Save the Plastic Bag Coalition v. County of Los Angeles, BS115845

Decision on Petition for Writ of Mandate and Declaratory Relief: denied

Petitioner Save the Plastic Bag Coalition ("Coalition") seeks a writ of traditional mandamus to set aside a decision of the Board of Supervisors of Respondent County of Los Angeles ("County") to adopt a program concerning plastic bag use, and a declaration that the County lacks the power to ban plastic bags. The court has read and considered the moving papers, opposition, and reply, heard oral argument, and renders the following decision.

A. Statement of the Case

The Coalition filed this CEQA Petition on July 17, 2008, seeking to set aside the County's decision to implement and enforce the "Single Use Bag Reduction and Recycling Program" (the "Program"). The County's Board of Supervisors ("Board") adopted the Program by Resolution on January 22, 2008. The First Amended Petition ("FAP") was filed on February 4, 2009.

The FAP alleges in pertinent part as follows. The Coalition, which is comprised of several suppliers of plastic grocery bags, contends that plastic grocery bags are better for the environment than paper bags. The Program is the initial phase of a County ban on plastic bags provided to consumers as carry out bags. In adopting the Program, the Board of Supervisors was considering "Alternative 5," which would trigger a ban on plastic bags at supermarkets and retail stores if benchmark reductions are not achieved by years 2010 and 2013, respectively. In addition, Alternative 5 provided for good faith consideration of efforts to achieve the benchmarks, participation levels, implementation of store- specific programs, and reduction of liner, all of which could lead to a one-year extension of the benchmarks if the achieved reduction is within 5% of the benchmark.

The Board amended Alternative 5 in the January 22, 2008 Resolution by reducing the percentage reductions, creating a 3% forgiveness rate, and setting a completion date for a draft ordinance of April 1, 2010 with the understanding that all CEQA compliance would be deferred to that date.

Prior to January 22, 2008, the County described the Program as "voluntary," when in fact it is not. Rather, if the stated goals of the putative "voluntary" program are not met by the stated deadlines, then a ban on plastic grocery bags will be effected. The net effect is that the Program is mandatory. The County violated CEQA by not first preparing and certifying an environmental impact report ("EIR").

The County has no authority to ban plastic bags. There is a proposed parallel statutory scheme currently pending before the state Legislature in AB 2058. The County lacks the authority to ban plastic bags on the ground that they may become litter.

The hearing occurred on April 29, 2010. After hearing, the parties informed the court that the CEQA claim had settled. The court has received a stipulation that the Board's January 22 resolution does not commit it to adopt an ordinance banning plastic bags, and the Coalition has dismissed its CEQA claim for mandamus. The declaratory relief claim is all that remains.

B. The Administrative Record and Additional Evidence

County has certified the administrative record. *See* Pub. Res. Code §21167.6; LASC

9.24(e).

The Coalition also asks the court to judicially notice various records. Judicial notice is the acceptance by a court without formal proof of the existence of a matter of law or fact that is relevant to an issue in the case. People v. Rowland, (1992) 4 Cal.4th 238, 268, n.6. Certain documents are subject to judicial notice. Ev. Code §451, 452. Even where subject to judicial notice, however, a document also must be relevant. Id.

The California Supreme Court decision in Western States provides that extrinsic evidence is generally not admissible for a traditional mandamus challenging a quasi-legislative agency action. 9 Cal.4th at 573, n.4. The exclusion of extrinsic evidence in a traditional mandamus action is essentially the exclusion of irrelevant evidence. Such evidence may be admissible in a narrowly construed exception in which (1) the evidence in question existed before the agency made the decision, and (2) the evidence could not have been presented to the agency in the first instance in the exercise of reasonable diligence. Id. at 578. The purpose of limiting extra-record evidence is that the free use of such evidence would invade the deference to which the legislative branch is entitled under the constitutional separation of powers. If the courts freely considered extra-record evidence in mandamus cases, the highly deferential substantial evidence standard would be turned into a *de novo* standard where the courts in effect would decide not whether an administrative decision was supported by the evidence before the agency but instead whether it was the wisest and best decision according to the courts. Id. at 572.

