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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SAVE THE PLASTIC BAG COALITION,
an unincorporated association

PLAINTIFF AND RESPONDENT

V.

CITY OF MANHATTAN BEACH,
a municipal corporation

DEFENDANT AND APPELLANT

PLAINTIFF'S ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION

"Trust, but verify."[1]

Plaintiff Save The Plastic Bag Coalition (the "Coalition") submits this response to the Opening Brief filed by Defendant City of Manhattan Beach (the "City"). This Court should affirm the decision of the Court of Appeal that the City's ordinance banning plastic bags (the "Ordinance") is invalid, because the City abused its discretion and violated the California Environmental Quality Act ("CEQA") by refusing and failing to prepare an Environmental Impact Report ("EIR").[2]

II. STATEMENT OF FACTS

The City did not file a petition for rehearing in the Court of Appeal. Therefore, the factual determinations in the Court of Appeal's decision are effectively a closed matter. Nevertheless, the Coalition tells the full story of what happened in Manhattan Beach for three reasons.

First, the City has not provided a descriptive statement of facts in its Opening Brief. Second, the City makes numerous factual assertions for which it provides no citation to the record.[3] The only way to respond is by

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[1] President Ronald Reagan. As Governor of California, he signed CEQA into law in 1970.

[2] The table of contents in the administrative record lacks necessary detail. Therefore, a table of significant documents in the administrative record is included on the preceding page, which is page vii.

[3] These sweeping and inaccurate factual statements appear primarily on pages 2, 3, 4, 5, 6, 7, and 30. The Coalition strongly objects and requests that this Court disregard all such unsupported factual assertions. In addition, the City Attorney asserts that the Coalition's counsel told him that the Coalition would have sued the City even if the City had prepared an *(Footnote cont'd on next page)*

providing a detailed recitation of the facts with proper citations. Third, the Coalition believes that the Court should see what role the Coalition has played in the process and how the Coalition has protected the environmental values enshrined in CEQA.

A. The Coalition's Formation Was A Direct Response To The Problem Of Environmental Misinformation About Plastic And Paper Bags

For several years, plastic bags have been the subject of an intense national and international vilification campaign. (AA 17 ¶7; 520 ¶7.) The Coalition believes and contends that groups seeking to have plastic bags banned have disseminated environmental myths, misinformation and exaggerations to promote their goal. (AA 18 ¶8; 520 ¶7.) *The Times* of London has stated as follows in an editorial:

> There is a danger that the green herd, in pursuit of a good cause, stumbles into misguided campaigns....
>
> Analysis without facts is guesswork. Sloppy analysis of bad science is worse. Poor interpretation of good science wastes time and impedes the fight against obnoxious behavior. There is no place for bad science, or weak analysis, in the search for credible answers to difficult questions....
>
> Many of those who have demonized plastic bags have enlisted scientific study to their cause. By exaggerating a grain of truth into a larger falsehood they spread misinformation, and abuse the trust of their unwitting audiences.

EIR. (OB at 4, n.1.) There is no citation to a declaration or any other evidence to support this assertion. The City Attorney has been making the allegation throughout this case, and the Coalition's counsel has repeatedly denied it. The allegation is untrue.

(AA 239.)

An example of such misinformation is the heavily publicized and widely held belief that 100,000 marine mammals and a million seabirds die annually as a result of ingesting plastic bags. Not surprisingly, the allegation has caused great consternation among decision makers and the public. However, the allegation is untrue. It is based on a Canadian study that reported that the deaths resulted from discarded fishing tackle including fishing nets, not plastic bags or plastic debris. The study did not mention plastic bags at all.[4]

The particular myth that is of concern in this case and is a matter of pressing public interest is the allegation that paper bags are better for the environment than plastic bags. This is important, because if plastic bags are banned, most people will inevitably switch to free paper bags. The Coalition and its members believe and contend that plastic bags are environmentally superior to paper bags. (AA 24 ¶52 to 25 ¶59.)[5]

The Coalition is an unincorporated association that was formed on June 3, 2008. Its members include individuals and plastic bag manufacturers. (AA 17 ¶¶5-6; 520 ¶¶6, 8.) The Coalition was formed to

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[4] "*Series of blunders turned the plastic bag into global villain.*" *The Times* of London, March 8, 2008. (AR 142-144, 398-400.)

[5] Historically, paper bags have been widely seen as environmentally benign because they are "biodegradable." Any discussion about the environmental impacts of paper bags ended once the word "biodegradable" was used. For example, Los Angeles County issued a 50-page staff report in 2007 relentlessly attacking plastic bags for their impacts while addressing and dismissing the negative environmental impacts of paper bags in just one sentence: "Paper bags will biodegrade in the marine environment, minimizing the negative environmental impacts." (AR 259-315 at 296.)

respond to environmental misinformation about plastic bags in the public interest. (AA 18 ¶¶11-12.) It seeks to present environmental truths that anti-plastic bag advocates do not mention. The Coalition's concern about environmental misinformation is genuine and continuing. (AA 589-597.)[6]

The Coalition's objective in filing objections with the City and bringing this action is that of an interested citizen seeking to procure enforcement of the City's public duties and compliance with CEQA in the public interest. (AA 18 ¶13; 521 ¶13; 523 ¶15.) The Court of Appeal acknowledged the Coalition's stated purpose is

> to respond to the misinformation, myths, and exaggerations that have been disseminated about the environmental impacts of plastic bag use. The public interest the Coalition asserts in this action is the need for an environmental impact report which addresses pollution, greenhouse gas emissions and the other negative impacts resulting from paper bag use.

(*Save The Plastic Bag Coalition v. City of Manhattan Beach* (2010) 181 Cal.App.4th 521, 537.)

B. The June 3, 2008 Staff Report And The Coalition's Intervention

The Coalition's formation and intervention in Manhattan Beach was prompted by a four-page City Staff Report issued on June 3, 2008. (AR 16-22.) The City was planning to adopt a plastic bag ban based entirely on that report to promote "the sustainability of our environment." (AR 16.) The report was full of negative statements about the environmental impacts of plastic bags, almost of all of which were incorrect. (See AR 23-30.)

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[6] The Coalition maintains a website at www.savetheplasticbag.com to respond to the environmental misinformation. (AA 18 ¶11; 520 ¶9.)

The June 3 Staff Report was a one-sided anti-plastic bag advocacy document and not an objective, accurate, or complete assessment of the environmental impacts of banning plastic bags. One of the assertions in the Staff Report was as follows:

> Plastic bags pose a particular problem for wildlife that mistakes the bags for food, and as a result, ingest the bags thereby starving or suffocating. It is estimated that more than 1 million seabirds, 100,000 marine mammals and countless fish die annually through ingestion of and entanglement in marine debris, including plastic bags.

(AR 17.)[7]

The June 3 Staff Report did not say *anything* about the negative environmental impacts of paper bags. The Coalition immediately demanded that the City prepare an EIR. Had the Coalition stood aside, the City would have proceeded based solely on the June 3 Staff Report. The City had no plans to prepare a CEQA Initial Study.

C. The Coalition's Objections To The June 3 Staff Report

On June 3, 2008, the Coalition filed objections to the Staff Report, which addressed the myths, misinformation, and exaggerations therein. The Coalition identified ways in which paper bags are worse for the environment than plastic bags and demanded that an EIR be prepared. (AR

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[7] The City uses the term "plastic bags" in the first sentence, but uses the term "marine *debris*, including plastic bags" in the second sentence. (Emphasis added.) The City dodged the issue of how much of the "debris" causing the deaths of marine mammals and seabirds consists of plastic bags. Similarly, the City Attorney talks about the accumulation of "plastic debris" in the Pacific Ocean. (OB at 16.) Marine debris, plastic debris, and plastic bags are not the same things. Ambiguous word choices such as "debris" hinder the search for truth. Not everyone notices the wordplay.

