FILED
ALAMEDA COUNTY
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CLERK OF THE SUPERIOR COURT
By Vicki Daybell

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

COALITION TO SUPPORT PLASTIC BAG RECYCLING, an unincorporated association, Petitioner, vs. CITY OF OAKLAND, et al. Respondents.	No. RG07-339097 TENTATIVE DECISION GRANTING PETITION FOR WRIT OF MANDATE

The Petition of Coalition to Support Plastic Bag Recycling for Writ of Mandate came on regularly for hearing on January 29, 2008, in Department 31 of this Court, Judge Frank Roesch presiding. Petitioner appeared by Michael N. Mills, Esq. of Downey Brand LLP. Respondents City of Oakland and Oakland City Council appeared by Kevin D. Siegel, Esq., Deputy City Attorney of the City of Oakland.

The court has considered all the papers filed on behalf of the parties and the arguments presented at the hearing and hereby issues this TENTATIVE DECISION granting the Petition for Writ of Mandate. This Tentative Decision shall become the Statement of Decision unless, within ten days, a party specifies controverted issues or makes proposals not covered in this Tentative Decision. The Petition for Writ of Mandate is hereby GRANTED. The Court's findings and reasoning follow.

Factual Summary

This action challenges the legality of Oakland Ordinance No. 12818 ("the Ordinance"), adopted by Respondent City Council on behalf of Respondent City of Oakland (collectively, "City") on July 17, 2007. (1 AR 4-9.) The Ordinance bans the distribution of plastic carry out bags by an affected class of retailers in Oakland whose annual sales meet or exceed $1,000,000. (Ordinance, Section 3.A. found at 1 AR 6) The Ordinance defines "plastic carry out bag" as a non-compostable plastic bag provided by a store to a customer at the point of sale. (1 AR 6.) Although the Ordinance would ban those 100% petroleum based plastic carry out bags,[1] the Ordinance allows, but does not require, the affected retailers to provide "[r]eusable bags, recyclable paper bags and compostable plastic bags" as alternatives to the 100% petroleum plastic bags. (1 AR 7, Ordinance section 3B.)

"Compostable plastic bag" means "a carry out bag that is certified and labeled as meeting the current ASTM-Standard Specifications for compostability ...." (1 AR 6.) Compostable plastic bags are not visually distinguishable from the 100% petroleum plastic bags and the Ordinance requires they be color-coded to allow them to be sorted out from the 100% petroleum bags. (1 AR 6.)

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[1] The court uses the following naming conventions: "100% petroleum plastic bags" are the bags presently provided by most grocery retailers which are banned by the Ordinance. "Compostable plastic bags" are the plastic bags permitted by the Ordinance as one of the alternative carry out bags.

Compostable bags are manufactured with less than 100% petroleum (many with 70-80% petroleum content [see e-mail of Brenda Platt to Misseldine then to Arrona then to Councilmember Nadel dated May 16, 2007]), and decompose in a commercial composting facility (but not in a backyard compost pile).) "Reusable Bag" means a bag that is specifically designed and manufactured for multiple re-use. (1 AR 6.) "Recyclable Paper Bag" is the familiar paper carry out bag provided by retailers to a customer at the point of sale for purposes of transporting groceries or other goods and which, here, meets all of the following requirements: (1) contains no old growth fiber; (2) is 100% recyclable; and (3) contains a minimum of 40% post-consumer recycled content. (1 AR 6.)

The stated purpose of the Ordinance is to prevent litter in, and toxic contamination of, the marine environment; to reduce the consumption of oil; and to discourage use of non-biodegradable plastic bags in favor of reusable bags as governments in other countries have done. (1 AR 4-5, recitals.) A staff report prepared in advance of the July 3, 2007 City Council meeting explains that a further purpose of the Ordinance is to "ban the use of single-use, non-biodegradable plastic bags and to foster a behavioral shift on the part of shoppers away from the use of any type of single-use bag and toward the use of their own re-usable bags." (1 AR 114.)