The Coalition asks the court to judicially notice (1) a superior court tentative decision and court docket showing adoption of that tentative decision in a case involving an Oakland ordinance filed in Alameda County (RG07-339097), (2) a decision from Los Angeles County Superior Court (BS116362) involving a Manhattan Beach ordinance, (3) a list of the legislative history, text, and amendment to AB 2058, (4) the Governor's statement in signing AB 2449. The legislative history of AB 2058 and 2449 is subject to judicial notice and the request is granted as to those items. Ev. Code §452(b). The decisions of other superior courts are not binding and are therefore irrelevant. The court declines to judicially notice them.

In reply, the Coalition asks the court to judicially notice (1) an opinion in Save the Plastic Bag Coalition v. City of Manhattan Beach, B215788, (2) legislative history of AB 2449, and a letter from a Los Angeles County Solid Waste Management Committee to the Governor dated September 26, 2006, urging the Governor to veto AB 2449. The legislative history of AB 2449 is subject to judicial notice and the request is granted. Ev. Code §452(b). The September 26 letter is not subject to judicial notice. The appellate opinion in B215788 would be relevant if still in effect, but the Supreme Court recently granted review of this decision. The opinion cannot be cited and is irrelevant. The request is denied as to the letter and the opinion.

Additionally, both parties have provided evidence through declarations. The Coalition purports to provide declarations on the subjects of standing, laches, and waiver, matters which arguably are permissible even though an administrative record is required. *See* Western States, *supra*, 9 Cal.4th at 575, n.5. Although County generally objects to this evidence, it makes no specific objections. Therefore, its objections have been waived.

County purports to present evidence on the current state of the Program and the participation of Coalition members in meetings before the Program was adopted. The court has ruled on the Coalitions written objections to these declarations. In addition, as the Coalition

points out, the declarations fail to comply with CCP section 2015.5 by stating the place where they were executed. Therefore, all of County's declarations and evidence is stricken.

C. Statement of Facts

1. The Scottish Report

The Scottish Report was issued by the "Scottish Government" in 2005. AR 1908-76) The report is an environmental assessment of the impact a proposed plastic bag levy. The report states: (1) 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 1914.

(2) [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 1950.

(3) 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 1950.

The Scottish Report contains the following comparison of the environmental metrics of plastic bags and paper bags. The metrics take into account the fact that a paper bag holds more than a plastic bag. According to the report, paper bags result in:

- 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 emissions of climate changing greenhouse gases than plastic bags.
- 1 .9 times more acid rain (atmospheric acidification) 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 1942.

2. AB 2449

AB 2449, the bill known as the Plastic Bag Recycling Act of 2006, became effective on January 1, 2007 and operative on July 1, 2007. Pub. Res. Code §42250-42257. The law requires certain grocery stores and retail pharmacies with more than 10,000 square feet of retail space to provide at-store recycling programs for plastic carry out bags. Ibid.

3. The Board's Motion and the Staff Report

On April 10, 2007, the Board approved a motion instructing various County departments to investigate the issue of plastic and paper sack consumption in in the County ("Board motion"), and to report back to the Board with findings and recommendations to reduce grocery and retail sack waste. AR 2.

An internal workgroup of the County Departments ("Working Group"), including the Department of Public Works ("DPW"), convened to undertake this task. The Working Group met with environmentalists, business interests, consumers, and with a number of plastic bag manufacturing companies, including Crown Poly and Command Packaging (members of

Petitioner). On June 25, 2007, the Working Group held a Stakeholder Meeting that included Crown Poly and Command Packaging. AR 148-50. Members of the Working Group viewed a presentation from Crown Poly entitled "An Environmental Alternative for L.A. County's Bag Study." AR 104-26. The Working Group met with Command Packaging on July 23, 2007. AR 153-54. It subsequently met with Crown Poly, which provided litter studies for the County's use. AR 154, 155.

In August 2007, the County issued a 50-page Staff Report on plastic bags. AR 333-89. The Staff Report includes little information about the environmental impacts of paper bags, and only states:" Littered paper carryout bags do not have the same impact on the ecosystem as plastic carryout bags for the following reasons: Paper bags are less likely to be littered because they are heavier and less likely to become airborne, as well as have a higher recycling rate (e.g. they are universally collected at curbside and have a recycling rate of 21 percent); and Paper carryout bags will degrade in the marine environment, minimizing the negative environmental impacts." AR 370.