23-30.)[8]

The Coalition also provided the City with a report published in *The Times* of London on March 8, 2008 entitled "Series of blunders turned the plastic bag into global villain." (AR 142-144.) *The Times* found that the allegation that plastic bags kill 100,000 animals and a million seabirds is false. The report stated:

> The central claim of campaigners is that the bags kill more than 100,000 marine mammals and one million seabirds every year. However, this figure is based on a misinterpretation of a 1987 Canadian study in Newfoundland, which found that, between 1981 and 1984, more than 100,000 marine mammals, including birds, were killed by discarded nets. The Canadian study did not mention plastic bags.
>
> Fifteen years later in 2002, when the Australian Government commissioned a report into the effects of plastic bags, its authors misquoted the Newfoundland study, mistakenly attributing the deaths to "plastic bags".
>
> The figure was latched on to by conservationists as proof that the bags were killers. For four years the "typo" remained uncorrected. It was only in 2006 that the authors altered the report, replacing "plastic bags" with "plastic debris". But they

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[8] Prior to the Coalition's demand for an EIR, the City of Oakland's ordinance banning plastic bags was invalidated by the Alameda Superior Court for failure to conduct an EIR. (*Coalition To Support Plastic Bag Recycling v. City of Oakland*, Case No. RG07-339097; AR 170-182.) The ordinance in Oakland was in all relevant respects identical to the Manhattan Beach Ordinance. The plaintiff in the Oakland case was not the Coalition, although some of the members were the same. The court found that the Oakland's ordinance may have a significant negative environmental impact because paper bags are worse for the environment than plastic bags, based on the Scottish Report which is discussed below. (AR 419-472.) The decision was not appealed. http://apps.alameda.courts.ca.gov/domainweb/html/index.html.

admitted: "The actual numbers of animals killed annually by plastic bag litter is nearly impossible to determine."[9]

In a postscript to the correction they admitted that the original Canadian study had referred to fishing tackle, not plastic debris, as the threat to the marine environment.

Regardless, the erroneous claim has become the keystone of a widening campaign to demonise plastic bags.

David Santillo, a marine biologist at Greenpeace, told The Times that bad science was undermining the [British] Government's case for banning the bags. "It's very unlikely that many animals are killed by plastic bags," he said. "The evidence shows just the opposite. We are not going to solve the problem of waste by focusing on plastic bags...."[10]

D. <u>The June 3 City Council Meeting</u>

A City Council meeting was held on June 3, 2008, following receipt of the Coalition's objections. In response to the objections, the City Attorney made the following statements on the record:

> [The Coalition] have raised in their letter what's called in CEQA terminology a "fair argument" -- that in fact there could be a negative impact from adopting this ordinance.

(AR 48.)

> [The Coalition] provide reference to a study. Now that doesn't mean it's a correct argument, but again, we have not sufficiently studied it to provide other evidence on the record that would contradict the evidence that they have presented.

(AR 49.)

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[9] The word "debris" haunts this debate.

[10] The false allegation is repeated thousands of times on the Internet and is impossible to erase.

> [C]ertainly if, if we could beef up the record we may well be able to proceed. But as the record is now, there is just simply not enough evidence to avoid a similar situation to Oakland.

(AR 50.)

> So we, we have a couple of things in our favor, but by and large, I think it's likely that a court would be persuaded by [the Alameda Superior Court ruling in the Oakland Case].

(AR 51.)

> [A]s long as [the Initial Study is] not obviously flawed -- even if, even if the judge really believes that our -- the study we rely on is inferior to the one that they've introduced, it doesn't make any difference. It's still substantial evidence and uh, we would prevail.

(AR 54-55.)

> Yeah I don't think we would need an EIR for this. They've just simply raised an issue -- it would depend on what information is out there. But if we can come up with studies that contradict the argument they've made about paper bags being more negative to the environment than plastic bags, then I think we can move forward rather quickly on it.

(AR 59.)

> What we're looking for is studies that say why plastic is bad.

(AR 73.)

As discussed in the Argument section of this brief, the City Attorney was wrong about the law. If there is evidence supporting a fair argument of significant environmental impact, it cannot be overcome by substantial evidence to the contrary.

E. The City's Initial Study Issued On June 12

On June 12, 2008, the City issued a draft Initial Study ("Initial Study") and a proposed Negative Declaration. (AR 109-123.) The City made the finding that the proposed ordinance "could not have a significant effect on the environment." (AR 111.)

Regarding paper bags, the Initial Study contained the following findings:

> There is a potential that the banning of plastic bags in the City of Manhattan Beach may result in an increase in paper bag usage. The proposed ordinance does require that all paper bags used in the City at the point of sale be at least composed of 40% recyclable material. However, it is well documented that the manufacture and distribution of paper bags can consume more energy than plastic bags. This increased use of energy could have an impact on the environment by increasing emissions from power plants and possibly from trucks carrying the heavier bulkier bags.

(AR 114a.) Thus, the City *conceded* that paper bags may have significant negative impacts on the environment.

The City tried to negate its finding about paper bags by categorizing any such impacts as *de minimis*. The City stated that the population of the City is "only" 33,852 and that there are "only" 217 retail establishments that might use paper bags. (AR 120.) It further stated:

> [I]t appears that any increase in the total use of paper bags resulting from the proposed ban on plastic bags in Manhattan Beach (and even considering it as a cumulative increase in the bans in Malibu and San Francisco) would be relatively small with a minimal or nonexistent increase in pollutants generated from production and recycling. This is counterbalanced by a modest reduction in plastic refuse being generated in a coastal region. No further investigation is required.

(AR 118.)

F. The Coalition's June 18 Objections To The Initial Study

On June 18, 2008, the Coalition filed objections to the Initial Study and the proposed Negative Declaration, again demanding that an EIR be prepared. (AR 374-384.) In support of the objections, the Coalition filed two reports with the City: the Scottish Report and the ULS Report.

The Scottish Report: The Scottish Report was published by the Scottish Government in 2005. (AR 419-472.) It is an environmental impact assessment of the effects of a proposed plastic bag levy in Scotland. The report includes the following findings:

> If only plastic bags were to be levied..., then studies and experience elsewhere suggest that there would be some shift in bag usage to paper bags (which have worse environmental impacts).

(AR 424.)

> [A] paper bag has a more adverse impact than a plastic bag for most of the environmental issues considered. Areas where paper bags score particularly badly include water consumption, atmospheric acidification (which can have effects on human health, sensitive ecosystems, forest decline and acidification of lakes) and eutrophication of water bodies (which can lead to growth of algae and depletion of oxygen).

(AR 460.)

> Paper bags are anywhere between six to ten times heavier than lightweight plastic carrier bags and, as such, require more transport and its associated costs. They would also take up more room in a landfill if they were not recycled.

(AR 460.)

According to the Scottish Report, the life cycle of paper bags result in the following impacts:

- 1.1 times more consumption of nonrenewable primary energy than plastic bags.
- 4.0 times more consumption of water than plastic bags.
- 3.3 times more greenhouse gas emissions than plastic bags.
- 1.9 times more acid rain than plastic bags.
- 1.3 times more negative air quality (ground level ozone formation) than plastic bags.
- 14.0 times more water body eutrophication than plastic bags.

- 2.7 times more solid waste production than plastic bags.

