply to cease. The corresponding increase in paper bag use is likely to be even smaller given that a single paper bag may replace up to three to four plastic bags (AR, Vol. I p. 117a; Vol. II, p. 603, lines 1-3) and some usage of reusable bags is anticipated, perhaps as high as 40%. (AR, Vol. II, p. 604, lines 18-23.) In addition, the ordinance requires that paper bags used have at least 40% recycled content (AR, Vol. I p. 21) and it is noted that paper bags are recycled at a much higher rate (21%) than plastic. (AR, Vol. I, p. 17.)

If a lead agency does not find substantial evidence in the initial study that the project may significantly affect the environment an EIR is not necessary and the agency may adopt a negative declaration. (Public Resources Code Section 21080(c)(1); 14 Cal. Code Regs. Sections 15063(b)(2), 15064(f)(3).)

> "An EIR is not required on any project proposed to be carried out or approved unless substantial evidence in light of the whole record supports a fair argument that the proposed project may have a significant effect on the environment. [Citations] In the absence of such a finding, the adoption of a mitigated negative declaration must be upheld. [Citations] The burden is on the petitioner to demonstrate by citation to the record the existence of such substantial evidence." (*Citizens For Responsible Development v. City of West Hollywood* (1995) 39 Cal.App4th 490, 498-499.)

The term "substantial evidence" is defined in the CEQA Guidelines as ". . .enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might be reached." (14 Cal. Code Regs. Section 15384(a).)

The *West Hollywood* case court's reference to ". . .in light of the whole record . . ." indicates that both evidence in support and in opposition to environmental impacts should be considered in determining whether an EIR is necessary. Indeed, cases such as *West Hollywood* and *Stanislaus Audobon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 151 acknowledge that a weighing of contrary evidence is an essential element of the lead agency's determination of whether or not an EIR is required. Yet the appellate panel in the instant case seems to interpret the term "substantial evidence" as meaning any evidence at all and ignores the requirement that the potential environmental impact be "significant." As applied by the appellate panel in this case the "Fair Argument" test is imposed based upon the lowest possible threshold of evidence and no deference, or even consideration, is paid to the deliberations and weighing of evidence by the lead agency.

The appellate majority state that " . . .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 an impact." (*Save The Plastic Bag Coalition v. City of Manhattan Beach* (2010) 181 Cal.App.4th 521, 542 (*Review Granted,* April 22, 2010.) They thus completely disregard the findings of the City's initial study. The Justices go on to say that evidence contradicting evidence showing that a project might have a significant impact on the environment cannot be considered. (*Id* at 542.) Thus the appellate majority seem to be saying that a lead agency has no discretion to weigh or compare evidence but may only consider evidence which supports an EIR requirement. This position is clearly a

departure from the earlier cases cited above and tends to create an inflexible standard that has the potential (as in the instant case) for absurd results.

The only evidence submitted in the instant case by the respondents were a few generic studies (several prepared by industry friendly sources) indicating that production of paper bags on a macro scale has greater impacts on the environment than production of plastic bags. There was no evidence which attempted to quantify the specific impacts of the Manhattan Beach ban and none which factored in the environmental damage from non biodegradable litter and the much higher recycling rate of paper bags compared with plastic. Clearly, the Manhattan Beach City Council was not convinced and did not consider the studies to be substantial evidence.

> "The lead agency has some discretion to determine whether particular evidence is substantial." (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1400.)

> "The determination of whether or not evidence is 'substantial' is in itself a weighing process. The court does not look only to the evidence relied upon by appellants to the exclusion of all contrary evidence. Evidence that rebuts, contradicts or diminishes the reliability or credibility of appellants' evidence is properly considered. The absence of supporting evidence is properly

considered." (*Citizens' Com. To Save Our Village v. City of Claremont* (1995) 37 Cal.App.4th 1157, 1168.)

In the instant case no deference was given to the determination of the City as to whether or not respondent's evidence was substantial nor did the trial court nor the appellate court majority make any effort themselves to analyze the substantiality of the evidence presented. In part this is because the case law has no clearly articulated standard or guidelines for determining the threshold of substantiality. The courts cited above did permit the lead agency to weigh the evidence in the record and paid deference to that effort. However, the appellate court majority in the instant case and other reviewing courts (e.g.: *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3rd 988; *Sierra Club v. County of Sonoma* (1992) 6th Cal.App.4th 1307) have simply ruled that any evidence in the record created a "fair argument" of environmental impact and failed to defer to the lead agency's determination or to consider conflicting evidence and conduct such a weighing and analysis themselves. Indeed the dissent focuses clearly on this issue in criticizing the majority's reliance on the generic reports submitted by respondents: "I do not consider these reports to constitute substantial evidence that a distribution ban within this small city will impact the environment." (*Save the Plastic Bag Coalition,* 181 Cal.App.4th at 549; 2010 DJDAR at 1496.)