4. Stakeholder Meetings

On September 4, 2007, the County's Chief Executive Officer wrote the Board a letter with initial recommendations for the Board motion, attaching a County Staff Report with Alternatives 1-3. AR 324-389. The letter recommended preparation of an ordinance banning plastic carry out bags upon confirmation that cities representing 2/3 of the County's population also adopted such an ordinance or entered into a Memorandum of Understanding with the County banning plastic bags. AR 325. The recommended ban would be contingent on completion of any environmental review necessary for compliance with CEQA. I bid. Upon a commitment by the California Grocer's Association to work collaboratively with the County, the item was taken off the Board's September 11, 2007 agenda. AR 391-94.

The County worked further with stakeholders, the public and industry in creating Alternative 4 that would address the issues raised in the Board's motion. Thereafter, the County staff advised Pete Grande ("Grande") at Command Packaging, Cathy Browne ("Browne") of Crown Poly, and others of an important stakeholders meeting on October 23, 2007 to discuss the plastic bag recommendation. AR 420-21. Browne attended the October 23, 2007 meeting. AR 429.

Another meeting was held on November 29, 2007 to discuss changes to Alternative 4 and the development of a new Alternative 5. Grande, but not Browne, was sent an email announcing the meeting. AR 446. Alternative 5 noted that the Program would establish 35% and 75% reduction "goals" to "measure the success" of the Program, and that a draft ordinance would be prepared "upon completion of any necessary environmental review in compliance with CEQA." AR 462-64. Command Packaging and Crown Poly were informed of the meeting. AR 446. The agenda for this meeting and all alternatives that have been developed to date, including a new Alternative 5, were forwarded to stakeholders like Grande at Command Packaging. AR 450-65.

5. Notice to Stakeholders

The Chief Executive's Office sent an email to stakeholders on January 21, 2008 attaching (1) a Board letter dated January 22 recommending adoption of Alternative 5, which is a framework for implementing a voluntary single use bag reduction and recycling, including

specific goals for reduction and preparation of an ordinance to ban plastic bags if reduction goals are not met, with any necessary environmental review to be completed before the adoption of an ordinance, (2) the Staff Report, and (3) the express language and a summary of alternatives. AR 494-576. Brown at CrownPoly and Grande at Command Packaging were included in this email. AR 494.

On January 21, 2008, another e-mail was sent, including to Grande and Brown, attaching three motions for the January 22, 2008 hearing date relating to Alternative 5. AR 598. The motion of Supervisors Michael Antonovich and Don Knabe provided for revisions to the reduction goals and target dates in Alternative 5 to allow for compliance with CEQA. AR 685.

6. <u>The January 22. 2998 Board Meeting</u>

The Agenda for the Regular Meeting of the Board of Supervisors was posted five days in advance of the January 22, 2008 meeting. AR 581. Item 19 of the Agenda was the plastic bag Program, and the Agenda listed the recommendation to approve Alternative 5 allowing for the creation of the Program for implementing voluntary single use bag reduction and recycling, and "to complete by April 1, 2009, a draft ordinance banning plastic carryout bags at large supermarkets and retail stores upon completion of any necessary environmental review in compliance with the California Environmental Quality Act." AR 592.

By letter dated January 22, 2008, the County's Chief Executive Officer identified five alternatives (AR 842-54) for consideration at the January 22, 2008 meeting. "Alternative 5" was described in part as follows:

> The County, in partnership with large supermarkets and retail stores, the plastic bag industry, environmental organizations, recyclers, and other key stakeholders, will develop a voluntary "Single Use Bag Reduction and Recycling Program" to: promote reusable bags, increase at-store recycling of plastic bags, reduce consumption of single use bags, increase post-consumer recycled content of paper bags, and promote public awareness of litter impacts and consumer responsibilities. In addition, an ordinance aimed at implementing a plastic bag ban, to be effective of the County program goals are not met, will be brought to the Board for adoption. (AR 573)

The Board letter noted that Alternative 5 triggers a ban "subject to adoption of an ordinance by your Board", and if benchmark reductions of plastic bag use -- 35% by 2010 and 70% by 2013 -- are not achieved. AR 500. Additionally, Alternative 5 provides for consideration of a one-year extension to meet the benchmarks if good faith efforts by stakeholders to voluntarily achieve the goals. AR 500. County Counsel would draft the ordinance banning plastic bags "upon completion of any necessary environmental review" to meet the contingency that the benchmarks are not met. AR 576.[1]

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[1]The final part of "Alternative 4" did not provide for a ban: "If the goals of this program are not achieved, the Board will reevaluate this issue." AR 570.

