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COALITION TO SUPPORT PLASTIC BAG RECYCLING  
7

8 SUPERIOR COURT OF CALIFORNIA  
9 COUNTY OF ALAMEDA  
10

11 COALITION TO SUPPORT PLASTIC  
BAG RECYCLING,

12 Petitioner,

13 v.  
14

15 CITY OF OAKLAND, a municipal  
corporation, CITY COUNCIL OF THE  
16 CITY OF OAKLAND, collectively and in  
their official capacities, and DOES 1  
through 20 inclusive,  
17

18 Respondents.  
19

CASE NO. RG07339097

**PETITIONER'S OPENING BRIEF IN  
SUPPORT OF PETITION FOR WRIT OF  
MANDATE UNDER THE CALIFORNIA  
ENVIRONMENTAL QUALITY ACT**

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Date: January 29, 2008  
Time: 9:00 a.m.  
Dept: 31

ASSIGNED FOR ALL PURPOSED TO:  
JUDGE: FRANK ROESCH  
DEPARTMENT: 31

DOWNEY BRAND LLP

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TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. FACTUAL AND PROCEDURAL BACKGROUND.....	3
A. Oakland Ordinance No. 12818.....	3
B. Respondents Ignored Substantial Evidence In the Record .....	3
1. The Ordinance Will Increase the Use of Paper Bags, Which Will Result in Significant Impacts on the Environment .....	3
2. The Ordinance Will Result in a Corruption of the Plastic Recycling Stream, Causing Needless Waste of Natural Resources .....	7
C. Respondents’ Notice of Exemption .....	10
III. SUMMARY OF ARGUMENT .....	10
IV. STANDARD OF REVIEW .....	12
V. LEGAL ARGUMENT .....	12
A. Oakland’s Reliance on the “Common Sense” Exemption Constitutes an Abuse of Discretion in Violation of CEQA .....	13
B. The Ordinance Does Not Fall Within a Categorical Exemption.....	14
C. Even if This Court Finds That the Ordinance Fits a Categorical Exemption, There is a Reasonable Possibility that the Ordinance will Have a Significant Effect on the Environment.....	17
1. Reasonable Possibility .....	17
2. Significant Effect .....	18
3. Unusual Circumstances .....	18
D. The Record Does Not Contain Any Evidence That Respondents Relied on the Land Use and Transportation EIR, Nor Would Such an EIR Address the Peculiar Circumstances of This Ordinance .....	19
VI. CONCLUSION .....	20

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
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17  
18  
19  
20  
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22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**Page**

**CASES**

*Apartment Ass'n of Greater Los Angeles v. City of Los Angeles*  
(2001) 90 Cal.App.4th 1162..... 11

*Ass'n for Protection of Environmental Values in Ukiah v. City of Ukiah*  
(1991) 2 Cal.App.4th 720, 728-729, n.7 ..... 17

*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego*  
139 Cal.App.4th 249, 264, 265 (2006)..... 2, 12, 17, 18

*County of Amador v. El Dorado County Water Agency*  
(1999) 76 Cal.App.4th 931..... 2, 11, 15

*Davidon Homes v. City of San Jose*  
(1997) 54 Cal.App.4th 106..... 10, 11, 13, 14

*Dehne v. County of Santa Clara*  
(1981) 115 Cal.App.3d 827..... 11

*Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist.*  
(1992) 9 Cal.App.4th 644..... 17

*Fairbank v. City of Mill Valley*  
(1999) 75 Cal.App.4th 1243..... 18

*Fullerton Joint Union High School Dist. v. State Board of Ed.*  
(1982) 32 Cal.3d 779..... 2, 12

*Lewis v. Seventeenth Dist. Agric. Ass'n*  
(1985) 165 Cal.App.3d 823..... 18

*McQueen v. Board of Directors*  
(1988) 202 Cal.App.3d 1136..... 18

*Megan v. County of Kings*  
(2002) 105 Cal.App.4th 468..... 15

*Save Our Carmel River v. Monterey Peninsula Wat. Mgmt. Dist.*  
(2006) 141 Cal.App.4th 677..... 15, 19

*Western States Petroleum Assn. v. Sup. Ct.*  
(1995) 9 Cal.4th 559 ..... 19

**STATUTES**

Pub. Resources Code § 21065..... 10, 12, 14

Pub. Resources Code § 21168.5..... 12, 19

Pub. Resources Code § 42251..... 1

Pub. Resources Code § 42251, subd. (a)..... 8, 16

Pub. Resources Code § 42252, subd. (b) ..... 3

Pub. Resources Code § 42253..... 9

1  
2  
3  
4  
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**TABLE OF AUTHORITIES**  
(continued)

**Page**

**REGULATIONS**

14 Cal. Code Regs. § 15002, subd. (g)..... 14

14 Cal. Code Regs. § 15061, subd. (b)(3)..... 10, 11, 13, 14

14 Cal. Code Regs. § 15183..... 2, 12, 19

14 Cal. Code Regs. § 15183, subd. (a)..... 12, 20

14 Cal. Code Regs. § 15300.2..... 12, 17

14 Cal. Code Regs. § 15300.2, subd. (c)..... 12, 17, 18

14 Cal. Code Regs. § 15307..... 11, 15

14 Cal. Code Regs. § 15308..... 11, 15, 19

14 Cal. Code Regs. § 15378..... 10, 12

14 Cal. Code Regs. § 15061..... 13, 14

**OTHER AUTHORITIES**

Kostka and Zischke, Practice Under the California Environmental Quality Act, §  
5.55, p. 249..... 18

Kostka and Zischke, Practice Under the California Environmental Quality Act, §  
5.55, p. 250; § 4.25, p. 178-180 ..... 13, 18

Oakland Ord. No. 12818, § (2)(A), (F)..... 3

Oakland Ord. No. 12818, § (3)(A)..... 3

1     **I. INTRODUCTION**

2           This is an action under the California Environmental Quality Act (“CEQA”), Public  
3 Resources Code sections 21000, *et seq.*, challenging the legality of Oakland Ordinance No. 12818,  
4 which bans 100% recyclable plastic carry-out bags by large retailers within the City of Oakland  
5 (the “Ordinance”).<sup>1</sup> The Ordinance was adopted by Respondent CITY COUNCIL OF THE CITY  
6 OF OAKLAND (the “Council”) on July 17, 2007 on behalf of Respondent CITY OF OAKLAND  
7 (hereinafter “Oakland”) (Oakland and the Council are referred to collectively herein as  
8 “Respondents”) and will become effective on January 17, 2008. Although the Ordinance has the  
9 policy of eliminating the use of plastic carry-out bags to reduce adverse impacts on the  
10 environment, the Council ignored substantial evidence that the Ordinance’s unintended effects will  
11 actually cause substantial adverse environmental impacts. Namely, substantial evidence in the  
12 Administrative Record (hereinafter “Record”) demonstrates that the Ordinance leaves retailers and  
13 consumers with very limited and environmentally damaging options. Increased use of paper bags  
14 will result in a demonstrable increase in greenhouse gases and an increase in landfill waste. Less  
15 available compostable plastic bags do not decompose in landfills and threaten the integrity of the  
16 plastics recycling stream.