The "Fair Argument" test as employed by the majority in this case is too simplistic to allow a careful weighing of the environmental consequences of a project in an era of limited public resources. As applied in the instant case it inevitably leads to requiring an

EIR even where causation of environmental impacts is tenuous and unlikely. This encourages abuse of CEQA by those whose motives have nothing to do with protecting the environment.

ii. Significant Impact On The Environment

The term "significant effect on the environment" is defined in the CEQA Guidelines as " . . . a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project . . ." (Public Resources Code Section 21068; 14 Cal. Code Regs. Section 15382.)

Webster's defines the term "substantial" (not defined in the Public Resources Code or CEQA Guidelines) as "having substance," "real, true not seeming or imaginary," "with regard to essential elements; corporeal; material." (*Webster's Dictionary of The English Language, Unabridged* (1977), p. 1817.) *Black's* defines the term as meaning "Of real worth and importance; of considerable value." (*Black's Law Dictionary* (4th Edition, 1968) p. 1597.) Therefore when a determination is made that a project will cause "substantial" adverse changes to the environment one would assume that the change must be meaningful, material and considerable to require an EIR.

The studies put into the record by respondents do not address the specific impacts of the proposed project. They contain no discussion of per capita bag usage or recycling rates and no analysis of a ban or levy on plastic bags on any scale. The studies failed to quantify the amounts of greenhouse gases and other toxic substances which might be

increased as a result of the Manhattan Beach plastic bag ban. They failed to evaluate or even discuss the actual environmental effects of any such increase. Respondents failed entirely to extrapolate any of the findings of these reports to the specific impacts of the Manhattan Beach plastic bag ban. These reports never say, or attempt to say, how much of an increase in paper bag use has to occur before "significant" degradation of the environment would occur. Is it twenty million bags or two? Respondents never provide their own analysis to counter the issues raised by the City's initial study.

What level of environmental degradation must be likely before the impact is considered "significant?" If greenhouse gases are involved what level of increase in carbon emissions must occur before an impact must be studied? Respondent never even attempted to provide such an estimate and given that the proposed project was so limited in scope shouldn't some evidence of the level of impact likely to occur be part of the substantial evidence required to establish a "Fair Argument?"

"Substantial evidence" must be applied, not to some generic, abstract, concept like paper versus plastic, but to the actual impacts of the "proposed project." Logic usually takes us from specific propositions to a more general conclusion. The evidence submitted into the record by respondents regarding Ordinance 2115 starts and ends with general conclusions unsupported by analysis specific to the proposed project. The reports examining the effects of bag manufacturing, even if they were not skewed to support the industry, tell us very little about banning plastic bags in the context of a small Southern California beach bedroom community. That task was undertaken by the initial study which acknowledged

the general conclusions of the reports submitted by respondents. (AR, Vol. I, p. 114a.) The fact that on a generic, abstract, level the manufacture of plastic bags may have a lesser environmental impact than manufacture of paper bags does not inevitably lead to the conclusion that a limited ban of plastic bags in a small residential community must therefore be harmful to the environment or that, in any case, any such harm would be "significant" as defined under CEQA.

Neither the trial court nor the appellate majority bothered to analyze whether or not the supposed impact to the environment supported by respondent's studies would be significant. The trial court brushed aside the *de minimis* analysis in the city's initial study by noting:

> "The contention has no merit because it is supported by no standard by which to determine what is 'minimal.' " (App., Vol. III, p. 808.)

If that is the case then CEQA is not capable of distinguishing between a small project with minimal impacts and a similar project of larger scope. Both projects would be treated similarly and require an EIR.

The trial court did not cite any case law to support its notion that any *de minimis* argument must be based on some kind of formal, definitive standard. Given the uniqueness of the proposed project, the community in which it was to be implemented

and the relatively recent advent of environmental science dealing with disposable bags it should not be surprising that no such standard existed. If CEQA law had not evolved to the point where a clear cut methodology existed to evaluate impacts how could the City have been expected to have done so?