(AR 452.)[11]

The ULS Report: The ULS Report addresses the impact of San Francisco's ordinance banning plastic bags. (AR 537-542.)[12] Specifically, the ULS Report contains the following findings:

- Plastic bags generate 39% less greenhouse gas emissions than uncomposted paper bags and 68% less greenhouse gas emissions than composted paper bags.
- Plastic bags consume less than 6% of the water needed to make paper bags.
- Plastic bags consume 71% less energy during production than paper bags.
- Plastic bags generate approximately only one-fifth of the amount of solid waste that is generated by paper bags.

(AR 539-540.) The ULS Report concludes as follows:

> Legislation designed to reduce environmental impacts and litter by outlawing grocery bags based on the material from which they are produced will not deliver the intended results. While some litter reduction might take place, it would be outweighed by the disadvantages that would subsequently occur (increased solid waste and greenhouse gas emissions) [from paper bags]. Ironically, reducing the use of traditional plastic bags would

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[11] The Scottish Report makes adjustments based on the fact that a paper bag holds more than a plastic bag. (AR 451 ¶6.)

[12] The San Francisco ordinance defines acceptable paper bags in the same manner as the Manhattan Beach Ordinance. (San Francisco Environment Code, Ch. 17, §1702(j): "no old growth fiber…100% recyclable… contains a minimum of 40% post-consumer recycled content" (AR 235-239); Manhattan Beach Ordinance defining "Recyclable Paper Bag" at AR 687.)

> not even reduce the reliance on fossil fuels, as paper and biodegradable plastic bags consume at least as much non-renewable energy during their full life cycle.

(AR 541.)[13]

Objection to *de minimis* assertion: In its June 18, 2008 objections, the Coalition objected to the City's *de minimis* assertion that the impact of a plastic bag ban would be "relatively small with a minimal or nonexistent increase in pollutants generated from production and recycling." The Coalition stated:

> The size of the city and the number of retail outlets have nothing to do with whether the activity in question may have a significant negative effect on the environment.

(AR 382, ¶E.)

Objection to failure to address all impacts: The Coalition also objected on the ground that the City had not addressed all of the possible negative environmental impacts of paper bags identified in the Scottish Report and the ULS Report. (AR 382, ¶F.) The Initial Study, including the final version (AR 109-123), did not even *mention* increased greenhouse gases, increased water consumption, increased acid rain, increased ground level ozone formation, increased water body eutrophication, increased solid waste production, or increased logging operations, all of which were addressed in the Scottish and ULS Reports. (AR 103, 452, 539-540.)

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[13] The ULS Report makes the following statement regarding relying on studies performed in other parts of the world: "While the 2007 Boustead Consulting Study was performed in the United States, the other studies originated in Europe. Because production processes are relatively similar globally, the data provide accurate assessments that can be used to draw valid conclusions in the United States. The similarity in results between the American and European studies further bears this out." (AR 538 n.3.)

The City did not assert that those significant environmental effects would be minimal or nonexistent. *They are all significant negative environmental impacts that the City totally failed to address and preclude as a possibility.*

G. The July 1 Staff Report

On July 1, 2008, the City published a second Staff Report, but did not amend the Initial Study. (AR 99-107.)[14] By this time, three more environmental reports were in the administrative record.

The Franklin Report: The City cited and attached the Franklin report that was prepared for the plastic industry. (AR 103, 404-418.) The report is a life cycle assessment of plastic and paper carryout bags used in the United States. The City stated in the July 1 Staff Report: "Although this report is 18 years old, it is often cited in articles related to the paper versus plastic debate." (AR 102.)

The Franklin Report shows that plastic bags are substantially better for the environment than paper bags, based on the following findings:

- The energy requirements for plastic bags are between 20% and 40% less than for paper bags at zero percent recycling of both kinds of bags. Assuming paper bags carry 50% more than plastic bags, the plastic bag continues to require 23% less energy than paper bags even at 100% recycling.

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[14] Because the Initial Study was never amended, it remains the only operative CEQA document in this case. However, the Coalition discusses the July 1 Staff Report in detail in this brief, because it shows how the City went to great lengths to suppress the environmental truth about paper bags.

- Plastic bags contribute between 74% and 80% less solid waste than paper bags at zero percent recycling. Plastic bags continue to contribute less solid waste than paper bags at all recycling rates.
- Atmospheric emissions for plastic bags are between 63% and 73% less than for paper bags at zero percent recycling. Plastic bags continue to contribute less atmospheric emissions than paper bags at all recycling rates.
- At a zero percent recycling rate, plastic bags contribute over 90% less waterborne wastes than paper bags. This percentage actually increases as the recycling rate increases.
- The landfill volume occupied by plastic bags is 70% to 80% less than the volume occupied by paper bags based on 10,000 uses.

(AR 417-418.)

The Boustead Report: The City attached (but never discussed) the Boustead report. (AR 473-536.)

The Boustead Report is an extremely thorough and detailed life cycle analysis of the environmental impacts of the types of plastic and paper carryout bags used in the United States. (AR 478, 479.) It is packed with data. It takes into account that a paper bag holds more than a plastic bag and applies an adjustment factor: 1 paper bag = 1.5 plastic bags. (AR 479.) The Boustead Report summarizes its findings in the following table (AR 476), which the Court of Appeal included in its decision in table format. Note that plastic bags are made of polyethylene.

Boustead Report
Impact Summary of Various Bag Types
(Carrying Capacity Equivalent to 1000 Paper Bags)

	Paper (30% Recycled Fiber)	Compostable Plastic	Polyethylene
Total Energy Used (MJ)	2622	2070	763
Fossil Fuel Use (kg)	23.2	41.5	14.9
Municipal Solid Waste (kg)	33.9	19.2	7.0
Greenhouse Gas Emissions (CO_2 Equiv. Tons)	0.08	0.18	0.04
Fresh Water Usage (Gal)	1004	1017	58

The Boustead Report analyzes paper bags with 30% post consumer recycled content. (AR 478-479.) The Ordinance requires that paper bags have 40% post-consumer recycled content. (AR 687.) An additional 10% of recycled content would not result in a 10% improvement in environmental impacts.[15] But even if an extra 10% of recycled content decreased all environmental impacts of paper bags by 10%, paper bags are still far worse than plastic bags in every environmental category. For example, instead of

[15] Obviously, a paper bag with 100% post consumer recycled content would not have zero negative environmental impacts.

consuming 2622 megajoules of total energy, 1000 paper bags would consume 2360 megajoules. Plastic bags with the same carrying capacity consume only 763 megajoules.[16]

The Boustead Report was commissioned by Progressive Bag Affiliates, a plastic bag industry organization. (AR 473.) It was peer reviewed by an independent third party, a Professor of Chemical Engineering at North Carolina State University. (AR 476, 535-536.) He is an expert on life cycle analysis with extensive experience in the field. (AR 535.) He stated that the Boustead Report

> provides both a sound technical descriptions (sic) of the grocery bag products and the processes of life cycle use.... Whatever the goals of the policy makers, these need to be far more explicit that general environmental improvement, since the life cycle story is consistent in favor of recyclable plastic bags.

(AR 535.)[17]

The Swedish Report: The City also cited and attached a summary of a report that the City claimed was "prepared by an Independent Swedish Environmental Consulting Group." (AR 102, 560-570.) According to the

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[16] The recycling rate scenarios in the Boustead Report are 5.2% for plastic bags and 21% for paper bags. (AR 518.) These are the same as the recycling rates that the City accepted and used in the July 1 Staff Report. (AR 100-101.) The recycling rate refers to the rate at which used plastic bags are recycled rather than the amount of recycled material that new bags contain.