The City promulgated a Notice of Exemption (from CEQA review) for the Ordinance on July 19, 2007, citing each of the exemptions found in CEQA Guidelines[2] sections 15307 and 15308 on the basis that the Ordinance will "maintain, restore, or enhance" natural resources or the environment and further citing CEQA Guidelines section 15061, subdivision (b)(3) ("the common sense

[2] "CEQA Guidelines" refers to title 14 of the California Code of Regulations Sections 15000 et seq.

exemption"), asserting the Ordinance will have "positive environmental effects and no possibility of significant adverse effects."[3] (1 AR 1-3.)

On August 3, 2007, Petitioner filed its action to invalidate the Ordinance asserting non-compliance with the California Environmental Quality Act (Public Resources Code Sections 21000 et seq.) Petitioner[4] contends that City ignored substantial evidence in the record supporting the proposition that the Ordinance will have unintended adverse environmental consequences, making City's reliance on categorical and other exemptions for the project inappropriate and requiring further CEQA review. More specifically, Petitioner contends that if 100% petroleum plastic bags are banned, the ban will cause a significant increase in the use of paper bags and that such an increase of paper bag use will have a significant effect on the environment. Petitioner also contends that if compostable plastic bags are available, their use will trigger the significant environmental effect of causing contamination of the 100% petroleum plastic bag recycling stream mandated by AB 2449.[5] Petitioner asks the court to invalidate the Ordinance and the City's finding that the Ordinance is exempt from further environmental review under CEQA.

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[3] City's Notice also states that City relied on the exemption found in Guidelines section 15183 for projects that are consistent with a community plan, general plan or zoning. (CEQA Guidelines, § 15183) Petitioner contends that this exemption does not apply to the Ordinance and City does not refute this contention in its brief. For that reason, any argument that might have been raised here regarding the applicability of CEQA Guidelines section 15183 is deemed waived.

[4] Petitioner Coalition to Support Plastic Bag Recycling is comprised of the following: Fresh Pak Corporation, Advanced Polybag, Inc., Crown Poly, Inc. Elkay Plastics Co., Inc. Grand Packaging, Inc. Heritage Plastics, Inc. Hilex Poly Company LLC, Superbag Operating, Ltd. and Kevin Kelly. Mr. Kelly lives in Oakland and is the Chief Executive Officer of Emerald Packaging, a plastic packaging manufacturer. Petition ¶ 7; 2 AR 463.

[5] AB 2449 is a state law enacted in 2006 requiring large retailers to install in-store plastic bag recycling stations that consumers can use to recycle petroleum-based plastic bags. (Pub. Resources Code, §§ 42250-42257.)

Standard of Review

The standard of review in an action alleging a violation of CEQA is whether there has been a prejudicial abuse of discretion. (*See* § 21168.5; *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392.) "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (§ 21168.5; *Laurel Heights*, *supra*, 47 Cal.3d at 409.) Substantial evidence is defined 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 also be reached." (CEQA Guidelines § 15384(a); *Laurel Heights*, *supra*, 47 Cal.3d at 393.) It includes facts, reasonable assumptions predicated on facts, and expert opinion supported by facts; however, it does not include argument, speculation, or unsubstantiated opinion or narrative. (CEQA Guidelines §§ 21080(e), 21082.2(c).)

This case involves an analysis of the applicability of "the common sense exemption" and the applicability of two categorical exemptions. Further, if either or both of the categorical exemptions apply, the issue arises of the applicability of exceptions to the categorical exemptions.

An activity is exempt from the requirements of CEQA if it is activity that has no potential for causing a significant effect on the environment. "Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA." (CEQA Guidelines, section 15061 (b)(3).) The applicability of this "common sense exemption" is determined by an analysis of the Administrative Record. If there is substantial evidence in the record demonstrating no possibility of environmental effect, the exemption applies. The burden is on the City to produce the evidence to support its determination that the common sense

exemption applies, including evidence that entirely negates any substantial evidence in the record of an environmental effect.

> "The showing required of a party challenging an exemption under Guidelines section 15061, subdivision (b)(3) is slight, since that exemption requires the agency to be certain that there is no possibility the project may cause significant environmental impacts. If legitimate questions can be raised about whether the project might have a significant impact and there is any dispute about the possibility of such an impact, the agency cannot find with certainty that a project is exempt."

Davidon Homes v. City of San Jose, (1997) 54 Cal.App.4th 106, 117.