In its opinion the appellate majority provide a laundry list of the reasons why a plastic bag ban would have a *de minimis* effect:

> " . . . the city concluded such increased paper bag use and any corresponding environmental effect would be minimal or nonexistent because: plastic bag bans are not widespread; the city's population is only 33,852 people; plastic bag use by residents generally would not be banned-only their distribution at point of sale; paper bags distributed at point of sale would be minimally composed of 40 percent recyclable material; only 11.2 percent of the city was zoned for commercial use; the city has only 217 retail establishments that might use plastic bags; there were only two supermarkets, three drug stores, and one Target store known to be high volume users of plastic bags; many restaurants and fast food outlets use paper bags for take-out orders; paper bags have a higher capacity, so plastic bags would not be replaced by paper bags on a one-to-one ratio;

a larger portion of paper bags is recycled than plastic; the city represents a small proportion of regional landfill users; and as a result of education efforts and increased publicity together with public concern for the environment, it was expected some percentage of plastic bags to be replaced by reusable bags." (*Save The Plastic Bag Coalition v. City of Manhattan Beach* (2010) 181 Cal.App.4th 521, 543-544 (No. S180720 *Review Granted* April 22, 2010).)

After citing all of these findings the court observes that:

> "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. 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 the California Environmental Quality Act when it believes its actions will have a positive effect on the environment." (*Id.* at 544.)

So while the majority acknowledged, based on the straightforward facts advanced by the City, the real possibility that the plastic bag ban would have no significant environmental impact it nevertheless required further analysis that would be entirely speculative based on a standard it created itself. The appellate majority seems to be requiring the City to have completely refuted all possible arguments regarding environmental impacts (even minor ones) before it can be allowed to adopt a negative declaration.

The dissent, on the other hand, accepts the City's analysis and notes that:

> "This small residential city, with only 217 licensed retail establishments that might provide plastic bags, would have a comparatively infinitesimal distribution of paper bags. Many of the City's residents undoubtedly obtain their bags from vendors outside the city. Paper bags may be bulkier than plastic bags, but they also are larger-requiring fewer bags-and can be recycled. Every possible increased use of paper does not compel an EIR. Moreover, this ordinance does not endorse paper bags. Rather, it promotes reusable bags." (*Id.* at 548.)

The dissent goes on to conclude the City should not be required ". . . to consider the effect of a ban on the distribution (not use) of plastic bags in the City on such matters as deforestation, energy use, acid rain, greenhouse gas emissions, water, waste and air quality. These purported elements are not significantly affected by this small scale application of the ordinance." (*Id.* at 549.)

The decision to require preparation of an EIR in this case, as the dissent notes, " . . . . stretches the California Environmental Quality Act [citations] and the requirements for an EIR to an absurdity." (*Id.* at 545-546.) That is because, the majority, in an attempt to justify its EIR requirement, has acknowledged and then disregarded the facts in this case regarding the significance of potential environmental impacts. In doing so it has imposed an artificial standard unsupported by case law and in defiance of common sense. This

results in an inflexible formula for determining potential impacts on the environment which precludes weighing the facts and circumstances of a project, disregards any contrary facts, ignores the analysis of the lead agency and requires that if there is the remotest possibility of impact an EIR must be required. If such a standard is indeed the law then absurd results are inevitable.

(c.) Standing.

The CEQA statute does not have a standard for determining standing. Courts have therefore applied the general rules of standing applicable to mandamus actions. (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3rd 818, 832.)

> "A writ of mandate may only be issued to a 'party beneficially interested.' [Citations] This requirement has been interpreted to mean that the petitioner must have 'some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.' [Citations]" (*Id.* at 832.)

In an action under CEQA a petitioner has such a beneficial interest if the environmental impacts from a proposed project may adversely affect it. (*Bozung v. LAFCO* (1975) 13 Cal.3rd 263, 272.) The scope of this environmental impact must be above and beyond that of the general public. (*Braude v. City of Los Angeles* (1990) 226 Cal.App.3rd 83, 88.)

In the instant case it appears quite clear that respondent is not asserting a particular beneficial interest as a result of adverse environmental impacts from the proposed project. The alleged adverse impacts of the City's plastic bag ban argued by respondents are generic, general, abstract and, if applicable at all, applicable to respondents in the same way as to the general public.