Grande of Command Packaging did not attend the January 22 hearing. Browne of Crown Poly's "Request to Address the Board" noted that she was "neutral on the plastic bag" issue on Alternative 5. AR 1027. She appeared during the public comment period and commented only about what plastic bags are made from and stating that the government should not legislate what bag a consumer uses. AR 905-06.

Rick Zirkler ("Zirkler")[2] submitted a written request to address the meeting stating: "Look at entire environmental impact." AR 1031. He also made the following oral comments:

> I'm really concerned about the misinformation that I'm hearing today. I would invite the board, all of you, everyone in this room to look at the E.P.A's study on paper versus plastic. The litter issue with plastic bags is real and it's a concern to all of us. But we're looking for an easy solution. And unfortunately we live in a world where we don't always have it. Our own environmental protection agency has a very exhaustive study on the impact of paper versus plastic. And I wish that everybody would look at the total environmental impact of the alternatives before looking at banning things. Plastic has its place. India, China are not banning those bags. They're making them thicker. Why are they making them thicker? It lends itself to reusing the product more often. It aids in the recycling of the product. There are other alternatives that I really don't think we're looking at this point. And it's about education. And that's my main concern. And the misinformation that's been stated here today. Thank you. (AR 953-54)

After public comment, Supervisors had the following exchange:

> Sup. Molina: I have tried to understand this debate and this discussion and I am at a total loss. And maybe you can explain it too [Supervisor] Burke, because I really don't understand it. It is my understanding that as this workgroup worked out these various alternatives, it was considered by the workgroup that instead of an out-and-out ban, that they would create this set of voluntary goals. And I think they are voluntary. If I'm not mistaken. Are they mandatory, or voluntary?
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> Sup. Burke, chair: These would be mandatory.
> Sup. Molina: These would be mandatory, is that correct?
> Department of Public Works ("DPW") Director Wolfe: They would be mandatory to the point that if they didn't meet those goals, then your board would impose a ban. In other words, there would be no penalty, criminal penalty for not meeting the goals, but the penalty would be that your board would move forward with the complete ban on plastic bags if they don't meet the goals. AR 962-63.

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[2]Zirkler was not a member of Petitioner when the lawsuit was filed, but became a member subsequently.

DPW Director Wolfe also told the Board that if the July 2010 benchmark is not met "an automatic ban would kick in." AR 945.

7. The Board's Adoption

On January 28, 2008, the Board approved Alternative 5, stating that it creates the framework for a voluntary single bag use reduction and recycling, and to draft an ordinance banning plastic bags contingent on completion of any environmental review under CEQA. AR 867-70.

The County did not commence a CEQA administrative process prior to the Board's January 22, 2008 adoption of the Program. There was no notice of intent to adopt a negative declaration and no public comment period pursuant to CEQA.

D. Analysis[3]

The Coalition's declaratory relief claim seeks a judgment that AB 2449 preempts the County's authority to ban plastic bags. The Coalition cites to the Governor's statement in signing AB 2449 to the effect that the law precludes local government from implementing more stringent requirements, also allowing local governments time to develop additional programs or the Legislature to consider more far-reaching solution. Pub. Res. Code section 42254(a)(1) and (b)(1) also preempt a county from adopting an ordinance requiring the recycling of plastic bags.[4]

The principle of ripeness -- that the courts will not entertain an action which is not founded on an actual controversy is a tenet of common law jurisprudence. A controversy is "ripe" when it has reached, but has not passed, the point that the facts have sufficient congealed to permit an intelligent and useful decision to be made. Pacific Legal Foundation v. California Coastal Commission, (1982) 33 Cal.3d 1258, 170-71. Ripeness looks at whether a controversy is "definite and concrete,...admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts." Action Apartment Assn. v. Santa Monica Rent Control Board, (2001) 94 Cal.App.4th 587, 609-10; *See* McAllister v. County of Monterey, (2007) 147 Cal.App.4th 253, 274-75. The judgment must decree, not suggest, what the parties may or may not do. Action Apartment, *supra*, 94 Cal.App.4th at 609.