[17] The professor reviewed all of the figures in the report and disagreed with some of them. (AR 536.) The Boustead report was amended to the extent that the Boustead author agreed with the professor's comments. For example, the figure "103" for electricity in Table 9B was corrected to "154." (See AR 536, 491.)

July 1 Staff Report, the Swedish Report concluded that paper bags were better for the environment than plastic bags. (AR 103.)

The Coalition filed supplemental objections on July 1 in response to the July 1 Staff Report. (AR 580a-g.) The Coalition strongly objected to the omission of page 48 of the summary of the Swedish Report. (AR 580b-c.) The Coalition found page 48 on the Internet and appended it to its objections. (Page 48 is AR 560.)

Page 48 contains a statement that the Swedish Report was prepared on behalf of European paper bag producers Eurosac and CEPI Eurokraft.[18] The Swedish Report was not "independent" at all.[19]

The following statement also appeared on missing Page 48: "It is noted that the products analyzed in this study are fundamentally different products to checkout carrier bags -- they are bigger bags." (AR 560.) They certainly were fundamentally different bags. *They were "animal feed distribution sacks."* (AR 543.) The capacity of the bags was 25 kilograms, which is 55 pounds. (AR 571 table heading Study 2.)

The Coalition objected, pointing out that the bags studied in the Swedish Report were the wrong kind of bags that the report was "misleading and irrelevant." (AR 580c.)

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[18] The website home pages of Eurosac and CEPI Eurokraft are attached to the July 1, 2008 objections showing that they are paper bag producers. (AR 580e-g).

[19] The Coalition was not objecting to the fact that it was an industry-sponsored study. The Coalition objected to the City falsely claiming that it was an "independent" study.

H. The Misleading Summary Table In The July 1 Staff Report

The most prominent feature of the July 1 Staff Report is the following table, which the City presented as the summary of its conclusion.

Impact Category	**Study 1: Franklin Associates**	**Study 2: Swedish Environmental Consulting Group**
Primary energy	Plastic uses 23.08% less	Paper uses 80% less
Solid waste	Plastic uses 75.68% less	*Category not considered*
Abiotic Resource Depletion	*Category not considered*	Paper depletes 85% less
Global warming	*Category not considered*	Paper contributes 95.69% less
Acidification	*Category not considered*	Paper contributes 53.79% less
Nutrient Enrichment	*Category not considered*	Plastic contributes 55.36% less
Ozone Formation	*Category not considered*	Paper contributes 64.04% less
Aquatic Ecotoxicity	*Category not considered*	Paper contributes 37.04% less
Air Emissions	Plastic contributes 57.45% less	Paper contributes 52.23% less
Water emissions	Plastic contributes 96.58% less	Paper contributes 28.79%% less

(AR 103.)

The table shows that the City was engaging in blatant cherry picking of data. There is no mention in the table or anywhere else in the July 1 Staff Report of the fact that the Swedish Report studied 55 pound capacity animal feed distribution sacks, not plastic carryout bags provided by stores to consumers.

Further, the table omits the Scottish, ULS and the Boustead Reports. In fact, the only time any of those three reports are *even mentioned* in the

July 1 Staff Report is in a note indicating that staff had reviewed them and that they were attached. (AR 102.) By eliminating those reports from the discussion, the table makes it appear that the Swedish Report is the sole source of data in the record regarding the impact of paper bags on global warming, acidification, nutrient enrichment (eutrophication), ozone formation, and aquatic toxicity (water pollution). Anyone reading the table is led to believe that those categories have been "not considered" except in the Swedish Report. In fact, the Scottish, ULS and Boustead Reports contain abundant data showing that plastic bags are environmentally superior to paper bags in every one of those categories. Unfortunately, one would have to dig through 265 pages of attachments to know that. (AR 108-372.)[20]

The misleading table highlights why the Coalition serves an important public purpose in exposing the environmental truth. No "environmental group" or anyone else has pointed out these problems.

Staff reports are no substitute for an EIR. They are not subject to any regulation or standards. They do not need to be based upon any evidence. They are often one-sided, advocacy documents that *argue backwards* to a predetermined conclusion. In addition, elected officials are not required to

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[20] The fact that the table appears in a South African report is no excuse. (AR 543-571 at 571.) The South African report is undated but as it only mentions the Franklin report dated 1990 (date at AR 553) and the Swedish report dated 2000 (date at AR 560), it was obviously prepared long before the Scottish (2005), Boustead (2007), and ULS (2008) reports. This is confirmed by the footnote at AR 552 showing a 2001 e-mail date. The South African report authors did not have the benefit of the later reports. The City did.

certify or consider them. Unfortunately, they tend to be persuasive to people who lack a deep understanding of the subject or who cannot delve into a 265-page record.

I. The July 1 City Council Meeting

On July 1, 2008, the City Council held a meeting to vote on the proposed ordinance. The Coalition's counsel made public comments at the meeting. (AR 611-630.)

By that time, the City had four reports showing that paper carryout bags are worse for the environment than plastic bags: the Scottish Report, the ULS Report, the Franklin Report, and the Boustead Report. The Swedish Report was irrelevant because it did not study plastic carryout bags. Therefore, the relevant evidence was *unanimous*.

City Council Member Aldinger remained unconvinced. He stated at the meeting:

> [What] really disturbs me most is that they are using CEQA against environmental issues. And, you know, for anybody to stand up and say that this does -- it has a negative impact on the environment just shocks me.

(AR 649-650.) Council Member Aldinger's statement constitutes a dismissive and hostile rejection of valid data because it contradicts his preconceived notions.

J. The Ordinance And The Negative Declaration

On July 15, 2008, the City Council adopted the Ordinance banning plastic bags at grocery stores, food vendors, restaurants, pharmacies, other businesses, and city facilities. (AR 673, 686-689.) The Ordinance states:

> An Initial Environmental Study was prepared in compliance with the provisions of [CEQA]. *Based upon this study* it was determined that the project is not an action involving any significant impacts upon the environment, and a Negative

Declaration was prepared and is hereby adopted.

(AR 686 ¶H (emphasis added).)

III. PROCEDURAL HISTORY

On August 12, 2008, the Coalition filed a Verified Petition For Writ Of Mandate in the Los Angeles Superior Court requesting that the Ordinance be invalidated. The Coalition contended that it had presented substantial evidence to the City that a shift to paper bags might have significant negative environmental impacts. (AA 15-132.)

On February 20, 2009, the Superior Court ruled in favor of the Coalition. (AA 806-809.) On March 25, 2009, the Superior Court issued a writ of mandate requiring the City to repeal the Ordinance. (AA 815-816.) On April 24, 2009, the City filed a Notice of Appeal. (AA 817-818.)

On January 27, 2010, the Court of Appeal affirmed the Superior Court's decision. (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2010) 181 Cal.App.4th 521.) The City did not file a petition for rehearing.

IV. STANDARD OF REVIEW

Standing review: If the City had filed a petition for rehearing in the Court of Appeal, this Court could have reviewed the Superior Court's factual determination regarding CEQA standing based upon the substantial evidence standard. (*Environmental Protection and Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 481 citing *Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1092.) However, no petition for rehearing was filed by the City. Therefore, the Superior Court's factual determination regarding standing is effectively final. (Cal. Rules of Court, rule 8.500(c)(2).)

Merits review: As discussed below, the City was required by CEQA to prepare an EIR if the administrative record contained any credible

evidence that negative environmental impacts might occur as a result of the Ordinance. This is the "fair argument" test. In *Mejia v. City of Los Angeles (California Home Development, LLC)*, the Court of Appeal stated the standard of review as follows:

> Application of the 'fair argument' test is a question of law for our independent review. We review the trial court's findings and conclusions de novo, and do not defer to the agency's determination except on 'legitimate, disputed issues of credibility.' "Under this standard, deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary."