The appellate majority opines that respondent has a "beneficial interest" because:

> ". . .it was formed to counter misinformation about the effect of plastic bag usage on the environment and to require government agencies to prepare environmental impact reports before banning plastic bags so that their decisions are based on accurate information. The interest plaintiff asserts in its writ petition is not a commercial one." (*Save The Plastic Bag Coalition* 181 Cal.App.4th at 537.)

Yet respondents interest in countering "misinformation" can hardly be separated from its compelling interest in preserving commercial markets for a product its members manufacture and sell. Many industries, especially those engaged in environmentally controversial activities, aggressively seek to portray their products or activities as environmentally friendly. Public relations is an essential element of many commercial endeavors. So is protecting a product from prohibitive regulation. At what point can a

litigant's interest in protecting the environment be unraveled from their interest in making a profit? Certainly where a business entity's operations will directly suffer environmental impacts, due to reduced water quality, air quality or other environmental blight their capacity for standing should be recognized. But in the instant case there are no such actual impacts affecting respondents. Their interest is abstract and inextricably intertwined with their commercial interest.

In fact, in granting respondents standing the appellate majority is really relying upon the theory that respondent is attempting to enforce a public duty in asserting its standing. This type of standing is permitted in cases where a citizen or citizens' group can assert that an important duty has allegedly been breached, those who are beneficially interested in the action cannot or would find it difficult to assert their rights, and the petitioner has a special interest in the subject matter of the action. (*Waste Management v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1238.)

The only petitioner in this case is the "Save The Plastic Bag Coalition" an unincorporated association. There is no individual named as a petitioner, this is not a citizens suit. Indeed, the very first page of respondent's appellate brief identified the membership of the "Save The Plastic Bag Coalition" as being made up heavily of plastic bag manufacturers. Respondent is therefore not a "citizen" as envisioned by the law. "'Citizens' are natural persons who are born and/or reside within a community." (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1237.) The *Waste Management* court goes on to note that:

> "In our view when a nonhuman entity claims the right to pursue a citizen suit the issue must be resolved in light of the particular circumstances presented, including the strength of the nexus between the artificial entity and human beings and the context in which the dispute arises." (*Id.* at 1238.)

A corporation or other non-human entity must be able to demonstrate "genuine and continuing" environmental concern. (*Waste Management,* 79 Cal.App4th at 1234.) Respondents do not allege such an injury. They are not located in Manhattan Beach and most of the members of the coalition are not even located in California. They do not even make bare allegations that they are affected by the impacts on the environment they assert will result from this project. Nor is respondent a group formed to pursue and protect general environmental interests. They are uniquely focused on protecting the plastic bag, which coincidentally is also a means of their collective livelihood. A corporation or other non-human entity is not considered a citizen for purposes of "public interest standing." (*Waste Management of Alameda County* 79 Cal.App.4th at 1236-1239.)

In the instant case respondent has failed to show how its interests reflect that of natural persons affected by the proposed ban particularly in light of the fact that the record shows dedicated environmental groups unanimously in support of the City's action. Groups formed for the express purpose of protecting the environment such as Heal The Bay, Surfrider Foundation, Santa Monica Baykeepers, Earth Resource Foundation and Planet

Pals, all of whom supported the Manhattan Beach ban, would presumably more disinterestedly represent the interests of natural persons than a group made up of manufacturers of the product proposed to be banned. In fact, respondents interests differ most particularly from that of the general public in their commercial involvement with plastic bags. How likely is it that respondent's concern with countering "misinformation" about the environmental effects of plastic bags is directly related to their commercial interest in continuing to be able to make and sell those bags? As the *Waste Management* court notes:

> ". . .where a corporation attempts to maintain a citizen suit, it is appropriate to require the corporation to demonstrate it should be accorded the attributes of a citizen litigant, since it is generally to be expected that a corporation will act out of a concern for what is expedient for the attainment of corporate purposes [Citations], rather than by virtue of the neutrality of citizenship." (*Waste Management* 79 Cal.App.4th at 1238.)

The context in which this particular CEQA dispute has arisen is that appellant desires to ban a product which respondent's membership manufactures and sells for use in appellant's jurisdiction. Respondent does not assert that it is directly affected in any noncommercial way by the alleged environmental effects of the City's ban.