17           Respondents rely on the hope that the public will make a significant behavioral shift and  
18 discontinue its reliance on all single use disposable bags (i.e., paper, plastic, or compostable  
19 plastic), although there is no evidence to suggest that there will be such a behavioral shift. Even if  
20 such a behavioral shift does occur in the long term, environmental review is still necessary to  
21 evaluate short term environmental impacts.

22           As discussed herein, the Record demonstrates that Respondents’ adoption of the Ordinance

23 \_\_\_\_\_  
24 <sup>1</sup> To eliminate any confusion created by the diversity of naming conventions and the inconsistencies between those  
25 of Oakland and those set forth in State law (discussed below), this brief uses the following naming conventions:  
26 “Plastic carry-out bag” refers to the plastic bags that are offered by retailers to consumers at the point of sale. Plastic  
27 carry-out bags are 100% recyclable, and are the subject of California’s AB 2449, which is the first statewide,  
28 mandatory, and comprehensive effort to increase recycling of plastic bags, and which went into effect July 1, 2007.  
Pub. Resources Code § 42251. “Compostable” plastic bags, or “biodegradable” plastic bags, as referred to in  
Oakland’s Ordinance, are made from a base product derived from corn. However, compostable plastic bags are not  
compatible with the recycling stream established under AB 2449 and can only compost in limited, specifically  
engineered composting facilities. Thus, compostable plastic bags do not compost or biodegrade in backyard composts  
or landfills.

1 is not exempt from CEQA, because:

- 2 • The Ordinance has the potential for resulting in either a direct physical change in  
3 the environment, or a reasonably foreseeable indirect physical change in the  
4 environment, and consequently constitutes a “project,” the discretionary approval  
5 of which by a public agency triggers CEQA unless otherwise exempt. *Fullerton*  
6 *Joint Union High School Dist. v. State Board of Ed.* (1982) 32 Cal.3d 779, 795.<sup>2</sup>
- 7 • The Ordinance does not fall within the “common sense” exemption or any  
8 categories of activities identified as exempt by the California Resources Agency.  
9 *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931.
- 10 • Regardless of whether the Ordinance falls within any such categories, under the  
11 rigorous “fair argument” test, the Ordinance falls within an exception to the  
12 exemptions, because there is substantial evidence in the Record that “the  
13 [Ordinance] may have a significant effect on the environment.” *Banker’s Hill,*  
14 *Hillcrest, Park West Community Preservation Group v. City of San Diego*, 139  
15 Cal.App.4th 249, 264, 265 (2006).
- 16 • Finally, Respondents’ reliance on CEQA Guidelines section 15183 is simply  
17 without support in the Record, and in any event, the impacts of the Ordinance  
18 would be “peculiar” and not evaluated in the Land Use and Transportation EIR,  
19 upon which Respondents allegedly rely.

20 As a result, CEQA mandates an in-depth environmental review before the Ordinance may  
21 be adopted, in order to fully examine its impacts and evaluate any feasible alternatives and  
22 mitigation measures. Accordingly, and for the following reasons, Petitioner COALITION TO  
23 SUPPORT PLASTIC BAG RECYCLING (hereinafter “Petitioner”) respectfully requests that this  
24 Court set aside the Ordinance, and require Respondents to conduct the necessary and legally  
25 required environmental review of the impacts of the Ordinance under CEQA.

26 ///

27 ///

28 <sup>2</sup> Notably, in approving the Ordinance, Respondents concede that the Ordinance constitutes a “project” for the purposes of CEQA.

1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 **A. Oakland Ordinance No. 12818.**

3 On July 17, 2007, Respondents passed the Ordinance, which provides in pertinent part:

4 Affected retail establishments are prohibited from providing plastic  
5 carry-out bags to their customers at the point of sale. Reusable bags,  
6 recyclable paper bags and compostable or biodegradable bags,  
7 including biodegradable plastic bags, are allowed alternatives.

8 Oakland Ord. No. 12818, § (3)(A); 1 AR 006.<sup>3</sup>

9 The practical effect of the Ordinance will be to ban 100% recyclable plastic carry-out bags  
10 at retail establishments with gross annual sales exceeding \$1,000,000, while permitting the use of  
11 more environmentally harmful single use paper and compostable bags. Oakland Ord. No. 12818, §  
12 (2)(A), (F); 1 AR 005. According to the Council's findings in support of the Ordinance, paper bags  
13 are allowed, because "despite having an adverse impact on the environment [they, unlike plastic  
14 bags] are collected by Oakland's curbside recycling program." Ord. Recitals; 1 AR 005. This  
15 justification for the disparate treatment of paper and plastic bags ignores AB 2449, a State law  
16 implemented on July 1, 2007, that requires the very same retailers to have a comprehensive  
17 collection program at every store to recycle plastic bags. Pub. Resources Code § 42252, subd. (b).

18 **B. Respondents Ignored Substantial Evidence In the Record.**

19 **1. The Ordinance Will Increase the Use of Paper Bags, Which Will  
20 Result in Significant Impacts on the Environment.**

21 When the Council proposed the Ordinance, it provoked considerable attention and comment  
22 for several reasons, including the common sense fact that the practical effect of the Ordinance will  
23 be to increase the use of paper bags. During the June 26, 2007 Public Works Committee Meeting,  
24 at which the Ordinance was considered, criticism about the environmental impacts of the (then  
25 proposed) Ordinance surfaced. At that time, the Record before the Committee included a U.S.  
26 EPA study that addressed the following points:

- 27 • *(Air and water impacts)* "Paper sacks generate 70 percent more air, and 50 times

28 <sup>3</sup> Citations to the Administrative Record will follow the format of Volume Number : AR : Page Number. Thus, citation to Volume 1, page 006, will be 1 AR 006.

1 more water pollutants, than plastic bags.” 3 AR 742.