((2005) 130 Cal.App.4th 322, 332-33 (citations omitted).)

The Court of Appeal made extensive factual findings on which it based its ruling that the Coalition had made a fair argument. None of the findings of fact was challenged by the City in a petition for rehearing. Therefore, the findings of fact in the Court of Appeal opinion are effectively closed. (Cal. Rules of Court, rule 8.500(c)(2).)

V. ARGUMENT

Under the public right/public duty exception to the beneficial interest rule, the Coalition has standing to bring this case. The Coalition is seeking to enforce the City's public duty to prepare an EIR. The Superior Court and Court of Appeal agreed and found that the Coalition had standing.

The Coalition presented "substantial evidence" supporting a "fair argument" that the Ordinance may result in significant negative environmental impacts. The administrative record is replete with evidence of environmental harms that may result if the Ordinance is allowed to stand. Under CEQA, the City was required to prepare an EIR.

A. The Coalition Has Public Interest Standing

The Superior Court and the Court of Appeal held that the Coalition has standing in this case. The Court of Appeal applied the long-settled public right/public duty exception to the beneficial interest rule, which has been accepted by this Court since 1945.[21]

In *Green v. Obledo*, this Court described the public right/public duty exception to the beneficial interest rule as follows:

> It is true that ordinarily the writ of mandate will be issued only to persons who are "beneficially interested." (Code Civ. Proc., §1086.) Yet in *Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, this court recognized an exception to the general rule "where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced" (*id.* at pp. 100-101). The exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right. (*Id.* at p. 100.) It has often been invoked by California courts.

((1981) 29 Cal.3d 126, 144.)

This Court has held that a person has standing under CEQA "to procure enforcement of a public duty." (*Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 272.)

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[21] (181 Cal.App.4th at 536-38 citing *Board of Social Welfare v. Los Angeles County* (1945) 27 Cal.2d 98, 100-101); *Green v. Obledo* (1981) 29 Cal.3d 126, 144; *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439; *Environmental Protection and Information Center, supra,* 44 Cal.4th at p. 479) ["a well-established exception to the beneficial interest rule"]).

The City cites *Waste Management v. County of Alameda,* (2000) 79 Cal.App.4th 1223 and completely misstates the ruling in that case. (OB at 23-27.) The facts of that case were as follows. Waste Management operated a landfill. Its competitor, Browning-Ferris, operated a landfill about four miles away. When Waste Management sought regulatory permission to accept designated waste at its landfill, the county required preparation of an EIR. When Browning-Ferris sought similar permission to accept designated wastes at its landfill, no EIR was required. Waste Management petitioned the Superior Court to set aside the permission for Browning-Ferris because no EIR had been prepared. The Court of Appeal stated:

> Accordingly, in its respondent's brief, Waste Management asserts a beneficial interest by complaining it was required to undertake the substantial expense of EIR review and mitigation while Browning-Ferris was not, *and it identifies its injury as the extra costs it incurred and continuing competitive injury due to Browning-Ferris's lower costs.* The assertion fails.
>
> CEQA is not a fair competition statutory scheme. Numerous findings and declarations were made by the Legislature with respect to CEQA. (Pub. Res. Code, §§ 21000-21005.) None of them suggest a purpose of fostering, protecting, or otherwise affecting economic competition among commercial enterprises.
>
> Thus, Waste Management's commercial and competitive interests are not within the zone of interests CEQA was intended to preserve or protect and cannot serve as a beneficial interest for purposes of the standing requirement.

(*Id.* at p. 1225 (emphasis added).)

The Court of Appeal went on to note, however, that there is a public right/public duty exception to the beneficial interest standard.

> The matter of a citizen's action is a long-established exception to the requirement of a personal beneficial interest. The exception applies where the question is one of public right and the object of the action is to enforce a public duty -- in which case it is sufficient that the Coalition be interested as a citizen in having the laws executed and the public duty enforced.... This exception promotes a policy of guaranteeing citizens an opportunity to ensure that the purpose of legislation establishing a public right is not impaired or defeated by a governmental agency.

(*Id.* at p. 1236-37 (citations omitted).)

The petitioner in *Waste Management* did not raise any environmental concerns or issues whatsoever. It admitted that the sole purpose of its petition was to use CEQA to impose the expense of preparing an EIR on its competitor. It did not identify even a single environmental issue that an EIR would address or resolve. It did not identify any public interest in an EIR.

Waste Management is easily distinguishable from the instant case. The Coalition's action is based on environmental issues, not competitive economic issues. The purpose of the Coalition's action is to enforce a public duty in the public interest.

The Court of Appeal has found that a business entity has standing to enforce CEQA's provisions, provided that the issues raised relate to the purposes of CEQA. In *Burrtec Waste Industries, Inc. v. City of Colton,* (2002) 97 Cal.App.4th 1133, two competing corporations, Taormina and Burrtec, were engaged in solid waste recycling and disposal. The City of Colton approved a Mitigated Negative Declaration ("MND") and granted a Conditional Use Permit ("CUP") to Taormina to operate a solid waste facility. Burrtec alleged that the notice of intention to adopt the MND was not properly posted, as a result of which it did not find out about its competitor's application for the amended CUP until after it was too late to

comment or appeal the city's approval. Burrtec did not allege that it would suffer any environmental harm. The Court of Appeal found that Burrtec had standing under CEQA. The court stated as follows:

> CEQA litigants often may be characterized as having competing economic interests. But, under CEQA, a corporation is a person entitled to receive notice and to bring a suit for noncompliance. [CEQA §21066.] Furthermore, as noted by the trial court, the interest asserted by Burrtec in its writ petition is not a commercial one but an issue involving the adequacy of the public notice required by CEQA. Where a plaintiff seeks by mandamus to enforce a public duty, especially under CEQA, standing is properly conferred: "[S]trict rules of standing that might be appropriate in other contexts have no application where broad and long-term effects are involved." [*Bozung v. Local Agency Formation Com.*, *supra*, 13 Cal.3d at p. 272.]
>
> *Waste Management* does not compel a different result. Sufficient evidence supports the superior court's determination that the express beneficial interest asserted by Burrtec is not rank commercialism but rather the need for public notice under CEQA. The record establishes Burrtec has a genuine and continuing concern for environmental matters and for compliance with the CEQA process. According to Eric Herbert, a Burrtec officer, the company encourages and monitors environmental compliance, including CEQA determinations, by itself and other waste companies in Southern California. Burrtec even reviewed the initial approval of Taormina's Colton site although it did not comment on it. Using the primary factor of a demonstrated environmental concern, as identified in *Waste Management*, we hold Burrtec meets the test, under the particular circumstances of this case, for being allowed to bring a citizen suit as a corporation.

(*Id.* at p. 1138-39 (citations omitted).)