It is clearly true that business entities have the right to maintain CEQA suits but it also seems clear that, unless it can establish its right to bring a citizen's suit, a nonhuman entity must establish a beneficial interest which is directly threatened by the environmental effects of the challenged project. (*Id.* at 1236.) In *Waste Management* the petitioner had a facility a mere four miles from the proposed project which the court found insufficient to establish any sort of beneficial interest subject to potential harm from the environmental effects of the project. (*Id.* at 1236.) In the instant case none of respondents members operate anywhere close to Manhattan Beach nor do they allege that they are located close to or will be affected by the paper bag manufacturing facilities that will allegedly generate so many environmental effects as a result of the Manhattan Beach plastic bag ban any more than any other person. Their interests are clearly economic and their use of an unincorporated association to pursue litigation should not allow them to pursue a citizens' suit to further poorly camouflaged commercial interests.

Under the National Environmental Policy Act ("NEPA") (42 USC Sections 4321 *et seq.*) Federal courts have ruled that a petitioner with economic interest in opposing a project cannot have standing to sue unless it can show an environmental injury. That injury must be within the "zone of interests" protected by the statute. (*Association of Data Processing Serv. Orgs., Inc. v. Camp* (1970) 397 U.S. 150, 153; *Churchill County v. Babbitt* (9th Cir., 1998) 150 Fed.3rd 1072, 1078.) A party who can only assert an economic injury without any environmental injury is therefore precluded from challenging an agency action under NEPA. (*Nevada Land Action Ass'n v. U.S. Forest Service* (9th Cir. 1993) 8

Fed.3rd 713, 715-716.) Had respondents filed their suit under NEPA in Federal court their action would have been dismissed.

In the *Nevada Land Action Ass'n* case, for example, an organization consisting of ranchers with permits to use the national forest for grazing challenged the Forest Service for a land and resource management plan ("LRMP") which impacted their grazing rights for failing to comply with NEPA. The court denied them standing based on the fact that " . . .the primary injury suffered by its members is economic. . ." (*Nevada Land Action Ass'n* 8 Fed.3rd at 716) despite the fact that they had argued the broader issue that the challenged plan affected the "human environment" and created general "lifestyle loss." The court noted that:

> ". . .in order to challenge the LRMP under NEPA, NLAA must allege that its injury is within the zone of interests protected by NEPA. NEPA was enacted in order 'to promote efforts which will prevent or eliminate damage to the environment . . ." (*Nevada Land Action Ass'n* 8 Fed.3rd at 716.)

The *Waste Management* case is an attempt by an appellate court to begin to refine a doctrine not unlike the Federal courts'. That case reflects a growing sensitivity on the part of courts towards the use of CEQA litigation for commercial advantage and to thwart regulation. Ultimately, it is necessary to refine the CEQA standing requirements in order

to confine its use to legitimate environmental issues and prohibit it from being used in commercial battles with no real environmental effect.

(d.) The Appropriate Remedy.

The appellate majority brushed aside the City's negative declaration by noting that the *de minimis* analysis was flawed because ". . .the initial study contains no information about the city's actual experience . . ." (*Save the Plastic Bag Coalition,* 181 Cal.App.4th at 544.) The opinion further asserts that the analysis in the City's initial study failed to quantify the environmental impacts from the number of paper bags required to be used as a result of the ban on plastic bags. (*Save the Plastic Bag Coalition,* 181 Cal.App.4th at 544.)

Assuming *arguendo* that the court was correct, the appropriate remedy would have been a remand of the proceedings back to the administrative level for correction of the initial study which, after all, is intended to be the guideline for the analysis to determine whether or not an EIR is necessary. If the initial study is really as defective as the appellate majority claimed remand would have been an appropriate starting place for a corrected CEQA process.

Public Resources Code Section 21168.9(b) emphasizes that relief in a CEQA case should be limited to those specific project activities in noncompliance with CEQA. In ordering an EIR the court exceeded its role as a reviewing body by ordering that the initial study be brought into compliance with CEQA having already made the determination for the

public agency that an EIR was required without supporting analysis. Are the generic reports submitted into the record by respondent really sufficient analysis of the environmental impacts of a Manhattan Beach plastic bag ban to justify requiring an EIR? Or, given the appellate majority's comments, do they simply raise unanalyzed issues that need to be thoroughly considered before a final decision on environmental review is made by the lead agency?