- 2 • *(Land use impacts)* “2000 plastic bags weigh 30 pounds, 2000 paper bags weigh  
3 280 pounds. The latter takes up a lot more landfill space.” 3 AR 742.
- 4 • *(Energy and fossil fuel impacts)* “It takes 91 percent less energy to recycle a pound  
5 of plastic than it takes to recycle a pound of paper. It takes more than four times as  
6 much energy to manufacture a paper bag as it does to manufacture a plastic bag.” 3  
7 AR 742.
- 8 • *(Land use impacts)* “[P]aper in today’s landfills does not degrade or break down at  
9 a substantially faster rate than plastic does. In fact, nothing completely degrades in  
10 modern landfills due to the lack of water, light, oxygen and other important  
11 elements that are necessary for the degradation process to be completed.” 3 AR  
12 742.

13 Also on June 26, 2007, the Public Works Committee received a copy of the June 1, 2007  
14 ULS Report, prepared by Robert Lilienfeld, Editor of “use-less-stuff.com.” According to the ULS  
15 Report, “The evidence does not support conventional wisdom that paper bags are a more  
16 environmentally sustainable alternative than plastic bags.” 3 AR 739 (emphasis in original). The  
17 ULS Report relied on the following facts to illustrate the point:

- 18 • *(Air impacts)* “Plastic bags generate 60% less greenhouse gas emissions than  
19 uncomposted paper bags, and 79% less greenhouse gas emissions than composted  
20 paper bags.” 3 AR 739.
- 21 • *(Water impacts)* “Plastic bags consume less than 4% of the water needed to make  
22 paper bags.” 3 AR 739.
- 23 • *(Energy and land use impacts)* “Plastic grocery bags consume 40% less energy  
24 during production and generate 80% less solid waste than paper bags.” 3 AR 739.

25 Also at the June 26th meeting, Dr. Chet Chaffey, an expert in the areas of Life Cycle  
26 Assessment, Environmentally Preferable Products, and Environmental Auditing and Certification,  
27 offered his opinion that *paper bag use will increase under the Ordinance*:

28 *///*



1 [I]f you ban single use plastic bags . . . paper bags [will be] the  
2 predominate thing that is going to take its place . . . Twenty years of  
3 studies have shown that [from] manufacturer transport to the  
4 disposal of paper in all forms have much greater consequences on  
the environment in terms of global warming, in terms of water use,  
in terms of solid waste.

5 1 AR 249-250.

6 Additionally, at the June 26th meeting, Kevin Kelly, the Chief Executive of a 45 year-old  
7 Union City plastic packaging manufacturer, Emerald Packaging, Inc., reiterated Dr. Chaffey's  
8 opinion, and added that the lack of availability of compostable bags naturally will result in an  
9 increased use of paper bags: "[B]iodegradable bags are unlikely to be available in sufficient  
10 quantities, if at all, for use within the City of Oakland. . . . As a result, there will be a substantial  
11 increase in the use of paper bags." 2 AR 463-464.

12 Following the comments presented at the June 26, 2007 Public Works Committee meeting,  
13 Councilmembers Nadel and Quan prepared and submitted a Supplemental Agenda Report  
14 (hereinafter "SAR") for the July 3, 2007 City Council Meeting that attempted to address the  
15 evidence of substantial environmental impacts flowing from the Ordinance. Without any reference  
16 to supporting evidence as to how it would be achieved, Councilmembers Nadel and Quan stated  
17 that the purpose of the Ordinance was to foster a "behavioral shift on the part of shoppers." 1 AR  
18 114. Even still, they recognized that "some shoppers will choose not to do so; consequently, stores  
19 likely will continue to provide some alternatives in those cases." 1 AR 114.

20 Additionally, Respondents concede in the SAR that there is varying opinion on a key aspect  
21 of the Ordinance that should trigger CEQA review: "there is an ongoing debate as to whether  
22 single-use paper or plastic bags have the greatest environmental impact. Staff's research confirms  
23 that there is varying opinion." 1 AR 114.

24 This varying opinion, and different impacts posed by each type of bag, are the precise  
25 reasons why a detailed environmental review under CEQA is necessary. Yet, Respondents elected  
26 to second guess what the results of a detailed environmental review under CEQA would reveal, and  
27 arrived at the self-serving conclusion that, "[i]t should be noted that the lack of such an evaluative  
28 framework suggests that CEQA review (such as an Initial Study or EIR) would lead to

1 inconclusive results that would yield little if no benefit to the decision makers and the public in  
2 evaluating the merits of the Ordinance.” 1 AR 114, n.1.

3 The SAR went on to dismiss the evidence and CEQA’s requirements stating,

4 Opponents of the plastic bag ban essentially contend that a detailed  
5 CEQA review (i.e., an Environmental Impact Report (EIR)) is  
6 required before the Council can adopt the proposed Ordinance  
7 because a shift to paper bags and biodegradable plastic bags will  
8 have significant adverse environmental impacts and that  
9 alternatives and mitigation measures must be explored. However,  
10 there is no evidence to support this assertion . . . there is no  
11 evidence that the Ordinance would contribute to the increased use  
12 of such bags, nor if it might, what percentage of consumers would  
13 likely switch to biodegradable versus paper bags. Thus, *any*  
14 *detailed environmental analysis would be speculative.*

15 1 AR 117 (emphasis added).

16 Yet, notwithstanding substantial evidence in the Record to the contrary, Respondents stood  
17 by their unfounded conclusion at the July 3, 2007 City Council Meeting. And despite the SAR’s  
18 inadequate attempts to sweep the Ordinance’s environmental consequences under the rug, the full  
19 Council was presented with further substantial evidence that these impacts were not speculative  
20 and needed to be studied. For instance, the Council was provided with the Scottish Executive 2005  
21 Environmental Resource Group Report, a report commissioned and prepared by the Government of  
22 Scotland (hereinafter “Scottish Report”), which studied the impacts of a potential tax on plastic  
23 bags. The Scottish Report’s findings included the following:

- 24 • *(Water, air and land use impacts)* “Paper bags have a bigger environmental impact  
25 than lightweight plastic bags in all categories apart from the risk of litter. Paper  
26 bags have a particularly high impact on the environment in terms of:  
27 Eutrophication of water bodies (rivers, lakes, etc.) due to pollutants released to  
28 water during the manufacture of the paper; Water consumption; Greenhouse gas  
emissions; [and] Production of solid waste.” 2 AR 368.
- *(Increased use of paper bags is not speculative)* Under the heading “Consumer  
Behavior,” the Scottish Report concluded “[i]f a levy is introduced and does not  
include paper bags, it is anticipated that there will be an increased use of paper bags  
. . . Under scenarios 1A and 1B (in which paper bags are not subject to the levy), it

1 is assumed that of consumers not purchasing a lightweight plastic carrier bag . . .  
 2 *25% will switch to paper carrier bags.*" 2 AR 363 (emphasis added).