In this case, the interest asserted by the Coalition is not "rank commercialism," but rather the need for an EIR to address specific environmental issues. The Coalition is not making any commercial

arguments in support of its case.[22]

According to CEQA Guidelines §15002, the "basic purposes of CEQA" are as follows:

> 1. Inform governmental decision-makers and the public about the potential, significant environmental effects of proposed activities.
>
> 2. Identify ways that environmental damage can be avoided or significantly reduced.
>
> 3. Prevent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the government agency finds the changes to be feasible.
>
> 4. Disclose to the public the reasons why a governmental agency approved the project in the manner the agency chose

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[22] The City's reliance on authorities regarding standing under the National Environmental Policy Act ("NEPA") is misplaced. The City cites *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) and *Churchill County v. Babbitt*, 150 F.3d 1072, 1078 (9th Cir. 1993) for the unremarkable proposition that the alleged injury must be within the zone of interests protected by the statute. (OB at 27.) The Coalition agrees with the City that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA." (*Nevada Land Action Association v. United States Forest Service*, 8 F.3d 713, 716 (9th Cir. 1993)). However, a federal court applying NEPA would not have dismissed this suit for lack of standing as the Coalition has asserted that a host of specific environmental harms would occur. (See, e.g., *Ranchers Cattlemen Action Legal Fund v. United States Department of Agriculture*, 415 F.3d 1078, 1102 (9th Cir. 2005) ["A plaintiff can, however, have standing under NEPA even if his or her interest is primarily economic, as long as he or she also alleges an environmental interest or economic injuries that are 'causally related to an act within NEPA's embrace.'"] (quoting *Port of Astoria v. Hodel*, 595 F.2d 467, 476 (9th Cir. 1979)).

if significant environmental effects are involved.[23]

These are precisely the public purposes and duties that the Coalition is seeking to enforce. There is substantial evidence in the record in this case to support the factual determination that the Coalition has standing.

The City argues that the Coalition should have no role in enforcing CEQA's requirements. The City states as follows:

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

(Petition for Review ("Petition") at 12.)

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

(AA 558-559.) The City's reflexive dismissal of the environmental information and reports provided by the Coalition is matched by its reflexive and unconditional trust of environmental groups to provide the whole truth. Such trust is naïve. Environmental groups are not infallible. They are also not immune from the temptation of spreading incomplete, misleading, exaggerated, or false information in support of their causes.[24]

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[23] The CEQA Guidelines are at Cal. Code Regs., title 14, §15000 *et seq.* ("Guidelines").

[24] For example, environmental groups have been loose with the truth about the marine mammal issue. Heal the Bay told the Los Angeles County Board of Supervisors: "Worldwide we use over a million plastic bags a minute. The marine debris problem has become a global environmental crisis. Every year, 1 million seabirds and 100,000 marine mammals die in the Pacific due to marine debris. Unlike shoppers, marine life doesn't get to *(Footnote cont'd on next page)*

Only a group that has the financial support of business could reasonably be expected to incur the substantial cost and take on the major responsibility of litigating this case. That is because none of the environmental impacts affects any one location or person more than any other. In particular, greenhouse gas emissions affect the entire planet and everybody on it.

The environment is a highly politicized information battleground. While Heal the Bay and Californians Against Waste (who filed amicus letters in support of the City's Petition) do much truly wonderful work, they cannot be *depended* upon to tell both sides of the story when they are in campaign mode. They have been shouting from the rooftops for years about the alleged horrors of plastic bags, but they have been silent about the environmental impacts of paper bags. Any attempt to interrupt their narrative by pointing out inconvenient truths is met by *ad hominem* attacks.

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

If the Coalition does not hold the City's feet to the fire on environmental truth regarding plastic bags, then who will? Heal the Bay? Surfrider Foundation? Planet Pals?[25]

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make a bag choice." (AA at 763.)

[25] No "environmental group" provided any evidence to the City about the environmental impacts of paper bags, including the increase in climate changing greenhouse gas emissions; no "environmental group" pointed out that the allegation about 100,000 marine mammals and a million seabirds is *(Footnote cont'd on next page)*

If this Court holds that the Coalition lacks standing, one side of the environmental debate will be muzzled resulting in no debate at all. Environmental groups will *monopolize* the flow of environmental information to cities and counties that place their complete trust in them. The Coalition will be limited to making two-minute presentations along with the rest of the public as part of compressed agendas during busy evenings at City Council and Board of Supervisors meetings -- and being politely thanked and ignored.[26]

The City's argument that the Coalition lacks standing under CEQA is a dangerous one for the environment. The Coalition is helping cities and counties distinguish between environmental myths, hype, and facts; ensuring that inconvenient truths are not buried; and challenging groupthink. The Coalition is playing a critical and *indispensable* role. The Superior Court and Court of Appeal rightly rejected the City's arguments, and this Court should do the same.

B. The City Has Conceded That The Ordinance Is A "Project" Under CEQA

The City admits that banning plastic bags is a project under CEQA. The City told the Court of Appeal that "clearly CEQA applies.... We never argued that it wasn't a project." (181 Cal.App.4th at p. 538.) The Court of Appeal confirmed that the Ordinance is a "project" under CEQA. (*Id.* at p.

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untrue; and most importantly, no "environmental group" asked for an EIR or even an Initial Study.

[26] The only reason that the Coalition was able to appear for more than two minutes before the Manhattan Beach City Council and was not ignored was that the Coalition had threatened to litigate.

538-39.) The City has not raised the issue of whether the Ordinance is a "project" in this Court.[27]

C. The Coalition Made A "Fair Argument" That An EIR Must Be Prepared

The Ordinance has a potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. Therefore, the City was required to prepare an EIR or issue a negative declaration. (Pub. Res. Code §21080(c), (d), §21151; Guidelines §15378(a).)

In issuing the Negative Declaration, the City relied on Pub. Res. Code §21080(c)(1) and Guidelines §15061(b)(3) which is known as the "Common Sense Exemption." Guidelines §15061(b)(3) states as follows:

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

In *Davidon Homes v. City of San Jose*, the Court of Appeal confirmed that all legitimate disputes must be settled in favor of preparing an EIR:

> 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.

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[27] A "project" that is subject to CEQA is defined in Pub. Res. Code §21065 to include "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, which is any of the following: [¶] (a) An activity directly undertaken by any public agency."

((1997) 54 Cal.App.4th 106, 117.) In other words, if there is "any credible evidence" that negative environmental impacts are possible, an EIR must be prepared. (*Mejia, supra,* 130 Cal.App.4th at p. 332.) This approach is incorporated in Guidelines §15064(g) which states as follows:

> [I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.

In *County Sanitation District No. 2 v. County of Kern*, the Court of Appeal emphasized that this is a low threshold test designed to ensure that the environment is protected:

> We hold County was required to prepare an EIR under CEQA. This is because CEQA requires the preparation of an EIR whenever substantial evidence supports a fair argument that an ordinance will cause potentially significant adverse environmental impacts.

((2005) 127 Cal.App.4th 1544, 1558.)

> California courts, including the Fifth Appellate District, routinely describe the fair argument test as a low threshold requirement for the initial preparation of an EIR that reflects a preference for resolving doubts in favor of environmental review....
>
> In contrast to this description of the fair argument test, County asserts that "[a]ny reasonable doubts whether substantial evidence exists must be resolved in favor of the agency's decision." This assertion is rejected because (1) it misstates the low threshold of the fair argument test and (2) the case relied upon by County did not actually involve the fair argument test or the approval of a negative declaration....

(*Id.* at p. 1579.)

> A logical deduction from the formulation of the fair argument test is that, if substantial evidence establishes a reasonable possibility of a significant environmental impact, then the existence of contrary evidence in the administrative record is not adequate to support a decision to dispense with an EIR.

(*Id.* at p. 1580.)[28]

Banning plastic bags means that there may or will be a shift to paper bags, as the City concedes. (AR 114a, 115, 424.) The Court of Appeal in this case found that the Scottish Report, the ULS Report, the Franklin Report, and the Boustead Report constitute substantial evidence that the Ordinance may have significant negative impacts on the environment. (181 Cal.App.4th at p. 525.) The Coalition therefore made a fair argument.