Code of Civil Procedure Section 1094.5(f) suggests remand to the public agency as an appropriate remedy and cautions that ". . .the judgment shall not limit or control in any way the discretion legally vested in respondent." In the instant case the court has inserted itself into the CEQA process as decision maker rather than requiring the actual decision maker to go back and conduct sufficient analysis to allow it to conduct proceedings consistent with the applicable law.

In *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, the court in ruling that the City's negative declaration was deficient noted that:

> "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 to propose a new mitigated negative declaration." (*Id.* at 1424.)

Reviewing courts seem to think that they are mandated to require an EIR in every case where environmental review has been challenged. Especially, as in the present case, if analysis of a project's significant impact on the environment is considered to be inadequate a remand could serve to avoid unnecessary expense and delay in proceeding with a project. Courts need to understand that remand is clearly an option under the CEQA statute and that not every environmental challenge has to result in an EIR being required.

IV

CONCLUSION

Somewhere in the north central Pacific Ocean between 135-155 degrees West and 35-42 degrees North lies an area known as the "Great Pacific Garbage Patch." It consists almost entirely of plastic debris accumulated by ocean currents and is virtually indestructible by the forces of nature. The garbage patch is a symptom of the accumulation of non-biodegradable waste whether in landfills, storm drains, or the middle of the Pacific Ocean. It is a problem which, increasingly, local governments in California are interested in trying to solve. The answer is not just to ban plastic but to discourage the use of all types of disposable bags and to encourage consumers to turn to reusable bags. The banning of plastic bags is, however, an important first step.

From its inception CEQA has been used as a tool for purposes having nothing to do with the environment. Developers, competitors, NIMBY groups and others whose economic well being or life style was threatened by a project have used CEQA as a way of delaying

or sabotaging projects. In the instant case a manufacturing group is threatened by the potential ban of its product for environmental reasons and ironically uses an environmental law to fight the ban.

The plastic bag industry's use of CEQA to deter ordinances banning or regulating the use of their products would not likely have been predicted by the framers of CEQA back in 1972. They undoubtedly saw CEQA as a vehicle to help local legislative bodies make environmentally informed decisions. Sadly it has become a vehicle to create obstacles entirely unrelated to any environmental purpose. Despite respondent's self righteous proclamation that plastic bags are the victims of misinformation and somehow good for the environment the instant case is a regrettable example of this distortion of CEQA. As this Court commented:

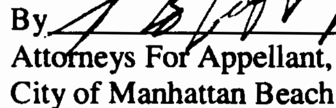
> ". . .we caution that rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3rd 553, 576.)

It is difficult to imagine the Manhattan Beach City Council having more information available to them than they did or being more informed about the consequences of their action than they were when they adopted Ordinance 2115 (thanks in no small part to

respondent's aggressive participation). In the greater scheme of things their decision, had it been permitted to have been implemented, would not have made much of a dent in the considerable waste stream generated by the plastic bag industry. But it would have been an important policy statement and perhaps an inspiration to others. To prevent that from happening and to allow it to be used as an obstacle to legislative policy making is a gross misapplication of CEQA. We therefore urge this court to reverse the appellate court by ruling that there was insufficient evidence in the record to require an EIR and that respondent lacked standing to file an action under CEQA thus allow implementation of Ordinance 2115.

Dated: May 18, 2010

Robert V. Wadden Jr.,
City Attorney



By____________________
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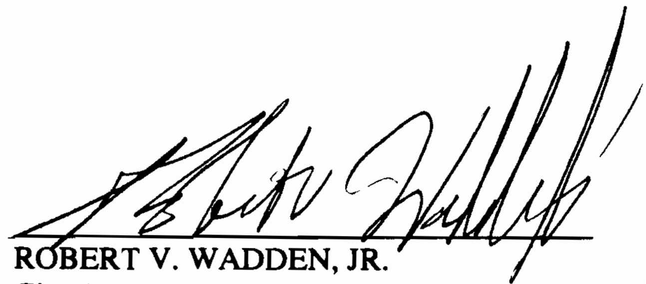
CERTIFICATE OF COMPLIANCE

The word count on the word processor indicates that there were 7,842 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: May 18, 2010



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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 May 20, 2010, following ordinary business practice, I served the within **CITY OF MANHATTAN BEACH'S OPENING BRIEF;** on the party or parties named below, by U.S. Mail, addressed as follows:

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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 May 20, 2010, at Manhattan Beach, California.

WENDY PICKERING
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Signature