3 Here, Respondents' Ordinance eliminates the option of paying extra for plastic bags. Thus,  
 4 a 25 percent increase in the use of paper bags is the minimum increase, and the percentage is likely  
 5 to be higher in the absence of the consumers' option to use plastic bags. These facts entreat  
 6 Respondents for more environmental review – not less.

7 Councilmember Desley Brooks saw the logic behind the environmental objections, and  
 8 offered the following comments in response to the SAR during the July 3, 2007 City Council  
 9 Meeting:

- 10 • "And so if I look at plastic bags and I look at paper bags, paper bags are equally, if  
 11 not as bad, and there are some assumptions that are made in the [SAR] and *we*  
 12 *continue to not get the information to make an informed decision* about how  
 13 we're going to move forward on this and so that's disconcerting to me." 1 AR 178  
 14 (emphasis added).
- 15 • "There's some assumptions that we won't increase the use of paper bags and it's  
 16 interesting to me that we say that the suggestion by the plastic industry is  
 17 speculative that we won't increase paper bag usage and yet we use the same  
 18 analysis to say that if we institute this, that we're going to encourage all these  
 19 people to use reusable bags. *We don't know that that's equally speculative.*" 1 AR  
 20 178-179 (emphasis added).

21 Councilmember Brooks astutely summed up the crux of this dispute. Specifically, this  
 22 Ordinance is an uninformed decision based on speculative assumptions.

23 **2. The Ordinance Will Result in a Corruption of the Plastic Recycling**  
 24 **Stream, Causing Needless Waste of Natural Resources.**

25 Not only will the Ordinance result in increased use of the more environmentally harmful  
 26 single use paper bags, but the use of compostable plastic bags will cause substantial harm to the  
 27 plastic recycling stream, including the recycling of 100% recyclable plastic carry-out bags.  
 28 Respondents fail to make it clear why they consider paper bag recycling to be more

1 environmentally important than statewide plastic recycling mandated under AB 2449, which is  
 2 expected to dramatically increase the percentage of plastic carry-out bags that are recycled:

3           The operator of a store shall establish an at-store recycling program  
 4           pursuant to this chapter that provides an opportunity for a customer  
             of the store to return to the store clean plastic carryout bags.

5 Pub. Resources Code § 42251, subd. (a).

6           The Smithsonian Magazine illustrated the environmental dangers here:

- 7           • *(Natural resource impacts)* The base product for manufacturing “biodegradable”  
 8           or “compostable” plastic bags is called “polylactic acid” or “PLA,” which is made  
 9           from corn. More common plastics are made from “polyethylene terephthalate” or  
 10          “PET.” “[R]ecycling facilities have problems with PLA . . . . They worry that  
 11          consumers will simply dump PLA in with their PET . . . *Because PLA and PET*  
 12          *mix as well as oil and water, recyclers consider PLA a contaminant.*” 3 AR 733  
 13          (emphasis added).

14          Kevin Kelly also offered the following comments on this issue for the June 26, 2007 Public  
 15 Works Committee Meeting:

- 16          • *(Natural resource and land use impacts)* “With the implementation of AB 2449 . .  
 17          . most, if not all, plastic bags will be recycled . . . Biodegradable bags cannot be  
 18          recycled, as traditional plastic bags can be, and therefore, biodegradable bags  
 19          undoubtedly will contaminate the recycling stream of bags that can be recycled  
 20          (traditional carryout bags). The process used to make material ‘biodegradable’  
 21          creates a contaminant for most plastic bag recycling applications and renders the  
 22          [plastic carry-out] bags essentially unable to be recycled.” 2 AR 464.

23          Prior to the introduction of the Ordinance, several internal emails were exchanged between  
 24 Ordinance co-author and Councilmember Nancy Nadel, her aid Marisa Arrona, and former  
 25 Oakland Public Works’ Sustainability Coordinator Carol Misseldine. These emails concerned a  
 26 study forwarded by the Institute of Local Self-Reliance on the environmental impacts of  
 27 compostable bags:

28          ///

- 1 • (*Natural resource impacts*) The person forwarding the study commented that, “Just  
2 because a bag is biodegradable does not mean that it is environmentally sound. Do  
3 we care about the impact on recycling film plastics? . . . Biodegradable bags will  
4 become a contaminant in [plastic bag] film recycling . . . I think that this is a  
5 concern from a recycling perspective.” Supp. AR, Exhibit A.<sup>4</sup>
- 6 • (*Marine and natural resource impacts*) Misseldine forwarded the study to Arrona  
7 commenting that, “‘biodegradable’ bags in the marine environment are going to  
8 keep killing wildlife, just like petroleum based ones do. In addition, *bio bags gum*  
9 *up the recycling machines* . . . Since they’re more expensive than paper, no one  
10 will use them anyway.” Supp. AR (emphasis added), Exhibit A.
- 11 • (*Marine impacts*) Councilmember Nadel added, “I think that including other  
12 plastic bags even if they are biodegradable should be our policy because they aren’t  
13 biodegradable in the marine environment . . . *biodegradable plastic bags are a bit*  
14 *of an oxymoron.*” Supp. AR (emphasis added), Exhibit A.

15 While the lack of availability of the compostable plastic bags will mostly increase  
16 consumers’ use of paper bags, to the extent available, compostable plastic bag use also will rise if  
17 plastic carry-out bags are banned. These bags will threaten the integrity of the plastics recycling  
18 stream, especially since the Ordinance comes on the heels of AB 2449’s July 1, 2007  
19 implementation. 2 AR 464; 3 AR 733. AB 2449 significantly adds to the plastic bag recycling  
20 infrastructure with built-in education components to increase the public’s awareness to “reduce,  
21 reuse, and recycle,” in addition to dramatically increasing the number of recycling locations within  
22 the state. Pub. Resources Code § 42253. Because these two types of bags are nearly  
23 indistinguishable, the public will be confused about the recyclable nature of these bags. The public  
24 will use the expanding plastic bag recycling infrastructure to dispose of the compostable plastic  
25 bags, which will cause contamination to the plastic recycling stream. 2 AR 464; 3 AR 733.  
26 Immeasurable amounts of natural resources will be wasted as a result of the contamination. *Id.*

27 \_\_\_\_\_  
28 <sup>4</sup> The Supplemental Administrative Record referred to herein is attached as exhibits to the Declaration of Michael  
Mills, part of a motion to augment the Record, served and filed herewith.