D. The City's Argument That Any Negative Impact Would Be *De Minimis* Lacks Any Basis

The City tried to shoehorn its process into the "common sense exemption" by stating in the Initial Study that the population of Manhattan Beach is "only" 33,852 and there are "only" 217 retail establishments that might use plastic bags. (AR 120.) Based on those figures alone, it concluded as follows:

> [I]t appears that any increase in the total use of paper bags resulting from the proposed ban on plastic bags in Manhattan Beach (and even considering it as a cumulative increase in the

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[28] (See also *Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337, 1348) ["If such evidence [supporting a fair argument of significant environmental impact] is found, it cannot be overcome by substantial evidence to the contrary."]; (*Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002) ["[E]vidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact."]

> bans in Malibu and San Francisco) would be relatively small with a minimal or nonexistent increase in pollutants generated from production and recycling. This is counterbalanced by a modest reduction in plastic refuse being generated in a coastal region. No further investigation is required.

(AR 118; see also AR 120.)

The "Initial Study Checklist" form completed by the City states that the explanation of each issue should identify "the significance criteria or threshold, if any, used to evaluate each question." (AR113a ¶9a.) In dismissing the impacts as "minimal," the City identified only the size of the city as the significance criterion or threshold. However, it is possible for a small city with 33,852 people and 217 stores to produce significant environmental impacts.

The population figure and the number of stores are not quantifications of environmental impacts. The quantification of environmental impacts would be expressed as the number of bags with equivalent carrying capacity multiplied by the number of years that the Ordinance may remain in effect[29] multiplied by:

- Greenhouse gas production (see AR 476 for impact in CO_2 equivalent tons, also AR 531)[30]

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[29] "[T]he unintended consequences can be significant and long-lasting." (Boustead Report at AR 476.) It would be appropriate to extrapolate the environmental impacts over at least 30 years into the future. The test is what time period is "possible." (CEQA Guidelines §15065(a)(3).)

[30] The CEQA Guidelines have been amended with retroactive effect. Lead agencies must make a "good-faith effort, based on available information, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project." (Guidelines §15064.4(a); SB 97 enacted 8-07.)

- Energy consumption (see AR 476 and 528 for impact in megajoules)
- Fossil fuel use (see AR 476 for impact in kilograms, also AR 529)
- Solid waste production (see AR 476 for impact in kilograms, also AR 530)
- Water consumption (see AR 476 for impact in gallons, also AR 531)
- Other environmental impacts

The Boustead Report breaks down the figures into minute detail. There are more than a thousand pieces of such data in the Boustead Report that were available to the City. For example, 1000 paper bags use 4,591,000 milligrams of crude oil. (AR 486.)

The City could have applied the data from the Boustead table rather than ignoring it. For example, according to the Boustead Report table, 1,000 paper bags result in 33.9 kilograms of solid waste. Plastic bags with the same carrying capacity as 1,000 paper bags result in just 7.0 kilograms of solid waste. The Court of Appeal pointed out that there was no information in the Initial Study regarding how the City disposes of its trash and "whether the city has a landfill that would be impacted by any increased paper bag use." (181 Cal.App.4th at p. 544.) Why couldn't the City have included information regarding its landfill and the impact of the increased solid waste in the Initial Study?

There was no finding (not even a *de minimis* finding) by the City showing that paper bags are better for the environment than plastic bags on any ground. The Initial Study did not even *mention* the following impacts that are described in the Scottish, Boustead, Franklin or ULS reports:

- Climate changing greenhouse gas emissions;
- Consumption of nonrenewable primary energy;
- Acid rain;

- Negative air quality (ground level ozone formation);
- Consumption of water;
- Water body eutrophication;
- Solid waste production including landfills; and
- The cutting down of trees

In the Initial Study, the City stated that decreasing plastic bag "refuse" would "counterbalance" the negative environmental effects of paper bags. (AR 118.) That is a *non sequitur*. Reducing plastic bag trash does not negate the impacts caused by increased paper bag usage, including increased climate changing greenhouse gas emissions, increased acid rain, increased ground level ozone formation, increased water body eutrophication, increased water consumption, increased solid waste production, and increased logging operations. The City was comparing apples and oranges in making its flawed argument.

The Court of Appeal rejected the City's *de minimis* argument and held that CEQA does not contain an exemption based on the City's size, stating as follows:

> 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.

(181 Cal.App.4th at p. 544 (emphasis added.)

By merely labeling the impacts as "minimal," the City provided only argument and unsubstantiated opinion. Guidelines §15064(f) states:

> Argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous, or evidence that is not credible, shall not constitute substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.

If a city or county could just dismiss impacts by labeling them as "minimal," it would open the floodgates to the wholesale evasion of CEQA.

E. Even If Contrary Evidence Could Legally Negate Substantial Evidence Of Environmental Impacts, There Is No Such Evidence In The Administrative Record

The City argues that "evidence in support and in opposition to environmental impacts should be considered in determining whether an EIR is necessary." (OB at 11.) As we have seen from the authorities cited above, if there is any credible evidence that negative environmental impacts may occur, then an EIR must be prepared regardless of any substantial evidence to the contrary.

In any event, there are no reports in the administrative record that contradict the Scottish, Boustead, Franklin and ULS Reports. The Swedish Report is irrelevant because the plastic bags in that study were 55 lb capacity animal feed distribution sacks, not plastic carryout bags. (AR 543.) Moreover, the Swedish Report is not mentioned in the Initial Study. Simply put, there is no other evidence.

F. CEQA Places The Burden Of Environmental Investigation Firmly On The Public Agency, Not On The Public

When preparing an Initial Study, "an agency must use its best efforts to find out and disclose all that it reasonably can." Guidelines §15144. Nevertheless, the City attempts to shift its burden of producing a proper Initial Study to the Coalition and the public. The City states:

> The only evidence submitted by [The Coalition] were a few generic studies (several prepared by industry friendly sources) indicating that production of paper 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 rate of recycling compared with plastic.

(OB at 12.)

In *Sundstrom v. County of Mendocino*, the Court of Appeal stated:

> While a fair argument of environmental impact must be based on substantial evidence, mechanical application of this rule would defeat the purpose of CEQA where the local agency has failed to undertake an adequate initial study. The agency should not be allowed to hide behind its own failure to gather relevant data.... CEQA places the burden of environmental investigation on government rather than the public. If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.

((1988) 202 Cal.App.3d 296, 311.) The City, not the Coalition, had the burden of preparing the Initial Study and satisfying the common sense

exemption. The City failed to discharge that burden.[31]

G. Courts Do Not Defer To Determinations By Agencies Under CEQA

The City argues that the courts must defer to determinations by public agencies under CEQA. (Petition at 12; OB at 13.) The City is incorrect. In *Mejia, supra,* the Court of Appeal stated:

> Application of the 'fair argument' test is a question of law for our independent review. We review the trial court's findings and conclusions de novo and do not defer to the agency's determination except on 'legitimate, disputed issues of credibility.' "Under this standard, deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary."

(130 Cal.App.4th at p. 332-333 (citations omitted).)[32]

The City asserts that "no deference was given to the determination of the City as to whether or not [the Coalition's] evidence was substantial." (OB at 13.) The City does not cite any page in the administrative record that contains such a determination. In fact, the City did not make a determination that any of the reports was not credible or substantial. There

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[31] (See also *County Sanitation, supra,* 127 Cal.App.4th at p. 1597) ["the lead agency bears a burden to investigate potential environmental impacts."].

[32] (See also *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 151 ["Application of this standard is a question of law and deference to the agency's determination is not appropriate."]; *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602) ["Under this standard, deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary."].)

was nothing to defer to.

H. The City Should Not Be Permitted To Prepare A New Initial Study

The City asks for an opportunity to prepare another Initial Study, essentially admitting that the existing Initial Study does not adequately support the Negative Declaration. (OB at 28-30.) However, the City has waived this issue as it was not raised in a petition for rehearing.