An activity is also exempt from CEQA if it falls into any one of the categorical exemptions. (see CEQA Guidelines Sections 15300-15332.) If there is substantial evidence in the record demonstrating that the activity qualifies for any asserted exemption, the exemption applies. The burden is on the City to produce the evidence to support its determination of applicability. "On review, an agency's categorical exemption determination will be affirmed if supported by substantial evidence that the project fell within the exempt category of projects." (*Magan v County of Kings* (2002) 105 Cal.App.4th 468, 474 quoting from *Davidon Homes*, supra.)

If the agency establishes that the activity or project falls within a categorical exemption, the burden shifts to the party challenging the exemption who must show, by substantial evidence in the Administrative Record, that an exception to the exemption applies. (see, e.g., *Davidon Homes*, supra, and *Magan*, supra; see also *Apartment Assn of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1172-1175.)

<u>City's Reliance on the Common Sense Exemption</u>

City relied on the "common sense" exemption from CEQA review for the Ordinance. (1 AR 1, Notice of Exemption.) CEQA Guidelines section

15061(b)(3) states: "The activity is covered by the general rule that CEQA applies only to projects which have the potential for causing significant effect on the environment. Where it can be seen with certainty that there is *no possibility* that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA." (14 CCR § 15061, subd. (b)(3) [emphasis added].)

It appears from a review of the Ordinance that its sole operative portion merely substitutes one type of plastic single use carry out bag (the compostable plastic bag) in place of another (the 100% petroleum plastic bag). Common sense would suggest that such a one-for-one substitution would engender no environmental effect and that the "common sense exemption" of CEQA Guidelines section 15061(b)(3) would apply (assuming there was no evidence whatever that the compostable plastic bag may, of itself, have environmental consequences separate or worse than the 100% petroleum plastic bag). (See, *e.g.*, *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2007) 41 Cal. 4th 372).

However, this seductively simple, straightforward (and elegant) argument is completely undercut by the credible (and uncontroverted) evidence presented by Kevin Kelly, a manufacturer of both 100% petroleum plastic bags and compostable plastic bags who described himself as "one of the larger providers of biodegradable and compostable produce packaging in the State of California."

Kevin Kelly is the Chief Executive Officer of a Union City plastic packaging manufacturer and a member of Petitioner Coalition. In a comment letter to City in advance of its June 26, 2007 Public Works Committee meeting , Mr. Kelly gave his opinion that compostable plastic bags were unlikely to be available in quantities sufficient to meet the demand created by the (proposed) Ordinance. (2 AR 463-464.) In subsequent testimony to the City Council at its July 3, 2007 meeting, Mr. Kelly gave the basis for his unavailability prediction:

"There is not enough biodegradable resin in the United States...to support the demand that would be generated [by the Ordinance]." (1 AR 180-181.)

As the Chief Executive Officer of one of the "larger" manufacturers of one kind of compostable plastic bag, Mr. Kelly is competent to express an opinion regarding the availability or unavailability of the material needed to produce the substitute compostable bags permitted by the Ordinance. [6] (See *Architectural Heritage Ass'n v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1117 [fact based observations by persons qualified to speak to a question qualify as substantial evidence].)

The fact of credible evidence in the record supporting a fair argument in that the substitute compostable plastic bags may not be available after the 100% petroleum plastic bags are banned needs be evaluated together with the Scottish Executive Environment Group Research Report 2005/6 (1 AR 333-446) ("Scottish Report") which provides evidence that the reduced availability of plastic bags (because of a surcharge in the Scottish situation) resulted in an increase in the use of paper bags.

The Scottish Report is the result of a study to evaluate the environmental impacts of a proposed levy in Scotland on petroleum-based plastic bags, called "lightweight plastic carrier bags" in the Scottish Report. (2 AR 337.) Under a heading entitled "Consumer Behavior," the report's findings included:

> [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 is assumed that of consumers not purchasing a lightweight plastic carrier bag...*25% will switch to paper carrier bags.*

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[6] The fact that Mr. Kelly is a member of Petitioner's coalition does not alter the validity of his opinion as an "expert opinion supported by facts," or at a minimum, a lay opinion predicated on his personal observations in the packaging trade. (Pub. Resources Code, §21082.2(c); and see Bowman v. City of Berkeley (2004) 122 Cal.App.4th 572, 583 [lay witnesses testimony may qualify as substantial evidence if based on relevant personal observations or involve non-technical issues].)