Applying this law to the issue -- whether a yet-to-be-passed ordinance banning plastic bags is preempted by AB 2449 — it is clear that the issue is not ripe because it has not "congealed" sufficiently to permit an intelligent decision.

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[3]The Coalition's members include plastic bag manufacturers and distributors who are directly affected and prejudiced by the Program. The Coalition has standing to seek declaratory relief.

[4]The County argues that the declaratory relief claim is improperly pled because it contends that the "County has no power to ban an item on the ground it sometimes becomes litter," and now is arguing that the County does not have the power to ban plastic bags due to preemption by AB 2449. This argument is overcome by the FAP's allegation that "the County has no power to ban plastic bags." ¶154.

The Legislature preempts local regulation and fully occupies an area of law when it has expressly manifested its intent to occupy to do so, or when it has impliedly done so in light of one of the following indicia of intent: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality. American Financial Services Assn. v. City of Oakland, (2005) 34 Cal.4th 1239, 1252.

Where the Legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme. Id. State regulation may be so complete and detailed as to indicate an intent to preclude local regulation. In this connection, it may be significant that the subject is one which requires uniform treatment throughout the state. Id. The denial of power to a local body where the state has preempted the field is not based solely upon the state's superior authority, but also on the need to prevent dual regulations that could result in uncertainty and confusion. Id.

The Coalition challenges the validity of an ordinance which has been threatened, but which does not exist. The County has directed County Council to draft an ordinance banning plastic bags for the Board's review if the Program does not achieve adequate voluntary reductions. The court cannot evaluate the issue of preemption without an ordinance in place. No one know what language the ordinance will use, or how it will achieve its goal of a "ban" of plastic bags. The language of any ordinance is critical to an evaluation of whether it is preempted. The ordinance must define what a "ban" is, and may purport to achieve its desired result through means that are not preempted. Even the Governor's statement upon which the Coalition relies indicates that "additional programs" by local governments is consistent with AB 2449.

A decision on preemption of an ordinance that has not been promulgated would also run afoul of the ripeness requirement that a controversy be "definite and concrete," as "distinguished from an opinion advising what the law would be upon a hypothetical set of facts." There are several contingencies to the passage of an ordinance banning plastic bags. First, the voluntary Program, as potentially extended, must fail to reduce plastic bag usage. Second, the County's environmental assessment under CEQA must adequately consider the environmental impact of a plastic bag ban, including mitigations and alternatives to a ban. Third, the Board, having CEQA compliance in hand, must decide that a ban is appropriate and adopt such an ordinance. Until these conditions occur and a ban ordinance is in effect, a court decision that AB 2449 preempts a local ban on plastic bags is an advisory opinion based on a hypothetical, and not definite, controversy.

The Coalition argues that the "threat" of a ban, coupled with the statements of DPW Director Wolfe and Supervisor Burke that the benchmarks are mandatory and the ban is automatic if the benchmarks are not met, renders the matter ripe. But threats and statements of an individual supervisor's understanding and intent does not make the matter ripe. The Board was clear that it would comply with CEQA, and CEQA compliance means that an agency will

have an open mind about environmental impacts until it receives an environmental assessment and before finally deciding to adopt a project. The court cannot know with certainty what the Board will do with respect to plastic bags. The Board may go forward with a ban or it may be persuaded by the Scottish Report and other reports that paper bags are a greater environmental hazard than plastic bags. In any event, the Board is presumed to follow its official duties under the law. Ev. Code §664. The court cannot conclude that the matter is definite and concrete based on a threat.

Finally, the ripeness decision must consider whether withholding of judicial consideration will result in a hardship to a party. Pacific Legal Foundation, *supra*, 33 Cal.3d at 171-73. There will be no hardship to the Coalition by being forced to wait until CEQA review has occurred and the County has enacted an ordinance banning plastic bags. The Coalition will be able to make all CEQA and preemption arguments at that time. Until then, the Coalition's members will suffer no loss from County action.

E. Conclusion

The Petition is denied. The County's counsel is ordered to prepare a proposed judgment, serve it on the Coalition's counsel for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for May 19, 2010.

Dated: May 3, 2010

/s/ JAMES C. CHALFANT

Superior Court Judge

JAMES C. CHALFANT