1 This too demands more environmental review – not less, and Respondents have abused their  
2 discretion by ignoring this substantial evidence.

3 **C. Respondents' Notice of Exemption**

4 Notwithstanding the substantial evidence in the Record and the repeated attempts to  
5 encourage Respondents to conduct the requisite environmental review of the Ordinance under  
6 CEQA, Respondents filed a Notice of Exemption (hereinafter "NOE") on July 18, 2007 as follows:

7 **Reasons why project is exempt:** All the following provide a  
8 separate and independent basis for an exemption and when  
9 reviewed collectively provide an overall basis for exemption: The  
10 project will have positive environmental effects and no possibility  
11 of significant adverse effects (15061(b)(3)). The project is  
12 consistent with the Land Use and Transportation Element EIR for  
13 which an EIR was certified, as well as consistent with other general  
14 plan elements, and there are no project specific effects which are  
15 peculiar to the project or its site (15183). The project is designated  
16 to protect both the environment (15308) and natural resources  
17 (15307).

18 1 AR 001.

19 **III. SUMMARY OF ARGUMENT**

20 The Ordinance constitutes a "project" under CEQA, the discretionary approval of which  
21 triggers CEQA review absent an applicable exemption. Specifically, the Ordinance has the  
22 potential to result in either a direct physical change on the environment, or a reasonably foreseeable  
23 indirect physical change in the environment. Pub. Resources Code § 21065; *see also* 14 Cal. Code  
24 Regs. § 15378. As discussed below, no exemption, and certainly none of Respondents' claimed  
25 exemptions, are applicable under these facts.

26 First, Respondents fail to meet their burden under the "common sense" exemption to  
27 provide substantial evidence that the Ordinance would not significantly effect the environment. 14  
28 Cal. Code Regs. § 15061, subd. (b)(3). "Imposing the burden on the members of the public in the  
first instance to prove a possibility of adverse environmental impact would frustrate CEQA's  
fundamental purpose of ensuring that government officials make decisions with environmental  
consequences in mind." *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 116.  
Where the agency's action document (ordinance, resolution, order, etc.) merely includes a  
conclusory recital that the project is exempt pursuant to section 15061(b)(3) of the CEQA

1 Guidelines, the agency must point to substantial evidence in the record to demonstrate that it  
2 properly considered the potential environmental impacts. *Id.* at 116-17. Here, Respondents have  
3 relied on section 15061(b)(3) of the CEQA Guidelines as one basis for exempting its approval of  
4 the Ordinance from CEQA review. Yet, under *Davidon Homes*, Respondents did not meet their  
5 burden of production to support their finding, and they steadfastly refused to acknowledge that  
6 there would be *any* impacts, even in light of the substantial evidence to the contrary.

7 Second, Respondents mistakenly rely upon two of CEQA's categorical exemptions,  
8 sections 15307 and 15308 of the CEQA Guidelines. These sections provide an exemption for  
9 projects that "assure" protection of the environment and natural resources. 14 Cal. Code Regs. §§  
10 15307, 15308. In determining whether a categorical exemption applies, the courts have stated that  
11 categorical exemptions must be narrowly construed. *Dehne v. County of Santa Clara* (1981) 115  
12 Cal.App.3d 827, 842. Strict construction ensures that categorical exemptions are interpreted in a  
13 manner affording the greatest environmental protection. *County of Amador v. El Dorado County*  
14 *Water Agency* (1999) 76 Cal.App.4th 931, 966.

15 A court can only affirm an agency's factual determination that a project fits within an  
16 exemption category if its decision is supported by substantial evidence, and, under *Dehne* and  
17 *County of Amador*, the category must be narrowly construed to afford the greatest environmental  
18 protection. *Apartment Ass'n of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th  
19 1162, 1173; *Dehne, supra*, 115 Cal.App.3d at 842; *County of Amador, supra*, 76 Cal.App.4th at  
20 966. Here, substantial evidence in the Record establishes that the Ordinance does not "assure"  
21 protection of the environment or natural resources, because the Ordinance merely causes  
22 consumers to shift to environmentally harmful alternatives. 14 Cal. Code Regs. §§ 15307, 15308.  
23 Substantial evidence further confirms that the greatest environmental protection is best served by  
24 conducting a thorough review under CEQA. Only then will Respondents have the benefit of  
25 knowing the Ordinance's environmental impacts and feasible alternatives and mitigation measures.  
26 Respondents should, therefore, be precluded from relying on these exemptions.

27 Third, if this Court finds that the Ordinance falls within the scope of any categorical  
28 exemption, the categorical exemptions are not absolute. An exemption should be denied if one of

1 the exceptions listed in section 15300.2 of the CEQA Guidelines applies. *Id.* § 15300.2. Section  
 2 15300.2(c) provides for one such exception and states that if there is a “reasonable possibility” of a  
 3 “significant effect on the environment due to unusual circumstances,” then the categorical  
 4 exception cannot apply. *Id.* As most recently explained in *Banker’s Hill, Hillcrest, Park West*  
 5 *Community Preservation Group v. City of San Diego*, (2006) 139 Cal.App.4th 249 in reviewing  
 6 whether a section 15300.2(c) exception applies to a particular agency decision the rigorous “fair  
 7 argument” standard applies. Thus, this Court must disallow the exemption where, as here, the  
 8 Record reflects a fair argument that there may be a significant effect on the environment due to the  
 9 unusual circumstances surrounding the effects of the Ordinance. *Id.* at 266-67.

10 Fourth, Respondents’ reliance on the partial statutory exemption in CEQA Guidelines  
 11 section 15183 is without merit, because the Record is devoid of the “Land Use and Transportation  
 12 Element EIR,” upon which this exemption relies. Additionally, the facts and circumstances of this  
 13 case demonstrate that the project-specific effects which are peculiar to the Ordinance would require  
 14 independent environmental review under CEQA in any event, thereby eliminating the application  
 15 of this partial statutory exemption. 14 Cal. Code Regs. § 15183, subd. (a).

#### 16 **IV. STANDARD OF REVIEW**

17 Under Public Resources Code section 21168.5, the standard of review here is whether the  
 18 agency has abused its discretion. “Abuse of discretion” exists if Respondents fail to proceed in a  
 19 manner required by law, or if its decision was not supported by “substantial evidence” in the  
 20 Record. Pub. Resources Code § 21168.5. Here, Respondents abused their discretion by ignoring  
 21 CEQA’s mandates and by erroneously citing inapplicable exemptions to justify their actions.