(2 AR 363 (emphasis added)).

The Scottish Report further concluded:

> In scenarios where paper bags are excluded, the environmental benefits of reduced plastic bag usage are negated for some indicators by the impacts of *increased paper bag usage*. This is because a paper bag has a more adverse impact than a plastic bag for most of the environmental issues considered..."

(2 AR 375 (emphasis added)).

The City attempts to distinguish the Scottish Report on the ground that the report did not consider the availability of compostable plastic bags in its analysis. (2 AR 366 ["we have not considered compostable...bags in the analysis…because they are not thought to be used in any great numbers."]). In other words, because the Scottish Report did not analyze how a *plastic* plastic-bag alternative might affect consumer choice, the City argues that its conclusions are not evidence of any adverse environmental effect here.

Were it not for Mr. Kelly's comments regarding a shortage in the material needed to manufacture compostable bags, the court might agree with the City regarding the relevance of the Scottish Report's conclusions. However, considered together, the Kelly comments and the Scottish Report amount to "enough relevant information and reasonable inferences from this information that a fair argument can be made that a project may have a significant environmental effect." (CEQA Guidelines § 15384(a); *Laurel Heights*, *supra*, 47 Cal.3d at 393.) Moreover, the Scottish Report's conclusion of a 25 percent increase in the use of paper bags appears conservative as applied here. Under the scenarios analyzed in the Scottish Report, consumers had the option to purchase single-use plastic bags, whereas consumers lack this option under the Ordinance. The findings of the Scottish report raise a reasonable inference that an outright ban on single-use 100% petroleum plastic bags may result in increased use of paper bags.

This evidence is sufficient to defeat the assertion of the "common sense exemption" because, with such evidence as part of the record, the City cannot meet the standard that there is no possibility that the Ordinance will cause a significant environmental effect.

Stated in a different way: the City is not able to assert the common sense exemption because the record contains evidence which raises a fair argument that there will be a shortage of substitute compostable plastic bags and that such shortage will cause an increase in the use of paper take out bags. It is because of that evidence in the record and unanimity (1 AR 114) of the uncertainty whether paper bags are less (or more) environmentally friendly than plastic bags that the City cannot assert that there is "no possibility" of any significant environmental effect caused by the ban of the 100% petroleum plastic bags.

Having found evidence to support a fair argument regarding the significant adverse effects of the Ordinance claimed by Petitioner, and no evidence that would permit the City to conclude to a certainty that Petitioner's concerns are unfounded, City's reliance on the common sense exemption was an abuse of discretion. (*Davidon Homes v. City of San Jose*, *supra*, 54 Cal.App.4th 106,118 [if a reasonable argument is made to suggest a possibility that a project will cause a significant environmental impact, the agency must refute that claim to a certainty before finding that the exemption applies].)

City's Reliance on Categorical Exemptions for the Ordinance.

The City also relied on the two CEQA categorical exemptions found in Guideline sections 15307 and 15308, which provide an exemption for projects undertaken to assure the "maintenance, restoration, or enhancement" of a natural resource or the environment. (CEQA Guidelines, §§15307, 15308.) The City's determination that the Ordinance falls within those categorical exemptions will be

upheld if there is substantial evidence in the record that the Ordinance meets the definition of a categorically exempt project. (*Davidon Homes v. City of San Jose, supra,* 54 Cal.App.4th 106, 114-115.)

The court finds that the City met its burden to demonstrate substantial evidence in the record to support the City's reliance on the foregoing categorical exemptions for the Ordinance. The Ordinance is intended to maintain, restore and enhance natural resources and the environment based on evidence that it will reduce the City's contribution of oil-based plastic waste to the landfills; reduce oil consumption in general; reduce the amount of toxic plastic litter in the environment; and reduce degradation of the marine environment and harm to marine wildlife. (See, *e.g.*, 1 AR 2:4-5; 1 AR 206; 1 AR 209; 1 AR 211 and 1 AR 217.)