The record in this case already contains evidence supporting a fair argument that the Ordinance may have a significant negative environmental impact. The City cannot change this with a new study. Nothing can negate the evidence already in the record.

Additionally, the City has never said what changes it would make to the Initial Study or made any kind of proffer. The administrative record is closed and this case must be decided based upon that record alone.

The City cites *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359. (OB at 29.) That case concerned a project that needed to be fully redefined by the agency and it was sent back for that purpose. There was no way of knowing before it was sent back whether the redefined project would require an EIR or what kind of EIR. That case was not ripe for decision about the need for an EIR. In this case, the Ordinance has been enacted into law and there is no issue of redefining the project. The question of whether the Initial Study supports the Negative Declaration for the Ordinance is ripe for decision.[33]

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[33] The ruling in *Gentry* was as follows: "Nothing in this opinion should be taken to mean that the City must prepare an EIR for the Project. When the City takes up the matter again, it may consider: whether the Project is a *(Footnote cont'd on next page)*

I. The Dissent In The Court of Appeal Is Not Consistent With CEQA

In his dissenting opinion in the Court of Appeal, Justice Mosk stated as follows:

> Requiring the small city of Manhattan Beach (City), containing a little over 33,000 people, to expend public resources to prepare an [EIR] for enacting what the City believes is an environmentally friendly ordinance... stretches [CEQA] and the requirements for an EIR to an absurdity.

(181 Cal.App.4th at p. 545 (emphasis added).)

> In this day of limits, we must interpret statutes reasonably so as not to require the unnecessary expenditure of public monies for no corresponding benefit.

(*Id.* at p. 551.)

There are three elements in Justice Mosk's opinion that are contrary to CEQA. First, that "small cities" should be subject to different rules than big cities. Second, that if a small city "believes" that it is acting in an environmentally friendly manner, it should not be required to prepare an EIR. Third, that CEQA (and other statutes) must be interpreted differently in challenging economic times. The majority responded as follows:

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

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change or modification to either the Plan EIR or the Adobe I EIR, and if so, whether an SEIR is required; whether the Project is partially exempt under section 21083.3; whether to use tiering; and whether to propose a new mitigated negative declaration." (36 Cal.App.4th at p. 1424.)

(181 Cal.App.4th at p. 544.)

A city's or county's *belief* that a project is good for the environment does not satisfy CEQA and is not a substitute for an EIR. A city or county may hold an incorrect belief.

CEQA is concerned with protecting the environment, not public finances. The City's funding issues are not within the zone of interests CEQA was intended to preserve or protect. Moreover, the City *chose* to ban plastic bags. It *chose* to spend public money on this project. The City should not have embarked upon this project if it could not afford it.

J. This Court Should Decline The City's "Challenge" To Change The Law

The City calls the Court of Appeal's decision "rigid and inflexible." (Petition at 4, 10.) The City is correct; the decision rigidly and inflexibly complies with the law. Faced with that problem, the City urges this Court to change the law. The City says:

> 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.

(OB at 13.) The City asks this Court to accept a "challenge... to provide fresh and meaningful interpretation" of the fair argument, substantial impact and standing requirements of CEQA. (Petition at 22.) The City further asks this Court to define a "legal threshold" as to when an environmental impact is significant and "provide guidance as to how to determine it." (Petition at 5, 16.)

The City is asking this Court to usurp the *exclusive* statutory authority of the Governor's Office of Planning and Research ("OPR") and public agencies regarding the development of any such thresholds. (Pub. Res. Code §21083.) OPR developed the CEQA Guidelines. (Guidelines

§15000.) Guidelines §15064.7(a) states that "each public agency is encouraged to develop and publish thresholds of significance that the agency uses in the determination of significance of environmental effects." According to §15064.7(b), any such thresholds may only be adopted by "ordinance, resolution, rule or regulation, and developed through a public review process and supported by substantial evidence." This Court cannot supplant OPR and public agencies in the development of thresholds of significance and cast aside the public review process.

The fair argument rule is a fundamental principle of CEQA law. It is the bedrock premise for numerous precedents on CEQA issues. The CEQA Guidelines, state and local rules and regulations, administrative procedures, governmental documents and forms, including the standard Environmental Checklist Form, are based on the fair argument rule which the City now asks this Court to throw aside. There is simply no need for it.[34]

VI. CONCLUSION

Our society faces critical environmental decisions in the years ahead, including important energy and transportation choices that will have long-term environmental consequences. California's city councils and boards of supervisors will make many of those decisions. Understandably, they will want to make "green" choices. EIRs will play a critical role in ensuring that the facts are not lost in a green fog.

If the City complies with CEQA and prepares an EIR, the citizens of Manhattan Beach and the broader public will know the truth about the

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

environmental impacts of banning plastic bags. As the Court of Appeal stated in *People v. County of Kern*:

> Only by requiring [an agency] to fully comply with the letter of the law can a subversion of the important public purposes of CEQA be avoided, and only by this process will the public be able to determine the environmental and economic values of their elected and appointed officials, thus allowing for appropriate action come election day should a majority of the voters disagree.

((1974) 39 Cal.App.3d 830, 842.) "The whole purpose of the EIR 'review and consideration function' is...to expose the elected decision makers to the political heat of certifying an EIR." (*Vedanta Society of So. California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 527.)

WHEREFORE, the Coalition respectfully requests that this Court affirm the ruling of the Court of Appeal that the City's failure and refusal to prepare an EIR was a prejudicial abuse of discretion and remand for enforcement of the writ of mandate.

DATED: June 18, 2010

STEPHEN L. JOSEPH

Attorney for Plaintiff
SAVE THE PLASTIC BAG COALITION

WORD COUNT

I certify that the number of words in this brief is 12,076. This number includes footnotes and excludes the Table of Contents, the Table of Authorities, the Table of Significant Documents in the Administrative Record, this Word Count certificate, and the Proof of Service. The word count was generated by Microsoft Word.

DATED: June 18, 2010

STEPHEN L. JOSEPH

Attorney for Plaintiff
SAVE THE PLASTIC BAG COALITION

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am an active member of the State Bar of California and not a party to the within action. My business address is 350 Bay Street, Suite 100-328, San Francisco, CA 94133. I served the foregoing document described as **PLAINTIFF'S ANSWER BRIEF ON THE MERITS** on the interested parties in this action as follows.

I maintain an account with Federal Express. On June 18, 2010, I placed true copies of said document in sealed Federal Express containers and deposited them in a Federal Express drop-off receptacle in San Francisco, California. The Airbills were marked "FedEx Priority Overnight (Next business morning)" delivery; payment to be charged to sender's account; and permit delivery without signature. The names and addresses on the Airbills and the numbers of copies enclosed were as follows:

One copy to counsel for Defendant/Appellant
City of Manhattan Beach:
Robert V. Wadden, Jr.
City Attorney
City of Manhattan Beach
1400 Highland Avenue
Manhattan Beach, CA 90266
Phone: (310) 802-5061

Counsel for Defendant/Appellant has stipulated in writing to accept service by Federal Express.

One copy to Court of Appeal:
Office of the Clerk
Second District Court of Appeal
300 S. Spring Street, Second Floor
Los Angeles, CA 90013
Phone: (213) 830-7000

One copy to Superior Court trial judge:
Hon. David P. Yaffe, Judge
Department 86
Los Angeles Superior Court
111 North Hill Street
Los Angeles, CA 90012
Phone: (213) 974-5881

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 18, 2010 at San Francisco, California.

STEPHEN L. JOSEPH

PROOF OF SERVICE

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