#### 22 **V. LEGAL ARGUMENT**

23 Unless exempt, the City’s discretionary approval of the Ordinance triggers CEQA review.  
 24 CEQA applies to any discretionary approval of a “project” by a public agency. Pub. Resources  
 25 Code section 21065 and 14 Cal Code Regs. section 15378 define “project” as the whole of an  
 26 action, which, like the Ordinance, has the potential, “for resulting in either a direct physical change  
 27 in the environment, or a reasonably foreseeable indirect physical change in the environment.”  
 28 *Fullerton Joint Union High School Dist. v. State Board of Ed.* (1982) 32 Cal.3d 779, 795 (noting



1 that the lead agency’s determination as to whether an activity constitutes a “project” for purposes  
2 of CEQA receives no deference from the court).

3 Respondents have not contested the fact that the Ordinance constitutes a “project” under  
4 CEQA, and, as set forth below, none of the four CEQA exemptions upon which Respondents rely  
5 to avoid CEQA review of the Ordinance are applicable here. Therefore, and as further explained  
6 below, the Court should set aside the approval of the Ordinance, pending full, thorough, and legally  
7 adequate CEQA review.

8 **A. Oakland’s Reliance on the “Common Sense” Exemption Constitutes an**  
9 **Abuse of Discretion in Violation of CEQA.**

10 The Ordinance is not exempt from CEQA under the “common sense” exemption, section  
11 15061(b)(3). Section 15061(b)(3) only applies in the unusual situation where:

12 it can be seen with *certainty* that there is *no possibility* that the  
13 activity in question may have a significant effect on the  
14 environment.

14 Cal. Code Regs. § 15061(b)(3) (emphasis added).

15 Thus, under this exemption, “any plausible argument that an activity may have a significant  
16 effect precludes [the use of this exemption] because in the face of such an argument it cannot be  
17 certain there is no possibility of significant effects.” Kostka and Zischke, Practice Under the  
18 California Environmental Quality Act, § 5.55, p. 250; § 4.25, p. 178-180. If a reasonable argument  
19 is made that suggests a project might have a significant impact, the agency must refute that  
20 argument to a certainty to rely on the exemption. *Davidon Homes, supra*, 54 Cal.App.4th at 118.

21 In *Davidon*, the court invalidated a City of San Jose ordinance amendment for lack of  
22 compliance with CEQA. The City of San Jose adopted an amendment to a geologic hazard  
23 ordinance that placed a moratorium on building unless slope stability studies were completed at the  
24 landowner’s expense. *Id.* at 111. A preamble to the amended ordinance stated that it was found to  
25 be categorically exempt from environmental review under CEQA, pursuant to 14 Cal. Code Regs.  
26 section 15061. With the exception of comments provided by opponents to the ordinance, the court  
27 found that the administrative record was devoid of any evidence of potentially significant  
28 environmental impacts. *Id.* at 114. However, the court concluded that the city, rather than the

1 person challenging the exemption, had the burden to demonstrate that the activity would not  
2 significantly affect the environment. *Id.* at 115. As a result, the “conclusory recital” that there was  
3 no possibility that the adoption of the ordinance would cause significant effects on the environment  
4 was insufficient. *Id.* at 116-17.

5 Here, Respondents offer little more than the same conclusory recital set forth in *Davidon*.  
6 The SAR simply states that the Ordinance is exempt under 15061(b)(3). 1 AR 118. To support  
7 this conclusion, Respondents contend that the Ordinance does not “mandate” a switch to paper or  
8 compostable bags. *Id.* Respondents further assert that, assuming there is an increase in the use of  
9 paper or compostable bags, the adverse environmental impacts would be “less than significant.”  
10 *Id.* This conclusion lacks any evidentiary support in the Record and ignores substantial evidence to  
11 the contrary, such as that the ban on recyclable plastic carry-out bags will necessarily result in  
12 increased use of more harmful paper bags, and to the extent available, compostable bags that risk  
13 contamination of the plastic recycling stream. 2 AR 368; 3 AR 739, 742.

14 After the Ordinance was approved and erroneously found exempt from CEQA review,  
15 Respondents offered the following additional statement for relying on Section 15061(b)(3) in their  
16 NOE: “**Reasons why project is exempt:** ... The project will have positive environmental effects  
17 and no possibility of significant adverse effects (15061(b)(3)).” 1 AR 001. Respondents’  
18 statement in the NOE is remarkable for two reasons. First, the test under CEQA is not whether  
19 “the project will have a positive environmental effect,” but rather, whether the project, decision, or  
20 approval will have a substantial adverse change in the physical conditions to the environment,  
21 either directly or indirectly. Pub. Resources Code § 21065; 14 Cal. Code Regs. § 15002, subd. (g).  
22 Second, section 15061(b)(3) only applies “where it can be seen with *certainty* that there is *no*  
23 *possibility* that the activity in question *may* have a significant effect on the environment.” 14 Cal.  
24 Code Regs. § 15061(b)(3). As noted above, Respondents ignored the substantial evidence in the  
25 Record that the Ordinance will result in significant adverse impacts to air, water, land, energy and  
26 other natural resources. Accordingly, they have failed to satisfy this test.

27 **B. The Ordinance Does Not Fall Within a Categorical Exemption.**

28 The Ordinance does not fit within either of the categorical exemptions claimed by the City.

1 Section 15307 of the CEQA Guidelines categorically exempts from CEQA review actions taken by  
2 a regulatory agency to *protect natural resources*. Specifically, section 15307 exempts:

3 actions taken by regulatory agencies, as authorized by state or local  
4 ordinance, to *assure* the maintenance, restoration, enhancement, of  
5 a natural resource where the regulatory process involves procedures  
6 for protection of the environment . . .

7 *Id.* § 15307 (emphasis added).

8 Similarly, section 15308 of the CEQA Guidelines categorically exempts from CEQA  
9 review actions taken by a regulatory agency to *protect the environment*. Specifically, section  
10 15308 exempts:

11 actions taken by regulatory agencies, as authorized by state or local  
12 ordinance, to *assure* the maintenance, restoration, enhancement, or  
13 protection of the environment where the regulatory process  
14 involves procedures for protection of the environment . . .

15 *Id.* § 15308 (emphasis added).