However, there are exceptions to the categorical exemptions. The City cannot rely on a categorical exemption for a project where there is a "reasonable possibility" that the activity will have a significant effect on the environment due to "unusual circumstances." (CEQA Guidelines § 15300.2(c).) The City's determination whether the Ordinance will have a significant effect on the environment is reviewed under the fair argument standard. (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 264, 265.) The question is whether "on the basis of the whole record, there was *no* substantial evidence that there would be a significant [environmental] effect." (*Asuza Land Reclamation Company v. Main San Gabriel Basin Watermaster* (1997) 42 Cal.App.4th 1165, 1202 [emphasis in the original].)

A shift in consumer use from one environmentally damaging product to another constitutes an "unusual circumstance" of an activity that would otherwise be exempt from review under CEQA as activity undertaken to protect the environment. (See, e.g., *Magan v. County of Kings, supra,* 105 Cal.App.4th 468,

474.) The court also finds that substantial evidence in the record supports at least a fair argument that single-use paper bags are more environmentally damaging than single-use plastic bags. (2 AR 368 (Scottish Report); 3 AR 742 (EPA Report), 3 AR 739 (ULS Report); see also 1 AR 114 [City's acknowledgement of an "ongoing debate" regarding whether single use paper or single use plastic bags have the greatest environmental impact].)

The Ordinance allows the use of compostable plastic bags as an alternative to 100% petroleum plastic bags, but it does not require retailers to provide them. (1 AR 6, Ordinance, Section 3.C.) It is self evident that a consumer desiring a plastic single use carry out bag would accept a single use compostable plastic bag in place of an 100% petroleum plastic bag if it were offered. Thus Petitioner's claim that the Ordinance will result in a shift in consumer use to single-use paper depends on the existence of evidence that compostable plastic bags will not be available. For the reasons discussed above relative to the common sense exemption, the court concludes that the evidence cited by Petitioner, consisting of comments by plastic packaging manufacturer Kevin Kelly and relevant conclusions contained in the Scottish Report (1 AR 333-446), amounts to substantial evidence that would support a fair argument of an adverse environmental effect excepting the Ordinance from both categorical exemptions and warranting further environmental review.

Although City points to evidence in the record that contradicts evidence cited by Petitioner, the court does not address it except to note that none of this evidence negates the evidence cited by Petitioner. "If such evidence [supporting a fair argument of significant environmental impact] is found, it cannot be overcome by substantial evidence to the contrary." (Leonoff v. Monterey County Board of Supervisors (1990) 222 Cal.App.3d 1337, 1348.) Having concluded that the record contains sufficient evidence of a fair argument that the Ordinance may have a significant environmental effect, City must conduct further environmental

review, even if other conclusions might also be reached. (*Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1000-1003.)

The court need not address Petitioner's alternate claim concerning the potential for contamination of the plastics recycling stream in the event that more compostable bags are used.

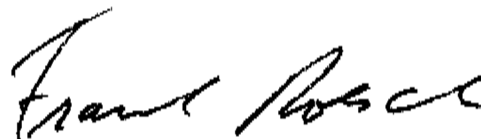
Conclusion

For the reasons set forth above, the Petition is GRANTED. Petitioner is asked to prepare form of judgment for the Court and to submit it to Respondent for approval as to form before submitting it to the Court.

Evidentiary Rulings

1. City's unopposed Requests for Judicial Notice are GRANTED.
2. The court GRANTS Petitioner's request to augment the administrative record to include the May 16, 2007 email messages addressing the merits of banning compostable bags as part of the Ordinance.

Date: April 17, 2008



FRANK ROESCH
Judge of the Superior Court

CLERK'S DECLARATION OF MAILING

I certify that I am not a party to this cause and that on the date stated below I caused a true copy of the foregoing TENTATIVE DECISION GRANTING PETITION FOR WRIT OF MANDATE to be mailed first class, postage pre paid, in a sealed envelope to the persons hereto, addressed as follows:

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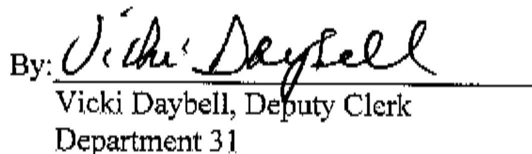
I declare under penalty of perjury that the same is true and correct.
Executed on April 17, 2008.

By: 
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