16 Under CEQA, the lead agency has the burden to point to substantial evidence in the record  
17 to support its finding that the project falls within the scope of the exempted categories. *Megan v.*  
18 *County of Kings* (2002) 105 Cal.App.4th 468, 475. Relying on an exemption to avoid the  
19 application of CEQA without substantial evidence to support that decision is an abuse of  
20 discretion. *Save Our Carmel River v. Monterey Peninsula Wat. Mgmt. Dist.* (2006) 141  
21 Cal.App.4th 677, 693 (“Abuse of discretion is established if . . . the determination or decision [that  
22 a project is exempt] is not supported by substantial evidence”). In determining whether a project  
23 meets the requirements of a categorical exemption, courts apply the rule that exemptions must be  
24 narrowly construed and that the scope of the exemption should not be unreasonably expanded:

25 Where a project is categorically exempt, it is not subject to CEQA  
26 compliance. . . . In keeping with general principles of statutory  
27 construction, *exemptions are construed narrowly* and will not be  
28 unreasonably expanded beyond their terms. Strict construction  
allows CEQA to be *interpreted in a manner affording the fullest  
possible environmental protections* within the reasonable scope of  
statutory language. It also comports with the statutory directive that  
exemptions may be provided only for projects which have been  
determined not to have a significant environmental effect.

*County of Amador, supra*, 76 Cal.App.4th at 966 (emphasis added; internal citations omitted).

Here, there is substantial evidence in the Record that the Ordinance will not “assure”

1 protection of the environment or natural resources. Rather, substantial evidence in the Record  
2 suggests a contrary result. The practical effect of the Ordinance will be to increase consumers' use  
3 of paper bags, and to the extent available, compostable bags. 2 AR 368; 3 AR 379, 742. "Paper  
4 bags have a bigger environmental impact than lightweight plastic bags in all categories apart from  
5 the risk of litter. Paper bags have a particularly high impact on the environment in terms of:  
6 Eutrophication of water bodies (rivers, lakes, etc.) due to pollutants released to water during the  
7 manufacture of the paper; Water consumption; Greenhouse gas emissions; [and] Production of  
8 solid waste." 2 AR 368. Additionally, "[i]t takes 91 percent less energy to recycle a pound of  
9 plastic than it takes to recycle a pound of paper. It takes more than four times as much energy to  
10 manufacture a paper bag as it does to manufacture a plastic bag." 3 AR 742. The Scottish Report  
11 shows that Respondents' Ordinance will increase paper bag use by at least 25 percent. 2 AR 363.  
12 Merely shifting consumer use from one bag to another hardly "assures" protection of the  
13 environment or natural resources, and substantial evidence suggests that more harm to the  
14 environment will be the result.

15 Similarly, the Ordinance allows for the use of compostable plastic bags as an alternative, so  
16 to the extent that these bags become more available, they are not without their own environmental  
17 impacts. In addition, the expanding plastic bag recycling infrastructure under AB 2449 requires  
18 Oakland retailers to have plastic bag recycling collection facilities inside each store. Pub.  
19 Resources Code § 42251, subd. (a). Yet under the Ordinance, stores will only be allowed to  
20 provide customers non-recyclable compostable bags at the point of sale, while at the same time  
21 providing consumers with recyclable, plastic produce bags. 1 AR 007; Oakland Ord. No. 12818, §  
22 (6)(B) (exempting produce bags from the ban). To avoid jeopardizing the comprehensive, state-  
23 wide recycling program established by AB 2449, consumers must separate out these bags received  
24 at the store before depositing the recyclable bags at the store's recycling bins. Failure to properly  
25 segregate these two types of bags "creates a contaminant . . . and renders the bags essentially  
26 unable to be recycled." 2 AR 464. This result also does not "assure" the protection of the  
27 environment or natural resources.  
28

1           **C.    Even if This Court Finds That the Ordinance Fits a Categorical Exemption,**  
 2           **There is a Reasonable Possibility that the Ordinance will Have a Significant**  
 3           **Effect on the Environment.**

4           Even if this Court concludes that the Ordinance fits within any categorical exemption, there  
 5           is ample evidence in the Record to bring the Ordinance within an exception to the exemption:

6                               Significant Effect. A categorical exemption shall not be used for an  
 7                               activity where there is a reasonable possibility that the activity will  
 8                               have a significant effect on the environment due to unusual  
 9                               circumstances.

10           14 Cal. Code Regs. § 15300.2, subd. (c).

11                               **1.       Reasonable Possibility.**

12           Under section 15300.2, courts have applied the “fair argument” standard when reviewing  
 13           the lead agencies findings that there is no “reasonable possibility” of a significant effect on the  
 14           environment. *Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist.* (1992) 9 Cal.App.4th  
 15           644; *see also Banker’s Hill, Hillcrest, Park West Community Preservation Group, supra*, 139  
 16           Cal.App.4th at 261-262. Under the “fair argument” standard, the operative question is whether  
 17           substantial evidence supports the agency’s decision to find the project exempt under section  
 18           15300.2. *Id.* at 262. “Under that standard, the court would review the record to determine whether  
 19           it contained evidence of a fair argument that the project *may* have a significant effect on the  
 20           environment.” *Id.* (Emphasis in original).<sup>5</sup>

21           Here, there is ample evidence to support a “fair argument” that the Ordinance’s effects are  
 22           poised to cause substantial environmental impacts. The practical effect of the Ordinance is to  
 23           merely shift consumers’ use of one product to more environmentally harmful alternatives.  
 24           Respondents’ only response was a statement in the SAR that the objective of the Ordinance is to  
 25           foster a “behavioral shift” in the public, yet the Record is devoid of evidence that such a behavioral  
 26           shift will occur. Even Councilmember Brooks commented that the hope of a behavioral shift is

27           <sup>5</sup> The First District Court of Appeal once suggested a different standard might apply. *Ass’n for Protection of*  
 28           *Environmental Values in Ukiah v. City of Ukiah* (1991) 2 Cal.App.4th 720, 728-729, n.7. Under the alternative  
 standard, an agency’s decision would be upheld if there was any substantial evidence in the record that there would  
 be no significant effect on the environment. However, despite a suggestion that the alternative standard might be  
 more appropriate, the court in *Ukiah* nonetheless utilized the fair argument standard, which standard was  
 subsequently affirmed a year later by the First District Court of Appeal’s holding in *Dunn-Edwards, supra*, 9  
 Cal.App.4th at 656.

1 “speculative” and that more information was needed to make an informed decision. 1 AR 178-179.  
2 In fact, even if Respondents were successful in achieving a “behavioral shift” in the long term, the  
3 short term impacts remain and require environmental review.

## 4 2. Significant Effect.

5 In this case, the Ordinance has the practical effect of increasing consumer use of paper and  
6 compostable bags. Substantial evidence in the Record supports the fact that paper bags are more  
7 harmful, or at least as harmful to the environment, as plastic bags. 2 AR 368. Paper bags cause  
8 more pollution to water resources, require more energy to produce and recycle, and their weight  
9 requires more energy to transport. 3 AR 742, 739. Paper takes up significantly more space in  
10 landfills, and it does not degrade in a substantially faster manner than plastic. *Id.* These obstacles  
11 clearly do not have a positive effect on the environment, especially in light of the additional harm  
12 that compostable bags pose to the plastic recycling process. 3 AR 733. Although the harm posed  
13 by paper bags may be different than that of plastic bags, with approximately 338 large retailers  
14 effected under the Ordinance, the air, water, and recycling impacts of increased paper bag use  
15 constitutes a potentially “significant effect” on the environment. 1 AR 115.

## 16 3. Unusual Circumstances.

17 If a significant effect on the environment is due to “unusual circumstances,” an agency may  
18 not find the decision to be categorically exempt. 14 Cal. Code Regs. § 15300.2(c). “The unusual  
19 circumstances exception applies when the circumstances of a project differ from the circumstances  
20 of projects covered by a particular categorical exemption, and those circumstances create an  
21 environmental risk that is inconsistent with the exemption.” Kostka and Zischke, Practice Under  
22 the California Environmental Quality Act, § 5.55, p. 249; *see also Banker’s Hill, Hillcrest, Park*  
23 *West Community Preservation Group, supra*, 139 Cal.App.4th at 278; *Fairbank v. City of Mill*  
24 *Valley* (1999) 75 Cal.App.4th 1243, 1260. “An exemption determination that ignores evidence of  
25 an unusual circumstance creating a reasonable possibility of a significant environmental impact . . .  
26 will be set aside.” Kostka and Zischke, *supra*, § 5.55, p. 250-51, citing *McQueen v. Board of*  
27 *Directors* (1988) 202 Cal.App.3d 1136, 1148; *Lewis v. Seventeenth Dist. Agric. Ass’n* (1985) 165  
28 Cal.App.3d 823.

1 Here, Respondents have ignored the unusual circumstances presented by the significant  
 2 increase in consumer use of environmentally harmful alternatives. Additionally, by allowing  
 3 compostable bags as an alternative, consumers will mistakenly try to recycle these bags using the  
 4 plastic recycling infrastructure developed under AB 2449. This will cause unusual harm to a  
 5 beneficial plastic recycling program, further causing a needless waste of natural resources. The  
 6 California Resources Agency envisioned categorical exemptions to apply to situations where the  
 7 project truly “assured” the protection of the environment or natural resources. And an Ordinance  
 8 that creates environmental harm, even with the intent of an environmental benefit, is not the  
 9 “usual” case anticipated under the Code. Even if Respondents could establish that a categorical  
 10 exemption applies to their enactment of the Ordinance, these unusual circumstances make  
 11 Respondents’ adoption of the Ordinance inconsistent with the categorical exemptions contained in  
 12 the CEQA Guidelines.

13 Simply put, substantial evidence does not exist in the Record to support Oakland’s reliance  
 14 on the categorical exemptions in sections 15308 and 15308, or any other section. Oakland’s  
 15 reliance on these sections to exempt the adoption the Ordinance from CEQA review was an abuse  
 16 of discretion, and Respondents should be required to review the Ordinance’s impacts on the  
 17 environment under CEQA.

18 **D. The Record Does Not Contain Any Evidence That Respondents Relied on the**  
 19 **Land Use and Transportation EIR, Nor Would Such an EIR Address the**  
 20 **Peculiar Circumstances of This Ordinance.**

21 Oakland also relies on section 15183 of the CEQA Guidelines, which provides a partial  
 22 statutory exemption for projects consistent with the General Plan for which an EIR is already  
 23 approved. 14 Cal. Code Regs. § 15183. Respondents cannot meet their burden that this exemption  
 24 applies:

25 Generally speaking, the court “may consider only the administrative  
 26 record in determining whether a quasi-legislative decision was  
 supported by substantial evidence within the meaning of Public  
 Resources Code section 21168.5”

27 *Save Our Carmel River, supra*, 141 Cal.App.4th at 694 (citing *Western States Petroleum Assn. v.*  
 28 *Sup. Ct.* (1995) 9 Cal.4th 559, 573).

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Here, the Record does not include the "Land Use and Transportation EIR" referenced in the NOE. 1 AR 001. Nor does the Record include any discussion whatsoever about the content of this EIR, such as the analysis of the environmental impacts of the Ordinance. Rather, it appears that Respondents simply "checked the box" on the NOE without giving proper consideration to the exemption.


In any event, the impacts of the Ordinance are sufficiently "peculiar" to not have been analyzed in the Land Use and Transportation EIR, assuming such an EIR was certified. The Ordinance's environmental impacts flow mainly from an increase in consumer use of paper bags, and to the extent available, compostable bags. 14 Cal. Code Regs. § 15183, subd. (a). The Ordinance shifts consumer reliance from one kind of single use bag to another, and it is highly unlikely that the Land Use and Transportation EIR addresses these peculiar impacts or discusses any applicable, feasible alternatives and/or mitigation measures.

**VI. CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests that this Court grant its Petition for Writ of Mandate under CEQA, invalidate Respondents' adoption of the Ordinance, and require Respondents to conduct the legally required environmental review for the Ordinance.

DATED: November 21, 2007

Respectfully submitted,  
DOWNEY BRAND LLP

By:   
MICHAEL N. MILLS  
Attorney for Petitioner  
COALITION TO SUPPORT PLASTIC BAG  
RECYCLING



**PROOF OF SERVICE**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Downey Brand LLP, 555 Capitol Mall, Tenth Floor, Sacramento, California, 95814-4686. On November 21, 2007, I served the within document(s):

**PETITIONER'S OPENING BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF MANDATE UNDER THE  
CALIFORNIA ENVIRONMENTAL QUALITY ACT.**

- BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.
- BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
- BY PERSONAL DELIVERY:** by causing personal delivery by \_\_\_\_\_ of the document(s) listed above to the person(s) at the address(es) set forth below.
- VIA E-MAIL DELIVERY**

John A. Russo  
Kevin Drake Siegel  
Oakland City Attorney's Office  
City Hall, 6<sup>th</sup> Floor  
1 Frank Ogawa Plaza  
Oakland, CA 94612

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 21, 2007, at Sacramento, California.

  
\_\_\_\_\_  
Marlene Cells